





**60 Years German Basic Law:
The German Constitution and its Court**

Landmark Decisions of the
Federal Constitutional Court of Germany
in the Area of Fundamental Rights

*Jürgen Bröhmer, Clauspeter Hill
& Marc Spitzkatz (Eds.)*

2nd Edition

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CONTENTS

Editors' Preface to the Second Edition	i
Preface by the Editors	iii
Foreword	
Prof. Dr. Andreas Voßkuhle, President of the Federal Constitutional Court of Germany	vii
Current Text of the German Basic Law	1
Introduction to German Constitutional Law and the Doctrine of Basic Rights	
Prof. Dr. Jürgen Bröhmer	67
Selected Fundamental Decisions of the Federal Constitutional Court	99
I. Human Dignity	
Article 1 of the Basic Law	99
a) BVerfGE 45, 187 - Life Imprisonment	
b) BVerfGE 115, 118 - Aviation Security Act	
II. Free Development of Personality and the Protection of Physical Integrity and Personal Liberty	
Article 2 of the Basic Law	130
1. Article 2.1 - Free Development of Personality	
a) BVerfGE 6, 32 - Elfes	
b) BVerfGE 80, 137 - Riding in Forests	
c) BVerfGE 65, 1 - Census Act	
d) BVerfGE 120, 274 - Data Collection	
2. Article 2.2 - Life, Limb and Liberty	
a) BVerfGE 39, 1 - Abortion I	
b) BVerfGE 88, 203 - Abortion II	
III. Equality and Non-Discrimination	
Article 3 of the Basic Law	222
a) BVerfGE 85, 191 - Prohibition of Nocturnal Employment	
b) BVerfGE 87, 1 - Rubble Women	
c) BVerfGE 88, 87 - Transsexuals	
d) BVerfGE 96, 288 - Inclusive Education	

Contents

IV. Freedom of Faith, Conscience and Creed	
Article 4 of the Basic Law	257
1. The Scope of Religious Freedom and Freedom of Conscience	
a) BVerfGE 24, 236 - Lumber Room	
b) BVerfGE 69, 1 - Conscientious Objection II	
c) BVerfGE 104, 337 - Hijab	
2. Religion and State - Relation	
a) BVerfGE 52, 223 - School Prayer	
b) BVerfGE 93, 1 - Classroom Crucifix	
c) BVerfGE 108, 282 - Head Scarf Ban	
V. Freedom of Expression, the Media, Arts and Research	
Article 5 of the Basic Law	350
1. Article 5.1, sentence 1 - Freedom of Expression	
a) BVerfGE 7, 198 - Lueth	
b) BVerfGE 27, 71 - Leipziger Volkszeitung (Leipzig People's Daily)	
c) BVerfGE 90, 241 - Auschwitz Lie (Holocaust Denial)	
d) BVerfGE 93, 266 - Soldiers - Murderers	
2. Article 5.1, sentence 2 - Freedom of the Media	
a) BVerfGE 20, 162 - Spiegel	
b) BVerfGE 101, 361 - Caroline of Monaco II	
c) BVerfGE 34, 269 - Soraya	
d) BVerfGE 12, 205 - 1st Broadcasting Decision	
e) BVerfGE 83, 238 - 6th Broadcasting Decision	
3. Article 5.3 - Freedom of Arts, Research and Teaching	
a) BVerfGE 30, 173 - Mephisto	
b) BVerfGE 67, 213 - Anachronistic Procession	
VI. Marriage, Family and Children	
Article 6 of the Basic Law	483
a) BVerfGE 105, 313 - Life Partnership Act	
b) BVerfGE 121, 69 - Parental Duty of Contact	
c) BVerfGE 111, 307 - Görgülü	
VII. Freedom of Assembly	
Article 8 of the Basic Law	523
a) BVerfGE 87, 399 - Right of Assembly	
b) BVerfGE 69, 315 - Brokdorf	

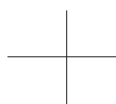
Contents

VIII. Freedom of Association	
Article 9 of the Basic Law	546
BVerfGE 92, 365 - Short-Work Benefits (S. 116 of the Employment Protection Act)	
IX. Privacy of Communications	
Article 10 of the Basic Law	557
a) BVerfGE 30, 1 - Eavesdropping	
b) BVerfGE 100, 313 - Federal Intelligence Service	
X. Freedom of Occupation	
Article 12 of the Basic Law	599
a) BVerfGE 7, 377 - Pharmacy	
b) BVerfGE 121, 317 - Non-Smoker Protection	
c) BVerfGE 105, 252 - Glycol Wine	
XI. Inviolability of the Home	
Article 13 of the Basic Law	644
a) BVerfGE 32, 54 - Right to Inspect Business Premises	
b) BVerfGE 109, 279 - Acoustic Surveillance	
XII. Protection of Property	
Article 14 of the Basic Law	672
a) BVerfGE 58, 300 - Groundwater	
b) BVerfGE 58, 137 - Legal Deposit Copies	
c) BVerfGE 100, 226 - Monument Protection Act	
XIII. Citizenship and Extradition	
Article 16 of the Basic Law	703
BVerfGE 113, 273 - European Arrest Warrant Act	
XIV. Political Prosecution and Asylum	
Article 16a of the Basic Law	732
a) BVerfGE 80, 315 - Tamils	
b) BVerfGE 94, 49 - Asylum (Third Country Rule)	
XV. Fundamental Rights Protection by the Federal Republic of Germany and the European Union	754
a) BVerfGE 37, 271 - Solange I (As-long-as I)	
b) BVerfGE 73, 339 - Solange II (As-long-as II)	
c) BVerfGE 89, 155 - Maastricht	
d) BVerfGE 102, 147 - Banana Market Organization	
e) BVerfGE 123, 267 - Lisbon Treaty	



Contents

Further Readings	793
Index	801
Explanation of Abbreviations	829





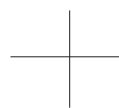
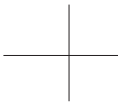
EDITORS' PREFACE TO THE SECOND EDITION

The usefulness and popularity of the First Edition of “60 Years German Basic Law” have encouraged us to present a Second Edition already, shortly after the first-time publication. In order to meet the high demand from many countries all over the world in the year of the German Constitutional Court’s 60th anniversary, we did not make any changes to the contents. Although we realize that we have not - by any means - exhausted the stock of decisions worthy to be displayed, we hope that this Second Edition will find favour among those who resort to it.

Perth/Bangkok/Singapore, April 2012

J. Bröhmer/C. Hill/M. Spitzkatz







PREFACE BY THE EDITORS

The German Basic Law has been in force for more than 60 years now and it is the foundation of democratic statehood in Germany. The Basic Law's central core is the principle of the rule of law as expressed by the broader German concept of the "*Rechtsstaatsprinzip*". The protection of fundamental individual rights is one important cornerstone of this "*Rechtsstaatsprinzip*".

The success story of the Basic Law can be traced to a number of factors. The institutional structure of Germany prescribed in the Basic Law and maintained after reunification has obviously proved its reliability. However, the fundamental rights guaranteed to individuals, some to all human beings, some to citizens of Germany only, and their interpretation and enforcement by the Federal Constitutional Court have been of utmost significance in turning the Basic Law from a technical instrument into an identity shaping national document.



The people in Germany have understood that the Basic Law is their constitution and that the fundamental rights protected there are their personal rights. They have also understood that this is not theoretical at all but that they can turn to the courts in general and to the Federal Constitutional Court in Karlsruhe in particular and have their rights effectively enforced against unjustified infringements by the legislative, executive or judicial branches of government.

The Constitutional Court has assumed its role as a true "guardian of the constitution" not only but especially in regard to fundamental rights protection and has earned the great respect of the German people. The Court was very successful at striking a fair balance between individual rights and the interests of society as a whole. Achieving this balance has never been an easy task and it has become more difficult after the attacks of 11 September 2001 in the USA and the renewed debate on the relationship between individual rights and liberties on the one hand and security on the other.

The procedural framework for the Federal Constitutional Court, most notably the constitutional complaints procedure, have allowed the Court to develop a specific, consistent and, after 60 years, a reliable dogmatic approach to fundamental rights interpretation and application. This has contributed to a remarkable interest in German constitutional theory and jurisprudence worldwide.

Countries in Latin America, Eastern Europe and Asia were keen to understand this approach in greater depth when they converted to real democracies based on the rule of law. In some cases Germany shares similar legal traditions and, above all, a common value system and legal ideals with those regions, for example the fact that the German legal system adheres to the civil law tradition of codified law.

But the German approach to constitutional law and fundamental rights protection is also interesting for common law countries. A written constitution constitutes codified law and requires statutory interpretation. But more importantly nowhere are the common and civil law legal



**60 Years German Basic Law:
The German Constitution and its Court**

traditions closer together than in the area of constitutional law where the decisions of the constitutional courts serve as precedents if not *de jure* than at least *de facto*. In the case of the German Constitutional Court the holding of a judgment can have the force of law and the Court can therefore assume a law making function quite similar to that of the highest courts in common law countries.

It is therefore not surprising that German constitutional law has become a field of growing interest to legal scholars, practitioners and officials involved in state reforms around the world. The work of American scholars, Donald P. Kommers and Russell Miller, “The Constitutional Jurisprudence of the Federal Republic of Germany” (3rd ed. to be published: Durham, NC: Duke University Press, 2011) is one prime example and we would like to recommend it to anyone interested in these matters. Most of the cases of our collection are discussed in their volume.

Taking note of this increasing demand the Rule of Law Programme of the Konrad-Adenauer-Stiftung in Singapore took the initiative for this project of aiming to make some core decisions of the German Constitutional Court accessible to judges, lawyers and scholars who do not speak German and to put these judgments into an explanatory context. One of the important objectives promoted by the Asia branch of the Rule of Law programme is the concept of constitutionalism and the support for mechanisms to review the constitutionality of actions of other state organs. Safeguarding citizens’ rights is a core element of such systems and therefore also of great significance for our programme.

This volume focuses on the case law of the German Constitutional Court in regard to the basic rights that are of utmost importance in German constitutional law. The general introduction to Basic Law and the doctrine of fundamental rights strives to provide some contextual background to enable readers to better understand the comprehensive jurisprudence. In addition, there are specific annotations to each decision or a set of decisions with background information on the individual case. We have also tried to suggest additional material in English where we could find useful and helpful sources.

In selecting the decisions for this volume we tried to provide the most relevant cases. At times this means that some concepts are dealt with repeatedly. Usually, the Federal Constitutional Court has elaborated on the one or another aspect in greater detail and shaped the law more precisely case by case. The selection has also been guided, and limited to a certain extent, by the necessity to keep the book at a manageable size. We wanted to provide more than just head notes or short extracts from each decision. We are convinced that a comprehensive translation is more useful for readers who might not have broader knowledge of German constitutional law. Therefore, the facts of each case were summarized and only preliminary issues - such as the admissibility of a case - have been left out. If deemed important those aspects have been mentioned in the short explanations to each case or set of cases.

All cases are cited in the original German way “BVerfGE” as the court itself uses to refer to its decisions. This acronym literally means ‘Federal Constitutional Court Decisions’ followed by volume and page number where they were published in the official collection of cases of the Federal Constitutional Court (e.g. BVerfGE 45 [volume of official collection], 187 [page where case begins]).

Preface by the Editors

Most of the decisions have been translated by Dr. Donna Elliott, LL.M. who is an Australian lawyer who has worked in Germany for many years and who has frequently been engaged as translator for the Federal Constitutional Court as well as the Federal Government. A number of translations were provided by courtesy of the Constitutional Court itself and can also be found on the Court's website (www.bverfg.de).

We are also very grateful to Donald P. Kommers, Sir Basil Markesinis, Robert E. Jonas and John D. Gorby for their generous permission to reprint decisions that were translated and published under their copyright in earlier publications. Last but not least we thank the Nomos Verlag for its generosity to use translations previously published in ['Decisions of the Bundesverfassungsgericht - Federal Constitutional Court - Federal Republic of Germany] (Vol. 1, 2 and 4, Baden-Baden 1993 - 2007). Whenever translations of other authors or publishers were used it has been indicated in detail.

A special word of thanks goes to Ms. Miriam Söhne who is the research associate at the Konrad-Adenauer-Stiftung office in Singapore. She translated two decisions on her own and amended translations of others where head notes or other important sections had not been translated before. Miriam and Ms. Jenny Chan, the executive assistant, were also extremely helpful in proof reading and compiling the whole manuscript. Mr. Martin Matasi, lawyer from Kenya and PhD-student at the University of New England, School of Law, has also helped in proofreading the introduction and the decision annotations and has also helped in pointing out improvements when the original draft became "too German" and therefore harder to understand for non-German lawyers.

'Democracy is more than a parliamentary form of government. It is a philosophy of life (*Weltanschauung*) based on the appreciation of the dignity, the value and the inalienable rights of each individual human being. A true democracy must respect these rights and the value of each and every human being in all respects of political, economic and cultural life.' Those words by Konrad Adenauer¹ who was the President of the Parliamentary Council in 1948 - 1949 inspired all the members of that Council when drafting the Basic Law and have become the guiding principle of constitutional jurisprudence in Germany.

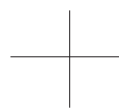
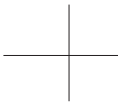
The editors hope that this book will contribute to a deeper understanding of German legal thinking in this respect. As always, any errors and causes for misunderstanding are to be blamed on us.

We dedicate this book to the many who have contributed to the success of the German Basic Law in many ways small and large and who have helped to shape a Germany that stands for the ideas of democracy, freedom and human rights.

Armidale / Singapore, October 2010

J. Bröhmer / C. Hill

1 Original German citation: "Demokratie ist mehr als eine parlamentarische Regierungsform, sie ist eine Weltanschauung, die wurzelt in der Auffassung von der Würde, dem Wert und den unveräußerlichen Rechten eines jeden einzelnen Menschen. Eine echte Demokratie muß diese unveräußerlichen Rechte und den Wert eines jeden einzelnen Menschen achten im staatlichen, im wirtschaftlichen und kulturellen Leben."







FOREWORD

During the last decade, the interest in the jurisprudence of the German Federal Constitutional Court has increased considerably among academics and political actors from all over the world. This is true not only for countries characterized by Continental-European law, but also for countries of Anglo-American law. Independently hereof, in the course of reforms towards rule of law in many developing countries and countries in transition, at least in those where English is a working language, a demand for translations of German Federal Constitutional Court decisions arose. Hence, I strongly appreciate the initiative of the Konrad-Adenauer-Stiftung to publish this English edition of landmark decisions of the Federal Constitutional Court. Translations into Spanish and Portuguese as well as into various languages of South-Eastern Europe have preceded this English edition. It focuses on decisions pertaining to fundamental rights, which constitute an essential field of Constitutional Court jurisprudence, and delineate the sphere of an individual to society and state. Simultaneously, fundamental rights play an important role for the participation of the citizen - as an individual or in a collective - in the democratic decision-making process.

Constitutional Law is influenced by the jurisprudence of the Federal Constitutional Court more than any other field of German Law. The text of the German Basic Law organises governmental as well as communal life and for this reason is phrased in a way which is able to comprise an endless variety of cases. Its abstract norms are frequently substantiated by jurisprudence through case-related interpretation.

Moreover, another distinctive feature of the Federal Constitutional Court's jurisprudence originates in its range of subject matters of proceedings. Not only measures taken by the executive and decisions made by trial and appellate courts, but also statutes which are enacted in Parliament and disputes between government bodies, belong to the original field of constitutional review. This circumstance inevitably determines a certain proximity to the area of politics and raises the question about the jurisdiction of the Federal Constitutional Court under the principle of separation of powers. It should not be disregarded that the Federal Constitutional Court determines the basic conditions within which the political leaders of the executive and legislative operate. Seen in context of the possibility of a constitutional affirmation or rejection of Acts of Parliament, one can argue that "the Federal Constitutional Court participates in the government". This very strong connection between the jurisdiction of the Federal Constitutional Court and the other branches within the system of separation of powers has been subject to frequent criticism. Notwithstanding, the Federal Constitutional Court is a "real" court. It cannot act initiatively but only on application. The basic principle "Where no plaintiff, there no judge" also applies here. Furthermore, the Federal Constitutional Court decides only in legally predetermined procedures and frames. Above all, the examination criteria of the Federal Constitutional Court are always and exclusively found in the effective constitutional law, not in political, social or economic considerations of expediency. Constitutional norms in particular can often be relatively indefinite



**60 Years German Basic Law:
The German Constitution and its Court**

and allow certain room for interpretation. The basic principle that constitutional jurisprudence is not political composition but legal realization following juridical methods applies, despite certain ambiguity and the difficulty to draw a line in particular cases.

The function of the Federal Constitutional Court comprises not only judicial review of statutes and settlements of conflicts between the supreme government bodies. In praxis, the review of a multiplicity of executive acts and court decisions in individual cases is particularly essential. This is due to a substantive as well as a procedural reason. On the one hand, the fundamental rights of the Basic Law are not only guidelines for the legislative body, but apply directly for every administrative act and for every court decision. Very important thereby is that fundamental rights basically constitute defensive rights against public action. On the other hand, at the same time they embody an objective value system that has to be considered in judicial interpretation and application of the law. Even within settlement disputes between citizens, the constitutional values must be observed by the civil courts. For example, in custody disputes under family law, parental rights and rights of protection for children (Art. 6 GG) have to be taken in account. This very important aspect of the effects fundamental rights have is based on the well-known “Lüth-decision” (BVerfGE 7, 198 - in this collection). The practical task of the Federal Constitutional Court is determined by this fundamental idea in a significant way. Thus, citizens have the opportunity to defend against court decisions violating their fundamental values by using the constitutional complaint (*Verfassungsbeschwerde*, see Art. 93 Para. 1 No. 4a GG). Therefore the Federal Constitutional Court is not purely a “Court for State Affairs” (*Staatsgerichtshof*).

Accordingly, constitutional complaints against trial and appellate court decisions form a large part of the Federal Constitutional Court decision-making. In addition to the central institution of the constitutional complaints the Federal Constitutional Court has a variety of further competences (see s. 13 BVerfGG in conjunction with Art. 93 Para. 1 GG). Worth mentioning is the abstract judicial review (*Abstrakte Normenkontrolle*, Art. 93 Para. 1 No. 2 GG) which examines upon application of either the federal or the *Länder* (states) government or one third of the Federal Parliament members, federal and *Länder* law on their compatibility with the Basic Law. Furthermore, disputes between government bodies are to be decided by the Federal Constitutional Court (*Organstreitverfahren*, Art. 93 Para. 1 No. 1 GG). Finally, the concrete judicial review (*Konkrete Normenkontrolle*) can be requested at the Federal Constitutional Court by any trial or appellate court that denies the constitutionality of any applicable legislation (see Art. 100 Para. 1 GG).

The Federal Constitutional Court makes its decisions through two benches (*Senate*), each consisting of eight Constitutional Court Judges. The allocation of cases between the two senates depends on the type and subject matter of proceedings. In case of diverging interpretations of law, decisions are made by the judges of both senates together in the so-called plenum. Not all decisions require the involvement of all eight judges of a bench. Each senate forms three chambers (*Kammern*) that deal with a large number of constitutional complaints conclusively as long as the central legal questions in the cases have already been decided by a senate.

The Federal Republic of Germany is embedded in a number of agreements of public international law, of which particularly relevant are the European Convention on Human Rights (ECHR), whose enforcement is incumbent on the European Court of Human Rights in Strasbourg, and the membership to the European Union, whose law is guarded by the European Court of Justice. In the area of protection of fundamental rights, a system of separation of the

**60 Years German Basic Law:
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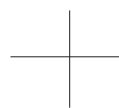
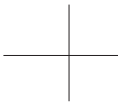
examination criteria applies between the Federal Constitutional Court and the European Court of Justice. Thus, secondary legal acts of European law are scrutinized exclusively by European courts on the scale of European fundamental rights as long as the fundamental rights standard of European law is in essence equal to the standard of the Basic Law (see BVerfGE 73, 339 - included in this collection). In contrast to that, for the protection of the European Convention of Human Rights an integrating approach applies. According to this, the values expressed in the ECHR are to be incorporated into the interpretation of German law - including constitutional law (see BVerfGE 111, 307 - included in this collection).

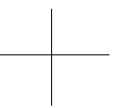
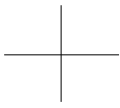
An enormous amount of constitutional findings concerning a great variety of different questions have been developed in the described organisational frame of state and courts. These have always been the outcome of intensive arguments and not least the result of courageous pursuit of justice by the parties to the procedures. This selection provides a good opportunity to get to know the spectrum of jurisprudence, to form an opinion based on the original argumentation of the Federal Constitutional Court and to discover the possible transferability to constitutional constellations and issues in other countries.

To that end, I wish the book a great success!

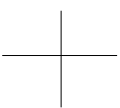
Karlsruhe, August 2010

Andreas Voßkuhle



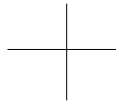


Current Text of the German Basic Law





PREAMBLE

- Part I – Basic Rights
 - Part II – The Federation and the Länder
 - Part III – The Bundestag
 - Part IV – The Bundesrat
 - Part IVa – The Joint Committee
 - Part V – The Federal President
 - Part VI – The Federal Government
 - Part VII – Legislative Powers of the Federation
 - Part VIII – The Execution of Federal Laws and the Federal Administration
 - Part VIIIa – Joint Tasks
 - Part IX – The Judiciary
 - Part X – Finance
 - Part Xa – State of Defence
 - Part XI – Transitional and Concluding Provisions
- 
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CURRENT TEXT OF THE GERMAN BASIC LAW

Basic Law of the Federal Republic of Germany

Last amended on July 29, 2009 (BGBl. I, 2248)

Preamble

Conscious of their responsibility before God and man,

Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law.

Germans in the *Länder* of Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein, and Thuringia have achieved the unity and freedom of Germany in free self-determination. This Basic Law thus applies to the entire German people.

I. Basic Rights

Article 1 [Human dignity]

- (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
- (3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.

Article 2 [Personal freedoms]

- (1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.
- (2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

Article 3 [Equality before the law]

- (1) All persons shall be equal before the law.

**60 Years German Basic Law:
The German Constitution and its Court**

- (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 favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.

Article 4 [Freedom of faith, conscience, and creed]

- (1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.
- (2) The undisturbed practice of religion shall be guaranteed.
- (3) No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.

Article 5 [Freedom of expression]

- (1) Every person shall have the right to freely express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.
- (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.
- (3) Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

Article 6 [Marriage and the family; children born outside of marriage]

- (1) Marriage and the family shall enjoy the special protection of the state.
- (2) 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.
- (3) Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.
- (4) Every mother shall be entitled to the protection and care of the community.
- (5) 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.

Current Text of the German Basic Law

Article 7 [School education]

- (1) The entire school system shall be under the supervision of the state.
- (2) Parents and guardians shall have the right to decide whether children shall receive religious instruction.
- (3) Religious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned. Teachers may not be obliged against their will to give religious instruction.
- (4) The right to establish private schools shall be guaranteed. Private schools that serve as alternatives to state schools shall require the approval of the State and shall be subject to the laws of the *Länder*. Such approval shall be given when private schools are not inferior to the state schools in terms of their educational aims, their facilities, or the professional training of their teaching staff, and when segregation of pupils according to the means of their parents will not be encouraged thereby. Approval shall be withheld if the economic and legal position of the teaching staff is not adequately assured.
- (5) A private elementary school shall be approved only if the educational authority finds that it serves a special pedagogical interest or if, on the application of parents or guardians, it is to be established as a denominational or interdenominational school or as a school based on a particular philosophy and no state elementary school of that type exists in the municipality.
- (6) Preparatory schools shall remain abolished.

Article 8 [Freedom of assembly]

- (1) All Germans shall have the right to assemble peacefully and unarmed without prior notification or permission.
- (2) In the case of outdoor assemblies, this right may be restricted by or pursuant to a law.

Article 9 [Freedom of association]

- (1) All Germans shall have the right to form corporations and other associations.
- (2) Associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited.
- (3) The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. Measures taken pursuant to Article 12a, to paragraphs (2) and (3) of Article 35, to paragraph (4) of Article 87a, or to Article 91

**60 Years German Basic Law:
The German Constitution and its Court**

may not be directed against industrial disputes engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions.

Article 10 [Privacy of correspondence, posts and telecommunications]

- (1) The privacy of correspondence, posts and telecommunications shall be inviolable.
- (2) Restrictions may be ordered only pursuant to a law. If the restriction serves to protect the free democratic basic order or the existence or security of the Federation or of a *Land*, the law may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.

Article 11 [Freedom of movement]

- (1) All Germans shall have the right to move freely throughout the federal territory.
- (2) This right may be restricted only by or pursuant to a law, and only in cases in which the absence of adequate means of support would result in a particular burden for the community, or in which such restriction is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or of a *Land*, to combat the danger of an epidemic, to respond to a grave accident or natural disaster, to protect young persons from serious neglect, or to prevent crime.

Article 12 [Occupational freedom; prohibition of forced labour]

- (1) All Germans shall have the right freely to choose their occupation or profession, their place of work, and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.
- (2) No person may be required to perform work of a particular kind except within the framework of a traditional duty of community service that applies generally and equally to all.
- (3) Forced labour may be imposed only on persons deprived of their liberty by the judgment of a court.

Article 12a [Compulsory military or alternative service]

- (1) Men who have attained the age of eighteen may be required to serve in the Armed Forces, in the Federal Border Police, or in a civil defence organization.
- (2) Any person who, on grounds of conscience, refuses to render military service involving the use of arms may be required to perform alternative service. The duration of alternative service shall not exceed that of military service. Details shall be regulated by a law, which shall not interfere with the freedom to make a decision in accordance with the dictates of conscience, and which shall also provide for the possibility of alternative service not connected with units of the Armed Forces or of the Federal Border Police.

Current Text of the German Basic Law

- (3) Persons liable to compulsory military service who are not called upon to render service pursuant to paragraph (1) or (2) of this Article may, when a state of defence is in effect, be assigned by or pursuant to a law to employment involving civilian services for defence purposes, including the protection of the civilian population; they may be assigned to public employment only for the purpose of discharging police functions or such other sovereign functions of public administration as can be discharged only by persons employed in the public service. The employment contemplated by the first sentence of this paragraph may include services within the Armed Forces, in the provision of military supplies, or with public administrative authorities; assignments to employment connected with supplying and servicing the civilian population shall be permissible only to meet their basic requirements or to guarantee their safety.
- (4) If, during a state of defence, the need for civilian services in the civilian health system or in stationary military hospitals cannot be met on a voluntary basis, women between the ages of eighteen and fifty-five may be called upon to render such services by or pursuant to a law. Under no circumstances may they render service involving the use of arms.
- (5) Prior to the existence of a state of defence, assignments under paragraph (3) of this Article may be made only if the requirements of paragraph (1) of Article 80a are met. In preparation for the provision of services under paragraph (3) of this Article that demand special knowledge or skills, participation in training courses may be required by or pursuant to a law. In this case the first sentence of this paragraph shall not apply.
- (6) If, during a state of defence, the need for workers in the areas specified in the second sentence of paragraph (3) of this Article cannot be met on a voluntary basis, the right of German citizens to abandon their occupation or place of employment may be restricted by or pursuant to a law in order to meet this need. Prior to the existence of a state of defence, the first sentence of paragraph (5) of this Article shall apply *mutatis mutandis*.

Article 13 [Inviolability of the home]

- (1) The home is inviolable.
- (2) Searches may be authorized only by a judge or, when time is of the essence, by other authorities designated by the laws, and may be carried out only in the manner therein prescribed.
- (3) If particular facts justify the suspicion that any person has committed an especially serious crime specifically defined by a law, technical means of acoustical surveillance of any home in which the suspect is supposedly staying may be employed pursuant to judicial order for the purpose of prosecuting the offence, provided that alternative methods of investigating the matter would be disproportionately difficult or unproductive. The authorization shall be for a limited time. The order shall be issued by a panel composed of three judges. When time is of the essence, it may also be issued by a single judge.

**60 Years German Basic Law:
The German Constitution and its Court**

- (4) To avert acute dangers to public safety, especially dangers to life or to the public, technical means of surveillance of the home may be employed only pursuant to judicial order. When time is of the essence, such measures may also be ordered by other authorities designated by a law; a judicial decision shall subsequently be obtained without delay.
- (5) If technical means are contemplated solely for the protection of persons officially deployed in a home, the measure may be ordered by an authority designated by a law. The information thereby obtained may be otherwise used only for purposes of criminal prosecution or to avert danger and only if the legality of the measure has been previously determined by a judge; when time is of the essence, a judicial decision shall subsequently be obtained without delay.
- (6) The Federal Government shall report to the *Bundestag* annually as to the employment of technical means pursuant to paragraph (3) and, within the jurisdiction of the Federation, pursuant to paragraph (4) and, insofar as judicial approval is required, pursuant to paragraph (5) of this Article. A panel elected by the *Bundestag* shall exercise parliamentary control on the basis of this report. A comparable parliamentary control shall be afforded by the *Länder*.
- (7) Interferences and restrictions shall otherwise only be permissible to avert a danger to the public or to the life of an individual, or, pursuant to a law, to confront an acute danger to public safety and order, in particular to relieve a housing shortage, to combat the danger of an epidemic, or to protect young persons at risk.

Article 14 [Property, inheritance, expropriation]

- (1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.
- (2) Property entails obligations. Its use shall also serve the public good.
- (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts.

Article 15 [Socialization]

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. With respect to such compensation the third and fourth sentences of paragraph (3) of Article 14 shall apply *mutatis mutandis*.

Current Text of the German Basic Law

Article 16 [Citizenship; extradition]

- (1) No German may be deprived of his citizenship. Citizenship may be lost only pursuant to a law, and against the will of the person affected only if he does not become stateless as a result.
- (2) No German may be extradited to a foreign country.

Article 16a [Right of asylum]

- (1) Persons persecuted on political grounds shall have the right of asylum.
- (2) Paragraph (1) of this Article may not be invoked by a person who enters the federal territory from a member state of the European Communities or from another third state in which application of the Convention Relating to the Status of Refugees and of the Convention for the Protection of Human Rights and Fundamental Freedoms is assured. The states outside the European Communities to which the criteria of the first sentence of this paragraph apply shall be specified by a law requiring the consent of the *Bundesrat*. In the cases specified in the first sentence of this paragraph, measures to terminate an applicant's stay may be implemented without regard to any legal challenge that may have been instituted against them.
- (3) By a law requiring the consent of the *Bundesrat*, states may be specified in which, on the basis of their laws, enforcement practices, and general political conditions, it can be safely concluded that neither political persecution nor inhuman or degrading punishment or treatment exists. It shall be presumed that a foreigner from such a state is not persecuted, unless he presents evidence justifying the conclusion that, contrary to this presumption, he is persecuted on political grounds.
- (4) In the cases specified by paragraph (3) of this Article and in other cases that are plainly unfounded or considered to be plainly unfounded, the implementation of measures to terminate an applicant's stay may be suspended by a court only if serious doubts exist as to their legality; the scope of review may be limited, and tardy objections may be disregarded. Details shall be determined by a law.
- (5) Paragraphs (1) through (4) of this Article shall not preclude the conclusion of international agreements of member states of the European Communities with each other or with those third states which, with due regard for the obligations arising from the Convention Relating to the Status of Refugees and the Convention for the Protection of Human Rights and Fundamental Freedoms, whose enforcement must be assured in the contracting states, adopt rules conferring jurisdiction to decide on applications for asylum, including the reciprocal recognition of asylum decisions.

Article 17 [Right of petition]

Every person shall have the right individually or jointly with others to address written requests or complaints to competent authorities and to the legislature.

**60 Years German Basic Law:
The German Constitution and its Court**

Article 17a [Restriction of certain basic rights by laws respecting defence and alternative service]

- (1) Laws respecting military and alternative service may provide that the basic right of members of the Armed Forces and of alternative service freely to express and disseminate their opinions in speech, writing, and pictures (first clause of paragraph (1) of Article 5), the basic right of assembly (Article 8), and the right of petition (Article 17) insofar as it permits the submission of requests or complaints jointly with others, be restricted during their period of military or alternative service.
- (2) Laws respecting defence, including protection of the civilian population, may provide for restriction of the basic rights of freedom of movement (Article 11) and inviolability of the home (Article 13).

Article 18 [Forfeiture of basic rights]

Whoever abuses the freedom of expression, in particular the freedom of the press (paragraph (1) of Article 5), the freedom of teaching (paragraph (3) of Article 5), the freedom of assembly (Article 8), the freedom of association (Article 9), the privacy of correspondence, posts and telecommunications (Article 10), the rights of property (Article 14), or the right of asylum (Article 16a) in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court.

Article 19 [Restriction of basic rights]

- (1) Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears.
- (2) In no case may the essence of a basic right be affected.
- (3) The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits.
- (4) Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph.

II. The Federation and the *Länder*

Article 20 [Basic institutional principles; defence of the constitutional order]

- (1) The Federal Republic of Germany is a democratic and social federal state.
- (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.
- (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

Current Text of the German Basic Law

- (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.

Article 20a [Protection of the natural bases of life]

Mindful also of its responsibility toward future generations, the state shall protect the natural bases of life by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.

Article 21 [Political parties]

- (1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.
- (2) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.
- (3) Details shall be regulated by federal laws.

Article 22 [The flag]

The federal flag shall be black, red, and gold.

Article 23 [European Union]

- (1) To realize a unified Europe, Germany participates in the development of the European Union which is bound to democratic, rule of law, social, and federal principles as well as the principle of subsidiarity and provides a protection of fundamental rights essentially equivalent to that of this Constitution. The federation can, for this purpose and with the consent of the Senate [*Bundesrat*], delegate sovereign powers. Article 79 II & III is applicable for the foundation of the European Union as well as for changes in its contractual bases and comparable regulations by which the content of this Constitution is changed or amended or by which such changes or amendments are authorized.
- (1a) The House of Representatives [*Bundestag*] and the Senate [*Bundesrat*] have the right to challenge violations of the principle of subsidiarity by legislative acts of the European Union before the Court of the European Union. The House of Representatives [*Bundestag*] is duty bound to do so upon the motion of one quarter of its members. By statute requiring the consent of the Senate [*Bundesrat*], regarding the exercise of rights of the House of Representatives [*Bundestag*] and the Senate [*Bundesrat*] under the contractual bases of the European Union, exceptions may be authorized to Article 42 II 1 and Article 52 III 1.

**60 Years German Basic Law:
The German Constitution and its Court**

- (2) The House of Representatives [*Bundestag*] and the States [*Länder*], by their representation in the Senate [*Bundesrat*], participate in matters of the European Union. The Government has to thoroughly inform House of Representatives [*Bundestag*] and Senate [*Bundesrat*] at the earliest possible time.
- (3) The Government allows for statements of the House of Representatives [*Bundestag*] before it takes part in drafting European Union laws. The Government considers statements of the House of Representatives [*Bundestag*] during deliberations. Details are regulated by federal statute.
- (4) The Senate [*Bundesrat*] has to be included in the deliberations of the House of Representatives [*Bundestag*] insofar as it would have to participate in a domestic measure or insofar as the States [*Länder*] would be accountable domestically.
- (5) Insofar as, in the area of exclusive legislative competence of the Federation, the interests of the States [*Länder*] are affected or insofar as, in all other cases, the Federation has legislative competence, the Government considers the statement of the Senate [*Bundesrat*]. If legislative competencies of the States [*Länder*], the installation of their agencies, or their procedures are centrally affected, the opinion of the Senate [*Bundesrat*] has to be considered as decisive for the Federation's deliberation; the responsibility of the Federation for the whole state has to be maintained in the process. The consent of the Government is necessary in matters possibly resulting in higher expenses or lower revenues for the Federation.
- (6) Where exclusive legislative competencies of the States [*Länder*] are centrally affected in the areas of school education, culture, or broadcasting, the exercise of the Federal Republic of Germany's rights as member state of the European Union is delegated to a representative of the States [*Länder*] assigned by the Senate [*Bundesrat*]. These rights are exercised with participation of and in coordination with the Government; the responsibility of the Federation for the whole state has to be maintained in the process.
- (7) Details of Paragraphs IV to VI are regulated by a statute requiring the consent of the Senate [*Bundesrat*].

Article 24 [International organizations]

- (1) The Federation may by a law, transfer sovereign powers to international organizations.
- (1a) Insofar as the *Länder* are competent to exercise state powers and to perform state functions, they may, with the consent of the Federal Government, transfer sovereign powers to transfrontier institutions in neighbouring regions.
- (2) With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world.

Current Text of the German Basic Law

- (3) For the settlement of disputes between states, the Federation shall accede to agreements providing for general, comprehensive, and compulsory international arbitration.

Article 25 [International law and federal law]

The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.

Article 26 [Ban on preparations for war of aggression]

- (1) Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be made a criminal offence.
- (2) Weapons designed for warfare may be manufactured, transported, or marketed only with the permission of the Federal Government. Details shall be regulated by a federal law.

Article 27 [Merchant fleet]

All German merchant vessels shall constitute a unitary merchant fleet.

Article 28 [Federal guarantee of Land constitutions and of local self-government]

- (1) The constitutional order in the *Länder* must conform to the principles of a republican, democratic, and social state governed by the rule of law, within the meaning of this Basic Law. In each *Land*, county, and municipality the people shall be represented by a body chosen in general, direct, free, equal, and secret elections. In county and municipal elections, persons who possess citizenship in any member state of the European Community are also eligible to vote and to be elected in accord with European Community law. In municipalities a local assembly may take the place of an elected body.
- (2) Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility, within the limits prescribed by the laws. Within the limits of their functions designated by a law, associations of municipalities shall also have the right of self-government according to the laws. The guarantee of self-government shall extend to the bases of financial autonomy; these bases shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed.
- (3) The Federation shall guarantee that the constitutional order of the *Länder* conforms to the basic rights and to the provisions of paragraphs (1) and (2) of this Article.

Article 29 [New delimitation of the Länder]

- (1) The division of the federal territory into *Länder* may be revised to ensure that each *Land* be of a size and capacity to perform its functions effectively. Due regard shall be given in this connection to regional, historical, and cultural ties, economic efficiency, and the requirements of local and regional planning.

**60 Years German Basic Law:
The German Constitution and its Court**

- (2) Revisions of the existing division into *Länder* shall be effected by a federal law, which must be confirmed by referendum. The affected *Länder* shall be afforded an opportunity to be heard.
- (3) The referendum shall be held in the *Länder* from whose territories or parts of territories a new *Land* or a *Land* with redefined boundaries is to be established (affected *Länder*). The question to be voted on is whether the affected *Länder* are to remain as they are or whether the new *Land* or the *Land* with redefined boundaries should be established. The proposal to establish a new *Land* or a *Land* with redefined boundaries shall take effect if the change is approved by a majority in the future territory of such *Land* and by a majority in the territories or parts of territories of an affected *Land* taken together whose affiliation with a *Land* is to be changed in the same way. The proposal shall not take effect if within the territory of any of the affected *Länder* a majority reject the change; however, such rejection shall be of no consequence if in any part of the territory whose affiliation with the affected *Land* is to be changed a two-thirds majority approves the change, unless it is rejected by a two-thirds majority in the territory of the affected *Land* as a whole.
- (4) If in any clearly defined and contiguous residential and economic area located in two or more *Länder* and having at least one million inhabitants one tenth of those entitled to vote in *Bundestag* elections petition for the inclusion of that area in a single *Land*, a federal law shall specify within two years whether the change shall be made in accordance with paragraph (2) of this Article or that an advisory referendum shall be held in the affected *Länder*.
- (5) The advisory referendum shall establish whether the changes the law proposes meet with the voters' approval. The law may put forward not more than two distinct proposals for consideration by the voters. If a majority approves a proposed change of the existing division into *Länder*, a federal law shall specify within two years whether the change shall be made in accordance with paragraph (2) of this Article. If a proposal is approved in accordance with the third and fourth sentences of paragraph (3) of this Article, a federal law providing for establishment of the proposed *Land* shall be enacted within two years after the advisory ballot, and confirmation by referendum shall no longer be required.
- (6) A majority in a referendum or in an advisory referendum shall consist of a majority of the votes cast, provided that it amounts to at least one quarter of those entitled to vote in *Bundestag* elections. Other details respecting referenda, petitions, and advisory referenda shall be regulated by a federal law, which may also provide that the same petition may not be filed more than once within a period of five years.
- (7) Other changes respecting the territory of the *Länder* may be effected by agreements between the *Länder* concerned or by a federal law with the consent of the *Bundesrat*, if the territory that is to be the subject of the change has no more than 50,000 inhabitants. Details shall be regulated by a federal law requiring the consent of the *Bundesrat* and of a majority of the Members of the *Bundestag*. The law must provide affected municipalities and counties with an opportunity to be heard.

Current Text of the German Basic Law

- (8) *Länder* may revise the division of their existing territory or parts of their territory by agreement without regard to the provisions of paragraphs (2) through (7) of this Article. Affected municipalities and counties shall be afforded an opportunity to be heard. The agreement shall require confirmation by referendum in each of the *Länder* concerned. If the revision affects only part of a *Land's* territory, the referendum may be confined to the areas affected; the second clause of the fifth sentence shall not apply. In a referendum under this paragraph a majority of the votes cast shall be decisive, provided it amounts to at least one quarter of those entitled to vote in *Bundestag* elections; details shall be regulated by a federal law. The agreement shall require the consent of the *Bundestag*.

Article 30 [Division of authority between the Federation and the Länder]

Except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the *Länder*.

Article 31 [Supremacy of federal law]

Federal law shall take precedence over *Land* law.

Article 32 [Foreign relations]

- (1) Relations with foreign states shall be conducted by the Federation.
- (2) Before the conclusion of a treaty affecting the special circumstances of a *Land*, that *Land* shall be consulted in timely fashion.
- (3) Insofar as the *Länder* have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government.

Article 33 [Equal citizenship; professional civil service]

- (1) Every German shall have in every *Land* the same political rights and duties.
- (2) Every German shall be equally eligible for any public office according to his aptitude, qualifications, and professional achievements.
- (3) Neither the enjoyment of civil and political rights, nor eligibility for public office, nor rights acquired in the public service shall be dependent upon religious affiliation. No one may be disadvantaged by reason of adherence or non-adherence to a particular religious denomination or philosophical creed.
- (4) The exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law.
- (5) The law governing the public service shall be regulated with due regard to the traditional principles of the professional civil service.

**60 Years German Basic Law:
The German Constitution and its Court**

Article 34 [Liability for violation of official duty]

If any person, in the exercise of a public office entrusted to him, violates his official duty to a third party, liability shall rest principally with the state or public body that employs him. In the event of intentional wrongdoing or gross negligence, the right of recourse against the individual officer shall be preserved. The ordinary courts shall not be closed to claims for compensation or indemnity.

Article 35 [Legal and administrative assistance; assistance during disasters]

- (1) All federal and *Land* authorities shall render legal and administrative assistance to one another.
- (2) In order to maintain or restore public security or order, a *Land* in particularly serious cases may call upon personnel and facilities of the Federal Border Police to assist its police when without such assistance the police could not fulfil their responsibilities, or could do so only with great difficulty. In order to respond to a grave accident or a natural disaster, a *Land* may call for the assistance of police forces of other *Länder* or of personnel and facilities of other administrative authorities, of the Armed Forces, or of the Federal Border Police.
- (3) If the natural disaster or accident endangers the territory of more than one *Land*, the Federal Government, insofar as is necessary to combat the danger, may instruct the *Land* governments to place police forces at the disposal of other *Länder*, and may deploy units of the Federal Border Police or the Armed Forces to support the police. Measures taken by the Federal Government pursuant to the first sentence of this paragraph shall be rescinded at any time at the demand of the *Bundesrat*, and in any event as soon as the danger is removed.

Article 36 [Personnel of federal authorities]

- (1) Civil servants employed by the highest federal authorities shall be drawn from all *Länder* in appropriate proportion. Persons employed by other federal authorities shall, as a rule, be drawn from the *Land* in which they serve.
- (2) Laws respecting military service shall also take into account both the division of the Federation into *Länder* and the regional loyalties of their people.

Article 37 [Federal execution]

- (1) If a *Land* fails to comply with its obligations under this Basic Law or other federal laws, the Federal Government, with the consent of the *Bundesrat*, may take the necessary steps to compel the *Land* to comply with its duties.
- (2) For the purpose of implementing such coercive measures, the Federal Government or its representative shall have the right to issue instructions to all *Länder* and their authorities.

III. The *Bundestag*

Article 38 [Elections]

- (1) Members of the German *Bundestag* shall be elected in general, direct, free, equal, and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience.
- (2) Any person who has attained the age of eighteen shall be entitled to vote; any person who has attained the age of majority may be elected.
- (3) Details shall be regulated by a federal law.

Article 39 [Convening and legislative term]

- (1) Save the following provisions, the *Bundestag* shall be elected for four years. Its term shall end when a new *Bundestag* convenes. New elections shall be held no sooner than forty-six months and no later than forty-eight months after the legislative term begins. If the *Bundestag* is dissolved, new elections shall be held within sixty days.
- (2) The *Bundestag* shall convene no later than the thirtieth day after the elections are held.
- (3) The *Bundestag* shall determine when its sessions shall be adjourned and resumed. The President of the *Bundestag* may convene it at an earlier date. He shall be obliged to do so if one third of the Members, the Federal President or the Federal Chancellor so demand.

Article 40 [President; rules of procedure]

- (1) The *Bundestag* shall elect its President, Vice-Presidents, and secretaries. It shall adopt rules of procedure.
- (2) The President shall exercise proprietary and police powers in the *Bundestag* building. No search or seizure may take place on the premises of the *Bundestag* without his permission.

Article 41 [Scrutiny of elections]

- (1) Scrutiny of elections shall be the responsibility of the *Bundestag*. It shall also decide whether a Member has lost his seat.
- (2) Complaints against such decisions of the *Bundestag* may be lodged with the Federal Constitutional Court.
- (3) Details shall be regulated by a federal law.

Article 42 [Proceedings; voting]

- (1) Sessions of the *Bundestag* shall be public. On the motion of one tenth of its Members, or on the motion of the Federal Government, the public may be excluded by a two-thirds majority. The motion shall be voted upon at a session not open to the public.

**60 Years German Basic Law:
The German Constitution and its Court**

- (2) Decisions of the *Bundestag* shall require a majority of the votes cast unless this Basic Law otherwise provides. The rules of procedure may permit exceptions with respect to elections to be conducted by the *Bundestag*.
- (3) Truthful reports of public sessions of the *Bundestag* and of its committees shall not give rise to any liability.

Article 43 [Attendance of members of the Federal Government and of the Bundesrat]

- (1) The *Bundestag* and its committees may require the appearance of any member of the Federal Government.
- (2) The members of the *Bundesrat* and of the Federal Government as well as their representatives may attend all sessions of the *Bundestag* and of its committees. They shall have the right to be heard at any time.

Article 44 [Investigative committees]

- (1) The *Bundestag* shall have the right, and on the motion of one quarter of its Members the duty, to establish an investigative committee, which shall take the requisite evidence at public hearings. The public may be excluded.
- (2) The rules of criminal procedure shall apply *mutatis mutandis* to the taking of evidence. The privacy of correspondence, posts and telecommunications shall not be affected.
- (3) Courts and administrative authorities shall be required to provide legal and administrative assistance.
- (4) The decisions of investigative committees shall not be subject to judicial review. The courts shall be free to evaluate and rule upon the facts that were the subject of the investigation.

Article 45 [Committee on the European Union]

The *Bundestag* shall appoint a Committee on European Union Affairs. It may authorize the committee to exercise the rights of the *Bundestag* under Article 23 *vis-à-vis* the Federal Government. It can also empower the committee to exercise the rights of the House of Representatives [*Bundestag*] under the contractual bases of the European Union.

Article 45a [Committees on Foreign Affairs and Defence]

- (1) The *Bundestag* shall appoint a Committee on Foreign Affairs and a Committee on Defence.
- (2) The Committee on Defence shall also have the powers of an investigative committee. On the motion of one quarter of its members it shall have the duty to make a specific matter the subject of investigation.
- (3) Paragraph (1) of Article 44 shall not apply to defence matters.

Current Text of the German Basic Law

Article 45b [Parliamentary Commissioner for the Armed Forces]

A Parliamentary Commissioner for the Armed Forces shall be appointed to safeguard basic rights and to assist the *Bundestag* in exercising parliamentary control over the Armed Forces. Details shall be regulated by a federal law.

Article 45c [Petitions Committee]

- (1) The *Bundestag* shall appoint a Petitions Committee to deal with requests and complaints addressed to the *Bundestag* pursuant to Article 17.
- (2) The powers of the Committee to consider complaints shall be regulated by a federal law.

Article 45d [Parliamentary Control Body]

- (1) The House of Representatives [*Bundestag*] appoints a Body to control the intelligence services of the Federation.
- (2) Details are regulated by a federal statute.

Article 46 [Immunities]

- (1) At no time may a Member be subjected to court proceedings or disciplinary action or otherwise called to account outside the *Bundestag* for a vote cast or for any speech or debate in the *Bundestag* or in any of its committees. This provision shall not apply to defamatory insults.
- (2) A Member may not be called to account or arrested for a punishable offence without permission of the *Bundestag*, unless he is apprehended while committing the offence or in the course of the following day.
- (3) The permission of the *Bundestag* shall also be required for any other restriction of a Member's freedom of the person or for the initiation of proceedings against a Member under Article 18.
- (4) Any criminal proceedings or any proceedings under Article 18 against a Member and any detention or other restriction of the freedom of his person shall be suspended at the demand of the *Bundestag*.

Article 47 [Right not to give evidence]

Members may refuse to give evidence concerning persons who have confided information to them in their capacity as Members of the *Bundestag*, or to whom they have confided information in this capacity, as well as evidence concerning this information itself. To the extent that this right of refusal to give evidence applies, no seizure of documents shall be permissible.

**60 Years German Basic Law:
The German Constitution and its Court**

Article 48 [Entitlements of Members]

- (1) Every candidate for election to the *Bundestag* shall be entitled to the leave necessary for his election campaign.
- (2) No one may be prevented from accepting or exercising the office of Member of the *Bundestag*. No one may be given notice of dismissal or discharged from employment on this ground.
- (3) Members shall be entitled to remuneration adequate to ensure their independence. They shall be entitled to the free use of all publicly owned means of transport. Details shall be regulated by a federal law.

Article 49 [Repealed]

IV. The *Bundesrat*

Article 50 [Functions]

The *Länder* shall participate through the *Bundesrat* in the legislation and administration of the Federation and in matters concerning the European Union.

Article 51 [Composition]

- (1) The *Bundesrat* shall consist of members of the *Land* governments, which appoint and recall them. Other members of those governments may serve as alternates.
- (2) Each *Land* shall have at least three votes; *Länder* with more than two million inhabitants shall have four, *Länder* with more than six million inhabitants five, and *Länder* with more than seven million inhabitants six votes.
- (3) Each *Land* may appoint as many members as it has votes. The votes of each *Land* may be cast only as a unit and only by Members present or their alternates.

Article 52 [President; rules of procedure]

- (1) The *Bundesrat* shall elect its President for one year.
- (2) The President shall convene the *Bundesrat*. He shall be obliged to do so if the delegates of at least two *Länder* or the Federal Government so demand.
- (3) Decisions of the *Bundesrat* shall require at least a majority of its votes. It shall adopt rules of procedure. Its sessions shall be public. The public may be excluded.
- (3a) For matters concerning the European Union the *Bundesrat* may establish a Chamber for European Affairs whose decisions shall be considered decisions of the *Bundesrat*; paragraph (2) and the second sentence of paragraph (3) of Article 51 shall apply *mutatis mutandis*.
- (4) Other members or representatives of *Land* governments may serve on committees of the *Bundesrat*.

Current Text of the German Basic Law

Article 53 [Attendance of members of the Federal Government]

The members of the Federal Government shall have the right, and on demand the duty, to participate in sessions of the *Bundesrat* and of its committees. They shall have the right to be heard at any time. The *Bundesrat* shall be kept informed by the Federal Government with regard to the conduct of its affairs.

IVa. The Joint Committee

Article 53a [Composition; rules of procedure; right to information]

- (1) The Joint Committee shall consist of Members of the *Bundestag* and Members of the *Bundesrat*; the *Bundestag* shall provide two thirds and the *Bundesrat* one third of the committee members. The *Bundestag* shall designate Members in proportion to the relative strength of the various parliamentary groups; they may not be members of the Federal Government. Each *Land* shall be represented by a *Bundesrat* Member of its choice; these Members shall not be bound by instructions. The establishment of the Joint Committee and its proceedings shall be regulated by rules of procedure to be adopted by the *Bundestag* and requiring the consent of the *Bundesrat*.
- (2) The Federal Government shall inform the Joint Committee about its plans for a state of defence. The rights of the *Bundestag* and its committees under paragraph (1) of Article 43 shall not be affected by the provisions of this paragraph.

V. The Federal President

Article 54 [Election]

- (1) The Federal President shall be elected by the Federal Convention without debate. Any German who is entitled to vote in *Bundestag* elections and has attained the age of forty may be elected.
- (2) The term of office of the Federal President shall be five years. Re-election for a consecutive term shall be permitted only once.
- (3) The Federal Convention shall consist of the Members of the *Bundestag* and an equal number of members elected by the parliaments of the *Länder* on the basis of proportional representation.
- (4) The Federal Convention shall meet not later than thirty days before the term of office of the Federal President expires or, in the case of premature termination, not later than thirty days after that date. It shall be convened by the President of the *Bundestag*.
- (5) After the expiration of a legislative term, the period specified in the first sentence of paragraph (4) of this Article shall begin when the *Bundestag* first convenes.
- (6) The person receiving the votes of a majority of the members of the Federal Convention shall be elected. If after two ballots no candidate has obtained such a majority, the person who receives the largest number of votes on the next ballot shall be elected.
- (7) Details shall be regulated by a federal law.

**60 Years German Basic Law:
The German Constitution and its Court**

Article 55 [Incompatibility]

- (1) The Federal President may not be a member of the government or of a legislative body of the Federation or of a *Land*.
- (2) The Federal President may not hold any other salaried office, or engage in any trade or profession, or belong to the management or supervisory board of any enterprise conducted for profit.

Article 56 [Oath of office]

On assuming his office, the Federal President shall take the following oath before the assembled Members of the *Bundestag* and the *Bundesrat*:

“I swear that I will dedicate my efforts to the well-being of the German people, promote their welfare, protect them from harm, uphold and defend the Basic Law and the laws of the Federation, perform my duties conscientiously, and do justice to all. So help me God.”

The oath may also be taken without religious affirmation.

Article 57 [Disability or vacancy]

If the Federal President is unable to perform his duties, or if his office falls prematurely vacant, the President of the *Bundesrat* shall exercise his powers.

Article 58 [Countersignature]

Orders and directions of the Federal President shall require for their validity the countersignature of the Federal Chancellor or of the competent Federal Minister. This provision shall not apply to the appointment or dismissal of the Federal Chancellor, the dissolution of the *Bundestag* under Article 63, or a request made under paragraph (3) of Article 69.

Article 59 [Representation of the Federation]

- (1) The Federal President shall represent the Federation in terms of international law. He shall conclude treaties with foreign states on behalf of the Federation. He shall accredit and receive envoys.
- (2) Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply *mutatis mutandis*.

Article 59a [Repealed]

Article 60 [Appointment and dismissal of federal judges, federal civil servants, and military officers; pardon]

- (1) The Federal President shall appoint and dismiss federal judges, federal civil servants, and commissioned and non-commissioned officers of the Armed Forces, except as may otherwise be provided by a law.

Current Text of the German Basic Law

- (2) He shall exercise the power to pardon individual offenders on behalf of the Federation.
- (3) He may delegate these powers to other authorities.
- (4) Paragraphs (2) to (4) of Article 46 shall apply to the Federal President *mutatis mutandis*.

Article 61 [Impeachment before the Federal Constitutional Court]

- (1) The *Bundestag* or the *Bundesrat* may impeach the Federal President before the Federal Constitutional Court for wilful violation of this Basic Law or of any other federal law. The motion of impeachment must be supported by at least one quarter of the Members of the *Bundestag* or one quarter of the votes of the *Bundesrat*. The decision to impeach shall require a majority of two thirds of the Members of the *Bundestag* or of two thirds of the votes of the *Bundesrat*. The case for impeachment shall be presented before the Federal Constitutional Court by a person commissioned by the impeaching body.
- (2) If the Federal Constitutional Court finds the Federal President guilty of a wilful violation of this Basic Law or of any other federal law, it may declare that he has forfeited his office. After the Federal President has been impeached, the Court may issue an interim order preventing him from exercising his functions.

VI. The Federal Government

Article 62 [Composition]

The Federal Government shall consist of the Federal Chancellor and the Federal Ministers.

Article 63 [Election and appointment of the Federal Chancellor]

- (1) The Federal Chancellor shall be elected by the *Bundestag* without debate on the proposal of the Federal President.
- (2) The person who receives the votes of a majority of the Members of the *Bundestag* shall be elected. The person elected shall be appointed by the Federal President.
- (3) If the person proposed by the Federal President is not elected, the *Bundestag* may elect a Federal Chancellor within fourteen days after the ballot by the votes of more than one half of its Members.
- (4) If no Federal Chancellor is elected within this period, a new election shall take place without delay, in which the person who receives the largest number of votes shall be elected. If the person elected receives the votes of a majority of the Members of the *Bundestag*, the Federal President must appoint him within seven days after the election. If the person elected does not receive such a majority, then within seven days the Federal President shall either appoint him or dissolve the *Bundestag*.

Article 64 [Appointment and dismissal of Federal Ministers]

- (1) Federal Ministers shall be appointed and dismissed by the Federal President upon the proposal of the Federal Chancellor.

**60 Years German Basic Law:
The German Constitution and its Court**

- (2) On taking office the Federal Chancellor and the Federal Ministers shall take the oath provided for in Article 56 before the *Bundestag*.

Article 65 [Authority within the Federal Government]

The Federal Chancellor shall determine and be responsible for the general guidelines of policy. Within these limits each Federal Minister shall conduct the affairs of his department independently and on his own responsibility. The Federal Government shall resolve differences of opinion between Federal Ministers. The Federal Chancellor shall conduct the proceedings of the Federal Government in accordance with rules of procedure adopted by the Government and approved by the Federal President.

Article 65a [Command of the Armed Forces]

Command of the Armed Forces shall be vested in the Federal Minister of Defence.

Article 66 [Incompatibility]

Neither the Federal Chancellor nor a Federal Minister may hold any other salaried office, or engage in any trade or profession, or belong to the management or, without the consent of the *Bundestag*, to the supervisory board of an enterprise conducted for profit.

Article 67 [Constructive vote of no confidence]

- (1) The *Bundestag* may express its lack of confidence in the Federal Chancellor only by electing a successor by the vote of a majority of its Members and requesting the Federal President to dismiss the Federal Chancellor. The Federal President must comply with the request and appoint the person elected.
- (2) Forty-eight hours shall elapse between the motion and the election.

Article 68 [Vote of confidence; dissolution of the Bundestag]

- (1) If a motion of the Federal Chancellor for a vote of confidence is not supported by the majority of the Members of the *Bundestag*, the Federal President, upon the proposal of the Federal Chancellor, may dissolve the *Bundestag* within twenty-one days. The right of dissolution shall lapse as soon as the *Bundestag* elects another Federal Chancellor by the vote of a majority of its Members.
- (2) Forty-eight hours shall elapse between the motion and the vote.

Article 69 [Deputy Federal Chancellor; tenure of members of the Federal Government]

- (1) The Federal Chancellor shall appoint a Federal Minister as his deputy.
- (2) The tenure of office of the Federal Chancellor or of a Federal Minister shall end in any event when a new *Bundestag* convenes; the tenure of office of a Federal Minister shall also end on any other occasion on which the Federal Chancellor ceases to hold office.

Current Text of the German Basic Law

- (3) At the request of the Federal President the Federal Chancellor, or at the request of the Federal Chancellor or of the Federal President a Federal Minister, shall be obliged to continue to manage the affairs of his office until a successor is appointed.

VII. Legislative Powers of the Federation

Article 70 [Division of legislative powers between the Federation and the Länder]

- (1) The *Länder* shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation.
- (2) The division of authority between the Federation and the *Länder* shall be governed by the provisions of this Basic Law respecting exclusive and concurrent legislative powers.

Article 71 [Exclusive legislative power of the Federation definition]

On matters within the exclusive legislative power of the Federation, the *Länder* shall have power to legislate only when and to the extent that they are expressly authorized to do so by a federal law.

Article 72 [Concurrent legislative power of the Federation definition]

- (1) On matters within the concurrent legislative power, the *Länder* shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law.
- (2) The Federation shall have the right to legislate on these matters if and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.
- (3) A federal law may provide that federal legislation that is no longer necessary within the meaning of paragraph (2) of this Article may be superseded by *Land* law.

Article 73 [Subjects of exclusive legislative power]

The Federation shall have exclusive power to legislate with respect to:

1. foreign affairs and defence, including protection of the civilian population;
2. citizenship in the Federation;
3. freedom of movement, passports, immigration, emigration, and extradition;
4. currency, money, and coinage, weights and measures, and the determination of standards of time;
5. the unity of the customs and trading area, treaties respecting commerce and navigation, the free movement of goods, and the exchange of goods and payments with foreign countries, including customs and border protection;

**60 Years German Basic Law:
The German Constitution and its Court**

6. air transport;
- 6a. the operation of railways wholly or predominantly owned by the Federation (federal railways), the construction, maintenance, and operation of tracks belonging to federal railways as well as the imposition of charges for the use of such tracks;
7. postal and telecommunication services;
8. the legal relations of persons employed by the Federation and by federal corporations under public law;
9. industrial property rights, copyrights, and publishing;
10. cooperation between the Federation and the *Länder* concerning:
 - (a) criminal police work,
 - (b) protection of the free democratic basic order, existence, and security of the Federation or of a *Land* (protection of the constitution), and
 - (c) protection against activities within the federal territory which, by the use of force or preparations for the use of force, endanger the external interests of the Federal Republic of Germany,as well as the establishment of a Federal Criminal Police Office and international action to combat crime;
11. statistics for federal purposes.

Article 74 [Subjects of concurrent legislation]

- (1) Concurrent legislative powers shall extend to the following subjects:
 1. civil law, criminal law, and corrections, court organization and procedure, the legal profession, notaries, and the provision of legal advice;
 2. registration of births, deaths, and marriages;
 3. the law of association and assembly;
 4. the law relating to residence and establishment of aliens;
 - 4a. the law relating to weapons and explosives;
 5. [repealed]
 6. matters concerning refugees and expellees;
 7. public welfare;
 8. [repealed]
 9. war damage and reparations;

Current Text of the German Basic Law

10. benefits for persons disabled by war and for dependents of deceased war victims as well as assistance to former prisoners of war;
- 10a. war graves and graves of other victims of war or despotism;
11. the law relating to economic affairs (mining, industry, energy, crafts, trades, commerce, banking, stock exchanges, and private insurance);
- 11a. the production and utilization of nuclear energy for peaceful purposes, the construction and operation of facilities serving such purposes, protection against hazards arising from the release of nuclear energy or from ionizing radiation, and the disposal of radioactive substances;
12. labour law, including the organization of enterprises, occupational safety and health, and employment agencies, as well as social security, including unemployment insurance;
13. the regulation of educational and training grants and the promotion of research;
14. the law regarding expropriation, to the extent relevant to matters enumerated in Articles 73 and 74;
15. the transfer of *land*, natural resources, and means of production to public ownership or other forms of public enterprise;
16. prevention of the abuse of economic power;
17. the promotion of agricultural production and forestry, ensuring the adequacy of the food supply, the importation and exportation of agricultural and forestry products, deep sea and coastal fishing, and preservation of the coasts;
18. real estate transactions, *land* law (except for laws respecting development fees), and matters concerning agricultural leases, as well as housing, settlement, and homestead matters;
19. measures to combat dangerous and communicable human and animal diseases, admission to the medical profession and to ancillary professions or occupations, as well as trade in medicines, drugs, narcotics, and poisons;
- 19a. the economic viability of hospitals and the regulation of hospital charges;
20. protective measures in connection with the marketing of food, drink, and tobacco, essential commodities, feedstuffs, agricultural and forest seeds and seedlings, and protection of plants against diseases and pests, as well as the protection of animals;
21. maritime and coastal shipping, as well as navigational aids, inland navigation, meteorological services, sea routes, and inland waterways used for general traffic;
22. road traffic, motor transport, construction and maintenance of long distance highways, as well as the collection of tolls for the use of public highways by vehicles and the allocation of the revenue;

**60 Years German Basic Law:
The German Constitution and its Court**

23. non-federal railways, except mountain railways;
 24. waste disposal, air pollution control, and noise abatement;
 25. state liability;
 26. human artificial insemination, analysis and modification of genetic information, as well as the regulation of organ and tissue transplantation.
- (2) Laws adopted pursuant to clause 25 of paragraph (1) of this Article shall require the consent of the *Bundesrat*.

Article 74a [Concurrent legislative power of the Federation remuneration, pensions, and related benefits of members of the public service]

- (1) Concurrent legislative power shall also extend to the remuneration, pensions, and related benefits of members of the public service who stand in a relationship of service and loyalty defined by public law, insofar as the Federation does not have exclusive legislative power pursuant to clause 8 of Article 73.
- (2) Federal laws enacted pursuant to paragraph (1) of this Article shall require the consent of the *Bundesrat*.
- (3) Federal laws enacted pursuant to clause 8 of Article 73 shall likewise require the consent of the *Bundesrat*, insofar as they contemplate standards for the structure or computation of remuneration, pensions, and related benefits including the classification of positions, or minimum or maximum rates, that differ from those provided for in federal laws enacted pursuant to paragraph (1) of this Article.
- (4) Paragraphs (1) and (2) of this Article shall apply *mutatis mutandis* to the remuneration, pensions, and related benefits of judges of the *Länder*. Paragraph (3) of this Article shall apply *mutatis mutandis* to laws enacted pursuant to paragraph (1) of Article 98.

Article 75 [Areas of federal framework legislation]

- (1) Subject to the conditions laid down in Article 72, the Federation shall have power to enact provisions on the following subjects as a framework for *Land* legislation:
 1. the legal relations of persons in the public service of the *Länder*, municipalities, or other corporate bodies under public law, insofar as Article 74a does not otherwise provide;
 - 1a. general principles respecting higher education;
 2. the general legal relations of the press;
 3. hunting, nature conservation, and landscape management;
 4. land distribution, regional planning, and the management of water resources;
 5. matters relating to the registration of residence or domicile and to identity cards;
 6. measures to prevent expatriation of German cultural assets.

Current Text of the German Basic Law

Paragraph (3) of Article 72 shall apply *mutatis mutandis*.

- (2) Only in exceptional circumstances may framework legislation contain detailed or directly applicable provisions.
- (3) When the Federation enacts framework legislation, the *Länder* shall be obliged to adopt the necessary *Land* laws within a reasonable period prescribed by the law.

Article 76 [Bills]

- (1) Bills may be introduced in the *Bundestag* by the Federal Government, by the *Bundesrat*, or from the floor of the *Bundestag*.
- (2) Federal Government bills shall first be submitted to the *Bundesrat*. The *Bundesrat* shall be entitled to comment on such bills within six weeks. If for important reasons, especially with respect to the scope of the bill, the *Bundesrat* demands an extension, the period shall be increased to nine weeks. If in exceptional circumstances the Federal Government on submitting a bill to the *Bundesrat* declares it to be particularly urgent, it may submit the bill to the *Bundestag* after three weeks or, if the *Bundesrat* has demanded an extension pursuant to the third sentence of this paragraph, after six weeks, even if it has not yet received the comments of the *Bundesrat*; upon receiving such comments, it shall transmit them to the *Bundestag* without delay. In the case of bills to amend this Basic Law or to transfer sovereign powers pursuant to Article 23 or 24 the comment period shall be nine weeks; the fourth sentence of this paragraph shall not apply.
- (3) *Bundesrat* bills shall be submitted to the *Bundestag* by the Federal Government within six weeks. In submitting them the Federal Government shall state its own views. If for important reasons, especially with respect to the scope of the bill, the Federal Government demands an extension, the period shall be increased to nine weeks. If in exceptional circumstances the *Bundesrat* declares a bill to be particularly urgent, the period shall be three weeks or, if the Federal Government has demanded an extension pursuant to the third sentence of this paragraph, six weeks. In the case of bills to amend this Basic Law or to transfer sovereign powers pursuant to Article 23 or 24 the comment period shall be nine weeks; the fourth sentence of this paragraph shall not apply. The *Bundestag* shall consider and vote on bills within a reasonable time.

Article 77 [The legislative process]

- (1) Federal laws shall be adopted by the *Bundestag*. After their adoption the President of the *Bundestag* shall submit them to the *Bundesrat* without delay.
- (2) Within three weeks after receiving an adopted bill, the *Bundesrat* may demand that a committee for joint consideration of bills, composed of Members of the *Bundestag* and of the *Bundesrat*, be convened. The composition and proceedings of this committee shall be regulated by rules of procedure adopted by the *Bundestag* and requiring the consent of the *Bundesrat*. The Members of the *Bundesrat* on this committee shall not be bound by instructions. When the consent of the *Bundesrat* is required for a bill to become law,

**60 Years German Basic Law:
The German Constitution and its Court**

the *Bundestag* and the Federal Government may likewise demand that such a committee be convened. Should the committee propose any amendment to the adopted bill, the *Bundestag* shall vote on it a second time.

- (2a) Insofar as its consent is required for a bill to become law, the *Bundesrat*, if no request has been made pursuant to the first sentence of paragraph (2) of this Article or if the mediation proceeding has been completed without a proposal to amend the bill, shall vote on the bill within a reasonable time.
- (3) Insofar as its consent is not required for a bill to become law, the *Bundesrat*, once proceedings under paragraph (2) of this Article are completed, may within two weeks object to a bill adopted by the *Bundestag*. The time for objection shall begin, in the case described in the last sentence of paragraph (2) of this Article, upon receipt of the bill as readopted by the *Bundestag*, and in all other cases upon receipt of a communication from the chairman of the committee provided for in paragraph (2) of this Article to the effect that the committee's proceedings have been concluded.
- (4) If the objection is adopted by the majority of the votes of the *Bundesrat*, it may be rejected by a decision of the majority of the Members of the *Bundestag*. If the *Bundesrat* adopted the objection by a majority of at least two thirds of its votes, its rejection by the *Bundestag* shall require a two-thirds majority, including at least a majority of the Members of the *Bundestag*.

Article 78 [Passage of federal laws]

A bill adopted by the *Bundestag* shall become law if the *Bundesrat* consents to it, or fails to make a demand pursuant to paragraph (2) of Article 77, or fails to enter an objection within the period stipulated in paragraph (3) of Article 77, or withdraws such an objection, or if the objection is overridden by the *Bundestag*.

Article 79 [Amendment of the Basic Law]

- (1) This Basic Law may be amended only by a law expressly amending or supplementing its text. In the case of an international treaty respecting a peace settlement, the preparation of a peace settlement, or the phasing out of an occupation regime, or designed to promote the defence of the Federal Republic, it shall be sufficient, for the purpose of making clear that the provisions of this Basic Law do not preclude the conclusion and entry into force of the treaty, to add language to the Basic Law that merely makes this clarification.
- (2) Any such law shall be carried by two thirds of the Members of the *Bundestag* and two thirds of the votes of the *Bundesrat*.
- (3) Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

Current Text of the German Basic Law

Article 80 [Issuance of statutory instruments]

- (1) The Federal Government, a Federal Minister, or the *Land* governments may be authorized by a law to issue statutory instruments. The content, purpose, and scope of the authority conferred shall be specified in the law. Each statutory instrument shall contain a statement of its legal basis. If the law provides that such authority may be further delegated, such sub-delegation shall be effected by statutory instrument.
- (2) Unless a federal law otherwise provides, the consent of the *Bundesrat* shall be required for statutory instruments issued by the Federal Government or a Federal Minister respecting fees or basic principles for the use of postal and telecommunication facilities, basic principles for levying of charges for the use of facilities of federal railways, or the construction and operation of railways, as well as for statutory instruments issued pursuant to federal laws that require the consent of the *Bundesrat* or that are executed by the *Länder* on federal commission or in their own right.
- (3) The *Bundesrat* may submit to the Federal Government drafts of statutory instruments that require its consent.
- (4) Insofar as *Land* governments are authorized by or pursuant to federal laws to issue statutory instruments, the *Länder* shall also be entitled to regulate the matter by a law.

Article 80a [Application of legal provisions in a state of tension]

- (1) If this Basic Law or a federal law respecting defence, including protection of the civilian population, provides that legal provisions may be applied only in accordance with this Article, their application, except when a state of defence has been declared, shall be permissible only after the *Bundestag* has determined that a state of tension exists or has specifically approved such application. The determination of a state of tension and specific approval in the cases mentioned in the first sentence of paragraph (5) and the second sentence of paragraph (6) of Article 12a shall require a two-thirds majority of the votes cast.
- (2) Any measures taken pursuant to legal provisions by virtue of paragraph (1) of this Article shall be rescinded whenever the *Bundestag* so demands.
- (3) Notwithstanding paragraph (1) of this Article, the application of such legal provisions shall also be permissible on the basis of and in accordance with a decision made by an international body within the framework of a treaty of alliance with the approval of the Federal Government. Any measures taken pursuant to this paragraph shall be rescinded whenever the *Bundestag*, by the vote of a majority of its Members, so demands.

Article 81 [Legislative emergency]

- (1) If, in the circumstances described in Article 68, the *Bundestag* is not dissolved, the Federal President, at the request of the Federal Government and with the consent of the *Bundesrat*, may declare a state of legislative emergency with respect to a bill, if the

**60 Years German Basic Law:
The German Constitution and its Court**

Bundestag rejects the bill although the Federal Government has declared it to be urgent. The same shall apply if a bill has been rejected although the Federal Chancellor had combined it with a motion under Article 68.

- (2) If, after a state of legislative emergency has been declared, the *Bundestag* again rejects the bill or adopts it in a version the Federal Government declares unacceptable, the bill shall be deemed to have become law to the extent that it receives the consent of the *Bundesrat*. The same shall apply if the *Bundestag* does not pass the bill within four weeks after it is reintroduced.
- (3) During the term of office of a Federal Chancellor, any other bill rejected by the *Bundestag* may become law in accordance with paragraphs (1) and (2) of this Article within a period of six months after the first declaration of a state of legislative emergency. After the expiration of this period, no further declaration of a state of legislative emergency may be made during the term of office of the same Federal Chancellor.
- (4) This Basic Law may neither be amended nor abrogated nor suspended in whole or in part by a law enacted pursuant to paragraph (2) of this Article.

Article 82 [Promulgation, publication, and entry into force]

- (1) Laws enacted in accordance with the provisions of this Basic Law shall, after countersignature, be certified by the Federal President and promulgated in the Federal Law Gazette. Statutory instruments shall be certified by the agency that issues them and, unless a law otherwise provides, shall be promulgated in the Federal Law Gazette.
- (2) Every law or statutory instrument shall specify the date on which it shall take effect. In the absence of such a provision, it shall take effect on the fourteenth day after the day on which the Federal Law Gazette containing it was published.

VIII. The Execution of Federal Laws and the Federal Administration

Article 83 [Distribution of authority between the Federation and the Länder]

The *Länder* shall execute federal laws in their own right insofar as this Basic Law does not otherwise provide or permit.

Article 84 [Execution by the Länder in their own right and federal oversight]

- (1) Where the *Länder* execute federal laws in their own right, they shall regulate the establishment of the authorities and their administrative procedure insofar as federal laws enacted with the consent of the *Bundesrat* do not otherwise provide.
- (2) The Federal Government, with the consent of the *Bundesrat*, may issue general administrative rules.

Current Text of the German Basic Law

- (3) The Federal Government shall exercise oversight to ensure that the *Länder* execute federal laws in accordance with the law. For this purpose the Federal Government may send commissioners to the highest *Land* authorities and, with their consent or, where such consent is refused, with the consent of the *Bundesrat*, also to subordinate authorities.
- (4) Should any deficiencies that the Federal Government has identified in the execution of federal laws in the *Länder* not be corrected, the *Bundesrat*, on application of the Federal Government or of the *Land* concerned, shall decide whether that *Land* has violated the law. The decision of the *Bundesrat* may be challenged in the Federal Constitutional Court.
- (5) With a view to the execution of federal laws, the Federal Government may be authorized by a federal law requiring the consent of the *Bundesrat* to issue instructions in particular cases. They shall be addressed to the highest *Land* authorities unless the Federal Government considers the matter urgent.

Article 85 [Execution by the Länder on federal commission]

- (1) Where the *Länder* execute federal laws on federal commission, establishment of the authorities shall remain the concern of the *Länder*, except insofar as federal laws enacted with the consent of the *Bundesrat* otherwise provide.
- (2) The Federal Government, with the consent of the *Bundesrat*, may issue general administrative rules. It may provide for the uniform training of civil servants and other salaried public employees. The heads of intermediate authorities shall be appointed with its approval.
- (3) The *Land* authorities shall be subject to instructions from the competent highest federal authorities. Such instructions shall be addressed to the highest *Land* authorities unless the Federal Government considers the matter urgent. Implementation of the instructions shall be ensured by the highest *Land* authorities.
- (4) Federal oversight shall extend to the legality and appropriateness of execution. For this purpose the Federal Government may require the submission of reports and documents and send commissioners to all authorities.

Article 86 [Federal administration]

Where the Federation executes laws through its own administrative authorities or through federal corporations or institutions established under public law, the Federal Government shall, insofar as the law in question contains no special provision, issue general administrative rules. The Federal Government shall provide for the establishment of the authorities insofar as the law in question does not otherwise provide.

Article 87 [Subjects of direct federal administration]

- (1) The foreign service, the federal financial administration, and, in accordance with the provisions of Article 89, the administration of federal waterways and shipping shall be conducted by federal administrative authorities with their own administrative substructures. A federal law may establish Federal Border Police authorities and central

**60 Years German Basic Law:
The German Constitution and its Court**

offices for police information and communications, for the criminal police, and for the compilation of data for purposes of protection of the constitution and of protection against activities within the federal territory which, through the use of force or acts preparatory to the use of force, endanger the external interests of the Federal Republic of Germany.

- (2) Social insurance institutions whose jurisdiction extends beyond the territory of a single *Land* shall be administered as federal corporations under public law. Social insurance institutions whose jurisdiction extends beyond the territory of a single *Land* but not beyond that of three *Länder* shall, notwithstanding the first sentence of this paragraph, be administered as *Land* corporations under public law, if the *Länder* concerned have specified which *Land* shall exercise supervisory authority.
- (3) In addition, autonomous federal higher authorities as well as new federal corporations and institutions under public law may be established by a federal law for matters on which the Federation has legislative power. When the Federation is confronted with new responsibilities with respect to matters on which it has legislative power, federal authorities at intermediate and lower levels may be established, with the consent of the *Bundesrat* and of a majority of the Members of the *Bundestag*, in cases of urgent need.

Article 87a [Establishment and powers of the Armed Forces]

- (1) The Federation shall establish Armed Forces for purposes of defence. Their numerical strength and general organizational structure must be shown in the budget.
- (2) Apart from defence, the Armed Forces may be employed only to the extent expressly permitted by this Basic Law.
- (3) During a state of defence or a state of tension the Armed Forces shall have the power to protect civilian property and to perform traffic control functions to the extent necessary to accomplish their defence mission. Moreover, during a state of defence or a state of tension, the Armed Forces may also be authorized to support police measures for the protection of civilian property; in this event the Armed Forces shall cooperate with the competent authorities.
- (4) In order to avert an imminent danger to the existence or free democratic basic order of the Federation or of a *Land*, the Federal Government, if the conditions referred to in paragraph (2) of Article 91 obtain and the police forces and the Federal Border Police prove inadequate, may employ the Armed Forces to support the police and the Federal Border Police in protecting civilian property and in combating organized armed insurgents. Any such employment of the Armed Forces shall be discontinued if the *Bundestag* or the *Bundesrat* so demands.

Article 87b [The Federal Defence Administration]

- (1) The Federal Defence Administration shall be conducted as a federal administrative authority with its own administrative substructure. It shall have jurisdiction for personnel matters and direct responsibility for satisfaction of the procurement needs of the Armed

Current Text of the German Basic Law

Forces. Responsibilities connected with pensions for injured persons or with construction work may be assigned to the Federal Defence Administration only by a federal law requiring the consent of the *Bundesrat*. Such consent shall also be required for any laws to the extent that they empower the Federal Defence Administration to interfere with rights of third parties; this requirement, however, shall not apply in the case of laws respecting personnel matters.

- (2) In addition, federal laws concerning defence, including recruitment for military service and protection of the civilian population, may, with the consent of the *Bundesrat*, provide that they shall be executed, wholly or in part, either by federal administrative authorities with their own administrative substructures or by the *Länder* on federal commission. If such laws are executed by the *Länder* on federal commission, they may, with the consent of the *Bundesrat*, provide that the powers vested in the Federal Government or in the competent highest federal authorities pursuant to Article 85 be transferred wholly or in part to federal higher authorities; in this event the law may provide that such authorities shall not require the consent of the *Bundesrat* in issuing general administrative rules pursuant to the first sentence of paragraph (2) of Article 85.

Article 87c [Administration in the field of nuclear energy]

Laws enacted under clause 11a of Article 74 may, with the consent of the *Bundesrat*, provide that they shall be executed by the *Länder* on federal commission.

Article 87d [Air transport administration]

- (1) Air transport administration shall be conducted by federal authorities. Tasks of air traffic control can also be conducted by foreign air-traffic control organizations accredited under the law of the European Community. Details are regulated by a federal statute.
- (2) By a federal law requiring the consent of the *Bundesrat*, responsibilities for air transport administration may be delegated to the *Länder* acting on federal commission.

Article 87e [Federal railway administration]

- (1) Rail transport with respect to federal railways shall be administered by federal authorities. Responsibilities for rail transport administration may be delegated by a federal law to the *Länder* acting in their own right.
- (2) The Federation shall discharge rail transport administration responsibilities assigned to it by a federal law, above and beyond those respecting federal railways.
- (3) Federal railways shall be operated as enterprises under private law. They shall remain the property of the Federation to the extent that their activities embrace the construction, maintenance, and operation of the tracks. The transfer of federal shares in these enterprises under the second sentence of this paragraph shall be effected pursuant to a law; the Federation shall retain a majority of the shares. Details shall be regulated by a federal law.

**60 Years German Basic Law:
The German Constitution and its Court**

- (4) The Federation shall ensure that in developing and maintaining the federal railway system as well as in offering services over this system, other than local passenger services, due account is taken of the interests and especially the transportation needs of the public. Details shall be regulated by a federal law.
- (5) Laws enacted pursuant to paragraphs (1) through (4) of this Article shall require the consent of the *Bundesrat*. The consent of the *Bundesrat* shall also be required for laws respecting the dissolution, merger, or division of federal railway enterprises, the transfer of tracks of federal railways to third parties, or the abandonment of such tracks, or affecting local passenger services.

Article 87f [Posts and telecommunications]

- (1) In accordance with a federal law requiring the consent of the *Bundesrat*, the Federation shall ensure the availability of adequate and appropriate postal and telecommunications services throughout the federal territory.
- (2) Services within the meaning of paragraph (1) of this Article shall be provided as a matter of private enterprise by the firms succeeding to the special trust Deutsche Bundespost and by other private providers. Sovereign functions in the area of posts and telecommunications shall be discharged by federal administrative authorities.
- (3) Notwithstanding the second sentence of paragraph (2) of this Article, the Federation, by means of a federal institution under public law, shall discharge particular responsibilities relating to the firms succeeding to the special trust Deutsche Bundespost as prescribed by a federal law.

Article 88 [The Federal Bank]

The Federation shall establish a note-issuing and currency bank as the Federal Bank. Within the framework of the European Union, its responsibilities and powers may be transferred to the European Central Bank that is independent and committed to the overriding goal of assuring price stability.

Article 89 [Federal waterways]

- (1) The Federation shall be the owner of the former Reich waterways.
- (2) The Federation shall administer the federal waterways through its own authorities. It shall exercise those state functions relating to inland shipping which extend beyond the territory of a single *Land*, and those functions relating to maritime shipping, which are conferred on it by a law. Insofar as federal waterways lie within the territory of a single *Land*, the Federation on its application may delegate their administration to that *Land* on federal commission. If a waterway touches the territory of several *Länder*, the Federation may commission that *Land* which is designated by the affected *Länder*.
- (3) In the administration, development, and new construction of waterways, the requirements of land improvement and of water management shall be assured in agreement with the *Länder*.

Current Text of the German Basic Law

Article 90 [Federal highways]

- (1) The Federation shall be the owner of the former Reich highways and superhighways.
- (2) The *Länder*, or such self-governing corporate bodies as are competent under *Land* law, shall administer the federal superhighways and other federal highways used by long-distance traffic on federal commission.
- (3) On application of a *Land*, the Federation may assume the administration of federal superhighways and other federal highways used by long distance traffic insofar as they lie within the territory of that *Land*.

Article 91 [Internal emergency]

- (1) In order to avert an imminent danger to the existence or free democratic basic order of the Federation or of a *Land*, a *Land* may call upon police forces of other *Länder*, or upon personnel and facilities of other administrative authorities and of the Federal Border Police.
- (2) If the *Land* where such danger is imminent is not itself willing or able to combat the danger, the Federal Government may place the police in that *Land* and the police forces of other *Länder* under its own orders and deploy units of the Federal Border Police. Any such order shall be rescinded once the danger is removed, or at any time on the demand of the *Bundesrat*. If the danger extends beyond the territory of a single *Land*, the Federal Government, insofar as is necessary to combat such danger, may issue instructions to the *Land* governments; the first and second sentences of this paragraph shall not be affected by this provision.

VIIIa. Joint Tasks

Article 91a [Participation of the Federation pursuant to federal legislation]

- (1) In the following areas the Federation shall participate in the discharge of responsibilities of the *Länder*, provided that such responsibilities are important to society as a whole and that federal participation is necessary for the improvement of living conditions (joint tasks):
 1. extension and construction of institutions of higher learning, including university clinics;
 2. improvement of regional economic structures;
 3. improvement of the agrarian structure and of coastal preservation.
- (2) Joint tasks shall be defined in detail by a federal law requiring the consent of the *Bundesrat*. This law shall include general principles governing the performance of such tasks.
- (3) The law referred to in paragraph (2) of this Article shall provide for the procedure and institutions required for joint overall planning. The inclusion of a project in the overall plan shall require the consent of the *Land* in whose territory it is to be carried out.

**60 Years German Basic Law:
The German Constitution and its Court**

- (4) In cases to which subparagraphs 1 and 2 of paragraph (1) of this Article apply, the Federation shall finance one half of the expenditure in each *Land*. In cases to which subparagraph 3 of paragraph (1) of this Article applies, the Federation shall finance at least one half of the expenditure, and the proportion shall be the same for all *Länder*. Details shall be regulated by the law. The provision of funds shall be subject to appropriation in the budgets of the Federation and the *Länder*.
- (5) Upon request the Federal Government and the *Bundesrat* shall be informed about the execution of joint tasks.

Article 91b [Cooperation between the Federation and the Länder pursuant to agreements]

Pursuant to agreements, the Federation and the *Länder* may cooperate in educational planning and in the promotion of research institutions and research projects of supraregional importance. The apportionment of costs shall be regulated by the relevant agreement.

Article 91c [Systems of Information Technology]

- (1) Federation and States [*Länder*] may cooperate in the planning, installation, and operation of systems of information technology needed for their tasks.
- (2) Federation and States [*Länder*] may by agreement establish standards and security requirements necessary for the communication between their systems of information technology. Agreements about the basis of cooperation according to sentence 1 may for tasks of specific substance and extent provide that detailed regulation is adopted on the consent of a qualified majority of Federation and States [*Länder*] as specified in the convention. They require the consent of the House of Representatives [*Bundestag*] and of the Houses of Representatives of participating States [*Länder*]; the right to cancellation of these agreements cannot be excluded. The agreement also determines the allocation of costs.
- (3) Furthermore, the States [*Länder*] may agree on the joint operation of systems of information technology as well as the establishment of specific installations.
- (4) For the connection of information technology networks of the Federation and the States [*Länder*], the Federation establishes a connection network. Details regarding the installation and operation of the connection network are regulated by a federal statute requiring the consent of the Senate [*Bundesrat*].

Article 91d [Comparative Surveys]

Federation and States [*Länder*] may, to establish and improve the performance of their administrations, conduct comparative surveys and publish the results.

IX. The Judiciary

Article 92 [The courts]

The judicial power shall be vested in the judges; it 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*.

Article 93 [Federal Constitutional Court: jurisdiction]

- (1) The Federal Constitutional Court decides:
 1. on the interpretation of this Constitution in the event of disputes concerning the extent of the rights and duties of a highest federal body or of other parties concerned who have been vested with rights of their own by this Constitution or by rules of procedure of a highest federal body;
 2. in case of differences of opinion or doubts on the formal and material compatibility of federal law or State [*Land*] law with this Constitution, or on the compatibility of State [*Land*] law with other federal law, at the request of the Government, of a State [*Land*] government, or of one fourth of the House of Representatives [*Bundestag*] members;
 - 2a. in case of differences of opinion on the compatibility of federal law with Article 72 II, at the request of the Senate [*Bundesrat*], of a State [*Land*] government, or of a State [*Land*] parliament;
 3. in case of differences of opinion on the rights and duties of the Federation and the States [*Länder*], particularly in the execution of federal law by the States [*Länder*] and in the exercise of federal supervision;
 4. on other disputes involving public law, between the Federation and the States [*Länder*], between different States [*Länder*] or within a State [*Land*], unless recourse to another court exists;
 - 4a. on complaints of unconstitutionality, being filed by any person claiming that one of his basic rights or one of his rights under Article 20 IV or under Article 33, 38, 101, 103 or 1 or 104 has been violated by public authority;
 - 4b. on complaints of unconstitutionality filed by communes or associations of communes on the ground that their right to self-government under Article 28 has been violated by a statute other than a State [*Land*] statute open to complaint to the respective State [*Land*] constitutional court;
 5. in the other cases provided for in this Constitution.
- (2) The Federal Constitutional Court also decides, at the request of the Senate [*Bundesrat*], a State [*Land*] Government or State [*Land*] Parliament, whether in the case of Article 72 IV the necessity of federal regulation according to Article 72 II no longer prevails or federal law could no longer be adopted in the cases of Article 125a II 1. The declaration

**60 Years German Basic Law:
The German Constitution and its Court**

that the necessity no longer prevails or that federal law no longer could be adopted replaces a federal statute based on Article 72 IV or Article 125a II 2. The request according to Sentence 1 is only admissible once a bill based on Article 72 IV or 125 a II 2 has been denied in the German House of Representatives [*Bundestag*] or not been deliberated and decided within one year or if such a bill has been denied in the Senate [*Bundesrat*].

- (3) The Federal Constitutional Court also acts in such other cases as are assigned to it by federal legislation.

Article 94 [Federal Constitutional Court: composition]

- (1) The Federal Constitutional Court shall consist of federal judges and other members. Half the members of the Federal Constitutional Court shall be elected by the *Bundestag* and half by the *Bundesrat*. They may not be members of the *Bundestag*, of the *Bundesrat*, of the Federal Government, or of any of the corresponding bodies of a *Land*.
- (2) The organization and procedure of the Federal Constitutional Court shall be regulated by a federal law, which shall specify in which instances its decisions shall have the force of law. The law may require that all other legal remedies be exhausted before a constitutional complaint may be filed, and may provide for a separate proceeding to determine whether the complaint will be accepted for decision.

Article 95 [Supreme federal courts]

- (1) The Federation shall establish the Federal Court of Justice, the Federal Administrative Court, the Federal Finance Court, the Federal Labour Court, and the Federal Social Court as supreme courts of ordinary, administrative, financial, labour, and social jurisdiction.
- (2) The judges of each of these courts shall be chosen jointly by the competent Federal Minister and a committee for the selection of judges consisting of the competent *Land* ministers and an equal number of members elected by the *Bundestag*.
- (3) A Joint Chamber of the courts specified in paragraph (1) of this Article shall be established to preserve the uniformity of decisions. Details shall be regulated by a federal law.

Article 96 [Other federal courts; exercise of federal jurisdiction by courts of the Länder]

- (1) The Federation may establish a federal court for matters respecting industrial property rights.
- (2) The Federation may establish federal military criminal courts for the Armed Forces. These courts may exercise criminal jurisdiction only during a state of defence or over members of the Armed Forces serving abroad or on board warships. Details shall be regulated by a federal law. These courts shall be under the aegis of the Federal Minister of Justice. Their fulltime judges shall be persons qualified to hold judicial office.

Current Text of the German Basic Law

- (3) The supreme court of review from the courts designated in paragraphs (1) and (2) of this Article shall be the Federal Court of Justice.
- (4) The Federation may establish federal courts for disciplinary proceedings against, and for proceedings on complaints by, persons in the federal public service.
- (5) With the consent of the *Bundesrat*, a federal law may provide for the exercise of federal jurisdiction over criminal proceedings arising under paragraph (1) of Article 26 or involving national security by courts of the *Länder*.

Article 97 [Independence of judges]

- (1) Judges shall be independent and subject only to the law.
- (2) Judges appointed permanently to fulltime positions may be involuntarily dismissed, permanently or temporarily suspended, transferred, or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

Article 98 [Legal status of federal and Land judges]

- (1) The legal status of federal judges shall be regulated by a special federal law.
- (2) If a federal judge infringes the principles of this Basic Law or the constitutional order of a *Land* in his official capacity or unofficially, the Federal Constitutional Court, upon application of the *Bundestag*, may by a two-thirds majority order that the judge be transferred or retired. In the case of an intentional infringement it may order him dismissed.
- (3) The legal status of *Land* judges shall be regulated by special *Land* laws. The Federation may enact framework provisions on this subject to the extent that paragraph (4) of Article 74a does not otherwise provide.
- (4) The *Länder* may provide that *Land* judges shall be chosen jointly by the *Land* Minister of Justice and a committee for the selection of judges.
- (5) The *Länder* may enact provisions respecting *Land* judges that correspond with those of paragraph (2) of this Article. Existing *Land* constitutional law shall not be affected. The decision in cases of judicial impeachment shall rest with the Federal Constitutional Court.

Article 99 [Decision by the Federal Constitutional Court and the supreme federal courts in disputes concerning Land law]

A *Land* law may assign the decision of constitutional disputes within a *Land* to the Federal Constitutional Court, and the final decision in matters involving the application of *Land* law to the supreme courts specified in paragraph (1) of Article 95.

**60 Years German Basic Law:
The German Constitution and its Court**

Article 100 [Compatibility of laws with the Basic Law]

- (1) If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the *Land* court with jurisdiction over constitutional disputes where the constitution of a *Land* is held to be violated, or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by *Land* law and where a *Land* law is held to be incompatible with a federal law.
- (2) If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court.
- (3) If the constitutional court of a *Land*, in interpreting this Basic Law, proposes to deviate from a decision of the Federal Constitutional Court or of the constitutional court of another *Land*, it shall obtain a decision from the Federal Constitutional Court.

Article 101 [Ban on extraordinary courts]

- (1) Extraordinary courts shall not be allowed. No one may be removed from the jurisdiction of his lawful judge.
- (2) Courts for particular fields of law may be established only by a law.

Article 102 [Abolition of capital punishment]

Capital punishment is abolished.

Article 103 [Hearing in accordance with law; ban on retroactive criminal laws and on multiple punishment]

- (1) In the courts every person shall be entitled to a hearing in accordance with law.
- (2) An act may be punished only if it was defined by a law as a criminal offence before the act was committed.
- (3) No person may be punished for the same act more than once under the general criminal laws.

Article 104 [Legal guarantees in the event of detention]

- (1) Freedom of the person may be restricted only pursuant to a formal law and only in compliance with the procedures prescribed therein. Persons in custody may not be subjected to mental or physical mistreatment.
- (2) Only a judge may rule upon the permissibility or continuation of any deprivation of freedom. If such a deprivation is not based on a judicial order, a judicial decision shall be obtained without delay. The police may hold no one in custody on their own authority beyond the end of the day following the arrest. Details shall be regulated by a law.

Current Text of the German Basic Law

- (3) Any person provisionally detained on suspicion of having committed a criminal offence shall be brought before a judge no later than the day following his arrest; the judge shall inform him of the reasons for the arrest, examine him, and give him an opportunity to raise objections. The judge shall, without delay, either issue a written arrest warrant setting forth the reasons therefore or order his release.
- (4) A relative or a person enjoying the confidence of the person in custody shall be notified without delay of any judicial decision imposing or continuing a deprivation of freedom.

X. Finance

Article 104a [Apportionment of expenditures between the Federation and the Länder]

- (1) The Federation and the *Länder* shall separately finance the expenditures resulting from the discharge of their respective responsibilities insofar as this Basic Law does not otherwise provide.
- (2) Where the *Länder* act on federal commission, the Federation shall finance the resulting expenditures.
- (3) Federal laws providing for money grants to be administered by the *Länder* may provide that the Federation shall pay for such grants wholly or in part. If any such law provides that the Federation shall finance one half or more of the expenditure, it shall be executed by the *Länder* on federal commission. If any such law provides that the *Länder* shall finance one quarter or more of the expenditure, it shall require the consent of the *Bundesrat*.
- (4) The Federation may grant the *Länder* financial assistance for particularly important investments by the *Länder* or by municipalities (associations of municipalities), provided that such investments are necessary to avert a disturbance of the overall economic equilibrium, to equalize differing economic capacities within the federal territory, or to promote economic growth. Details, especially with respect to the kinds of investments to be promoted, shall be regulated by a federal law requiring the consent of the *Bundesrat* or by executive agreements under the Federal Budget Law.
- (5) The Federation and the *Länder* shall finance the administrative expenditures incurred by their respective authorities and shall be responsible to one another for ensuring proper administration. Details shall be regulated by a federal law requiring the consent of the *Bundesrat*.

Article 104b [Financial Support for Investments]

- (1) The Federation may, as far as this Constitution grants federal legislative power, provide the States [*Länder*] with financial support for particularly important investments by the States [*Länder*] or Communes (associations of communes), if such support is necessary:
 1. for the defence against a disturbance of the overall economic equilibrium, or
 2. to equalize differences of economic performance throughout the federal territory, or
 3. for the advancement of economic growth.

**60 Years German Basic Law:
The German Constitution and its Court**

In deviation from sentence 1, the Federation may, in the case of natural catastrophes or exceptional emergencies outside of state control and with serious negative impact on public finances, grant financial support even without legislative power.

- (2) Details, in particular the kinds of investments to be supported, are regulated by a federal statute requiring the consent of the Senate [*Bundesrat*] or by administrative agreement on the basis of the federal statute about the budget. The funds are provided with a time limit and are subject to periodic examination regarding their utilization. Financial support has to be designed with decreasing yearly payments during its duration.
- (3) On their request, House of Representatives [*Bundestag*], Government, and Senate [*Bundesrat*] have to receive a report about the implementation of the measures and about the improvements achieved.

Article 105 [Legislative powers]

- (1) The Federation shall have exclusive power to legislate with respect to customs duties and fiscal monopolies.
- (2) The Federation shall have concurrent power to legislate with respect to all other taxes the revenue from which accrues to it wholly or in part or as to which the conditions provided for in paragraph (2) of Article 72 apply.
- (2a) The *Länder* shall have power to legislate with respect to local taxes on consumption and expenditures so long and insofar as they are not substantially similar to taxes imposed by a federal law.
- (3) Federal laws relating to taxes the revenue from which accrues wholly or in part to the *Länder* or to municipalities (associations of municipalities) shall require the consent of the *Bundesrat*.

Article 106 [Apportionment of tax revenue]

- (1) The yield of fiscal monopolies and the revenue from the following taxes shall accrue to the Federation:
 1. customs duties;
 2. taxes on consumption insofar as they do not accrue to the *Länder* pursuant to paragraph (2), or jointly to the Federation and the *Länder* in accordance with paragraph (3), or to municipalities in accordance with paragraph (6) of this Article;
 3. the highway freight tax;
 4. the taxes on capital transactions, insurance, and bills of exchange;
 5. nonrecurring levies on property and equalization of burdens levies;
 6. income and corporation surtaxes;
 7. levies imposed within the framework of the European Communities.

Current Text of the German Basic Law

- (2) Revenue from the following taxes shall accrue to the *Länder*:
1. the property tax;
 2. the inheritance tax;
 3. such taxes on transactions as do not accrue to the Federation pursuant to paragraph (1) or jointly to the Federation and the *Länder* pursuant to paragraph (3) of this Article;
 4. the beer tax;
 5. the tax on gambling establishments.
- (3) Revenue from income taxes, corporation taxes, and turnover taxes shall accrue jointly to the Federation and the *Länder* (joint taxes) to the extent that the revenue from the income tax and the turnover tax is not allocated to municipalities pursuant to paragraphs (5) and (5a) of this Article. The Federation and the *Länder* shall share equally the revenues from income taxes and corporation taxes. The respective shares of the Federation and the *Länder* in the revenue from the turnover tax shall be determined by a federal law requiring the consent of the *Bundesrat*. Such determination shall be based on the following principles:
1. The Federation and the *Länder* shall have an equal claim against current revenues to cover their necessary expenditures. The extent of such expenditures shall be determined with due regard to multi-year financial planning.
 2. The financial requirements of the Federation and of the *Länder* shall be coordinated in such a way as to establish a fair balance, avoid excessive burdens on taxpayers, and ensure uniformity of living standards throughout the federal territory.

In determining the respective shares of the Federation and the *Länder* in the revenue from the turnover tax, reductions in revenue incurred by the *Länder* from January 1, 1996 because of the provisions made with respect to children in the income tax law shall also be taken into account. Details shall be regulated by the federal law enacted pursuant to the third sentence of this paragraph.

- (4) The respective shares of the Federation and the *Länder* in the revenue from the turnover tax shall be apportioned anew whenever the ratio of revenues to expenditures of the Federation becomes substantially different from that of the *Länder*; reductions in revenue that are taken into account in determining the respective shares of revenue from the turnover tax under the fifth sentence of paragraph (3) of this Article shall not be considered in this regard. If a federal law imposes additional expenditures on or withdraws revenue from the *Länder*, the additional burden may be compensated for by federal grants pursuant to a federal law requiring the consent of the *Bundesrat*, provided the additional burden is limited to a short period of time. This law shall establish the principles for calculating such grants and distributing them among the *Länder*.

**60 Years German Basic Law:
The German Constitution and its Court**

- (5) A share of the revenue from the income tax shall accrue to the municipalities, to be passed on by the Länder to their municipalities on the basis of the income taxes paid by their inhabitants. Details shall be regulated by a federal law requiring the consent of the *Bundesrat*. This law may provide that municipalities may establish supplementary or reduced rates with respect to their share of the tax.
- (5a) From and after January 1, 1998, a share of the revenue from the turnover tax shall accrue to the municipalities. It shall be passed on by the Länder to their municipalities on the basis of a formula reflecting geographical and economic factors. Details shall be regulated by a federal law requiring the consent of the *Bundesrat*.
- (6) Revenue from taxes on real property and trades shall accrue to the municipalities; revenue from local taxes on consumption and expenditures shall accrue to the municipalities or, as may be provided for by *Land* legislation, to associations of municipalities. Municipalities shall be authorized to establish the rates at which taxes on real property and trades are levied, within the framework of the laws. If there are no municipalities in a *Land*, revenue from taxes on real property and trades as well as from local taxes on consumption and expenditures shall accrue to the *Land*. The Federation and the *Länder* may participate, by virtue of an apportionment, in the revenue from the tax on trades. Details regarding such apportionment shall be regulated by a federal law requiring the consent of the *Bundesrat*. In accordance with *Land* legislation, taxes on real property and trades as well as the municipalities' share of revenue from the income tax and the turnover tax may be taken as a basis for calculating the amount of apportionment.
- (7) An overall percentage of the *Land* share of total revenue from joint taxes, to be determined by *Land* legislation, shall accrue to the municipalities or associations of municipalities. In all other respects *Land* legislation shall determine whether and to what extent revenue from *Land* taxes shall accrue to municipalities (associations of municipalities).
- (8) If in individual *Länder* or municipalities (associations of municipalities) the Federation requires special facilities to be established that directly result in an increase of expenditure or in reductions in revenue (special burden) to these *Länder* or municipalities (associations of municipalities), the Federation shall grant the necessary compensation if and insofar as the *Länder* or municipalities (associations of municipalities) cannot reasonably be expected to bear the burden. In granting such compensation, due account shall be taken of indemnities paid by third parties and financial benefits accruing to these *Länder* or municipalities (associations of municipalities) as a result of the establishment of such facilities.
- (9) For the purpose of this Article, revenues and expenditures of municipalities (associations of municipalities) shall also be deemed to be revenues and expenditures of the *Länder*.

Current Text of the German Basic Law

Article 106a [Federal grants for local mass transit]

Beginning January 1, 1996 the *Länder* shall be entitled to an allocation of federal tax revenues for purposes of local mass transit. Details shall be regulated by a federal law requiring the consent of the *Bundesrat*. Allocations made pursuant to the first sentence of this Article shall not be taken into account in determining the financial capacity of a *Land* under paragraph (2) of Article 107.

Article 106b [Compensation for Transfer of Motor Vehicle Tax]

Starting 1 July 2009, the States [*Länder*] can claim a sum out of federal tax revenues for the transfer of the motor vehicle tax to the Federation. Details are regulated by a federal statute requiring the consent of the Senate [*Bundesrat*].

Article 107 [Financial equalization]

- (1) Revenue from *Land* taxes and the *Land* share of revenue from income and corporation taxes shall accrue to the individual *Länder* to the extent that such taxes are collected by revenue authorities within their respective territories (local revenue). Details respecting the delimitation as well as the manner and scope of allotment of local revenue from corporation and wage taxes shall be regulated by a federal law requiring the consent of the *Bundesrat*. This law may also provide for the delimitation and allotment of local revenue from other taxes. The *Land* share of revenue from the turnover tax shall accrue to the individual *Länder* on a per capita basis; a federal law requiring the consent of the *Bundesrat* may provide for the grant of supplementary shares not exceeding one quarter of a *Land* share to *Länder* whose per capita revenue from *Land* taxes and from income and corporation taxes and according to article 106b is below the average of all the *Länder* combined; in the case of real estate transfer tax, the difference in revenue has to be taken into account.
- (2) Such law shall ensure a reasonable equalization of the disparate financial capacities of the *Länder*, with due regard for the financial capacities and needs of municipalities (associations of municipalities). It shall specify the conditions governing the claims of *Länder* entitled to equalization payments and the liabilities of *Länder* required to make them as well as the criteria for determining the amounts of such payments. It may also provide for grants to be made by the Federation to financially weak *Länder* from its own funds to assist them in meeting their general financial needs (supplementary grants).

Article 108 [Financial administration]

- (1) Customs duties, fiscal monopolies, taxes on consumption regulated by a federal law, including the turnover tax on imports, and levies imposed within the framework of the European Communities shall be administered by federal revenue authorities. The organization of these authorities shall be regulated by a federal law. The heads of intermediate authorities shall be appointed in consultation with the *Land* governments.

**60 Years German Basic Law:
The German Constitution and its Court**

- (2) All other taxes shall be administered by the revenue authorities of the *Länder*. The organization of these authorities and the uniform training of their civil servants may be regulated by a federal law requiring the consent of the *Bundesrat*. The heads of intermediate authorities shall be appointed in agreement with the Federal Government.
- (3) To the extent that taxes accruing wholly or in part to the Federation are administered by revenue authorities of the *Länder*, those authorities shall act on federal commission. Paragraphs (3) and (4) of Article 85 shall apply, provided that the Federal Minister of Finance shall take the place of the Federal Government.
- (4) Regarding the administration of taxes, a federal statute requiring the consent of the Senate [*Bundesrat*] may provide for collaboration between federal and state revenue authorities as well as, for taxes according to Paragraph I, for their administration by state revenue authorities, and, in the case of other taxes, for their administration by federal revenue authorities, if and insofar as the implementation of revenue statutes is substantially improved or facilitated. Regarding taxes the revenue from which belongs exclusively to communes (associations of communes), the administration may completely or in part be transferred by the States [*Länder*] from the appropriate state revenue authorities to communes (associations of communes).
- (5) The procedures to be followed by federal revenue authorities shall be prescribed by a federal law. The procedures to be followed by *Land* revenue authorities or, as provided by the second sentence of paragraph (4) of this Article, by municipalities (associations of municipalities) may be prescribed by a federal law requiring the consent of the *Bundesrat*.
- (6) Financial jurisdiction shall be uniformly regulated by a federal law.
- (7) The Federal Government may issue general administrative rules which, to the extent that administration is entrusted to *Land* revenue authorities or to municipalities (associations of municipalities), shall require the consent of the *Bundesrat*.

Article 109 [Budgets of the Federation and the Länder]

- (1) The Federation and the *Länder* shall be autonomous and independent of one another in the management of their respective budgets.
- (2) In managing their respective budgets the Federation and the *Länder* shall take due account of the requirements of the overall economic equilibrium.
- (3) The budgets of Federation and States [*Länder*] principally have to be balanced without revenue from credits. Federation and States [*Länder*] may adopt rules to symmetrically balance in boom and bust periods the effects of economic cycles deviating from normality as well as exceptions for natural catastrophes or exceptional emergencies outside of state control and with serious negative impact on public finances. Equivalent amortization rules have to be adopted for exceptions. Details are regulated for the budget of the Federation according to Article 115, provided that sentence 1 is complied with if revenues from credits do not exceed 0.35 percent in relation to the nominal

Current Text of the German Basic Law

gross domestic product. Details are regulated for the budget of the States [*Länder*] within their constitutional competencies, provided that sentence 1 is only complied with if no revenues from credits are admitted.

- (4) Through federal legislation requiring the consent of the Senate [*Bundesrat*] principles applicable to both the Federation and the States [*Länder*] may be established governing budgetary law, responsiveness of budget management to economic trends, and financial planning to cover several years ahead.
- (5) Sanctions by the European Community with regard to provisions in Article 104 of the Treaty establishing the European Community about the observance of fiscal discipline are borne by the Federation and the States [*Länder*] in the ratio 65 to 35.

Article 109a [Stability Council]

To prevent budget emergencies, a federal statute requiring the consent of the Senate [*Bundesrat*] provides for:

1. continuous control of the budget management of Federation and States [*Länder*] by a common body (stability council),
2. preconditions and procedure for the declaration of an imminent budget emergency,
3. principles for the establishment and implementation of restructuring programs to prevent budget emergencies.

The decisions of the stability council and the documentation of its deliberation have to be published.

Article 110 [Federal budget and Budget Law]

- (1) All revenues and expenditures of the Federation shall be included in the budget; in the case of federal enterprises and special trusts, only payments to or remittances from them need be included. The budget shall be balanced with respect to revenues and expenditures.
- (2) The budget for one or more fiscal years shall be set forth in a law enacted before the beginning of the first year and making separate provision for each year. The law may provide that various parts of the budget apply to different periods of time, divided by fiscal years.
- (3) Bills to comply with the first sentence of paragraph (2) of this Article as well as bills to amend the Budget Law or the budget itself shall be submitted simultaneously to the *Bundesrat* and to the *Bundestag*; the *Bundesrat* shall be entitled to comment on such bills within six weeks or, in the case of amending bills, within three weeks.
- (4) The Budget Law may contain only such provisions as relate to federal revenues and expenditures and to the period for which it is enacted. The Budget Law may specify that its provisions shall expire only upon promulgation of the next Budget Law or, in the event of an authorization pursuant to Article 115, at a later date.

**60 Years German Basic Law:
The German Constitution and its Court**

Article 111 [Interim budget management]

- (1) If, by the end of a fiscal year, the budget for the following year has not been adopted by a law, the Federal Government, until such law comes into force, may make all expenditures that are necessary:
 - (a) to maintain institutions established by a law and to carry out measures authorized by a law;
 - (b) to meet the legal obligations of the Federation;
 - (c) to continue construction projects, procurements, and the provision of other benefits or services, or to continue to make grants for these purposes, to the extent that amounts have already been appropriated in the budget of a previous year.
- (2) To the extent that revenues based upon specific laws and derived from taxes, or duties, or other sources, or the working capital reserves, do not cover the expenditures referred to in paragraph (1) of this Article, the Federal Government may borrow the funds necessary to sustain current operations up to a maximum of one quarter of the total amount of the previous budget.

Article 112 [Extra budgetary expenditures]

Expenditures in excess of budgetary appropriations or for purposes not contemplated by the budget shall require the consent of the Federal Minister of Finance. Such consent may be given only in the event of an unforeseen and unavoidable necessity. Details may be regulated by a federal law.

Article 113 [Consent of the Federal Government to increases in expenditures or decreases in revenue]

- (1) Laws that increase the budget expenditures proposed by the Federal Government, or entail or will bring about new expenditures, shall require the consent of the Federal Government. This requirement shall also apply to laws that entail or will bring about decreases in revenue. The Federal Government may demand that the *Bundestag* postpone its vote on bills to this effect. In this event the Federal Government shall submit its comments to the *Bundestag* within six weeks.
- (2) Within four weeks after the *Bundestag* has adopted such a law, the Federal Government may demand that it vote on the law a second time.
- (3) If the bill has become law pursuant to Article 78, the Federal Government may withhold its consent only within six weeks and only after having initiated the procedure provided for in the third and fourth sentences of paragraph (1) or in paragraph (2) of this Article. Upon the expiration of this period such consent shall be deemed to have been given.

Article 114 [Submission and auditing of accounts]

- (1) For the purpose of discharging the Federal Government, the Federal Minister of Finance shall submit annually to the *Bundestag* and to the *Bundesrat* an account of all revenues and expenditures as well as of assets and debts during the preceding fiscal year.

Current Text of the German Basic Law

- (2) The Federal Court of Audit, whose members shall enjoy judicial independence, shall audit the account and determine whether public finances have been properly and efficiently administered. It shall submit an annual report directly to the *Bundestag* and the *Bundesrat* as well as to the Federal Government. In other respects the powers of the Federal Court of Audit shall be regulated by a federal law.

Article 115 [State Credit]

- (1) The borrowing of funds and the assumption of pledges, guarantees or other commitments, as a result of which expenditure may be incurred in future fiscal years, requires federal legislative authorization indicating, or permitting computation of the maximum amounts involved.
- (2) Revenue and expenditure are principally to be balanced without revenues from credits. This principle is satisfied if revenues from credits do not exceed 0.35 percent in relation to the nominal gross domestic product. Furthermore, in the case of economic cycles deviating from normality, effects on the budget have to be factored in by symmetrically balancing boom and bust periods. Deviations of actual borrowing from the credit limit outlined by sentences 1 to 3 are to be registered on a control account; debits exceeding the threshold of 1.5 percent in relation to the nominal gross domestic product have to be reduced with the economic cycle. Details, particularly the balancing of revenue and expenditure by financial transactions and the procedure for the calculation of the yearly limit of net borrowing in consideration of the economic cycle on the basis of an economic cycle equalization procedure as well as the control and readjustment of effective borrowing against the credit limit, are regulated by a federal statute. In the case of natural catastrophes or exceptional emergencies outside of state control and with serious negative impact on public finances, these credit limits may be exceeded by a decision of the majority of the members of the House of Representatives [*Bundestag*]. The decision has to be combined with an amortization plan. The readjustment of borrowing according to sentence 6 has to be carried out within an adequate space of time.

Xa. State of Defence

Article 115a [Definition and declaration of a state of defence]

- (1) Any determination that the federal territory is under attack by armed force or imminently threatened with such an attack (state of defence) shall be made by the *Bundestag* with the consent of the *Bundesrat*. Such determination shall be made on application of the Federal Government and shall require a two-thirds majority of the votes cast, which shall include at least a majority of the Members of the *Bundestag*.
- (2) If the situation imperatively calls for immediate action, and if insurmountable obstacles prevent the timely convening of the *Bundestag* or the *Bundestag* cannot muster a quorum, the Joint Committee shall make this determination by a two-thirds majority of the votes cast, which shall include at least a majority of its members.

**60 Years German Basic Law:
The German Constitution and its Court**

- (3) The determination shall be promulgated by the Federal President in the Federal Law Gazette pursuant to Article 82. If this cannot be done in time, promulgation shall be effected in another manner; the determination shall be printed in the Federal Law Gazette as soon as circumstances permit.
- (4) If the federal territory is under attack by armed force, and if the competent federal authorities are not in a position at once to make the determination provided for in the first sentence of paragraph (1) of this Article, the determination shall be deemed to have been made and promulgated at the time the attack began. The Federal President shall announce that time as soon as circumstances permit.
- (5) If the determination of a state of defence has been promulgated, and if the federal territory is under attack by armed force, the Federal President, with the consent of the *Bundestag*, may issue declarations under international law respecting the existence of the state of defence. Under the conditions specified in paragraph (2) of this Article, the Joint Committee shall act in place of the *Bundestag*.

Article 115b [Transfer of command to the Federal Chancellor]

Upon the promulgation of a state of defence the power of command over the Armed Forces shall pass to the Federal Chancellor.

Article 115c [Extension of the legislative powers of the Federation]

- (1) The Federation shall have the right to legislate concurrently for a state of defence even with respect to matters within the legislative powers of the *Länder*. Such laws shall require the consent of the *Bundesrat*.
- (2) To the extent required by circumstances during a state of defence, a federal law for a state of defence may:
 1. make temporary provisions respecting compensation in the event of expropriation that deviate from the requirements of the second sentence of paragraph (3) of Article 14;
 2. establish a time limit for deprivations of freedom different from that specified in the third sentence of paragraph (2) and the first sentence of paragraph (3) of Article 104, but not exceeding four days, for cases in which no judge has been able to act within the time limit that normally applies.
- (3) To the extent necessary to repel an existing or imminently threatened attack, a federal law for a state of defence may, with the consent of the *Bundesrat*, regulate the administration and finances of the Federation and the *Länder* without regard to Titles VIII, VIIIa and X of this Basic Law, provided that the viability of the *Länder*, municipalities, and associations of municipalities, especially with respect to financial matters, is assured.
- (4) Federal laws enacted pursuant to paragraph (1) or subparagraph 1 of paragraph (2) of this Article may, for the purpose of preparing for their enforcement, be applied even before a state of defence arises.

Current Text of the German Basic Law

Article 115d [Legislative process in the case of urgent bills]

- (1) During a state of defence the federal legislative process shall be governed by the provisions of paragraphs (2) and (3) of this Article without regard to the provisions of paragraph (2) of Article 76, the second sentence of paragraph (1) and paragraphs (2) to (4) of Article 77, Article 78, and paragraph (1) of Article 82.
- (2) Federal Government bills that the Government designates as urgent shall be forwarded to the *Bundesrat* at the same time as they are submitted to the *Bundestag*. The *Bundestag* and the *Bundesrat* shall debate such bills in joint session without delay. Insofar as the consent of the *Bundesrat* is necessary for any such bill to become law, a majority of its votes shall be required. Details shall be regulated by rules of procedure adopted by the *Bundestag* and requiring the consent of the *Bundesrat*.
- (3) The second sentence of paragraph (3) of Article 115a shall apply to the promulgation of such laws *mutatis mutandis*.

Article 115e [Powers of the Joint Committee]

- (1) If, during a state of defence, the Joint Committee by a two-thirds majority of the votes cast, which shall include at least a majority of its members, determines that insurmountable obstacles prevent the timely convening of the *Bundestag* or that the *Bundestag* cannot muster a quorum, the Joint Committee shall occupy the position of both the *Bundestag* and the *Bundesrat* and shall exercise their powers as a single body.
- (2) This Basic Law may neither be amended nor abrogated nor suspended in whole or in part by a law enacted by the Joint Committee. The Joint Committee shall have no power to enact laws pursuant to the second sentence of paragraph (1) of Article 23, paragraph (1) of Article 24, or Article 29.

Article 115f [Powers of the Federal Government]

- (1) During a state of defence the Federal Government, to the extent circumstances require, may:
 1. employ the Federal Border Police throughout the federal territory;
 2. issue instructions not only to federal administrative authorities but also to *Land* governments and, if it deems the matter urgent, to *Land* authorities, and may delegate this power to members of *Land* governments designated by it.
- (2) The *Bundestag*, the *Bundesrat*, and the Joint Committee shall be informed without delay of the measures taken in accordance with paragraph (1) of this Article.

Article 115g [Status of the Federal Constitutional Court]

Neither the constitutional status nor the performance of the constitutional functions of the Federal Constitutional Court or its judges may be impaired. The law governing the Federal Constitutional Court may be amended by a law enacted by the Joint Committee only insofar as

**60 Years German Basic Law:
The German Constitution and its Court**

the Federal Constitutional Court agrees is necessary to ensure that it can continue to perform its functions. Pending the enactment of such a law, the Federal Constitutional Court may take such measures as are necessary to this end. Determinations by the Federal Constitutional Court pursuant to the second and third sentences of this Article shall be made by a majority of the judges present.

Article 115b [Continued functioning of constitutional bodies]

- (1) Any legislative terms of the *Bundestag* or of *Land* parliaments due to expire during a state of defence shall end six months after the termination of the state of defence. A term of office of the Federal President due to expire during a state of defence, and the exercise of his functions by the President of the *Bundesrat* in case of the premature vacancy of his office, shall end nine months after the termination of the state of defence. The term of office of a member of the Federal Constitutional Court due to expire during a state of defence shall end six months after the termination of the state of defence.
- (2) Should it be necessary for the Joint Committee to elect a new Federal Chancellor, it shall do so by the votes of a majority of its members; the Federal President shall propose a candidate to the Joint Committee. The Joint Committee may express its lack of confidence in the Federal Chancellor only by electing a successor by a two-thirds majority of its members.
- (3) The *Bundestag* shall not be dissolved while a state of defence exists.

Article 115i [Powers of the Land governments]

- (1) If the competent federal bodies are incapable of taking the measures necessary to avert the danger, and if the situation imperatively calls for immediate independent action in particular areas of the federal territory, the *Land* governments or the authorities or representatives they designate shall be authorized, within their respective spheres of competence, to take the measures provided for in paragraph (1) of Article 115f.
- (2) Any measures taken in accordance with paragraph (1) of this Article may be rescinded at any time by the Federal Government, or, with respect to *Land* authorities and subordinate federal authorities, by Minister-Presidents of the *Länder*.

Article 115k [Duration of extraordinary legal provisions]

- (1) Laws enacted in accordance with Articles 115c, 115e, and 115g, as well as statutory instruments issued on the basis of such laws, shall suspend the operation of incompatible law so long as they are in effect. This provision shall not apply to earlier law enacted pursuant to Articles 115c, 115e or 115g.
- (2) Laws adopted by the Joint Committee, as well as statutory instruments issued on the basis of such laws, shall cease to have effect no later than six months after the termination of a state of defence.

Current Text of the German Basic Law

- (3) Laws containing provisions that diverge from Articles 91a, 91b, 104a, 106, and 107 shall apply no longer than the end of the second fiscal year following the termination of a state of defence. After such termination they may, with the consent of the *Bundesrat*, be amended by a federal law so as to revert to the provisions of Titles VIIIa and X.

Article 115l [Repeal of extraordinary measures; termination of a state of defence; conclusion of peace]

- (1) The *Bundestag*, with the consent of the *Bundesrat*, may at any time repeal laws enacted by the Joint Committee. The *Bundesrat* may demand that the *Bundestag* reach a decision on this question. Any measures taken by the Joint Committee or by the Federal Government to avert a danger shall be rescinded if the *Bundestag* and the *Bundesrat* so decide.
- (2) The *Bundestag*, with the consent of the *Bundesrat*, may at any time, by a decision to be promulgated by the Federal President, declare a state of defence terminated. The *Bundesrat* may demand that the *Bundestag* reach a decision on this question. A state of defence shall be declared terminated without delay if the conditions for determining it no longer exist.
- (3) The conclusion of peace shall be determined by a federal law.

XI. Transitional and Concluding Provisions

Article 116 [Definition of "German"; restoration of citizenship]

- (1) Unless otherwise provided by a law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the boundaries of December 31, 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendant of such person.
- (2) Former German citizens, who between January 30, 1933 and May 8, 1945 were deprived of their citizenship on political, racial, or religious grounds, and their descendants, shall on application have their citizenship restored. They shall be deemed never to have been deprived of their citizenship if they have established their domicile in Germany after May 8, 1945 and have not expressed a contrary intention.

Article 117 [Transitional provision respecting paragraph 2 of Article 3 and Article 11]

- (1) Law which is inconsistent with paragraph (2) of Article 3 of this Basic Law shall remain in force until adapted to that provision, but not beyond March 31, 1953.
- (2) Laws that restrict freedom of movement in view of the present housing shortage shall remain in force until repealed by a federal law.

Article 118 [New delimitation of Länder in the Southwest]

The division of the territory comprising Baden, Württemberg-Baden and Württemberg-Hohenzollern into *Länder* may be revised, without regard to the provisions of Article 29, by agreement between the *Länder* concerned. If no agreement is reached, the revision shall be effected by a federal law, which shall provide for an advisory referendum.

**60 Years German Basic Law:
The German Constitution and its Court**

Article 118a [New delimitation of Berlin and Brandenburg]

The division of the territory comprising Berlin and Brandenburg into *Länder* may be revised, without regard to the provisions of Article 29, by agreement between the two *Länder* with the participation of their inhabitants who are entitled to vote.

Article 119 [Statutory instruments respecting refugees and expellees]

In matters relating to refugees and expellees, especially as regards their distribution among the *Länder*, the Federal Government, with the consent of the *Bundesrat*, may issue statutory instruments having the force of law, pending settlement of the matter by a federal law. In this connection the Federal Government may be authorized to issue individual instructions in particular cases. Unless time is of the essence, such instructions shall be addressed to the highest *Land* authorities.

Article 120 [Occupation costs and burdens resulting from the war]

- (1) The Federation shall finance the expenditures for occupation costs and other internal and external burdens resulting from the war, as regulated in detail by federal laws. To the extent that these war burdens were regulated by federal laws on or before October 1, 1969, the Federation and the *Länder* shall finance such expenditures in the proportion established by such federal laws. Insofar as expenditures for such of these war burdens as neither have been nor will be regulated by federal laws were met on or before October 1, 1965 by *Länder*, municipalities (associations of municipalities), or other entities performing functions of the *Länder* or municipalities, the Federation shall not be obliged to finance them even after that date. The Federation shall be responsible for subsidies toward meeting the costs of social security, including unemployment insurance and public assistance to the unemployed. The distribution of war burdens between the Federation and the *Länder* prescribed by this paragraph shall not be construed to affect any law respecting claims for compensation for consequences of the war.
- (2) Revenue shall pass to the Federation at the time it assumes responsibility for the expenditures referred to in this Article.

Article 120a [Execution of laws respecting equalization of burdens]

- (1) Laws implementing the equalization of burdens may, with the consent of the *Bundesrat*, provide that with respect to equalization payments they shall be executed partly by the Federation and partly by the *Länder* acting on federal commission, and that the relevant powers vested in the Federal Government and the competent highest federal authorities by virtue of Article 85 shall be wholly or partly delegated to the Federal Equalization of Burdens Office. In exercising these powers, the Federal Equalization of Burdens Office shall not require the consent of the *Bundesrat*; except in urgent cases, its instructions shall be given to the highest *Land* authorities (*Land* Equalization of Burdens Offices).
- (2) The second sentence of paragraph (3) of Article 87 shall not be affected by this provision.

Current Text of the German Basic Law

Article 121 [Definition of “majority of the members”]

Within the meaning of this Basic Law, a majority of the Members of the *Bundestag* and a majority of the members of the Federal Convention shall be a majority of the number of their members specified by a law.

Article 122 [Termination of pre-existing legislative powers]

- (1) From the date on which the *Bundestag* first convenes, laws shall be enacted only by the legislative bodies recognized by this Basic Law.
- (2) Legislative bodies and institutions participating in the legislative process in an advisory capacity, whose competence expires by virtue of paragraph (1) of this Article, shall be dissolved as of that date.

Article 123 [Continuing validity of pre-existing law and treaties]

- (1) Law in force before the *Bundestag* first convenes shall remain in force insofar as it does not conflict with this Basic Law.
- (2) Subject to all rights and objections of interested parties, treaties concluded by the German Reich concerning matters within the legislative competence of the *Länder* under this Basic Law shall remain in force, provided they are and continue to be valid under general principles of law, until new treaties are concluded by the authorities competent under this Basic Law, or until they are in some other way terminated pursuant to their provisions.

Article 124 [Continuing applicability as federal law within the sphere of exclusive legislative power]

Law respecting matters subject to the exclusive legislative power of the Federation shall become federal law in the area in which it applies.

Article 125 [Same within the sphere of concurrent legislative power]

Law respecting matters subject to the concurrent legislative power of the Federation shall become federal law in the area in which it applies:

1. insofar as it applies uniformly within one or more occupation zones;
2. insofar as it is law by which former Reich law has been amended since May 8, 1945.

Article 125a [Same within the spheres of concurrent or framework legislation]

- (1) Law that was enacted as federal law, but that by virtue of amendments to paragraph (1) of Article 74 or paragraph (1) of Article 75 could no longer be enacted as federal law, shall remain in force as federal law. It may be superseded by *Land* law.
- (2) Law that was enacted pursuant to paragraph (2) of Article 72 as it stood until November 15, 1994 shall remain in force as federal law. A federal law may provide that it may be superseded by *Land* law. The same shall be true of federal law enacted before that date which could no longer be enacted by virtue of paragraph (2) of Article 75.

**60 Years German Basic Law:
The German Constitution and its Court**

Article 126 [Disagreements respecting the continued applicability of law as federal law]

Disagreements respecting the continued applicability of law as federal law shall be resolved by the Federal Constitutional Court.

Article 127 [Law of the Administration of the Combined Economic Area]

Within one year after promulgation of this Basic Law, the Federal Government, with the consent of the governments of the *Länder* concerned, may extend to the *Länder* of Baden, Greater Berlin, Rhineland-Palatinate and Württemberg-Hohenzollern any law of the Administration of the Combined Economic Area, insofar as it remains in force as federal law under Article 124 or 125.

Article 128 [Continuing authority to issue instructions]

Insofar as law that remains in force grants authority to issue instructions within the meaning of paragraph (5) of Article 84, this authority shall remain in existence until a law otherwise provides.

Article 129 [Continuing authority to issue statutory instruments etc.]

- (1) Insofar as legal provisions that remain in force as federal law grant authority to issue statutory instruments or general administrative rules or to make administrative decisions in individual cases, such powers shall pass to the authorities that henceforth have competence over the subject matter. In cases of doubt the Federal Government shall decide in agreement with the *Bundesrat*; such decisions shall be published.
- (2) Insofar as legal provisions that remain in force as *Land* law grant such authority, it shall be exercised by the authorities competent under *Land* law.
- (3) Insofar as legal provisions within the meaning of paragraphs (1) and (2) of this Article grant authority to amend or supplement the provisions themselves or to issue legal provisions that have the force of laws, such authority shall be deemed to have expired.
- (4) The provisions of paragraphs (1) and (2) of this Article shall apply *mutatis mutandis* to legal provisions that refer to provisions no longer in force or to institutions no longer in existence.

Article 130 [Control of existing institutions]

- (1) Administrative agencies and other institutions that serve the public administration or the administration of justice and are not based on *Land* law or on agreements between *Länder*, as well as the Administrative Union of South West German Railways and the Administrative Council for Postal and Telecommunications Services for the French Occupation Zone, shall be placed under the control of the Federal Government. The Federal Government, with the consent of the *Bundesrat*, shall provide for their transfer, dissolution, or liquidation.
- (2) The supreme disciplinary authority for the personnel of these administrative bodies and institutions shall be the competent Federal Minister.

Current Text of the German Basic Law

- (3) Corporations and institutions under public law not directly subordinate to a *Land* nor based on agreements between *Länder* shall be under the supervision of the competent highest federal authority.

Article 131 [Legal relations of persons formerly in the public service]

The legal relations of persons, including refugees and expellees, who on May 8, 1945 were employed in the public service, have left the service for reasons other than those recognized by civil service regulations or collective bargaining agreements, and have not yet been reinstated or are employed in positions that do not correspond to those they previously held, shall be regulated by a federal law. The same shall apply *mutatis mutandis* to persons, including refugees and expellees, who on May 8, 1945 were entitled to pensions and related benefits and who for reasons other than those recognized by civil service regulations or collective bargaining agreements no longer receive any such pension or related benefits. Until the pertinent federal law takes effect, no legal claims may be made, unless *Land* law otherwise provides.

Article 132 [Temporary suspension of rights of persons in the public service]

- (1) Civil servants and judges who enjoy life tenure when this Basic Law takes effect may, within six months after the *Bundestag* first convenes, be retired, suspended, or transferred to lower-salaried positions if they lack the personal or professional aptitude for their present positions. This provision shall apply *mutatis mutandis* to salaried public employees, other than civil servants or judges, whose employment cannot be terminated at will. In the case of salaried employees whose employment may be terminated at will, notice periods longer than those set by collective bargaining agreements may be rescinded within the same period.
- (2) The preceding provision shall not apply to members of the public service who are unaffected by the provisions respecting “Liberation from National Socialism and Militarism” or who are recognized victims of National Socialism, absent important personal grounds.
- (3) Persons affected may have recourse to the courts in accordance with paragraph (4) of Article 19.
- (4) Details shall be specified by a statutory instrument issued by the Federal Government with the consent of the *Bundesrat*.

Article 133 [Succession to rights and duties of the Administration of the Combined Economic Area]

The Federation shall succeed to the rights and duties of the Administration of the Combined Economic Area.

Article 134 [Succession to Reich assets]

- (1) Reich assets shall basically become federal assets.
- (2) Insofar as such assets were originally intended to be used principally for administrative tasks not entrusted to the Federation under this Basic Law, they shall be transferred without compensation to the authorities now entrusted with such tasks and to the extent

**60 Years German Basic Law:
The German Constitution and its Court**

that such assets are now being used, not merely temporarily, for administrative tasks that under this Basic Law are now performed by the *Länder*, they shall be transferred to the *Länder*. The Federation may also transfer other assets to the *Länder*.

- (3) Assets that were placed at the disposal of the Reich without compensation by *Länder* or municipalities (associations of municipalities) shall revert to those *Länder* or municipalities (associations of municipalities) insofar as the Federation does not require them for its own administrative purposes.
- (4) Details shall be regulated by a federal law requiring the consent of the *Bundesrat*.

Article 135 [Succession to assets of previously existing Länder and corporations]

- (1) If after May 8, 1945 and before the effective date of this Basic Law, an area has passed from one *Land* to another, the *Land* to which the area now belongs shall be entitled to the assets of the *Land* to which it previously belonged that are located in that area.
- (2) The assets of *Länder* or other public law corporations or institutions that no longer exist, insofar as they were originally intended to be used principally for administrative tasks or are now being so used, not merely temporarily, shall pass to the *Land*, corporation, or institution that now performs those tasks.
- (3) Real property of *Länder* that no longer exist, including appurtenances, shall pass to the *Land* within which it is located, insofar as it is not among the assets already referred to in paragraph (1) of this Article.
- (4) Insofar as an overriding interest of the Federation or the particular interest of a region requires, a federal law may depart from the rules prescribed by paragraphs (1) to (3) of this Article.
- (5) In all other respects, the succession to and disposition of assets, insofar as it has not been effected before January 1, 1952 by agreement between the affected *Länder* or corporations or institutions established under public law, shall be regulated by a federal law requiring the consent of the *Bundesrat*.
- (6) Holdings of the former *Land* of Prussia in enterprises established under private law shall pass to the Federation. Details shall be regulated by a federal law, which may also depart from this provision.
- (7) Insofar as assets that on the effective date of this Basic Law would devolve upon a *Land* or a corporation or institution established under public law pursuant to paragraphs (1) to (3) of this Article have been disposed of by or pursuant to a *Land* law or in any other manner by the party thus entitled, the transfer of assets shall be deemed to have taken place before such disposition.

Current Text of the German Basic Law

Article 135a [Old obligations]

- (1) Federal legislation enacted pursuant to paragraph (4) of Article 134 or paragraph (5) of Article 135 may also provide that the following obligations shall not be performed, or that they shall be performed only in part:
 1. obligations of the Reich, of the former *Land* of Prussia, or of such other corporations and institutions under public law as no longer exist;
 2. such obligations of the Federation or of corporations and institutions under public law as are connected with the transfer of assets pursuant to Article 89, 90, 134, or 135, and such obligations of these bodies as arise from measures taken by the bodies designated in sub-paragraph 1;
 3. such obligations of the *Länder* or municipalities (associations of municipalities) as have arisen from measures taken by them before August 1, 1945 within the framework of administrative functions incumbent upon or delegated by the Reich to comply with orders of the occupying powers or to terminate a state of emergency resulting from the war.
- (2) Paragraph (1) of this Article shall apply *mutatis mutandis* to obligations of the German Democratic Republic or its institutions as well as to obligations of the Federation or other corporations and institutions under public law that are connected with the transfer of assets of the German Democratic Republic to the Federation, *Länder*, or municipalities, and to obligations arising from measures taken by the German Democratic Republic or its institutions.

Article 136 [First convening of the Bundesrat]

- (1) The *Bundesrat* shall convene for the first time on the day the *Bundestag* first convenes.
- (2) Until the election of the first Federal President, his powers shall be exercised by the President of the *Bundesrat*. He shall not have authority to dissolve the *Bundestag*.

Article 137 [Right of civil servants to stand for election]

- (1) The right of civil servants, other salaried public employees, professional or volunteer members of the Armed Forces, and judges to stand for election in the Federation, in the *Länder*, or in the municipalities may be restricted by a law.
- (2) The election of the first *Bundestag*, of the first Federal Convention, and of the first Federal President shall be governed by an electoral law to be enacted by the Parliamentary Council.
- (3) Until the Federal Constitutional Court is established, its authority under paragraph (2) of Article 41 shall be exercised by the German High Court for the Combined Economic Area, which shall make determinations in accordance with its procedural rules.

**60 Years German Basic Law:
The German Constitution and its Court**

Article 138 [South German notaries]

Changes in the rules governing the notaries' profession as it now exists in the *Länder* of Baden, Bavaria, Württemberg-Baden, and Württemberg-Hohenzollern shall require the consent of the governments of these *Länder*.

Article 139 [Continuing validity of denazification provisions]

The legal provisions enacted for the "Liberation of the German People from National Socialism and Militarism" shall not be affected by the provisions of this Basic Law.

Article 140 [Provisions respecting religious societies]

The provisions of Articles 136, 137, 138, 139, and 141 of the German Constitution of August 11, 1919 shall be an integral part of this Basic Law.

Article 141 ["Bremen Clause"]

The first sentence of paragraph (3) of Article 7 shall not apply in any *Land* in which *Land* law otherwise provided on January 1, 1949.

Article 142 [Basic rights in Land constitutions]

Notwithstanding Article 31, provisions of *Land* constitutions shall also remain in force insofar as they guarantee basic rights in conformity with Articles 1 to 18 of this Basic Law.

Article 142a [Repealed]

Article 143 [Deviations from the Basic Law]

- (1) The law in the territory specified in Article 3 of the Unification Treaty may deviate from provisions of this Basic Law for a period extending no later than December 31, 1992 insofar and so long as disparate circumstances make full compliance impossible. Deviations may not violate paragraph (2) of Article 19 and must be compatible with the principles specified in paragraph (3) of Article 79.
- (2) Deviations from Titles II, VIII, VIIIa, IX, X, and XI shall be permissible for a period extending no later than December 31, 1995.
- (3) Independently of paragraphs (1) and (2) of this Article, Article 41 of the Unification Treaty and the rules for its implementation shall also remain in effect insofar as they provide for the irreversibility of acts interfering with property rights in the territory specified in Article 3 of this Treaty.

Article 143a [Privatization of federal railways]

- (1) The Federation shall have exclusive power to legislate with respect to all matters arising from the transformation of federal railways administered by the Federation into business enterprises. Paragraph (5) of Article 87e shall apply *mutatis mutandis*. Civil servants

Current Text of the German Basic Law

employed by federal railways may be assigned by a law to render services to federal railways established under private law without prejudice to their legal status or the responsibility of their employer.

- (2) Laws enacted pursuant to paragraph (1) of this Article shall be executed by the Federation.
- (3) The Federation shall continue to be responsible for local passenger services of the former federal railways until December 31, 1995. The same shall apply to the corresponding functions of rail transport administration. Details shall be regulated by a federal law requiring the consent of the *Bundesrat*.

Article 143b [Privatization of the Deutsche Bundespost]

- (1) The special trust Deutsche Bundespost shall be transformed into enterprises under private law in accordance with a federal law. The Federation shall have exclusive power to legislate with respect to all matters arising from this transformation.
- (2) The exclusive rights of the Federation existing before the transformation may be transferred by a federal law for a transitional period to the enterprises that succeed to the Deutsche Bundespost Postdienst and to the Deutsche Bundespost Telekom. The Federation may not surrender its majority interest in the enterprise that succeeds to the Deutsche Bundespost Postdienst until at least five years after the law takes effect. To do so shall require a federal law with the consent of the *Bundesrat*.
- (3) Federal civil servants employed by the Deutsche Bundespost shall be given positions in the private enterprises that succeed to it, without prejudice to their legal status or the re-sponsibility of their employer. The enterprises shall exercise the employer's authority. Details shall be regulated by a federal law.

Article 143c [Compensation for the Abolishment of Joint Tasks and Financial Support]

- (1) Between 1st January 2007 and 31st December 2019, the States [*Länder*] may claim yearly contributions from the federal budget for the abolishment of joint tasks regarding extension and construction of universities including university hospitals and educational planning as well as for the abolishment of financial support to improve traffic conditions within communes and rent-controlled apartments. Until 31st December 2013, these contributions will be calculated on the basis of average federal support during the reference period of 2000 to 2008.
- (2) Until 31st December 2013, the contributions according to Paragraph I are distributed among the States [*Länder*]:
 1. as yearly fixed amounts according to the average share of each State [*Land*] during the period 2000 to 2003;
 2. according to the purpose of the task in the case of former mixed financing.

**60 Years German Basic Law:
The German Constitution and its Court**

- (3) Federation and States, until the end of 2013, reappraise the sufficiency and necessity of the funds assigned to the States [*Länder*] according to Paragraph I for fulfilling the responsibilities of the States [*Länder*]. Starting 1st January 2014, the limitation to the purpose as established by Paragraph II Number 2 for the funds provided according to Paragraph I is abolished; the share of investment within the total of funds remains fixed. Agreements in the Solidarity Pact II remain unaffected.
- (4) Details are regulated by a federal statute requiring the consent of the Senate [*Bundesrat*].

Article 143d [Consolidation Support]

- (1) Articles 109 and 115 in the version valid until 31 July 2009 are applicable for the last time on the 2010 budget. Articles 109 and 115 in the version in force on 1 August 2009 are applicable for the first time on the 2011 budget; provided that credit authorizations existing on 31 December 2010 for separate assets remain untouched. The States [*Länder*] may, for the period 1 January 2011 to 31 December 2019, following applicable rules of State [*Land*] regulation, deviate from the provisions of Article 109 III. The budgets of the States [*Länder*] have to be planned in a way that the budget 2020 satisfies the requirements of Article 109 III 5. The Federation may, for the period 1 Jan. 2011 to 31 Dec. 2015 deviate from the provision of Article 115 II 2. The reduction of existing deficits should commence with the budget 2011. The yearly budgets have to be planned in a way that the budget 2016 satisfies the requirement of Article 115 II 2; details are regulated by a federal statute.
- (2) To help observing the provisions of Article 109 III after 1 January 2020, the States [*Länder*] of Berlin, Bremen, Saarland, Saxony-Anhalt, and Schleswig-Holstein for the period 2011 to 2019 may receive consolidation support out of the federal budget to the total extent of 800 million Euro per year. The shares are 300 million Euro for Bremen, 260 million Euro for Saarland, and 80 million Euro each for Berlin, Saxony-Anhalt, and Schleswig-Holstein. The support is extended on the basis of an administrative agreement according to a federal statute requiring the consent of the Senate [*Bundesrat*]. Receipt of the support requires a complete reduction of financial deficits until the end of 2010. The details, particularly regarding the yearly steps of reduction in financial deficits, the supervision of the reduction of financial deficits by the stability council as well as the sanctions in case of non-compliance with the steps of reduction, are regulated by federal statute requiring the consent of the Senate [*Bundesrat*] and by administrative agreement. The simultaneous receipt of consolidation support and reorganization support in case of extreme budget emergency is excluded.
- (3) The financial burden resulting from consolidation support is carried by Federation and States [*Länder*] to one half each, the latter financing it from their share of the value added tax. Details are regulated by federal statute requiring the consent of the Senate [*Bundesrat*].

Current Text of the German Basic Law

Article 144 [Ratification of the Basic Law]

- (1) This Basic Law shall require ratification by the parliaments of two thirds of the German *Länder* in which it is initially to apply.
- (2) Insofar as the application of this Basic Law is subject to restrictions in any *Land* listed in Article 23: [since repealed] or in any part thereof, such *Land* or part thereof shall have the right to send representatives to the *Bundestag* in accordance with Article 38 and to the *Bundesrat* in accordance with Article 50.

Article 145 [Promulgation of the Basic Law]

- (1) The Parliamentary Council, with the participation of the members for Greater Berlin, shall confirm the ratification of this Basic Law in public session and shall certify and promulgate it.
- (2) This Basic Law shall take effect at the end of the day on which it is promulgated.
- (3) It shall be published in the Federal Law Gazette.

Article 146 [Duration of validity of the Basic Law]

This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.

60 Years German Basic Law:
The German Constitution and its Court

Appendix to the Basic Law

Extracts from the German Constitution of August 11, 1919 [Weimar Constitution]

Religion and Religious Societies

Article 136

- (1) Civil and political rights and duties shall be neither dependent upon nor restricted by the exercise of religious freedom.
- (2) Enjoyment of civil and political rights and eligibility for public office shall be independent of religious affiliation.
- (3) No person shall be required to disclose his religious convictions. The authorities shall have the right to inquire into a person's membership in a religious society only to the extent that rights or duties depend upon it or that a statistical survey mandated by a law so requires.
- (4) No person may be compelled to perform any religious act or ceremony, to participate in religious exercises, or to take a religious form of oath.

Article 137

- (1) There shall be no state church.
- (2) The freedom to form religious societies shall be guaranteed. The union of religious societies within the territory of the Reich shall be subject to no restrictions.
- (3) Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. They shall confer their offices without the participation of the state or the civil community.
- (4) Religious societies shall acquire legal capacity according to the general provisions of civil law.
- (5) Religious societies shall remain corporations under public law insofar as they have enjoyed that status in the past. Other religious societies shall be granted the same rights upon application, if their constitution and the number of their members give assurance of their permanency. If two or more religious societies established under public law unite into a single organization, it too shall be a corporation under public law.
- (6) Religious societies that are corporations under public law shall be entitled to levy taxes on the basis of the civil taxation lists in accordance with *Land* law.
- (7) Associations whose purpose is to foster a philosophical creed shall have the same status as religious societies.
- (8) Such further regulation as may be required for the implementation of these provisions shall be a matter for *Land* legislation.

Current Text of the German Basic Law

Article 138

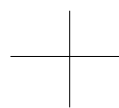
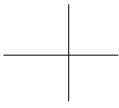
- (1) Rights of religious societies to public subsidies on the basis of a law, contract, or special grant shall be redeemed by legislation of the *Länder*. The principles governing such redemption shall be established by the Reich.
- (2) Property rights and other rights of religious societies or associations in their institutions, foundations, and other assets intended for purposes of worship, education, or charity shall be guaranteed.

Article 139

Sundays and holidays recognized by the state shall remain protected by law as days of rest from work and of spiritual improvement.

Article 141

To the extent that a need exists for religious services and pastoral work in the army, in hospitals, in prisons, or in other public institutions, religious societies shall be permitted to provide them, but without compulsion of any kind.



INTRODUCTION TO GERMAN CONSTITUTIONAL LAW AND THE DOCTRINE OF BASIC RIGHTS

By Jürgen Bröhmer

I. Introduction

1. *Brief Historical Context*

When on 23 May 1949, the Basic Law of the new Federal Republic of Germany was solemnly promulgated the new country still lay largely in ruins. The ruins were not only of bricks and mortar. Perhaps more importantly there was the complete moral devastation the country had experienced between 1933 and 1945. How was it possible that a proud nation, the home of countless thinkers, scientists and artists, a country with one of the most educated general population at the time became one of the most barbaric nations the world ever had to endure? Many explanations have been brought forward but the definitive answer remains elusive. To create a governmental order that safeguards future generations from unrestrained rampages of evil was the primary goal of the 61 fathers and four mothers of the Basic Law. Much if not all that happens and has happened in Germany, from subsequent constitutional reforms to the terror years of the Red Army Faction, from Germany's reunification in 1990 to Germany's participation in the development of the European Union, from the federal structure of Germany to the special role of its Constitutional Court can only be understood against the historical background of the annihilation brought onto others and self between 1933 and 1945. The Basic Law is the child of this catastrophe.

The Basic Law is also a child of the Allied powers and the occupational power exercised by them in Germany after the end of World War II in 1945. Soon it became clear that the emerging cold war between the western powers, i.e. the USA, United Kingdom and France on the one side and the Soviet Union on the other would make any solution for Germany as a whole, impossible for the time being. As a result the western powers, together with Germany's neighbouring countries, Belgium, The Netherlands and Luxembourg held a conference in London in 1948. This conference brought about the Frankfurt Documents which contained some ground rules for a new post-war constitution for what was to become West Germany in 1949, the institutional framework for its adoption including the prescription of a constitutional assembly as well as principles for the relationship of the new state to be formed and the western allied powers.

**60 Years German Basic Law:
The German Constitution and its Court**

The Parliamentary Council was the constitutional assembly created on the basis of the allied blueprint communicated in the Frankfurt Documents and it met for the first time in the old University City of Bonn on the banks of the Rhine River on 1 September 1948¹. Under the Chairmanship of *Konrad Adenauer*², soon to become Chancellor of the Federal Republic for just over 14 years, 65 members altogether, 61 men and four women³, elected to the Council by the parliaments of the 11 *Länder* (states) which were to become part of the new West-German federation and had already previously been established, and representing the political spectrum from the communist left to the national right with a solid majority for the large centre left and centre right parties⁴ came together to draft the new Basic Law in less than nine months. The Basic Law was not the result of a grassroots' democratic movement in Germany. It was drafted under close supervision of the western Allies by a group of dignitaries and experts and the broader public couldn't have cared much less at the time⁵.

The drafters did not at all intend this document to be of lasting nature. To the contrary they went to great length to emphasize the fact that it was merely to guide a transitional, and in that sense unwanted regime to overcome the emerging new geo-political reality of a Germany divided by the cold war. The absence of any direct democratic legitimization of the new constitutional order and, in fact, its very name - Basic Law rather than 'constitution' - together with the express stipulation of its transitional character in the original Preamble⁶ and in Article 146⁷ were deliberate steps taken to communicate this provisional character.

However, provisional as the document was intended to be it was from the beginning a constitution heavily drawn on the lessons to be learned from the failure of the first republican and democratic constitution of Germany, the Weimar Constitution of 1919, and from the unprecedented disregard for human dignity, life and freedom shown in the twelve years between 1933 and 1945. At the beginning, like a beacon of light and hope, stood and stand Articles 1 to

1 Photographic impressions by Erna Wagner-Hehmke and more available at:
<http://www.parlamentarischerrat.de>.

2 Born 5 January 1876, died 19 April 1967; Federal Chancellor from 15 September 1949 to 16 October 1963.

3 Photo gallery and names available at:
http://www.parlamentarischerrat.de/mitglieder_891.html.

The four women were Frederike Nadig, Elisabeth Selbert from the Social-Democratic Party, Helene Weber from the Christian-Democrats and Helene Wessel from the Catholic *Zentrum* party.

4 The Christian-Democratic Union and the Social-Democratic Party, still the two dominant political parties in Germany albeit at a much smaller scale, held 27 seats each for a combined total 54 of the 65 seats.

5 The new Republic started with 40% of the population being indifferent to the Basic Law and only 21% interested in the new Constitution and in 1955 more than half of the population did not know about the Basic Law, see Voränder, Hans, *Die Deutschen und ihre Verfassung*, Aus Politik und Zeitgeschichte (APuZ) 18-19/2009, p. 8 at 9,
http://www.bpb.de/publikationenGENSCL,0,Die_Deutschen_und_ihre_Verfassung.html.

6 The Preamble originally read: "Conscious of its responsibility before God and mankind, filled with the resolve to preserve its national and political unity [...] the German people in the Länder [...] enacted this Basic Law of the Federal Republic of Germany to provide a new governmental order for a transitional period." [translation by author]

7 The original language of Article 146 was: "This Basic Law shall become invalid on the day when a constitution freely adopted by the German people enters into force." [translation by author]

Introduction to German Constitutional Law and the Doctrine of Basic Rights

19 containing a catalogue of fundamental rights of freedoms and defining parameters and limits for governmental intervention in those rights and freedoms, guarded by Article 20.3 and the fundamental difference between law and justice expressed therein, by Article 79.3, which disallows any and all changes to the fundamental core principals of the Basic Law and by Article 20.4 which grants all Germans the *ultima ratio* right to resistance against those who might wish to overthrow this order.

2. *Principal Structure of the Basic Law*

The principal content and structure of the Basic Law largely follows what might be expected from a constitutional document. A preamble preludes followed by the first chapter “Basic Rights” extending from Article 1 through to Article 19 and complemented by procedural guarantees in Articles 101 to 104.

Article 1 is the foundation norm insofar as all basic rights and freedoms have a core that can and must be traced to human dignity and hence to an understanding of the human being that precedes the law and regards individual rights not as something bestowed upon men and women in an act of benevolent largesse by other human beings but as an inherent quality of all human beings. However, it does so without suggesting any explanation for this assumption of human dignity, leaving it to those governed by the Basic Law to come to their own conclusions, be they religiously motivated - men and women created in God’s likeness - or be they more natural law oriented or more technocratic reduced to ideas of social contracts or the like⁸.

The second chapter (Articles 20 - 37) contains a bouquet of norms under the somewhat misleading title “The Federation and the *Länder*” to do with the foundation, objectives and purposes of the state, its relationship to international law, its participation in the development of the European Union and its internal federal structure. Article 20 is one of the core foundational norms of the Basic Law⁹. Article 21 describes the role of political parties in the democratic process. Article 22 stipulates the colours of the German flag and, after a recent amendment, that Berlin is the capital city. Article 23 was introduced in the wake of the Maastricht Treaty on the European Union and addresses Germany’s participation in the development of the European Union and some internal federal problems arising from membership in this highly integrated supranational organization. Article 24 regulates the transfer of sovereign power to international organizations outside the European Union and, for example, governs Germany’s membership and collaboration in organizations of collective security such as NATO¹⁰ and the United Nations¹¹. Article 25 stipulates the precedence of norms of customary international law over domestic statutory - but not constitutional - law. Article 26 forbids any engaging in or preparation for military aggression or other action intended at disturbing international peace. Article 27 deals with

8 For a more profound look at the legal concept of human dignity see R Gröschner (ed.), *Das Dogma der Unantastbarkeit - eine Auseinandersetzung mit dem Absolutheitsanspruch der Würde*, 2009; Malpas/Lickiss (eds.), *Perspectives on Human Dignity - A Conversation*, 2007.

9 See below on page 86.

10 The North Atlantic Treaty Organization, see www.nato.int.

11 See <http://www.un.org/>.

**60 Years German Basic Law:
The German Constitution and its Court**

the merchant fleet. Article 28 requires the constituent states to be organized in accordance with fundamental principles of democracy and the rule of law and guarantees a meaningful standard of municipal self-government. Article 29 is one of the longest provisions of the Basic Law and prescribes detailed procedures for internal territorial restructures such as amalgamations of *Länder* or redrawing of internal borders. Article 30 stipulates the principle of enumerated powers. The federal authorities may only exercise those powers specifically assigned to them by the Basic Law and all residual powers rest with the *Länder*. This principle is repeated for the exercise of legislative power in Article 70. The refreshingly short and precise Article 31 stipulates the precedence of federal law over the law of the *Länder*. Article 32 deals with foreign affairs assigning the principal functions in this respect to the central level but leaving some powers for the *Länder* as well. Article 33 stipulates the equal citizenship rights for all German citizens regardless of what constituent *Land* they live in, demands that all citizens have equal access to public office in the civil service (to be read in conjunction with Article 36) and guarantees the independent and impartial function of the civil service. Article 34 deals with state liability for wrongful acts and Article 35 regulates legal and administrative assistance in the case of natural disasters or threats to public security. The provision currently restricts any assistance of the military forces to natural disasters which has led to calls for amending it to allow for a greater internal role of the military, for example in the case of a major terrorist attack. Article 37 gives the Federation the power to enforce the Basic Law in the *Länder* should a *Land* fail to comply with it. The provision has never been used.

The next five chapters deal with the organs of the state, their composition, principal powers and task and other specific issues pertaining to them.

Articles 38 to 48 are concerned with the Federal Parliament, the *Bundestag*¹². The electoral principles - general, direct, free, equal and secret elections - and the status of the deputies as independent representatives of the whole people (and not their party) and their remuneration are addressed in Articles 38 and 48¹³; the electoral term is governed by Article 39 and election oversight by Article 41. A number of articles address the Committee structure of the Bundestag and other powers such as the power to summon members of government. The Bundestag legislates its own rules of procedure, which address in detail its procedures and the rights of the individual deputies, the parliamentary groups and factions, the Committees, the conduct of hearings, debates and question times and other related issues.

Articles 50 to 53 deal with the Federal Chamber, the *Bundesrat*¹⁴, an institution that allows the *Länder* a high degree of co-decision powers in the federal legislative process (Article 50). The *Länder* are represented in the *Bundesrat* by members of their executive branches (governments) and voting is weighted according to the size of the respective *Land* (Article 52).

12 See http://www.bundestag.de/htdocs_e/index.html.

13 The details are governed by the Federal Election Act (*Bundeswahlgesetz*) and by the Act on the Legal Status of the Members of the German Bundestag (*Abgeordnetengesetz*), see http://www.bundestag.de/htdocs_e/bundestag/function/legal/memlaw.pdf.

14 See <http://www.bundesrat.de/EN>.

Introduction to German Constitutional Law and the Doctrine of Basic Rights

Article 53a regulates the Joint Committee, a conference committee of *Bundestag* and *Bundesrat* to deal with cases of legislative deadlock, i.e. bills that were successfully passed in one house but could not muster a majority in the other and therefore require compromise negotiations.

Articles 54 to 61 spell out the status and relatively minor powers of the Federal President, the formal Head of State. Articles 62 to 69 do the same for the Federal Government, which consists of the Federal Chancellor, currently Angela Merkel of the Christian-Democratic Union, and the various government ministers (Article 62)¹⁵. Germany is a parliamentary democracy and hence the Chancellor is elected by the Parliament (*Bundestag*, Article 63). The Basic Law affords a constitutional leadership role to the Chancellor in deciding the principles of the political agenda of the Federal Government (Article 65) but in practice much depends on the political strength of the various players in the political arena. The *Bundestag* may elect a new chancellor by constructive vote of no-confidence (Article 67) at any time¹⁶. The pathways for dissolution of the *Bundestag* and new elections outside the regular electoral term are much more restricted (Articles 67 and 68).

Chapter VII of the Basic Law deals with the legislative process and legislative powers of the federal parliament. The principal norm reflecting the underlying principle of enumerated powers is repeated in Article 70. The distribution of legislative powers between the Federation and its constituent *Länder* has been the subject of significant constitutional reform and reallocation recently¹⁷. The Basic Law distinguishes between exclusive legislative powers of the Federation and concurring powers, where the power to legislate resides with the constituent *Länder* until and insofar as these powers are or have been taken up by the Federation. Both sets of powers are governed by extensive sets of subject matter catalogues attributing specific powers to the federal level (Article 73 for exclusive powers, Article 74 for concurring powers). Articles 76 to 82 stipulate the details of the legislative procedure beginning with the introduction of a bill (Article 76.1) all the way to the final signature of the Federal President (Article 82).

Articles 83 to 91 of Chapter VIII address the issues of administration and implementation of federal law. Legislative and administrative powers are treated differently in the Basic Law. From the perspective of the Federation, possessing the legislative power is not tantamount to possessing the power to administer, implement and execute the legislation. The principal of enumerated powers governs this field as well and the *Länder* hold all administrative powers unless otherwise stipulated in the Basic Law in general and in the provisions of Chapter VIII in particular (Article 83 and, for example, Articles 87 to 87f).

15 See <http://www.bundesregierung.de/Webs/Breg/EN/Homepage/home.html>.

16 As opposed to a destructive vote of no confidence. In a constructive no confidence vote a majority must be found that is willing to elect a new chancellor whereas in a destructive no confidence vote the majority must only agree to oust the present chancellor without electing a new one.

17 Amendments to the Basic Law as a result of stage 1 of the federalism reform effort came into force in 2006, see http://webarchiv.bundestag.de/archive/2008/0506/htdocs_e/parliament/bodies/federalism1/index.html. Stage 2 of the reforms is concerned with the financial relationship between the Federation and the *Länder*, see <http://www.bundestag.de/bundestag/ausschuesse/gremien/foederalisreform/english.pdf>.

**60 Years German Basic Law:
The German Constitution and its Court**

Chapter IX (Articles 92 to 104) is concerned with the judicial power of the Federal Republic. The judicial power is vested in independent (Article 97) judges and federal and state courts (Article 92). Article 95 names the five supreme federal courts for general civil and criminal, labour, administrative, welfare and tax matters. Articles 93 and 94 deal in relatively great deal with the jurisdiction and composition of the Federal Constitutional Court, an institution that has shaped the constitutional reality of the Federal Republic to a degree that can hardly be overestimated and whose role as the guardian of the Basic Law in general and for the fundamental rights and freedoms in particular can only be described as a blessing for the country, notwithstanding the occasional aberration or even fundamental mistake inherent in any human activity.

Chapter X (Articles 104a to 115) contains the financial constitution of the Federal Republic, i.e. provisions concerning income (taxes and distribution of tax income) and expenditure (budget and debt). The complexity of these issues and their political significance is illustrated by the fact that these provisions are very long, very complicated, not overly well-drafted and often unbefitting of a constitution. This notwithstanding, it is these provisions that have largely defined the special strand of German federalism and have ensured that the constituent *Länder* and their independent role has not been overtaken to the same degree by the power of the federal purse as can be observed in other large federal systems such as for example the USA and Australia. One important question in this regard is the control and limitation of public debt. Despite the relative lack of success in trying to control and limit public debt by legal means the German constitutional legislator has just recently amended the relevant Article 115 of the Basic Law with the goal of limiting the amount of deficit spending in the budget process¹⁸.

Chapter Xa (Articles 115a to 115l) was included into the Basic Law in 1968 - after great controversy and student revolts - and addresses the state of war and the effects these will have on the running of the government.

The final Chapter XI contains an assortment of transitional and concluding provisions reaching from the definition of German citizenship (Article 116) to the integration of some norms of the Weimar Constitution of 1919 pertaining to the relationship between state and churches. Finally, Article 146 provides that the Basic Law can be replaced at any time by a new constitution adopted freely by the German people.

18 57th Amendment to the Basic Law of 29.7.2009, Official Journal of the Federal Republic of Germany (BGBl.), Part I, p. 2248 (2009).

II. The Basic Law's Fundamental Norms and State Objectives

1. *The Preamble of the Basic Law*

The Preamble is part of the Basic Law, therefore subject to amendment and has been amended, namely in 1990 to replace all references to reunification and the transitional character of the Basic Law after completion of German unity in 1990¹⁹. It has normative character²⁰ mainly with regard to the nomination of state objectives of which the successfully achieved reunification of Germany was one. The other two pivotal state objectives of the Federal Republic are “the promotion of world peace” in which the Federal Republic is to engage as “an equal partner in a united Europe”, thus requiring the Federal Republic to play a positive role in the - undefined development of this united Europe. Both of these goals had and have direct impacts on the interpretation of subsequent norms of the Basic Law²¹.

2. *Article 1 of the Basic Law - More than Human Dignity*

Article 1 of the Basic Law is a cornerstone of the Basic Law in general and the anchor provision for its system of fundamental rights protection. Commencing with the stipulation of the inviolability of human dignity and commanding state authority to actively protect it is a deliberate contrast and consequence from the terror years of the Nazi regime and from a perceived shortcoming of the Weimar Constitution that preceded that regime, which mentioned human dignity in a rather peripheral manner. The core message is the primacy of the individual over the state. The state as the embodiment of human community is there to serve the individual members of the community and thus the community as a whole and not the other way around. The supreme concept of human dignity, as inherently vague as it is, has been referred to as a “directly effective positivist embodiment of natural law”.²² Notwithstanding the great significance of the protection of human dignity both as the anchor provision and pivot of fundamental rights protection, its practical relevance has been reduced by the fact that no violation of human dignity is conceivable that would not also violate one of the more specific fundamental rights spelled out in the Basic Law. The protection of human dignity in Article 1 Basic Law is in that sense not legally necessary to achieve comprehensive fundamental rights protection and the lack of a similar clause in the European Convention of Human Rights illustrates this impressively. However, the example of the European Convention²³ as well as many other - domestic and international treaties also illustrate impressively that the protection of fundamental rights is only comprehensible against the backdrop of a specific understanding of the role and status of the individual human being and the abstract concept of human dignity is the embodiment of that understanding.

19 Official Journal of the Federal Republic of Germany (BGBl.), Part II, p. 885 (1990).

20 Recognized by the Constitutional Court, see BVerfG 36, 1 (17).

21 BVerfG, 2 BvE 2/08 of 30.6.2009, paras. 222 et seq., http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html.

22 Höfling in: Sachs, GG-Kommentar. 5th ed. 2009, Article 1, MN 1.

23 In the words of the European Court of Human Rights: “[...] the very essence of the Convention is the respect for human dignity and human freedom”, ECHR, 12.6.2003, Appl. No. 35968/97, van Kück/Germany, s. 69; 11.7.2002, Appl. No. 25680/94, I./United kingdom, s. 70; 11.7.2002, Appl. No. 28957/95, Christine Goodwin/United Kingdom, s. 90.

**60 Years German Basic Law:
The German Constitution and its Court**

Article 1.2 adds to the dignity protection by linking it to the programmatic declaration and recognition of human rights protection as the foundation of any human community and as a foundation for peace and justice. Human rights protect the individual and secure a sphere of individual autonomy against the state but the Basic Law does not pair community and state on the one hand and human rights on the other hand antagonistically against each other. By contrast, human rights protection is regarded as an inherent and indispensable precondition for communal peace and justice.

Article 1.3 is a key norm in its own right because it clarifies that all fundamental rights contained in the Basic Law are directly applicable and justiciable “hard-law” obligations for all state authority. The fundamental rights of the Basic Law directly limit the exercise of executive, legislative and judicial power. The possibility of judicial review for acts of parliament is an indirect consequence that has found its direct expression in the role afforded to the Constitutional Court in Article 93 of the Basic Law.

The stipulation of the legislative, executive and judicial authority as addressees of the obligations flowing from fundamental rights of freedoms also clarifies that these rights do not directly obligate private individuals. The primary function of fundamental rights is the defence of individual autonomy *vis-à-vis* the state and not the limitation of individual autonomy *vis-à-vis* other individuals. However, the fundamental rights of the basic law do have considerable effect between private parties - so-called indirect third party effect - because of their objective function as a determining guide for the interpretation of private (civil) law norms. Such norms, especially the generic legal terms used for example in the German Civil Code must be interpreted in the light of the fundamental rights of the Basic Law. That has consequences for example in damage cases for defamation because the incriminated speech might be protected under the free speech guarantee.

3. *Article 20 of the Basic Law - Core Principles*

Article 20 is the central foundational norm defining the status of the German Federation. Article 20.1 describes and prescribes what kind of state Germany is and must be - a democratic, social and federal republic. Article 20.3 adds to these attributes the rule of law as a fourth one by making it clear that any legislative action must be constitutional and any actions of the executive branch and the judiciary are bound by the constitution and the statutory and other law in effect at the time.

However, Article 20.3, again in direct consequence of the experiences of the Nazi dictatorship, also stipulates that state action is not only bound and determined by positive law but also by the meta-positivist notion of justice. Not everything that is legal is just as legal norms can be drafted to allow for or even demand committing the most heinous crimes perceivable. Legality and legitimacy are different concepts. In the case of the order established by the Basic Law that conflict could only eventuate if forces had succeeded in usurping this order and at least practically rendering it ineffective. That would have to include, for example, eliminating effective access to the courts and the Constitutional Court in particular. Should such a constitutional crisis occur Article 20.4 expressly provides for a right to resistance for all Germans, including armed resistance should that prove to be necessary.

Introduction to German Constitutional Law and the Doctrine of Basic Rights

Article 20.2 elaborates on the democratic principle adopted for the Federal Republic of Germany. The people are the sovereign but they exercise their sovereignty in a form of indirect parliamentary democracy by way of elections and delegate the exercise of authority to the various organs and institutions of the state, the Federal Parliament (*Bundestag*) being the most significant. Any and all state action must be traceable to the people as the sovereign, acting through Parliament to which everybody else is directly or indirectly accountable and which in turn answers to the people. Section 2 also makes it clear that the Basic Law's notion of democracy is not one of direct democracy where the people can directly legislate and circumvent parliament. The absence of practically all elements of direct democracy, though more the rule than the exception around the world at least with respect to central rather than local or regional affairs²⁴, has been criticized by some as a weakness of the Basic Law but the proponents have so far not found sufficient support.²⁵

The rule of law²⁶ as described in Article 20.3 is an abstract principle with many practical emanations. The supremacy of law (and justice) and the Constitution is only one albeit very important one. Of immense practical significance is the notion that in order for law to rule any state action must be determined by the law and hence any state action must have an identifiable base in the law and all individuals must have access to the courts to have their legal rights assessed by an independent judicial body. One consequence of this is that any action by public authorities limiting the rights of individuals is only legally possible if provided for in the law. From the perspective of the citizen everything is legal unless prohibited by law. From the perspective of state authority any action by state authority is illegal unless specifically authorized by law.

Another emanation of the rule of law is that legal norms must be formulated with sufficient clarity so that those at whom they are addressed are able to understand what is required of them. This is, of course, a difficult proposition in times of complex and highly abstract tax and social systems. It should be kept in mind that from the perspective of the separation of powers any imprecision in law making always expands the role of the judiciary as the branch of government responsible for the interpretation of norms. Sufficient clarity is especially important in the area of criminal law where sanctions for violations are inherently harsh (e.g. fines or even deprivation of liberty). A further aspect of the rule of law is the prohibition of retroactive laws. Norms, whether criminal law norms, or, for example, tax laws, can only be adhered to when people can know about them. Norms that have not even been passed at the time of the conduct in question can therefore not be applied to this conduct.²⁷

24 Switzerland is one notable exception.

25 Some member states of the European Union either have at least the constitutional possibility or are outright required to hold public referenda on some issues, the development of European integration by way of new treaties being one example. The fact that such referenda took place in a number of member states, for example on the Draft Constitutional Treaty of the European Union, has also prompted demands for such an option in Germany where the Basic Law as it stands today does not allow for referenda and would have to be amended accordingly.

26 The English term "rule of law" can only rudimentarily convey the full scope of the meaning of the German term "Rechtsstaat".

27 The Constitutional Court has interpreted Article 103.2 of the Basic Law restrictively to prohibit the application of criminal norms to behavior not directly covered by them but applicable in the form of an analogy, see BVerfGE 92, 1 (14 et seq.).

**60 Years German Basic Law:
The German Constitution and its Court**

Of pivotal importance in the context of the rule of law is the principle of proportionality, which for all practical purposes dominates the fundamental rights protection regime under the Basic Law. The principle of proportionality involves the application of a three-pronged test to any and all state action. On the first level state action must in fact be able to reach the objective for which it is undertaken. On the second level any state action must not go beyond what is absolutely necessary to achieve this goal effectively. And finally, on the third level, state authority must not pursue even otherwise legitimate objectives if the price for achieving them in terms of rights restrictions is disproportionate to the objective pursued. Bluntly spoken, the police must never shoot the thief even if it means that the thief gets away.

The social state principle in Article 20.1 demands that the government strives to achieve a just social order²⁸, without defining or even giving any guidance as to what a just social order might be. It follows that governmental authority has a wide margin of appreciation in the pursuit of this goal. However, the state must provide the bare fundamental necessities for every human being²⁹. That would certainly include a place to sleep, something to eat and access to fundamental health care. The increasing, albeit on a very low scale, the number of homeless or otherwise destitute people in Germany shows that law and reality can and do collide. Legally there is no room for involuntary homelessness.

The attribute ‘Republic’ only requires that Germany must not be a monarchy, not even a constitutionally organized democratic monarchy. The republican attribute is owed to the historical developments at the end of and after World War I and has no practical relevance today, as there are no noticeable or even remotely significant monarchical tendencies visible in Germany.

One open question is whether Article 20 protects only the attributes of statehood mentioned above or whether the sovereign statehood of the Federal Republic of Germany itself is also protected. That question is relevant because of Germany’s participation in the European Union. Whereas the European Union has not yet developed into a federal state commanding sovereignty externally and internally, such a development is not inconceivable. If Article 20 as such also protected sovereign statehood such a European federal state with Germany as a constitutive element could not be achieved for Germany by way of amending the Basic Law. It follows that for Germany this step of European integration would require the activation of the “*pouvoir constituant*”, i.e. the constitution making power of the German people rather than the amending power of the two chambers of Parliament.³⁰

28 BVerfGE 59, 231 (263); 100, 271 (284).

29 Cf. BVerfGE 82,60 (80); 110, 412 (445)

30 BVerfG, 2 BvE 2/08 of 30.6.2009, paras. 226-228,
http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html.

Introduction to German Constitutional Law and the Doctrine of Basic Rights

4. Article 23 of the Basic Law - European Union

The so-called “Europe-Article” 23 was introduced into the Basic Law in 1992 in the context of the founding of the European Union by the Treaty of Maastricht and after the previous and unrelated Article 23 had become obsolete in the wake of German reunification and had been struck out of the Basic Law. Until the introduction of the new Article 23, German participation in international cooperation and integration, including the transfer of sovereign powers to inter and supranational bodies (for example, European Communities, United Nations, NATO) had to be conducted on the basis of the very generally formulated Article 24 Basic Law.³¹ With Article 23 the very special and indeed unique case of the European Union and Germany’s integration into this *supranational* organization was given a special foundation in the Basic Law, providing a constitutional framework for the ongoing dynamic process of European integration by formulating objectives and limitations and by balancing the federal interests involved, i.e. those of the federation *vis-à-vis* the constituent *Länder*, in a legally binding way.

Article 23.1 links the participation of Germany in the process of European unity to the core principles of the German state: democracy, rule of law, federalism and social welfare³² and adds to it the principle of subsidiarity, which speaks to the division of powers between the European Union and its member states and limits the exercise of the powers attributed to the European Union unless certain conditions are met.³³ This creates a delicate relationship between the international law aspects of European integration, the fact that this integration process has created a deeply integrated union of law and classical notions of state sovereignty. Potential conflict over the power of the last word on the scope and extent of sovereign powers transferred to the Union - does the power of the last word still lie within the member states and their constitutional courts or with the European Union and the European Court of Justice - are still lingering but have so far not led to outright conflict between the European Union and its member states.

Under the new Treaty of Lisbon³⁴ and protocols pertaining to the rights of national Parliaments and the application of the principle of subsidiarity, the national Parliaments will enjoy direct participation rights in the decision making process of the European Union. The Treaty of Lisbon will also trigger the coming into effect of a new Article 23.1a empowering both houses

31 The term ‘supranational’ refers to the European Union (EU) and until the coming into effect of the Lisbon Treaty on 1.12.2009 to its underlying European Communities (the European Community as the best known and most significant one, the European Atomic Energy Community and, until 2002, the European Coal and Steel Community and European Community) and the fact that the EU, while not qualifying as a federal state is much more and does much more than any other international organization.

32 See *supra* Article 20 Basic Law.

33 The European Union can only exercise a power attributed to it in the relevant treaties under the principle of enumerated powers if, in addition to this attribution, it can establish that the objectives pursued by the legislative measure cannot be better achieved at the members state level therefore warranting action on the European Union level.

34 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 50/1 (17.12.2007), text of the Lisbon Treaty and consolidated versions available at http://europa.eu/lisbon_treaty/full_text/index_en. The Treaty entered into force on 1 December 2009.

**60 Years German Basic Law:
The German Constitution and its Court**

of Parliament, *Bundestag* and *Bundesrat*, to institute proceedings before the European Court of Justice in Luxembourg claiming a violation of the principle of subsidiarity. The new Article 23.1a even obligates the *Bundestag* to do so if a minority of 25 percent wish to proceed in this manner. The new addition to Article 23 reflects the concerns of (some) member states over a significant loss of jurisdiction to the European Union. The loss is inherently more relevant for the legislative branch because it is by and large legislative power that is ceded to the European Union and because the executive branches retain at least some power by being represented in the Council of Ministers on the European level.

Articles 23.2 to 23.8 of the Basic Law deal with the participation of both Houses of Parliament in the formation of the German positions to be taken on the European level. These participation rights reach from information and consultation by the government to various degrees of how the views especially of the federal chamber of Parliament, the *Bundesrat* with its *Länder*-representatives, have to be taken into account. The scope extends from merely taking note of the views of *Bundestag* and/or *Bundesrat* all the way to shifting the representation of Germany in the Council of Ministers of the European Union away from the Federal Government to a representative appointed by the federal chamber, the *Bundesrat*, if the legislative matter at issue at the European Union falls under a subject-matter which internally constitutes an exclusive power of the *Länder*.

5. *Eternity Clause, End and New Beginning, Articles 79.3 and 146 of the Basic Law*

The “eternity clause” in Article 79.3 and the “termination-clause” in Article 146 are rather peculiar features of the Basic Law. Constitutions usually do not contain clauses defining their own end and one might even argue that such a clause is superfluous anyway because who and what is to stop the *pouvoir constituant*, the constitution making power of the people, to replace the existing constitution with a new one?³⁵

In the case of the Basic Law the fact that such a provision came into the constitution and remained there, has historical reasons. Originally, Article 146³⁶ was an expression of the transitional character of the Basic Law as a provisional constitutional order to bridge the gap until German reunification. When the time for reunification came in 1989/1990 Article 146 and its concept of building a new unified Germany on the basis of a new constitution had to compete with a second option provided for by the Basic Law in the original Article 23³⁷, which allowed for the accession of “other parts” of Germany to the Federal Republic thus extending the

35 There are examples of constitutions that, though not defining their end, address the question of fundamental revisions as opposed to partial revisions or amendments, see for example, Article 44.3 of the Austrian Federal Constitutional Statute, <http://www.verfassungen.de/at/verfassungheute.htm>, Article 193 of the Federal Constitution of the Swiss Confederation, <http://www.verfassungen.de/ch/verf99.htm>,

36 See supra footnote 8.

37 The original Article 23 read: “For the time being this Basic Law will be effective in the territories of the Länder Baden, Bayern, Bremen, Greater Berlin, Hamburg Hessen, Lower Saxony, North-Rhine Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Württemberg-Baden und Württemberg-Hohenzollern. It shall enter into force in other parts of Germany upon their accession.” [translation by author]

Introduction to German Constitutional Law and the Doctrine of Basic Rights

territorial scope of the existing Basic Law. It was the (old) Article 23 option under which German reunification took place in 1990. The former German Democratic Republic acceded to the Federal Republic and was at the same time restructured into five new *Länder*, which became *Länder* of the Federal Republic.³⁸ However, the debate continued on whether the option of re-legitimizing the constitution and providing space to incorporate into the constitution more of the East-German history - whatever that might have been in constitutional terms - should be dropped altogether and Article 146 removed or whether that option should remain. The compromise reached was that the Basic Law should remain in place largely unchanged but that Article 146 would also be retained to leave open the option of broader constitutional reform debate at a later stage.³⁹

Article 79 of the Basic Law deals with the amendment of the constitution, defining the necessary requirements for affording constitutional change. Article 79.2 requires qualified two-third majorities in both Houses of Parliament, the *Bundestag* (lower house) and the *Bundesrat* (Federal Council of constituent *Länder*).

Article 79.1 demands that the Basic Law can only be amended by changing its wordings, i.e. by changing the language in one or more of its provisions, adding new provisions or striking out existing ones. By contrast, amending regular statutory law by way of a qualified majority cannot change the constitutional order. This ensures that constitutional law is concentrated in one constitutional document, rather than being spread out over the whole body of law and that such amendments are and remain transparent.⁴⁰

Article 79.3 is often referred to as the ‘eternity clause’ because it stipulates that the federal character of the nation, including the participation of the *Länder* in the federal legislative process and the fundamental principles laid down in Articles 1 and 20 are not subject to amendments. The principles referred to are the protection of human dignity in Article 1 and, following from that, the dignity-related core of the fundamental rights protected in Articles 2 to 19 of the Basic Law. The principles laid down in Article 20 are the core fundamental characteristics of the German state established under the Basic Law, namely the:

38 See Article 1 of the Treaty of 31 August 1990 between the Federal Republic of Germany and the German Democratic Republic on the establishment of German Unity (Unification Treaty): “(1) Upon the accession of the German Democratic Republic to the Federal Republic of Germany in accordance with Article 23 of the Basic Law taking effect on 3 October 1990 the *Länder* of Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia shall become *Länder* of the Federal Republic of Germany.” Text available at: <http://www.ena.lu> or http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=78.

39 See Article 5 “Future Amendments to the Constitution” of the Unification Treaty: “The Governments of the two Contracting Parties recommend to the legislative bodies of the united Germany that within two years they should deal with the questions regarding amendments or additions to the Basic Law as raised in connection with German unification, in particular [...] - with the question of applying Article 146 of the Basic Law and of holding a referendum in this context.”

40 As is the case for example in Austria, where the Constitution is not codified in a single document and constitutional amendments can be found in numerous other statutes and as was the case in the preceding Weimar Constitution of 1919 in Germany as well.

**60 Years German Basic Law:
The German Constitution and its Court**

- ▶ Republican form of state (as opposed to a constitutional monarchy),
- ▶ Democratic form of government where all exercise of state authority is linked to and legitimized by representatives freely elected at regular intervals,
- ▶ Principal character of Germany as a social (welfare) state securing access to a bare minimum of resources to satisfy fundamental needs for housing, clothing and food relative to the general standard of living⁴¹, and
- ▶ Rule of law, a broad concept consisting of various sub-concepts such as the absolute supremacy of the Constitution which guides and restricts the exercise of power by the legislative, executive and judicial branch of government, the supremacy of acts of parliament, which are binding on the executive and judicial branches, the requirement of a statutory law foundation for the exercise of any and all governmental authority thus ensuring the involvement of the directly elected parliament and democratically legitimizing all exercise of governmental power, the principal separation of powers in a legislative, executive and judicial branch, the guarantee of access to independent courts for legal protection against the exercise of any and all governmental power and the notion of limited government which can exercise its powers only subject to judicially enforceable fundamental rights and guarantees (as spelled out in Articles 1-19 of the Basic Law) which protect individuals and secure a core level of personal autonomy against infraction by the democratic majority.

In its recent decision concerning the constitutionality of the Lisbon Treaty reforming the European Union, of which Germany is a member state, the German Constitutional Court addressed the possible relationship between Article 146 and Article 79.3 of the Basic Law. In Article 79.3 the question is whether German sovereign statehood as such is also part of the eternity clause and hence not subject to the amending power of Parliament. If that were the case, Parliament could not ratify future treaties that would develop the European Union into a federal state. With regard to Article 146 the question has been raised whether even the constitution making power (*pouvoir constituant*) is subject to the eternity clause of Article 79.3, which, if answered in the affirmative, would make Germany's participation in a European federal state legally impossible and in effect require a revolutionary act. The decision by the German Constitutional Court contains *obiter dicta* indicating that such a development would indeed be barred by Article 79.3 but that this provision might not extend to Article 146 and hence the creation of a European federal state remains legally possible from a German constitutional law perspective, albeit only by way of creating a new constitution and not by amending the existing Basic Law.⁴²

41 The social state principle has found its statutory expression in § 1 of Book XII of the General Social Code (Sozialgesetzbuch), http://bundesrecht.juris.de/sgb_12/: "It is the objective of social aid [Sozialhilfe] to enable those entitled to it to lead their lives in a manner which is consistent with human dignity. [...]" [translation by the author].

42 BVerfG, 2 BvE 2/08 of 30.6.2009. The decision is available in English at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html. See also Bröhmer, Jürgen, "Containment eines Leviathans" - Anmerkungen zur Entscheidung des Bundesverfassungsgerichts zum Vertrag von Lissabon, ZEuS 2009, p. 543, 552 et seq.

III. The Fundamental Rights and Freedoms Guaranteed by the Basic Law

1. Introduction and Overview

The fundamental rights guaranteed and protected by the Basic Law are the central pillar of Germany's constitutional order. Their significance for the development of Germany after the war is a direct result of the despotic regime that preceded the free and democratic Germany of 1949 and that significance was reinforced when the communist dictatorship broke down in the former East-Germany in 1989 and the country was unified under the Basic Law in 1990.

The framers placed the catalogue of fundamental rights intentionally at the beginning of the Basic Law in Articles 1 to 19. The rights protected there include the general nomenclature of fundamental civil and political rights, similar to the ones found in international human rights treaties, ranging from the protection of life, limb and liberty in Article 2 sec. 2, religious freedom in Article 4, free speech and freedom of assembly and demonstration in Articles 5 and 8, freedom of association in Article 9 and the protection of property against expropriation and other forms of taking in Article 14 to more context oriented rights such as commercial and professional freedom in Article 12, school and education in Article 7, family and children in Article 6, equality in Article 3, asylum in Article 16 or the peculiar and subsidiary general freedom for everyone to do whatever one wants to do without infringing upon the rights of others in Article 2.1.

However, fundamental rights are not only found in Articles 1 to 19 of the Basic Law. Other more special fundamental guarantees are contained in the chapter on the judiciary and deal with the right to a lawful judge in Article 101.1⁴³, specific procedural guarantees in case of arrest and detention in Article 104 and the guarantee of a fair trial in Article 103.

The Basic Law did not take up the notion of social, economic or cultural rights as they can be found in the International Covenant of Economic, Social and Cultural Rights⁴⁴ or the European Social Charter.⁴⁵ The Basic Law therefore does not guarantee, for example, the right to work, the right to fair remuneration or the right to an adequate standard of living. The reason for this lies in the fact that such rights are very difficult to enforce. By and large political and civil rights spell out limitations for the exercise of governmental authority, i.e. they order the government not to act in a certain way. Where they go beyond this and require positive action, the actions required will be fairly easy to determine. The protection of social rights, on the other hand, is much more difficult and complicated because one often does not know what action is actually required to achieve the goal. What a government must do to guarantee a right to work is generally contested and part of the democratic discourse. Some think it might require more government intervention in the form of higher taxation or regulation, others believe the opposite to be the case. Rights to adequate standard of living require a certain distribution of resources but the right does not tell governments how to achieve that. Social rights are therefore always in

43 The right to a lawful judge ensures that the allocation of cases to courts, tribunals and judges must be such that the relevant dispositions are in place before the act that gives rise to the case are committed so that no subsequent interference, such as allocating certain criminal cases to "favourable" judges, is possible.

44 <http://www2.ohchr.org/english/law/cescr.htm>.

45 <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm>.

**60 Years German Basic Law:
The German Constitution and its Court**

danger of becoming or at least being regarded as programmatic expressions rather than enforceable hard law. Social justice is no less important than civil and political freedoms and the danger does not lie in the goals pursued by social rights. However, there is a risk that the relativity and complexity of social rights might be transferred into the field of political rights as well and that these rights will then be watered down as a result.

The Basic Law's fundamental rights chapter does, however, contain Article 15, which stipulates that "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." This norm is a reflection of the economic neutrality of the Basic Law. In 1949 it was by no means clear whether a social market economy would prove to be a successful formula or whether more socialistic or even communist ideas would prevail. As far as economic organization was concerned and in sharp contrast to the individual rights protection afforded, the Basic Law did not want to decide this issue one way or another.⁴⁶

Finally, there is the fundamental right of citizens to participate in general and free elections as guaranteed by Article 38 of the Basic Law for any citizen⁴⁷ who has attained the age of 18 years. This right has gained perhaps surprising significance because the Federal Constitutional Court has construed this right as not only guaranteeing an election process as such but also as guaranteeing that the entity to be elected, in this case the Federal Parliament (*Bundestag*), actually has retained sufficient powers to ensure that the elections are democratically meaningful. The Court has used this interpretation of Article 38 to set limits to the extent of legislative powers Germany can transfer to the European Union.⁴⁸

2. *Fundamental Rights: How do they work?*

Fundamental rights of the Basic Law are not absolute. Restrictions and limitations of rights are therefore possible and must be possible. In fact in the field of human rights there is only one guarantee to which no legal exception exists and that is the prohibition of torture.⁴⁹ However,

⁴⁶ See, for example, Becker, in: Stern/Becker (eds.), *Grundrechte-Kommentar*, 2010, Article 15 para 9 et seq.

⁴⁷ Only citizens are entitled to participate in federal and state elections, not foreigners regardless of how long they have lived in Germany and regardless of their specific legal status as residents. The Federal Constitutional Court has held that democratic legitimacy can only flow from elections if the right to vote is limited to citizens, BVerfGE 83, 60 (81). This does not apply to local, municipal elections where at least citizens of the European Union must be allowed to participate actively and passively and to elections for the European Parliament. See Article 20.2 (b) of the Treaty of Lisbon, see Official Journal C 83 (2010), text available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF>.

⁴⁸ BVerfG, 2 BvE 2/08 of 30.6.2009, http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html.

⁴⁹ See, for example, Article 3 of the European Convention on Human Rights (ECHR), <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>, Article 7 ICCPR, <http://www2.ohchr.org/english/law/ccpr.htm>, and Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 2.2 specifically states that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." Text available at: <http://www2.ohchr.org/english/law/cat.htm>.

Introduction to German Constitutional Law and the Doctrine of Basic Rights

the prohibition of torture does not exist as such in the Basic Law. It is part of Article 2.2, which protects the health and physical integrity of persons. Obviously conduct amounting to torture would fall under this provision and could never be justified but it is also evident that the health and physical integrity of a person extends beyond torturous conduct and would, for example, also come into play when a policeman uses the baton against an individual, or when firearms are used etc. and it is equally obvious that such actions must be legally possible under certain circumstances. How then can it be determined, by those responsible for such actions, by the courts exercising their adjudicatory function and, finally, by the Federal Constitutional Court⁵⁰ whether fundamental rights and guarantees of the Basic Law were breached? The principal dogmatic approach to this problem is the ‘scope-limitation, counter-limitation’ test.

a. The determination of the Scope of a Fundamental Right

The first step in this test is to determine under which right(s) or guarantee(s) the impugned activity might fall. Thus, the use of the baton by the police, will *prima facie* fall within the ambit of Article 2.2 because this norm addresses, *inter alia*, the health and physical integrity of persons. If the baton was used in the context of a demonstration or assembly, Article 8 might also be relevant as this provision protects the right to assemble and demonstrate. An issue might even arise under the free speech clause in Article 5 of the Basic Law. Having thus *prima facie* identified the relevant topics for the legal analysis of the conduct in question, the next step is to identify and define the exact scope of the rights and guarantees so identified. In other words what follows now is an act of statutory interpretation, i.e. of identifying the concrete meaning of the abstract language in which the various rights identified are formulated in the Basic Law. The result will be a definition of the “personal and subject-matter” scope of the right in question as it pertains to the case constellation at issue.

b. The Determination of an Infringement of a Fundamental Right

After this exercise a determination will have to be made as to whether the factual conduct at issue, for example the use of the baton against the plaintiff, infringed on one or more of the rights identified as potentially relevant. That will be the case if the action in question reduces the scope of the right as defined during the construction of the rights provision. Being hit by a police baton will necessarily result in pain and therefore affect the health of an individual and his or her physical integrity. Hence an infringement of the scope of Article 2.2 would have to be determined in this example. Whether one could also determine an infringement of the freedom to demonstrate will depend on the circumstances. If the victim had been a demonstrator the answer would be “yes”, if the victim had been somebody who happened to be at the venue only coincidentally the answer would have to be “no”.

50 And, as will be shown below, subsequently perhaps even by the European Court on Human Rights (ECtHR) in Strasbourg.

**60 Years German Basic Law:
The German Constitution and its Court**

c. Defining the Scope of Possible Limitations and Justifications for Infringements of Fundamental Rights

The next step after having determined scope and infringement is to look at the possible limitations of the infringed right. The question here is whether the limitation can be justified. Most rights and guarantees in the Basic Law contain specific language pertaining to possible limitations. The scope of those possible limitations to the rights in question must again be determined by statutory interpretation. Article 2.2 for example stipulates that the right to physical integrity may be interfered with pursuant to law. It follows from this language that the use of the baton against an individual must accordingly be authorized by statutory law. In fact the Federal Constitutional Court has consistently held that only parliament itself, and not the executive byway of delegated legislation, can and must legislate the necessary statutory law on the basis of which infringement of rights may be justified.

Other fundamental rights provisions contain more detailed or more restricted limitation clauses as for example the possible free speech restrictions in Article 5.2 illustrate. There are also rights provisions that contain no limitation language at all. The freedom of religion in Article 4.1 of the Basic Law is one such example. This however does not mean that these rights grant absolutely unrestricted liberty as this would be nonsensical. Nobody has the right to pray in the middle of a four lane highway during rush hour and if somebody claimed this under the freedom of religion clause the freedom could be restricted on account of what is commonly referred to as “inherent constitutional limitations”, i.e. limitations that themselves can be traced to legal provisions in the Basic Law.

d. Applying Counter-Limitations to the Scope of Justified Limitations of Fundamental Rights - The Principle of Proportionality

The next and last step in the exercise of determining the constitutionality of potential rights restrictions is concerned with limiting the scope of the potential rights restrictions (counter-limitations). The core, but not the only tool in this exercise, is the application of the principle of proportionality.⁵¹ The proportionality test itself consists of three subtests.

The first one is the *principle of utility or effectiveness* whereby it must be established that the exercise of governmental authority which led to the limitation of a fundamental right is actually able to achieve the goal the government set out to achieve. Whereas the government will have a margin of appreciation in the determination of what measures might work to achieve a certain objective, the exercise of this discretion is subject to judicial scrutiny.

51 The principle of proportionality is of immense significance in the human rights field but not only there. The proportionality test applies in many areas ranging from administrative law to international humanitarian law, i.e. the rules of war, where, for example, the test will be applied in assessing the legal suitability of potential military targets. For more information on this principle see, for example, E Ellis (ed.), *The Principle of Proportionality in the Laws of Europe*, 1999; D Susnjar, *Proportionality, Fundamental Rights and Balance of Powers*, 2010; I Henderson, *The Contemporary Law of Targeting - Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I*, 2009.

Introduction to German Constitutional Law and the Doctrine of Basic Rights

The second sub-test is the *principle of least impact*. It requires the government to select from the catalogue of potentially possible and effective measures the one that, while being equally effective, will have the least impact on the individual rights of those affected by the measure. If, for example, a demonstration threatens to cause violent clashes with counter demonstrators a prohibition of the demonstration could solve the problem. However, the authorities would have to consider, for example, prescribing a different venue to separate the parties before they could prohibit the demonstration, as this would have a lesser impact on the freedom of demonstration but still avoid the violence.

The third and final sub-test is the *principle of reasonableness or proportionality in the narrow sense* and it stipulates that some otherwise lawful means just cannot be pursued if the only means of achieving the otherwise lawful goal is obtainable only at too high a price. The police cannot stop the shoplifter by shooting him even if this is the only means to stop the theft.

The courts in general and the Federal Constitutional Court in particular will apply these tests in all cases in which an individual contests a limitation placed on his or her fundamental right.

3. *Functions of Fundamental Rights*

The fundamental rights of the Basic Law have several functions, an understanding of which will also shed some light on how the fundamental rights work.

a. The Traditional “Defence-Function” - Protecting Individual Autonomy

The traditional, and arguably still the most significant function of fundamental rights is the “defence-function”. Fundamental rights defend against the intrusion of governmental authority into the sphere of individual autonomy protected by them. In other words, fundamental rights create a protective wall around the individual to secure a space of individual liberty. That space is amorphous and its extent is determined on a case-by-case basis as shown above. The defence-function of fundamental rights reigns in governmental authority, this far but no further.

This has two major implications. First, if fundamental rights reign in the exercise of governmental authority then they are not applicable against other individuals. And indeed, the fundamental rights of the Basic Law are, in principle directed against public authority only and not against private individuals. An individual may invoke his or her right to free speech against the government but not against the neighbour. The government will have to tolerate a demonstration on public streets but the house-owner does not have to tolerate a demonstration on his or her front lawn.

The second implication following from the defence-function is that fundamental rights are minority rights. However, this is not about ethnic or religious or like-minorities. It is about any minority in the political decision making process. It is about those who have lost a political argument on an issue and it protects them against majority rule. In the so-called ‘war against terror’ the political majority of the day might favour security over individual rights. However, the proponents of individual rights will have to succumb to the majority only insofar as limitations of individual rights are legally possible. The majority cannot legally go beyond whatever the defined scope of personal autonomy is under the fundamental rights regime.

**60 Years German Basic Law:
The German Constitution and its Court**

Fundamental rights are a limitation of democratic majority rule. It is for this very reason that societies heavily based on concepts such as parliamentary sovereignty or where the concept of democracy is primarily understood as democratically legitimized majority rule, such as the United Kingdom, Australia and even the USA⁵², have some difficulties with the concept of fundamental rights protection and the role of a powerful court in this context. However, to limit the concept of democracy to majority rule falls short. The protection of the minorities of the day is part and parcel of democratic rule because the inherent limitation of governmental power as achieved by fundamental rights regimes is one important pillar of democratic legitimization, the electoral process and majority rule being the other. Both pillars are necessary to support the democratic system of government of the Basic Law.⁵³

b. The Objective Function

The objective function of fundamental rights addresses a consequence of the fact that fundamental rights of the Basic Law are primarily defensive rights against government intrusion. That being so does it mean that fundamental rights play no role whatsoever in private relationships? The answer to that more narrow question is “no” and the objective function is the vehicle to transport effects of fundamental rights protection into the sphere of private relationships. This is achieved by way of statutory interpretation. Private relationships are governed by the Civil Code, which contains provisions for contractual obligations and liabilities flowing, for example, from the law of tort or unjust enrichment. The relevant provisions in the Civil Code are framed in abstract legal terms and require legal interpretation as do all legal norms. The objective function of fundamental rights requires that fundamental rights implications are a constitutive part of that interpretative effort, i.e. that these private law norms, which provide the framework for the relationship if private individuals, must be interpreted in the light of fundamental rights and in conformity with them. The objective function of fundamental rights is, in other words, a vehicle for attributing indirect third party effect to fundamental rights.

The leading *Lüth* decision of the Constitutional Court⁵⁴ amply illustrates the workings of this objective function. Mr. Lüth had, in his capacity as a private citizen, publicly called for a boycott of a movie shown in German cinemas on account of the movie director’s past racist propaganda work for the Nazi regime. The production firm of the movie feared economic

52 The United Kingdom has no written constitution and hence no constitutional catalogue of fundamental rights. However, the European Convention on Human Rights has taken on a similar function in the UK after its incorporation into domestic law by the Human Rights Act 1998, http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1. Australia has a constitution but no catalogue of rights. The US has both and a Supreme Court which has asserted the rights of judicial review, which has led to repeated conflicts between the Court and commentators whenever the Supreme Court declared legislation null and void on account of a violation of fundamental rights. The abortion decision in *Roe v Wade* (410 U.S. 113 (1972)), <http://laws.findlaw.com/us/410/113.html>, is perhaps the best-known example for this conflict.

53 It is a different question whether that protection of the minority of the day necessarily requires a constitutional catalogue as in a bill of rights. That protection can also be afforded in other ways in a relatively sufficient manner. Australia is an example for that.

54 BVerfGE 7, 198 - translation of the decision in this book.

Introduction to German Constitutional Law and the Doctrine of Basic Rights

loss from this call to boycott the movie and sought and was granted an injunction on the basis of a norm in the Civil Code that prohibits the intentional and malicious infliction of economic loss on another individual. The term malicious, of course, requires interpretation and the Constitutional Court held that this interpretation would have to take into account the enormous significance of the free speech guarantee in Article 5.1 of the Basic Law. At issue was a controversy and so long as this controversy was conducted by voicing opinions and the power of persuasion, as opposed to, for example, the use of a dominant market position or other means of extortion, it was protected by the free speech guarantee and the respective private law provisions invoked in this case had to be interpreted restrictively to comply with the Basic Law.

c. The Duty to Protect

The third function of fundamental rights is the duty to protect. It means that fundamental rights do not only tell the government what not to do, they can also serve as a legal basis for an obligation of the government to act. The right to life is an illustrative example. The defensive function of that right limits governmental action that poses a risk to an individual's life. The duty to protect on the other hand requires governmental action to protect individuals against life threatening behaviour. Providing an appropriate legal order with criminal sanctions for the taking of life is one example. Whereas that might sound trivial as all legal orders will punish homicide and similar crimes it may well play a role when it comes to the negligent taking of life or even to the protection of unborn life. The decisions of the German Constitutional Court in the abortion cases are prime examples.⁵⁵ The Court stipulated that the duty to protect flowing from Article 2.2 of the Basic Law would bar the government from legalizing abortion and demand that some sort of protective system be put into place, for example counselling and support services that could persuade the mother to opt pro-life.

The duty to protect comes into play in trilateral constellations involving two colliding rights and the government as potential mediator. In abortion constellations it is usually the right of the mother to self-determination and the right of the unborn. The duty to protect defines the legal minimum of protection for the unborn that the government must undertake. The defensive function of the self-determination rights of the mother describes the legal maximum the government can engage in to protect the unborn. The space between the minimum and the maximum defines the margin of appreciation the government has in this balancing act.

The duty to protect is potentially problematic because fundamental freedoms become the legal basis for the restriction of freedoms. The protection of personality rights could, for example, lead to significant restrictions to free speech, the problem of delineating free speech from defamation has been controversial not only in Germany but in many jurisdictions. The German Constitutional Court has so far been successful in keeping a check on governmental duties to protect. The defensive function is and must be the prime function of fundamental rights.

55 BVerfGE 39, 1 and 88, 205, translations of the decisions in this book.

**60 Years German Basic Law:
The German Constitution and its Court**

d. Participatory Function and Entitlements

The main difference between traditional, liberal defence rights and social rights is the direct connection to resources that is inherent to social rights. The traditional defensive function of political rights is cost neutral. In fact insofar as they prohibit the government from taking certain actions, they might even save money. The prosecution of certain opinions demands resources, tolerating opinions costs nothing.

However, that distinction between social rights and traditional liberal rights does not always apply. There are some traditional rights, which require the allocation of resources. The right of access to court and fair trial require the availability of a functioning judicial system with a sufficient number of judges and judicial administrative staff. The prohibition of torture and inhuman treatment requires certain minimum standards for prisons and other institutions where people are confined in the care of the government.

Other rights have an indirect connection to resources. Property rights are relevant only for those who own property. The freedom of the press is, ignoring the possibility of leaflets, only relevant for those who have the capital to operate a newspaper and the freedom to broadcast electronically usually requires significant resources as well. Do the respective rights of the Basic Law create an obligation for the government to provide the respective resources?

As a matter of principle the rights protected by the Basic Law do not grant entitlements in the narrow sense. Nobody can demand from the government the money to run a newspaper. However, the Constitutional Court has construed the freedom to broadcast as including and guaranteeing the existence of a public broadcasting system which must be financed in such a way that it can fulfil its role as a guarantor of plurality in the electronic media sector.⁵⁶ It follows from the protection of human dignity, Article 1.1, in conjunction with the duty to protect the health of those living in Germany and in conjunction with the fundamental requirement of the Basic Law that Germany is a social welfare state that the existential minimum of food, clothing and housing must be provided.⁵⁷

The Court has also held that the *de facto* state monopoly on university education necessitates a corresponding equal participation right derived from Article 12 of the Basic Law for access to universities if the educational requirements are met and subject only to the available capacity.⁵⁸

However, direct or indirect entitlements remain an exception. The allocation of resources cannot be subjected to a rights' regime unless one is willing to risk the effectiveness of this regime. Experience shows that the protection of rights becomes very difficult if resources are required. Not only because the resources might not be available or the allocation of the resources to the specific cause might not find acceptance but also because any investment

56 BVerfGE 90, 107.

57 Cf. BVerfGE 91, 93 (115); 99, 216 (256 ff.).

58 BVerfGE 33, 303.

Introduction to German Constitutional Law and the Doctrine of Basic Rights

will take time to become effective making the violation of that right systemic. The danger is that rights become very relative concepts. It is for that reason that the Basic Law has remained very reluctant in construing the fundamental rights of the Basic Law as entitlement rights and has left the decisions over the allocation of financial resources to the democratic process.

4. *The Relationship between the German Basic Law and the European Systems for the Protection of Fundamental Rights*

a. Overview

Fundamental human rights protection in Germany is not merely a national affair but has increasingly become an international or even supranational issue. Germany is a signatory to the international treaties that make up the international 'bill of rights', most prominently the International Covenant on Civil and Political Rights (ICCPR) and the Optional Protocol to the ICCPR providing for an individual complaints procedure to the Human Rights Committee and thus turning the objective guarantees of the ICCPR into subjective rights pursuable by any individual.⁵⁹ However, the international embedding of fundamental rights protection in Europe in general and in Germany in particular reaches beyond the ICCPR, especially in significance.

b. The European Convention on Human Rights (ECHR)

This is particularly due to the fact of Germany's membership, together with 46 other European nations, in the European Convention of Human Rights (ECHR).⁶⁰ The ECHR was signed in 1950, came into force in 1953 and underwent a major reform in 1998 with the coming into force of the 11th Protocol.⁶¹ The major effect of this Protocol was to abolish the previous two-tier system of a Human Rights Commission with only *quasi*-judicial functions and a non-permanent Court with optional jurisdiction and to replace it with a permanent European Court of Human Rights (ECtHR) with mandatory jurisdiction. The ECtHR's sole task is to adjudicate and interpret the ECHR. Article 46 ECHR stipulates that decisions of the ECtHR are binding on the member states and their execution is supervised by the

59 Germany ratified the ICCPR on 17 December 1973 and the Optional Protocol on 25 August 1993, see <http://treaties.un.org/Pages/ParticipationStatus.aspx> under Chapter IV Human Rights.

60 <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

61 <http://conventions.coe.int/Treaty/en/Treaties/Html/155.htm>. The ECtHR is currently under extreme pressure from a burgeoning case-load that is threatening to suffocate its effectiveness. At the end of 2009 the ECtHR sat on 119,300 pending applications of which 44,400 will have to be dealt with by a full Chamber or even the Grand Chamber, and this notwithstanding the fact that the ECtHR managed to deliver 2394 judgments and decided 35461 applications in 2009, see <http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFiguresEN2010.pdf>. The 14th Protocol to the ECHR of 2004 is another reform attempt to help the ECtHR to deal with this overwhelming demand. The Protocol was finally ratified by Russia in February 2010 and will enter into force on 1 June 2010, <http://conventions.coe.int/Treaty/en/Treaties/Html/194.htm>. Further possibilities for remedies were recently discussed at a high-level conference in Interlaken, Switzerland on 18 and 19 February 2010. For the resulting 'Interlaken Declaration', See http://www.coe.int/t/dc/files/events/2010_interlaken_conf/default_EN.asp? and http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf.

**60 Years German Basic Law:
The German Constitution and its Court**

Committee of Ministers.⁶² The ECtHR may only deal with the matter after all domestic remedies have been exhausted and in the case of Germany that means that the German Federal Constitutional Court must have rendered a decision before the ECtHR can attend to the matter. By the end of 2009 the ECtHR had rendered judgment in 157 cases brought against Germany and found a violation of the ECHR in 99 of these cases⁶³ - despite the fact that all of these cases had already undergone the scrutiny of the domestic court system including the Federal Constitutional Court. This demonstrates the significance of this extra layer of international human rights protection in Germany and beyond.

c. The European Union

(1) General Principles of European Union Law

The coming into force of the new Lisbon Treaty on 1 December 2009⁶⁴ will not be without effect on human rights protection in Europe. The original foundation treaties of the European Communities and the European Union did not contain a catalogue of fundamental rights. This gap was subsequently overcome by the jurisprudence of the European Court of Justice (ECJ) in Luxembourg who developed fundamental rights under the concept of unwritten general principles of European Union law based on the fact that such rights are shared by all member states of the European Union in their domestic constitutional law and legal systems and that all member states of the European Union are also member states of the European Convention of Human Rights.⁶⁵ This concept of unwritten general principles of law was subsequently written into the founding treaties and will remain relevant under Article 6.3 of the Treaty on European Union as amended by the Treaty of Lisbon.

(2) Treaty of Lisbon and Charter of Fundamental Rights of the European Union

However, in addition to this the Treaty of Lisbon also provides that the Charter of Fundamental Rights of the European Union of 7 December 2000⁶⁶, which had then been adopted as non-binding law, will now have the “same value as the treaties” and will hence become part of the primary law of the European Union. This has given new impetus to the question of whom the European Union fundamental rights are addressed to and how their scope is to be delineated from domestic fundamental rights protection. Article 51 of the Charter stipulates that:

“[T]he provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.”

62 See Articles 13 et seq. of the Statute of the Council of Europe,
<http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm>.

63 See http://www.echr.coe.int/NR/rdonlyres/C2E5DFA6-B53C-42D2-8512-034BD3C889B0/0/FICHEPARPAYS_ENG_2010.pdf.

64 See supra n. 35.

65 European Court of Justice (ECJ), Case 29/69, 1969 ECR 419 - Stauder; Case 11/70, 1970 ECR 1125 - Internationale Handelsgesellschaft. For more information see European Parliament Factsheet on “Respect for Fundamental Rights in the EU - General development” at http://www.europarl.europa.eu/factsheets/2_1_1_en.htm.

66 <http://eur-lex.europa.eu/en/treaties/dat/32007X1214/htm/C2007303EN.01000101.htm>.

Introduction to German Constitutional Law and the Doctrine of Basic Rights

This clarifies that the European Union fundamental rights are not an overarching catalogue of rights guiding and superior to the domestic rights regimes but that the European Union rights are meant to limit the exercise of European Union authority and are meant to limit the Member States only insofar as they are, untechnically speaking, exercising European Union powers by implementing European Union law.

In addition, the Treaty of Lisbon finally added in Article 6.2 a power for the European Union to “accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms”. This opens up the possibility for the European Union to become a member of the European Convention on Human Rights. The Council of Europe on its side has created the same possibility in the 14th Protocol to the European Convention on Human Rights⁶⁷, which specifically provides for the European Union to become a member of the ECHR.⁶⁸ The European Union will, after this accession is completed, in the area of fundamental rights protection have assumed the same status as the member states of the European Convention of Human Rights.

(3) Fundamental Rights Protection and Supremacy of European Union Law in Germany

The relationship between European Union and Germany is somewhat more complicated. European Union law is supreme to the law of the member states. The supremacy of European Union law extends to domestic constitutional law as well. The European Court of Justice (ECJ) has consistently held that the member states of the European Union cannot invoke their domestic law, constitutional or otherwise, against legal norms of the European Union, i.e. against statutory provisions legislated at the European level in so-called regulations or directives or norms contained in decisions by relevant European authorities. Member states are therefore barred, from the perspective of the European Union, to render ineffective European Union law on account of a violation of their domestic fundamental rights. European Union law must measure up only to European Union fundamental rights and the ECHR but not to domestic fundamental rights. However, the German Constitutional Court has never fully accepted this approach. It has consistently held that the final responsibility for the protection of fundamental rights lies with itself. This potential jurisdictional conflict has never manifested itself because the German Constitutional Court has also consistently held that it will exercise this function in cooperation with the European Court of Justice and that, in practice, for the German Court to assume this role would require for a potential plaintiff to show that the European Court of Justice no longer adequately protects fundamental rights and that this would have to be demonstrated not just for the case in question but as a “general and evident” trend of continuous delinquency.⁶⁹

⁶⁷ See supra n. 62.

⁶⁸ Article 17 of the Protocol amends Article 59 ECHR by adding a new paragraph 2 stipulating that “The European Union may accede to this Convention.”

⁶⁹ See BVerfG, 2 BvR 2253/06 vom 27.1.2010, para. 19, http://www.bverfg.de/entscheidungen/rk20100127_2bvr225306.html with further references.

IV. The Interpretation of the Basic Law and the Role of the Federal Constitutional Court

The provisions of the Basic Law in general and the fundamental rights provision do not explain themselves. Like all norms, and perhaps even more so, they require interpretation, i.e. their meaning is to be construed to make it applicable to the specific case constellation or constitutional law question at issue. In the case of fundamental rights that applies, as explained above, to the construction of the scope of freedom, the construction of the possible limitations and the construction of the possible counter-limitations.

1. *Grammatical Interpretation*

The interpretation of the Basic law by and large follows the general rules of interpretation, which can be found in many jurisdictions.⁷⁰ The starting point for interpretation is the objective meaning of the words used, also referred to as *grammatical interpretation*. However, that usually does not yield the decisive result, which is why the legal profession is not made up of linguists.

2. *Systematic Interpretation*

The second and third steps beyond grammatical interpretation are often the decisive steps for elucidating the precise meaning of the abstract constitutional norm. The second step is referred to as *systematic interpretation* and requires that in order to determine the specific meaning of a (constitutional) norm it must be read with a view to its systematic context. This means looking for identical or similar terms in other provisions of the Basic Law in neighbouring sections, within the chapter and within the text as a whole.

3. *Teleological Interpretation*

The third step is referred to as *teleological interpretation*, which means interpreting a norm according to the object or purpose that the norm objectively appears to have. The attribute 'objective' denotes one of the major differences between the interpretation of the Basic Law and the interpretation of constitutional norms in other jurisdictions, for example in the USA or in Australia. The subjective will of the drafters of the constitution and, in the case of subsequent amendments, of the two Houses of Parliament plays a very small role in this exercise. The subjective will of the drafters will only be of relevance to confirm the result achieved by the other means of interpretation or to resolve any interpretative difficulties that remain after the application of the other means of interpretation.⁷¹

⁷⁰ For the Australian example see Geddes/Pearce, *Statutory Interpretation in Australia*, 6th ed. 2006.

⁷¹ See, for example, BVerfG, 2 BvR 1520/01 of 30.3.2004, paras 89 and 94 et seq., http://www.bverfg.de/entscheidungen/rs20040330_2bvr152001.html; see also Stern, in: Stern/Becker (eds.), *Grundrechte-Kommentar*, 2010, Einl. para 89 et seq.

Introduction to German Constitutional Law and the Doctrine of Basic Rights

4. “Living Constitution”

Another major difference in the approach to interpretation lies in the fact that the Federal Constitutional Court, and this is not disputed in the legal or political community, interprets the Basic Law as a “living Constitution” rather than as a static document.⁷² Hence, not only does the will of the drafters of the Constitution play little role in the determination of the actual meaning of the normative language, the meaning of the same language can change substantially over time.

The meaning of equality in Article 3 of the Basic Law illustrates this vividly. The principal obligation under the non-discrimination rule is to treat all things that are equal equally and to differentiate between all things that are not equal. The application of Article 3 therefore requires that comparison groups are formed and objective reasons are identified for treating the comparison groups differently. Children, for example, are different from adults and it is therefore not only possible to discriminate against children but actually mandated because children must be protected. Hence their access to employment is severely limited, and, depending on age, even prohibited. The type of work they can do is limited and their freedoms can be limited with regard to such things as going to the pub, drinking alcohol or watching certain movies. Women are also different from men in some respects. However, in both examples the perception of the scope of discrimination that can be constitutionally justified has dramatically changed over the last decades. Especially women are treated much “more equal” today as was the case 20, 30 or 40 years ago notwithstanding the fact that the principal non-discrimination provision in Article 3.1 of the Basic Law has not fundamentally changed. What has changed, however and fortunately, is the perception of the comparison groups; male and female, and the social evaluation of objective criteria that differentiate the sexes.⁷³

72 Without, however, constantly emphasizing that point in almost mantra-like fashion as the European Court of Human Rights does, who never forgets to mention - and rightly so - that the ECHR is a “living document, which must be interpreted in the light of present day conditions”, see, for example, EctHR, Appl. No. 13102/02, 2.3.2010, Kozak/Poland, s. 98; Appl. No. 25965/04, 7.1.2010, Rantsev/Cyprus and Russia, s. 277. The concept of a “living constitution” has given rise to a sustained and profound debate in the context of the US Constitution where the Supreme Court is divided by constructivist views in objection to such “judicial activism” and others who are more open to this approach. Currently Justices Antonin Scalia and Stephen Breyer are protagonists of this debate. See, <http://www.youtube.com/watch?v=VXeUFvhdVUM> and <http://www.youtube.com/watch?v=DRKgOjNPxIM>.

73 Perhaps the most radical change can be seen in the area of military service of women. Military service was actually prohibited by the Basic Law until non-discrimination requirements originating from the European Union required an amendment of the Constitution to allow for broad access of women to the armed forces. The traditional view that men and women are different, for example in terms of physical strength, is not any more an acceptable objective reason for banning women from undertaking a career in the military. See ECJ, Case C-285/98, 11.1.2000, Tanja Kreil/Germany, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>. At the same time, the discrimination of men insofar as only men are subject to compulsory military duty or an alternative civil service period can still be justified by disadvantages women as a group face in relation, for example, to education and career development, by the fact that only they can bear children.

**60 Years German Basic Law:
The German Constitution and its Court**

5. *Conflict of Norms*

Fundamental rights protection often involves conflict between two or more fundamental rights. One of the functions of fundamental rights as shown above is the duty of the state to protect the legal sphere of people within their jurisdiction. It follows that the exercise of a freedom, e.g. to demonstrate, can and will frequently collide with the rights of others, e.g. to move freely on the road or to have open access to their store. Sometimes this conflict can culminate in a life and death matter in one person. That is the case when the right to life, if extended to the unborn fetus as under Article 2.2 of the Basic Law, collides with the right of the mother to self-determination, privacy, health or even her own life. Such constellations are common and marked by the fact that they involve trilateral constellations rather than just the bilateral relationship between state and subject. The arrest of a person by the police is a purely bilateral issue between the government and the arrested person and subject to the defensive function of the respective fundamental right. When fundamental rights conflict there are always at least three parties involved: the government exercising state authority through the executive, legislative or judicial branch, the person asserting a right and the person asserting that the exercise of that right would unduly infringe on his or her own rights.

The balancing exercise required to solve such rights' conflicts falls to the courts and especially to the Federal Constitutional Court. One parameter used in this balancing act is the notion of "practical concordance". It means that in such situations the courts will strive for solutions that grant the greatest possible effect for all rights involved in the conflict.⁷⁴

The Constitutional Court takes a very flexible approach to constellations where more than one fundamental right might be involved. To identify the right against which state action is to be measured is important because rights differ in the scope of possible limitations. However, the Court's doctrine developed in the context of free speech (Article 5 Basic Law) of interpreting the scope of possible limitations of rights in the light of the significance of the right in question has led to a dogmatically lamentable but practically acceptable flexibility in this regard. One could not maintain the position, for example, that possible limitations of rights containing no limitation clause (e.g. Article 4 Basic Law) under the doctrine of constitutionally immanent limitations, are *per se* more difficult or more restricted in scope than limitations of rights which do contain limitation clauses.

The most important constellation in which the identification of the correct right has played a role has been in the context of free speech (Article 5.1) and freedom of the arts in Article 5.3 of the Basic Law. Whereas free speech can be restricted within the parameters of Article 5.2, albeit only with great care under the Constitutional Court's consistent doctrine of the fundamental significance of free speech, the freedom of the arts is one of those rights that contain no limitation clause and can therefore only be restricted to safeguard other constitutionally

74 The concept of "practical concordance" was developed by the constitutional scholar Konrad Hesse, see Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20. Aufl., Heidelberg 1999, para 317 et seq.

Introduction to German Constitutional Law and the Doctrine of Basic Rights

protected legal interest should there be a conflict. An example for such a conflict is the *Mephisto* case where the Court had to balance post-mortem personality rights of an actor who had ruthlessly pursued his career during the Nazi regime, which, after his death, became the blueprint for a highly critical novel by the author Klaus Mann. The surviving son of the depicted actor sought to stop the sale of the book and was successful on account of a violation of the personality rights of his deceased father.⁷⁵

V. The Procedural Context for Fundamental Rights Protection under the Basic Law

1. Overview

The protection of fundamental rights in Germany under the Basic Law is not only a task of the Federal Constitutional Court or the judiciary for that matter. Article 1.3 makes it abundantly clear that the fundamental rights of the Basic Law “bind the legislature, the executive and the judiciary as directly applicable law”. Hence all state authority is under an obligation to observe the freedoms and guarantees afforded by the Basic Law.

The role of the judiciary, however, is somewhat more pronounced as it falls mainly to the judiciary to exercise oversight and control the behaviour of the other two branches and most notably of the executive branch.⁷⁶ This task falls to all courts but by nature the general and special administrative courts will be at the forefront of this and the Federal Constitutional Court is the main player in this area.

2. Procedural Framework - The Jurisdiction of the Bundesverfassungsgericht

The jurisdiction of the *BVerfG* is enumerated in the *Grundgesetz* (Article 93 GG) and, with more detail, in the Federal Constitutional Court Act.⁷⁷ There are a number of different procedures with varying admissibility requirements, especially with regard to standing, that can be brought to the *BVerfG*.⁷⁸

3. Judicial Review

The *BVerfG* has the full power of judicial review. This means that the court has the power to quash any parliamentary statute on account of its unconstitutionality. Judicial review proceedings can be brought to the *BVerfG* as principal or as incidental judicial review. Principal judicial review comes as *abstract or concrete judicial review*.⁷⁹

75 BVerfG 30 (173) - *Mephisto* (German text at <http://www.servat.unibe.ch/dfr/bv030173.html>).

76 Mainly but again not exclusively; Parliament, for example, can and must exercise that oversight by acting to amend legislation if it finds that the executive has gone overboard.

77 *Bundesverfassungsgerichtsgesetz* (BVerfGG); see <http://www.gesetze-im-internet.de/bverfgg/BJNR002430951.html>; an English translation, albeit not current but still useful, is available at <http://www.iuscomp.org/gla/statutes/BVerfGG.htm>.

78 Altogether there are 19 different procedures, which can be brought to the Court. All are enumerated in s. 13 BVerfGG.

79 Article 93 Abs. 1 No. 2 GG, ss. 13 No. 6, 76-79 BVerfGG.

**60 Years German Basic Law:
The German Constitution and its Court**

The abstractness is a result of the fact that there is not a concrete case or dispute at issue in which the constitutionality of a norm arises as an incidental question. Rather, the constitutionality of a statute respectively of one or more norms within a statute is the sole judicial matter brought to the court.⁸⁰ Such abstract judicial review proceedings can only be brought by the federal government, a state government or by joint application of one fourth of the deputies of the first chamber of parliament (*Bundestag*).⁸¹ If the constitutionality of a norm is challenged on the grounds of the federation having the power to legislate, the proceeding can also be brought by the second chamber of parliament, the *Bundesrat* and by a state parliament.⁸²

The second possibility for judicial review is referred to as a *concrete judicial review* of the constitutionality of a norm.⁸³ The concreteness arises from the fact that in these proceedings the constitutionality of a norm arises as the decisive question in regular court proceedings. However, regular courts do not possess the power to declare an act of Parliament unconstitutional.⁸⁴ If a regular court comes to the conclusion that such an unconstitutionality exists and the decision of the concrete case is contingent on this unconstitutionality, the court must interrupt proceedings, prepare an opinion outlining in detail why it is convinced of the unconstitutionality of the norm and submit this opinion to the *BVerfG* who will then review the constitutionality of the norm in question. After that has happened, the regular court will then decide its case on the basis of the decision rendered by the *BVerfG*.

4. *Constitutional Complaints Procedure*

Arguably, the most important procedure the *BVerfG* has to deal with is the constitutional complaints procedure (*Verfassungsbeschwerde*).⁸⁵ The constitutional complaints procedure is by far the most numerous type of procedure brought before the court. In the year 2009 alone, 6308 constitutional complaints were brought to the court.⁸⁶ Since 1951 more than 175,000 constitutional complaints have been lodged with the Court. The success rate for constitutional complaints is very small. In 2009, the *BVerfG* rendered a decision in 5911 constitutional complaints. Only 111 were successful (1.88%). In the past decade, the success rate for constitutional complaints has always been below 3%.

80 The *BVerfG*'s power to judicial review is not limited to these two procedures of "principal norm control". The constitutional complaints procedure or any other procedure may lead to incidental judicial review of parliamentary laws.

81 S. 76 of the Federal Constitutional Court Act, see supra note 78. The English version cited there is no longer correct with respect to the necessary number of deputies for an application.

82 See s. 76.2 *BVerfGG*.

83 Article 100.1 GG, ss. 13 No. 11, 80-82 *BVerfGG*.

84 The judicial review power of regular courts is therefore limited to "pre-constitutional" norms, i.e. norms passed before the *Grundgesetz* became effective and the *Bundestag* began to operate and to non-parliamentary executive legislation such as regulations.

85 Article 93.1, No. 4a Basic Law, ss. 13 No. 8a, 90-95 *BVerfGG*.

86 Statistical data cited in this paragraph pertains to the year 2009 and is taken from the "Statistik für das Geschäftsjahr 2009", available on the Court's website at: http://www.bverfg.de/organisation/statistik_2009.html.

Introduction to German Constitutional Law and the Doctrine of Basic Rights

Constitutional complaints can be brought to the *BVerfG* only after regular judicial remedies have been exhausted.⁸⁷ That means that the *BVerfG* will only deal with constitutional complaints after the ‘regular’ courts, through all available appeals, have rendered a decision in the matter. The filter effect of this so-called subsidiarity of the Constitutional Complaint procedure partly explains the low success rate. There is also no cost attached to bringing such a case to the *BVerfG* and hence parties have little to lose and risk only a relatively modest frivolous procedure fee in a worst-case scenario. Representation by a lawyer is only required if a hearing is necessary, which can be waived by the parties.

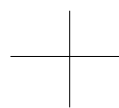
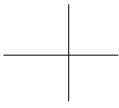
VI. Challenges and Outlook

The Basic Law of the Federal Republic of Germany has undoubtedly been a major success story. It has guided the Republic on its difficult path from tyranny into a modern democratic state. It has weathered any and all storms along the way, from the NATO and rearmament debates in the early 1950’s, through the students unrest and the inclusion of state of emergency provisions into the Basic Law in the 1960’s, from the attempts of the terrorists of the Red Army Fraction to specifically strike at its heart in the 1970’s and later to the stationing of nuclear missiles in the 1980’s. And when German reunification became reality and the reason for the provisional name “Basic Law” became history, the vast majority of Germans did not want to engage in the adoption of a new constitution as Article 146 had envisaged for just this case preferring rather to stick with the Basic Law that had served the Federal Republic so well.

However, no linguistic text, however carefully drafted, can by itself determine the shape of a society. It requires functioning institutions and the people in these institutions have to administer and implement the constitutional text in the light of the spirit of the text, on the basis of a general and profound conviction of individual liberty and freedom. It is an interdependent trilateral coalition of constitutional text, functioning institutions and responsible people, which together shaped and shape the German state and society. The institutions and the people need the scaffolding of the Basic Law as much as the Basic Law needs the people to be dedicated to its principal ideas of freedom, tolerance and responsibility.

Liberty, freedom, tolerance are never achieved. They have to be actively defended in an ongoing dynamic process. The threat posed by global terror, whatever its causes might be, creates constant pressure on any society based on ideas of liberty and tolerance. Social and demographic change, perceived threats to identity, economic and social pressures, loss of perspective and opportunity are also constant challenges. The future success of the Basic Law will depend on how the trilateral coalition of constitutional text and scaffolding, institutional efficacy and a broad consensus based on liberty and tolerance will deal with these challenges.

87 S. 90.2 BVerfGG.



SELECTED FUNDAMENTAL DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT

I. Human Dignity - Article 1 of the Basic Law

a) *Life Imprisonment, BVerfGE 45, 187*

Explanatory Annotation

Article 102 of the Basic Law prohibits the death penalty absolutely and with no exception in times of peace or war. The German Criminal Code's¹ most severe sanction is imprisonment for life. This sanction is prescribed for the most heinous of crimes reaching from qualified forms of homicide (e.g. "murder" as defined in ss. 211, 212, and other crimes causing the death of victims, see ss. 176b, 178, 239a, 251, 306c, 307, 308, 309, 316a, 316c Criminal Code), to preparation of a war of aggression (s. 80), and qualified forms of treason (ss. 81, 94, 100). It is also prescribed as a sanction for certain international crimes such as genocide, crimes against humanity, and certain war crimes under the Code of Crimes Against International Law introduced in 2002.²

Life imprisonment, as the term suggests, could mean imprisonment until death. That raises two issues in the context of human dignity. The first one is connected to the understanding of human dignity itself. The understanding of human dignity as the core of a number of specialized and specified rights deriving from it in essence means that all of the rights guaranteed by the Basic Law have a dignity core. One of these rights is the freedom of movement in Article 2.2. That right is obviously severely limited if one is sentenced to a prison term. However, if one is sentenced to imprisonment for life, and if that were indeed to mean imprisonment until death, the right of freedom of movement would in fact be reduced to naught. This is incompatible with the notion of Article 1.1 of the Basic Law that every human being, including heinous criminals, partake in the protection of human dignity, that this dignity must be protected and that human dignity cannot be reduced to naught.

The Constitutional Court therefore stipulated in this decision that imprisonment for life cannot be construed as meaning imprisonment until death. Every human being must retain the possibility of regaining his or her freedom and this "freedom perspective" must be more than just the vague hope for clemency or an executive pardon at some time in the future. In practice

1 German version at <http://www.gesetze-im-internet.de/stgb/BJNR001270871.html>; English translation available at http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

2 German version at <http://www.gesetze-im-internet.de/vstgb/BJNR225410002.html>; English translation available from <http://www.iuscomp.org/gla/statutes/statutes.htm> (<http://www.iuscomp.org/gla/statutes/VoeStGB.pdf>).

**60 Years German Basic Law:
The German Constitution and its Court**

this means that after 15 years of imprisonment, prisoners must either be released on probation (ss. 57a and 57b Criminal Code) or review processes must be in place that guarantee a periodic review of the prisoner's status and his potential for being released on probation.

The second issue raised by the imprisonment for life case if construed as imprisonment until death, has to do with Article 19.2 of the Basic Law which states that “[i]n no case may the essence of a basic right be affected”. Article 19.2 requires that whereas certain limitations of rights can be justified, some rest of the right must always remain and a right cannot be “limited away” in totality. Construing life imprisonment as imprisonment until death would totally eliminate the right to freedom. The connection of Article 19.2 to the dignity core of all rights is evident.

There is one case where this “dignity core” approach is more difficult to establish. There are undoubtedly instances in which the police can use deadly force, e.g. in hostage-taking constellations if killing the hostage-taker appears to be the only way to save the hostages. One could argue that this necessarily takes away the hostage-taker's right of life and nothing remains of this right. From a dignity perspective, however, it is important to note that the actor in these situations will always have some control over the situation. A hostage-taker, for example, can give up and release the hostages. It is up to him or her to stop and withdraw from the criminal act. The hostage taker is a main actor, a subject of the unfolding events and not just a mere object of government action and hence his dignity is not affected. However, from the perspective of the right to life and Article 19.2 things are more complicated and one will either have to construe this as an exception to the “untouchable core” principle or one will have to construe the right beyond just its individual component and argue that the killing affects only one person whereas the right of life of all the others remains unaffected.

Translation of the Life Imprisonment Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 45, 187*

Headnotes:

1. Life imprisonment for murder (s. 211 of the Criminal Code) is, in compliance with the following headnotes, compatible with the Basic Law.
2. As according to the status quo of scientific findings, it cannot be proven that the execution of the lifelong imprisonment is indispensably resulting in irreparable damages of a person's psychological or physical health and therefore establishing an infringement of human dignity (Article 1.1 of the Basic Law). This is if life imprisonment is executed in compliance with the penal law and considering the present practice of granting pardons.
3. A humane execution of the life imprisonment can only be assured if the sentenced criminal has a principally attainable option to regain freedom at a later point in time. The possibility of being granted a pardon is not sufficient; rather, the principle of the rule of law demands a statutory provision, determining the requirements for the suspension of an execution of life imprisonment and the applicable procedure.

* Translation by Miriam Söhne; © Konrad-Adenauer-Stiftung.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

4. It is not contrary to the Basic Law if the ‘wantonly cruel’ killing of a human being and the killing of a human being, to conceal another crime’ are qualified as murder according to s. 211.2 of the Criminal Code. But this assumption requires the provision to be subject to a restrictive interpretation, in compliance with the principle of proportionality.

Order of the First Senate of 21 June 1977 - 1 BvL 14/76 -

Facts:

This case has its origin as a District Court case in the town of Verden. The defendant Detlev R. was a policeman and drug dealer. One of his customers, the substance-abuser Guenter L., blackmailed the defendant and demanded free drugs. Detlev R. pretended to go along and scheduled a visit at Guenter L.’s house. The defendant actually provided Guenter L. with the demanded drugs, but while the latter was busy preparing an injection, Detlev R. fatally shot him in the head three times at close range.

The case is before the Federal Constitutional Court due to a referral from the Verden District Court. The reason for the deferral was that the Verden court deemed the murder and the manslaughter statutes, ss. 211 and 212, respectively, of the Criminal Code in the revised version of 1969, incompatible with the human dignity clause of Article 1.1 of the Basic Law. The murder and the manslaughter statute both provide for life imprisonment in extreme cases—such as homicide to satisfy sexual urges, homicide as a result of greed, homicide to conceal another crime, extreme homicides in general, et cetera. The Verden court argued in detail that life imprisonment can be shown to destroy human beings within about twenty years. The District Court outlined how such long prison terms turn people into spiritual and physical wrecks. It concluded that the permanent exclusion of the criminal from society will destroy him psychologically and therefore the legislator violated its duty to respect human dignity as commanded by Article 1.1 of the Basic Law when it passed ss. 211 and 212 of the Criminal Code. The question was whether statutes which allow for life imprisonment in certain extreme cases of homicide are compatible with Article 1.1 of the Basic Law which commands that the state has the duty to respect and protect human dignity.

Extract from the Grounds:

C. I.

A sentence of life imprisonment represents an extraordinary severe infringement of a person’s basic rights. In the catalogue of penalties, this punishment is the most invasive of the inviolable right to personal freedom under Article 2.2 of the Basic Law.

...

In implementing this penalty, the state not only limits the basic right guaranteed by article 2.2 of the Basic Law but it also implicates numerous other rights guaranteed by the Basic Law, depending on the individual case. The constitutional matter in question is therefore of considerable gravity and importance.

**60 Years German Basic Law:
The German Constitution and its Court**

Indeed, the right of personal freedom under Article 2.2 of the Basic Law may be limited by a statutory act of Parliament. Parliament's freedom to enact legislation, however, is limited by the constitution in numerous respects.

In exercising its powers the legislature must take account of both the inviolability of human dignity (Article 1.1 of the Basic Law) which is the highest value in the constitutional order, as well as other constitutional principles, especially the principle of equality (Article 3.1 of the Basic Law), the rule of law, and the social state (Article 20.1 of the Basic Law).

Since the freedom of the individual is already such a highly important object of legal protection that it may only be limited on truly compelling grounds (BVerfGE 22, 180 [219]), any lifelong deprivation requires special scrutiny by the criterion of proportionality.

...

II.

1. Respect and protection of human dignity are among the constitutional principles of the Basic Law. The free human personality and human dignity represent the highest legal values within the constitutional order (see BVerfGE 6, 32 [41]; 27, 1 [6]; 30, 173 [193]; 32, 98 [108]). The state in all its forms has the duty to respect and to protect the dignity of human beings.

This is based on the conception of man as a spiritual-moral being endowed to determine and develop himself. This freedom, within the meaning of the Basic Law, is not one of an isolated and self-regarding individual, but rather it is the freedom of an individual that is related to the community and bound by it (see BVerfGE 33, 303 [334]). Due to the fact that the individual is bound by the community, the freedom cannot be in principle unlimited. The individual must allow those limitations of his freedom to act that the legislator deems bearable and necessary, in particular factual circumstances for the nourishment and support of the communal living with each other; however, the autonomy of the individual must be protected (see BVerfGE 30, 1 [20] - "Eavesdropping"). This means, also, that within the community each individual must be recognized, as a matter of principle, as a member with equal rights and a value of his own. The sentence "the human being must always remain the end of itself" has unlimited validity in all areas of the law; for the dignity of man as a person, which can never be taken away consists particularly therein, that he remains recognized as a person who bears responsibility for himself.

In the area of criminal law in which the highest demands to the maintenance of justice are posed, Article 1.1 of the Basic Law determines the understanding of the nature of penal sanctions and the relation between guilt and atonement. The fundamental principle *nulla poena sine culpa* has the rank of a constitutional norm (BVerfGE 20, 323 [331]). Every penal sanction must bear a just relation to the severity of the offence and the guilt of the offender (BVerfGE 6, 389 [439]; 9, 167 [169]; 20, 323 [331]; 25, 269 [285 seq.]). The command to respect human dignity means in particular that cruel, inhuman and degrading punishments are not permitted (BVerfGE 1, 332 [348]; 6, 389 [439]). The offender may not be turned into a mere object of the state's fight against crime under violation of his constitutionally protected right to social worth and respect (BVerfGE 28, 389 [391]). The fundamental prerequisites of individual and social

**Selected Fundamental Decisions of
the Federal Constitutional Court**

existence of men must be preserved. From Article 1.1 of the Basic Law, in conjunction with the social state principle, one can, and this is particularly true in the execution of criminal punishments, derive the duty of the state to allow everyone at least that minimum level of existence at which human dignity is conceived. It would be inconsistent with human dignity perceived in this way if the state were to claim the right to forcefully strip a human of his freedom without the person having at least the possibility to ever regain freedom.

In the course of the discussion one must never lose sight of this principle: The dignity of the human being is something indispensable. The recognition of what is necessary to comply with the command to respect human dignity is, however, inseparable from the historical development. The history of criminal law clearly shows that most cruel punishments were always replaced by milder punishments. The progress, away from more raw towards more humane, away from more simple towards more differentiated forms of punishment, has continued, and the path future progress will take, becomes visible. The judgment on what is necessary for the maintenance of human dignity can therefore only rest on present understanding and claim no right to timeless validity.

2. If these standards are used in assessing nature and effect of life imprisonment, one reaches the conclusion that no violation of Article 1.1 of the Basic Law is before the court.

...

c) With such a factual background, the constitutional review must exercise restraint (BVerfGE 37, 104 [118]; 43, 291 [347]). It is true that the Federal Constitutional Court has the duty to protect the basic rights against infringements from the legislator. Therefore, the court is in its review not bound by the legal understanding of the legislator. However, if assessments and actual judgments by the legislator are of importance for the constitutional review, then the court may, as a matter of principle, only overrule those which are possible to disprove. It seems apprehensible, however, that, even in cases where serious interferences with basic rights are under review, uncertainties in the evaluation of facts are to be resolved to the burden of the holder of the basic right. When the Federal Constitutional Court nevertheless denied finding a violation of the inviolability of the dignity of man as guaranteed by Article 1.1 of the Basic Law, that decision was mainly due to the following reasons:

aa) Life imprisonment finds its constitutionally necessary complement in a sensible execution of treatment. Penal institutions are obliged, even in the cases of life imprisonment, to promote the rehabilitation of the inmates, to maintain their ability and willingness to function as human beings and to offset damaging consequences caused by the loss of freedom and thereby especially preventing them from all deforming alterations of personality. These obligations for the execution of the penal sanctions are based on the Constitution. They can be derived from the inviolability of the dignity of man as guaranteed by Article 1.1 of the Basic Law. If these obligations are adequately complied with by the penal institutions, then those institutions substantially contribute to counter, for instance, the threat of changing personalities of inmates.

**60 Years German Basic Law:
The German Constitution and its Court**

As of today, the execution of criminal penalties in the Federal Republic of Germany has already been more than a mere execution to incapacitate. Rather, the authorities have attempted to achieve an execution with treatment aimed at the reintegration of the offenders into society. This is consistent with former decisions by the Federal Constitutional Court on issues of the execution of criminal penalties. The court on several occasions has maintained that rehabilitation is constitutionally required in any community that puts human dignity at its centre and that it is committed to the principle of social justice. The prisoner's interest in reintegration into society flows from Article 1.1 of the Basic Law in conjunction with Article 2.1 of the Basic Law. The condemned criminal must be given the chance to re-enter society after having atoned for his crime (BVerfGE 35, 202 [235 seq.] - Lebach; 36, 174 [188]). The state is obliged within the realm of the possible to take all legal measures that are useful and necessary to achieve this goal.

If one assumes that even the criminal sentenced to life imprisonment must principally be granted a possibility to regain his freedom, then he must also have a right to be prepared to re-enter the society, even if he will only after a long period of atonement for his crime have the possibility to be obliged to handle a life in freedom (BVerfGE 40, 276 [284]). Even in such cases, the execution of the penalty can establish the prerequisites for a later release and ease the convict's reintegration into society.

...

- bb) Empirical data shows that the full serving of a life imprisonment sentence is a rare exception. The criminals sentenced to life imprisonment, except in a few cases in which the predictions of social reintegration are negative and for reasons of public safety a continued execution of the sentence is necessary, are most often being released on parole. The probability of an occurrence of serious alterations of inmates' personalities is significantly limited by this practice. A summary study of the parole administration in the states shows, that over a period of thirty years, of the 702 inmates with lifetime sentences, who were released, very few (48) were released before 10 years and also very few were released after the extreme length of up to thirty years (27). The vast majority of parole releases happens between the 15th and the 25th year of the sentence.

...

III.

...

4. a) The assessment of the constitutionality of life imprisonment especially with references to Article 1.1 of the Basic Law and the principle of the rule of law (Rechtsstaatsprinzip) shows that a humane execution of life imprisonment is possible only when the prisoner is given a concrete and realistically attainable chance to regain freedom at a later point in time; the state strikes at the very core of human dignity if it treats the prisoner without regard to the development of his personality and strips

**Selected Fundamental Decisions of
the Federal Constitutional Court**

him of any hope of regaining his freedom. In order to assure the perspective to regain freedom at some point in the future, which is the prerequisite for rendering life imprisonment bearable according to the court's understanding of human dignity, in a manner which meets constitutional requirements, the current legal provisions relating to the granting of pardons are not sufficient.

...

- b) A basically new trend became evident in the Ministry of Justice's 1974 draft of the fifteenth amendment to the Criminal Code. This draft provides that the execution of the penal sanction of life imprisonment can be suspended under parole with the consent of the inmate after an adequate part of the sentence has passed - the draft proposes 12 to 15 years - and one can justify to test whether the convict will cease to commit crimes. A review board shall then decide on the prisoner's release. This decision shall apparently be subject to the approval of a superior appellate court. The preface to the draft states that under certain conditions it should still be possible to enforce life imprisonment. Life imprisonment is the most invasive punishment in the current catalogue of penalties and should still be imposed, if necessary to protect the common good. As long as it is necessary to protect the common good, the state should not only impose such sentences but also carry them out. However, experience shows that the execution of life imprisonment to its full term is not always necessary to protect the common good. With regard to murder, the crime for which a sentence of life imprisonment is most often imposed, there are a significant number of offenders who in all probability will not repeat that crime. In these cases, where a positive social prognosis can be set up, life imprisonment can hardly be justified. Moreover, the finding that the long, continuous lack of freedom is an extraordinary physical and psychological burden that could result in a substantial detriment to the prisoner's personality provides a good reason for introducing a possibility of release. Additionally, a sentence of life imprisonment cannot be enforced humanely if from the outset the prisoner is denied any and every possibility of returning to freedom. Indeed, it has hardly been the rule up to now to require the prisoner to serve out his life sentence. Yet, an individual and case-by-case decision on whether a prisoner can be granted parole is not a satisfactory solution. Leading state officials rightly noted in their resolution of March 16, 1972 that it cannot be a satisfactory solution to correct the law in force by implementing a uniform practice of granting pardons.

...

IV.

The legislature does not infringe the constitutional requirement of sensible and appropriate punishment if it decides to impose life imprisonment for most offensive acts of killing (BVerfGE 28, 386 [391]).

...

**60 Years German Basic Law:
The German Constitution and its Court**

- c) The imposition of a life sentence does not contradict the constitutionally-based concept of rehabilitation, given the practice of granting pardons and current legislation concerning the suspension of punishments. The murderer sentenced to life usually does have a chance to be released after serving a certain period of time.

...

But for the criminal who remains a threat to society, the goal of rehabilitation may never be fulfilled. It is the particular personal circumstances of the criminal which may rule out successful rehabilitation rather than the sentence of life imprisonment itself.

...

V.

Article 1.1 and Article 2.1 together with the principle of the rule of law require that the elements of crime and its consequences must be harmonised in a reasonable way, in compliance with the idea of justice (see BVerfGE 20, 323 [331]; 25, 269 [286]; 27, 18 [29]). Therefore, the threatened punishment must be tailored in due consideration of the severity of the crime and the culpability of the offender.

...

In this context especially, the question arises whether the principle of proportionality may require a penalty other than life imprisonment for “murders of wanton cruelty” or for cases of murder “to conceal another crime”. The issue is particularly relevant here because, with the exception of murder (s. 211 of the Criminal Code) and genocide (s. 220a.1 no. 1 of the Criminal Code), the legislature usually granted a range of punishment to the applicable court. Within this range it may ascertain the extent of punishment in a concrete case, according to the criteria concerning the award of punishment, named in s. 46 of the Criminal Code.

...

Under specific circumstances, the application of s. 211 of the Criminal Code might indeed result in an undue burden to the offender. But the senate is of the opinion that this is not the case as far as the killing under consideration is concerned. However, the criterion of an undue burden might still apply to cases where the offence was not specifically condemnable.

...

**Selected Fundamental Decisions of
the Federal Constitutional Court**

b) *Aviation Security Act, BVerfGE 115, 118*

Explanatory Annotation

The decision concerning the Aviation Security Act is one of several dealing with legislative efforts concentrating on security in the aftermath of the 9/11-attacks in New York and Washington, D.C. in 2001. Under the Basic Law any and all executive action requires a statutory legal basis if and insofar as such action has the potential to infringe upon a person's rights as guaranteed by the Basic Law. However, there was no such statutory authority to shoot down an aircraft if that was the only way to stop this aircraft from being used as a weapon against structures on the ground thus potentially threatening the lives of many. The new Aviation Security Act³ intended to fill this perceived gap but was immediately challenged in constitutional complaint proceedings before the Constitutional Court. The Court struck down the statute on two main grounds.

First, the Court saw no constitutional authority for the use of the armed forces within the territory of the Republic. The use of the armed forces, i.e. the military, is tightly regulated by the Basic Law and restricted to the defence of the Republic from armed attacks and to extraterritorial military activities as part of collective self-defence organizations such as NATO or the United Nations. Domestic deployments and missions are only possible under Article 35.2 and 35.3 of the Basic Law to assist state police forces in their response to "grave accidents" and "natural disasters". The Court limited this assistance to measures the police forces could take themselves and the shooting down of an aircraft is not one of those measures.

Second, and despite the fact that the Act was already unconstitutional for lack of constitutional authority, the Court also addressed the fundamental rights aspect. The shooting down of a passenger aircraft with "innocent" passengers on board is obviously relevant under the right to life and human dignity guarantees of Articles 1.1 and 2.2 of the Basic Law. The shooting down of a passenger aircraft would inherently reduce the innocent passengers on board to mere objects of this decision, devoid of any and all rights, procedural or otherwise. The orders to shoot down would be tantamount to the order to sacrifice their lives for the protection of other lives. It would inherently mean that state authority values some lives, those on the ground, higher than those in the plane. The Court was not persuaded by and regarded as a purely fictional construct the argument that those who board a passenger aircraft (after 9/11) are familiar with this risk and have implicitly consented to be shot down. The Court also dismissed the argument that the airplane passengers are dead anyway because if not shot down they will almost certainly die when crashed into the target. In a human dignity context the fallacy of this argument is evident as it would require state authority to make a judgment on the value of life based on an estimate of the remaining life span and these decisions would have to be reached within a very small time span and under inherent insecurity of the precise facts.

It is only consequent that these considerations could not apply to an airplane solely occupied by terrorists. In this case the individuals on board are not merely helpless pawns but subjects controlling the unfolding events.

3 Luftsicherheitsgesetz, BGBl I, p. 78 (2003).

60 Years German Basic Law:
The German Constitution and its Court

Translation of the Aviation Security Act Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 115, 118*

Headnotes:

1. Article 35.2 sentence 2 and 35.3 sentence 1 of the Basic Law (Grundgesetz - GG) directly grants the Federation the right to issue regulations that provide the details concerning the deployment of the armed forces for the control of natural disasters and in the case of especially grave accidents in accordance with these provisions and concerning the cooperation with the Länder (states) affected. The concept of an “especially grave accident” within the meaning of Article 35.2, sentence 2 of the Basic Law also comprises events in which a disaster can be expected to happen with near certainty.
2. Article 35.2, sentence 2 and 35.3, sentence 1 of the Basic Law does not permit the Federation to order missions of the armed forces with specifically military weapons for the control of natural disasters and in the case of especially grave accidents.
3. The armed forces’ authorisation pursuant to s. 14.3 of the Aviation Security Act (Luftsicherheitsgesetz - LuftSiG) to shoot down by the direct use of armed force an aircraft that is intended to be used against human lives is incompatible with the right to life under Article 2.2 sentence 1 of the Basic Law in conjunction with the guarantee of human dignity under Article 1.1 of the Basic Law to the extent that it affects persons on board the aircraft who are not participants in the crime.

Judgment of the First Senate of 15 February 2006 on the basis of the oral hearing of 9 November 2005 - 1 BvR 357/05 -

Facts:

The constitutional complaint challenges the armed forces’ authorisation by the Aviation Security Act to shoot down, by the direct use of armed force, aircraft that are intended to be used as weapons in crimes against human lives.

The incidents on 11 September 2001 and 5 January 2003 caused a large number of measures aimed at preventing unlawful interference with civil aviation, at improving the security of civil aviation as a whole and at protecting it, in doing so, also from dangers that are imminent where aircraft are taken command of by people who want to abuse them for objectives that are unrelated to air traffic.

On 16 December 2002, the European Parliament and the Council of the European Union adopted Regulation (EC) No. 2320/2002 - amended by Regulation (EC) No. 849/2004 of 29 April 2004 (Official Journal of the European Communities (OJ) L 158 of 30 April 2004, p. 1) - Regulation (EC) No. 2320/2002 establishing common rules in the field of civil aviation security

* © Bundesverfassungsgericht (Federal Constitutional Court).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

(OJ L 355 of 30 December 2002, p. 1). In the Federal Republic of Germany, factual as well as legal measures have been taken whose intended objectives are to increase the security of air traffic and to protect it from attacks.

Since 1 October 2003, a “National Air Security Centre” (Nationales Lage- und Führungszentrum “Sicherheit im Luftraum”), which has been established in Kalkar on the Lower Rhine, has been operational. It is intended to ensure coordinated, swift cooperation of all authorities of the Federation and the *Länder* in charge of questions of aviation security as a central information hub in order to guarantee security in the German air space. In the National Air Security Centre, members of the Federal Armed Forces, the Federal Police and the Deutsche Flugsicherung (German Air Navigation Services) survey the air space. The main function of the centre is to avert dangers that emanate from so-called renegade planes, which are civil aircraft that have been taken command of by people who want to abuse them as weapons for a targeted crash. Once an aircraft has been classified as a renegade, - be it by NATO or be it by the National Air Security Centre itself, - the responsibility for the measures required for averting such danger in the German air space rests with the competent authorities of the Federal Republic of Germany.

With their constitutional complaint, the complainants directly challenge the Aviation Security Act because, as they argue, it permits the state to intentionally kill persons who have not become perpetrators but victims of a crime. The complainants put forward that s. 14.3 of the Aviation Security Act, which under the conditions specified in the law authorises to shoot down aircraft, violates their rights under Article 1.1, Article 2.2 sentence 1 in conjunction with Article 19.2 of the Basic Law.

Extracts from the Grounds:

B.

The constitutional complaint is admissible.

...

C.

The constitutional complaint is also well-founded. s. 14.3 of the Aviation Security Act is incompatible with Article 2.2 sentence 1 in conjunction with Article 87a.2 and Article 35.2 and 35.3 and in conjunction with Article 1.1 of the Basic Law, and is void.

I.

Article 2.2 sentence 1 of the Basic Law guarantees the right to life as a liberty right (see BVerfGE 89, 120 [130]). With this right, the biological and physical existence of every human being is protected against encroachments by the state from the point in time of its coming into being until the human being’s death, independently of the individual’s circumstances of life and of his or her physical state and state of mind. Every human life as such has the same value (see BVerfGE 39, 1 [59]). Although it constitutes an ultimate value within the order of the Basic Law (see BVerfGE 39, 1 [42]; 46, 160 [164]; 49, 24 [53]), also this right is nevertheless subject

**60 Years German Basic Law:
The German Constitution and its Court**

to the constitutional requirement of the specific enactment of a statute pursuant to Article 2.2 sentence 3 of the Basic Law. Also the fundamental right to life can therefore be encroached upon on the basis of a formal Act of Parliament (see BVerfGE 22, 180 [219]). The precondition for this is, however, that the Act in question meets the requirements of the Basic Law in every respect. It must be adopted in accordance with the legislative competences, it must leave the essence of the fundamental right unaffected pursuant to Article 19.2 of the Basic Law, and it may also not contradict the fundamental decisions of the constitution in any other respect.

II.

The challenged provision of s. 14.3 of the Aviation Security Act does not live up to these standards.

1. It encroaches upon the scope of protection of the fundamental right to life, which is guaranteed by Article 2.2 sentence 1 of the Basic Law, of the crew and of the passengers of an aircraft affected by an operation pursuant to s. 14.3 of the Aviation Security Act and also of those who want to use the plane against the lives of people in the sense of this provision. Recourse to the authorisation to use direct armed force against an aircraft pursuant to s. 14.3 of the Aviation Security Act will virtually always result in its crash. The consequence of the crash, in turn, will with near certainty be the death, and consequently the destruction of the lives, of all people on board the aircraft.

2. No constitutional justification can be adduced for such an encroachment. Under formal aspects already, s. 14.3 of the Aviation Security Act cannot be based on a legislative competence of the Federation (a). Apart from this, the provision also infringes Article 2.2 sentence 1 of the Basic Law as regards substance to the extent that it not only affects those who want to abuse the aircraft as a weapon but also persons who are not responsible for causing the major aerial incident presumed under s. 14.3 of the Aviation Security Act (b).

a) The Federation lacks the legislative competence to enact the challenged regulation.

aa) S. 14.3 of the Aviation Security Act is part of the provisions in Part 3 of the Aviation Security Act. This part has the title “Support and Administrative Assistance by the Armed Forces” and thereby makes it evident that their deployment as it is regulated in ss. 13 to 15 of the Aviation Security Act does not primarily constitute the performance of an autonomous function of the Federation but assistance, “in the context of the exercise of police power” and of the “support of the police forces of the Länder” (s. 13.1 of the Aviation Security Act), with a function that is incumbent on the Länder. This assistance is rendered, as s. 13 of the Aviation Security Act specifies in its subsections 1 to 3, along the lines of Article 35.2 sentence 2 of the Basic Law on the one hand and of Article 35.3 of the Basic Law on the other hand. Because these Articles incontestably form part of those regulations of the Basic Law which within the meaning of Article 87a.2 of the Basic Law explicitly permit the use of the armed forces outside defence (see Bundestag document V/2873, p. 2 under B in conjunction with pp. 9-10; on Article 35.3 of the Basic Law, see also BVerfGE 90, 286 [386, 387]), s. 14.3 of the Aviation Security Act, just like the other regulations of Part 3 of the Act, is

**Selected Fundamental Decisions of
the Federal Constitutional Court**

not about defence, also within the meaning of the provision under Article 73 no. 1 of the Basic Law, which establishes the corresponding competences (a different opinion is advanced in the reasoning of the draft bill on the new regulation of aviation security functions, Bundestag document 15/2361, p. 14, and also for instance in Federal Administrative Court, *Die Öffentliche Verwaltung - DÖV* 1973, p. 490 [492]). Also the sector of the protection of the civil population, which is included in the competence title “Defence”, is therefore not pertinent.

S. 14.3 of the Aviation Security Act can also not be based on the legislative competence of the Federation for air traffic pursuant to Article 73 no. 6 of the Basic Law. It need not be decided here whether the Federation could, in the framework of Article 73 no. 6 of the Basic Law, take over functions in the context of police power to a greater extent than it does so far. According to the design of the law, ss. 13 to 15 of the Aviation Security Act are about support of the *Länder* in the context of their police power. It is the objective of the regulation to determine the procedures in the area of the Federation and as regards the co-operation with the *Länder* and to determine the operational equipment of the armed forces for the case of the armed forces being placed at the disposal of the police forces of the *Länder* to support them in the averting of dangers that are caused by a major aerial incident. Consequently, they are implementing regulations for the deployment of the armed forces under the circumstances of Article 35.2 sentences 2 and 3 of the Basic Law. The legislative competence of the Federation for this does not result from Article 73 no. 6 of the Basic Law (stated also in the Federal Government’s reasoning for the bill; see Bundestag document 15/2361, p. 14). Instead, the competence for regulations of the Federation which determine details concerning the deployment of its armed forces, in cooperation with the *Länder* involved, to deal with a regional or interregional emergency situation, directly follows from Article 35.2 sentences 2 and 3 of the Basic Law itself.

bb) However, s. 14.3 of the Aviation Security Act is not covered by this area of competence of the Federation because the provision cannot be reconciled with the framework provided by the Basic Law of constitutional law relating to the armed forces.

aaa) The armed forces, whose deployment is regulated by ss. 13 to 15 of the Aviation Security Act, are established by the Federation for defence purposes pursuant to Article 87a.1 sentence 1 of the Basic Law. Pursuant to Article 87a.2 of the Basic Law, they may only be employed for other purposes (“Apart from defence”) to the extent explicitly permitted by the Basic Law. This regulation, which has been created in the course of the incorporation of the emergency constitution into the Basic Law by the Seventeenth Act to Amend the Basic Law of 24 June 1968 (*Gesetz zur Änderung des Grundgesetzes*, Federal Law Gazette I p. 709) is intended to prevent that for the deployment of the armed forces as a means of the executive power, “unwritten ... competences” are derived “from the nature of things” (statement by the Bundestag Committee on Legal Affairs in its Written report

**60 Years German Basic Law:
The German Constitution and its Court**

on the draft of an emergency constitution, Bundestag document V/2873, p. 13). What is decisive for the interpretation and application of Article 87a.2 of the Basic Law is therefore the objective to limit the possibilities for an deployment of the Federal Armed Forces within the domestic territory by the precept of strict faithfulness to the wording of the statute (see BVerfGE 90, 286 [356, 357]).

bbb) This objective also determines the interpretation and application of the regulations by which, within the meaning of Article 87a.2 of the Basic Law, the deployment of the armed forces for purposes other than defence is explicitly provided in the Basic Law. They comprise, as has already been mentioned, the authorisations in Article 35.2 sentences 2 and 3 of the Basic Law, on the basis of which ss. 13 to 15 of the Aviation Security Act are intended to serve the control of major aerial incidents and of the dangers connected with them. In the case of a regional emergency situation pursuant to Article 35.2 sentence 2 of the Basic Law, the Land affected can, *inter alia*, request the assistance of forces and facilities of the armed forces to deal with the natural disaster or the especially grave accident. In the case of an interregional emergency situation, which endangers an area larger than a Land, no such request is necessary pursuant to Article 35.3 sentence 1 of the Basic Law. Instead, the Federal Government can in this case employ units of the armed forces of its own accord to support the police forces of the Länder, apart from units of the Federal Border Guard, which by an Act of 21 June 2005 (Federal Law Gazette I p. 1818) has been renamed Federal Police, to the extent that this is necessary for effectively dealing with the emergency situation.

ccc) The authorisation of the armed forces under s. 14.3 of the Aviation Security Act to use direct armed force against an aircraft is not in harmony with these regulations.

(1) Article 35.2 sentence 2 of the Basic Law rules out the use of direct armed force in the case of a regional emergency situation.

(a) It is not constitutionally objectionable, however, that s. 14.3 of the Aviation Security Act, as results from the connection of the provision with s. 13.1 and s. 14.1 of the Aviation Security Act, pursues the objective to prevent, by the use of police force, the occurrence of an especially grave accident pursuant to Article 35.2 sentence 2 of the Basic Law which is imminent as a present danger as a consequence of a major aerial incident.

(aa) What is understood as an especially grave accident within the meaning of Article 35.2 sentence 2 of the Basic Law - and with this, also within the meaning of ss. 13 to 15 of the Aviation Security Act - is, in general, the occurrence of a damage of major extent which - such as a grave air or railway accident, a power failure with effects on essential sectors of the services of general interest, or an accident in a nuclear power plant - especially affects the public due to its

**Selected Fundamental Decisions of
the Federal Constitutional Court**

significance and which is caused by human wrongdoing or technical deficiencies (along this line, see already Part A no. 3 of the Guideline of the Federal Minister of Defence for Assistance by the German Armed Forces in the Case of Natural Disasters or Especially Grave Accidents and in the Context of Emergency Assistance (Richtlinie des Bundesministers der Verteidigung über Hilfeleistungen der Bundeswehr bei Naturkatastrophen oder besonders schweren Unglücksfällen und im Rahmen der dringenden Nothilfe) of 8 November 1988, Ministerialblatt des Bundesministers für Verteidigung - VMBl p. 279). This understanding of the concept of an especially grave accident, which is constitutionally unobjectionable, also comprises events such as the ones that are at issue here.

- (bb) The fact that the crash of the aircraft against which the measure pursuant to s. 14.3 of the Aviation Security Act is directed is meant to be caused intentionally does not run counter to the application of Article 35.2 sentence 2 of the Basic Law.

According to general usage, also an event whose occurrence is due to human intention can easily be understood as being an accident. Grounds to suppose that Article 35.2 sentence 2 of the Basic Law, in derogation of this, is intended to be restricted to accidents that have been caused unintentionally or negligently, so that it is not meant to include incidents that are based on intention, can be inferred neither from the wording of the provision nor from the materials relating to the Act (see Bundestag document V/1879, pp. 22 et seq.; V/2873, pp. 9-10). The meaning and purpose of Article 35.2 sentence 2 of the Basic Law, which is to make effective disaster control possible also through the deployment of the armed forces (see Bundestag document V/1879, pp. 23-24) also speak in favour of interpreting the concept of “accident” broadly. For a long time state practice therefore has been rightly assuming that also occurrences of damages that are caused intentionally by third parties are to be regarded as especially grave accidents (see, respectively, nos. 3 of the Order of the Federal Minister of Defence on Assistance by the German Armed Forces in the Case of Natural Disasters or Especially Grave Accidents and in the Context of Emergency Assistance (Erlass des Bundesministers der Verteidigung über Hilfeleistungen der Bundeswehr bei Naturkatastrophen bzw. besonders schweren Unglücksfällen und dringende Nothilfe) of 22 May 1973, Ministerialblatt des Bundesministers für Verteidigung p. 313, and of the corresponding guideline of 17 December 1977, Ministerialblatt des Bundesministers für Verteidigung 1978 p. 86).

- (cc) It is also constitutionally unobjectionable that the operation pursuant to s. 14.3 of the Aviation Security Act is intended to be ordered and carried out at a point in time in which a major aerial incident within the meaning of s. 13.1 of the Aviation Security Act has already happened, its consequence, however, the especially grave accident itself which is supposed to be prevented by the direct use of armed force (see s. 14.1 of the Aviation Security Act), has not yet occurred. Article 35.2, sentence 2 of the Basic Law does not require the especially grave accident, for

**60 Years German Basic Law:
The German Constitution and its Court**

the control of which the armed forces are intended to be employed, to have already happened. By contrast, the concept of an emergency situation also comprises events in which a disaster can be expected to happen with near certainty.

It cannot be inferred from Article 35.2 sentence 2 of the Basic Law that the armed forces' deployment for assistance is intended to be different in the case of natural disasters and especially grave accidents as regards the beginning of the deployment. As regards natural disasters, however, it is generally assumed in conformity with the Federal Minister of Defence's guideline for assistance (see Part A no. 2 of the Guideline of 8 November 1988) that this concept also comprises situations of imminent danger (see for example Bauer, in: Dreier, Grundgesetz, vol. II, 1998, Article 35, marginal no. 24; Gubelt, in: von Münch/Kunig, GrundgesetzKommentar, vol. 2, 4th/5th ed. 2001, Article 35, marginal no. 25; von Danwitz, in: v. Mangoldt/Klein/Starck, Kommentar zum Grundgesetz, 5th ed., vol. 2, 2005, Article 35, marginal no. 70), which means that it also covers situations of danger in which the damaging event that is imminent in the respective case can be expected to occur with near certainty if the situations of danger are not counteracted in time. For especially grave accidents, nothing different can apply for the sole reason that there cannot always be a clear-cut dividing line between them and natural disasters and because also here, the transition between a danger that is still imminent and the occurrence of the damage which has already happened can be fluid in the individual case. The meaning and purpose of Article 35.2 sentence 2 of the Basic Law, which is to enable the Federation to render effective assistance in the sphere of activity of the Länder, speaks in favour of treating both causes of disasters in the same manner as regards the aspect of time, i.e. not to wait, in both cases, until the development of the danger that results in the occurrence of the damage has come to a close.

The fact that pursuant to Article 35.2 sentence 2 of the Basic Law the request for armed forces and their deployment is made "to render assistance" "in the case of" a natural disaster and "in the case of" an especially grave accident, does not forcibly suggest the assumption that the occurrence of the respective damage must have already occurred. The sense of the wording of the regulation equally admits of an interpretation to the effect that assistance can already be requested and rendered when it becomes apparent that in all probability, a case of damage will occur soon, i.e. if a present danger within the meaning of police law exists. This is perceptibly the assumption made under Article 35.3 sentence 1 of the Basic Law, which, going back to Article 35.2 sentence 2 of the Basic Law, extends the Federal Government's competences for the case that the natural disaster or the accident "endangers" the area of more than one Land. As is the case here with an interregional emergency situation, the existence of a present danger is to be regarded as sufficient for the deployment of the armed forces also in a regional emergency situation pursuant to Article 35.2 sentence 2 of the Basic Law.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

The Guidelines of the Federal Minister of Defence for Assistance by the German Armed Forces in the Case of Natural Disasters or Especially Grave Accidents and in the Context of Emergency Assistance have therefore rightly been assuming for a long time already that the armed forces may be employed not only “in cases of interregional endangerment” pursuant to Article 35.3 of the Basic Law, but also “in cases of regional endangerment” pursuant to Article 35.2 sentence 2 of the Basic Law (thus most recently Part A no. 4 of the Guideline of 8 November 1988). This necessarily rules out the assumption that the especially grave accident must have already happened.

- (b) The reason why an operation involving the direct use of armed force against an aircraft does not respect the boundaries of Article 35.2 sentence 2 of the Basic Law is, however, that this provision does not permit an operational mission of the armed forces with specifically military weapons for the control of natural disasters or in the case of especially grave accidents.
 - (aa) The “assistance” referred to in Article 35.2 sentence 2 of the Basic Law is rendered to the Länder to enable them to effectively fulfil the function, which is incumbent on them, to deal with natural disasters or especially grave accidents. This is correctly assumed also by s. 13.1 of the Aviation Security Act, pursuant to which the deployment of the armed forces is intended to support the Länder, in the context of the exercise of police power, in preventing the occurrence of an especially grave accident to the extent that this is necessary for effectively dealing with such danger. Because the assistance is oriented towards this function which falls under the area of competence of the police authorities of the Länder, which according to the reasoning of the Act is not supposed to be encroached upon by ss. 13 to 15 of the Aviation Security Act (see Bundestag document 15/2361, p. 20 on s. 13), this also necessarily determines the kind of resources that can be used where the armed forces are employed for rendering assistance. They cannot be of a kind which is completely different, with regard to its quality, from those which are originally at the disposal of the Länder police forces for performing their duties. This means that when the armed forces are employed “to render assistance” upon the request of a Land pursuant to Article 35.2 sentence 2 of the Basic Law, they can use the weapons that the law of the respective Land provides for its police forces. In contrast to this, military implements of combat, for instance the on-board weapons of a fighter aircraft which are required for measures pursuant to s. 14.3 of the Aviation Security Act, may not be used.
 - (bb) This understanding of the provision, which is imposed by the wording and by the meaning and purpose of Article 35.2 sentence 2 of the Basic Law, is confirmed by the place of this provision in the legal system and by its legislative history. Pursuant to the draft of an emergency constitution presented by the Federal Government, the regional emergency situation within the meaning of Article 35.2 sentence 2 of the Basic Law was originally intended to be regulated in Article 91 of the Basic Law together with the so-called domestic state of emergency (see Bundestag document V/1879, p. 3). It was the objective of the proposal to

**60 Years German Basic Law:
The German Constitution and its Court**

constitutionally legitimise the deployment of the armed forces within the domestic territory *vis-à-vis* the citizens and in view of the Basic Law's allocation of competences also for the case of regional disaster response (see Bundestag document V/1879, p. 23 on Article 91.1). What was intended pursuant to the explicit wording of the intended regulation was, however, that the armed forces can only be made available "as police forces". Thus, the Federal Government intended to ensure that the armed forces can be employed for police functions alone, and only with the competences provided under police law *vis-à-vis* the citizens (see Bundestag document V/1879, p. 23 on Article 91.2). This includes the statement that the use of specific military weapons should be ruled out where the armed forces are employed in the sphere of activity of the Länder.

Admittedly, the restrictive wording of an deployment of the armed forces "as police forces" has not been incorporated into the subsequent text of the constitution; it has been left out on the suggestion of the Bundestag's Committee on Legal Affairs to regulate assistance for the benefit of the Länder in the case of an emergency situation due to a disaster in Article 35.2 and 35.3 of the Basic Law and the assistance of the Länder in dealing with domestic states of emergency in Article 87a.4 and Article 91 of the Basic Law, i.e. in different factual contexts (on this, see Bundestag document V/2873, p. 2 under B, p. 9 on s. 1 no. 2c). This, however, did not pursue the objective to extend the objects regarded as admissible equipment of the armed forces to include weapons that are typical of the military (see also Cl. Arndt, *Deutsches Verwaltungsblatt - DVBl* 1968, p. 729 [730]).

On the contrary: With the provision proposed by it, which the constitution-amending legislature has later on made its own to this extent, the Committee intended to raise the threshold of the deployment of the military as an armed force in comparison with the draft presented by the government and to permit the armed deployment of the Federal Armed Forces only for combating militarily armed insurgents pursuant to Article 87a.4 of the Basic Law (see Bundestag document V/2873, p. 2 under B). This finds its visible expression in the fact that the provision on the deployment of the armed forces in a regional emergency situation has been incorporated into Part II of the Basic Law, which concerns the Federation and the Länder, and not into Part VIII, which also regulates the deployment of the armed forces in a war. According to the ideas of the constitution-creating legislature, their deployment for "assistance" pursuant to Article 35.2 sentence 2 of the Basic Law was explicitly intended to be restricted to enabling the Federal Armed Forces to perform the police functions, and to exercise their authorisation to take coercive police measures, which arise in the context of a regional emergency situation, for instance to block off endangered property and to perform traffic control (see Bundestag document V/2873, p. 10 on Article 35.2; on the constitutional-policy background of the North German flood disaster in 1962. See also the statements made by Senator Ruhnau (Hamburg, SPD) in the 3rd public information meeting of the Committees on Legal Affairs and on Internal

**Selected Fundamental Decisions of
the Federal Constitutional Court**

Affairs of the 5th German Bundestag on 30 November 1967, Minutes, p. 8, and by Deputy Schmidt (Hamburg, SPD) in the 175th Session of the 5th German Bundestag on 16 May 1968, Stenographic Record, p. 9444).

- (2) S. 14.3 of the Aviation Security Act is also incompatible with the regulation about interregional emergency situations under Article 35.3 sentence 1 of the Basic Law.
- (a) In this context, however, the fact that the direct use of armed force against an aircraft pursuant to s. 14.3 in conjunction with s. 13.1 of the Aviation Security Act occurs as a consequence of an action which has been started intentionally by those who want to use the aircraft against human lives is also constitutionally unobjectionable. For the reasons given with regard to Article 35.2 sentence 2 of the Basic Law (see above under C II 2 a bb ccc (1) (a)), such an incident, which has been caused intentionally, can be regarded as an especially grave accident within the meaning of Article 35.3 sentence 1 of the Basic Law. As results from the element “endangered”, the fact that not all of its consequences have occurred yet, but that instead, events are still moving towards disaster, does also not rule out the application of Article 35.3 sentence 1 of the Basic Law. Where it is that the endangerment occurs, and whether consequently the requirement of an interregional endangerment has been met, is the question in each individual case. That such endangerment concerns more than one Land if the requirements of s. 14.3 of the Aviation Security Act are met is at any rate possible; according to the legislature’s assessment of the situation (see Bundestag document 15/2361, pp. 20, 21, on s. 13 respectively) and according to the opinions submitted by the Bundestag and the Federal Government this is rather the rule.
- (b) However, s. 14.3 of the Aviation Security Act meets with constitutional objections already because the deployment of the armed forces which is admissible pursuant to this provision does, in accordance with s. 13.3 of the Aviation Security Act, not always require a decision about the mission which is taken by the Federal Government before the mission.

Pursuant to Article 35.3 sentence 1 of the Basic Law, only the Federal Government is explicitly authorised to order the deployment of the armed forces in the case of an interregional emergency situation. Pursuant to Article 62 of the Basic Law, the Federal Government consists of the Federal Chancellor and the Federal Ministers. It is a collegial body. If the competence for deciding about the deployment of the armed forces for the purpose of interregional disaster response is reserved to the Federal Government, Article 35.3 sentence 1 of the Basic Law consequently requires a decision of the collegial body (see Article 80.1 sentence 1 of the Basic Law - BVerfGE 91, 148 [165, 166]). The competence for taking decisions that rests with the Federal Government as a whole is also a more powerful safeguard of the interests of the Länder, which are deeply affected by the deployment of the armed forces in their sphere of competence without this having been previously requested by the endangered Länder (see BVerfGE 26, 338 [397]).

**60 Years German Basic Law:
The German Constitution and its Court**

S. 13.3 of the Aviation Security Act lives up to this only in its sentence 1, pursuant to which the decision about a mission pursuant to Article 35.3 of the Basic Law shall be taken by the Federal Government in consultation with the Länder affected. Sentences 2 and 3, however, provide that the Federal Minister of Defence, or in the event of the Minister of Defence having to be represented, the member of the Federal Government who is authorised to represent the Minister, shall decide if a decision of the Federal Government is not possible in time; in such case, which, in the opinion of the legislature, will be the rule (see Bundestag document 15/2361, p. 21 on s. 13), the decision of the Federal Government is to be brought about subsequently without delay. Pursuant to this provision, the Federal Government will not only in exceptional cases but regularly be substituted by individual government ministers when it comes to deciding on the deployment of the armed forces in interregional emergency situations. In view of Article 35.3 sentence 1 of the Basic Law, this can also not be justified by the special urgency of the decision. Instead, the fact that generally, the time available in the area of application of s. 13.3 of the Aviation Security Act will only be very short shows particularly clearly that as a general rule, it will not be possible to deal with measures of the kind regulated in s. 14.3 of the Aviation Security Act in the manner that is provided under Article 35.3 sentence 1 of the Basic Law.

- (c) Moreover, the boundaries of constitutional law relating to the armed forces under Article 35.3 sentence 1 of the Basic Law have been overstepped above all because also in the case of an interregional emergency situation, a mission of the armed forces with typically military weapons is constitutionally impermissible.

Article 35.3 sentence 1 of the Basic Law differs from Article 35.2 sentence 2 of the Basic Law only in two aspects. Firstly, Article 35.3 sentence 1 of the Basic Law requires the existence of a danger which threatens the territory of more than one Land. Secondly, regarding the interregional nature of the emergency situation, the initiative for effectively dealing with this situation is shifted to the Federal Government, and its competences to support the police forces of the Länder are extended; the Federal Government can, *inter alia*, employ units of the armed forces of its own accord. What is not provided, however, is that in such a mission, the armed forces can use specifically military weapons which are needed for an operation pursuant to s. 14.3 of the Aviation Security Act. Instead, the wording of Article 35.3 sentence 1 of the Basic Law, which permits the deployment of the armed forces only “to support” the police forces of the Länder, i.e. again only to perform a Land function, and the purpose of the regulation of mere support of the Länder by the Federation, which becomes apparent from this, rule out a mission with weapons that are typical of the military in the light of Article 87a.2 of the Basic Law also when it comes to dealing with interregional emergency situations.

This is confirmed by the legislative history of Article 35.3 sentence 1 of the Basic Law to the extent that as regards this provision, the constitution-amending legislature did not see any reason for regulating the deployment of the armed forces and their equipment in a different manner than in Article 35.2 sentence 2 of the Basic Law. After it had been expressed with regard to this provision that in the context of an deployment for

**Selected Fundamental Decisions of
the Federal Constitutional Court**

assistance in favour of the Länder also the performance of police functions that arise in such a mission is intended to be permitted, the corresponding statement concerning Article 35.3 sentence 1 of the Basic Law obviously was so much a matter of course that the materials relating to the Act could do without any remarks on this (see Bundestag document V/2873, p. 10 on Article 35.2 and 35.3). This is understandable regarding the purposes of deployment “to render assistance” in Article 35.2 sentence 2 of the Basic Law and “to support” in Article 35.3 sentence 1 of the Basic Law, which in general usage are essentially equal in meaning (on this, see also Cl. Arndt, loc. cit.). Also the Federal Minister of Defence’s assistance guidelines of 8 November 1988 assume quite naturally in Part A no. 5 in conjunction with no. 4 and in Part C no. 16 that the powers as well as the nature and the extent of the Federal Armed Forces’ assistance in the cases regulated by Article 35.2 sentence 2 and those regulated by Article 35.3 sentence 1 of the Basic Law do not differ from each other. The Guidelines also do not provide missions of the armed forces with specifically military weapons of the kind assumed in s. 14.3 of the Aviation Security Act for the support of the police forces of the Länder pursuant to Article 35.3 sentence 1 of the Basic Law.

- b) Regarding the guarantee of human dignity enshrined in Article 1.1. of the Basic Law (aa), over and above this, s. 14.3 of the Aviation Security Act is not in harmony with Article 2.2 sentence 1 of the Basic Law also as regards substance to the extent that it permits the armed forces to shoot down aircraft with human beings on board who have become victims of an attack on the security of air traffic pursuant to s. 1 of the Aviation Security Act (bb). The provision is constitutionally unobjectionable as concerns substance (cc) only to the extent that the operation provided by s. 14.3 of the Aviation Security Act is aimed at a pilotless aircraft or exclusively against the person or persons to whom such an attack can be attributed.
- aa) The fundamental right to life guaranteed by Article 2.2 sentence 1 of the Basic Law is subject to the requirement of the specific enactment of a statute pursuant to Article 2.2 sentence 3 of the Basic Law (see also above under C I). The Act, however, that restricts the fundamental right must in its turn be regarded in the light of the fundamental right and of the guarantee of human dignity under Article 1.1 of the Basic Law, which is closely linked with it. Human life is the vital basis of human dignity as the essential constitutive principle, and as the supreme value, of the constitution (see BVerfGE 39, 1 [42]; 72, 105 [115]; 109, 279 [311]). All human beings possess this dignity as persons, irrespective of their qualities, their physical or mental state, their achievements and their social status (see BVerfGE 87, 209 [228]; 96, 375 [399]). It cannot be taken away from any human being. What can be violated, however, is the claim to respect which results from it (see BVerfGE 87, 209 [228]). This applies irrespective, *inter alia*, of the probable duration of the individual human life (see BVerfGE 30, 173 [194] on the human being’s claim to respect of his or her dignity even after death).

In view of this relation between the right to life and human dignity, the state is prohibited, on the one hand, from encroaching upon the fundamental right to life by measures of its own, thereby violating the ban on the disregard of human

**60 Years German Basic Law:
The German Constitution and its Court**

dignity. On the other hand, the state is also obliged to protect every human life. This duty of protection demands of the state and its bodies to shield and to promote the life of every individual, which means above all to also protect it from unlawful attacks, and interference, by third parties (see BVerfGE 39, 1 [42]; 46, 160 [164]; 56, 54 [73]). Also this duty of protection has its foundations in Article 1.1 sentence 2 of the Basic Law, which explicitly obliges the state to respect and protect human dignity (see BVerfGE 46, 160 [164]; 49, 89 [142]; 88, 203 [251]).

What this obligation means in concrete terms for state action cannot be definitely determined once and for all (see BVerfGE 45, 187 [229]; 96, 375 [399, 400]). Article 1.1 of the Basic Law protects the individual human being not only against humiliation, branding, persecution, outlawing and similar actions by third parties or by the state itself (see BVerfGE 1, 97 [104]; 107, 275 [284]; 109, 279 [312]). Taking as a starting point the idea of the constitution-creating legislature that it is part of the nature of human beings to exercise self-determination in freedom and to freely develop themselves, and that the individual can claim, in principle, to be recognised in society as a member with equal rights and with a value of his or her own (see BVerfGE 45, 187 [227, 228]), the obligation to respect and protect human dignity generally precludes making a human being a mere object of the state (see BVerfGE 27, 1 [6]; 45, 187 [228]; 96, 375 [399]). What is thus absolutely prohibited is any treatment of a human being by public authority which fundamentally calls into question his or her quality of a subject, his or her status as a legal entity (see BVerfGE 30, 1 [26]; 87, 209 [228]; 96, 375 [399]) by its lack of respect of the value which is due to every human being for his or her own sake, by virtue of his or her being a person (see BVerfGE 30, 1 [26]; 109, 279 [312, 313]). When it is that such a treatment occurs must be stated in concrete terms in the individual case in view of the specific situation in which a conflict can arise (see BVerfGE 30, 1 [25]; 109, 279 [311]).

- bb) According to these standards, s. 14.3 of the Aviation Security Act is also incompatible with Article 2.2 sentence 1 in conjunction with Article 1.1 of the Basic Law to the extent that the shooting down of an aircraft affects people who, as its crew and passengers, have not exerted any influence on the occurrence of the non-warlike aerial incident assumed under s. 14.3 of the Aviation Security Act.
- aaa) In the situation in which these persons are at the moment in which the order to use direct armed force against the aircraft involved in the aerial incident pursuant to s. 14.4 sentence 1 of the Aviation Security Act is made, it must be possible, pursuant to s. 14.3 of the Aviation Security Act, to assume with certainty that the aircraft is intended to be used against human lives. As has been stated in the reasoning for the Act, the aircraft must have been converted into an assault weapon by those who have brought it under their command (see Bundestag document 15/2361, p. 20 on s. 13.1); the aircraft itself must be used by the perpetrators in a targeted manner as a weapon for the crime, not merely as an auxiliary means for committing the crime, against the lives of people who stay in the area in which the aircraft is intended to crash (see Bundestag document 15/2361, p. 21 on s. 14.3), In

**Selected Fundamental Decisions of
the Federal Constitutional Court**

such an extreme situation, which is, moreover, characterised by the cramped conditions of an aircraft in flight, the passengers and the crew are typically in a desperate situation. They can no longer influence the circumstances of their lives independently from others in a self-determined manner.

This makes them objects not only of the perpetrators of the crime. Also the state which in such a situation resorts to the measure provided by s. 14.3 of the Aviation Security Act treats them as mere objects of its rescue operation for the protection of others. The desperateness and inescapability which characterise the situation of the people on board the aircraft who are affected as victims also exist *vis-à-vis* those who order and execute the shooting down of the aircraft. Due to the circumstances, which cannot be controlled by them in any way, the crew and the passengers of the plane cannot escape this state action but are helpless and defenceless in the face of it with the consequence that they are shot down in a targeted manner together with the aircraft and as result of this will be killed with near certainty. Such a treatment ignores the status of the persons affected as subjects endowed with dignity and inalienable rights. By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake.

- bbb) In addition, this happens under circumstances in which it cannot be expected that at the moment in which pursuant to s. 14.4 sentence 1 of the Aviation Security Act a decision concerning an operation under s. 14.3 of the Aviation Security Act is taken, there is always a complete picture of the factual situation and that the factual situation can always be assessed correctly. One also cannot rule out the possibility that the course of events will be such that it is no longer required to carry out the operation. According to the findings that the Senate has gained from the written opinions submitted in the proceedings and from the statements made in the oral hearing, it cannot be assumed that the factual prerequisites for ordering and carrying out such an operation can always be established with the certainty required for this.
- (1) In particular the Cockpit Association has pointed out that depending on the circumstances, establishing that a major aerial incident within the meaning of s. 13.1 of the Aviation Security Act has occurred and that such incident constitutes the danger of an especially grave accident is already fraught with great uncertainties. According to the Cockpit Association, such establishment can only rarely be made with certainty. The critical point in the assessment of the situation was said to be to what extent the possibly affected crew of the plane is still able to communicate the attempt at, or the success of, hijacking an aircraft to the decision-makers on the ground. If this was not possible, the factual basis was said to be tainted with the stigma of a misinterpretation from the very beginning.

**60 Years German Basic Law:
The German Constitution and its Court**

Also the findings that are supposed to be gained from reconnaissance measures and checks pursuant to s. 15.1 of the Aviation Security Act are, in the opinion of the Cockpit Association, vague at best, even with ideal weather conditions. In the opinion of the Cockpit Association, there are limits to the approach of interceptors to an aircraft that has become conspicuous in view of the dangers involved. For this reason, the possibility of making out the situation and the events on board of such an aircraft is, according to the Cockpit Association, limited even if there is visual contact, which, moreover, is often difficult to establish. Under these circumstances, the assessment of the motivation and the objectives of the hijackers of an aircraft that is made on the basis of the facts ascertained were said to probably remain, as a general rule, speculative to the very end. Consequently, the danger concerning the application of s. 14.3 of the Aviation Security Act was said to be that the order to shoot down the aircraft was made too early on an uncertain factual basis if, within the time slot available, which as a general rule is extremely narrow, armed force was at all supposed to be used in a timely manner with prospects of success and without disproportionately endangering people who are not participants in the crime. For such a mission to be effective, it was said to have to be accepted from the very beginning that the operation was possibly not required at all. In other words, reactions would probably often have to be excessive.

- (2) In the proceedings, no indications have arisen for assuming that this assessment could be based on unrealistic, and thus unfounded, assumptions. On the contrary, also the Independent Flight Attendant Organisation UFO has plausibly stated that the decision to be taken by the Federal Minister of Defence or by the Minister's deputy pursuant to s. 14.4 sentence 1 in conjunction with s. 14.3 of the Aviation Security Act must be made on the basis of information most of which is uncertain. Due to the complicated and error-prone channels of communication between the cabin crew and the cockpit on board an aircraft that is involved in an aerial incident on the one hand and between the cockpit and the decision-makers on the ground on the other hand, and with a view to the fact that the situation on board the aircraft can change within minutes or even seconds, it was said to be virtually impossible for those on the ground who must decide under extreme time pressure to reliably assess whether the requirements of s. 14.3 of the Aviation Security Act are met. It was put forward that as a general rule, the decision would have to be taken on the basis of a suspicion only and not on the basis of established facts.

This appraisal appears convincing to the Senate not least because the complicated decision-making system, which depends on a large number of decision-makers and persons concerned, that must have been gone through pursuant to ss. 13 to 15 of the Aviation Security Act until an operation pursuant to s. 14.3 of the Aviation Security Act can be carried out, will require considerable time in the case of an emergency. In view of the fact that the overflight area of the Federal Republic of Germany is relatively small, this means that there is not only enormous time pressure on decision-making but also the danger of premature decisions.

- ccc) Even if in the area of police power, insecurities concerning forecasts often cannot be completely avoided, it is absolutely inconceivable under the applicability of Article 1.1 of the Basic Law to intentionally kill persons such

**Selected Fundamental Decisions of
the Federal Constitutional Court**

as the crew and the passengers of a hijacked plane, who are in a situation that is hopeless for them, on the basis of a statutory authorisation which even accepts such imponderabilities if necessary. It need not be decided here how a shooting down that is performed all the same, and an order relating to it, would have to be assessed under criminal law (on this, and on cases with comparable combinations of circumstances see, for instance, Decisions of the Supreme Court of Justice for the British Zone in Criminal Matters (Entscheidungen des Obersten Gerichtshofs für die Britische Zone in Strafsachen - OGHSt) 1, 321 [331 et seq., 335 et seq.]; 2, 117 [120 et seq.]; Roxin, Strafrecht, Allgemeiner Teil, vol. I, 3rd ed. 1997, pp. 888-889; Erb, in: Münchener Kommentar zum Strafgesetzbuch, vol. 1, 2003, s. 34, marginal nos. 117 et seq.; Rudolphi, in: Systematischer Kommentar zum Strafgesetzbuch, vol. I, Allgemeiner Teil, Vor s. 19, marginal no. 8 [as at April 2003]; Kühl, Strafgesetzbuch, 25th ed. 2004, Vor s. 32, marginal no. 31; Tröndle/Fischer, Strafgesetzbuch, 52nd ed. 2004, Vor s. 32, marginal no. 15, s. 34, marginal no. 23; Hilgendorf, in: Blaschke/Förster/Lumpp/Schmidt, Sicherheit statt Freiheit?, 2005, p. 107 [130]). What is solely decisive for the constitutional appraisal is that the legislature may not, by establishing a statutory authorisation for intervention, give authority to perform operations of the nature regulated in s. 14.3 of the Aviation Security Act *vis-à-vis* people who are not participants in the crime and may not in this manner qualify such operations as legal and thus permit them. As missions of the armed forces of a non-warlike nature, they are incompatible with the right to life and the obligation of the state to respect and protect human dignity.

- (1) Therefore it cannot be assumed - differently from arguments that are advanced sometimes - that someone boarding an aircraft as a crew member or as a passenger will presumably consent to it being shot down, and thus consenting to his or her own killing, in the case of the aircraft becoming involved in an aerial incident within the meaning of s. 13.1 of the Aviation Security Act which results in a measure averting the danger pursuant to s. 14.3 of the Aviation Security Act. Such an assumption lacks any realistic grounds and is no more than an unrealistic fiction.
- (2) Also the assessment that the persons who are on board a plane that is intended to be used against other people's lives, within the meaning of s. 14.3 of the Aviation Security Act, are doomed anyway, cannot remove its nature of an infringement of their right to dignity from the killing of innocent people in a situation that is desperate for them which an operation performed pursuant to this provisions as a general rule involves. Human life and human dignity enjoy the same constitutional protection regardless of the duration of the physical existence of the individual human being (see above under C I, II 2 b aa). Whoever denies this or calls this into question denies those who, such as the victims of a hijacking, are in a desperate situation that offers no alternative to them, precisely the respect which is due to them for the sake of their human dignity (see above under C II 2 b aa, bb aaa).

**60 Years German Basic Law:
The German Constitution and its Court**

In addition, uncertainties as regards the factual situation exist here as well. These uncertainties, which characterise the assessment of the situation in the area of application of ss. 13 to 15 of the Aviation Security Act in general (see above under C II 2 b bb bbb), necessarily also influence the prediction of how long people who are on board a plane which has been converted into an assault weapon will live, and whether there is still a chance of rescuing them. As a general rule, it will therefore not be possible to make a reliable statement about these people's lives being "lost anyway already".

- (3) The assumption that anyone who is held on board an aircraft under the command of persons who intend to use the aircraft as a weapon of a crime against other people's lives within the meaning of s. 14.3 of the Aviation Security Act has become part of a weapon and must bear being treated as such also does not justify a different assessment. This opinion expresses in a virtually undisguised manner that the victims of such an incident are no longer perceived as human beings but as part of an object, a view by which they themselves become objects. This cannot be reconciled with the Basic Law's concept of the human being and with the idea of the human being as a creature whose nature it is to exercise self-determination in freedom (see BVerfGE 45, 187 [227]), and who therefore may not be made a mere object of state action.
- (4) The idea that the individual is obliged to sacrifice his or her life in the interest of the state as a whole in case of need if this is the only possible way of protecting the legally constituted body politic from attacks which are aimed at its breakdown and destruction (for instance Enders, in: Berliner Kommentar zum Grundgesetz, vol. 1, Article 1, marginal no. 93 (as of July 2005)) also does not lead to a different result. In this context, the Senate need not decide whether, and should the occasion arise, under which circumstances such a duty of taking responsibility, in solidarity, over and above the mechanisms of protection provided in the emergency constitution can be derived from the Basic Law. For in the area of application of s. 14.3 of the Aviation Security Act the issue is not averting attacks aimed at abolishing the body politic and at eliminating the state's legal and constitutional system.

SS. 13 to 15 of the Aviation Security Act serve to prevent, in the context of police power, the occurrence of especially grave accidents within the meaning of Article 35.2 sentences 2 and 3 of the Basic Law. As appears from the reasoning of the Act, such accidents can be politically motivated but can also be caused by criminals or by mentally confused persons acting on their own (see Bundestag document 15/2361, p. 14). As the incorporation of ss. 13 et seq. of the Aviation Security Act into the system of disaster control pursuant to Article 35.2 sentences 2 and 3 of the Basic Law shows, incidents are assumed which are not aimed at calling into question the state and its continued existence even where they are caused by political motives in the individual case. Under these circumstances, there is no room to assume a duty to intervene within the meaning that has been explained.

- (5) Finally, s. 14.3 of the Aviation Security Act also cannot be justified by invoking the state's duty to protect those against whose lives the aircraft that is abused as a weapon for a crime within the meaning of s. 14.3 of the Aviation Security Act, is intended to be used.

Selected Fundamental Decisions of the Federal Constitutional Court

In complying with such duties of protection, the state and its bodies have a broad margin of assessment, valuation and organisation (see BVerfGE 77, 170 [214]; 79, 174 [202]; 92, 26 [46]). Unlike the fundamental rights in their function as subjective rights of defence against the state, the state's duties to protect which result from the objective contents of the fundamental rights are, in principle, not defined (see BVerfGE 96, 56 [64]). How the state bodies comply with such duties of protection is to be decided, as a matter of principle, by themselves on their own responsibility (see BVerfGE 46, 160 [164]; 96, 56 [64]). This also applies to their duty to protect human life. It is true that especially as regards this protected interest, in cases with a particular combination of circumstances, if effective protection of life cannot be achieved otherwise, the possibilities of choosing the means of complying with the duty of protection can be restricted to the choice of one particular means (see BVerfGE 46, 160 [164, 165]). The choice, however, can only be between means, the use of which is in harmony with the constitution.

This is not the case with s. 14.3 of the Aviation Security Act. What the ordering and the carrying out of the direct use of force against an aircraft pursuant to this provision leaves out of account is that, also the victims of an attack who are held in the aircraft are entitled to their lives being protected by the state. Not only are they denied this protection by the state, the state itself even encroaches on the lives of these defenceless people. Thus any procedure pursuant to s. 14.3 of the Aviation Security Act disregards, as has been explained, these people's positions as subjects in a manner that is incompatible with Article 1.1 of the Basic Law and disregards the ban on killing that results from it for the state. The fact that this procedure is intended to serve, to protect and to preserve other people's lives does not alter this.

cc) S. 14.3 of the Aviation Security Act is, however, compatible with Article 2.2 sentence 1 in conjunction with Article 1.1 of the Basic Law to the extent that the direct use of armed force is aimed at a pilotless aircraft or exclusively at persons who want to use the aircraft as a weapon of crime against the lives of people on the ground.

aaa) To this extent the guarantee of human dignity under Article 1.1 of the Basic Law is not contrary to the ordering and carrying out of an operation pursuant to s. 14.3 of the Aviation Security Act. This goes without saying in operations against pilotless aircraft but also applies in other case. Whoever, such as those who want to abuse an aircraft as a weapon to destroy human lives, unlawfully attacks the legal interests of others is not fundamentally called into question as regards his or her quality as a subject by being made the mere object of state action (see above under C II 2 b aa) where the state, complying with its duty of protection, defends itself against the unlawful attack and tries to avert it, complying with its duty of protection *vis-à-vis* those whose lives are intended to be annihilated. On the contrary, it exactly corresponds to the attacker's position as a subject if the consequences of his or her self-determined conduct are attributed to him or her personally, and if the attacker is held responsible for the events that he or she started. The attacker's right to respect of the dignity that is inherent also to him or her is therefore not impaired.

**60 Years German Basic Law:
The German Constitution and its Court**

This is also not altered by the uncertainties which can arise in the examination of whether the prerequisites for ordering and carrying out of an operation pursuant to s. 14.3 of the Aviation Security Act are actually met (see above under C II 2 b bb bbb). In nature of the cases discussed here, these insecurities are not comparable to those that will have to be assumed, as a general rule, where there are, apart from the offenders also crew members and passengers on board the aircraft. If those who have the aircraft under their command do not intend to use it as a weapon, if therefore the corresponding suspicion is unfounded, they can, on the occasion of the early measures carried out pursuant to s. 15.1 and s. 14.1 of the Aviation Security Act, for instance on account of the threat to use armed force or on account of a warning shot, easily show by cooperating, for instance by changing course or by landing the aircraft, that no danger emanates from them. The specific difficulties that can arise as regards communication between the cabin crew, which is possibly threatened by offenders, and the cockpit, and between the cockpit and the decision-makers on the ground, do not exist here. In such cases, it is therefore easier to ascertain with sufficient reliability and also in a timely manner that an aircraft is intended to be abused as a weapon for a targeted crash.

If no indications exist that there are people on board an aircraft that has become conspicuous who are not participants in the crime, remaining uncertainties - for example as regards the underlying motives of the aerial incident - refer to a course of events that has been started, and can be averted, by those against whom the measure averting danger pursuant to s. 14.3 of the Aviation Security Act is exclusively directed. Imponderabilities in this context are therefore attributable to the offenders' sphere of responsibility.

- bbb) To the extent that it is only applied *vis-à-vis* persons on board an aircraft who want to use it as a weapon against human lives, the regulation under s. 14.3 of the Aviation Security Act also lives up to the requirements of the principle of proportionality.
- (1) The provision serves the objective of saving human lives. With regard to the ultimate value that human life has in the Basic Law's constitutional order (see above under C I), this is a regulatory purpose of such weight that it can justify the serious encroachment upon the right to life of the offenders on board the aircraft.
 - (2) S. 14.3 of the Aviation Security Act is not absolutely unsuitable for achieving this purpose of protection because it cannot be ruled out that this purpose is promoted in an individual case by a measure pursuant to s. 14.3 of the Aviation Security Act (see BVerfGE 30, 292 [316]; 90, 145 [172]; 110, 141 [164]). Regardless of the uncertainties concerning the assessment and prediction of the situation that have been described (see above under C II 2 b bb bbb), situations are conceivable in which it can be reliably ascertained that the only people on board an aircraft which is involved in an aerial incident are offenders participating in such incident, and in which it can also be assumed with sufficient certainty

**Selected Fundamental Decisions of
the Federal Constitutional Court**

that a mission pursuant to s. 14.3 of the Aviation Security Act will not have consequences that are detrimental to the lives of people on the ground. Whether such a factual situation exists depends on the assessment of the situation in the individual case. If such assessment results in the safe judgment that there are only offenders on board the aircraft and in the prediction that the shooting down of the aircraft can avert the danger from the people on the ground who are threatened by the plane, the success that is intended to be achieved by s. 14.3 of the Aviation Security Act is furthered. Therefore the suitability of this provision for the purpose that is intended with it cannot be generally denied.

- (3) In such a case also, the requirement of the necessity of the provision for achieving the objective is met because no equally effective means is apparent that does not impair the offenders' right to life at all, or impairs it less (see BVerfGE 30, 292 [316]; 90, 145 [172]; 110, 141 [164]).

Especially in ss. 5 to 12 of the Aviation Security Act, the legislature has taken a whole package of measures, all of which are intended to serve protection from attacks on the security of air traffic, in particular from hijackings, acts of sabotage and terrorist attacks within the meaning of s. 1 of the Aviation Security Act (for further details, see above under A I 2 b bb aaa (1)). In spite of this, the legislature has regarded it as necessary to enact, with ss. 13 to 15 of the Aviation Security Act, regulations with special authorisations for intervention and protective measures for the case that on account of a major aerial incident, the occurrence of an especially grave accident within the meaning of Article 35.2 sentence 2 or 35.3 of the Basic Law must be feared, regulations that even include the authorisation to use, as the *ultima ratio*, direct armed force against an aircraft under the conditions specified in s. 14.3 of the Aviation Security Act. This is based on the irrefutable assessment that experience has shown that also the extensive precautions pursuant to ss. 5 to 11 of the Aviation Security Act, as well as the extension of the pilots' functions and competences by s. 12 of the Aviation Security Act cannot provide absolutely reliable protection against the misuse of aircraft for criminal purposes. Nothing different can apply to other conceivable protective measures.

- (4) Finally, the authorisation to use direct armed force against an aircraft on board of which there are only people who want to abuse it within the meaning of s. 14.3 of the Aviation Security Act, is also proportional in the narrower sense. According to the result of the overall weighing up between the seriousness of the encroachment upon fundamental rights that it involves and the weight of the legal interests that are to be protected (see on this BVerfGE 90, 145 [173]; 104, 337 [349]; 110, 141 [165]), the shooting down of such an aircraft is an appropriate measure of averting danger which is reasonable for the persons affected if there is certainty about the elements of the offence.
- (a) However, the encroachment upon fundamental rights carries much weight because the execution of the operation pursuant to s. 14.3 of the Aviation Security Act will with near certainty result in the death of the people on board the plane. But under the combination of circumstances that is assumed here, it is these people themselves who, as offenders, have brought about the necessity of state intervention, and that they can avert such intervention at any time by refraining from realising their criminal plan. It

**60 Years German Basic Law:
The German Constitution and its Court**

is the people who have the aircraft under their command who determine not only the course of events on board, but also on the ground in a decisive manner. Their killing can only take place if it can be established with certainty that they will use the aircraft that is under their control to kill people, and if they keep to their plan even though they are aware of the danger to their lives that this involves for them. This reduces the gravity of the encroachment upon their fundamental rights.

On the other hand, those in the target area of the intended plane crash whose lives are intended to be protected by the measure of intervention under s. 14.3 of the Aviation Security Act by which the state complies with its duty of protection, as a general rule do not have the possibility of averting the attack that is planned against them and in particular, of escaping it.

- (b) What must also be kept in mind, however, is that the application of s. 14.3 of the Aviation Security Act will possibly affect not only extremely dangerous installations on the ground but will possibly also kill people who are staying in areas in which, in all probability, the wreckage of the aircraft that is shot down by the use of armed force will come down. The state is constitutionally obliged to protect also the lives - and the health - of these people. In a decision pursuant to s. 14.4 sentence 1 of the Aviation Security Act, this cannot be left out of account.

This aspect, however, does not concern the continued existence in law of the regulation under s. 14.3 of the Aviation Security Act, but its application in the individual case. Pursuant to the opinions submitted in the proceedings, the application is intended to be refrained from anyway if it must be assumed with certainty that people on the ground would suffer damage or even lose their lives by plane wreckage falling down on densely populated areas. Concerning the question whether the provision also meets the proportionality requirements of constitutional law, it is sufficient to establish that combinations of circumstances are conceivable in which the direct use of armed force against an aircraft which only has attackers on air traffic on board can avert the danger to the lives of those against whom the aircraft is intended to be used as the weapon for the crime without the shooting down of the aircraft encroaching at the same time upon the lives of others. As has been set out (see above under C II 2 b cc bbb (2)), this is the case. This makes s. 14.3 of the Aviation Security Act also proportional in the narrower sense to the extent that it permits the direct use of armed force against a pilotless aircraft or against an aircraft which only has attackers on board.

- ccc) The ban under Article 19.2 of the Basic Law on affecting the essence of a fundamental right does also not rule out such a measure against this group of persons. In view of the extremely exceptional situation that is assumed by s. 14.3 of the Aviation Security Act, the essence of the fundamental right to life remains unaffected in the case assumed here by the encroachment upon the fundamental right that this provision involves as long as important interests of protection of third parties legitimise the encroachment and as long as the principle of proportionality is respected (see BVerfGE 22, 180 [219, 220]; 109, 133 [156]). According to the statements made above, both conditions are met (see under C II 2 b cc bbb).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

III.

Because the Federation lacks legislative competence for s. 14.3 of the Aviation Security Act in the first place, the regulation does not continue in force also to the extent that the direct use of armed force against an aircraft can be justified under substantive constitutional law. The regulation is completely unconstitutional and consequently, it is void pursuant to s. 95.3 sentence 1 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG). Under the circumstances, there is no room for merely stating the incompatibility of the challenged regulation with the Basic Law.

D.

The decision about the costs is based on s. 34a.2 of the Federal Constitutional Court Act.

II. Free Development of Personality and the Protection of Physical Integrity and Personal Liberty - Article 2 of the Basic Law

1. Article 2.1 - Free Development of Personality

a) *Elfes*, BVerfGE 6, 32

Explanatory Annotation

This decision is one of the fundamental decisions of the Constitutional Court that has shaped the liberal character of the Basic Law. At issue was the refusal of a passport for an outspoken critic of the policies of the government at the time pertaining to the reorganization of military forces and the question of reunification of Germany.

The Court held that the freedom to leave the country to travel abroad is not part of the freedom of movement guarantee of Article 11 of the Basic Law, which it saw as limited to free movement within the territory of the Federal Republic. This raised the question of whether the freedom to travel abroad was unprotected under the Basic Law or whether it fell within the scope of Article 2.1 and its somewhat cryptic guarantee that “every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.” A literal interpretation of “free development of personality” could lead to a narrow understanding of personality as a basket-term for those essential elements, which define the human as a spiritual-moral being. This narrow understanding of the norm would essentially have protected the dignity core of a human being. However, and herein lies the significance of the decision, the Court did not follow this narrow interpretation. Instead it chose a broad interpretation based on the original formulation for this provision in the drafting stage of the Basic Law, according to which “every person is free to do or not to do what he wishes” (as long as the rights of others or the constitutional order are not infringed upon), a formulation that was not abandoned because of its meaning but only because it was perceived as too ordinary an expression for this document.

Article 2.1, in other words, became an all encompassing “fall-back” right to protect against any state action infringing on the personal sphere. As broad as its protective scope is, as broad are its possible limitations. The fall-back right of Article 2.1 can be limited by any state action for which proportionate statutory authority exists.

The broad construction of the provision provoked the question why the Court construed a right, the scope of which is largely defined by the legislature. The Court’s answer to this question is another central aspect of this decision. The Court held that Article 2.1 in its broad meaning could only be restricted on the basis of a statute which conforms to any aspect of the Basic Law, including formal aspects such as legislative procedure and sufficient power base for the federal or state legislature and substantive aspects, i.e. mainly the principle of proportionality.

The consequences of this interpretation of Article 2.1 are immense: Not only did the Court create a broad fall-back right against any and all state activity impacting on a person. The Court’s interpretation of the limitation clause made it possible for individuals to raise any and all legality

**Selected Fundamental Decisions of
the Federal Constitutional Court**

issues against statutory provisions infringing on personal freedom in the constitutional complaint procedure. It strengthened the Court's power to exercise constitutional oversight over any and all state action if only one individual was willing to bring a constitutional complaint. And finally, the Court's decision underscored the pivotal importance of the principle of proportionality in the fundamental rights' protection system of the Basic Law, a principle which the Court interprets and applies and which gives the Court broad license for the exercise of its role as the final constitutional arbitrator.

**Translation of the Elfes Judgment - Decisions of the Federal Constitutional Court
(Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 6, 32***

1. Article 11 of the Basic Law does not cover the right to travel.
2. The right to travel, as deriving from the general freedom of action, is guaranteed, within the limits of the Constitutional order, by Article 2.1 of the Basic Law.
3. Constitutional order in terms of Article 2.1 of the Basic Law is the constitutional state law, i.e. every legal norm that conforms procedurally and substantively to the constitution.
4. Everyone can bring a Constitutional complaint to the Federal Constitutional court, claiming a norm restricting his or her general freedom of action not to be part of the Constitutional order.

Order of the Second Senate of 16 January 1957 - 1 BvR 253/56 -

Facts:

The complainant, an active member of the Christian Democratic Union (CDU), was elected to the North Rhine-Westphalia parliament in 1947. He was also a leading spokesman of a radical right wing organization vehemently opposed to the Federal Republic's policies toward military defence and German reunification. He had participated in a number of conferences and demonstrations at home and abroad in which he sharply criticized these policies and for which he was refused a passport to travel abroad. Claiming that the state had violated his freedom of movement under Article 11 of the basic Law, he filed a constitutional complaint against judicial decisions sustaining the denial of his passport.

* Translation by Donald P. Kommers in: *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed, (1997) Durham NC., p 315 et seq. © Donald P. Kommers.

60 Years German Basic Law:
The German Constitution and its Court

Extract from the Grounds:

The constitutional complaint is rejected

I.

1. The complainant contends that s. 7.1 of the Passport Act of March 4, 1952, is null and void because the right to travel abroad, allegedly based on Article 11 of the Basic Law, is impermissibly limited. That is not so. The Passport Act provision reads: “A passport must be refused if facts justify the supposition that (a) the applicant threatens the internal or external security or other vital interests of the Federal Republic of Germany or one of the German states. ...”

Article 11.1 of the Basic Law guarantees freedom of movement “throughout the federal territory.” This text clearly does not protect a fundamental right to travel outside the federal territory. What is more, the original history of the provision does not provide any support for such an interpretation. ...

The fundamental right to freedom of movement may be limited only by the express provisions of Article 11.2. Article 11.2 states: “This right may be restricted only by or pursuant to a law ... or in which such restriction is necessary to avert an imminent danger to the existence of the free democratic basic order of the federation or a state, to combat the danger of epidemics, to deal with natural disasters or particularly grave accidents, to protect young people from neglect, or to prevent crime.” In providing for these limitations, the framers obviously had in mind freedom of movement within the country; Article 11.2 of the Basic Law makes no mention of traditional and relevant limitations on travel outside the country. Many countries (including free democracies) have long denied passports for reasons of state security. Similar restrictions, enforced in Germany since World War I, were carried over essentially unaltered into the Passport Act of 1952. If the framers had desired to incorporate a fundamental right to foreign travel into Article 11, they would not have forgotten to consider the long historical practice of withholding passports on the ground of state security. They clearly did not intend to guarantee freedom to travel abroad in Article 11.

...

Yet, freedom to travel abroad is not without some degree of constitutional protection as derivative of the basic right to general freedom of action.

2. In its ruling of July 20, 1954 (BVerfGE 4, 7 [15 seq.]), the Federal Constitutional Court did not decide whether the free development of one’s personality includes freedom of action in the widest sense possible, or whether Article 2.1 of the Basic Law is limited to the protection of a minimum amount of this right to freedom of action without which an individual would be unable to develop himself as a spiritual-moral person.

- a) The term “free development of personality” cannot simply mean development within that central area of personality that essentially defines a human person as a spiritual-moral being, i.e., the Kernbereichstheorie, for it is inconceivable how development within this core area could offend the moral code, the rights of others, or even the

**Selected Fundamental Decisions of
the Federal Constitutional Court**

constitutional order of a free democracy. Rather, the limitations imposed on the individual as a member of the political community show that the freedom of action in Article 2.1 of the Basic Law is to be broadly construed.

To be sure, the solemn formulation of Article 2.1 of the Basic Law was an inducement to see it in the light of Article 1 and to infer therefrom that its purpose was to embody the Basic Law's image of man. Yet nothing else is suggested other than that Article 1 is a fundamental constitutional principle which, like all the provisions of the Basic Law, informs the meaning of Article 2.1. Legally speaking, it represents a separate, individual basic right that guarantees a person's general right to freedom of action. Linguistic rather than legal considerations prompted the framers to substitute the current language for the original proposal, which read, "Every person is free to do or not to do what he wishes" (see *v. Mangoldt*, *Parlamentarischer Rat*, 42. session, p. 533). Apparently, the fact that the constitutional order is also mentioned in the second half of the sentence among the permissible limitations on the citizen's development of personality contributed to the theory that Article 2.1 intended to protect only a limited core area of personality. In the effort to uniformly interpret this term, i.e., "constitutional order", which appears in other provisions of the Constitution, the constitutional order was viewed as a more restrictive concept than the concept of a legal order that conforms to the Constitution. Thus one felt compelled to conclude that the Constitution should protect only a core sphere of personality, and not one's right to freedom of action.

In addition to the general right to freedom of action secured by Article 2.1, the Basic Law employs specific fundamental rights to protect man's self-determination in certain areas of life that were historically subject to encroachment by public authority. These constitutional provisions contain graduated reservation clauses that limit the extent to which the legislature may encroach upon a given basic right. The individual may invoke Article 2.1 in the face of an encroachment upon his freedom by public authority to the extent that fundamental rights do not specifically protect such special areas of life. There was no need for a general reservation clause here because the extent to which encroachments are possible by the state is easily ascertained from the restriction the constitutional order imposes upon the development of personality.

In other contexts (e.g., Article 9 of the Basic Law), the concept of the constitutional order can be limited to certain elementary principles of the Constitution (see *BGHSt* 7, 222 [227]; 9, 285 [286]).

...

Within the context of Article 2.1 of the Basic Law, "constitutional order" refers to the "general legal order, i.e. all norms conforming to the substantive and procedural provisions of the Constitution."

**60 Years German Basic Law:
The German Constitution and its Court**

- c) Legal scholars often held that the basic right of Article 2.1 will prove hollow if it is put under such a broad limitation because it could be restricted by any act of Parliament. They overlook the fact that legislative power is subject to more stringent constitutional restrictions than under the Weimar Constitution of 1919.... The legislature at that time could modify or alter constitutional rights at will.

The Basic Law, on the other hand, erected a value oriented order that limits public authority. This order guarantees the independence, self-determination, and dignity of man within the political community (BVerfGE 2, 1 [12 seq.]; 5, 85 [204 seq.]). The highest principles of this order of values are protected against constitutional change (Articles 1, 20, 79.3 of the Basic Law).

...

Laws are not constitutional merely because they have been passed in conformity with procedural provisions. This refers to the Weimar Constitution's adherence to the positivistic theory of constitutional law. See the section in Chapter I on structures and principles of the Basic Law for a discussion of *Begriffsjurisprudenz*. They must be substantively compatible with the highest values of a free and democratic order - i.e., the constitutional order of values - and must also conform to unwritten fundamental constitutional principles as well as the fundamental decisions of the Basic Law, in particular the principles of the rule of law and the social welfare state. Above all, laws must not violate a person's dignity which represents the highest value of the Basic Law; nor may they restrict a person's spiritual, political, or economic freedom in a way that would erode the essence of personhood. This follows from the constitutional protection afforded to each citizen's sphere of private development; that is, that ultimately inviolable area of human freedom insulated against any intrusion by public authority.

...

3. Even if the right to leave the country does not specifically belong to the concept of freedom of movement as protected by Article 11, it nevertheless is guaranteed by Article 2.1, within the limits of the constitutional order (i.e., the legal order that conforms to the Constitution) as a manifestation of the general right to freedom of action. Whether or not the passport law is part of the constitutional order as defined here remains to be decided. The answer is yes.

- a) The Passport Act requires all Germans crossing a foreign border to have a passport-in itself a substantial formal limitation on foreign travel. Because the law, however, by unanimous interpretation confers a legal right to a passport, it preserves the principle of free foreign travel. It does so by permitting the denial of a passport only under specified conditions. Thus the act is cognizant of the fundamental requirements of Article 2.1.
- b) S. 7 of the Passport Act clearly sets forth the grounds for denying a passport. The provision at issue here is unobjectionable to the extent that it permits denial of a passport on the basis of an internal or external threat to the security of the Federal Republic of Germany. Objections might be raised to the extent that the provision allows

Selected Fundamental Decisions of
the Federal Constitutional Court

the apprehension of a threat to “other vital interests” to suffice for the denial of a passport. The application of such a substantively indeterminate standard could, of course, lead to an abuse of discretion on the part of passport authorities.

...

But that has not occurred here.

b) *Riding in Forests*, BVerfGE 80, 137

Explanatory Annotation

In this 1989 decision the Court confirmed its broad interpretation of the right to free development of one’s personality as the right to do as one pleases, as long rights of others are not negatively affected. At issue were provisions restricting horseback riding in forests to trails and roads marked accordingly. Justice Grimm, in a forceful dissenting opinion, argued that Article 2.1 should not be afforded the broad meaning developed in the *Elfes* case. Unlike *Elfes*, where the important freedom to travel abroad was at issue and the question whether that freedom was to be constitutionally protected at all, the dissent saw no comparable legal position requiring constitutional oversight in this case. Fundamental rights should not be trivialized and they should not provide an avenue for opening up judicial review of legislation across the board when such norm review was generally procedurally limited and in principle not open for individuals. The majority, however, upheld its decision in *Elfes* and, for the time being, the question on the scope of Article 2.1 can be regarded as constitutionally settled.⁴

Translation of the Riding in Forests Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 80, 137*

Headnotes:

1. When constitutional complaint proceedings indirectly relate to the establishment of whether a provision of Land law is compatible with (ordinary) federal law, the Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) must interpret the Land law itself and is in that respect not restricted to a constitutional review of the interpretation of the (ordinary) court.
2. A provision of Land law that in principle allows riding in forests only on private roads and paths that are identified as bridleways is compatible with s. 14 of the Federal Forest Act (Bundeswaldgesetz - BWaldG) of 2 May 1975 (Federal Law Gazette (*Bundesgesetzblatt* - BGBl.) I p. 1037) and is not in violation of Article 2.1 of the Basic Law.

⁴ See also BVerfGE 90, 145 on the right to use drugs (cannabis), available in German at <http://www.servat.unibe.ch/dfr/bv090145.html> and BVerfGE 54, 143 on the municipal prohibition to feed doves, <http://www.servat.unibe.ch/dfr/bv054143.html>.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

**60 Years German Basic Law:
The German Constitution and its Court**

Order of the First Senate of 6 June 1989 - 1 BvR 921/85:

Facts:

S. 14 of the Federal Forest Act allows everyone access to forests for recreational purposes. Under s. 14.1 sentence 2 of the Federal Forest Act, riding in forests is allowed only on roads and paths. The regulation of details is left to the Länder (s. 14.2 sentence 1 of the Federal Forest Act), which may under certain circumstances restrict access to or any other use of forests. S. 27 of the Federal Nature Conservation Act (Bundesnaturschutzgesetz - BnatSchG) contains a similar provision that pertains to roads and paths on farmland. With s. 50.2 sentence 1 of the Landscape Act (Landschaftsgesetz - LG) of 26 June 1980 (Bavarian Law Gazette [*Bayerisches Gesetz und Verordnungsblatt* - GVBl.]. p. 734), the Land of North RhineWestphalia adopted a provision that, *inter alia*, restricts riding in forests to private roads and paths identified as bridleways in accordance with the provisions of the Highway Code (Straßenverkehrsordnung - StVO). The complainant petitioned the administration courts without success to find, *inter alia*, that he could use the paths under dispute in a specific forested area as a rider without being bound by the Landscape Act.

The constitutional complaint challenging the court decisions and indirectly also s. 50.2 sentence 2 of the Landscape Act was dismissed.

Extract from the Grounds:

C. I.

The fundamental right of the complainant under Article 2.1 of the Basic Law (Grundgesetz - GG) is not infringed by the challenged decisions and the underlying provision of s. 50.2 sentence 1 of the Landscape Act of 1980.

1. a) On the basis of the principles established in the case law of the Federal Constitutional Court, Article 2.1 of the Basic Law guarantees general freedom of action in a comprehensive sense (established case law since BVerfGE 6, 32 [36]; more recently, for example: BVerfGE 74, 129 [151]; 75, 108 [154, 155]).

Accordingly, protection is afforded not only to a limited area of the development of a person's personality, but rather to every form of human activity without regard to the importance of the activity for the development of a person's personality (see, for example, the decision of a pre-review committee in BVerfGE 54, 143 [146] - Feeding Pigeons [*Taubenfütten*]).

However, except for a core area of private conduct of life that enjoys absolute protection and is removed from the sphere of influence of public authority (BVerfGE 6, 32 [41]), general freedom of action is guaranteed only within the constraints of the second half of the sentence constituting Article 2.1 of the Basic Law and is therefore in particular subject to the constitutional (legal) order (BVerfGE 6, 32 [37, 38]; 74, 129 [152]).

Selected Fundamental Decisions of the Federal Constitutional Court

When an act of a public authority that affects freedom of action is based on a provision of law, a constitutional complaint invoking Article 2.1 of the Basic Law may be filed to seek review for the purposes of establishing whether such provision inheres to the constitutional order, that is, whether it is in form and substance compatible with the articles of the Basic Law (established case law since BVerfGE 6, 32).

This involves not only a substantive assessment of the provision of law in respect of Article 2.1 of the Basic Law, but also an examination of its compatibility with the Basic Law otherwise. As a result, it is also necessary in particular to establish whether the law is in compliance with provisions governing constitutional jurisdiction (BVerfGE 11, 105 [110]; 29, 402 [408]; 75, 108 [146, 149]).

In the case of Land legislation, it is also necessary to examine in addition to the jurisdictional issues involved in view of Article 31 of the Basic Law whether the substance of the Land law is in compliance with federal law (enacted in turn in compliance with jurisdictional requirements) and also with federal framework legislation (BVerfGE 51, 77 [89, 90, 95, 96]; see also BVerfGE 7, 111 [118, 119]).

In terms of substance, the principle of proportionality provides the standard for establishing the extent to which general freedom of action may be restricted (BVerfGE 17, 306 [314]; 55, 159 [165]; 75, 108 [154, 155]). In the event an existing right is subsequently set aside, the protection of legitimate expectations required by the principle of the rule of law must be preserved (BVerfGE 74, 129 [152]).

In addition, it is necessary to satisfy the requirements that derive (see also on this BVerfGE 6, 32 [42]; 20, 150 [157, 158]) from the constitutional necessity for the enactment of a specific statute (BVerfGE 49, 89 [126, 127]).

- b) Reservations in respect of the above case law of the Federal Constitutional Court have been and are still being raised in the literature (see, for example, Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 16th ed., marginal nos. 426 et seq.; extensive references from the past in Scholz, *AöR* 100 [1975], pp. 80 et seq.). They are directed in particular against the unrestricted inclusion of all forms of human activity in the area protected by the fundamental rights, which as compared with other areas protected by fundamental rights results in protection “in excess of the system of values” (see Scholz, *op. cit.*, pp. 8283, with further references), but on the other hand deprives the fundamental right of substance due to the broad possibility of restriction inherent in the expansion of the scope of protection (Hesse, *op. cit.*, marginal no. 426).

The restriction of the scope of protection afforded by Article 2.1 of the Basic Law that is advocated could in the present case become important since it is doubtful that riding on private forest paths can be subsumed under development of personality as understood in the narrower sense.

There is, however, no justification for restriction of the scope of protection afforded by Article 2.1 of the Basic Law in deviation from previous case law. Not only the history of the development of the fundamental right would stand in the way of such

**60 Years German Basic Law:
The German Constitution and its Court**

restriction (see BVerfGE 6, 32 [3940]). In addition to the above rights of freedom, comprehensive protection of the freedom of human activity also fulfils a valuable function in terms of preserving freedom since the fundamental right guarantees protection of substantial weight despite the broad possibilities for restriction under the above standards. Any attempt at a normative restriction of the scope of protection would therefore result in a loss of freedom for citizens that may not be imposed, if for no other reason than because other fundamental rights have a scope of protection that is narrower and of distinct quality and because no compelling reasons for such a loss are otherwise apparent. Limitation, for example, to a guarantee for a narrower, personal sphere of life, even if not restricted to purely intellectual and moral development, or on the basis of similar criteria would, moreover, be accompanied by difficult problems of differentiation that would in practice defy satisfactory resolution.

2. As a form of human activity, riding does fall within the scope of protection of Article 2.1 of the Basic Law, but does not belong to the core area of private conduct of life. It is therefore in principle not exempt from statutory restriction. The provision contained in s. 50.2 sentence 1 of the Landscape Act of 1980 that is indirectly challenged, restricts in a manner that is compatible with the Basic Law; the right to ride in forests.

The provision, which is a statute under Land law, does not conflict with the provisions of federal law contained in s. 14 of the Federal Forest Act and s. 27 of the Federal Nature Conservation Act.

- a) In deciding this matter, the Federal Constitutional Court is not limited to a review of the interpretation of the provisions of federal law by the ordinary courts in the initial proceedings on the basis of the principles that have been established for the purposes of review by the constitutional court of the application of ordinary law in decisions of the courts (see BVerfGE 18, 85 [92, 93]).

The effect of these principles would be that the review of the validity of the provision under Land law, which must be included in the decision indirectly, could be carried out only to a limited extent. If in a subsequent case an ordinary court were to interpret the federal rule differently, which - as long as the Federal Constitutional Court has not itself rendered a decision as regards the interpretation - it cannot be prohibited from doing, the provision under Land law would then have to be measured again - possibly with different results - against this interpretation. This would defeat the purpose of a judicial review, even if only an indirect one. A decision as to whether a provision under Land law is valid or not must be conclusive; as a result, the standard of review - in this case the substance of the federal provision - must be established. The Federal Constitutional Court has accordingly itself consistently interpreted federal laws as provided for under Article 100.1 sentence 2 (2nd alternative) of the Basic Law in connection with the review of Land law to determine compliance with federal law (BVerfGE 25, 142 [149 et seq.]; 66, 270 [282 et seq.]; 66, 291 [307 et seq.]). No objective reason is evident that would warrant proceeding otherwise in the case of an interlocutory judicial review.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

Accordingly, in the case of constitutional complaint proceedings the Federal Constitutional Court must therefore also interpret the federal provision in order to establish the standard of review when the compatibility of a provision under Land law with a federal provision is to be reviewed indirectly (see also BVerfGE 51, 77 [90 et seq., in particular p. 92]).

- b) The wording of s. 14 of the Federal Forest Act could be understood to mean that access to forests is already allowed in principle by subsection 1 sentence 1 of this provision and that - according to subsection 2 - the Länder may restrict this principle by law only for good reason. The same would have to apply as regards riding, if riding were to be subsumed under access. However, even if riding were to be considered to fall under “other type of use” within the meaning of s. 14.2 sentence 2 of the Federal Forest Act, this would in principle not change anything in the end. “Equivalence” with other types of use within the meaning of s. 14.2 sentence 2 of the Federal Forest Act would then apply not only to allowance on principle, but also as regards the right of the Länder to make provision for exceptions. It could, to be sure, not logically be construed to mean that regulation of all types of use would have to be completely identical, if other types of use are even included in the first place. As far as their methodology is concerned, provisions governing use on foot and those governing other types of use would, however, have to correspond to one another.

However, such an interpretation of s. 14 of the Federal Forest Act - which is not compelled by the wording of the provision - can be excluded in view of the nature of the provision as framework legislation and its historical development.

- aa) S. 14 of the Federal Forest Act contains no legal provisions that are directly binding upon the public; moreover, the provisions address exclusively the Länder, which must themselves enact the appropriate public laws.

...

This is not inconsistent with the fact that the term “framework provisions” contained in Article 75 of the Basic Law is not to be construed in this narrower technical sense since the federal legislature may also enact individual, directly applicable provisions in the exercise of the powers it is granted, therein in addition to guidelines for the legislatures of the Länder (see BVerfGE 4, 115 [130]).

The fact that the provision contained in s. 14.1 of the Federal Forest Act is itself also intended only as a guideline for the legislatures of the Länder is also again underscored by the wording of s. 14.2 sentence 1 of the Federal Forest Act, which stipulates that the Länder are to regulate the details. If the substantive content of s. 14.1 of the Federal Forest Act had been intended as directly applicable law, it would have to have been formulated to stipulate that the Länder may enact complementary provisions.

...

**60 Years German Basic Law:
The German Constitution and its Court**

cc) The nature of a framework provision is such as to indicate in the case of doubt that it is intended to be filled out and that the legislative power of the Länder is not to be restricted any more than is compellingly required by the wording of the framework provision (see BVerfGE 25, 142 [152]; 67, 1 [12]). According to this rule of interpretation, s. 14.1 sentence 2 of the Federal Forest Act in conjunction with s. 2 sentence 1 of the provision is to be understood to mean that the legislatures of the Länder may allow riding in forests only on roads and paths, but may themselves provide the details within this framework. In the case of a provision that restricts riding within the prescribed framework, legislatures must be sure to respect the aspects enumerated for this purpose in s. 14.2 sentence 2 of the Federal Forest Act since the provision also constitutes a guideline for the legislatures in this regard. It is on the other hand not possible to infer the existence of a specific mandatory methodology in the framework, in particular in the sense of a system of rules and exceptions. It therefore also does not preclude a provision that serves to separate recreational riders and others seeking recreation and assigns riders to special bridleways to protect persons visiting the forest, as was provided for by s. 50.2 sentence 1 of the Landscape Act of 1980.

...

3. The provision contained in s. 50.2 sentence 1 of the Landscape Act of 1980 also meets the standards that derive directly from the Basic Law in respect of restriction of the general freedom of action under Article 2.1 of the Basic Law.

a) The provision under challenge is compatible with the principle of proportionality.

It is intended to achieve consistent separation of “recreational traffic” in forests by assigning riders on the one hand and others seeking recreation (in particular those on foot and bicyclists) on the other hand to separate paths. As the Land government submitted, what the legislature primarily wanted to achieve with this provision was to avoid the dangers and other inconveniences that result for those seeking recreation on foot, from encounters with horses and the de-compaction of the floor of the forest associated with riding. This was intended to achieve a purpose that is not only in the public interest and legitimate under constitutional law, but can also be justified directly under Article 2.1 of the Basic Law. By attempting to achieve orderly coexistence of various forms of activity that fall under the category of general freedom of action through the separation of riders and others seeking recreation, the legislature undertook a responsibility that is grounded in the fundamental right itself and prescribed in Article 2.1 of the Basic Law by the reference to the rights of others.

It cannot be established that the legislature has succumbed to any obvious error of judgment in pursuing this objective. It was able to rely upon experience gained while the predecessor provision was in force. In this context, the Land government has plausibly set forth, that encounters with horses cause many persons seeking recreation to feel threatened and that persons on foot could be exposed to situations involving serious dangers due to riders, especially on narrower forest paths. Ultimately, the complainant himself concedes this by assuming the existence of conflicts of interest

**Selected Fundamental Decisions of
the Federal Constitutional Court**

between riders and others seeking recreation in the vicinity of major metropolitan centres. His claim to the effect that most people seeking recreation enjoy seeing horses being ridden in the country cannot in any case apply to situations involving encounters at close quarters.

The provision is obviously suitable for achieving the desired purpose of protection. The fact that riders are assigned to separate paths precludes from the very start the use of the same forest paths by both persons on foot and riders and as a result the concomitant dangers and inconveniences for persons on foot as well.

The separation of riders and other “recreational traffic” in forests also satisfies the dictate of exigency. The Federal Constitutional Court may consequently limit itself to a review of the alternatives that are enumerated by the complainant and other alternatives discussed among experts for the purposes of establishing whether they could make it possible to achieve the desired goal in a manner that is not only simpler and equally effective, but also involves less tangible restriction of fundamental rights (BVerfGE 77, 84 [109]).

More moderate means of achieving in a comparably effective manner the twofold goal pursued (protection of persons on foot against the danger posed by animals and maintenance of paths in a condition suitable for hiking) are neither set forth by the complainant nor otherwise apparent.

Finally, the provision is in the narrower sense, proportionate. It is of special importance in this context that the two classes whose competing interests in the use of forests that the law is intended to reconcile, namely, persons on foot and riders, be able to rely equally upon Article 2.1 of the Basic Law. In separating recreational traffic, the legislature had to regulate the competing claims to the use of the existing network of paths in a manner that does justice to the interests of all parties involved. The fact that the legislature effected this separation by setting bridleways apart from the total number of available private forest paths and not, the other way around, by setting apart special paths for persons on foot cannot be objected to. In view of the smaller number of riders as compared with that of persons on foot and the greater effect on the ground of the latter, this cannot be considered a failure on the part of the legislature to achieve the equitable reconciliation of interests with which it is charged. This applies all the more so since the landscape authorities are explicitly charged under s. 50.7 of the Landscape Act of 1980 to make provision for an adequate and suitable network of bridleways.

- b) The provision under challenge satisfies the requirements that arise from the constitutional necessity for the enactment of a specific statute.

Under the doctrine that binds the administration to the law, a provision that restricts freedom of action may not be so unspecific as to leave prohibition of an activity to the discretion of the administration with, for practical purposes, no possibility for review (see BVerfGE 6, 32 [42 et seq.]).

**60 Years German Basic Law:
The German Constitution and its Court**

The Federal Constitutional Court elaborated on this doctrine in its judgment on the Collection Act (Sammlungsgesetz - SammlG) (BVerfGE 20, 150), stating that the legislature may, to be sure, regulate the exercise of allowed activities by adopting a negative statute that makes provision for authorization of otherwise prohibited activities (BVerfGE, op. cit., 154 et seq.).

It must, however, according to the Court, then specify conditions for the issuance of such authorization and upon compliance with such conditions extend a legal right to such approval to the holder of the fundamental right, for it must itself define the legal sphere within the scope of the exercise of the fundamental right that is exposed to governmental intervention and may not leave this to the discretion of administrative authorities (BVerfGE, op. cit., 155, [157, 158]).

In that regard, the doctrine that binds the administration to the law is affected from the point of view of the constitutional necessity for the enactment of a specific statute (see BVerfGE 49, 89 [126, 127]).

The provision under challenge does not, in any case within the meaning established by the Federal Constitutional Court, fall under the term “negative statute that makes provision for authorization,” which the Federal Administrative Court (Bundesverwaltungsgericht) also used in the initial proceedings concerning the provision contained in s. 50.2 sentence 1 of the Landscape Act of 1980. It would not, however, be possible to achieve the goal of separation of recreational traffic, which would be legitimate under constitutional law, through a negative statute that makes provision for authorization. Classification of the individual paths presupposes in each case the existence of a decision based on regulatory policy that is not already concretely predetermined by law and entails no obligation to grant a legal right to assignment of specific paths to riders. The decision as to which forest paths in particular are to be made available as bridleways in the context of regulation of all recreational traffic is pursuant to s. 50.2 sentence 1 in conjunction with s. 50.7 sentence 1 of the Landscape Act of 1980 ultimately an act of governmental (road) planning. The legislature of the Land has therefore adopted an approach to the regulation of riding in forests that has already become common practice in the case of legislation governing other specific activities involving freedom of movement - such as, for example, vehicular traffic. Such acts of planning cannot be predetermined by law by means of catalogue of conditions. However, the duty to balance competing interests in the area of planning does provide an objective standard that permits the achievement of an equitable reconciliation of the interests of the general public and the private concerns of the respective property owners as a function of concrete circumstances. As a result, that which applies to the planning of other travelling ways such as public roads applies equally in respect of the duty of the landscape authorities to plan and implement a network of bridleways as explicitly prescribed by s. 50.1 sentence 1 of the Landscape Act of 1980 (see on this BVerfGE 79, 174 [198, 199]).

In deciding which private forest ways are to be identified as bridleways and consequently, in compliance with the idea behind the law, closed to persons on foot, the responsible authorities involved must deal with a multitude of legitimate interests.

Selected Fundamental Decisions of the Federal Constitutional Court

At the very least, not only the interest of riders in as large a network of bridleways as possible and the countervailing interest of persons on foot, but also the interest of property owners in the maintenance and undisturbed use of their own ways will regularly be affected and presently require reconciliation. The objective importance of each of these individual interests may vary from case to case.

The resolution of such conflicts lies beyond the reach of detailed regulation by law. This can also not be required from the point of view of the constitutional necessity for the enactment of a specific statute. For this doctrine may not be allowed to oblige the legislature to renounce a provision that it considers (and may so consider) appropriate for the purposes of achieving a goal that is legitimate under the Basic Law (see also BVerfGE 58, 300 [346]).

- c) The provision under challenge is also not the subject of any reservations of a constitutional nature as regards the protection of legitimate expectations. The legislature also has in principle the power to further narrow existing limitations of general freedom of action within the bounds of proportionality. The predecessor provision of the Landscape Act, which in principle allowed riding on forest roads and ways, was in force for only five years. It was preceded by a regulation that in principle prohibited riding in forests (s. 4.e of the Land Forest Act of 1969). Before that time, no right to ride in forests had been granted by statute, nor is there evidence of any customary right to ride in forests that either the federal or Land legislature could have revoked under their respective authority (see also Bavarian Constitutional Court [*Bayerischer Verfassungsgerichtshof* - BayVfGH] 28, 107 [120] with further references).

In view of the inconveniences that result from mixed recreational traffic that includes riders, it was necessary to anticipate that the legislature might be moved by the experience gained under the law of 1975 to modify the provision again at the expense of riders. If for no other reason, riders could not rely on the continued existence of this provision because of the brief period during which riders were legally allowed to use all forest ways. Furthermore, the reasons that lend the provision under challenge legitimacy under constitutional law would also suffice to override any protection of legitimate expectations that might have been required.

c) *Census Act, BVerfGE 65, 1*

Explanatory Annotation

The intention to conduct a census in 1983 in order to collect framework data for planning purposes concerning personal, work and business related information and about living conditions was at issue in this decision. In absence of a specific right protecting against the collection and use of such data the Court resorted to the fall-back right of Article 2.1 as construed in the *Elfer*-decision.

Using the broad construction of the right of free development of one's personality whereby any state action affecting individuals in a negative way by reducing the sphere of individual freedom must be measured against Article 2.1 the Court went on to develop the right to

**60 Years German Basic Law:
The German Constitution and its Court**

informational self-determination. Under this new right, which the Court also explicitly linked to the human dignity clause in Article 1.1 of the Basic Law, personal data is linked to the individual from whom it is taken and the release and use of such data must in principle be consented to by that individual. The Court argued that data collection and usage in the age of computer technology has a very different and potentially threatening dimension because such data collections could be used to comprehensively map individual behaviour without any influence of individuals to even know what data is collected about them and how it is, will or might be used in the future.

Infringements of this right are, of course, possible and as the Court had developed in the *Effes*-decision, there is actually a broad scope for such infringements, however, only on the basis of statutory authority that is in compliance with the Basic Law in all respects, conforms to the principle of proportionality and contains organizational and procedural safeguards against the misuse of the data. The census statute of 1983, albeit unanimously passed by Parliament, did not fulfil these requirements.

This new right has played a crucial role in many other decisions of the Court, for example with regard to the “genetic fingerprint”, i.e. the analysis and storage of DNA for identification purposes in criminal proceedings⁵, or GPS surveillance in the context of organized crime and terrorism.⁶

Translation of the Census Act Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 65, 1*

Headnotes:

1. Given the context of modern data processing, the protection of individuals against unlimited collection, storage, use and transfer of their personal data is subsumed under the general right of personality governed by Article 2.1 in conjunction with Article 1.1 of the Basic Law (Grundgesetz - GG). In that regard, this fundamental right guarantees in principle the power of individuals to make their own decisions as regards the disclosure and use of their personal data.
2. Restrictions of this right to “informational self-determination” are permissible only in the case of an overriding general public interest. Such restrictions must have a constitutional basis that satisfies the requirement of legal certainty in keeping with the rule of law. The legislature must ensure that its statutory regulations respect the principle of proportionality. The legislature must also make provision for organizational and procedural precautions that preclude the threat of violation of the right of personality.

⁵ BVerfGE 103, 21, in German available at <http://www.servat.unibe.ch/law/dfr/bv103021.html>.

⁶ BVerfGE 112, 304, in German available at <http://www.servat.unibe.ch/law/dfr/bv112304.html>.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

3. As regards the constitutional requirements to be satisfied by such restrictions, it is necessary to distinguish between personal data that are collected and processed in personalized, non-anonymous form and data intended for statistical purposes.

In the case of data collected for statistical purposes, it is not possible to require the existence of a narrowly defined, concrete purpose for the collection of such data. However, the collection and processing of information must be accompanied by appropriate restrictions within the information system to compensate for the absence of such a concrete purpose.

4. The survey program of the 1983 Census Act (Volkszählungsgesetz - VZG) (s. 2 nos. 1 to 7 and ss. 3 to 5) does not entail registration and classification of personal data that would be incompatible with human dignity; it therefore also satisfies the requirements of legal certainty and proportionality. Nonetheless, procedural precautions are required in connection with the execution and organization of the collection of such data in order to preserve the right to informational self-determination.
5. The provisions governing the transfer of data (including for the purposes of crosschecks with population registers) contained in s. 9.1 to 3 of the 1983 Census Act violate the general right of personality. The transfer of data for scientific purposes (s. 9.4 of the 1983 Census Act) is compatible with the Basic Law.

Judgment of the First Senate of 15 December 1983, on the basis of the oral hearing of 18 and 19 October 1983 - 1 BvL 209, 269, 362, 420, 440 and 484/83:

Facts:

The 1983 Census Act of 25 March 1982 (Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I p. 369) made provision for a general census of the population, employment, housing and places of employment for statistical purposes in the spring of 1983. The declared purpose of the Act was to obtain information on the most recent state of the population, its geographic distribution and its composition in terms of demographic and social characteristics as well as on the economic activity of the population through the surveys to be carried out, which information provides the indispensable basis for decisions made by the Federation, the *Länder* and municipalities in the areas of social and economic policy. The previous census had been taken in the year 1970. The 1983 Census Act defined in detail the data to be collected and the respondents, and s. 9 made provision, among other things, for the possibility of crosschecking the data collected with municipalities and federal and Land authorities for specific purposes having to do with administrative enforcement.

In response to numerous constitutional complaints lodged directly against the 1983 Census Act, the Federal Constitutional Court found the Act to be essentially in compliance with the Basic Law; the Court declared in particular those provisions void that govern crosschecks with population registers and the power to transfer data for the purposes of administrative enforcement.

60 Years German Basic Law:
The German Constitution and its Court

Extract from the Grounds:

B. II.

To the extent that the complainants were themselves personally affected by the 1983 Census Act, theirs is an immediate and current concern.

However, according to the case law of the Federal Constitutional Court, an immediate concern is lacking if the implementation of the provision under challenge requires a separate act of enforcement on the part of the administration. The reason for this is that such an act of enforcement will as a rule encroach on the legal sphere of the citizen first; legal recourse that may be taken against such encroachment also permits review of the constitutionality of the law applied (BVerfGE 58, 81 [104]; see BVerfGE 59, 1 [17]; 60, 360 [369 and 370]).

Implementation of the 1983 Census Act necessarily involved requests to furnish information; only through such requests could the legal sphere of the complainants be affected (See s. 5.2 of the 1983 Census Act). The way to legal recourse against this enforcement measure before the administrative courts would have been opened. This does not, however, constitute an obstacle to the admissibility of the constitutional complaints.

The Federal Constitutional Court has, in cases involving special circumstances affirmed by way of exception, the admissibility of constitutional complaints lodged directly against a law before an act of enforcement was ordered when that law would force the parties affected to make decisions that cannot be rectified later or would cause them to take measures that they can then no longer reverse after enforcement of the law (see BVerfGE 60, 360 [372]). The constitutional complaints lodged directly against the 1983 Census Act are also admissible by way of exception before the act of enforcement is ordered.

Enforcement of this Act was intended to affect the entire population within a very short period of time. The questionnaires were to be distributed starting on 18 April 1983 and then collected by early May 1983. A period of only about two weeks would therefore have been available to obtain injunctive relief before the administrative courts. The courts would not have been able to address the issue in this limited period of time in such a manner as to make it possible for the Federal Constitutional Court to expect substantive preliminary review from them. Nevertheless, a constitutional complaint against negative decisions in proceedings pursuant to s. 80.5, s. 123 and s. 146.1 of the Code of Administrative Court Procedure (Verwaltungsgerichtsordnung - VwGO) would have been admissible (see BVerfGE 51, 130 [138 et seq.]; 53, 30 [49, 52]; 54, 173 [190]). In any case, after the request to furnish information was contested through recourse to the administrative courts, a decision from the Federal Constitutional Court would have been conceivable prior to exhaustion of such legal remedies pursuant to s. 90.2 sentence 2 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG) (See BVerfGE 59, 1 [19 and 20]). The Federal Constitutional Court would then, however, have had to deal with numerous, possibly contradictory, decisions of the administrative courts. The fact that some courts had granted the parties affected injunctive relief, but others not, could also have resulted in the possibility of legal uncertainty. Under these circumstances, the subsidiarity principle, according to which the public is in principle initially referred to the specialized courts, would have achieved the exact opposite of what is intended: it would no longer

**Selected Fundamental Decisions of
the Federal Constitutional Court**

have served to relieve the Federal Constitutional Court and leave to it the review of cases of the specialized courts, but would have put it under especially great time pressure to make decisions on this subject matter. Given this situation, the complainants had the right, by way of exception, to challenge the law directly with their constitutional complaint.

C.

The constitutional complaints are - to the extent admissible - in part founded.

...

II.

The primary standard of review is the general right of personality, which is protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law.

1. a) The worth and dignity of individuals, who through free self-determination function as members of a free society, lie at the core of the constitutional order. In addition to specific guarantees of freedom, the general right of personality guaranteed in Article 2.1 in conjunction with Article 1.1 of the Basic Law, which can also become important precisely in view of modern developments and the concomitant new threats to the personality, serves to protect that worth and dignity (see BVerfGE 54, 148 [153]). Previous concrete treatment in the case law does not conclusively describe the content of the right of personality. This right also subsumes - as has already been suggested in the BVerfGE 54, 148 [155] decision in extension of previous decisions (see BVerfGE 27, 1 [6]; 27, 344 [350 and 351]; 32, 373 [379]; 35, 202 [229]; 44, 353 [372 and 373]). - the right of individuals that follows from this idea of self-determination to decide in principle themselves when and within what limits personal matters are disclosed (see also BVerfGE 56, 37 [41 et seq.]; 63, 131 [142 and 143]).

Given the current and future state of automated data processing, this right merits a special measure of protection. It is especially threatened since it is no longer necessary to consult manually assembled files and dossiers for the purposes of decision making processes, as was the case previously; to the contrary, it is today technically possible, with the help of automated data processing, to store indefinitely and retrieve at any time, in a matter of seconds and without regard to distance, specific information on the personal or material circumstances of individuals whose identity is known or can be ascertained (personal data (see s. 2.1 of the Federal Data Protection Act (Bundesdatenschutzgesetz - BDSG)). This information can also be combined - especially if integrated information systems are set up - with other collections of data to assemble a partial or essentially complete personality profile without giving the party affected an adequate opportunity to control the accuracy or the use of that profile. As a result, the possibilities for consultation and manipulation have expanded to a previously unknown extent, which can affect the conduct of the individual because of the mere psychological pressure of public access.

**60 Years German Basic Law:
The German Constitution and its Court**

However, personal self-determination also presupposes - even in the context of modern information processing technologies - that individuals are to be afforded the freedom to decide whether to engage in or desist from certain activities, including the possibility of actually conducting themselves in accordance with their decisions. The freedom of individuals to make plans or decisions in reliance on their personal powers of self-determination may be significantly inhibited if they cannot with sufficient certainty determine what information on them is known in certain areas of their social sphere and in some measure appraise the extent of knowledge in the possession of possible interlocutors. A social order in which individuals can no longer ascertain who knows what about them and when and a legal order that makes this possible would not be compatible with the right to informational self-determination. A person who is uncertain as to whether unusual behaviour is being taken note of at all times and the information permanently stored, used or transferred to others will attempt to avoid standing out through such behaviour. Persons who assume, for example, that attendance of an assembly or participation in a citizens' interest group will be officially recorded and that this could expose them to risks will possibly waive exercise of their corresponding fundamental rights (Articles 8 and 9 of the Basic Law). This would not only restrict the possibilities for personal development of those individuals but also be detrimental to the public good since self-determination is an elementary prerequisite for the functioning of a free democratic society predicated on the freedom of action and participation of its members.

From this follows that free development of personality presupposes, in the context of modern data processing, protection of individuals against the unrestricted collection, storage, use and transfer of their personal data. This protection is therefore subsumed under the fundamental right contained in Article 2.1 in conjunction with Article 1.1 of the Basic Law. In that regard, the fundamental right guarantees in principle the power of individuals to make their own decisions as regards the disclosure and use of their personal data.

- b) The guarantee of this right to “informational self-determination” is not entirely unrestricted. Individuals have no right in the sense of absolute, unrestricted control over their data; they are after all human persons who develop within the social community and are dependent upon communication. Information, even if related to individual persons, represents a reflection of societal reality that cannot be exclusively assigned solely to the parties affected. The Basic Law, as has been emphasized several times in the case law of the Federal Constitutional Court, embodies in negotiating the tension between the individual and the community a decision in favour of civic participation and civic responsibility (see BVerfGE 4, 7 [15]; 8, 274 [329]; 27, 1 [7]; 27, 344 [351 and 352]; 33, 303 [334]; 50, 290 [353]; 56, 37 [49]).

Individuals must therefore in principle accept restrictions on their right to informational self-determination in the overriding general public interest.

Selected Fundamental Decisions of the Federal Constitutional Court

According to Article 2.1 of the Basic Law - as is also correctly recognized in s. 6.1 of the Federal Statistics Act (Bundesstatistikgesetz - BStatG) - these restrictions require a (constitutionally) legal basis from which the prerequisites for and the scope of the restrictions clearly follow and can be recognized by the public and which therefore satisfies the requirement of legal certainty in keeping with the rule of law (BVerfGE 45, 400 [420] with further references). The legislature must in its statutory regulations respect the principle of proportionality. This principle, which enjoys constitutional status, follows from the nature of the fundamental rights themselves, which, as an expression of the general right of the public to freedom from interference by the state, may be restricted by the public powers in any given case only insofar as indispensable for the protection of public interests (BVerfGE 19, 342 [348]; established case law). In view of the threats described above that arise from the use of automated data processing, the legislature must more than was the case previously, adopt organizational and procedural precautions that work counter to the threat of violation of the right of personality (see BVerfGE 53, 30 [65]; 63, 131 [143]).

2. The constitutional complaints provide no occasion for an exhaustive discussion of the right to informational self-determination. The only issue to be decided relates to the reach of this right in the case of governmental actions that require that individuals furnish personal data. It is not possible in such cases to limit consideration exclusively to the nature of the information. The usefulness and possible uses of the information are what are of decisive importance. This depends on the one hand upon the purpose served by the survey and on the other hand upon the possibilities for processing and collating information inherent in information technology. This is what makes it possible for data that are in and of themselves of no significance to take on new importance; in that respect, "unimportant" data no longer exist in the context of automated data processing.

Accordingly, the extent to which information is sensitive cannot depend exclusively upon whether it concerns intimate matters. Indeed, knowledge of the context in which data are used is necessary to establish the importance of data for the purposes of legislation governing the right to personality. Only after it has been clearly established, what the purpose is for requiring that data be furnished and what possibilities exist for collation and use of such data, is it possible to address the question as to the admissibility of restriction of the right to informational self-determination. In this context, it is necessary to distinguish between personal data that are collected and processed in personalized, non-anonymized form (see under (a)) and data intended for statistical purposes (see under (b)).

- a) It has been acknowledged up to now that compulsory collection of personal data without restriction is not permissible, in particular if such data are to be used for the purposes of administrative enforcement (for example, in connection with taxation or allocation of social benefits). In that respect, the legislature has made provision for various measures to protect the parties affected that go in the direction required by the Basic Law (see, for example, provisions of the data protection laws of the Federation and the *Länder*, ss. 30, 31 of the Fiscal Code (*Abgabenordnung* - AO); s. 35 of the First Book of the Social Code (*Sozialgesetzbuch I* - SGB I) in conjunction with ss. 67 to 86 of the Social Code X). The extent to which the right to informational

**60 Years German Basic Law:
The German Constitution and its Court**

self-determination and in that connection the principle of proportionality and the duty to take procedural precautions compel the legislature to make such provision on constitutional grounds depends on the nature, scope and conceivable uses of the collected data and the danger of abuse (see BVerfGE 49, 89 [142]; 53, 30 [61]).

An overriding general public interest will regularly exist exclusively in data of concern to society, to the exclusion of unreasonable, intimate information and self-incrimination. On the basis of the state of knowledge and experience from the past, the following measures in particular would seem important:

Compulsory disclosure of personal data presupposes that the legislature has specifically and precisely defined the intended area of use and that the information is suitable and required for that purpose. The collection of non-anonymized data to be stored for purposes that are not or have not yet been specified would not be compatible with this. All governmental entities that collect personal data to fulfil their duties will have to restrict themselves to the minimum required to achieve the specified purpose.

The use of the data is limited to the purpose specified by law. If for no other reason than because of the dangers associated with automated data processing, protection is required against unauthorized use - including protection against such use by other governmental entities - through a prohibition on the transfer and use of such data. Mandatory information, disclosure and deletion constitute further procedural precautions.

Due to the lack of transparency of the storage and use of data for the public in the context of automated data processing as well as in the interest of anticipatory legal protection in the form of timely precautions, the involvement of independent data protection officers is of significant importance for effective protection of the right to informational self-determination.

- b) The collection and processing of data for statistical purposes involve unique aspects that may not be ignored in the context of constitutional scrutiny.
 - aa) Statistics are of significant importance for governmental policy that is subject to the principles and guidelines of the Basic Law. If economic and social progress is not to be taken as the result of inevitable fate but as a permanent goal, comprehensive, continuous and constantly updated information on economic, ecological and social developments is necessary. It is possible to create the basis for action that is indispensable for governmental policy that is aligned with the principle of the social state only with a knowledge of the relevant data and the possibility of using such information for statistical purposes with the help of the opportunities presented by automated data processing (see BVerfGE 27, 1 [9]).

In the case of surveys for statistical purposes, it is not possible to require that the purpose for which the data are collected be narrowly and concretely defined. It lies in the nature of statistics that data are intended to be used for a wide variety of different purposes after collection and that these purposes cannot be defined from the outset; accordingly, there is a need to store such data.

Selected Fundamental Decisions of
the Federal Constitutional Court

...

- bb) If the variety of possibilities for the use and collation of data cannot therefore be determined in advance in the case of statistics because of the very nature of the situation, the collection and processing of information within the information system must be accompanied by appropriate restrictions to compensate for this. Clearly defined conditions must be created for processing to ensure that individuals do not become mere data subjects in the context of the automated collection and processing of the information pertaining to their person. Both the absence of a connection with a specific purpose that can be recognized and verified at all times and the multifunctional use of data, reinforce the tendencies that are to be checked and restricted by data-protection legislation, which represents the concrete manifestation of the constitutionally guaranteed right to informational self-determination. Precisely because there is from the outset an absence of purposive limits that restrict the data set, population censuses are likely to entail the danger of invasive registration and classification of individuals that has already been emphasized in the micro census decision (Mikrozensus-Beschluß) (see BVerfGE 27, 1 [6]). For that reason, the collection and processing of data for statistical purposes must be subjected to special requirements intended to protect the right of personality of respondents.

Notwithstanding the multinational nature of the collection and processing of data for statistical purposes, it is a prerequisite that this be done exclusively to support the fulfilment of public duties. Here too, not just any information may be required. Even in the case of the collection of individual data that are required for statistical purposes, the legislature must, when it imposes a duty to furnish information, determine in particular whether the collection of such information could entail the danger of social categorization (for example, in respect of substance addiction, criminal record, mental illness or social marginality) of the party affected and whether the purpose of the survey could not also be achieved by means of an anonymized investigation. This is, for example, likely to be the case of those aspects of the collection of data governed by s. 2 no. 8 of the 1983 Census Act, according to which the population and employment census in the institutional area includes information on the status of respondents as inmates or employees or relatives of employees. The collection of such data is intended to provide information on the population of institutions (*Bundestag* document (*Bundestagsdrucksache* - BTDrucks.), 9/451, p. 9). Such a goal can - apart from the danger of social stigmatization - also be achieved without reference to specific individuals. It would suffice to have the head of the institution provide figures on the population as of the date of the census, broken down according to the criteria listed in s. 2 no. 8 of the 1983 Census Act without any reference to individual persons. Collection of the personal data mentioned under s. 2 no. 8 of the 1983 Census Act would for that reason constitute from the outset a violation of the right of personality protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law.

**60 Years German Basic Law:
The German Constitution and its Court**

Special precautions are required as regards the execution and organization of the collection and processing of data in order to preserve the right to informational self-determination since information can be more easily assigned to individuals during the collection phase - and to some extent also during storage; at the same time, rules are required for deletion of information that is required for secondary purposes (identifying characteristics) and would facilitate de-anonymization such as names, addresses, identification numbers and lists of census takers (see also s. 11.7 sentence 1 of the Federal Statistics Act).

Regulations that ensure effective protection against access from outside are of especial importance in the case of surveys carried out for statistical purposes. Strict confidentiality of the individual data collected for statistical purposes is indispensable for the purposes of protection of the right to informational self-determination - and to be sure also during the collection process - as long as a link to a person exists or can be created (confidentiality of statistics); the same applies as regards the necessity of (effective) anonymization at the earliest possible time together with precautions to prevent de-anonymization.

Governmental entities are allowed access to information required for planning purposes only in the case of hermetic isolation of statistics through anonymization of data and confidential treatment of data as long as they still relate to a person; same is required by the right to informational self-determination and must be guaranteed by law. Only under this condition can and may the public be expected to provide the mandatory information. If the transfer of personal data that are collected for statistical purposes were to be allowed against the will or without the knowledge of the parties affected, this would not only impermissibly restrict the constitutionally guaranteed right to informational self-determination but also jeopardize official statistics, which are provided for under the Basic Law itself in Article 73 no. 11 and therefore merit protection. The highest possible degree of accuracy and truthfulness in the data collected is necessary to ensure the functional viability of official statistics. This can be achieved only if respondents have the necessary confidence in the protection of data collected for statistical purposes against access from outside, without which it is not possible to create a willingness on the part of the public to provide truthful information (as already correctly justified in the Federal Government's draft of the 1950 Census Act; see *Bundestag* document I/982, p. 20 on s. 10).

Governmental practice that does not involve an effort to foster such confidence through disclosure of the data processing procedure and strict protection against access to information from outside would in the longer term lead to diminishing willingness to cooperate since a lack of trust would otherwise result. Since governmental compulsion can be of only limited effectiveness, governmental action that ignores the interests of the public will at best prove effective over the short term; in the long run, it will result in a decrease in the scope and accuracy of the information (*Bundestag* document I/982, loc. cit.). Since the constant increase in the complexity of the environment that is typical of highly industrialized societies can

**Selected Fundamental Decisions of
the Federal Constitutional Court**

be deciphered and rendered amenable to targeted governmental measures only with the help of reliable statistics, any threat to official statistics will in the end jeopardize an important prerequisite for governmental policy in the social area. If responsibility for “planning” can therefore be guaranteed only through hermetic isolation of statistics against access from outside, the principle of confidentiality and anonymization of data at the earliest possible time is not only required by the Basic Law for the protection of the right to informational self-determination of the individual but is also of constitutive importance for the statistics themselves.

- c) If the requirements discussed above are taken into account in an effective manner, there can be no misgivings on the basis of current knowledge and experience as regards the collection of data exclusively for statistical purposes on constitutional grounds. It is not possible to ascertain that the right of personality of individuals could be compromised if the collected data are made available to other governmental bodies or other agencies after anonymization or processing for statistical purposes (see s. 11.5 and s. 11.6 of the Census Act).

Any transfer (disclosure) of data that have been neither anonymized nor processed for statistical use and are therefore still personalized data raises special problems. Surveys conducted for statistical purposes also include personalized information on individual citizens that are not required for statistical purposes and - which the surveyed public must be able to assume - serve only to facilitate the survey process. All of this information may, to be sure be made available to other parties by virtue of explicit legal authority to the extent and insofar as this occurs for the purposes of statistical processing by other public authorities and the right of personality has been reliably protected by taking the required precautions, in particular as regards the confidentiality of statistics and the requirement of early anonymization, as well as through organizational and procedural means as in the case of the Statistical Offices of the Federation and the Länder. The act of making data collected for statistical purposes that have not been anonymized or statistically processed, available for the purposes of administrative enforcement may on the other hand improperly infringe the right to informational self-determination (see also C IV 1 below).

III.

The survey program of the 1983 Census Act essentially satisfies the constitutional requirements presented above. In that regard, the subject matter under review covers, with the exception of the question as to qualification as an inmate of an institution or member of the personnel of an institution (s. 2 no. 8 in conjunction with s. 5.1 no. 1 second half of the sentence), ss. 2 to 4 in conjunction with s. 5.1 of the Census Act. These provisions are compatible with the general right of personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law on condition that the legislature complement the legislation to compensate for heretofore lacking organizational and procedural rules to preserve the fundamental right, thereby ensuring compliance with the constitutional requirements to be satisfied by a total survey of the nature of the 1983 census.

...

- c) The survey program of the 1983 Census Act also satisfies, to the extent relevant to the matter under review, the principle of proportionality. A measure to achieve the intended purpose must therefore be suitable and necessary; the intensity of the attendant action may not be disproportionate to the importance of the matter and the compromises imposed upon the public (see BVerfGE 27, 344 [352 and 353]; established case law).

The 1983 Census Act is intended to provide the state with information required for future planning and actions. As a prerequisite for making it possible to plan governmental activities (see BVerfGE 27, 1 [7]), the 1983 census serves a purpose that is obviously intended to fulfil legitimate duties of the state.

Through the use of a census in the form of a total census (exhaustive census) and the catalogue of questions of s. 2 no 1 to 7 and ss. 3 and 4 of the 1983 Census Act, the Federal Republic of Germany has fulfilled its obligation arising from the Directive of the Council of the European Communities of 22 November 1973 on the synchronization of general population censuses - 73/403/EWG (OJ no. L 347 of 17 December 1973, p. 50). The survey method and program are suitable and necessary for achieving the intended purpose and represent a reasonable imposition on respondents.

...

IV.

1. Data collected for statistical purposes that have not yet been anonymized and are therefore still personalized may - as has already been set forth (C II b cc above) - be made available to other parties by virtue of explicit legal authority to the extent and insofar as this occurs for the purposes of statistical processing by other public authorities and if the right of personality has been reliably protected by taking the required precautions, in particular as regards the confidentiality of statistics and the requirement of anonymization as in the case of the Statistical Offices of the Federation and the *Länder*. If on the other hand personalized, non-anonymized data collected for statistical purposes and intended for such purposes by the statutory regulation are transferred to other parties for the purposes of administrative enforcement (improper use) in compliance with the law, this would constitute improper infringement of the right to informational self-determination. The question may remain open as to whether there would be any objection to direct transmission of such data in general and even if the legislature were to explicitly make provision for such transmission on the grounds of incompatibility with the principle of separation of statistics and enforcement. There is also no need for a conclusive discussion as to whether simultaneous collection of personal data for statistical purposes, which is in and of itself allowed, and collection of personal data for the purposes of administrative enforcement, which is in and of itself allowed, would be permissible if different forms were used (combined survey). Both the direct transfer of data collected for statistical purposes as well as the use of combined surveys would constitute a source of misgivings since the combination of two different purposes with different requirements would cause considerable uncertainty on the part of the public in view of

**Selected Fundamental Decisions of
the Federal Constitutional Court**

the lack of transparency of the possibilities permitted by automated data processing, thereby threatening the reliability of the information and its suitability for statistical purposes. It is also necessary to take into account the different requirements that have to be satisfied: For example, the confidential nature of statistics, the requirement of anonymization and the prohibition of discrimination, apply to the collection and exploitation of data for statistical purposes; this does not apply, or not in the same manner, as regards the collection of data for the purposes of administrative enforcement; whereas identification data (for example, name and address) serve only to facilitate processing in the case of statistics, they do as a rule constitute essential elements of data collected for the purposes of administrative enforcement. In this case, the investigative organization that is designed for the collection of data for statistical purposes is also used to collect data for other purposes that would hardly justify such an organization on their own. It would also be necessary to take into account that judicial process can differ depending on which of the two types of data collection is used.

A regulatory measure intended to achieve both goals nonetheless is in any case unsuitable for achieving the intended purposes and therefore in violation of the Basic Law if it combines aspects that are basically incompatible. In such a case, the combination of statistical purposes with purposes of administrative enforcement in a census may result not only in a lack of clarity and obscurity in the statute, but also makes the statute disproportionate. Unlike the situation in the case of the collection of data for exclusively statistical purposes, it is essential that the data be transmitted for a narrowly defined, concrete purpose in this case (C II 2 (a) above). In addition, the requirement of legal certainty is of especial importance. The public must be able to clearly recognize from the statutory regulation that data are not being used exclusively for statistical purposes, the concrete purposes of administrative enforcement for which the personal data are intended and required and that the use of the data will remain limited to such purposes and the respondent shielded against self-incrimination.

2. The combination of the census conducted for statistical purposes and cross-checks with the population register pursuant to s. 9.1 of the 1983 Census Act does not satisfy the constitutional requirements.

...

**60 Years German Basic Law:
The German Constitution and its Court**

d) *Data Collection - BVerfGE 120, 274*

Explanatory Annotation

In 2008 the Court extended the right to informational self-determination contained in Article 2.1 to include the confidentiality and integrity of information technology systems.⁷ At issue was the question whether and under what conditions “constitution protection agencies”, in essence domestic secret police with narrow jurisdiction, have the power to secretly hack into computer systems of suspects in order to search and retrieve relevant information. The Court erected several procedural and substantial safeguards. One of the problems in this context lies in the fact that such measures are by definition secretive and the person affected by such measures, if they are to make sense, will not know about them and will therefore be unable to obtain judicial protection. Any such measures can only be undertaken if authorized by a judge in order to secure judicial oversight before the measures are invoked. In addition, the necessary statutory authority for such measures must contain provisions for the immediate deletion of and the prohibition to use in any way irrelevant personal and private data.

Translation of the Data Collection Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 120, 274

Headnotes:

1. The general right of personality (Article 2.1 in conjunction with Article 1.1 of the Basic Law (Grundgesetz - GG)) encompasses the fundamental right to the guarantee of the confidentiality and integrity of information technology systems.
2. The secret infiltration of an information technology system by means of which the use of the system can be monitored and its storage media can be read, is constitutionally only permissible if factual indications exist of a concrete danger to a predominantly important legal interest. Predominantly important are the life, limb and freedom of the individual or such interests of the public a threat to which affects the basis or continued existence of the state or the basis of human existence. The measure can already be justified even if it cannot yet be ascertained with sufficient probability that the danger will arise in the near future insofar as certain facts indicate a danger posed to the predominantly important legal interest by specific individuals in the individual case.
3. The secret infiltration of an information technology system is in principle to be placed under the reservation of a judicial order. The statute granting powers to perform such an encroachment must contain precautions in order to protect the core area of private life.
4. Insofar as empowerment is restricted to a state measure by means of which the contents and circumstances of ongoing telecommunication are collected in the computer network, or the data related thereto is evaluated, the encroachment is to be measured against Article 10.1 of the Basic Law alone.

⁷ BVerfGE 120, 274; Available in English at:
http://www.bverfg.de/entscheidungen/rs20080227_1bvr037007en.html.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

5. If the state obtains knowledge of the contents of Internet communication by the channel technically provided therefore, this shall only constitute an encroachment on Article 10.1 of the Basic Law, if the state agency is not authorised to obtain such knowledge by those involved in the communication.
6. If the state obtains knowledge of communication contents which are publicly accessible on the Internet, or if it participates in publicly accessible communication processes, in principle it does not encroach on fundamental rights.

Judgment of the First Senate of 27 February 2008 on the basis of the oral hearing of 10 October 2007 - 1 BvR 370, 595/07:

Facts:

The subject matter of the constitutional complaints are the provisions of the North Rhine-Westphalia Constitution Protection Act regulating, firstly, the powers of the constitution protection authority regarding various instances of data collection, in particular from information technology systems, and secondly, the handling of the data collected.

The impugned provisions were largely inserted or amended by the Act Amending the Act on the Protection of the Constitution in North Rhine-Westphalia of 20 December 2006 (Law and Ordinance Gazette of North Rhine-Westphalia, p. 620).

Both constitutional complaints complain of the unconstitutionality of s. 5.2 no. 11 of the North Rhine-Westphalia Constitution Protection Act. This provision empowers the Constitution protection authority to carry out two types of investigative measures: Firstly, secret monitoring and other reconnaissance of the Internet (alternative 1), and secondly secret access to information technology systems (alternative 2).

Extract from the Grounds:

B.

Insofar as they are admissible, the constitutional complaints are largely well-founded. s. 5.2 no. 11 of the North Rhine-Westphalia Constitution Protection Act is unconstitutional and null and void in the second alternative listed there (I.). The same applies to the first alternative of this provision (II.). As a result of the nullity, the complaints addressed against s. 5.3 and s. 17 of the North Rhine-Westphalia Constitution Protection Act are disposed of (III.). By contrast, there are no constitutional objections (IV.) against s. 5a.1 of the North Rhine-Westphalia Constitution Protection Act.

I.

S. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act, which regulates secret access to information technology systems, violates the general right of personality (Article 2.1 in conjunction with Article 1.1 of the Basic Law) in its particular manifestation as a fundamental right to the guarantee of the confidentiality and integrity of information technology systems.

**60 Years German Basic Law:
The German Constitution and its Court**

This manifestation of the general right of personality protects against encroachment on information technology systems, insofar as the protection is not guaranteed by other fundamental rights, such as in particular Article 10 or Article 13 of the Basic Law, as well as by the right to informational self-determination (1). In the instant case, the encroachments are not constitutionally justified: s. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act does not comply with the principle of the clarity of provisions (2 a), the requirements of the principle of proportionality are not met (2 b) and the provision does not contain any sufficient precautions to protect the core area of private life (2 c). The impugned provision is null and void (2 d). There is no need for an additional review against other fundamental rights (2 e).

1. S. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act grants powers to encroach on the general right of personality in its special manifestation as a fundamental right to the guarantee of the confidentiality and integrity of information technology systems; it enters the field besides the other concrete forms of this fundamental right, such as the right to informational self-determination, as well as the guarantee of freedom contained in Article 10 and Article 13 of the Basic Law, insofar as these do not guarantee any or sufficient protection.

- a) The general right of personality guarantee elements of the personality which are not the subject matter of the special guarantee of freedom contained in the Basic Law, but which are not inferior to these in their constituting significance for the personality (see BVerfGE 99, 185 [193]; 114, 339 [346]). Such a loophole closing guarantee is needed in particular in order to counter new types of endangerment which may occur in the course of scientific and technical progress or changed circumstances (see BVerfGE 54, 148 [153]; 65, 1 [41]; Federal Constitutional Court, Order of 13 June 2007 - 1 BvR 1550/03 et al. -, *Neue Juristische Wochenschrift* 2007, p. 2464 [2465]). The assignment of a concrete legal protection claim regarding the various aspects of the right of personality conforms above all to the type of danger to the personality (see BVerfGE 101, 361 [380]; 106, 28 [39]).
- b) The use of information technology has taken on a significance for the personality and the development of the individual which could not have been predicted. Modern information technology provides the individual with new possibilities, whilst at the same time entailing new types of endangerment of personality. ...
- cc) The increasing spread of networked information technology systems entails for the individual new endangerments of personality, in addition to new possibilities for the development of the personality.

- (1) Such endangerments emerge from the fact that complex information technology systems such as personal computers open up a broad spectrum of use possibilities, all of which are associated with the creation, processing and storage of data. This is not only data which computer users create or store deliberately. In the context of the data processing process, information technology systems also create by themselves large quantities of further data which can be evaluated as to the user's conduct and characteristics in the same way as data stored by the user. As a consequence, a large amount of data can be accessed in the

**Selected Fundamental Decisions of
the Federal Constitutional Court**

working memory and on the storage media of such systems relating to the personal circumstances, social contacts and activities of the user. If this data is collected and evaluated by third parties, this can be highly illuminating as to the personality of the user, and may even make it possible to form a profile (see on the personality endangerments resulting from such conclusions BVerfGE 65, 1 [42]).

- (2) These risks are exacerbated in a variety of ways in a networked system, in particular one which is connected to the Internet. Firstly, the expansion of the facilities offered by networking leads to a situation in which an even greater number and diversity of data is created, processed and stored in comparison to a stand alone system. This includes communication contents, as well as data relating to network communication. Wide ranging knowledge of the personality of the user can be obtained by storing and evaluating such data on the conduct of the users in the network.

Above all, however, the networking of the system opens to third parties a technical access facility which can be used in order to spy on or manipulate data kept on the system. The individual cannot detect such access at all in some cases, or at least can only prevent it to a restricted degree. Information technology systems have now reached such a degree of complexity that effective social or technical self-protection leads to considerable difficulties and may be beyond the ability of at least the average user. Technical self-protection may also entail considerable effort or result in the loss of the functionality of the protected system. Many possibilities of self-protection - such as encryption or the concealment of sensitive data - are also largely ineffective if third parties have been able to infiltrate the system on which the data has been stored. Finally, it is not possible, in view of the speed of the development of information technology, to reliably forecast the technical means which users may have to protect themselves in future.

- c) A need for protection that is relevant from the fundamental rights perspective emerges from the significance of the use of information technology systems for the development of the personality and from endangerments of the personality linked with this use. The individual relies on the state respecting the expectations of the integrity and confidentiality of such systems which are justified with regard to the unhindered development of the personality. The fundamental rights guarantees contained in Article 10 and Article 13 of the Basic Law, like those manifestations of the general right of personality previously developed in the case law of the Federal Constitutional Court, do not adequately take account of the need for protection arising as a consequence of the development of information technology.
- aa) The guarantee of the secrecy of telecommunication according to Article 10.1 of the Basic Law protects the non-physical transmission of information to individual recipients with the aid of telecommunication traffic (see BVerfGE 67, 157 [172]; 106, 28 [35, 36]), but not the confidentiality and integrity of information technology systems.
- (1) The protection of Article 10.1 of the Basic Law covers telecommunication, regardless of the method of transmission (cable or broadcast, analogue or digital transmission) and the form of expression (speech, pictures, sound, symbols or other data) which are used (see

**60 Years German Basic Law:
The German Constitution and its Court**

BVerfGE 106, 28 [36]; 115, 166 [182]). The scope of protection of the secrecy of telecommunication accordingly also covers the communication services of the Internet (see re e-mails BVerfGE 113, 348 [383]). What is more, not only the contents of the telecommunication are protected against knowledge being obtained of them, but also their circumstances. This includes in particular whether, when and how frequently telecommunication traffic has taken place or has been attempted between which persons or telecommunication facilities (see BVerfGE 67, 157 [172]; 85, 386 [396]; 100, 313 [358]; 107, 299 [312, 313]). In this context, the confidentiality of telecommunication encounters both old and new endangerments of personality emerging from the increased significance of information technology for the development of the individual.

Insofar as an empowerment is restricted to a state measure by means of which the contents and circumstances of the ongoing telecommunication are collected in the computer network, or the data related thereto is evaluated, the encroachment is to be measured against Article 10.1 of the Basic Law alone. The scope of protection of this fundamental right is affected here regardless of whether in technical terms the measure targets the transmission channel or the terminal used for telecommunication (see BVerfGE 106, 28 [37, 38]; 115, 166 [186, 187]). This also applies in principle if the terminal is a networked complex information technology system the use of which for telecommunication is only one among several types of use.

- (2) The fundamental rights protection provided by Article 10.1 of the Basic Law however does not cover the contents and circumstances of the telecommunication stored subsequent to completion of the communication in the sphere of a subscriber, insofar as he or she can take their own protective precautions against secret data access. The specific dangers of spatially distanced communication which are to be averted by secrecy of telecommunication do not then continue to apply to such data (see BVerfGE 115, 166 [183 et seq.]).
- (3) The protection effected by secrecy of telecommunication likewise does not apply if a state agency monitors the use of an information technology system as such or searches the storage media of the system. As to the collection of contents or circumstances outside the ongoing telecommunication, an encroachment on Article 10.1 of the Basic Law does not apply even if a telecommunication connection is used for transmission of the data collected to the evaluating authority, as is the case for instance with online access to stored data (see Germann, *Gefahrenabwehr und Strafverfolgung im Internet*, 2000, p. 497; Rux, *Juristenzeitung* 2007, p. 285 [292]).
- (4) Insofar as the secret access to an information technology system serves to collect data also where Article 10.1 of the Basic Law does not provide protection against access, a loop-hole in protection exists which is to be closed by the general right of personality in its manifestation as a protection of the confidentiality and integrity of information technology systems.

If a complex information technology system is technically infiltrated in order to perform telecommunication surveillance (“source telecommunication surveillance”), the infiltration overcomes the critical hurdle to spying on the system as a whole. The endangerment thereby brought about goes far beyond what is entailed by the mere surveillance of ongoing

**Selected Fundamental Decisions of
the Federal Constitutional Court**

telecommunication. In particular, the data stored on personal computers which does not relate to the use of the system for telecommunication can also be obtained. For instance, the conduct in using a personal computer for personal purposes, the frequency of accessing certain services, in particular also the contents of files created or - insofar as the infiltrated information technology system also controls appliances in households - the conduct in the personal dwelling can be discovered.

According to information from the experts heard in the oral hearing, moreover, it may happen that, data is collected following infiltration which is unrelated to the ongoing telecommunication, even if this is not intended. As a result - and in contradistinction to what is usually the case with traditional network based telecommunication surveillance - there is always a risk for the person concerned that further personal information is collected over and above the contents and circumstances of telecommunication. The specific endangerments of personality which this brings about cannot be countered or cannot be sufficiently countered by Article 10.1 of the Basic Law.

Article 10.1 of the Basic Law is by contrast the sole fundamental right related standard for the evaluation of an empowerment to engage in "source telecommunication surveillance" if the surveillance is restricted exclusively to data emanating from an ongoing telecommunication process. This must be ensured by technical precautions and legal instructions.

- bb) Also the guarantee of the inviolability of the home granted by Article 13.1 of the Basic Law guarantees an elementary space to the individual with regard to his or her human dignity, as well as in the interest of the development of his or her personality, which may be encroached upon only under the special preconditions of Article 13.2 to 13.7 of the Basic Law, but leaves loopholes as regards access to information technology systems.

The interests protected by this fundamental right are constituted by the spatial sphere in which private life takes place (see BVerfGE 89, 1 [12]; 103, 142 [150, 151]). In addition to private dwellings, company and business premises are also within the scope of protection of Article 13 of the Basic Law (see BVerfGE 32, 54 [69 et seq.]; 44, 353 [371]; 76, 83 [88]; 96, 44 [51]). The fundamental rights protection is not restricted here to the prevention of physical penetration of the dwelling. Measures by means of which state agencies use special aids to obtain an impression of events within the dwelling which are removed from the natural perception from outside the protected area are also to be regarded as an encroachment on Article 13 of the Basic Law. This includes not only acoustic or optical monitoring of dwellings (see BVerfGE 109, 279 [309, 327]), but also for instance the measurement of electromagnetic radiation with which the use of an information technology system in the dwelling can be monitored. This can also concern a system which operates offline.

Over and above this, a state measure which is connected to secret technical access to an information technology system may be measured against Article 13.1 of the Basic Law, for instance if and insofar as staff of the investigation authority seek

**60 Years German Basic Law:
The German Constitution and its Court**

access to premises that are protected as a dwelling in order to physically manipulate an information technology system there. A further case of the application of Article 13.1 of the Basic Law is the infiltration of an information technology system in a dwelling in order to monitor certain events within the dwelling by using it, for instance by using peripherals connected to the system, such as a microphone or a camera.

Article 13.1 of the Basic Law does not however confer on the individual any across-the-board protection regardless of the access modalities against the infiltration of his or her information technology system, even if this system is located in a dwelling (see for instance Beulke/Meininghaus, *Der Strafverteidiger - StV* 2007, p. 63 [64]; Gercke, *Computer und Recht* 2007, p. 245 [250]; Schlegel, *Goldammer's Archiv für Strafrecht* 2007, p. 648 [654 et seq.]; other views for instance Buermeyer, *Höchstrichterliche Rechtsprechung im Strafrecht* 2007, p. 392 [395 et seq.]; Rux, *Juristenzeitung* 2007, p. 285 [292 et seq.]; Schaar/Landwehr, *Kommunikation & Recht* 2007, p. 202 [204]). The encroachment may take place regardless of location, so that space oriented protection is unable to avert the specific endangerment of the information technology system. Insofar as the infiltration uses the connection of the computer concerned to form a computer network, it leaves spatial privacy provided by delimitation of the dwelling unaffected. The location of the system is in many cases of no interest for the investigation measure, and frequently will not be recognisable even for the authority. This applies in particular to mobile information technology systems such as laptops, Personal Digital Assistants (PDAs) or mobile telephones.

Article 13.1 of the Basic Law also does not provide protection against the collection, facilitated by infiltration of the system, of data found in the working memory or on the storage media of an information technology system located in a dwelling (see on the parallel relationship of home searches and seizure BVerfGE 113, 29 [45]).

- cc) The manifestations of the general right of personality, in particular the guarantees of the protection of privacy, and of the right to informational self-determination, previously recognised in the case law of the Federal Constitutional Court, also do not comply sufficiently with the special need for protection of the user of information technology systems.
- (1) In its manifestation as protection of privacy, the general right of personality of the individual guarantees a spatially and thematically specified area which is to remain, in principle, free of undesired inspection (see BVerfGE 27, 344 [350 et seq.]; 44, 353 [372, 373]; 90, 255 [260]; 101, 361 [382, 383]). The need for protection of the user of an information technology system is however not solely restricted to data to be allotted to his or her privacy. Such an attribution also frequently depends on the context in which the data came about and into which it is brought by linking with other data. In many cases, the data itself does not reveal what significance it has for the person concerned and which

**Selected Fundamental Decisions of
the Federal Constitutional Court**

it may gain by inclusion in other contexts. The consequence of this is that, inevitably, not only private data is collected by the infiltration of the system, but access to all data is facilitated, so that a comprehensive picture of the user of the system may emerge.

- (2) The right to informational self-determination goes beyond the protection of privacy. It confers on the individual, in principle, the power to determine for himself or herself the disclosure and use of his or her personal data (see BVerfGE 65, 1 [43]; 84, 192 [194]). It supports and expands the protection of freedom of conduct and privacy in terms of fundamental rights by already making it start at the level of endangerment of the personality. Such an endangerment situation can already arise in the run-up to concrete threats to specific legal interests, in particular if personal information can be used and linked in a manner which the person concerned can neither detect nor prevent. The extent of protection of the right to informational self-determination is not restricted here to information which is already sensitive by its nature and hence already protected by fundamental rights. Depending on the purpose of access and the existing processing and linking facilities, the use of personal data which *per se* has only little information content can also have an impact on the privacy and freedom of conduct of the person concerned in terms of fundamental rights (see Federal Constitutional Court, Order of 13 June 2007 - 1 BvR 1550/03 et al. -, Neue Juristische Wochenschrift 2007, p. 2464 [2466]).

...

However, the right to informational self-determination does not fully consider elements of personality endangerments which emerge from the fact that the individual relies on the use of information technology systems for his or her personality development, and in such instances entrusts personal data to the system or inevitably provides such data already by using the system. A third party accessing such a system can obtain data stocks which are potentially extremely large and revealing without having to rely on further data collection and data processing measures. In its severity for the personality of the person concerned, such access goes beyond individual data collections against which the right to informational self-determination provides protection.

- d) Insofar as no adequate protection exists against endangerments of the personality emerging from the individual relying on the use of information technology systems for his or her personality development, the general right of personality accounts for the need for protection in its loophole filling function over and above its manifestations recognised thus far by virtue of the fact that it guarantees the integrity and confidentiality of information technology systems. In the same way as the right to informational self-determination, this right is based on Article 2.1 in conjunction with Article 1.1 of the Basic Law; it protects the personal and private life of the subjects of the fundamental rights against access by the state in the area of information technology also insofar as the state has access to the information technology system as a whole, and not only to individual communication events or stored data.
- aa) However, not all information technology systems which are able to create, process or store personal data require the special protection of a separate guarantee of personality rights. Insofar as such a system by its technical construction only

**60 Years German Basic Law:
The German Constitution and its Court**

contains data with a partial connection to a certain area of life of the person concerned - for instance non-networked electronic control systems in household appliances -, state access to the existing data is no different in qualitative terms than other data collections. In such a case, the protection of the right to informational self-determination is sufficient to guarantee the justified interests of the person concerned in confidentiality.

The fundamental right to the guarantee of the integrity and confidentiality of information technology systems is to be applied, by contrast, if the empowerment to encroach covers systems which alone or in their technical networking can contain personal data of the person concerned to such a degree and in such a diversity that access to the system facilitates insight into significant parts of the life of a person or indeed provides a revealing picture of the personality. Such a possibility applies for instance to access to personal computers, regardless of whether they are installed in a fixed location or are operated while on the move. It is possible as a rule to conclude not only as regards use for private purposes, but also with business use, possible characteristics or preferences from the usage pattern. Specific fundamental right related protection also covers for instance mobile telephones or electronic assistants which have a large number of functions and can collect and store many kinds of personal data.

- bb) What is first of all protected by the fundamental right to the guarantee of the confidentiality and integrity of information technology systems is the interest of the user in ensuring that the data which are created, processed and stored by the information technology system that is covered by its scope of protection remain confidential. An encroachment on this fundamental right is also to be presumed to have taken place if the integrity of the protected information technology system is affected by the system being accessed such that its performance, functions and storage contents can be used by third parties; the crucial technical hurdle for spying, surveillance or manipulation of the system has then been overcome.
- (1) The general right of personality in the manifestation dealt with here in particular provides protection against secret access, by means of which the data available on the system can be spied on in its entirety or in major parts. The fundamental right related protection covers both the data stored in the working memory and also that which is temporarily or permanently kept on the storage media of the system. The fundamental right also protects against data collection using means which are technically independent of the data processing events of the information technology system in question, but the subject matter of which is these data processing events. This is for instance the case with use of so-called hardware keyloggers or in measuring the electromagnetic radiation from monitors or keyboards.
- (2) The fundamental right related protection of the expectation of confidentiality and integrity exists regardless of whether access to the information technology system can be achieved easily or only with considerable effort. An expectation of confidentiality and integrity to be recognised from the fundamental rights perspective however only exists insofar as the person concerned uses the information technology system as his or her own, and hence may presume according to the circumstances that he or she alone or together with others

**Selected Fundamental Decisions of
the Federal Constitutional Court**

entitled to use it disposes of the information technology system in a self-determined manner. Insofar as the use of the personal information technology system takes place via information technology systems which are at the disposal of others, the protection of the user also covers this.

2. The fundamental right to the guarantee of the confidentiality and integrity of information technology systems is not unrestricted. Encroachments may be justified both for preventive purposes, and for criminal prosecution. The individual must only accept such restrictions of his or her right which are based on a statutory foundation that is constitutional. This is missing in the empowerment of the constitution protection authority to carry out preventive measures to be reviewed in the instant case.

a) The impugned provision does not meet the principle of the clarity of provisions and determinedness of provisions.

aa) The principle of determinedness finds its basis in the principle of the rule of law (Article 20 and Article 28.1 of the Basic Law) also with regard to the general right of personality in its various manifestations (see BVerfGE 110, 33 [53, 57, 70]; 112, 284 [301]; 113, 348 [375]; 115, 320 [365]). It is to ensure that the democratically legitimised parliamentary legislature itself takes the essential decisions on encroachments on fundamental rights and the extent of the encroachments, that the Government and the administration find steering and restricting action standards in the statute, and that the courts can carry out judicial review. Furthermore, the clarity and determinedness of the provision ensure that the person concerned can realise the legal situation and can adjust to possible burdensome measures (see BVerfGE 110, 33 [52 et seq.]; 113, 348 [375 et seq.]). The parliamentary legislature must determine the occasion, purpose and limits of the encroachment in a manner that is sufficiently area specific, precise and clear in terms of its wording (see BVerfGE 100, 313 [359, 360, 372]; 110, 33 [53]; 113, 348 [375]; Federal Constitutional Court, Order of 13 June 2007 - 1 BvR 1550/03 et al. -, *Neue Juristische Wochenschrift* 2007, p. 2464 [2466]).

...

bb) According to these standards, s. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act does not satisfy the principle of the clarity of provisions and determinedness of provisions insofar as the factual preconditions of the regulated measures cannot be sufficiently derived from the statute.

(1) The preconditions for measures according to s. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act can be determined via two legislative referrals. Firstly, s. 5.2 of the North Rhine-Westphalia Constitution Protection Act refers in general terms to s. 7.1 of the North Rhine-Westphalia Constitution Protection Act, which in turn refers to s. 3.1 of the North Rhine-Westphalia Constitution Protection Act. Accordingly, the deployment of intelligence service means are permissible if information relevant to the protection of the constitution can be obtained by these means. Secondly,

**60 Years German Basic Law:
The German Constitution and its Court**

s. 5.2 no. 11, sentence 2 of the North Rhine-Westphalia Constitution Protection Act refers to the more stringent preconditions of the Act re Article 10 of the Basic Law for a case in which a measure according to s. 5.2 no. 11 of the North Rhine-Westphalia Constitution Protection Act encroaches on the secrecy of correspondence, post and telecommunications or is equivalent to such encroachment in terms of its nature and grievousness.

- (2) It is not compatible with the principle of the clarity of provisions and determinedness of provisions that s. 5.2 no. 11, sentence 2 of the North Rhine-Westphalia Constitution Protection Act makes the reference to the Act re Article 10 of the Basic Law contingent on whether a measure encroaches on Article 10 of the Basic Law. The answer to the question of which fundamental rights are encroached on by investigation measures taken by the constitution protection authority can require complex assessments and evaluations. They are first and foremost incumbent on the legislature. It cannot avoid its task of giving concrete form to the relevant fundamental rights by means of corresponding statutory precautions by passing on the decision on how this fundamental right is to be concretised and implemented to a statute executing administration through a mere factual reference to a possibly relevant fundamental right. Such “escape clause” legislative technique does not comply with the principle of determinedness in a provision such as s. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act, which provides for new types of investigation measures which are intended to react to recent technological developments.

The breach of the principle of the clarity of provisions is made even more profound by the addition contained in s. 5.2 no.11 sentence 2 of the North Rhine-Westphalia Constitution Protection Act that the reference to the Act re Article 10 of the Basic Law also applies if an investigation measure is equivalent by its “nature and grievousness” to an encroachment on Article 10 of the Basic Law. Hence, the factual preconditions of regulated access are made contingent upon an evaluating comparison being carried out between this access and a measure which would have to be regarded as an encroachment on a specific fundamental right. s. 5.2 no.11 sentence 2 of the North Rhine-Westphalia Constitution Protection Act does not contain any standards for this comparison. If the factual preconditions cannot be adequately specified by merely referring to a specific fundamental right, this certainly applies to a provision which provides for such a comparison of the regulated measure on which there is no further statutory instruction with an encroachment on a specific fundamental right.

- (3) The reference to the Act re Article 10 of the Basic Law in s. 5.2 no.11 sentence 2 of the North Rhine-Westphalia Constitution Protection Act also does not comply with the principle of the clarity of provisions and of the determinedness of provisions insofar as the range of the reference is not regulated with an adequate level of determinedness.

S. 5.2 no. 11 sentence 2 of the North Rhine-Westphalia Constitution Protection Act refers to the “preconditions” of the Act re Article 10 of the Basic Law. The provision hence largely leaves unclear the parts of the Act re Article 10 of the Basic Law to which the reference is intended to be made. It does not reveal whether only the substantive encroachment threshold regulated in s. 3 of the Act re Article 10 of the Basic Law is to be understood by the preconditions of this Act, or whether further provisions are also

**Selected Fundamental Decisions of
the Federal Constitutional Court**

intended to be referred to. For instance, the procedural rules contained in ss. 9 et seq. of the Act re Article 10 of the Basic Law could also be included among the preconditions for an encroachment according to this statute. It would at least be conceivable to further refer to both the substantive encroachment thresholds and also to all procedural precautions of the Act re Article 10 of the Basic Law, as has been proposed by the Government of the Land North Rhine-Westphalia. Accordingly, the provisions on dealing with collected data contained in s. 4 of the Act re Article 10 of the Basic Law and the provisions of ss. 14 et seq. of the Act re Article 10 of the Basic Law on parliamentary control would also be covered, although these provisions contain regulations which are not to be complied with until after an encroachment has taken place, and hence linguistically can hardly be counted among the preconditions for encroachment.

It is not evident that the undetermined version of the Act is due to particular legislative difficulties. The legislature could easily have listed in the referring provision those provisions of the Act re Article 10 of the Basic Law to which the reference was intended to be made.

b) S. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act also does not comply with the principle of proportionality. The latter demands that an encroachment on fundamental rights should serve a legitimate purpose and be suitable, necessary and appropriate as a means to this end (see BVerfGE 109, 279 [335 et seq.]; 115, 320 [345]; Federal Constitutional Court, Order of 13 June 2007 - 1 BvR 1550/03 et al. -, *Neue Juristische Wochenschrift* 2007, p. 2464 [2468]; established case law).

aa) The data collections provided for in the impugned provision serve the constitution protection authority in the performance of its tasks according to s. 3.1 of the North Rhine-Westphalia Constitution Protection Act, and hence serve to secure, in the run-up to concrete dangers, the free democratic fundamental order, the continued existence of the Federation and of the Länder, as well as certain interests of the Federal Republic directed at international relations. Here, according to the reasoning of the Act, one of the goals pursued in particular with the revision of the Constitutional Protection Act was to ensure an effective fight against terrorism by the constitution protection authority in view of new risks, in particular connected with Internet communication (see Landtag document 14/2211, p. 1). However, the area of application of the revision is not restricted to the fight against terrorism, either explicitly or as a consequence of the systematic context. The provision requires a justification for its entire area of application.

The security of the state as a power securing peace and order which has a constitutional structure, and the security which it is to provide for the population against dangers to life, limb and freedom are constitutional values ranking equally with other high value interests (see BVerfGE 49, 24 [5657]; 115, 320 [346]). The duty to protect has its foundation both in Article 2.2 sentence 1 and in Article 1.1 sentence 2 of the Basic Law (see BVerfGE 115, 118 [152]). The state complies with its constitutional mandate by countering dangers from terrorist or other activities. The increased use of electronic or digital means of communication

**60 Years German Basic Law:
The German Constitution and its Court**

and their penetration into almost all areas of life makes it more difficult for the constitution protection authority to perform its tasks effectively. Also, modern information technology offers extremist and terrorist groups many possibilities to establish and maintain contacts, as well as to plan and prepare, as well as to commit criminal offences. Legislative measures opening up information technology for state investigations in particular are to be seen against the background of the shift from traditional forms of communication to electronic message traffic and the possibilities to encrypt or conceal files (see on criminal prosecution BVerfGE 115, 166 [193]).

- bb) Secret access to information technology systems is suitable to serve these purposes. It expands the possibilities available to the constitution protection authority for reconnaissance of threat situations. The legislature is granted considerable latitude in the evaluation of suitability (see BVerfGE 77, 84 [106]; 90, 145 [173]; 109, 279 [336]). It is not evident that this latitude has been exceeded here.

...

- cc) Secret access to information technology systems also does not violate the principle of necessity. In the context of its prerogative of assessment, the legislature may presume that no path which is equally effective, but less burdensome for the person concerned, exists to collect the data that is available on such systems.

...

- dd) S. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act however does not comply with the principle of appropriateness in the narrower sense.

This principle requires that the gravity of the encroachment, in an overall evaluation, may not be disproportionate to the gravity of the reasons justifying it (see BVerfGE 90, 145 [173]; 109, 279 [349 et seq.]; 113, 348 [382]; established case law). The legislature must appropriately attribute the individual interest encroached on by an encroachment on fundamental rights to the general interests served by the encroachment. A review carried out according to these standards can lead to a situation in which means may not be used to implement general interests because the impairments of fundamental rights emanating from it are more weighty than the interests to be implemented (see BVerfGE 115, 320 [345, 346]; Federal Constitutional Court, Order of 13 June 2007 - 1 BvR 1550/03 et al. -, *Neue Juristische Wochenschrift* 2007, p. 2464 [2469]).

S. 5.2 no.11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act does not comply with this. The measures provided for in this norm entail encroachments on fundamental rights which are so intensive that they are disproportionate to the public investigation interest emerging from the regulated occasion for the encroachment. What is more, there is a need for supplementary procedural requirements in order to account for the interests of the person concerned protected by fundamental rights; these are also missing.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

...

(ee) Insofar as data is collected which provides information on the communication of the person concerned with third parties, the intensity of the encroachment on fundamental rights is further increased by virtue of the fact that the possibility for the citizen to participate in telecommunication without being monitored - also within the public good - is restricted (see on the collection of connection data BVerfGE 115, 166 [187 et seq.]). Collection of such data indirectly impairs the freedom of the citizen because he or she may be prevented from engaging in uninhibited individual communication by fear of surveillance, even if surveillance does not take place until after the fact. What is more, such data collection shows in this respect a considerable spread, which increases the gravity of the encroachment, given that data collection of necessity covers communication partners of the target person, i.e. third parties, without it being necessary for the preconditions for such access to apply to these persons (see on telecommunication surveillance BVerfGE 113, 348 [382, 383]; furthermore BVerfGE 34, 238 [247]; 107, 299 [321]).

(b) The gravity of the encroachment on fundamental rights is particularly severe if - as provided for by the impugned provision - secret technical infiltration facilitates the longer-term surveillance of the use of the system and the ongoing collection of the data in question.

...

(4) In view of its intensity, the encroachment on fundamental rights lying in secret access to an information technology system in the context of a preventive goal only satisfies the principle of appropriateness if certain facts indicate a danger posed to a predominantly important legal interest in the individual case, even if it cannot yet be ascertained with sufficient probability that the danger will arise in the near future. What is more, the statute granting powers to perform such an encroachment must ensure the protection of the fundamental rights of the person concerned also by means of suitable procedural precautions.

(a) In the tension between the obligation incumbent on the state to protect legal interests and the interest of the individual in respect for his or her rights as guaranteed by the constitution, the task of the legislature includes in an abstract form achieving compensation between the conflicting interests (see BVerfGE 109, 279 [350]). This may lead to a situation in which certain intensive encroachments on fundamental rights may be provided only to protect certain legal interests, and only from certain suspicion or danger levels onwards. The obligations incumbent on the state to protect other legal interests also come up against their limits in the prohibition of inappropriate encroachments on fundamental rights (see BVerfGE 115, 320 [358]). Corresponding encroachment thresholds are to be guaranteed by a statutory provision (see BVerfGE 100, 313 [383, 384]; 109, 279 [350 et seq.]; 115, 320 [346]).

**60 Years German Basic Law:
The German Constitution and its Court**

- (b) A highly intensive encroachment on fundamental rights can already be disproportionate as such if the statutorily regulated occasion for the encroachment does not show sufficient gravity. Insofar as the relevant statute serves to avert certain dangers, as is the case for the Constitution Protection Act under s. 1 of the North Rhine-Westphalia Constitution Protection Act, it is the rank and the nature of the endangerment of protected interests referred to in the respective provision which is relevant to the gravity of the occasion for encroachment (see BVerfGE 115, 320 [360, 361]).

If the protected interests as such standing behind an empowerment to encroach are sufficiently prevalent to justify encroachments on fundamental rights of the regulated type, the principle of proportionality gives rise to constitutional requirements being placed on the factual preconditions of the encroachment. In this respect, the legislature has to maintain a balance between the nature and intensity of the impairment of fundamental rights on the one hand and the factual elements constituting an entitlement to encroachment on the other hand (see BVerfGE 100, 313 [392 et seq.]). The requirements as to the degree of probability and the factual basis of the prognosis must be proportionate to the nature and gravity of the impairment of fundamental rights. Even with the greatest weight of the threatening legal interest in encroachment, it is not possible to forgo the requirement of sufficient probability of occurrence. It must also be guaranteed as a precondition for a grave encroachment on fundamental rights that presumptions and conclusions have a starting point in fact which has a concrete outline (see BVerfGE 113, 348 [386]; 115, 320 [360, 361]).

- (c) The principle of proportionality restricts a statutory provision granting powers to effect secret access to information technology systems initially insofar as special requirements exist as to the occasion for the encroachment. The latter consists here of risk aversion in the context of the tasks of the constitution protection authority according to s. 1 of the North Rhine-Westphalia Constitution Protection Act.

...

- (d) Furthermore, empowerment to effect secret access to information technology systems must be linked with suitable statutory precautions in order to secure the interests of the person concerned under procedural law. If a norm provides for secret investigation activities on the part of the state which - as here - affect particularly protected zones of privacy or demonstrate a particularly high intensity of encroachment, the weight of the encroachment on fundamental rights is to be accounted for by suitable procedural precautions (see Federal Constitutional Court, Order of 13 June 2007 - 1 BvR 1550/03 et al. -, *Neue Juristische Wochenschrift* 2007, p. 2464 [2471], with further references). In particular, access is in principle to be placed under the reservation of a judicial order.

...

- (5) According to these standards, the impugned provision does not meet the constitutional requirements.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- (a) According to s. 5.2 in conjunction with s. 7.1 no. 1 and s. 3.1 of the North Rhine-Westphalia Constitution Protection Act, preconditions for the deployment of intelligence service means by the constitution protection authority are only factual indications of the presumption that information on anti-constitutional activities can be obtained by these means. This is not a sufficient substantive encroachment threshold, either as to the factual preconditions for the encroachment, or to the weight of legal interests to be protected. Also, there is no provision for a prior examination by an independent body, so that the constitutionally-required procedural security is lacking.
- (b) These shortcomings do not cease to apply if the reference contained in s. 5.2 no. 11 sentence 2 of the North Rhine-Westphalia Constitution Protection Act to the detailed preconditions according to the Act re Article 10 of the Basic Law, is included in the examination despite its undeterminedness, and, in the broad interpretation of the Government of the Land North Rhine-Westphalia, is understood to refer to all formal and substantive precautions of this Act. s. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act does not restrict secret access to an information technology system to telecommunication surveillance, the preconditions for which are regulated by s. 3.1 of the Act re Article 10 of the Basic Law, but facilitates such access in principle to obtain all available data. Neither the regulation of the encroachment threshold, nor the procedural requirements of the encroachment elements provided for in s. 3.1 of the Act re Article 10 of the Basic Law, meet the constitutional requirements.
- ...
- c) Finally, there are no adequate statutory precautions to avoid encroachments on the absolutely protected core area of private life by measures according to s. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act.

- aa) Secret surveillance measures carried out by state agencies must respect an inviolable core area of private life, the protection of which emerges from Article 1.1 of the Basic Law (see BVerfGE 6, 32 [41]; 27, 1 [6]; 32, 373 [378, 379]; 34, 238 [245]; 80, 367 [373]; 109, 279 [313]; 113, 348 [390]). Even overriding interests of the public cannot justify encroachment on it (see BVerfGE 34, 238 [245]; 109, 279 [313]). The development of the personality in the core area of private life includes the possibility to express inner events such as perceptions and feelings, as well as considerations, views and experiences of a highly personal nature, without fear that state agencies may have access to them (see BVerfGE 109, 279 [314]).

In the context of secret access to an information technology system, the danger exists that the state agency might collect personal data which is to be attributed to the core area. For instance, the person concerned may use the system to establish and store files with highly personal contents, such as diary like records or private film or sound documents. Such files can enjoy absolute protection, as can for instance written embodiments of highly personal experiences (on this see BVerfGE 80, 367 [373 et seq.]; 109, 279 [319]). Secondly, insofar as it is used for telecommunication purposes, the system can be used to transmit contents which

**60 Years German Basic Law:
The German Constitution and its Court**

can equally fall within the core area. This applies not only to speech telephony, but for instance also to telecommunication using e-mail or other Internet communication services (see BVerfGE 113, 348 [390]). The absolutely protected data can be collected with different types of access, such as with the inspection of storage media, just as with the surveillance of ongoing Internet communication or indeed with full surveillance of the use of the target system.

- bb) In the event of secret access to the information technology system of the person concerned, there is a need for special statutory precautions protecting the core area of private life.

To manage their personal matters, and for use in telecommunication also with close persons, citizens increasingly use complex information technology systems which offer them development possibilities in the highly personal sphere. In view of this, an investigation measure such as access to an information technology system, using which the data available on the target system can be comprehensively collected, entails in comparison to other surveillance measures - such as the use of the Global Positioning System as a tool of technical monitoring (see on this BVerfGE 112, 304 [318]) - an increased danger of data being collected which have highly personal contents.

Because of the secrecy of access, the person concerned has no opportunity himself or herself to endeavour to ensure prior to or during the investigative measure that the investigating state agency respects the core area of his or her private life. This complete loss of control is to be countered by special provisions which provide protection against the danger of a violation of the core area through suitable procedural precautions.

- cc) The constitutional requirements as to the concrete structure of the protection of the core area can differ depending on the nature of the collection of the information and the information collected by it.

A statutory empowerment to carry out a surveillance measure which may affect the core area of private life must ensure as far as possible that no data is collected which relates to the core area. If - as with secret access to an information technology system - it is practically unavoidable to obtain information before its reference to the core area can be evaluated, sufficient protection must be ensured in the evaluation phase. In particular, data that is found and collected which refers to the core area must be deleted without delay and its exploitation must be ruled out (see BVerfGE 109, 279 [318]; 113, 348 [391, 392]).

...

- dd) The Constitution Protection Act does not contain the required provisions protecting the core area. Nothing else emerges if the reference in s. 5.2 no. 11 sentence 2 of the North Rhine-Westphalia Constitution Protection Act to the Act re Article 10 of the Basic Law is included despite its undeterminedness. This statute also does not contain precautions to protect the core area of private life.

Selected Fundamental Decisions of the Federal Constitutional Court

In contradistinction to the view taken by the Government of the Land North Rhine-Westphalia, s. 4.1 of the Act re Article 10 of the Basic Law may not even be referred to if the reference of s. 5.2 no. 11 sentence 2 of the North Rhine-Westphalia Constitution Protection Act is understood broadly such that it covers this provision. s. 4.1 of the Act re Article 10 of the Basic Law only regulates that collected data is to be deleted which are not or are no longer needed, and hence regulates the general principle of necessity. The provision by contrast does not contain any special standards for the collection, viewing and deletion of data which can show a connection to the core area. The principle of necessity cannot be equated with constitutionally-required respect for the core area of private life. The core area is rather in particular not amenable to being qualified by contrary investigation interests, as was explicitly introduced by the application of the principle of necessity (see BVerfGE 109, 279 [314]).

- d) The violation of the general right of personality in its manifestation as providing protection of the confidentiality and integrity of information technology systems (Article 2.1 in conjunction with Article 1.1 of the Basic Law) leads to the nullity of s. 5.2 no. 11 sentence 1 alternative 2 of the North Rhine-Westphalia Constitution Protection Act.
- e) In view of this, there is no longer any need to review the degree to which measures permitted by the provision also violate other fundamental rights or the principle of specifying the fundamental right which is restricted as contained in Article 19.1 sentence 2 of the Basic Law.

II.

The empowerment to secret reconnaissance of the Internet contained in s. 5.2 no. 11 sentence 1 alternative 1 of the North Rhine-Westphalia Constitution Protection Act violates the secrecy of telecommunication guaranteed by Article 10.1 of the Basic Law. Measures according to this provision can in certain cases constitute an encroachment on this fundamental right which is constitutionally not justified (1); Article 19.1 sentence 2 of the Basic Law is also violated (2). Its unconstitutionality makes the provision null and void (3). The constitution protection authority may however continue to carry out measures of Internet reconnaissance insofar as these are not to be regarded as encroachments on fundamental rights (4).

1. The secret reconnaissance of the Internet regulated in s. 5.2 no. 11 sentence 1 alternative 1 of the North Rhine-Westphalia Constitution Protection Act covers measures by means of which the constitution protection authority obtains knowledge of the contents of Internet communication via the channel technically provided therefor, in other words for instance by calling up a Web site on the World Wide Web using a Web browser (see above A I 1 a). In certain cases, this can encroach on the secrecy of telecommunication. Such an encroachment is constitutionally not justified by the impugned provision.

- a) The area protected by Article 10.1 of the Basic Law covers the ongoing telecommunication carried out using an information technology system that is connected to the Internet (see above I 1 c, aa (1)). However, this fundamental right only protects the confidence of the individual that knowledge of the telecommunication in which he

**60 Years German Basic Law:
The German Constitution and its Court**

or she is involved is not being obtained by third parties. By contrast, the confidence of the communication partners in one another is not the subject matter of the fundamental rights protection. If a state investigation measure does not focus on unauthorised access to telecommunication, but on the disappointment of the personal trust in the communication partner, this does not constitute an encroachment on Article 10.1 of the Basic Law (see BVerfGE 106, 28 [37, 38]). The state's obtaining knowledge of the contents of telecommunication is hence only to be measured against the secrecy of telecommunication if a state agency monitors a telecommunication relationship from outside without itself being an addressee of the communication. By contrast, the fundamental right does not provide protection against a state agency itself establishing a telecommunication relationship with a subject of fundamental rights.

If a state agency obtains knowledge of the contents of telecommunication conducted via the communication services of the Internet via the channel technically provided therefor, this shall only constitute an encroachment on Article 10.1 of the Basic Law if the state agency is not authorised to do so by those involved in the communication. Since the secrecy of telecommunication does not protect the mutual personal trust of those involved in communication, the state agency is already authorised to collect the communication contents if only one of several participants has permitted it such access voluntarily.

The secret reconnaissance of the Internet accordingly encroaches on Article 10.1 of the Basic Law if the constitution protection authority monitors secured communication contents by using access keys which it collected without authorisation or against the will of those involved in the communications. This is the case for instance if a password collected using key-logging is used in order to gain access to an e-mail inbox or to a closed chatroom.

By contrast, an encroachment on Article 10.1 of the Basic Law is to be denied if for instance a participant of a closed chatroom has voluntarily provided the person acting for the constitution protection authority with his or her access, and as a consequence the authority uses this access. Encroachment on the secrecy of telecommunication certainly does not apply if the authority collects generally accessible contents, for instance by viewing open discussion fora or Web sites which are not password protected.

- b) The encroachments on Article 10.1 of the Basic Law facilitated by s. 5.2 no. 11 sentence 1 alternative 1 of the North Rhine-Westphalia Constitution Protection Act are constitutionally not justified. The impugned provision does not meet the constitutional requirements as to empowerments to effect such encroachments.
 - aa) S. 5.2 no. 11 sentence 1 alternative 1 of the North Rhine-Westphalia Constitution Protection Act does not comply with the principle of the clarity of provisions and determinedness of provisions since the preconditions for encroachment are not sufficiently precisely regulated because of the undeterminedness of subsection 2 of this provision (see above C I 2 a, bb).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- bb) The impugned provision is furthermore not in compliance with the principle of appropriateness in the narrower sense insofar as it is to be measured against Article 10.1 of the Basic Law.

The encroachment on the secrecy of telecommunication is grievous. On the basis of the impugned provision, the constitution protection authority may access communication contents which may be sensitive in nature, and which may provide insight into the personal matters and habits of the person concerned. It is not only the one who gave rise to the surveillance measure who is concerned. The encroachment can rather show a certain spread if information is obtained not only on the communication conduct of the party against whom the measure is addressed, but also on his or her communication partners. The secrecy of access increases the intensity of the encroachment. Additionally, because of the broad wording of the preconditions for encroachment contained in s. 7.1 no. 1 in conjunction with s. 3.1 of the North Rhine-Westphalia Constitution Protection Act, persons may also be monitored who have not given rise to the occasion for the encroachment.

Such a grievous encroachment on fundamental rights, even if the weight of the goals of protection of the constitution is taken into account, is in principle at least, also conditional on the provision of a qualified substantive encroachment threshold (see re criminal law investigations BVerfGE 107, 299 [321]). This is not the case here. Rather, s. 7.1 no. 1 in conjunction with s. 3.1 of the North Rhine-Westphalia Constitution Protection Act permits intelligence service measures to a considerable degree in the run-up to concrete endangerment without regard to the grievousness of the potential violation of legal interests, and also towards third parties. Such a broad empowerment to effect an encroachment is not compatible with the principle of proportionality.

- cc) The Constitution Protection Act does not contain any precaution to protect the core area of private life in connection with encroachments according to s. 5.2 no. 11 sentence 1 alternative 1 of the North Rhine-Westphalia Constitution Protection Act. Such provisions are however required insofar as a state agency is empowered to collect the contents of telecommunication by encroaching on Article 10.1 of the Basic Law (see BVerfGE 113, 348 [390 et seq.]).

2. Finally, s. 5.2 no. 11 sentence 1 alternative 1 of the North Rhine-Westphalia Constitution Protection Act, insofar as the provision grants powers to effect encroachments on Article 10.1 of the Basic Law, does not comply with the principle of specifying the fundamental right restricted contained in Article 19.1 sentence 2 of the Basic Law.

According to Article 19.1 sentence 2 of the Basic Law, a statute must specify the fundamental right which is restricted by this statute or this Act, stating the relevant Article. The function of the principle of specifying the fundamental right restricted is to provide a warning and an occasion for reflection (see BVerfGE 64, 72 [79, 80]). Specifying the encroachment contained in the wording of the Act is intended to ensure that the legislature only provides for encroachments of which it is aware as such, and with regard to which it accounts to itself as to

**60 Years German Basic Law:
The German Constitution and its Court**

their impact on the fundamental rights concerned (see BVerfGE 5, 13 [16]; 85, 386 [404]). The fact of explicit specifying also makes it easier to clarify the necessity and the extent of the intended encroachment on fundamental rights in the public debate. By contrast, it is not sufficient for the legislature to have been aware of the encroachment on fundamental rights if this has not been reflected in the text of the Act (see BVerfGE 113, 348 [366, 367]).

The impugned provision does not comply with the principle of specifying the fundamental right restricted with regard to Article 10.1 of the Basic Law. In contradistinction to the view taken by the Government of the Land North Rhine-Westphalia, the impugned provision does not meet the requirements simply because s. 5.2 no. 11 sentence 2 of the North Rhine-Westphalia Constitution Protection Act may indicate by referring to the Act re Article 10 of the Basic Law that the legislature has considered an encroachment on the secrecy of telecommunication to be possible. The principle of specifying the fundamental right restricted is only accounted for if the fundamental right is explicitly named in the text of the Act as being restricted. Moreover, in view of the fact that s. 5.2 no. 11 of the North Rhine-Westphalia Constitution Protection Act contains two different empowerments to encroach, it by no means emerges from the statute with sufficient clarity for which of them the legislature at least anticipated the possibility of an encroachment on Article 10 of the Basic Law.

3. The violation of s. 5.2 no. 11 sentence 1 alternative 1 of the North Rhine-Westphalia Constitution Protection Act against Article 10.1 and Article 19.1 sentence 2 of the Basic Law leads to the nullity of the provision.

4. The nullity of the empowerment however does not lead to a situation in which measures of Internet reconnaissance are in principle denied to the authority, insofar as these do not encroach on fundamental rights.

Insofar as it does not fall under Article 10.1 of the Basic Law, the secret reconnaissance of the Internet in particular does not always encroach on the general right of personality guaranteed by Article 2.1 in conjunction with Article 1.1 of the Basic Law.

- a) The confidentiality and integrity of information technology systems guaranteed by the general right of personality is not affected by measures of Internet reconnaissance since measures according to s. 5.2 no. 11 sentence 1 alternative 1 of the North Rhine-Westphalia Constitution Protection Act are restricted to data which the owner of the system has provided for Internet communication - for instance the operator of a Web server - using the channel technically provided therefor. The person concerned himself or herself has opened his or her system by technical terms for such data collections. He or she cannot rely on these not being carried out.
- b) At least as a rule, an encroachment on Article 2.1 in conjunction with Article 1.1 of the Basic Law is also to be denied in its manifestation as a right to informational self-determination.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

III.

Since s. 5.2 no. 11 of the North Rhine-Westphalia Constitution Protection Act is null and void as a whole, the complaints submitted against s. 5.3 and s. 17 of the North Rhine-Westphalia Constitution Protection Act are disposed of. Insofar as the complainants' complaints are admissible, the unconstitutionality of the impugned provisions is claimed only with regard to measures according to the provision that is null and void.

IV.

S. 5a.1 of the North Rhine-Westphalia Constitution Protection Act is compatible with the Basic Law insofar as its area of application was expanded to cover activities within the meaning of s. 3.1 no. 1 of the North Rhine-Westphalia Constitution Protection Act. In particular, this provision does not violate Article 2.1 in conjunction with Article 1.1 of the Basic Law.

1. The collection of account contents and account movements provided in s. 5a.1 of the North Rhine-Westphalia Constitution Protection Act encroaches on the general right of personality in its manifestation as a right to informational self-determination.

Such account information can be significant for the protection of the personality of the person concerned, and is protected by the fundamental right. According to the current habits, most payment transactions which go beyond the cash transactions of daily life are carried out via accounts. If information is deliberately compiled on the contents of the accounts of a specific person, this makes it possible to view the assets and the social contacts of the person concerned, insofar as these show a financial dimension - for instance via subscriptions or maintenance payments. Some account content data, such as the amount of payments connected with consumption dependent recurring obligations, can also permit further conclusions to be drawn as to the conduct of the person concerned (see Federal Constitutional Court, Order of 13 June 2007 - 1 BvR 1550/03 et al. -, *Neue Juristische Wochen-schrift* 2007, p. 2464 [2466]).

The measures provided in s. 5a.1 of the North Rhine-Westphalia Constitution Protection Act encroach on the right to informational self-determination. It is not a matter here of whether the content of the impugned provision is limited to a power of the constitution protection authority to address a request for information to a financial institution, or whether it implicitly imposes an obligation on the respective financial institution to provide information. In either case, the provision empowers the authority to undertake data collection exercises which as such already bring about an encroachment on fundamental rights.

2. The encroachments on fundamental rights provided in s. 5a.1 of the North Rhine-Westphalia Constitution Protection Act are however constitutionally justified for investigations in view of activities within the meaning of s. 3.1 no. 1 of the North Rhine-Westphalia Constitution Protection Act. In particular, the impugned provision complies with the principle of proportionality in this respect.

**60 Years German Basic Law:
The German Constitution and its Court**

- a) Because of the expansion of the area of application of the provision, the measures regulated in s. 5a.1 of the North Rhine-Westphalia Constitution Protection Act also serve the purpose of reconnaissance of the financing channels and of the financial circumstances and intertwinings in connection with activities within the meaning of s. 3.1 no. 1 of the North Rhine-Westphalia Constitution Protection Act. This is a legitimate goal of protection of the constitution.

The provision in its expanded version is suited to reach this goal. It is also necessary for it. No equally effective means is evident to achieve reconnaissance of bank transactions with a view to activities within the meaning of s. 3.1 no. 1 of the North Rhine-Westphalia Constitution Protection Act that is less burdening for the person concerned.

- b) S. 5a.1 of the North Rhine-Westphalia Constitution Protection Act also satisfies the principle of appropriateness in the narrower sense.

- aa) The provision empowers the constitution protection authority to effect encroachments on fundamental rights.

Information on account contents and account movements can be sensitive data. Accessing of such data of such persons concerned, who are protected by fundamental rights, can considerably impair their interests. The collection of such information has hence as a rule an increased weight from the fundamental rights perspective (see Federal Constitutional Court, Order of 13 June 2007 - 1 BvR 1550/03 et al. -, *Neue Juristische Wochenschrift* 2007, p. 2464 [2470]). The intensity of the encroachment is also increased by virtue of its secrecy. According to s. 5a.3 sentence 11 of the North Rhine-Westphalia Constitution Protection Act, the financial institution which provides the information may not notify the person concerned of the request for information and of the data transmitted. Finally, the person concerned may incur disadvantages since the financial institution holding the account of necessity hears of the data collection and may draw unfavourable conclusions on an individual concerned on the basis of such knowledge (see Federal Constitutional Court, Order of 13 June 2007 - 1 BvR 1550/03 et al. -, *Neue Juristische Wochenschrift* 2007, p. 2464 [2469]).

- bb) The public interests pursued with s. 5a.1 of the North Rhine-Westphalia Constitution Protection Act are however so weighty that they are not disproportionate to the encroachments on fundamental rights that are regulated in the provision.

- (1) The statute links the obtaining of knowledge on the account contents and account movements to factual preconditions which adequately accommodate the significance of the encroachment on fundamental rights for the person concerned.

S. 5a.1 of the North Rhine-Westphalia Constitution Protection Act makes the collection contingent on an element of endangerment that is qualified both as to the legal interests concerned, and as to the factual basis of the encroachment. There must be factual indications of grievous dangers to the interests protected contained in s. 3.1 of the North

Selected Fundamental Decisions of the Federal Constitutional Court

Rhine-Westphalia Constitution Protection Act. The term “grievous danger” refers - as in s. 8a.2 of the Federal Constitution Protection Act (Bundesverfassungsschutzgesetz - BVerfSchG) (see on this Bundestag document (Bundestagsdrucksache - BTDrucks) 16/2921, p. 14), which has identical wording in this respect - to an increased intensity of the threat to legal interests. The factual basis of the encroachments is additionally qualified by the requirement of factual indications of a grievous danger. It is not sufficient for the regulated data collection to be useful in general terms for the performance of the task of the constitution protection authority. Rather, indications must exist of a situation in which the protected interests are under threat in concrete terms.

With its two-fold qualification, the encroachment threshold meets the requirements of the general right of personality. No further restrictions of the factual preconditions of the encroachment are constitutionally required.

- (2) The impugned provision also takes account of the grievousness of the regulated encroachment on fundamental rights by means of suitable procedural precautions.

For instance, data collection according to s. 5a.3 sentence 3 of the North Rhine-Westphalia Constitution Protection Act requires an order from the Minister of the Interior, which is to be requested by the head of the Constitution Protection Department or his or her deputy. The encroachment on fundamental rights lying in the collection of account contents and account movements is not so grievous that ex ante control by a neutral body is constitutionally required *per se*. The intra-authority control provided however serves to secure the interests of the person concerned in the preparatory phase of data collection, and hence contributes to the proportionality of the encroachment. What is more, additional ex-post control by the G 10 Commission is provided for according to s. 5a.3 sentences 4 to 8 of the North Rhine-Westphalia Constitution Protection Act, which equally serves the protection of the interests of the persons concerned that are protected by fundamental rights.

S. 5a.3 sentence 9 of the North Rhine-Westphalia Constitution Protection Act in conjunction with s. 4 of the Act on the Implementation of the Act re Article 10 of the Basic Law contains standards for the processing and transmission of the collected data, in particular meeting the requirements of necessity and of the limitation principle.

S. 5a.3 sentence 11 of the North Rhine-Westphalia Constitution Protection Act in conjunction with s. 5 of the Act on the Implementation of the Act re Article 10 of the Basic Law, finally, provides for notification of the person concerned as soon as a risk to the purpose of the restriction can be ruled out. By these means, the person concerned is largely enabled to pursue his or her interests at least ex-post.

2. Article 2.2 - Life, Limb and Liberty

The Right to Life: The Abortion Decisions, BVerfGE 39, 1, BVerfGE 88, 203

Explanatory Annotation

The German Constitutional Court addressed the issue of termination of pregnancy twice in two fundamental judgments. The main issue in the first judgment of 1974 was the question of whether the general legalization of abortion in the first 12 weeks of the pregnancy as provided for in the relevant criminal law reform act was constitutional. This question had arisen in the broader context of liberal reforms, which, in Germany, were the result of complex socio-political changes in the society. The student revolts of the late 1960s, the change from a conservative government to a social-democratic/liberal coalition government are examples for this trend and similar developments internationally also provided support. The epochal decision of the United States Supreme Court in the case of *Roe v Wade* of 1973 is one prime example.

The second decision of 1992 is, on the one hand, the continuation of the old struggle between those strictly opposed to abortion and those with more balancing views in the light of the empirical developments since the first decision in 1974. The second decision of the Constitutional Court of 1992, on the other hand, also reflects the German reunification of 1990 and the fact that the two Germanys had significantly different laws pertaining to the question of abortion. Former communist East-Germany had in effect liberalized abortion in the first 12 weeks of pregnancy whereas former West-Germany operated under the more complex and less liberal legal regime established as a consequence of the Court's first decision in 1974. The Unification Treaty⁸ demanded in Article 31.4 that the abortion problem be addressed by the legislature until the end of 1992. The outcome of this reform process was the object of constitutional scrutiny in the second decision of 1992.

In substance, both decisions of the Court follow the same red line. The unborn life, the foetus, partakes in the right of life guarantee of Article 2.2 of the Basic Law and possesses human dignity as guaranteed in Article 1.1. Having thus decided that under the Basic Law, life in the sense of Article 2.2 begins at conception (or, to be more precise, with nidation, i.e. the implantation of the fertilized ovum in the endometrium of the uterus⁹) it is obvious that any legislative solution that would make this life dependent on the free will of another person, even if that other person is the mother, is not possible. The result was that the general liberalization of abortion in the first 12 weeks, as was intended under the West-German reform law of 1974 and as was the case under the East-German law (and in many other jurisdictions) was unconstitutional.

⁸ Einigungsvertrag (EV) of 31 August 1990 in conjunction with the Statute on the Unification Treaty of 23 September 1990, BGBl. Part II p. 885. Available in German at <http://www.gesetze-im-internet.de/einigvtr/BjNR208890990.html>. English version available at <http://www.ena.lu/unification-treaty-frg-gdr-berlin-31-august-1990-020300527.html>.

⁹ <http://medical-dictionary.thefreedictionary.com/nidation>.

Selected Fundamental Decisions of the Federal Constitutional Court

The consequence in West-Germany after 1974 was new legislation that maintained the illegality of abortion as a matter of principle but allowed for certain exceptions, the so-called 'indications', such as a significant danger to the life and health of the mother, rape, but also the eugenic indication, i.e. substantial genetic or other defects of the child and the most controversial 'social indication', which allowed for termination of the pregnancy if the mother was caught up in an 'emergency situation' and hence could not cope with the pregnancy and the child. These indications had by and large led to a situation at least akin to a general liberalization of abortion in the first part of the pregnancy and hence had given rise to much controversy, which influenced the post-reunification reform legislation and led to the second decision.

The second pillar of both decisions is the strong emphasis on the duty of the state to protect life. The Court held that it does not suffice that the state refrain from taking or interfering with life. Governmental authority must go beyond this and is obligated to actively protect life in its legal order. In the first decision the court had already held that this protection does not necessarily require criminalizing abortion and that criminal law as a protective means can be a last resort but that any means of protection must be effective.

In the second decision the Court had to deal with the reform law of 1992, which had replaced the 'indication' scheme with a counselling scheme under which abortion had to be preceded by defined counselling efforts designed to reinforce in the mother the will to carry out the pregnancy. The Court made it clear that the counselling framework must be such that the pregnant woman in her conflict situation can be offered concrete help to cope with the pregnancy and the child. This includes assistance when looking for accommodation, child-care and in continuing the education of the mother-to-be. The detail in which the Court described the elements of this counselling effort are striking and from the perspective of other jurisdictions one could well ask whether it is for a court of law to go into such detail. The Court also re-emphasized that abortion must retain the mark of an illegal activity even if the choice is not to sanction it criminally. Consequently abortion it could not be covered by the public health insurance system. It could, however, be covered by the subsidiary general welfare scheme for those qualifying.

Both decisions amply illustrate the pain the Court went through in order to find a balance between the right to life of the unborn and the right of the mother to self-determination. At times the decisions are not always practical and full of symbolism but they are always markedly different to the solution found, for example, by the United States Supreme Court in *Roe v Wade*. The US Constitution does not contain a right to life - but an implied right to privacy - and the function of fundamental rights, as creating a state duty to protect is also rather foreign to the US legal system. Different legal frameworks do not necessarily, but did in this instance, yield very different results.

60 Years German Basic Law:
The German Constitution and its Court

a) **Translation of the Abortion I Judgment: Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 39, 1***

Headnotes:

1. The life which is developing itself in the womb of the mother is an independent legal value which enjoys the protection of the constitution (Article 2.2 sentence 1, Article 1.1 of the Basic Law). The State's duty to protect forbids not only direct state attacks against life developing itself, but also requires the state to protect and foster this life.
2. The obligation of the state to protect the life developing itself exists, even against the mother.
3. The protection of life of the child *en ventre sa mere* takes precedence as a matter of principle for the entire duration of the pregnancy over the right of the pregnant woman to self-determination and may not be placed in question for any particular time.
4. The legislature may express the legal condemnation of the interruption of pregnancy required by the Basic Law through measures other than the threat of punishment. The decisive factor is whether the totality of the measures serving the protection of the unborn life guarantees an actual protection which in fact corresponds to the importance of the legal value to be guaranteed. In the extreme case, if the protection required by the constitution cannot be realized in any other manner, the legislature is obligated to employ the criminal law to secure the life developing itself.
5. A continuation of the pregnancy is not to be exacted (legally) if the termination is necessary to avert from the pregnant woman a danger to her life or the danger of a serious impairment of her health. Beyond that the legislature is at liberty to designate as non-exactable other extraordinary burdens for the pregnant woman which are of similar gravity and, in these cases, to leave the interruption of pregnancy free of punishment.
6. The Fifth Statute to Reform the Criminal Law of the 18th of June, 1974, (Federal Law Reporter I, p. 1297) has not in the required extent done justice to the constitutional obligation to protect prenatal life.

Order of the First Senate of 25 February 1975 - 1 BvF 1, 2, 3, 4, 5, 6/74 -

Facts:

The subject matter of the proceeding is the question whether the so-called regulation of terms of the Fifth Statute to Reform the Criminal Law according to which termination of pregnancy remains free of punishment during the first twelve weeks after conception under certain conditions is consistent with the Basic Law.

* Translation by Robert E. Jonas and John D. Gorby in The John Marshall Journal of Practice and Procedure (Vol. 9:605); © Robert E. Jonas and John D. Gorby.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

The Fifth Statute to Reform the Criminal Law (5 CLRS) of June 18, 1974 (Federal Law Reporter I, p. 1297) has regulated punishability of the interruption of pregnancy in a new manner. SS. 218 to 220 have been replaced by provisions which *vis-a-vis* the previous state of the law contain primarily the following alterations

As a matter of principle, anyone who interrupts a pregnancy more than 13 days after conception shall be punished (s. 218.1). An abortion performed by a physician, however, with the consent of the pregnant woman is not punishable under s. 218 if not more than twelve weeks have elapsed since conception (s. 218a - Regulation of Terms.). Furthermore, an interruption of pregnancy performed by a physician with the consent of the pregnant woman after the expiration of the twelve week period is not punishable under s. 218 if the abortion is indicated, according to the judgment of medical science, to avert from the pregnant woman either a danger to her life or the danger of a serious impairment of the condition of her health to the extent that these dangers cannot be averted in a fashion which is otherwise exactable (s. 218b, No. 1- Medical Indication). Furthermore, abortion is not punishable if compelling reasons demand the assumption that the child, because of an hereditary disposition or harmful influences before birth, will suffer impairment to its health which cannot be alleviated and which are so weighty that the continuation of the pregnancy cannot be demanded of the pregnant woman, and not more than 22 weeks have elapsed since conception (s. 218b no. 2 - Eugenic Indication). Anyone who interrupts a pregnancy without the pregnant woman first having received social and medical counselling at a counselling centre or from a physician shall be punished (s. 218c). Even so an individual makes himself liable to punishment if he interrupts a pregnancy after the expiration of twelve weeks from conception without a competent counselling centre having previously certified that the prerequisites of s. 218b (Medical or Eugenic Indications) have been met (s. 219). The pregnant woman herself shall not be punished either under s. 218 or under s. 219.

Extract from the Grounds:

...

B.

The Fifth Statute to Reform the Criminal Law did not need the concurrence of the Federal Council.

1. The statute, in Articles 6 and 7, alters, it is true, the Order of Criminal Procedure and the Introductory Statute to the Criminal Code which, for their part, were passed with the concurrence of the Federal Council. This reason by itself, however, does not necessitate concurrence (BVerfGE 37, 363). Further, the statute alters no statutory provisions, which, for their part, were in need of concurrence.

2. The Fifth Statute to Reform the Criminal Law itself contains no provisions which under Article 84.1, or any other provision of the Basic Law require concurrence. Neither s. 218 nor s. 219 of the Criminal Code regulates the establishment of authorities or administrative procedure. Rather, they merely establish the substantive legal prerequisites of non-punishable interruption of pregnancy. This is also true, insofar as s. 218c.1 no. 1 of the Criminal

**60 Years German Basic Law:
The German Constitution and its Court**

Code, requires that the pregnant woman, before the abortion, present herself to an authorized counselling centre and describe the object of the counselling. The setting up and establishment of counselling centres as well as the decreeing of administrative provisions for procedures to be followed by these centres are completely relegated to the federal states. For the same reasons s. 219 of the Criminal Code does not create a need for concurrence of the Federal Council by requiring the verification of the substantive prerequisites by “an authorized centre” before performing an abortion indicated under s. 218b.

3. The petitioning-state governments cannot be followed in concluding that concurrence is necessary insofar as they refer to the legal principle established in the decision of June 25, 1974, according to which an amendatory statute required the concurrence of the Federal Council “if, through the alteration of substantive legal norms, provisions regarding the administrative procedures which are not expressly altered experience an essentially different meaning and scope in a construction which is oriented to the purpose of the statute” (BVerfGE 37, 363, Fourth Guiding Principle and 383). The actual prerequisites for a direct application of this guiding principle are unquestionably not present here. Whether a continued extension of this legal principle in the sense proposed by the government of the federal state of Rhineland-Pfalz could come into consideration at all is uncertain. Even according to this view of the law, no requirement for concurrence for the Fifth Statute to Reform the Criminal Law arises since an even greater latitude to structure remains with the federal states under the substantive provisions for the administrative regulations incumbent upon them.

4. Finally, no requirement for concurrence can be inferred from the close connection of the Fifth Statute to Reform the Criminal Law with the Statute to Supplement the Criminal Law Reform which, with the content given it by the Federal Parliament, is viewed as needing concurrence. Regardless of that, the Statute to Supplement the Criminal Law Reform has not yet taken effect. The legislature is not prevented as a matter of principle in the exercise of its legislative freedom from dividing a statutory plan into several individual statutes. The Federal Constitutional Court has, up to this time, proceeded upon the principle that such divisions were permissible (cf. BVerfGE 34, 9 [28]; 37, 363 [382]). In the decision (BVerfGE 24, 184, [199 seq.]) *-Apostille-* the Court left unanswered the question whether there are constitutional limits to the authority and where these limits are to be found. In any event, such limits are not transgressed in this case. The Fifth Statute to Reform the Criminal Law and the planned Statute to Supplement the Criminal Law Reform were indeed voted upon consecutively. However, they must not necessarily be considered a statutory and technical unity. The first named statute contains in essence only criminal law and criminal procedure. In contrast, the Statute to Supplement the Criminal Law Reform contains social and labour law measures. The independence in content of the Statute to Supplement the Criminal Law Reform from the Fifth Statute to Reform the Criminal Law obviously results from the fact that the Statute to Supplement the Criminal Law Reform, according to its very wording, would be applicable to all of the proposed solutions for the new regulation of pregnancy termination, namely the “term solution” as well as the three indication solutions.

Selected Fundamental Decisions of
the Federal Constitutional Court

C.

...

I.

1. Article 2.2 sentence 1 of the Basic Law also protects the life developing itself in the womb of the mother as an intrinsic legal value.

- a) The express incorporation into the Basic Law of the self-evident right to life - in contrast to the Weimar Constitution - may be explained principally as a reaction to the “destruction of life unworthy of life,” to the “final solution” and “liquidations,” which were carried out by the National Socialistic Regime as measures of state. Article 2.2 sentence 1 of the Basic Law, just as it contains the abolition of the death penalty in Article 102, includes “a declaration of the fundamental worth of human life and of a concept of the state which stands, in emphatic contrast to the philosophies of a political regime to which the individual life meant little and which therefore practiced limitless abuse with its presumed right over life and death of the citizen” (BVerfGE 18, 112 [117]).
- b) In construing Article 2.2 sentence 1 of the Basic Law, one should begin with its language: “Everyone has a right to life. . .” Life, in the sense of historical existence of a human individual, exists according to definite biological-physiological knowledge, in any case, from the 14th day after conception (nidation, individuation) (cf. on this point the statements of Hinrichsen before the Special Committee for the Reform of the Criminal Law, Sixth Election Period, 74th Session, Stenographic Reports, p. 2142 seq.). The process of development which has begun at that point is a continuing process which exhibits no sharp demarcation and does not allow a precise division of the various steps of development of the human life. The process does not end even with birth; the phenomena of consciousness which are specific to the human personality, for example, appear for the first time a rather long time after birth. Therefore, the protection of Article 2.2 sentence 1 of the Basic Law cannot be limited either to the “completed” human being after birth or to the child about to be born which is independently capable of living. The right to life is guaranteed to everyone who “lives”; no distinction can be made here between various stages of the life developing itself before birth, or between unborn and born life. “Everyone” in the sense of Article 2.2 sentence 1 of the Basic Law is “everyone living”; expressed in another way: every life possessing human individuality; “everyone” also includes the yet unborn human being.
- c) In opposition to the objection that “everyone” commonly denotes, both in everyday language as well as in legal language, a “completed” person and that a strict interpretation of the language speaks therefore against the inclusion of the unborn life within the effective area of Article 2.2 sentence 1 of the Basic Law, it should be emphasized that, in any case, the sense and purpose of this provision of the Basic Law requires that the protection of life should also be extended to the life developing itself. The security of human existence against encroachments by the state would be incomplete if it did not also embrace the prior step of “completed life,” unborn life.

**60 Years German Basic Law:
The German Constitution and its Court**

This extensive interpretation corresponds to the principle established in the opinions of the Federal Constitutional Court, “according to which, in doubtful cases, that interpretation is to be selected which develops to the highest degree the judicial effectiveness of the fundamental legal norm” (BVerfGE 32, 54 [71]; 6, 55 [72]).

- d) In support of this result the legislative history of Article 2.2 sentence 1 of the Basic Law may be adduced here. After the German Party (DP) had made repeated moves to make explicit reference to “germinating life” in connection with the right to life and bodily inviolability (Federal Council Press 11.48 - 298 and 12.48 - 398), the Parliamentary Council deliberated on this circle of problems for the first time in its Committee for Fundamental Questions, the 32nd session, held on January 11, 1949. In the discussion of the question, “whether a provision should be incorporated into the Basic Law which would forbid medical operations which do not serve health,” Representative Dr. Heuss (FDP) explained, without encountering opposition, that compulsory sterilization and abortion in connection with the right to life were at issue. The Main Committee of the Parliamentary Council in its 42nd session on January 18, 1949, thoroughly dealt with, during the second reading on fundamental rights (proceedings of the Chief Committee of the Parliamentary Council, Stenographic Reports, p. 529 seq.), the question of the inclusion of developing life in the protection of the constitution. Parliamentary Representative Dr. Seebohm (DP) proposed to add both of the following sentences to Article 1.1 of the Basic Law as it existed at that time: “Germinating life is protected” and “the death penalty is abolished.” At the least, he continued, one must expressly enter into the record that germinating life is explicitly included in the right to life and bodily inviolability, if another interpretation is possible. Parliamentary Representative Dr. Weber explained in the name of the CDU/CSU that her faction, when it intercedes for the right to life, means life simply; and, in the faction’s view, germinating life, and above all, the defence of germinating life is contained in the right (bc. cit., p. 534). Dr. Heuss (FDP) agreed with Dr. Weber that the concept of life also embraces developing life; however, matters should not be placed in the constitution, which are regulated in the criminal law. As a consequence, he considered both the mention of germinating life as well as the death penalty as a special question to be superfluous (bc. cit., p. 535).” After the unopposed explanations according to which germinating life is embraced in the right to life and bodily inviolability,” Dr. Seebohm desired to withdraw his motion (bc. cit., p. 535). However Parliamentary Representative Dr. Greve (SPD) declared: “I must explicitly say here, for the record, that at the least as far as I am concerned, I do not understand the right of germinating life to be within the right to life. I would also like on behalf of my friends, at least for the great majority of them, to deliver a clarification of like content in order to establish for the minutes that the Main Committee of the Parliamentary Council in its entirety does not adopt the standpoint which my colleague Dr. Seebohm just expressed.” The motion of Dr. Seebohm was presented once again at that point but was indeed rejected by eleven votes to seven (bc. cit., p. 535). In the written report of the Main Committee (page 7), however, Parliamentary Representative Dr. von Mangoldt (CDU) explained with regard to Article 2 of the Basic Law: “With the guaranteeing of the right to life, germinating life should also be protected. The motions

**Selected Fundamental Decisions of
the Federal Constitutional Court**

introduced by the German Party in the Main Committee to attach a particular sentence about the protection of germinating life did not attain a majority only because, according to the view prevailing in the Committee, the value to be protected was already secured through the present version. The plenary Parliamentary Council concurred in Article 2.2 of the Basic Law on May 6, 1949, in the second reading, there being two votes in opposition. At the third reading on May 8, 1949, both Parliamentary Representatives Dr. Seebohm as well as Dr. Weber stated that, according to their conception, Article 2.2 of the Basic Law would also include germinating life within the protection of this fundamental right (proceedings of the Parliamentary Council, Stenographic Reports, p. 218, 223). The comments of both speakers stood without opposition. The history of the origin of Article 2.2 sentence 1 of the Basic Law suggests that the formulation “everyone has the right to life” should also include “germinating” life. In any case, even less can be concluded from the materials on behalf of the contrary point of view. On the other hand, no evidence is found in the legislative history for answering the question whether unborn life must be protected by the criminal law.

- e) Furthermore, in the deliberations on the Fifth Statute to Reform the Criminal Law there was unity regarding the value of protecting unborn life, although, to be sure, the constitutional structure of the problem has not been treated definitively. In the report of the Special Committee for the Reform of the Criminal Law on the statutory draft introduced by the Factions of the SPD and FPD, *inter alia*, it was stated on this point: The legal value of unborn life is to be respected in principle equally with that of born life. This determination is self-evident for the stage in which unborn life would also be capable of independent life outside of the mother’s womb. The determination, however, is already justified for the earlier stage of development which begins approximately 14 days after conception, as, among others, Hinrichsen convincingly established in the public hearing (AP, VI, p. 2142 et seq.). ... Therefore, it is impermissible to deny the existence of unborn life from the end of nidation on or to contemplate it merely with indifference. The question debated in the literature whether, and if the occasion arises, to what extent the Basic Law should include unborn life in its protection, need not be answered at this point. In any case, if one disregards the extreme ideas of individual groups, the concept of unborn life as a legal value of high rank corresponds to the general public’s understanding of the law. This understanding of the law also lies at the basis of this draft. (Federal Parliamentary Press, 7/198 1, new, p. 5) Nearly of the same tenor are, to an extent, the committee reports regarding the remaining drafts (Federal Parliamentary Press, 7/1982, p. 5, Federal Parliamentary Press, 7/1983, p. 5, Federal Parliamentary Press, 7/1984, new, p. 4).

2. The duty of the state to protect every human life may therefore be directly deduced from Article 2.2 sentence 1, of the Basic Law. In addition to that, the duty also results from the explicit provision of Article 1.1 sentence 2 of the Basic Law since developing life participates in the protection which Article 1.1 of the Basic Law guarantees to human dignity. Where human life exists, human dignity is present to it; it is not decisive that the bearer of this dignity himself is conscious of it and knows personally how to preserve it. The potential faculties present in the human being from the beginning suffice to establish human dignity.

**60 Years German Basic Law:
The German Constitution and its Court**

3. On the other hand, the question disputed in the present proceeding as well as in judicial opinions and in scientific literature, whether the one about to be born himself is a bearer of the fundamental right or, on account of a lesser capacity to possess legal and fundamental rights, is “only” protected in his right to life by the objective norms of the constitution, need not be decided here. According to the constant judicial utterances of the Federal Constitutional Court, the fundamental legal norms contain not only subjective rights of defence of the individual against the state but embody, at the same time, an objective ordering of values, which is valid as a constitutionally fundamental decision for all areas of the law and which provides direction and impetus for legislation, administration, and judicial opinions (BVerfGE 7, 198 [205]--Lueth--; 35, 79 [114]--High School Decisions--for further sources). Whether and, if so, to what extent the state is obligated by the constitution to legal protection of developing life can therefore be concluded from the objective-legal content of the fundamental legal norms.

II.

1. The duty of the state to protect is comprehensive. It forbids not only self-evidently direct state attacks on the life developing itself but also requires the state to take a position protecting and promoting this life, that is to say, it must, above all, preserve it even against illegal attacks by others. It is for the individual areas of the legal order, each according to its special function, to effectuate this requirement. The degree of seriousness with which the state must take its obligation to protect increases as the rank of the legal value in question increases in importance within the order of values of the Basic Law. Human life represents, within the order of the Basic Law, an ultimate value, the particulars of which need not be established; it is the living foundation of human dignity and the prerequisite for all other fundamental rights.

2. The obligation of the state to take the life developing itself under protection exists, as a matter of principle, even against the mother. Without doubt, the natural connection of unborn life with that of the mother establishes an especially unique relationship, for which there is no parallel in other circumstances of life. Pregnancy belongs to the sphere of intimacy of the woman, the protection of which is constitutionally guaranteed through Article 2.1 in conjunction with Article 1.1 of the Basic Law. Were the embryo to be considered only as a part of the maternal organism the interruption of pregnancy would remain in the area of the private structuring of one's life, where the legislature is forbidden to encroach (BVerfGE 6, 32 [41] ; 6, 389 [433] ; 27, 344 [350] ; 32, 373 [379]). Since, however, the one about to be born is an independent human being who stands under the protection of the constitution, there is a social dimension to the interruption of pregnancy which makes it amenable to and in need of regulation by the state. The right of the woman to the free development of her personality, which has as its content the freedom of behaviour in a comprehensive sense and accordingly embraces the personal responsibility of the woman to decide against parenthood and the responsibilities flowing from it, can also, it is true, likewise demand recognition and protection. This right, however, is not guaranteed without limits - the rights of others, the constitutional order, and the moral law limit it. A priori, this right can never include the authorization to intrude upon the protected sphere of right of another without justifying reason or much less to destroy that sphere along with the life itself; this is even less so, if, according to the nature of the case, a special responsibility exists precisely for this life. A compromise which guarantees the protection of the life of the one about to be born and permits the pregnant woman the freedom of abortion is

Selected Fundamental Decisions of the Federal Constitutional Court

not possible since the interruption of pregnancy always means the destruction of the unborn life. In the required balancing, “both constitutional values are to be viewed in their relationship to human dignity, the centre of the value system of the constitution” (BVerfGE 35, 202 [225]). A decision oriented to Article 1, Paragraph 1, of the Basic Law must come down in favour of the precedence of the protection of life for the child *en ventre sa mere* over the right of the pregnant woman to self-determination. Regarding many opportunities for development of personality, she can be adversely affected through pregnancy, birth and the education of her children. On the other hand, the unborn life is destroyed through the interruption of pregnancy. According to the principle of the balance which preserves most of competing constitutionally protected positions in view of the fundamental idea of Article 19.2 of the Basic Law; precedence must be given to the protection of the life of the child about to be born. This precedence exists as a matter of principle for the entire duration of pregnancy and may not be placed in question for any particular time. The opinion expressed in the Federal Parliament during the third deliberation on the Statute to Reform the Criminal Law, the effect of which is to propose the precedence for a particular time “of the right to self-determination of the woman which flows from human dignity *vis-a-vis* all others, including the child’s right to life” (German Federal Parliament, Seventh Election Period, 96th Session, Stenographic Reports, p. 6492), is not reconcilable with the value ordering of the Basic Law.

3. From this point, the fundamental attitude of the legal order which is required by the constitution with regard to the interruption of pregnancy becomes clear: the legal order may not make the woman’s right to self-determination the sole guideline of its rulemaking. The state must proceed, as a matter of principle, from a duty to carry the pregnancy to term and therefore to view, as a matter of principle, its interruption as an injustice. The condemnation of abortion must be clearly expressed in the legal order. The false impression must be avoided that the interruption of pregnancy is the same social process as, for example, approaching a physician for healing an illness or indeed a legally irrelevant alternative for the prevention of conception. The state may not abdicate its responsibility even through the recognition of a “legally free area,” by which the state abstains from the value judgment and abandons this judgment to the decision of the individual to be made on the basis of his own sense of responsibility.

III.

How the state fulfils its obligation for an effective protection of developing life is, in the first instance, to be decided by the legislature. It determines which measures of protection are required and which serve the purpose of guaranteeing an effective protection of life.

1. In this connection the guiding principle of the precedence of prevention over repression is also valid particularly for the protection of unborn life (BVerfGE 30, 336 [350]). It is therefore the task of the state to employ, in the first instance, social, political, and welfare means for securing developing life. What can happen here and how the assistance measures are to be structured in their particulars is largely left to the legislature and is generally beyond judgment by the Constitutional Court. Moreover, the primary concern is to strengthen readiness of the expectant mother to accept the pregnancy as her own responsibility and to bring the child *en ventre sa mere* to full life. Regardless of how the state fulfils its obligation to protect, it should not be forgotten that the developing life itself is entrusted by nature in the first place to the

**60 Years German Basic Law:
The German Constitution and its Court**

protection of the mother. To reawaken and, if required, to strengthen the maternal duty to protect, where it is lost, should be the principal goal of the endeavours of the state for the protection of life. Of course, the possibilities for the legislature to influence are limited. Measures introduced by the legislature are frequently only indirect and effective only after completion of the time-consuming process of comprehensive education and the alteration in the attitudes and philosophies of society achieved thereby.

2. The question of the extent to which the state is obligated under the constitution to employ, even for the protection of unborn life, the criminal law, the sharpest weapon standing at its disposal, cannot be answered by the simplified posing of the question whether the state must punish certain acts. A total consideration is necessary which, on the one hand, takes into account the worth of the injured legal value and the extent of the social harm of the injurious act - in comparison with other acts which socio-ethically are perhaps similarly assessed and which are subject to punishment - and which, on the other hand, takes into account the traditional legal regulation of this area of life as well as the development of concepts of the role of the criminal law in modern society; and, finally, does not leave out of consideration the practical effectiveness of criminal sanctions and the possibility of their replacement through other legal sanctions. The legislature is not obligated, as a matter of principle, to employ the same penal measures for the protection of the unborn life as it considers required and expedient for born-life. As a look at legal history shows, this was never the case in the application of penal sanctions and is also true for the situation in the law up to the Fifth Statute to Reform the Criminal Law.

- a) The task of criminal law from the beginning has been to protect the elementary values of community life. That the life of every individual human being is among the most important legal values has been established above. The interruption of pregnancy irrevocably destroys an existing human life. Abortion is an act of killing; this is most clearly shown by the fact that the relevant penal sanction, even in the Fifth Statute to Reform the Criminal Laws, contained in the section "Felonies and Misdemeanors against Life" and, in the previous criminal law, was designated the "Killing of the Child *en ventre sa mere*." The description now common, "interruption of pregnancy," cannot camouflage this fact. No legal regulation can pass over the fact that this act offends against the fundamental inviolability and indisposability of human life protected by Article 2.2 sentence 1 of the Basic Law. From this point of view, the employment of penal law for the requital of "acts of abortion" is to be seen as legitimate without a doubt; it is valid law in most cultural states - under prerequisites of various kinds - and especially corresponds to the German legal tradition. Therefore, it follows that the law cannot dispense with clearly labelling this procedure as "unjust."
- b) Punishment, however, can never be an end in itself. Its employment is in principle, subject to the decision of the legislature. The legislature is not prohibited, in consideration of the points of view set out above, from expressing the legal condemnation of abortion required by the Basic Law in ways other than the threat of punishment. The decisive factor is whether the totality of the measures serving the protection of the unborn life, whether they are in civil law or in public law, especially of a social-legal or of a penal nature, guarantees an actual protection corresponding to the importance of the legal value to be secured. In the extreme case, namely, if the

**Selected Fundamental Decisions of
the Federal Constitutional Court**

protection required by the constitution can be achieved in no other way, the lawgiver can be obligated to employ the means of the penal law for the protection of developing life. The penal norm represents, to a certain extent, the “ultimate reason” in the armory of the legislature. According to the principle of proportionality, a principle of the just state, which prevails for the whole of the public law, including constitutional law, the legislature may make use of this means only cautiously and with restraint. However, this final means must also be employed, if an effective protection of life cannot be achieved in any other way. The worth and the importance of the legal value to be protected, demand this. It is not a question of an “absolute” duty to punish but rather one of a “relative” duty to use the penal sanction, which grows out of the insight into the inadequacy of all other means. On the other hand, the objection that a political duty to punish can never be deduced from a norm of the Basic Law which guarantees freedom, is not decisive. If the state is obligated by a fundamental norm which determines value to protect an especially important legal value effectively even against the attacks of third parties, measures will often be unavoidable which touch upon the areas of freedom of other bearers of fundamental rights. In this respect, the legal situation in the employment of social-legal or civil law means is not fundamentally different than the enactment of a penal norm. Differences exist, perhaps, with respect to the intensity of the required interference. In any case, the legislature must resolve the conflict which arises from this situation through a balancing of both of the fundamental values or areas of freedom which are in opposition to each other according to the standard of the ordering of values in the Basic Law and in consideration of the constitutional principle of proportionality. If one were to deny that there was any duty to employ the means of the criminal law, the protection of life which is to be guaranteed would be essentially restricted. The seriousness of the sanction threatened for the destruction is to correspond to the worth of the legal value threatened with destruction. The elementary value of human life requires criminal law punishment for its destruction.

3. The obligation of the state to protect the developing life exists, as shown, against the mother as well. Here, however, the employment of the criminal law may give rise to special problems which result from the unique situation of the pregnant woman. The incisive effects of a pregnancy on the physical and emotional condition of the woman are immediately evident and need not be set forth in greater detail. They often mean a considerable change of the total conduct of life and a limitation of the possibilities for personal development. This burden is not always and not completely balanced by a woman finding new fulfilment in her task as mother and by the claim a pregnant woman has upon the assistance of the community (Article 6.4 of the Basic Law). In individual cases, difficult, even life-threatening situations of conflict may arise. The right to life of the unborn can lead to a burdening of the woman which essentially goes beyond that normally associated with pregnancy. The result is the question of enforceability, or, in other words, the question of whether the state, even in such cases, may compel the bearing of the child to term with the means of the criminal law. Respect for the unborn life and the right of the woman not to be compelled to sacrifice the values in her own life in excess of an exactable measure in the interest of respecting this legal value are in conflict with each other. In such a situation of conflict which, in general, does not allow an unequivocal moral judgment and in which the decision for an interruption of pregnancy can attain the rank of a decision of

**60 Years German Basic Law:
The German Constitution and its Court**

conscience worthy of consideration, the legislature is obligated to exercise special restraint. If, in these cases, it views the conduct of the pregnant woman as not deserving punishment and forgoes the use of penal sanctions, the result, at any rate, is to be constitutionally accepted as a balancing incumbent upon the legislature.

In determining the content of the criterion of non-exactability, circumstances, however, must be excluded which do not seriously burden the obligated party, since they represent the normal situation with which everyone must cope. Rather, circumstances of considerable weight must be present which render the fulfilment of the duty of the one affected extraordinarily more difficult, so that fulfilment cannot be expected from him in fairness. These circumstances are especially present if the one affected by fulfilling the duty is thrown into serious inner conflicts. The solution of such conflicts by criminal penalty does not appear in general to be appropriate (BVerfGE 32, 98 [109] - Gesundheitsbeter), since it applies external compulsion where respect for the sphere of personality of the human being demands full inner freedom of decision.

A continuation of the pregnancy appears to be non-exactable especially when it is proven that the interruption is required “to avert” from the pregnant woman “a danger for her life or the danger of a grave impairment of her condition of health” (s. 218b no. 1 of the Criminal Code in the version of the Fifth Statute to Reform the Criminal Law). In this case her own “right to life and physical integrity” (Article 2.2 sentence 1 of the Basic Law) is at stake, the sacrifice of which cannot be expected of her for the unborn life. Beyond that, the legislature has a free hand to leave the interruption of the pregnancy free of punishment in the case of other extraordinary burdens for the pregnant woman, which, from the point of view of non-exactability, are as weighty as those referred to in s. 218b no. 1. In this category can be counted, especially, the cases of the eugenic (cf. s. 218b no. 2 of the Criminal Code), ethical (criminological), and of the social or emergency indication for abortion which were contained in the draft proposed by the Federal Government in the sixth election period of the Federal Parliament and were discussed both in the public debate as well as in the course of the legislative proceedings. During the deliberations of the Special Committee for the Reform of the Criminal Law (Seventh Election Period, 25th Session, Stenographic Reports, p. 1470 et seq.), the representative of the Federal Government explained in detail and with convincing reasons why, in these four cases of indication, the bearing of the child to term does not appear to be exactable. The decisive viewpoint is that in all of these cases another interest equally worthy of protection, from the standpoint of the constitution, asserts its validity with such urgency that the state’s legal order cannot require that the pregnant woman must, under all circumstances, concede precedence to the right of the unborn. Also, the indication arising from general emergency (social indication) can be integrated here. Finally, the general social situation of the pregnant woman and her family can produce conflicts of such difficulty that, beyond a definite measure, a sacrifice by the pregnant woman in favour of the unborn life cannot be compelled with the means of the criminal law. In regulating this case, the legislature must so formulate the elements of the indication which is to remain free of punishment that the gravity of the social conflict presupposed will be clearly recognizable and, considered from the point of view of non-exactability, the congruence of this indication with the other cases of indication remains guaranteed. If the legislature removes genuine cases of conflict of this kind from the protection of the Criminal law, it does not violate its duty to protect life. Even in these cases the state may not be content merely to examine, and if the occasion arises, to certify that the statutory

**Selected Fundamental Decisions of
the Federal Constitutional Court**

prerequisites for an abortion free of punishment are present. Rather, the state will also be expected to offer counselling and assistance with the goal of reminding pregnant women of the fundamental duty to respect the right to life of the unborn, to encourage her to continue the pregnancy and - especially in cases of social need - to support her through practical measures of assistance. In all other cases the interruption of pregnancy remains a wrong, deserving punishment since, in these cases, the destruction of a value of the law of the highest rank is subjected to the unrestricted pleasure of another and is not motivated by an emergency. If the legislature wants to dispense (even in this case) with criminal law punishment, this would be compatible with the requirement of protecting Article 2.2 sentence 1 of the Basic Law, only on the condition that another equally effective legal sanction stands at its command, which would clearly bring out the unjust character of the act (the condemnation by the legal order) and likewise prevent the interruption of pregnancy as effectively as a penal provision.

D.

If the challenged regulation of terms of the Fifth Statute to Reform the Criminal Law is examined according to these standards, the result is that the statute does not do justice, to the extent required, to the obligation to protect developing life effectively which is derived from Article 2.2 sentence 1 in conjunction with Article 1.1 of the Basic Law.

I.

The constitutional requirement to protect developing life is directed in the first instance to the legislature. The duty is incumbent on the Federal Constitutional Court, however, to determine, in the exercise of the function allotted to it by the Basic Law, whether the legislature has fulfilled this requirement. Indeed, the Court must carefully observe the discretion of the legislature which belongs to it in evaluating the factual conditions which lie at the basis of its formation of norms, which discretion is fitting for the required prognosis and choice of means. The court may not put itself in the place of the legislature; it is, however, its task to examine carefully whether the legislature, in the framework of the possibilities standing at its disposal, has done what is necessary to avert dangers from the legal value to be protected. This is also fundamentally true for the question whether the legislature is obligated to utilize its sharpest means, the criminal law, in which case the examination can extend beyond the individual modalities of punishment.

II.

It is generally recognized that the previous s. 218 of the Criminal Code, precisely because it threatened punishment without distinction for nearly all cases of the interruption of pregnancy, has, as a result, only insufficiently protected developing life. The insight that there are cases in which the penal sanction is not appropriate has finally led to the point that cases actually deserving of punishment are no longer prosecuted with the necessary vigor. In addition, with respect to this offence, there is, in the nature of the case, the frequently difficult clarification of the factual situation. Certainly, the statistics on the incidence of illegal abortion differ greatly and it may hardly be possible to ascertain reliable data on this point through empirical investigations. In any case, the number of the illegal interruptions of pregnancy in the Federal Republic was high. The existence of a general penal norm may have contributed to that, since the state had neglected to employ other adequate measures for the protection of developing life. The legislature,

**60 Years German Basic Law:
The German Constitution and its Court**

in the final version of the Fifth Statute to Reform the Criminal Law, proceeded from the guiding consideration of the primacy of preventive measures over repressive sanctions, in this regard, the motions of the factions of the SPD and FDP for resolution which were accepted by the Federal Parliament in connection with the enactment of the Fifth Statute to Reform the Criminal Law Federal Parliamentary Press, 7/2042). The statute is based upon the idea that developing life would be better protected through individual counselling of the pregnant woman than through a threat of punishment, which would remove the one determined upon the abortion from every possible means of influence, which from a criminological point of view would be mistaken and, in addition, has proven itself without effect. On this basis the legislature has reached the decision to abandon the criminal penalty entirely for the first twelve weeks of pregnancy under definite prerequisites and, in its place, to introduce the preventive counselling and instruction (ss. 218a and 218c). It is constitutionally permissible and to be approved if the legislature attempts to fulfil its duty to improve protection of unborn life through preventive measures, including counselling to strengthen the personal responsibility of the woman. The regulation in question, however, encounters decisive constitutional problems in several respects:

1. The legal condemnation of the interruption of pregnancy required by the constitution must clearly appear in the legal order existing under the constitution. Therefore, as shown, only those cases can be excepted in which the continuation of the pregnancy is not exactable from the woman in consideration of the value decision made in Article 2.2 sentence 1 of the Basic Law. This absolute condemnation is not expressed in the provisions of the Fifth Statute to Reform the Criminal Law with regard to the interruption of pregnancy during the first twelve weeks because the statute leaves unclear whether an interruption of pregnancy which is not "indicated" is legal or illegal after the repeal of the criminal penalty through s. 218a of the Criminal Code. This is true without reference to the fact that s. 218a of the Criminal Code presents itself technically as the creation of an exception to the general penal provision of s. 218 of the Criminal Code. It is also true, independent of the view one should take in this question whether the provision factually restricts s. 218 of the Criminal Code or whether it creates a legally justifying reason or finally has as its content only a basis for excluding guilt or punishment. With the unbiased reader of the statute the impression must arise that s. 218a completely removes, through the absolute repeal of punishability, the legal condemnation - without consideration of the reasons - and legally allows the interruption of pregnancy under the prerequisites listed therein. The elements of s. 218 of the Criminal Code recede into the background since by far most interruptions of pregnancy, experience shows, are performed in the first twelve weeks - over nine out of ten cases according to the statements of the representative of the government (bc. cit., p. 1472). The picture which results is of a nearly complete decriminalization of the interruption of pregnancy (see also *Roxin* in: J. Baumann, editor, "The Proscription of Abortion, L s. 218, p. 185). Also in no other provision of the Fifth Statute to Reform the Criminal Law is the notion expressed that the interruption of pregnancy which is not indicated in the first twelve weeks will be legally condemned for the future. Even Article 2 of the statute, according to which no one in principle is obligated to participate in an interruption of pregnancy, mentions nothing about the legality or illegality of such a measure; this provision aims in the first place at making allowance for the freedom of conscience of the individual and at protecting the freedom of the ethical conviction of one who sees himself faced with the question whether he can and should actively participate in an interruption of pregnancy which is free of punishment in

**Selected Fundamental Decisions of
the Federal Constitutional Court**

conformity with s. 218a of the Criminal Code. A look at the proposed regulations in the Statute to Supplement the Criminal Law Reform for the area of social law further compels the conclusion that in the case of an interruption of pregnancy in the first twelve weeks, a procedure is involved which is apparently legally unobjectionable and which therefore should be socio-legally promoted and facilitated. Legal claims under statutes for social services presuppose that the elements, upon the fulfilment of which the services are guaranteed, do not represent a legally-prohibited (condemned) act. The proposed regulation, as a whole, can therefore only be interpreted to mean that an interruption of pregnancy performed by a physician in the first twelve weeks of pregnancy is not illegal and therefore should be allowed (under law). The Federal Government also proposed this concept in the statutory bill introduced in the sixth election period of the German Federal Parliament; there, in the commentary to Article 1, one reads as follows (Federal Parliamentary Press, VI/3434, p. 9): Although the legislature may trust in other areas that a repeal of penal prohibitions will not be understood as legal approbation of the behaviour previously punishable, special points are to be considered in the new regulation of the interruption of pregnancy: the term solution can only fulfil the public health task expected of it, if every interruption of pregnancy during the first three months appears as legally approved. The operation must be performed within the framework of general medical care. The contract for medical treatment must be effective. Not least, because of the inapplicability of ss. 134-138 of the Civil Code, these and other circumstances can only be interpreted in the sense that the legal order recognizes the operation, before the expiration of the three month period, in every case as a normal social process. The representative of the Government expressed himself similarly before the Special Committee for Criminal Law Reform (Seventh Election Period, 25th Session, Stenographic Reports, p. 1473): It is important to keep this much in mind: medical interruption of pregnancy during the first trimester of pregnancy is, within the framework of the regulation of terms, not contrary to law; it is permitted. Only in this way can its integration into the system of the penal law - with freedom from punishment even for the participants (exception of emergency service) - be justified and only in such a way can the civil law implications - the validity of the contract for treatment in spite of s. 134 -, the promotion of the procedure through public health measures and, above all else, the social insurance planned in the Statute to Supplement the Criminal Law Reform, be established.

2. A formal statutory condemnation of the interruption of pregnancy would, furthermore, not suffice because a woman determined upon abortion, would disregard it. The legislature which passed the Fifth Statute to Reform the Criminal Law has replaced the penal norm with a counselling system in s. 218c of the Criminal Code on the judgment that positive measures to protect developing life are also required for an interruption of pregnancy performed by a physician with the consent of the pregnant woman. Through the complete repeal of punishability, however, a gap in the protection has resulted which completely destroys the security of the developing life in a not insignificant number of cases by handing this life over to the completely unrestricted power of disposition of the woman. There are many women who have previously decided upon an interruption of pregnancy without having a reason which is worthy of esteem within the value order of the constitution and who are not accessible to a counselling such as s. 218c.1, proposes. These women find themselves neither in material distress nor in a grave situation of emotional conflict. They decline pregnancy because they are not willing to take on the renunciation and the natural motherly duties bound up with it. They have serious reasons

**60 Years German Basic Law:
The German Constitution and its Court**

for their conduct with respect to the developing life; there are, however, no reasons which can endure against the command to protect human life. For these women, pregnancy is exactable in line with the principles reiterated above. The behaviour even of this group of women, legitimized by law through the absence of a constitutionally important motive for the interruption of pregnancy, is fully covered under s. 218a of the Fifth Statute to Reform the Criminal Law. The life developing itself is abandoned without protection to their arbitrary decision. The objection against this is that women not subject to influence understand best from experience how to avoid punishment so that the penal sanction is often ineffective. Furthermore, the legislature is confronted with the dilemma that preventive counselling and repressive threat of punishment in their life protecting effect are necessarily partially exclusive: the penal sanction of the indication solution would, in truth, through its deterrent effect prevent unmotivated interruptions of pregnancy to an extent not exactly ascertainable. At the same time, according to this objection, the threat of punishment, by discouraging counselling of women susceptible of influence, impedes saving life in other cases because it is precisely women, in whose cases the prerequisites of an indication are absent and, beyond that, also those who do not trust the result of a procedure to determine an indication who will, in the face of the penal threat, carefully keep the pregnancy secret and who to a large extent withdraw themselves from helpful influence available through counselling centres and surroundings. On the basis of such an analysis, there could not be a defence of unborn life which was free of gaps. The legislature, so this objection continues, would have no other choice than to weigh off life against life, namely the life which through a definite regulation of the abortion question could probably be saved against the life which would probably be sacrificed on account of the same regulation, since the penal sanction would not only protect but at the same time destroy unborn life. Thus, since no solution would unequivocally better serve the protection of the individual life, the legislature would not have transgressed its constitutionally drawn boundaries with the regulation of terms.

- a) To begin with, this concept does not do justice to the essence and the function of the penal law. The penal norm directs itself fundamentally to all subjects of the law and obligates them in like manner. It is true that public prosecutors practically never succeed in administering punishment to all those who have broken the criminal law. The unknown incidence is variously high for the various offences. It is uncontested that the unknown incidence of acts of abortion is especially high. On the other hand, the general preventive function of the criminal law ought not be forgotten. If one views as the task of the criminal law the protection of especially important legal values and elementary values of the community, a great importance accrues to its function. Just as important as the observable reaction in an individual case is the long range effect of a penal norm which in its principal normative content ("abortion is punishable") has existed for a very long time. No doubt, the mere existence of such a penal sanction has influence on the conceptions of value and the manner of behaviour of the populace (cf. the report of the Special Committee for the Criminal Law Reform, Federal Parliamentary Press, 7/1981 new p. 10). The consciousness of legal consequences which follows from its transgression creates a threshold which many recoil from crossing. An opposite effect will result if, through a general repeal of punishability, even doubtlessly punishable behaviour is declared to be legally free from objection. This must confuse the concepts of "right" and "wrong," dominant in the populace. The purely theoretical announcement that the interruption of pregnancy is "tolerated," but not "approved,"

**Selected Fundamental Decisions of
the Federal Constitutional Court**

must remain without effect as long as no legal sanction is recognizable which clearly segregates the justified cases of abortion from the reprehensible. If the threat of punishment disappears in its entirety, the impression will arise of necessity in the consciousness of the citizens of the state that in all cases the interruption of pregnancy is legally allowed and, therefore, even from a socio-ethical point of view, is no longer to be condemned. The “dangerous inference of moral permissibility from a legal absence of sanction” (*Engisch*, “In the Quest for Justice”, 1971, p. 104) is too near not to be drawn by a large number of those subject to the law. Also corresponding to this is the view of the Federal Government in the commentary to the draft of the statute introduced in the sixth election period of the German Federal Parliament (Federal Parliamentary Press, VI/3434, p. 9): The term solution would lead to the disappearance of the general awareness of the worthiness of protection of unborn life during the first three months of pregnancy. It would lend support to the view that the interruption of pregnancy, in any case in the early stage of pregnancy, is as subject to the unrestricted right of disposition of the pregnant woman as the prevention of pregnancy. Such a view is not compatible with the constitutional classification of values.

- b) The weighing in bulk of life against life which leads to the allowance of the destruction of a supposedly smaller number in the interest of the preservation of an allegedly larger number is not reconcilable with the obligation of an individual protection of each single concrete life. In the judicial opinions of the Federal Constitutional Court the principle has been developed that the unconstitutionality of a statutory provision, which in its structure and actual effect prejudices a definite circle of persons, may not be refuted with the showing that this provision or other regulations of the statute favour another circle of persons. The emphasis of the general tendency of the statute as a whole to favour legal protection is even less adequate for this purpose. This principle (cf. BVerfGE 12, 151 [168]; 15, 328 [333]; 18, 97 [108]; 32, 260 [269]) is valid in special measure for the highest personal legal value, “life.” The protection of the individual life may not be abandoned for the reason that a goal of saving other lives, in itself worthy of respect, is pursued. Every human life - the life first developing itself as well - is as such equally valuable and can not therefore be subjected to a discriminatory evaluation, no matter how shaded, or indeed to a balancing on the basis of statistics. In the basic legal political conception of the Fifth Statute to Reform the Criminal Law a concept, which cannot be followed, of the function of a constitutional statute is recognizable. The legal protection for the concrete individual human life required by the constitution is pushed into the background in favour of a more “socio-technical” use of the statute as an intended action of the legislature for the achievement of a definitely desired socio-political goal, the “containing of the abortion epidemic.” The legislature may, however, not merely have a goal in view, be it ever so worthy of pursuit; it must be aware that every step on the way to the goal must be justified before the constitution and its indispensable postulates. The fundamental legal protection in individual cases may not be sacrificed to the efficiency of the regulation as a whole. The statute is not only an instrument to steer social processes according to sociological judgments and prognoses but is also the enduring expression of socio-ethical - and as a consequence - legal evaluation of human acts; it should say what is right and wrong for the individual.

**60 Years German Basic Law:
The German Constitution and its Court**

c) A dependable factual foundation is lacking for “a total accounting” - which is to be rejected on principle. A sufficient basis is lacking for the conclusion that the number of interruptions of pregnancy in the future will be significantly less than with the previous statutory regulation. Rather, the representative of the government has come to the conclusion before the Special Committee for Criminal Law Reform (Seventh Election Period, 25th Session, Stenographic Reports, p. 1451), on the basis of detailed considerations and comparisons, that after the introduction of the regulation of terms into the Federal Republic a 40% increase of the total number of legal and illegal abortions should be expected. This calculation, to be sure, was brought into doubt by Professor Dr. Jürgens, who was heard in the oral proceedings. The available statistics from other countries, however, especially from England after the Abortion Act of 1967 went into effect (cf. the statement in the report of the Committee on the Working of the Abortion Act - Lane Report) and from the German Democratic Republic (East Germany) after the decreeing of the statute on the interruption of pregnancy of March 9, 1972 (cf. Journal of German Physicians, 1974, p. 2765), allow no certain conclusion that there will be a substantial decline in abortions. Experiments, however, are not permissible considering the great worth of the legal value to be protected. The representatives of all parties in the Special Committee for the Reform of the Criminal Law, however, declined systematically to apply statistics regarding abortion from other countries to the Federal German Republic (Seventh Election Period, 20th Session, Stenographic Reports, p. 1286 et seq.). The effects of varying social structures, mentalities, religious affiliations and modes of behaviour hardly permit such calculations. Even if one takes into account all of the peculiarities of the relationships in the Federal Republic of Germany only in favour of the regulation of terms, an increase in abortions is to be counted on because - as shown - the mere existence of the penal norm of s. 218 of the Criminal Code has exerted influence on the value conceptions and manner of behaviour of the populace. It is important that as a consequence of punishability the opportunity to obtain an abortion generally or indeed *lege artis* has up to this time been considerably limited (for, among other things, financial reasons). That even a mere quantitative strengthening of the protection for life could result from the term solution, is, in any case, not evident.

3. The counselling and instruction of the pregnant woman provided under s. 218c.1 of the Criminal Code cannot, considered by itself, be viewed as suitable to effectuate a of the pregnancy. The measures proposed in this provision fall short of the concepts of the Alternative Draft of the 16 criminal law scholars, upon which the conception of the Fifth Statute to Reform the Criminal Law is, after all, largely based. The counselling centres provided for in Article 105.1 no. 2, of the Fifth Statute to Reform the Criminal Law should themselves have the means to afford financial, social, and family assistance. Furthermore, they should provide to the pregnant woman and her relatives, emotional care through suitable co-workers and work intensively for the continuation of the pregnancy (cf. for particulars, above, p. 11 et seq.). So to equip the counselling centres, in the sense of this or similar suggestions, so that they are able to arrange direct assistance, would come much nearer the mark, since according to the report of the Special Committee for the Reform of the Criminal Law (Printed Materials of the Federal Parliament, 7/1981, new, p. 7, with evidentiary support from the hearings) the unfavourable living situation,

**Selected Fundamental Decisions of
the Federal Constitutional Court**

the impossibility of caring for a child while pursuing an education or working as well as economic need and special material reasons, and, especially in the case of single mothers, anxiety about social sanctions are supposed to be among the most frequently given causes and motives for the desire for the interruption of pregnancy. On the other hand, the counselling centres will give instruction about “the public and private assistance available for pregnant women, mothers, and children,” “especially regarding assistance which facilitates the continuation of the pregnancy and alleviates the situation of mother and child.” This could be interpreted to mean that the counselling centres should only inform, without exerting influence directed to the motivational process. Whether the neutral description of the task of the counselling centres may be attributed to the opinion advocated in the Special Committee for the Reform of the Criminal Law that the pregnant woman should not be influenced in her decision through the counselling (Representative von Schiler, FDP, Seventh Election Period, 25th Session, Stenographic Reports, p. 1473) can remain an open question. If a protective effect in favour of developing life is to accrue to the counselling, it will depend, in any case, decisively upon such an exertion of influence. s. 218c.1, Nos. i and 2, to be sure, allow the interpretation that counselling and instruction should motivate the pregnant woman to carry the pregnancy to term. The report of the Special Committee is probably to be understood in this sense (Printed Materials of the Federal Parliament, 7/1981 new, p. 16); accordingly, the counselling should take into account the total circumstances of life of the pregnant woman and follow up personally and individually, not by telephone or by distributing printed materials (cf. also the previously mentioned resolution of the Federal Parliament, Printed Materials of the Federal Parliament, 7/2042). Even if one might consider it thinkable that counselling of this kind could exercise a definite effect in the sense of an aversion from the decision for abortion, its structure, in particular, exhibits in any case deficiencies which do not allow the expectation of an effective protection of developing life.

- a) The instruction about the public and private assistance available for pregnant women, mothers and children, according to s. 218c.1 no. 1, can also be undertaken by any physician. Social law and social reality are, however, very difficult for the technically-trained person to comprehend. A reliable instruction regarding the demands and possibilities in the individual case cannot be expected from a physician, especially since individual inquiries regarding need are frequently required (e.g., for assistance with rent or social assistance). Physicians are neither qualified for such counselling activity by their professional training nor do they generally have the time required for individual counselling.
- b) It is especially questionable that the instruction about social assistance can be undertaken by the same physician who will perform the interruption of pregnancy. Through this provision the medical counselling under s. 218c.1 no. 2, which itself falls within the realm of medical competence will be devalued. The counselling should be structured in conformity with the views of the Special Committee for the Reform of the Criminal Law as follows: Therefore, what is meant is counselling regarding the nature of the operation and its possible consequences for health. That the counselling may however not be limited to this purely medical aspect is emphasized through the conscious choice of the term by a physician. Rather the counselling as far as possible and appropriate must speak to the present and future total situation of the pregnant woman to the extent that she can be affected by the interruption of pregnancy and, at

**60 Years German Basic Law:
The German Constitution and its Court**

the same time, correspond to the other task of the physician, which is to work for the protection of the unborn life. The physician must, therefore, make it clear to the pregnant woman that human life is destroyed by the operation and explain its stage of development. Experience shows, as confirmed in the public hearing, for example, by Pross (AP, VI, p. 2255, 2256) and Rolinski (AP, VI, p. 2221) that in this respect many women do not have clear ideas and that this circumstance, if they later learn it, is frequently the occasion for burdening doubts and questionings of conscience. Accordingly, the counselling must be directed to preventing this kind of conflict situation. An explanation, in the manner proposed here, which has the required constitutional goal of working for a continuation of the pregnancy cannot be expected from the physician who has been sought out by the pregnant woman precisely for the purpose of performing the interruption of pregnancy. Since, according to the result of the previous inquiries and according to the position statements of representative medical professional panels, it must be assumed that the majority of physicians decline to perform interruptions of pregnancy which are not indicated, only those physicians will make themselves available who either see in the interruption of pregnancy a money-making business or who are inclined to comply with every wish of a woman for interruption of pregnancy because they see in it merely a manifestation of the right to self-determination or a means to the emancipation of women. In both cases, an influence by the physician on the pregnant woman for the continuation of the pregnancy is highly improbable. The experiences in England show this. There the indication (very broadly conceived) must be determined by any two physicians of the patient's choosing. This has led to the result that almost every desired abortion is carried out by private physicians specializing in such activity. The appearance of professional agents who guide women to these private clinics is an especially unfortunate by-product which is very difficult to avoid (cf. Lane Report, Vol. 1, No. 436 and 452).

- c) Furthermore, the prospects for success are poor since the interruption of pregnancy can immediately follow the instruction and counselling. A serious exchange with the pregnant woman and others involved in which the arguments in the counselling are contrasted with hers is not to be expected under these circumstances. The alternative formulation proposed by the Federal Ministry of Justice to the Special Committee for Criminal Law Reform for s. 218c provided as a consequence that the interruption of pregnancy could first be performed after a minimum of three days had elapsed after the instruction about available assistance (s. 218.1 no. 1) (Special Committee, Seventh Election Period, 30th Session, Stenographic Reports, p. 1659). In conformity with a report of the Special Committee, however, "a waiting period, enforced by the criminal law, between the counselling and the operation ... was rejected. This could in individual cases bring with it unreasonable difficulties for the pregnant woman according to her place of residence and her personal situation, with the consequence that the pregnant woman will dispense with the counselling." (Printed Materials of Federal Parliament, 7/1981 new, p. 17). For the woman decided upon an interruption of pregnancy it is only necessary to find an obliging physician. Since he may undertake the social as well as the medical counselling and finally even carry out the operation, a serious attempt to dissuade the pregnant woman from her decision is not to be expected from him.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

III.

In summary, the following observations should be made on the constitutional adjudication of the regulation of terms encountered in the Fifth Statute to Reform the Criminal Law:

That interruptions of pregnancy are neither legally condemned nor subject to punishment is not compatible with the duty incumbent upon the legislature to protect life, if the interruptions are the result of reasons which are not recognized in the value order of the Basic Law. Indeed, the limiting of punishability would not be constitutionally objectionable if it were combined with other measures which would be able to compensate, at least in their effect, for the disappearance of criminal protection. That is however - as shown - obviously not the case. The parliamentary discussions about the reform of the Abortion Law have indeed deepened the insight that it is the principal task of the state to prevent the killing of unborn life through enlightenment about the prevention of pregnancy on the one hand as well as through effective promotional measures in society and through a general alteration of social concepts on the other. Neither the assistance of the kind presently offered and guaranteed nor the counselling provided in the Fifth Statute to Reform the Criminal Law are, however, able to replace the individual protection of life which a penal norm fundamentally provides even today in those cases in which no reason for the interruption of pregnancy exists which is worthy of consideration according to the value order of the Basic Law. If the legislature regards the previously undifferentiated threat of punishment for the interruption of pregnancy as a questionable means for the protection of life, it is not thereby released from the obligation to undertake the attempt to achieve a better protection of life through a differentiated penal regulation by subjecting the same cases to punishment in which the interruption of pregnancy is to be condemned on constitutional grounds. A clear distinction of this group of cases in contrast to other cases in which the continuation of the pregnancy is not exactable from the woman will strengthen the power of the penal norm to develop a legal awareness. He who generally recognizes the precedence of the protection of life over the claim of the woman for an unrestricted structuring of her life will not be able to dispute the unjust nature of the act in those cases not covered by a particular indication. If the state not only declares that these cases are punishable but also prosecutes and punishes them in legal practice, this will be perceived in the legal consciousness of the community neither as unjust nor as antisocial. The passionate discussion of the abortion problematic may provide occasion for the fear that in a segment of the population the value of unborn life is no longer fully recognized. This, however, does not give the legislature a right to acquiesce. It rather must make a sincere effort through a differentiation of the penal sanction to achieve a more effective protection of life and formulate a regulation which will be supported by the general legal consciousness.

IV.

The regulation encountered in the Fifth Statute to Reform the Criminal Law at times is defended with the argument that in other democratic countries of the Western World in recent times the penal provisions regulating the interruption of pregnancy have been "liberalized" or "modernized" in a similar or an even more extensive fashion; this would be, as the argument goes, an indication that the new regulation corresponds, in any case, to the general development of theories in this area and is not inconsistent with fundamental socio-ethical and legal principles. These considerations cannot influence the decision to be made here. Disregarding the fact that

**60 Years German Basic Law:
The German Constitution and its Court**

all of these foreign laws in their respective countries are sharply controverted, the legal standards which are applicable there for the acts of the legislature are essentially different from those of the Federal Republic of Germany. Underlying the Basic Law are principles for the structuring of the state that may be understood only in light of the historical experience and the spiritual-moral confrontation with the previous system of National Socialism. In opposition to the omnipotence of the totalitarian state which claimed for itself limitless dominion over all areas of social life and which, in the prosecution of its goals of state, consideration for the life of the individual fundamentally meant nothing, the Basic Law of the Federal Republic of Germany has erected an order bound together by values which places the individual human being and his dignity at the focal point of all of its ordinances. At its basis lies the concept, as the Federal Constitutional Court previously pronounced (BVerfGE 2, 1 [12]), that human beings possess an inherent worth as individuals in order of creation which uncompromisingly demands unconditional respect for the life of every individual human being, even for the apparently socially "worthless," and which therefore excludes the destruction of such life without legally justifiable grounds. This fundamental constitutional decision determines the structure and the interpretation of the entire legal order. Even the legislature is bound by it; considerations of socio-political expediency, even necessities of state, cannot overcome this constitutional limitation (Decisions of the Federal Constitutional Court, 1, 14 36). Even a general change of the viewpoints dominant in the populace on this subject - if such a change could be established at all - would change nothing. The Federal Constitutional Court which is charged by the constitution with overseeing the observance of its fundamental principles by all organs of the state and, if necessary, with giving them effect, can orient its decisions only on those principles to the development of which this Court has decisively contributed in its judicial utterances. Therefore, no adverse judgment is being passed about other legal orders "which have not had these experiences with a system of injustice and which, on the basis of an historical development which has taken a different course and other political conditions and fundamental views of the philosophy of state, have not made such a decision for themselves" (BVerfGE 18, 112 [117]).

E.

On the basis of these considerations, s. 218a of the Criminal Code in the version of the Fifth Statute to Reform the Criminal Law is inconsistent with Article 2.2 sentence 1 in conjunction with Article 1.1 of the Basic Law to the extent that it excepts interruption of pregnancy from punishability if no reasons are present which, according to the present opinion, have standing under the ordering of values of the Basic Law. Within this framework, the nullity of the provision is to be determined. It is a matter for the legislature to distinguish in greater detail the cases of indicated interruption of pregnancy from those not indicated. In the interest of legal clarity, until a valid statutory regulation goes into effect, it appeared necessary, under s. 35 of the Statute for the Federal Constitutional Court, to issue a directive, the contents of which are obvious from the tenor of this judgment.

There is no occasion to declare further provisions of the Fifth Statute to Reform the Criminal Law to be invalid.

Selected Fundamental Decisions of
the Federal Constitutional Court

Extracts from the Dissenting Opinion of Justice Rupp von Brunneck and Justice Dr. Simon

The life of each individual human being is self-evidently a central value of the legal order. It is uncontested that the constitutional duty to protect this life also includes its preliminary stages before birth. The debates in Parliament and before the Federal Constitutional Court dealt not with the “whether” but rather only the “how” of this protection. This decision is a matter of legislative responsibility. Under no circumstances can the duty of the state to prescribe punishment for abortion in every stage of pregnancy be derived from the constitution. The legislature should be able to determine the regulations for counselling and the term solution as well as for the indications solution. A contrary construction of the constitution is not compatible with the liberal character of the fundamental legal norms and shifts the competence to decide, to a material extent, onto the Federal Constitutional Court (A). In the judgment on the Fifth Statute to Reform the Criminal Law, the majority neglects the uniqueness of abortion in relation to other risks of life (B.I.1. = p. 671 et seq.). It insufficiently appreciates the social problematic previously found by the legislature as well as the aims of urgent reform (B.I.2. p. 673 et seq.). Because each solution remains patchwork, it is not constitutionally objectionable that the German legislature - in consonance with the reforms in other western civilized states (B.III. = p. 683 et seq.) - has given priority to social-political measures over largely ineffective penal sanctions (B.I.3.-5. - p. 675 et seq.). The constitution nowhere requires a legal “condemnation” of behaviour not morally respectable without consideration of its actual protective effect (B.II. = p. 681 et seq.).

...

b) Translation of the Abortion II Judgement - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 88, 203

Headnotes:

1. The Basic Law imposes a duty on the state to protect human life, even the unborn human life. This duty flows from Article 1.1 of the Basic Law. Its content and - based on this - its extent are further determined by Article 2.2 of the Basic Law. Human dignity inheres already in the unborn human life. The state law has to set the stage for its development, respectively for a right to life for the unborn. This right exists without regard of the mother’s acceptance of the unborn child.
2. The duty to protect the unborn human life relates to the individual life, not only to human life in general.
3. There is a duty to protect the unborn life, against its mother as well. Such a protection is only possible if the legislator generally bans her from an interruption of pregnancy, therewith imposing an “in principle” statutory duty on her to carry the child to term. The general ban from interruption of pregnancy and the “in principle” duty to carry the child to term are two intrinsically tied aspects of the protection required under constitutional law.

**60 Years German Basic Law:
The German Constitution and its Court**

4. There must be an “in principle” ban from the interruption of pregnancy for its entire duration because it must be regarded as in principle legally wrong (Confirmation of BVerfGE 39, 1 [44]). The right to life of the unborn child must not, although just for a limited period of time, be given over to the legally unbound decision of a third party, even if it is the mother.
5. The extent of the duty to protect the unborn human life is to be determined with regard to the importance and vulnerability of the object of legal protection on the one hand and conflicting legal interests on the other hand. As conflicting legal interest regarding the right to life of the unborn child there is to consider the pregnant woman’s right to life and to physical integrity (Article 2.2 of the Basic Law) as well as her right to personality. All these rights of the pregnant woman are based on her right to human dignity. But for the killing of the unborn child that goes along with the interruption of pregnancy, the pregnant woman cannot rely on a legal position under Article 4.1 of the Basic Law.
6. To comply with its duty to protect the unborn life, the state has to take sufficient normative and *de facto* action leading to an adequate and efficient protection while considering conflicting legal interests (prohibition of insufficient means). Therefore a concept of protection is required combining pre-emptive and repressive elements of protection.
7. The woman’s basic rights do not justify to generally suspend her duty to carry the child to term, even if it is just for a certain period of time. But the woman’s basic rights lead to the effect that under certain exceptional circumstances it might be permissible or in some cases even required, not to impose such a statutory duty. It is up to the legislator to determine these exceptional cases with full details, according to the criterion of unreasonableness. Therefore there must be given burdens, that require such an extent of sacrifice, that the woman cannot be expected to accept them (Confirmation of BVerfGE 39, 1 [48 seq.]).
8. The prohibition of insufficient means does not allow for abstaining from the means of criminal law and its protective effects for human life.
9. The state’s duty to protect also includes the protection from threats for the unborn human life, emanating from influences exerted by members of the pregnant woman’s family or of her social environment. It also includes the protection from threats emanating from the present and foreseeable living conditions of the woman and her family, countervailing her willingness to carry the child to term.
10. Furthermore the duty to protect obliges the state to maintain and to foster the public awareness of the unborn human life’s right to be protected.
11. The legislature may express the legal condemnation of the interruption of pregnancy required by the Basic Law through measures other than the threat of punishment, depending on whether there is a medical indication, which has to be determined by a third party. Constitutional law allows for a concept of protection that in the early stages of an unwanted pregnancy focuses on a counselling programme for the pregnant woman to make her carry the child to term.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

12. Such a counselling programme requires a regulatory framework that provides for beneficial premises, encouraging the woman to act for the benefit of the unborn life. The state bears the full responsibility for its implementation.
13. The state's duty to protect requires the medical attendance to secure the protection of the unborn life although the necessary medical attendance is primarily arranged for in the woman's interest.
14. To legally classify the existence of a child as a cause of damage is out of the question under constitutional law (Article 1.1 of the Basic Law - GG). This implication not to take the obligation to support a child as damage.
15. Interruptions of pregnancy that are executed according to the counselling programme, without diagnosis of an indication, may not be declared as being justified (not contrary to law). As an indispensable legal requirement an exception from a legal provision can only have inherent justifying effects, if the state determines the incident of its preconditions.
16. The Basic Law does not allow for granting a legal claim to payment against the compulsory health insurance for an interruption of pregnancy that is not proved to be legal. In contrast the granting of social aid for abortions that are not punishable and that are executed according to the counselling programme is in accordance to constitutional law where there is a need for pecuniary help. This is also true for continued payment.
17. The principle that the federal states have the power to organize the implementation of Federal laws has to apply without exemptions if a regulation of Federal law only provides for a state's task that is to perform by the federal states without making detailed arrangements that could be executed by the administration.

Order of the Second Senate of 28 May 1993 - 2 BvF 2/90 and 4, 5/92 -

Facts:

The matter submitted for judicial review is primarily the question whether several different criminal, social-insurance related and organizational regulations concerning the interruption of pregnancy comply with the state's duty under constitutional law to protect the unborn human life. The provisions are either part of the new regulations in the Fifth Statute to Reform the Criminal Law and in the Statute supplementing the Reform of the Criminal Law or part of the statute for the benefit of pregnant women and family benefits that was passed for reunified Germany just after the reunion. The new regulations in the Fifth Statute to Reform the Criminal Law and in the Statute supplementing the reform of the Criminal Law were initiated by the Federal Constitutional Court's judgement of 25th February 1975 (BVerfGE 39, 1).

According to the Fifth Statute to Reform the Criminal Law of 18th May 1976 anyone who interrupts a pregnancy after the 13th day following conception shall be punished (s. 218.1, 3 sentence 1, s. 219d of the Criminal Code, old version).

**60 Years German Basic Law:
The German Constitution and its Court**

But within a fixed time limit the interruption of pregnancy is not punishable if it is performed by a physician with the consent of the pregnant woman and if, according to the judgement of medical science, the interruption is indicated to avoid specific extra legal emergencies for the pregnant woman (medical indications for the interruption of pregnancy).

Furthermore, although the interruption of pregnancy is not indicated, the pregnant woman is not punishable if a physician performs the abortion within 22 weeks after conception and after undergoing counselling in terms of s. 218b of the Criminal Code (StGB), old version (s. 218.3 sentence 2 of the Criminal Code, old version).

If these conditions are not fulfilled, however, the court may abandon the woman's penalty provided she was in a specific trouble at the time of the surgical intervention (s. 218.3 sentence 3 of the Criminal Code, old version).

If so, only the consulted physician will be punished. To the physician, however, stricter rules apply: A physician who interrupts a pregnancy shall be punished if he or she performs the abortion without making sure that the pregnant woman has received social and medical counselling at a counselling centre and by a physician, at least 3 days before the abortion. He or she is also punishable for interruption of pregnancy without counselling, if there is a medical indication for the abortion. Furthermore, even if there is a medical indication, anyone is punishable for interruption of pregnancy if the indication is not confirmed in writing by a second physician (s. 219 of the Criminal Code, old version).

Social and medical counselling may also be done by the physician who speaks out on the indication; the medical counselling may also be done by the physician performing the abortion. The pregnant woman is not punishable under ss. 218b, 219 of the Criminal Code, old version.

The Statute supplementing the Reform of the Criminal Law of 28th August 1975 (BGBl. I p. 2289) aims to support the reform efforts of the Fifth Statute to Reform the Criminal Law by accompanying socio-political measures (see BTDrucks. 7/376 p. 1). It is following an initiative of the social democratic faction and the liberal faction (BTDrucks. 7/376), resuming a government draft of 1972 (BTDrucks. 104/72). The draft i.a. provides for financial compensation from the compulsory health insurance in case of an interruption of pregnancy, if it is performed by a physician.

Selected Fundamental Decisions of
the Federal Constitutional Court

Extract from the Grounds:

...

D. I.

...

(The explanations given in paragraph I. list the core statements of the Abortion I decision (BVerfGE 39, 1). For details it is referred to this decision, see p. 185-188.

II.

After all, the legislature may express the legal condemnation of the interruption of pregnancy required by the Basic Law through measures other than the threat of punishment, depending on whether there is a medical indication, which has to be determined by a third party. Constitutional law allows for descending to a concept of protection that, in the early stages of pregnancy in case that unwanted, focuses on consulting service for the pregnant woman to make her carry the child to term.

The legislator's change in protection concept regarding the statute for the benefit of pregnant women and family benefits was tenable.

...

4. To pay tribute to a pregnant woman, the state is allowed to try to convince her of not abdicating from her responsibility towards the child other than by threat of punishment. The state is allowed to rather, use the means of individual counselling, appealing to her responsibility towards the unborn child, financial and social support, including providing the information needed.

The legislator may assume that it is rather prejudicial to achieving this aim, if a third party is asked to evaluate the woman's motivation for regarding the birth giving as being unacceptable.

5. If the legislator leaves the final decision on whether an interruption of pregnancy should be performed to the women who undergo the counselling and if the legislator provides for the possibility of medical attendance, should the situation arise, he may arguably demand of the pregnant woman to undergo the counselling and to reveal her motivations.

...

III.

If the legislator, in compliance with his duty to protect, changes his protection concept to a counselling programme, protection for the unborn human life primarily results from pre-emptive measures, i.e. counselling with the objective to convince the pregnant woman to carry the pregnancy to term.

The counselling concept aims at strengthening the woman's sense of responsibility. This is because in the end it is the woman who decides on whether the interruption of pregnancy will be performed and therefore she is the primarily responsible person, although her family and her

**60 Years German Basic Law:
The German Constitution and its Court**

social environment as well as her physician bear a certain responsibility, too (ultimate responsibility). Therefore, some basic conditions have to be fulfilled, in order to encourage the woman to decide in favour of the unborn life.

If there is no medical indication, which is required for an interruption of pregnancy, it is only on these conditions that the counselling programme can be considered to protect the unborn life (1.). But it is not acceptable to declare interruptions of pregnancy that are not medically indicated to be justifiable (not contrary to law), if they were performed by a physician on demand of the pregnant woman, after counselling and within the first twelve weeks of pregnancy (2.). However, the legislator is not obliged to follow the general prohibition of interruption of pregnancy without exception. If the counselling programme's effectiveness requires so, he may exclude certain circumstances (3.).

...

2. The implementation of the counselling concept aims at making sure that a woman does not face legal sanctions if she, after undergoing mandatory counselling, asks for an interruption of pregnancy and if this interruption is performed by a physician within the first twelve weeks of pregnancy, even if there is no medical indication. This statutory effect can only occur, if the legislator excludes those cases from the elements of crime under s. 218 of the Criminal Code; they may not be declared to be justified (not illegal).

- a) If the constitution only allows for an interruption of pregnancy under specific exceptional circumstances, criminal law cannot provide a wider range of circumstances under which an interruption of pregnancy is considered to be allowed. The state law has to confirm and to clarify the prohibition of interruption of pregnancy under constitutional law.
- b) Interruptions of pregnancy that are executed according to the counselling programme, without diagnosis of an indication, may not be declared as being justified (not contrary to law). As an indispensable legal requirement an exception from a legal provision can only have inherent justifying effects, if the state requires the incident of its preconditions to be determined, whether by the court or by a third party in whom the state may trust and whose decision is subject to a certain public control.

The legislator must not declare the interruption of pregnancy to be justified if he cannot provide for regulations of medical indication. The legislator's counselling concept does not allow for the recognition of a general emergency as a medical indication because doing so could hinder the counselling's effectiveness. This is why in those cases a justification is not possible.

...

- cc) The protective effects of the counselling programme do not depend on whether the woman's demand after counselling justifies an interruption of pregnancy. There is no evidence that the counselling can be effective only if the woman is assured that an interruption of pregnancy after undergoing the counselling will be legally approved.

Selected Fundamental Decisions of the Federal Constitutional Court

To the contrary, it would undermine the objective of the counselling to protect unborn life if the legal order would approve of every demand for an interruption of pregnancy in any event. This is because the counselling could not strengthen the woman's responsibility, if her decision in favour of an interruption after counselling was approved in any event.

3. To declare the interruption of pregnancy not to be punishable under certain conditions, allows to uphold the in principle prohibition of an interruption of pregnancy in the other areas of law.

At this, the counselling concept requires to provide such conditions that do not prevent the woman from being willing to accept the counselling that aims at protecting a life, from revealing her conflict and from responsibly contributing to a solution in a responsible manner.

This is why the woman must face a law that makes the acceptance of counselling preferable, to avoiding it and switching to illegality. Beyond the decision to make the interruption of pregnancy not punishable, the legislator must assure that emergency assistance by a third party in favour of the unborn child is not justifiable, if it aims to undermine the woman's and the physician's action. The woman must also be enabled to conclude a contract with a physician for an interruption of pregnancy that is classed as binding (see D.V.6.). Furthermore she needs legal protection against an eventual need to reveal the matter of her interruption of pregnancy and the reasons for it, leading to an infringement of her right to personality (see E.V.3.b and 4.b).

4. After all, the counselling programme makes an interruption of pregnancy, chosen by the woman after undergoing the counselling, illegal. The counselling concept cannot provide the woman with a legal justification as considering her being in an emergency situation because this would contradict its protection concept. This is just and reasonable and does not make the woman a bare object of the counselling concept. The counselling concept takes the woman serious as an acting person. It tries to persuade her of protecting the unborn life and expects her to exhibit responsible cooperation. It provides for conditions that attach much value to the legal position of the woman (see above, 3.). These conditions avoid any legal prejudice that could prevent the woman from undergoing the counselling and conversation with the doctor. It is only beyond these conditions that the "in principle" prohibition of an interruption of pregnancy must apply. That means, for example, that for those interruptions of pregnancy which are performed in accordance with the counselling programme, cannot be granted all those legal benefits that can be granted for legal abortions.

IV.

If the legislator chooses the counselling concept, the duty to protect the unborn human life also implicates certain limits for him concerning the legal organization of the counselling programme (see above III.1.a). This programme is of special importance for the protection of human life because its main focus lay on preventive protection. This is why the legislator, in light of the prohibition of insufficient means, must provide for effective and sufficient regulations to make a woman who is considering an interruption of pregnancy carry her child to term.

**60 Years German Basic Law:
The German Constitution and its Court**

Those provisions must be imposed for the subject matter of the counselling (1), its performance (2.) and its organization, including the participating persons (3). It is only under these conditions that the legislator may assume the counselling programme to be of protecting effect for life.

1. As regards to the content of the counselling, the legislator may assume that counselling can only be effective in protecting the unborn life, if it is not focused on results. In order to succeed, the counselling must aim at gaining the woman's cooperation in search of a solution. This also justifies the desistance from forcing the woman to discuss and to co-operate or from committing her to identify herself for the counselling.

The counselling is to encourage and not to intimidate the woman; to inspire her with sympathy and not to teach her; to strengthen the woman's responsibility and not to dominate her. This makes high demands on the counselling programme and the persons implementing it. Therefore it requires respective statutory provisions.

- a) If the pregnant woman's responsibility for the unborn life is to be the basis of a conscientious decision, the woman must be aware of this responsibility she bears due to the counselling concept. In doing so she must appreciate the unborn child's right to life that it is entitled to, even against its mother. That means, the woman must be aware that even in the early stages of pregnancy, the unborn life is specially protected by the state law. Consequently the woman must be aware that the state law only allows for considering an interruption of pregnancy under exceptional circumstances. This is if the woman faces heavy and exceptional burdens, exceeding the sacrificial limit. The consultant must assure his or herself of this awareness and must explain possible misconceptions in an understandable way.
- b) Science has developed methods for assisting in conflict resolution; those are also practiced. A concept that aims at guaranteeing the protection of the unborn human life in the first twelve weeks of pregnancy primarily by means of counselling, cannot do without it. This is why every counselling must be aimed at holding a conversation whereby applying the methods of counselling. As a first precondition, consultants must have the respective skills and a sufficient amount of time for every pregnant woman. Furthermore, from the very beginning counselling is only possible, if the pregnant woman communicates to the consultant her reasons for considering an interruption of pregnancy.

Although the nature of counselling excludes the enforcement of the pregnant woman's willingness to communicate and to cooperate for a counselling that aims to meet the goal of protecting life, it is indispensable to reveal the reasons for considering an interruption of pregnancy.

To ask this of a pregnant woman does not lead to a counselling process that is focused on results. Neither does it depreciate the woman's responsibility. The crucial point is that the counselling concept dispenses from medical indications to be determined by a third party in order to verify and evaluate the woman's reasons for the interruption. It also dispenses from sanctioning the woman's decision against the child if it is taken after undergoing the counselling. If in context of such a concept the counselling is

**Selected Fundamental Decisions of
the Federal Constitutional Court**

meant to make the woman disclose her reasons for the interruption, this is just based on the assumption that the pregnant woman bears a responsibility and that she is able to make a conscientious decision.

- c) To comply with the duty to protect the unborn life, counselling must include information about possible social and other supporting measures provided by the state. Furthermore, for claiming these benefits the woman must get the most effective support. This also applies to third parties, for example churches or foundations providing any means to protect life. Only in doing so, it can be guaranteed that all aid especially reaches those women who need it most, fostering their willingness to carry the child to term.
- d) The counselling programme would not provide a sufficient solution to its task if it did not take into consideration those persons associated with the pregnant woman in particular the father of the unborn child and the parents of an underage pregnant person who are in charge of supporting her and could possibly influence her decision for or against the child.

This is why each consultant has to clarify whether it seems appropriate to consult the father, other family members or persons of trust and whether the pregnant woman can be convinced to do so.

But, in case that from the outset the pregnant woman is accompanied by such an associated person, it is necessary to check whether this person must be expected to take influence on the pregnant woman in a damaging way. This would make it necessary to ask the pregnant woman to undergo the counselling again without any company.

...

- e) The interruption of pregnancy must not immediately follow the education and the counselling. In many cases the woman might only be able to deal with the issues of counselling after a certain period of time. The woman must be given the opportunity to talk to her persons of trust about the decision. This is if the decision is to be taken in a responsible manner (see BVerfGE 39, 1 [64]).

3. If the state seeks to protect the unborn human life by means of a counselling programme, it bears the full responsibility for its implementation. It is on the state to assure an appropriate range of consulting programmes, and it must not leave it to any private organization to uncoordinatedly implement it, pursuant to any religious, ideological or political objective.

...

**60 Years German Basic Law:
The German Constitution and its Court**

V.

The protection concept of a counselling programme also regards the physician, who is liable to the woman for advice and support from the medical perspective. The physician must not just perform an interruption of pregnancy but has to bear the responsibility for his action. He is bound to the protection of health and life. This is why he must not straight away assist in an interruption of pregnancy.

1. In particular the statutory provisions applying to a physician performing an interruption of pregnancy can begin with the physician's general duties in performing a surgical intervention. But his general duties of raising an indication, of education and counselling are to adapt to the characteristics of an interruption of pregnancy according to the counselling programme.

On the other hand, in order to protect the unborn life there must be limits to medical examination and information. This is to meet the danger of sexual choice that is disapproved by the constitution. This is why in the early stages of pregnancy the gender of the child must not become known to anyone else but the physician and his staff, unless the information was medically indicated.

...

- c) As responsible medical action is legally bound to the protection of the unborn life, the physician must take into consideration, under which circumstances the state law considers an interruption of pregnancy not to be illegal.

Therefore it needs a medical report on the woman's situation, in compliance with law, that can serve as a basis for the exchange with the woman and for the physician's own decision. In doing so, the physician must inform the woman on the decisive aspects determining his decision.

...

- 2b) If the physician considers the abortion to be justifiable from the medical point of view, he must be able to assist in it without the threat of punishment. If he considers the abortion not to be justifiable from the medical perspective he is obliged to refuse his assistance according to his general duties. But sanctions for the infringement of those duties are hard to enforce in legal practice. The constitutional duty to protect the unborn life does not require to employ criminal law in case of an infringement.

To comply with the duty to protect it seems to be sufficient but also necessary, that the mentioned commitment and its enforcement is regulated in the medical code of conduct; this must happen irrespective of any criminal sanction.

...

6. The duty of the State to protect the unborn life does not require that contracts are classed as non-binding which were concluded with physicians and hospitals for interruptions of pregnancy which are not punishable under the (new) counselling programme. The program rather requires that the mutual tie of obligations between physician and patient take the form of a legal

Selected Fundamental Decisions of the Federal Constitutional Court

relationship so that all obligations are fulfilled for valid legal reasons. Irrespective of any specific contractual consequences, ss. 134, 138 of the Civil Code are inapplicable. Doctors and hospitals only take part in abortions on the basis of a valid contract which safeguards their claim for payment and outlines their duties. It is in particular the doctor's duty towards the unborn child and the patient's health which needs contractual safeguards. As a consequence, faulty performance of the duties to provide counselling and treatment must in principle be able to trigger contractual and tortious sanctions.

However, in the light of the Constitution this result needs to be differentiated. A civil law sanction for faulty performance of the contract or for tortious infringement of the patient's physical integrity is basically necessary; this entails not only the duty to pay back any wasted fees, but also the duty to compensate for damage under the provisions of ss. 823, 847 of the Civil Code, including compensation for pain and suffering resulting from a failed abortion or from the birth of a incapacitated child. But as a result of Article 1.1 of the Basic Law, the child's existence cannot legally be classified as a damage. The duty of all public bodies to respect every human being for its own sake prohibits maintenance for a child to be classified as a damage. In the light of this fact, the case law of the civil courts on liability for medical mistakes in counselling or in performing failed abortions needs to be reconsidered (see for abortion BGHZ 86, 240 et seq.; 89, 95 et seq.; BGH NJW 1985, 671 et seq.; VersR 1985, 1068 et seq.; VersR 1986, 869 et seq.; VersR 1988, 155 et seq.; NJW 1992, 1556 et seq.; for sterilisations see BGHZ 76, 249 et seq.; 76, 259 et seq.; BGH NJW 1984, 2625 et seq.). However, the doctor's duty to pay damages to the child for damage caused in the course of an unskillfully attempted and thus failed abortion remains unaffected (see BGHZ 58, 48 [49 et seq.]; BGH NJW 1989, 1538 [1539]).

VI.

The state's duty to protect the unborn life also includes the protection from threats for the unborn human life, emanating from influences exerted by third parties such as members of the pregnant woman's family or of her social environment (see above, I.2 and III.1.b).

This gains special importance in the case of descending to a concept of protection that in the early stages of an unwanted pregnancy focuses on a counselling programme for the pregnant woman to make her carry the child to term.

1. This concept's effectiveness particularly requires the woman's protection against any unreasonable demands, leading to difficulties for the woman or imposing pressure upon her to interrupt the pregnancy. Such influences are also able to undo the counselling's success if the persons of her social environment press the woman even harder to make her interrupt the pregnancy, referring to impunity and the woman's responsibility, whereby abdicating from their own responsibility.

...

**60 Years German Basic Law:
The German Constitution and its Court**

2. a) Thus, it would not comply with a counselling concept aiming at the protection of the unborn life, just to call upon the respective persons' responsibility. Rather one needs to work towards new statutory provisions or towards the implementation of existing norms guaranteeing the framework conditions to ask for the family's responsibility as well as for the social environment's consideration (see above I.3.a).
- b) Furthermore there is an indispensable requirement for certain commands and prohibitions for family members under penalty of law. On the one hand these commands and prohibitions need to aim at ensuring that the respective persons give the necessary and reasonable support to the woman, at least if the denial was condemnable. On the other hand they need to aim at preventing these persons from pressing the woman to interrupt the pregnancy. Thereby the criminal liability may depend on whether an interruption of pregnancy was performed or not. Provisions of this kind would link to considerations of s. 201 of the 1962 Draft Statute to Reform the Criminal Law (see BRDrucks. 200/62 p. 45).

E.

Using these criteria to check the questioned provisions of the statute for the benefit of pregnant women and family benefits, it turns out that by descending to a counselling concept for the first twelve weeks of pregnancy, which is acceptable in principle, the statute does not sufficiently comply with its duty to effectively protect the unborn life, emanating from Article 1.1, in conjunction with Article 2.2 sentence 1 of the Basic Law. In contrast, the concerns about legal competence that were raised over particular regulations are only partly convincing as regards s. 4 of the Fifth Statute to Reform the Penal Law.

1. S. 218a.1 of the Criminal Code (new version) that states that abortions performed by a physician on demand of the pregnant woman after undergoing a counselling according to s. 219 of the Criminal Code (new version) and within the first twelve weeks of pregnancy are not "illegal", does not comply with the duty to protect the unborn human life (Article 1.1 Basic Law, in conjunction with Article 2.2 sentence 1 of the Basic Law) and is null and void. ...

2. If s. 218a.1 of the Criminal Code (new version) establishes a general justification for interruptions of pregnancy, its requirements in respect of content do not comply with the constitutional standards (see above D.I.2.c bb)). A justification of an interruption of pregnancy can only be possible, if a specified emergency occurs - which has to be determined. The emergency must be so severe, that the pregnant woman cannot be expected to carry the child to term, comparable to cases of medical, embryopathical or criminal indication. S. 218a.1 of the Criminal Code (new version) does not require such an emergency. ...

II.

S. 219 of the Criminal Code (new version) does not comply with the requirements of the unborn human life's protection (Article 1.1, Article 2.1 of the Basic Law); therefore it is contradicting the Basic Law and is void.

Selected Fundamental Decisions of the Federal Constitutional Court

The counselling is of fundamental importance within the protection concept of the statute. The legislator must organize the counselling as a public duty in a way that the state can assume full responsibility for its implementation (see above D.IV.3.). In doing so the legislator must regulate the aim and the content of the counselling as well as the procedure to be observed in compliance with the principles derived from the constitution (see above D.IV.1. and 2.). Given the importance of the object of legal protection and given the high level of its endangerment at the time when the pregnant woman is considering an interruption of pregnancy and when she is therefore frequenting a counselling service, the legislator must regulate task and implementation of the counselling in a clear and coherent way enabling to understand the law without needing explanations.

1. The regulation for a pregnant woman's counselling in case of an emergency or conflict situation (s. 219 of the Criminal Code, new version) is already insufficient under constitutional law because the counselling which is conceptually required and which aims to protect the life is not guaranteed by sufficient public competences and duties as regards the organization and surveillance of the counselling institution; based on this regulation the state cannot comply with its responsibility for offering such counselling institutions that leave one with the expectation of effectiveness according to its aim and content.

2. With this in mind there is no need to finally decide on whether the provisions of s. 219 of the Criminal Code (new version) on aim, content and implementation of the counselling bear up against a control of constitutionality. However, considering that there is a need for a new statutory law anyway, the new provision must be conceptualized in a way that it is clear and coherent by itself. It must be possible to apply it without needing further explanations, so that it complies with all the constitutional requirements from the state's duty to protect as stated under D.IV.1.and 2.

...

d) S. 219.1 sentence 3 of the Criminal Code (new version) describes the decision that the woman has to take after undergoing the counselling as a "matter of conscience". The legislator thereby obviously seeks to refer to a phrasing by the Federal constitutional Court (see BVerfGE 39, 1 [48]), stating that the decision in favour of an interruption of pregnancy may be considered a conscientious decision that has to be respected. However, the woman who decides in favour of an interruption of pregnancy after undergoing the counselling cannot claim an infringement of her basic right emanating from Article 4.1 of the Basic Law for the involved killing of the unborn child. To meet the requirements by constitutional law the statute can only mean a conscientiously taken and therefore estimable decision. This is to be clarified accordingly.

III.

Irrespective of the lack of constitutionality in s. 218a.1 and s. 219 of the Criminal Code (new version), the regulation in the statute for the benefit of pregnant women and family benefits concerning interruptions of pregnancy according to the counselling concept do not comply with the duty to protect the unborn human life. This is because the legislator failed to determine the

**60 Years German Basic Law:
The German Constitution and its Court**

special commitments of the woman and her family to the necessary extent (see D.VI.2.) and failed to put it under the threat of punishment. The legislator has to catch up on the missing regulations together when doing the readjustment that became necessary after the invalidation of s. 218a.1, 219 of the Criminal Code (new version).

IV.

Article 15 no. 2 of the Statute for the benefit of pregnant women and family benefits is contradicting Article 1.1, in conjunction with Article 2.2 sentence 1 of the Basic Law and is therefore void as far as the provision in Article 4 of the Fifth Statute to Reform the Penal Law concerning the Federal Statistics on interruptions of pregnancy is nullified thereby.

1. a) The legislator does not fulfil his duty to protect the unborn human life only by enacting a law regulating interruptions of pregnancy, aiming at this kind of protection and being appropriate to guarantee the degree of protection required by the Basic Law, according to his estimation which is acceptable from the constitutional law perspective.

Rather, because of his duty to protect he remains responsible for the effectiveness of the law in terms of ensuring reasonable and by itself effective protection against interruptions of pregnancies, taking into consideration other legal interests. ...

He must therefore frequently and appropriately reassure himself, whether the law really has the expected protective effects or whether deficits can be noticed, in terms of the concept or its implementation, leading to an infringement of the prohibition of insufficient means (see BVerfGE 56, 54 [82 seq.]). One opportunity is a frequent report to the government. The duty to monitor exists as well and even more precisely after a change in the protection concept.

...

2. According to this constitutional standard, the abolition of the previous provision on the Federal Statistics in Article 4 of the Fifth Statute to Reform the Penal Law is not incompatible with the duty to protect the unborn human life.

...

Indeed constitutional law did not require the legislator to retain the previous provision on the Federal Statistics unchanged. But he is denied to delete it without replacement. This deletion is void. A new regulation is necessary to comply with the duty to protect yet because the scope of the regulation does not reach out to the new Federal states, where previously it was only applicable because of an interim order of the senate (BVerfGE 86, 390 seq.).

V.

The provision of s. 24b of the Fifth Code of Social Law is compatible with the Basic Law (1. and 2. a). But it would contradict the Basic Law to grant a legal claim for benefits from the compulsory health insurance for the performance of an interruption of pregnancy which was not proved to be legal before in a way that meets the above-stated constitutional requirements (2.b.).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

In contrast the granting of social aid for abortions that are not sconded and that are executed according to the counselling programme is compatible with constitutional law where there is a need for pecuniary help. The same is true for continuous payment of wages (3. and 4.). The duty under constitutional law to protect the unborn human life does not conflict with the granting of financial benefits from the social health insurance for an interruption of pregnancy because of the general indication of an emergency according to the previous law. If it was compatible with constitutional law on other aspects to grant benefits from the social insurance even if the interruption of pregnancy was based on s. 218a. 2 no. 3 of the Criminal Code (old version), does not need to be decided on (5.).

...

- b) If the legality of the interruption of pregnancy is not proven, the duty under constitutional law to protect life prohibits an interpretation of s. 24b of the Fifth Code of Social Law (SGB V) that allows for the granting of benefits from the social insurance if these benefits are equal to those granted for legal abortions. The state under the rule of law may only pay for an act of killing if the killing is legal and if the state insured itself of its legality in a way that is complying with standards of reliability under the rule of law.

...

- c) According to the protection concept of the counselling programme the pregnant woman, after undergoing a social and medical counselling, bears the responsibility of whether a punishable interruption of pregnancy takes place or not. But the counselling programme does not require the acceptance of this responsibility by social law. It does not require to grant the same social benefits to women going through with a non-criminal interruption on the conditions of the counselling programme as to those for whom a medical, embryopatal or criminal indication, i. e. a justification has been notified.

...

- dd) The granting of social benefits for interruptions of pregnancy that are not punishable, indeed but that are not proven to be legal is contradicting the state's duty to protect the unborn human life because it would also damage people's general awareness of an unborn child having a right to life even against its mother and the awareness that an interruption of pregnancy is wrong in principle.

...

- c) After all, the constitution forbids the granting of benefits from the social insurance for the medical performance of an illegal interruption of pregnancy and the medical aftertreatment provided there were no complications.

...

- 3. a) After all the state is in principle prohibited by constitutional law from fostering interruptions of pregnancy that are not proven to be legal by granting social benefits or by setting laws granting a claim for benefits against a third party. The state is only

**60 Years German Basic Law:
The German Constitution and its Court**

allowed under constitutional law to breach this principle, as far as this is required by the concept for the protection of the unborn human life for its effectiveness. This is the case if only the performance of an interruption of pregnancy by a physician is in question.

If the state law requires the consultation of a doctor, on the one hand to protect the pregnant woman's health and on the other hand to protect the unborn child, this must not fail because of a lack of financial means. In this case the state must not be prevented from providing these means by itself.

- b) It is up to the legislator to provide regulations on how and under which circumstances the state should in case of the woman's need take over the costs, in case the concept of protection of the counselling programme requires so. ...

4. In the law of wage continuation it is not required to exclude those interruptions of pregnancy which are excluded from the elements of crime in s. 218 of the Criminal Code (new version), from the duty to indemnify.

...

It does not contradict the duty to protect unborn human life under constitutional law, if those principles of employment law are interpreted in a way that a duty of wage continuation also exists, if the unemployability is consequence of an interruption of pregnancy under the counselling programme; under constitutional law it is not objectionable to also consider those cases of unemployability to be through no fault of her own, according to s. 1.2 of the German Law on Continuation of Payments for Employees on Medical Leave (LFZG).

...

5. a) The duty under constitutional law to protect Life does not prevent the legislator from granting benefits from the compulsory health insurance for an interruption of pregnancy that is not illegal, as it is stated in s. 24b of the Fifth Code of Social Law, following s. 200f RVO. This also applies to the regulations in ss. 218a seq. of the Criminal Code (old version), which are applicable until 15 June 1993 (see II.1. of the ruling).

...

Extracts from the dissenting opinion of Vice President Judge Mahrenholz and Judge Sommer

...

As for the Senate it is also out of question for us that there exists a state's duty to protect the unborn human life from its very beginning. We share the senate's opinion that the duty to protect does not prevent the legislator from changing to a protection concept that focuses on the counselling of the pregnant woman, abstaining from a threat of punishment determined by indication and from determining the elements of an indication.

But we are of the opinion that in fact the final responsibility of the woman for an interruption in the early stages of pregnancy, that is generally recognized by the senate as a last statutory means if the woman underwent counselling, is necessary to comply with the woman's basic rights and the duty to protect is therefore limited (I).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

In our opinion an effective protection for the unborn life in the counselling programme just calls for a normative clarification on the admissible and non-admissible elements of an interruption of pregnancy; thereby the Basic Law at least allows for a justification of the abortion after undergoing a counselling (II.). From this it follows that s. 218a.1 of the Criminal Code is in compliance with the constitution and that benefits from the compulsory health insurance for interruptions of pregnancy are not to be excluded from s. 24b of the Fifth Code of Social Law (III.).

According to the senate's opinion, for the whole duration of the pregnancy the woman is bound to carry the child to term. After undergoing a counselling this duty only ends, if there is a justification by statutory law, complying with the criterion of unreasonableness (see judgement, D.I.2.c). We don't agree to this statement. Regarding the triangle given by constitutional law, comprising the woman, the prenatal life and the state, the duty to protect, deriving from the basic law, only calls upon the state, not directly upon the woman. Duties, imposed by statutory law of the state in order to protect the prenatal life, must at the same time consider the basic rights of the woman.

Every statutory provision regulating the interruption of pregnancy therefore does not only need to be in accordance with Article 2.2, in conjunction with Article 1.1 of the Basic Law, but it also needs to comply with the woman's right to protection of and respect for her human dignity (Article 1.1 Basic Law), her right to physical integrity (Article 2.2 of the Basic Law) and her right to personality (Article 2.1 of the Basic Law) (see judgement, D.I.2.b).

Irrespective of the submissions under I. in our opinion the Basic Law does not demand to refuse any justification (as for the question of criminal law), if the unreasonableness of the demand to carry the pregnancy to term was not confirmed by a third party.

...

The senate is of the opinion that the provision of s. 218a.1 of the Criminal Code (new version) as a justification is unconstitutional, because it neither requires a situation of emergency or conflict making it unreasonable for the woman to carry the child to term nor does it further determine such a situation. Nor it makes the determination of justification by a third party a precondition (see judgement, E.I.2.). According to our submissions under I and II, we hold that s. 218a.1 of the Criminal Code (new version) is compatible with the constitution.

In our opinion payments by the social insurance for interruptions of pregnancy that are performed by a physician within the first twelve weeks after conception are not contradicting the Basic Law. However we don't consider the legislator to be constitutionally bound to include legal interruptions of pregnancy that are not medically indicated but performed by a physician, in the list of services covered by the compulsory health insurance. But if he does so, what is suitable considering the protection of the woman's health, he is required to assure the equal allocation of benefits of the community based on the principle of mutual solidarity, organized in the health insurance. Distinctions must be justified.

**60 Years German Basic Law:
The German Constitution and its Court**

We would not be able to follow the majority of the senate's opinion that s. 24b of the Fifth Code of Social Law is not applicable to interruptions of pregnancy after counselling, even if those interruptions of pregnancy were not justifiable (what is the case according to the judgement). For as much as this we agree with the dissenting opinion of our colleague Böckenförde.

Against the leading submissions of the senate to involve the physician in the protection concept of the counselling programme (see judgement, D.V.) we object in two points.

1. In our opinion, against the senate's view, the duty under constitutional law to protect does not require the legislator to put the infringement of the doctor's duties in context of an abortion or the previous counselling and education under the sanction of punishment.
2. The subjects of the action do not provide a reason for the senate's submissions in the judgement, stating that the obligation to support a child can never be considered to be a damage (see judgement, D.V.6.). They are an *obiter dictum* and moreover lack the necessary examination of the submissions by the 6th Civil Senate of the Federal Court of Justice, stating under which specified circumstances one may consider something to be a damage (BGHZ 76, 249 [253 seq.]; BGH, NJW 1984, 2625 seq.).

Extracts from the dissenting opinion of Justice Böckenförde

...

I cannot agree with the explanations in the judgement that benefits from the social insurance for such abortions (in the following: counselled abortions) are excluded by constitutional law (under E.V.2.b), partially anticipated in D.III.1.c). To decide on this is up to the legislator.

Thereby it is not the point that such benefits are demanded by the constitution - they are certainly not -, but whether such benefits are constitutionally forbidden from the very beginning.

...

2. For the law of social insurance that is subsequent law in this case, the question arises how to deal with this entity of counselled abortions regarding the granting of insurance benefits.

...

The senate assumes that it is a requirement under the constitutional duty to protect the unborn human life, to consider every such abortion because it is not proved to be legal and its legality cannot be proven, must be considered not justified and therefore as a tort and must be excluded from benefits of the social insurance. Such an exclusion might be a possible result of legislative action. But it cannot be derived from the constitutional duty to protect the unborn human life or any other constitutional provision, that it is a compulsory demand of the constitution, making every other solution an infringement of the constitution.

...

**Selected Fundamental Decisions of
the Federal Constitutional Court**

3. However, the objections against the senate's opinion do not mean that the constitution requires the financing of counseled abortions.

This would contradict the principle rightly emphasized by the senate that illegal abortions must not be directly or indirectly financed by the state because of the protecting effects for the unborn life.

...

4. ...

The decisive action taken by the senate was, from a constitutional point of view, the descent to a protection concept of counselling. This descent seems to be generally acceptable in light of the constitutionally demanded protection for the unborn life. The reason is that the state's duty to protect aims at ensuring an effective protection of the unborn life by implementing normative rules and *de facto* measures. Therefore it is not sufficient, if there is indeed a regulation at normative level, aiming at a closed and stringent protection of the unborn life but this regulation is on for whatever reasons failing to be implemented into a *de facto* effective protection also for the individual human life. The reasons for that are explained in the judgement.

But if this way is considered to be acceptable to meet the state's duty to protect the unborn life - regardless of the necessary requirements for its particular form, - it must on the one hand be accepted in its needs and conditions of efficiency, thereby striking the balance with other legal positions and aspects. ...

III. Equality and Non-Discrimination - Article 3 of the Basic Law

a) Prohibition of Nocturnal Employment, BVerfGE 85, 191

Explanatory Annotation

Gender discrimination was the issue in this case where the applicant complained against legislation prohibiting the employment of women between 10 pm and 6 am. The legislation's object and purpose was to protect women from night work because the factual reality of working and often taking care of the household and family made women especially susceptible for the health risks associated with working at night. Article 3.1 stipulates that all persons are equal before the law. This means in essence that differentiation between two comparison groups, such as men and women, requires a reasonable justification. The legislation in question in this case differentiated between female workers and female salaried employees. Only the former were not allowed to work at night. The two comparison groups are workers and office employees but there are no reasonable arguments to justify differentiation between these two groups.

Article 3.2 obligated the government to pro-actively promote gender equality.

Article 3.3 prohibits discrimination on a number of grounds specifically listed, gender (sex) being one of them. The Court has interpreted this provision as going beyond Article 3.1 and prohibiting in principle of any differential treatment of people on account of the attributes listed in Article 3.3. However, Article 3.3 does not absolutely prohibit differentiating between the sexes. If the differentiation addresses a problem that is inherently connected to one's gender and if the different treatment is absolutely necessary to resolve the problem, then differential treatment is still possible. That would, for example, certainly be the case for protective measures during pregnancy. The prohibition to work at night, on the other hand, obviously did not pass this threshold. Working at night poses equal health risks for men and women and there is no compelling reason to exempt only women from working at night and thus excluding them from employment opportunities.

Translation of the Prohibition of Nocturnal Employment Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 85, 191*

Headnotes:

1. Under Article 100.1 sentence 1 of the Basic Law (Grundgesetz - GG) a law may not be used as the basis for a decision if it conflicts with European Community law.
2. Unequal treatment on the basis of gender is compatible with Article 3.3 of the Basic Law only if absolutely required to resolve problems that because of their nature can occur only in the case of men or women.

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**Selected Fundamental Decisions of
the Federal Constitutional Court**

3. The regulative import of Article 3.2 of the Basic Law that goes beyond the scope of the prohibition of discrimination under Article 3.3 of the Basic Law lies in the fact that it establishes a doctrine of equality and extends it to societal reality.
4. The prohibition of nocturnal employment under s. 19 of the Working Time Ordinance (Arbeitszeitordnung - AZO) discriminates against female hourly employees as compared with male hourly paid employees and female salaried-employees; it is therefore in violation of Articles 3.1 and 3.2 of the Basic Law.

Judgment of the First Senate of 28 January 1992 on the basis of the oral hearing of 1 October 1991 - 1 BvL 1025/82, 1 BvL 16/83 and 10/91 -

Facts:

S. 19.1 of the Working Time Ordinance of 1938, most recently amended by the Act of 10 March 1975 (Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I p. 685), prohibits, *inter alia*, paid employment at night between the hours of 8:00 p.m. and 6:00 a.m. A series of economic sectors, in particular agriculture and forestry, are exempted from this provision. S. 19.2 of the Working Time Ordinance contains special provisions for multiple-shift enterprises; s. 19.3 of the Working Time Ordinance makes provision for further general exceptions to the prohibition of nocturnal employment, for example, in the case of transport undertakings and eating and drinking establishments.

The complainant was employed in a managerial capacity by a baked goods factory; she was fined for paid employing in her enterprise during the night.

In response to her constitutional complaint, the Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) reversed the court decisions that had confirmed the imposition of the fine and found s. 19.1 of the Working Time Ordinance incompatible with Articles 3.1 and 3 of the Basic Law.

Extract from the Grounds:

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B. II.

The constitutional complaint is admissible.

On the basis of the submissions of the complainant, a violation of her fundamental rights is possible. She is to be sure not personally discriminated against by the prohibition of nocturnal employment, which applies only to paid employees. As a result, a violation of her fundamental right under Article 3 of the Basic Law is not at issue. However, there may exist a violation of her fundamental right to general freedom of action if the prohibition of nocturnal employment under s. 19.1 of the Working Time Ordinance is in violation of Articles 3.1 and 3 of the Basic Law since it discriminates against paid employees as compared with other employees without sufficient reason. In any case, a provision that compels a citizen to treat others in a discriminatory manner directly compromises that person's general freedom of action. Insofar as the decision BVerfGE 77, 84(101) concludes otherwise, it may not be relied upon.

**60 Years German Basic Law:
The German Constitution and its Court**

C.

The constitutional complaint is founded. The decisions under challenge are based on the prohibition of paid nocturnal employment of under s. 19.1 of the Working Time Ordinance. This prohibition is, however, not compatible with Articles 3.1 and 3 of the Basic Law. The imposition of a fine on this unconstitutional basis violates the complainant's fundamental right to general freedom of action (Article 2.1 of the Basic Law).

I.

The prohibition of nocturnal employment for female hourly employees (s. 19.1 first alternative of the Working Time Ordinance) is in violation of Article 3.3 of the Basic Law.

1. According to this article of the Basic Law, no one may be discriminated against or privileged on the basis of gender. It reinforces the general principle of equality under Article 3.1 of the Basic Law by narrowing the operating freedom afforded the legislature therein. Gender may in principle - like the other attributes mentioned in s. 3 - not be used as the basis for unequal treatment under the law. This also applies when a provision is not intended to have for effect unequal treatment of a nature prohibited under Article 3.3 of the Basic Law, but rather to pursue other objectives (Clarification of BVerfGE 75, 40 [70]).

Article 3.2 of the Basic Law contains no more exhaustive or more specific requirements in respect of the question as to whether a provision of law wrongfully discriminates against women on the basis of gender. The regulative import of Article 3.2 of the Basic Law that goes beyond the scope of the prohibition of discrimination under Article 3.3 of the Basic Law lies in the fact that it establishes a doctrine of equality and extends it to societal reality. The sentence "men and women shall have equal rights" is intended not only to set aside laws that discriminate against or favour individuals on the basis of gender related attributes, but also to achieve equal rights for both genders in the future (see BVerfGE 15, 337 [345]; 48, 327 [340]; 57, 335 [345, 346]).

It is intended to achieve equality in living conditions. For example, women must have the same employment opportunities as men (see BVerfGE 6, 55 [82]).

Traditional role models that result in greater burdens upon or other disadvantages for women may not be reinforced by measures of the state (see BVerfGE 15, 337 [345]; 52, 369 [376, 377]; 57, 335 [344]). The actual disadvantages that women typically experience may be compensated by preferential treatment under the law due to the principle of equal rights embodied in Article 3.2 of the Basic Law (BVerfGE 74, 163 [180]).

The case at hand does not involve the equalization of conditions, but rather the elimination of the existence of unequal treatment under the law. s. 19.1 of the Working Time Ordinance treats paid unequally "due to" their gender. This provision is to be sure addressed at employers. However, the implications of the prohibition of nocturnal employment directly affect paid. Unlike male employees, they are deprived of the possibility of working at night. This constitutes unequal treatment under the law that was originally associated with their gender affiliation.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

2. However, not every instance of unequal treatment based on gender is in violation of Article 3.3 of the Basic Law. Rather, provisions that make distinctions may be permissible if compellingly required to resolve problems, that because of their nature, can occur only in the case of men or women. Such a case is not at issue here.

- a) Research in the area of occupational medicine has produced no reliable basis for the original assumption underlying the prohibition of nocturnal employment to the effect that such employment was more deleterious to female hourly paid employees by virtue of their constitution than to male employees. Nocturnal employment is in principle harmful to everyone.

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Specific health risks inherent in the female constitution cannot be recognized with sufficient certainty.

- b) Insofar as investigations have shown, women are more adversely affected by nocturnal employment, this is generally attributed to the additional burden of housework and childcare.

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This cannot serve to support the prohibition of nocturnal employment for all female hourly paid employees, for the additional burden of housework and childcare is not a sufficiently gender-specific characteristic. The traditional perception of the roles of men and women is to be sure such that women manage the household and take care of children, and there is no disputing the fact that that role is very often assumed by women even if they, like their male partners, are also employed. However, the full impact of this twofold burden affects only those women with children that require care, who are either single or have male partners who leave responsibility for childcare and the household to them despite the fact that they work at night. It also affects single male parents in the same manner as well, as to a lesser extent men and women who share the burden of housework and childcare.

Such social findings do not suffice - irrespective of the precise number of those affected - to justify unequal treatment on the basis of gender. The undeniable need for protection of female and male hourly paid employees who work at night and at the same time also have children to care for and a multiple-person household to manage can be more appropriately addressed by provisions that take these circumstances into account.

- c) In support of the prohibition of nocturnal employment, the argument is also advanced that women are especially exposed to danger on the way to and from their places of employment at night. This is undoubtedly true in many cases. However, this can also not justify prohibiting all female hourly paid employees from working at night. The state may not absolve itself of its responsibility to protect women from being physically attacked in public streets by restricting their freedom of employment in order to keep them from leaving their homes at night (similarly also ECJ, *EuGRZ* 1991, p. 421 [422]).

**60 Years German Basic Law:
The German Constitution and its Court**

In addition, this argument also does not apply to the class of female hourly employees in general to an extent that would warrant discrimination of all female hourly employees. For example, excessive danger can be precluded by providing a company bus for the way to the place of employment.

3. Violation of the prohibition of discrimination on the basis of gender (Article 3.3 of the Basic Law) is not justified by the doctrine of equal rights contained in Article 3.2 of the Basic Law. The prohibition of nocturnal employment under s. 19.1 of the Working Time Ordinance does not serve to further the purposes of Article 3.2 of the Basic Law. It certainly protects many women against the deleterious effects of nocturnal employment, who in addition to bearing responsibility for childcare and management of a household, are also employed. This protection is, however, accompanied by significant disadvantages; women are discriminated against when they seek employment. They cannot accept employment that also involves occasional work at night. In a few industries, this has resulted in a significant decrease in the training and employment of female workers. In addition, female hourly paid employees are prevented from freely choosing their working hours. They cannot earn the supplementary income associated with night work. This may result in women continuing to be burdened by childcare and housework in addition to employment more than men, which would reinforce the traditional assignment of gender roles. The prohibition of nocturnal employment therefore inhibits mitigation of the societal disadvantages of women.

II.

S. 19.1 of the Working Time Ordinance is also in violation of Article 3.1 of the Basic Law since the provision treats female hourly paid employees differently from female salaried employees without sufficient reason.

1. The general principle of equality under Article 3.1 of the Basic Law prohibits the legislature from making distinctions in the treatment of the legal situations of different classes of persons in the absence of any differences of such nature and weight as could justify such unequal treatment (see BVerfGE 55, 72 [88]; 68, 287 [301]; 81, 156 [205]; 81, 228 [236] 82, 126 [146]). The difference in the treatment of female hourly paid employees and female salaried-employees as regards nocturnal employment cannot be reconciled with this standard.

2. Unequal treatment of the two classes of female employees could be justified only if female salaried-employees were less subject to the deleterious effects of nocturnal employment than female hourly paid employees. There is, however, no evidence of this. Moreover, relevant investigations in the area of occupational medicine indicate that both groups suffer equally from such deleterious effects (see Rutenfranz, *op. cit.* p. 31; Rutenfranz/Beermann/Löwenthal, *op. cit.* p. 59). The question as to whether this is due to increasing similarity in the occupational activities of female hourly paid employees and female salaried-employees in the wake of technical progress or whether the occupational activities had in the first place no influence on the deleterious effects of nocturnal employment can be ignored. In any case, there is no evidence of any difference between the need for protection of female hourly paid employees and that of female salaried employees that could alone justify distinctions in the regulation of nocturnal employment in view of the general principle of equality under Article 3.1 of the Basic Law.

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Selected Fundamental Decisions of
the Federal Constitutional Court

III.

The constitutional violation makes s. 19.1 first alternative of the Working Time Ordinance incompatible with the Basic Law. This finding also holds for the remaining regulations of the above provision (s. 19.1 second alternative subsections 2 and 3 of the Working Time Ordinance). They are non-independent supplements to the general prohibition of nocturnal employment for female hourly paid employees that is expressed in the first alternative of the first paragraph and therefore share its legal fate. The same applies to s. 25 of the Working Time Ordinance since it contains reference to s. 19 of the Working Time Ordinance.

1. If a law is incompatible with the Basic Law, it must in principle be nullified (s. 82.1 in conjunction with s. 78.1 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG). However, in view of the operating latitude of the legislature, a declaration of nullity is to be avoided if several possibilities exist for remedying the constitutional violation (see BVerfGE 28, 324 [362]; 52, 369 [379]; 55, 100 [113]; 77, 308 [337]). This regularly occurs in the case of violations of Article 3 of the Basic Law (see BVerfGE 22, 349 [361]). In such cases, a provision must be declared void only if it can be assumed with certainty that the legislature would in view of Article 3 of the Basic Law choose the version of the law remaining after the declaration of nullity, which in this case would therefore mean completely forgoing any prohibition of nocturnal employment (BVerfGE 27, 391 [399]).

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3. It follows directly from this finding of incompatibility that violations of s. 19 of the Working Time Ordinance may not be prosecuted. The legislature must formulate a new provision for the protection of employees against the deleterious effects of nocturnal employment. Such a provision is necessary to satisfy the substantive content of the fundamental rights, in particular that of the right to physical integrity (Article 2.2 sentence 1 of the Basic Law). The state has a special obligation to provide protection as regards this fundamental right (see BVerfGE 77, 170 [214] with further references; established case law).

In the context of fulfilling this duty, the legislature certainly does have a broad latitude for assessment, evaluation and operation that also leaves room for taking into account competing public and private interests. Measures adopted by the legislature may, however, not be totally unsuitable for ensuring protection of fundamental rights (see BVerfGE 77, 170 [214, 215]).

The new provision for the protection of employees against the deleterious effects of nocturnal employment must also meet this standard.

Special protection under the law cannot be considered dispensable because nocturnal employment is generally performed on the basis of voluntary agreements. The principle of personal autonomy underlying contract law can provide adequate protection only if the conditions for free self-determination exist. When the positions of the parties involved are not approximately equal, the provisions of contract law cannot on their own guarantee an equitable balance of interests. This is typically the case when employment contracts are concluded. In such situations, the objective fundamental decisions of the Basic Law in the section devoted to fundamental rights and the imperative of the social welfare state are to be implemented by provisions of law that work counter to social and economic inequality (see BVerfGE 81, 242 [214, 215]).

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**60 Years German Basic Law:
The German Constitution and its Court**

b) *Rubble Women*, BVerfGE 87, 1

Explanatory Annotation

Under the mandatory German public pension scheme the retirement payments depend on the number of years spent in the active workforce and on the income level achieved during that time. Parents, who opted to stay at home with their children, in the vast majority of cases the mothers, consequently lost active income years and hence would receive lower retirement pensions. This was regarded as unfair and in 1986 legislation was passed to recognize child-rearing time as active income time in the retirement pension calculation. This benefit was limited to women born after 1920. In 1987 additional legislation was passed with the aim of providing a similar benefit for women born before 1921, who, because of their role of removing the debris of the ruins left by the bombing campaigns on German cities directly after World War II were often as a whole referred to as “debris-women”. This benefit for the “debris-women was calculated differently as a direct benefit to the pension entitlement and amounted to slightly less than under the calculation formula chosen for women born post 1920 and it was only paid out after 1987. The government justified this with budget constraints. The Constitutional Court regarded this approach as in principle compatible with the Basic Law. However it regarded the steps taken to alleviate the discrimination of those women who opted for child-rearing in comparison to those who opted for income generating activities as insufficient and pointed out that measures could be taken within the system to alleviate the inequality, for example by reducing certain pension entitlements or tying them to tougher conditions, for example reducing entitlements for surviving stay-at-home spouses when there were no children.

The decision illustrates the difficulty of applying the equal protection/non-discrimination clause in the context of financial entitlements. In areas such as pension entitlements the potentially huge financial consequences are obvious. The Court has always taken a cautious approach in this respect. Equality can also be created by not giving any recognition to certain circumstances, such as child-rearing in this case. The Court also invoked the family protection guarantee of Article 6.1 of the Basic Law to argue that some form of recognition for child rearing must be provided for. However, it left it to the government to find ‘intra-system’ solutions that do not necessarily increase the total amount of entitlements owed and rather lead to a redistribution of the available monies. The government could have stayed away from introducing child-rearing benefits in the first place but once it chose to do so it had to choose a systematically coherent approach giving due regard to the equality clause of Article 3 and the family protection clause of Article 6.1 of the Basic Law.

Selected Fundamental Decisions of
the Federal Constitutional Court

Translation of the Rubble Women Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 87, 1*

Headnotes:

1. The legislative power of the federal government to recognize child raising time for purposes of statutory pension insurance derives from Article 74 no. 12 of the Basic Law (Grundgesetz - GG). The federal government was empowered to enact the Child Raising Benefits Act (Kindererziehungsleistungs-Gesetz - KLG) under Article 74 no. 7 of the Basic Law.
2. The Widows' and Surviving Dependents' Pension and Periods of Child Raising Act (*Hinterbliebenenrenten- und Erziehungszeiten-Gesetz* - HEZG) and the Child Raising Benefits Act did not violate the Basic Law (Grundgesetz - GG) by generally failing to equate child raising time with periods of contribution to the statutory pension insurance system. The legislature must, however, pursuant to Article 3.1 of the Basic Law in conjunction with Article 6.1 of the Basic Law compensate to a greater extent than in the past for the deficiency in the pension insurance system that lies in the disadvantages in respect of pension benefits due to child raising.
3. Exclusion of mothers born prior to 1921 from credit for child raising time under the statutory pension insurance system by the Widows' and Surviving Dependents' Pension and Periods of Child Raising Act was compatible with Article 3.1 of the Basic Law. As regards Article 3.1 of the Basic Law, entitlement of mothers born in the years prior to 1921 to benefits for child raising, albeit only incrementally, and concurrent exclusion of fathers from eligibility for benefits by the Child Raising Benefits Act were also justified for objective reasons.

Judgment of the First Senate of 7 July 1992 on the basis of the oral hearing of 28 April 1992 - 1 BvL 51/86, 50/87 and 1 BvR 873/90, 761/91 -

Facts:

The decision relates to several constitutional complaints and petitions for concrete judicial review that questions the constitutionality of the provision of law that governs recognition of child raising time under the statutory pension insurance system. Since the 1957 pension reform, wage earners and salaried employees have been provided with statutory pension insurance based on the principle of dynamic income based retirement benefits and financed under what is referred to as the generational compact. That means that expenditures of the pension insurance system are in principle covered by revenues from the same calendar year. These revenues are obtained through compensation based contributions made by the insured and their employers as well as through a federal subsidy. As a result, each employed generation finances pensions to be paid during a given period on a pay-as-you-go basis through contributions made during the same period.

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**60 Years German Basic Law:
The German Constitution and its Court**

The Act on the Reform of Widows' and Surviving Dependants' Pensions and Recognition of Child Raising Time for Purposes of Statutory Pension Insurance (Gesetz zur Neuordnung der Hinterbliebenenrenten sowie zur Anerkennung von Kindererziehungszeiten in der gesetzlichen Rentenversicherung - HEZG) of 11 July 1985 (Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I p. 1450), which went into force on 1 January 1986, not only introduced a fundamental reform of survivors' benefits, but also recognition of child raising years for the purposes of establishment of entitlement to and increases in pension benefits. Under this law, child raising time affected the pension insurance system for wage earners and salaried employees, in that the first 12 calendar months following the end of the month of birth were counted as time covered by compulsory insurance. Childraising time prior to 1 January 1986 thereby became important under the law governing pension insurance since the legislature qualified the first 12 calendar months of child raising following the end of the month of birth as part of the insured period with special status. This was complemented by the Act on Child Raising Benefits under the Statutory Pension Insurance System for Mothers Born in the Years Prior to 1921 (Gesetz über Leistungen der gesetzlichen Rentenversicherung für Kindererziehung an Mütter der Geburtsjahrgänge vor 1921 - KLG) of 12 July 1987 (Federal Law Gazette (*Bundesgesetzblatt* - BGBl.) I p.1585 which went into effect on 17 July 1987. The legislation accorded mothers born in the years prior to 1921, frequently often referred to as the "rubble women", who were not covered by the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act independent benefits for child raising. Under the Child Raising Benefits Act, benefits were provided from federal funds without regard to fulfilment of the prerequisites under legislation governing pension insurance and were equal in amount to the benefits accorded younger mothers under the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act. Payment of child raising benefits for older mothers commenced with effect as of 1 October 1987 and was then gradually expanded in increments of one year at a time to include all mothers born in the years up to 1920. The above provisions of the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act were replaced by the corresponding regulations of the Sixth Book of the Social Code (Sozialgesetzbuch) with effect as of 1 January 1992 along with the Reich Insurance Code (Reichsversicherungsordnung - RVO) and the Salaried Employees Insurance Act (Angestelltenversicherungsgesetz - AVG).

The constitutional complaints and several petitions for concrete judicial review relate to the period of application of the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act and the Child Raising Benefits Act; they challenge recognition of child raising time under this legislation as a whole because it fails to take into account the fact that child raising represents a form of contribution that is the equivalent of monetary contribution by virtue of its importance for what is referred to as the generational compact in the context of the statutory pension insurance system. In any case, it is argued, child raising time should also have been taken into account under the statutory pension insurance system in the case of those born in the years prior to 1921 and that the latter should at least also have been accorded corresponding benefits.

In this matter, the Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) did establish the existence of discrimination of families with children under the pension system in effect that the legislature must eliminate; the constitutional complaints themselves were, however, dismissed, and the Federal Constitutional Court also found the challenged provisions to be compatible with the Basic Law.

Selected Fundamental Decisions of
the Federal Constitutional Court

Extract from the Grounds:

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C. II.

The Widows' and Surviving Dependents' Pension and Periods of Child Raising Act and the Child Raising Benefits Act did not violate the Basic Law by generally failing to equate child raising time with periods of contribution to the statutory pension insurance system. The legislature must, however, compensate to a greater extent than in the past for the deficiency in the pension insurance system that is manifested in the disadvantages as regards pension benefits resulting from child raising.

1. It is not possible to infer an obligation from Article 6.1 of the Basic Law that would compel the legislature to make provision for greater retirement benefits for child raising than those provided under the Widows' and Surviving Dependents' Pension and Periods of Child Raising Act and the Child Raising Benefits Act.

Article 6.1 of the Basic Law constitutes a right of freedom that obligates the state to refrain from encroaching on family matters (see BVerfGE 6, 55 [76]; 80, 81 [92]). Article 6.1 of the Basic Law also contains an "underlying valuebased decision" that establishes the duty of the state to protect and promote the family (see BVerfGE 6, 55 [76]; 82, 60 [81]; established case law).

However, the state is not bound to compensate for every burden affecting the family or alleviate the burdens of everyone with maintenance obligations (see BVerfGE 82, 60 [81] with further references).

It is equally impossible to infer an obligation from Article 6.1 of the Basic Law to the effect that the state must promote the family without regard for other public interests. State promotion of the family through financial benefits is contingent upon what is feasible in the sense of what the individual can reasonably expect from society. The legislature must in the interest of the common good also take into account other social needs besides promotion of the family in its budget and in so doing respect in particular overall viability and equity. Only if these principles are taken into account is it possible to establish whether promotion of the family by the state is manifestly inappropriate and no longer satisfies the promotion requirement of Article 6.1 of the Basic Law (see BVerfG, op. cit., 8182). Accordingly, it is indeed possible to infer a general duty on the part of the state to compensate for burdens on families from the value-based decision in Article 6.1 of the Basic Law in conjunction with the principle underlying the social welfare state, but not, however, a decision as to the scope of such social compensation and the form it must take. Concrete implications with respect to the specific areas of law and subsystems in which relief is to be provided for families, cannot be inferred from the constitutional mandate. In fact, the legislature has an "in principle" operating latitude in that regard (see BVerfGE 39, 316 [326]; 82, 60 [81] with further references).

2. Moreover, Article 3.1 of the Basic Law, which must, however, be considered in conjunction with Article 6.1 of the Basic Law, must be considered the primary standard of review.

a) Article 3.1 of the Basic Law prescribes equal treatment for all persons under the law.

**60 Years German Basic Law:
The German Constitution and its Court**

This does not, however, completely prevent the legislature from making distinctions. Indeed, the principle of equality is intended to prevent any class of persons addressed by a statute from being treated differently from any other persons addressed by that statute despite the fact that no difference exists between the two classes of such nature or weight as to justify such unequal treatment (BVerfGE 55, 72 [88]). The legal distinction must therefore also be sufficiently supported by objective differences. Application of this principle requires comparison of personal circumstances, which will be identical in certain respects, but never in all respects. Given this situation, it is in principle the task of the legislature to decide which of these attributes it considers to be determinative for purposes of making provision for equal or unequal treatment (see BVerfGE 83, 395 [401]). Article 3.1 of the Basic Law prohibits the legislature only from improperly ignoring the nature and weight of actual differences. It is free to make its decisions within these limits. However, other articles of the Basic Law may give rise to further restriction. If the legislature makes distinctions to the disadvantage of the family, then it is necessary to take into account the special protection the state affords the family under Article 6.1 of the Basic Law (see BVerfGE 18, 257 [269]; 67, 186 [195, 196]).

- b) The existing old-age insurance system results in disadvantages for persons who devote themselves to child raising within the family as compared with childless persons, who can generally pursue employment. Pension law does not to be sure make any distinction between persons with families and those with none. Moreover, payment of pension benefits is independent of familial status and contingent exclusively upon previous payment of contributions from income from employment. This is what determines pension entitlement. The reasons for separation from employment and the resultant failure to make such contributions are immaterial. Under pension law, persons who separate from employment for reasons having to do with child raising are treated the same as non-employed persons.

However, unlike the reasons that might otherwise be responsible for unemployment and the resultant failure to make contributions, child raising is important in terms of securing the existence of the pension system. For the pension insurance system, which takes the form of a generational compact, cannot be maintained without the ensuing generation. This is the generation that will provide the funds for the pension benefits of the generation that is currently employed. Without a subsequent generation, the current generation would to be sure have paid contributions towards pension insurance, but could not expect to receive benefits from that insurance system. Due to the effect of the broad base of the pension insurance system, the fact that not every child will ultimately become a contributor can be ignored in this context.

The nature of pension insurance up to now has been such that it in effect leads to discrimination of families, in particular those with several children. Families with one parent who leaves its employment for child raising purposes, not only accept less income as compared with childless persons, but must in fact also share that reduced income with several persons. When their children enter employment and help to maintain the old-age security of their parents' generation through their contributions, the parents themselves must expect lower pensions.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- c) Discrimination of families with one parent who assume responsibility for child raising is not compensated for through state benefits or in any other manner.

It is precisely the system of compulsory insurance that is responsible for the significant decrease in old-age support that used to be provided by children prior to the introduction of pension insurance. The obligation to make insurance contributions reduces the financial resources of the children. Money that they could otherwise have used to support their parents when they were no longer employed if it were not for the compulsory contributions is taken away from them and transferred to the shared risk pool, which uses these funds to pay pension benefits to the insured community as a whole.

Widows' and surviving dependants' pensions, which used to compensate women to a certain extent for the lack of their own retirement benefits due to child raising when women were typically not employed, have for the most part lost this function since employment of both spouses has become more common and the number of children has decreased. The various allowances that exist in connection with the equalization of family related burdens (child raising allowance, family allowance, tax exemption for dependent children and educational assistance) also do not make up for the deficits that parents incur in terms of old-age security as compared with childless couples. The same applies to the "baby year" provisions of the Widows' and Surviving Dependents' Pension and Periods of Child Raising Act and the Child Raising Benefits Act. They have also compensated for the discriminatory effect on families only to a relatively modest extent.

This means in essence that despite the state's efforts to equalize family burdens child raising is considered a private matter, whereas old-age security is considered to be the responsibility of society. The existence of discrimination of families under legislation regarding social transfers that the complainants have set forth was also not "in principle" refuted during the oral hearing.

- d) In view of the mandate to provide protection under Article 6.1 of the Basic Law, which restricts the scope of operation under Article 3.1 of the Basic Law, an adequate reason for the discrimination of families under existing legislation is lacking. In particular, the current nature of the pension insurance system, which is based on the principle of insurance and the function of a pension as a substitute for earnings which is a system that finances the benefits it pays out on a pay-as-you-go basis, does not constitute an adequate reason for the significant discrimination that ultimately results for those who raise children as compared with those who remain childless. As is illustrated by the provisions of the Widows' and Surviving Dependents' Pension and Periods of Child Raising Act, ways exist to incorporate recognition of child raising activities into the structure of the pension insurance system. This finding does not, however, lead to objection on constitutional grounds to the provisions of applicable legislation pertaining to pension insurance submitted for review and challenged in the constitutional complaints, but only to an obligation on the part of the legislature to gradually eliminate discrimination to a greater extent than has been the case up to now.

**60 Years German Basic Law:
The German Constitution and its Court**

The disadvantages ascertained are rooted not solely in pension law and therefore must also not only be eliminated there. The fact advanced by the complainants that social transfers are effected from families with several children to families with a single child, which are in any case already in a better position, and childless couples as a result of the current legal situation relate not only to pension law, but also to equalization of family burdens in general. This does indeed make it possible to conclude that the legislature has up to now only incompletely fulfilled its protective mandate under Article 6.1 of the Basic Law. It is not, however, possible to draw concrete conclusions from this in respect of the statutory pension insurance system. The legislature is, moreover, in principle free to eliminate discrimination of families as it sees fit.

Insofar as discrimination is specifically reflected in the old-age benefits of those family members who assume responsibility for child raising, it must be compensated for principally through provisions of pension law. Here too, the operating latitude of the legislature is not insignificant. In particular, it does not follow from Article 3.1 of the Basic Law in conjunction with Article 6.1 that the legislature is under any obligation to equate child raising with the payment of contributions for purposes of establishing pension entitlement. Under the pay-as-you-go system employed by the pension insurance system since 1957, which cannot be objected to on constitutional grounds, child raising and the payment of contributions are not analogous. Unlike the monetary contributions of the employed population, contributions to the maintenance of the pension insurance system made in the form of child raising cannot be immediately redistributed to the older generation in the form of pension payments. The different functions the two forms of contribution have for the pension system also justify different treatment when it comes to the establishment of entitlement to pension benefits.

On the other hand, taking into account child raising under pension law does represent an appropriate way - and one that is compatible with the system - to compensate for discrimination at the level of old-age security. By recognizing child raising time for the purposes of establishing entitlement to and determining increases in pension benefits under the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act, the legislature has already taken an initial step in the direction of improving the old-age security of child raisers under the statutory pension insurance system although there is no immediately apparent reason for limitation to an amount equal to 75 per cent of the average income. The increase in the duration of child raising time that is credited which resulted from the 1992 Pension Reform Act (*Rentenreformgesetz - RRG*) represents a further step. This reform, which will not result in higher old-age pensions until some time in the more remote future, is not intended to represent the end of efforts to achieve further compensation, as the motion of 21 June 1991 submitted by the CDU/CSU, SPD and FDP parties (*Bundestag* document [*Drucksache des Deutschen Bundestages - BTDrucks*] 12/837) and adopted by the Bundestag shows according to which period up to the expiration of the safeguard provisions of the Pension Transition Act (*Rentenüberleitungsgesetz - RÜG*) is to be used in particular to improve the old-age security of women under the performance based pension insurance system. This is intended to include in particular broader recognition of child raising time.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- e) The legislature is entitled to an adequate transitional period for fulfilment of its constitutional mandate (see BVerfGE 54, 11 [37]; 80, 1 [26]). This applies in particular to reforms that, as in the present case, require considerable legislative effort in various areas of law and substantial financial means. The operating latitude of the legislature would be impermissibly restricted if it were to be prevented from implementing such a complex reform as that involving the assessment of child raising time for the purposes of old-age insurance in several phases in order to limit the regulatory effort and financial implications and take advantage of the experience gained in the course of the reform (see BVerfG, Order of 5 November 1991 1 BvR 1256/89, *FamRZ* 1992, p. 157 [160]).

When planning the various phases of the reform, the legislature may take into account the current state of the budget and the financial situation of the statutory pension insurance system. The federal government and legislative bodies must, however, consider the constitutional mandate in connection with both the future development of the pension insurance system and medium and longer-term financial planning. In this context, they are not limited by the Basic Law exclusively to the use of federal funds for the purposes of compensation. The protection of earned pension benefits afforded under Article 14.1 of the Basic Law does not preclude moderate reallocation within the statutory pension insurance system at the expense of persons with no or few children. The Basic Law also leaves room for change in survivors' benefits in order to attach greater weight to the duration of marriage in the case of pensions for widows and widowers and to take into account whether a surviving spouse was prevented from acquiring independent entitlement to retirement benefits through child raising or care within the family. Apart from the way in which funds for compensatory provisions are obtained, it is in any case necessary to ensure that each step of the reform actually results in less discrimination of families. The legislature, which is bound by its constitutional mandate, must take this into account in a recognisable manner.

3. Article 6.4 of the Basic Law does not come into question as a standard of review. The issue as to whether this provision entitles mothers to protection beyond pregnancy and the initial months following birth need not be addressed. In any case, no special rights can be inferred from this provision that do not pertain exclusively to mothers. Interpretation of Article 6.4 of the Basic Law to the effect that compensation for child raising activities may be granted (only) to mothers is also in contradiction with Article 3.2 of the Basic Law, which prohibits the reinforcement of traditional gender roles (see BVerfG, Judgment of 28 January 1992 - 1 BvR 1025/82 *inter alia*, *EuGRZ* 1992, p. 17 [21]).

However, the fact that child raising is not adequately taken into account under the statutory pension insurance system is in fact disadvantageous primarily to mothers since they fill today assume most of the responsibility for raising children and therefore limit, interrupt or completely abandon their employment. This does not, however, affect the protection afforded by Article 6.4 of the Basic Law. Moreover, since significantly more women are affected, this provides reason for the legislature to fulfil its mandate to promote equality between men and women under Article 3.2 of the Basic Law (see BVerfG, *loc. cit.*).

The legislature will also have to take this into account.

**60 Years German Basic Law:
The German Constitution and its Court**

4. The provisions under challenge do not constitute an encroachment on the part of the legislature on the legal rights protected by Article 14.1 of the Basic Law. The protection of property presupposes the existence of a legal right recognized by statute (see BVerfGE 83, 201 [208, 209]).

However, prior to the enactment of the Widows' and Surviving Dependents' Pension and Periods of Child Raising Act, no personal legal right existed in respect of credits for child raising time that could have been the object of any encroachment by the legislature. It was the Widows' and Surviving Dependents' Pension and Periods of Child Raising Act that created these rights in the first place. The same applies as regards child raising benefits under the Child Raising Benefits Act.

5. There is no occasion to make any decision here as regards the details of the provisions adopted under the Widows' and Surviving Dependents' Pension and Periods of Child Raising Act that does not affect the Child Raising Benefits Act such as, for example, provisions that govern the concurrence of child raising time and periods of contribution. The complainants and petitioners in the initial proceedings for concrete judicial review are constitutionally excluded from the scope of application of the Widows' and Surviving Dependents' Pension and Periods of Child Raising Act. Only the Child Raising Benefits Act applies to them.

III.

The provisions of the Widows' and Surviving Dependents' Pension and Periods of Child Raising Act were also compatible with the Basic Law in that child raising time was not taken into account in the calculation of old-age benefits paid to mothers born in the years prior to 1921 since they had reached the age of 65 and no provision had also been made for general benefits for child raising for this class of persons. The Child Raising Benefits Act was compatible with the Basic Law insofar as it does not accord the above class of persons benefits for child raising until a time subsequent to 1 January 1986. The unequal treatment of mothers born in the years prior to 1921 on the one hand and after 1921 on the other hand cannot be objected to on constitutional grounds.

1. The provision of the Widows' and Surviving Dependents' Pension and Periods of Child Raising Act (s.1a.1 of the Reich Insurance Code and s. 28a.1 of the Salaried Employees Insurance Act) to be reviewed in this regard is based on a cut-off date. Under this provision, credit for child raising time was accorded under the statutory pension insurance system only in the case of mothers and fathers born after 31 December 1920. In this context, Article 2.5c and Article 2.6c of the Salaried Employees' Pension Insurance (Reform) Act (*Arbeiterrentenversicherungs-Neuregelungsgesetz - AnVNG*) made provision for taking into account child raising time prior to 1 January 1986 only in the case of insurance claims occurring after 30 December 1985.

The legislature is in principle not prohibited by Article 3.1 of the Basic Law from introducing cut-off dates for the purposes of regulating certain circumstances affecting the lives of individuals although any cut-off date will inevitably result in certain hardships.

The choice of point in time must, however, be based on the given facts of the situation (BVerfGE 75, 108 [157]), which that is the case here.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- a) Since the legislature wanted to gradually eliminate a deficiency in the statutory pension insurance system, it was natural and objectively justified to situate the measure in the area of pension insurance. In so doing, it was necessary to take into account the structures of the pension insurance system. This was achieved by restricting the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act to new pensions and consequently to persons born from 1921 on and not on the other hand reopening pension biographies that had already been closed. Due to the traditional gender roles of men and women, mothers born in the years prior to 1921 had also in many cases not been employed and therefore not acquired entitlement to a pension (see *Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks] 60/87, p. 20).

It would have been possible only to an unsatisfactory extent to achieve the legislature's goal of having them accorded benefits for child raising with the solution for determining entitlement to and increases in retirement benefits under the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act, which - as was set forth above - would as such have been justified. Women born after 1921 onwards are also to be sure in some cases not entitled to a pension, but they were nevertheless able to close gaps in their pension biographies by making voluntary contributions (see s. 1233 of the Reich Insurance Code and s. 10 of the Salaried Employees Insurance Act, now: s. 7 of the Social Code VI) and at least in this way receive benefits under the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act in the event of an insurance claim. In the case of mothers born in the years prior to 1921, who had already reached retirement age, this possibility was excluded.

In the case of a cut-off provision other than that adopted by the legislature, pension insurance providers would also have been confronted with virtually insurmountable practical difficulties. When the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act went into effect on 1 January 1986, the pension biographies of mothers and fathers born in the years prior to 1921 had already been closed. According to the expert opinion of the Association of German Pension Providers (*Verband Deutscher Rentenversicherungsträger* - VDR), a total of 1,624,671 cases involving payment of child raising benefits were counted in September 1989 for persons born in the years 1907 to and including 1911. Taking into account those born in the years thereafter up to the end of the year 1920, it was possible to assume the existence of 3.7 million such cases. In terms of the personnel resources required, the pension insurance providers would not have been in a position to reprocess such a large number of pension files that had already been closed, to recalculate pensions to take into account child raising time or to determine new pensions for mothers who had previously not been insured under the statutory pension insurance system.

- b) Although a solution was chosen under pension insurance law in the form of the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act, the fact that financing was lacking, which the legislature assumed by virtue of its discretionary prerogative powers, also represented an objective ground for not including mothers born in the years prior to 1921 under this provision. Financial considerations are permissible, especially in the case of legislation involving entitlements (see BVerfGE 75, 40 [72] with further references).

**60 Years German Basic Law:
The German Constitution and its Court**

A provision that applies only to the class of persons who are not yet receiving a pension (new pensions) takes effect only gradually. Such a provision does not directly affect a person until an insurance claim occurs (regularly upon reaching the age of 65). The benefits to be provided then fall due only gradually. If on the other hand recipients of pension benefits (current pensions) were also to be covered by the provision, the benefits for this class of individuals would become due as soon as the legislation entered into force. The cost would then be much higher than in the case of a provision that is limited to new pensions. This also justifies the fact that the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act makes no provision for general child raising benefits for those born in the years prior to 1921, which the Child Raising Benefits Act did do at a later time.

2. The provision governing child raising introduced under the Child Raising Benefits Act granted mothers born in the years covered entitlement to benefits in an amount commensurate with that afforded on the basis of child raising time under the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act. However, unlike the Widows' and Surviving Dependants' Pension and Periods of Child Raising Act, which went into effect on 1 January 1986, the Child Raising Benefits Act makes provision for commencement of benefits only as of 1 October 1987. As a result, benefits of the class of persons affected are interrupted for at least 21 months. In addition, since the legislature had made provision for the phased commencement of benefits for those born in the years that qualified for eligibility under the Child Raising Benefits Act, only those mothers born prior to 1907 started to receive benefits based on child raising as of 1 October 1987. Mothers born in subsequent years, on the other hand, only started to receive benefits based on child raising thereafter. The legislature therefore made distinctions as regards the commencement of benefits on the basis of age among those belonging to the class of persons who benefited from the Child Raising Benefits Act. These distinctions are also objectively justified.

It is necessary to proceed on the basis of the estimate of the legislature, according to which only limited funds in an amount estimated at DM 6.05 billion were available for the period up to 1991. By adopting a phased approach, the legislature privileged those born in the earlier of the classes of years affected, which was as a result disadvantageous in particular for the class of persons born in the years 1917 to 1920. Although fiscal efforts to reduce expenditure do not as a general rule in and of themselves constitute sufficient justification for unequal treatment of different classes of persons (see BVerfGE 19, 76 [84]), the solution must be accepted in this case since no other practicable solutions are apparent. The only other possibility available to the legislature would otherwise have been to distribute the limited public funds on the basis of the "watering can" principle (see BVerfGE 75, 40 [72] with further references).

In the case of such a provision, the potential benefits per child would have been significantly lower than under the Child Raising Benefits Act. As the Federal Minister for Labour and Social Affairs (Bundesminister für Arbeit und Sozialordnung) set forth in his opinion, the introduction of benefits based on child raising as of 1 January 1986 for all mothers affected would have resulted in payments in the amount of only DM 1.13 per month in the year 1986. The amount of benefits would have increased only

**Selected Fundamental Decisions of
the Federal Constitutional Court**

slightly in the years thereafter and would not have reached the amount planned when the Child Raising Benefits Act entered into effect until the year 1990. The situation is similar in the case of uniform entitlement of benefits based on child raising for all mothers from 1 October 1987 on.

In the end, uniform distribution of funds available for implementation of the Child Raising Benefits Act for the years 1986 to 1989 to all mothers born in the years affected would not have produced a situation comparable with that based upon credit for child raising time under the Widows' and Surviving Dependents' Pension and Periods of Child Raising Act, for the benefits would have been substantially lower for a prolonged period of time. Mothers born in the years prior to 1907 would in effect have been at a significant disadvantage as compared with younger mothers in the case of such distribution due to their lower life expectancy. Apart from mere fiscal considerations, the legislature did, however, intentionally employ available funds to accord the oldest of those born in the relevant years chronological preference in view of their advanced age. There can be no objection to this.

The phased approach adopted under the Child Raising Benefits Act was of course especially disadvantageous for mothers born in 1920 as compared with those born in 1921, who had already benefited from the Widows' and Surviving Dependents' Pension and Periods of Child Raising Act. However, this constitutes a hardship that is necessarily inherent in any regulation involving a cut-off date and must therefore be accepted (see BVerfGE 3, 58 [148]; 49, 260 [275]; 80, 297 [311]).

It is, however, necessary to consider whether the legislature used its vested operating latitude in an appropriate manner, whether it adequately weighed the factors involved in the use of a chronological standard and whether the solution arrived at can be justified on objective grounds in view of the facts of the situation and the overall system in which the provision is embedded or whether it seems arbitrary (see BVerfGE 44, 1 [21, 22]; 80, 297 [311]).

However, the provision withstands examination in light of these criteria also in respect of mothers born in the years 1917 to 1920. When the law was enacted, the legislature was justified in taking into account that this class of persons would be likely to receive benefits based on child raising for a longer period of time, whereas this could not be assumed to the same extent in the case of mothers born in the preceding years due to their general life expectancy.

IV.

Finally, the provision is also not in violation of Article 3.1 and 3.3 of the Basic Law because fathers born in the years prior to 1921 are not entitled to benefits under the Child Raising Benefits Act whereas mothers born during those years do receive benefits based on child raising and younger fathers are included under the Widows' and Surviving Dependents' Pension and Periods of Child Raising Act.

**60 Years German Basic Law:
The German Constitution and its Court**

When the provision embodying these distinctions was enacted, the legislature proceeded on the assumption that fathers would typically not have assumed responsibility for child raising in the cases covered by the Child Raising Benefits Act and would therefore have incurred no disadvantages in terms of retirement benefits based on child raising; this, in the opinion of the legislature, reflected the typical roles within the family at the time (*Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks] 60/87, pp. 20 et seq.).

It is not possible to ascertain any error in this assessment (see also BVerfGE 39, 169 [187, 188]).

It justifies exclusion of fathers from benefits based on child raising under the Child Raising Benefits Act, in particular in view of the goal of the legislature, which was to implement this law in a manner that would involve as little administrative effort as possible.

V.

Although the constitutional complaints were rejected, the complainants did succeed in compelling the legislature to take into account child raising as part of life under the statutory pension system to a greater extent in the future. It is therefore appropriate to order reimbursement of half of their necessary expenses incurred (s. 34a.3 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* - BVerfGG)).

c) Transsexuals, BVerfGE 88, 87

Explanatory Annotation

The legislation at issue in this case allowed the name change for transsexual persons who had not undergone a sex-change operation only if the person in question was over 25 years old. The Court regarded this as a violation of the equality clause in Article 3.1 of the Basic Law. Interestingly the Court went beyond the classical interpretation of Article 3.1 according to which differentiation between two groups - in this case under 25 year old transsexuals and over 25 year old transsexuals - is possible and justified if based on reasonable grounds. The Court saw the discrimination based on age as being similar to the discrimination based on the list of attributes in Article 3.3. Age is not contained in that list but the Court drew on the fact that both age as a differentiating criterion and the criteria listed in Article 3.3 are person based criteria. In addition, the discrimination of the under 25 year old transsexuals had grave consequences for their personality rights as protected by Article 2.1 of the Basic Law. On this basis the Court resorted to the stricter “compelling reasons”-test employed under Article 3.3 rather than the more lenient ‘reasonable justification’-test normally employed under Article 3.1. The justification given for the age discrimination, allowing for enough time for the decision to reflect the sex change in the name to settle with sufficient confidence, might have qualified under the more lenient basic test but it failed the stricter test as the Court saw no compelling reasons for this discrimination.

Selected Fundamental Decisions of
the Federal Constitutional Court

**Translation of the Second Transsexuals Judgment - Decisions of the Federal
Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 88, 87***

Headnote:

It is incompatible with Article 3.1 of the Basic Law (Grundgesetz - GG) to deny transsexuals under the age of 25 the right to change their first names that is afforded older transsexuals under s. 1 of the Transsexuals Act (Transsexuellengesetz - TSG).

Order of the First Senate of 26 January 1993 - 1 BvR 38, 40, 43/92 -

Facts:

The petitions concern the question as to whether denial of the possibility of a change of first names before the age of 25 under s. 1 of the Transsexuals Act is compatible with the Basic Law.

The Act on Changes of First Names and Establishment of Gender Identity in Special Cases (Transsexuals Act) of 10 September 1980 (Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I p. 1654) was enacted pursuant to the order of the Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) of 11 October 1978 to take into account the special situation of transsexuals (BVerfGE 49, 286).

In addition to a procedure that permits a change of first names following establishment of a change of gender affiliation after sex-reassignment surgery (“major solution”), the law makes provision for the possibility of a change in the first names of transsexuals who have not undergone previous surgical intervention (“minor solution”).

- a) Conditions, procedures and legal consequences of the minor solution are governed by ss. 1 to 7 of the Transsexuals Act. S. 1 is worded as follows: (1) The first names of persons who by reason of their transsexual nature no longer identify with the gender specified in their registration at birth, but rather with the opposite gender and have for at least three years felt compelled to live according to their preferences must upon application be changed by the court if:
1. they are German within the meaning of the Basic Law or stateless or homeless aliens whose usual abode is within the jurisdiction of this Act or persons with the right to asylum or alien refugees whose residence is within the jurisdiction of this Act,
 2. it can be assumed with a high degree of probability that their sense of affiliation with the opposite gender will no longer change, and
 3. they are at least twenty-five years of age.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

**60 Years German Basic Law:
The German Constitution and its Court**

(2) The first names the applicant desires to use in the future must be provided in the application. The initial proceedings relate to two female-to-male transsexuals and one male-to-female transsexual. The petitioners are German citizens between the ages of 22 and 24 years of age who seek a change of first names under s. 1 of the Transsexuals Act. The opinions obtained by the local courts from two experts in each case conclude that the petitioners have for at least three years felt compelled to live as persons of the opposite gender and that it is highly probable that this transsexuality is no longer reversible.

2. The local courts stayed the proceedings and submitted the question as to whether s. 1.1 no. 3 of the Transsexuals Act is compatible with the Basic Law to the Federal Constitutional Court for decision.

Extract from the Grounds:

B.

S. 1.1 no. 3 of the Transsexuals Act is incompatible with Article 3.1 of the Basic Law and void.

I.

1. Depending on the object of regulation and the distinguishing characteristics involved, the constraints imposed upon the legislature by the general principle of equality vary, ranging from mere prohibition of arbitrariness to strict compliance with the requirements of proportionality. The gradation of these requirements follows from the wording and meaning of Article 3.1 of the Basic Law and its context in combination with other provisions of the Basic Law.

Since the principle to the effect that all persons are equal before the law is primarily intended to prevent unjustifiable differences in the treatment of individuals, the legislature is regularly bound to strict compliance when dealing with the unequal treatment of different classes of persons (see BVerfGE 55, 72 [88]). The greater the affinity between the personal attributes and those specified in Article 3.3 of the Basic Law and the greater therefore the danger that unequal treatment based on such attributes will result in discrimination of a minority, the stricter the constraints upon the legislature become. Stricter compliance is, however, not limited to differences that relate to persons. Indeed, it also applies if the unequal treatment of situations results indirectly in unequal treatment of different classes of persons. In the case of distinctions made exclusively on the basis of conduct, the degree of constraint imposed on the legislature varies as a function of the extent to which the affected persons are able through their conduct to influence the manifestation of the attributes on the basis of which such distinctions are made, (see BVerfGE 55, 72 [89]). Moreover, the more unequal treatment of individuals or situations can negatively impact the exercise of freedoms that enjoy constitutional protection, the narrower the operating latitude of the legislature becomes (see BVerfGE 60, 123 [134]; 82, 126 [146]).

The variance in the scope of operating latitude of the legislature is reflected in the gradation of the intensity of control in the case of constitutional review. If prohibition of arbitrary treatment is the only standard involved, violation of Article 3.1 of the Basic Law can be established only if a lack of objectivity is evident in the distinctions made (see BVerfGE 55, 72 [90]).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

In the case of provisions of law that stipulate different treatment for different classes of persons or negatively affect the exercise of fundamental rights, on the other hand, the Federal Constitutional Court examines in detail whether reasons of such nature and importance exist for the distinctions made as to justify the unequal legal consequences (see BVerfGE 82, 126 [146]).

The considerations underlying this graduated approach are also of importance in respect of the question as to the extent to which the legislature may exercise its discretionary prerogative powers in its assessment of the original situation and the possible ramifications of the provisions it adopts. The standards for the review of such prognostic assessments also vary, extending from mere review of evidence to rigorous substantive control. In particular, the specific nature of the respective facts at issue and the importance of the legal interests at stake must be taken into account in this context; in addition, the latitude for prognosis varies as a function of the possibilities available to the legislature for forming a sufficiently certain judgment when the decision was made (see BVerfGE 50, 290 [332, 333]).

2. These standards require strict review of s. 1.1 no. 3 of the Transsexuals Act. The age limit for a change of first names involves making a distinction that is based on personal attributes and has a significant effect on the general right to personality. Article 2.1 in conjunction with Article 1.1 of the Basic Law protects the narrower personal sphere of life, including in particular the area of intimacy and sexuality (see BVerfGE 47, 46 [73]); 60, 123 (134)., and guarantees the right of persons to determine in principle when and to what extent they divulge personal information (see BVerfGE 65, 1 [41, 42]; 84, 192 [194]).

The Transsexuals Act serves to protect these legal interests. The minor solution is intended to take into account the special situation of transsexuals prior to sex-reassignment surgery or if surgical intervention is foregone and enable them to live in their felt gender roles without having to make this known to third parties and public authorities in everyday life. The provision submitted for review would therefore be compatible with Article 3.1 of the Basic Law, only if there were reasons of such nature and importance for prohibiting transsexual inclined persons under the age of 25 years from changing only their names as to justify unequal treatment. This is, however, not the case.

- a) The age limit results in serious discrimination of persons under the age of 25 who have been found by two experts to be with a high degree of probability irreversibly transsexual. After the Act went into effect, these persons had absolutely no way of changing their first names to names corresponding to their sensibilities and appearance before the age of 25. As per the order of the Federal Constitutional Court of 16 March 1982 (BVerfGE 60, 123), they have recourse to the possibility of declaratory proceedings under legislation governing civil status and as a result to a change of first names under s. 8 of the Transsexuals Act as soon as the required surgical intervention has been carried out. Unlike transsexuals who have reached the age of 25, they are denied the possibility of living in the role of the other gender prior to sex-reassignment surgery without having to constantly subject themselves to burdensome situations at work, at school, in their dealings with public authorities and in everyday life in general.

This unequal treatment is especially serious in view of the purpose of the minor solution. The provision governing the change of first names is intended to create the general legal prerequisites for enabling transsexuals to cross-live early on in order to

**60 Years German Basic Law:
The German Constitution and its Court**

provide them with help prior to surgical intervention and significantly alleviate the emotional pressure to which they are subjected. In addition, legal establishment of the change of roles is intended to enable them to experience life in the opposite gender role for a lengthier period of time before making a decision as regards for the most part irreversible medical measures and to ascertain with certainty whether this life really suits their sensibilities and is something they can cope with. This is intended therefore not only to achieve additional certainty as regards the diagnosis, but also to facilitate habituation to the new role prior to major surgical intervention.

Denial of these possibilities may have especially serious ramifications in the case of younger transsexuals. On the one hand, they are of an age at which they as a rule have to make plans for their future occupational lives, complete their education and often seek employment for the first time. It is therefore especially important for them to develop self-confidence in the role corresponding to their sensibilities and to be spared awkward situations that may arise if the names that appear in their identification do not correspond to their appearance. The purpose of the minor solution, which is to help avoid difficulties in everyday life, in particular as regards relations with employers, is of considerable importance to them. On the other hand, younger transsexuals in particular have an interest in cross-living before subjecting themselves to for the most part irreversible operations and not, the other way around, in being compelled by the legal situation to decide hastily to undertake such measures. A major concern of the legislature was therefore also to prevent decisions without sufficient reflection, especially on the part of younger people.

- b) No reasons are apparent that would justify such serious discrimination of younger transsexuals.

There is no need here to address the question as to whether fears to the effect that the transsexual inclination of younger people with a certain such inclination could be prematurely fixed if it were easier to obtain a change of first names lay within the purview of the discretionary prerogative powers of the legislature when the law was enacted. It is equally unnecessary to examine more closely the question as to whether the minimum age of 25 years for a change of first names could on the basis of the state of knowledge at the time have seemed to constitute a suitable measure for discouraging decisions that were unreflected and based on insufficiently certain diagnosis. The assumption that the age limit prescribed in s. 1.1 no. 3 of the Transsexuals Act was required to protect younger people against an overly hasty change of roles and the ramifications of a possible error in prognosis can in any case no longer be justified today. Moreover, younger people are not better, but rather less well protected against the risk of an error under the current law.

Following the decision of the Federal Constitutional Court that declared void the minimum age for declaratory proceedings under legislation governing civil status contained in s. 8 of the Transsexuals Act, the legislature saw no occasion for the introduction of an age limit for sex-reassignment surgery (cf. A I 3). It did not therefore - no doubt in view of the expert opinions obtained - consider it necessary to

Selected Fundamental Decisions of the Federal Constitutional Court

protect younger people who were diagnosed as being with a high degree of probability irreversibly transsexual and for whom surgical intervention was considered medically indicated against unreflected decisions due to the possibility of an error in prognosis.

Under these circumstances, there is no obvious reason to protect the same class of persons against a decision that is much less incisive and can be reversed if the diagnosis in the individual case should happen - despite the protective procedural measures provided for in ss. 1 to 4 of the Transsexuals Act - to be in error. Moreover, the age limit for a change of first names is more likely to be such as to make life in the other gender role for a lengthier period of time - and as a result further confirmation of the diagnosis - more difficult prior to surgery and encourage younger transsexuals to opt for sex-reassignment surgery as early as possible since this is the only way they can fulfil the conditions for a change of first names under the major solution. The argument to the effect that the risk of misdiagnosis is greater than originally assumed and that transsexuality is today viewed as a whole differently therefore also cannot be used to justify denial of a change of first names in the case of younger people with a transsexual inclination. It may be true that the prognosis of irreversible transsexuality presents difficulties, but this does not speak against making the minor solution available to younger transsexuals, but rather in favour of also making it easier for them to acquire the experience of cross-living before taking irreversible measures. It is just as impossible to infer from a more differentiated view of transsexuality that younger transsexuals should be deprived of the possibility of a change of first names. For the minor solution was created precisely in view of the fact that physicians and psychologists consider further latitude for treatment and decision making necessary prior to irreversible operations (see Pfäfflin, *StAZ* 1986, p. 199 (201); see also Ehrhardt, in: *Festschrift für Volrad Deneke*, 1985, p. 272 [280, 281]; Sigusch, *Zeitschrift für Sexualforschung* 1991, p. 309 [p. 337, fn. 5]).

3. Since s. 1.1 no. 3 of the Transsexuals Act is already unconstitutional because it is in violation of Article 3.1 of the Basic Law, the question as to the existence of reservations with respect to the provision in view of Article 2.1 in conjunction with Article 1.1 of the Basic Law need not be resolved.

II.

If a statute is incompatible with the Basic Law, it must in principle be declared void (s. 82.1 in conjunction with s. 78 sentence 1 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG)). Because of the operating latitude of the legislature, the situation is different if a violation of Article 3.1 of the Basic Law can be eliminated in various ways. If, however, it can be assumed with certainty that the legislature would, taking into account the general principle of equality, choose the provision remaining after the declaration of nullity, the Federal Constitutional Court may void a provision that is incompatible with Article 3.1 of the Basic Law (see BVerfGE 27, 391 [399]).

This is not the case here. Since, after obtaining expert opinions, the legislature refrained from making provision for an age limit for sex-reassignment surgery, it cannot be assumed that it would introduce a new age limit for a change of first names. The question as to whether a

**60 Years German Basic Law:
The German Constitution and its Court**

significantly lower age limit than that provided for up to now under s. 1.1 no. 3 of the Transsexuals Act would be compatible with the principle of equality need not therefore be examined.

The possibility that the legislature would choose to eliminate the constitutional violation by completely eliminating the provision governing the change of first names and limit the Transsexuals Act to the major solution can also be excluded; the question as to whether such a decision would adequately respect the general right to personality need therefore also not be clarified in this context. The decision to make provision for a minor solution in addition to the major solution was made in 1980 following thorough debate. No reasons can be discerned that would indicate that this provision has not proven its worth or led to abuse. The opinions of the Federal Medical Association (Bundesärztekammer) and the German Society for Sex Research (Deutsche Gesellschaft für Sexualforschung) from the years 1983 and 1984 speak against such an assumption; the Federal Minister of the Interior (Bundesminister des Innern) also mentioned no indication of disadvantageous effects of the minor solution in his statement on this procedure. Rather, the expectation associated with this solution to the effect that facilitation of the change of first names could in itself contribute to a significant improvement in the situation of transsexuals prior to surgery and give physicians and transsexuals themselves greater latitude for making decisions would seem to have been confirmed (see Cabanis, in: *Festschrift für Horst Leithoff*, 1985, p. 487 [491]; Pfäfflin, *StAZ* 1986, p. 190 [201, 202]). The legislature obviously also proceeded on the basis of a positive assessment since it reconfirmed the minor solution when the Passport Act (Passgesetz - PassG) was revised in the year 1986. Under s. 4.1 sentence 3 of the Passport Act, temporary passports represent an exception to the provision contained in s. 4.1 sentence 2 no. 6 of the Passport Act in that they contain no indication of gender; this is intended to ameliorate the situation of transsexuals who have already obtained a change of first names, but who have not yet brought declaratory proceedings pursuant to legislation governing civil status under s. 8 of the Transsexuals Act (see *Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks] 10/5128, p. 5).

d) *Inclusive Education, BVerfGE 96, 288*

Explanatory Annotation

Article 3.3 of the Basic Law stipulates that no person shall be disadvantaged because of disability. The issue in this case was whether the denial of inclusive education for a child with a disability against her and her parents will and her transfer to a special school for children with disabilities constituted such a disadvantage. The relevant authorities justified the denial and the transfer with a lack of supporting resources at the regular school such as individual tuition for several hours and special support staff. The core problem was the question whether and to what degree the special non-discrimination clause of Article 3.3 of the Basic Law demands from the government not only to refrain from discriminating action but also to actively allocate significant resources to create a situation where potentially disadvantageous steps, such as transfer to a special school for the disabled rather than participation in general schools, can be avoided.

The question of whether fundamental rights can be used to create resource relevant entitlements is of utmost significance. An affirmative answer would have grave consequences for the democratic process because the available resources and their allocation would, as resources

Selected Fundamental Decisions of the Federal Constitutional Court

are limited, become a matter of judicial decision rather than parliamentary allocation. It is largely for this reason that there has been great reluctance to interpret fundamental rights in this fashion. It should be noted that on the international plane, economic and social rights have always been treated differently, for example with a view to enforcement, than the rights found in the traditional liberal canon, for example in the International Covenant on Civil and Political Rights (ICCPR) and in many constitutions, the Basic Law among them. It should also be noted, however, that even the traditional liberal rights sometimes contain resource relevant implications. For example, the prohibition of inhumane or degrading treatment, which the Basic Law addresses under Article 1.1 (human dignity) in conjunction with Article 2.2 (life and health), requires that prison facilities meet certain minimum standards. The guarantee of access to courts or fair trial requires that the necessary judicial infrastructure is provided. This illustrates that, despite the reluctance to grant financially relevant entitlements on the basis of fundamental rights, similar effects are not *per se* impossible.

In this case, however, the reluctance prevailed. The Constitutional Court held that the transfer to the special school could only constitute a disadvantage in the sense of Article 3.3 of the Basic Law if the pedagogical needs of the child could have been met at the regular school with available resources. The Court thus linked the criterion of disadvantageous treatment to the availability of relevant resources. The question was not whether education at the special school constitutes a disadvantage as compared to education at the regular school. It may well have been. The question for the Court was whether the government contributed to the disadvantage by denying the child what could have been provided with the available resources and the answer to that question had to be negative in this case.

Translation of the Inclusive Education Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 96, 288*

Headnotes:

1. Judgment concerning the prohibition of discrimination of disabled persons (Article 3.1 sentence 2 of the Basic Law) in the area of education (Grundgesetz - GG).
2. The transfer of a disabled pupil to a special school against the will of the latter and his or her parents does not in and of itself constitute prohibited discrimination within the meaning of Article 3.1 sentence 2 of the Basic Law. Such discrimination does, however, exist if the transfer is made despite the fact that instruction in a mainstream school is possible with supplementary educational support, the requisite personnel and physical resources can be provided with available personnel and means, and organizational difficulties and the legitimate interests of third parties also do not stand in the way of inclusive education.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

**60 Years German Basic Law:
The German Constitution and its Court**

Order of the First Senate of 8 October 1997 - 1 BvR 9/97 -

Facts:

In Lower Saxony, the Lower Saxony School Act (Niedersächsisches Schulgesetz - NSchG) of 1993 stipulated that pupils in the differentiated school system of the Land who due to physical, intellectual or psychological impairment or impairment of their social behaviour require supplementary educational support were to receive education and instruction together with other pupils in all schools if it was possible in this manner to meet their needs for individual support and insofar as organizational, staffing and physical circumstances allowed. Pupils with special educational needs were as a result obliged to attend a special school only if they were unable to receive the necessary support at another type of school. Inclusive goal differentiated education in what is referred to as an integration class may also be considered as an alternative form of support.

After the disabled complainant had completed her primary education at a mainstream school and changed to the fifth grade of an inclusive comprehensive school, the school authority assigned her to a school for the physically disabled against the wishes of her parents since evaluation for this grade had determined that the complainant had special educational needs that could not have been satisfied by the comprehensive school. The proceedings before the administrative courts initiated to obtain injunctive relief against immediate enforcement of this measure were unsuccessful. After a petition for interim relief was accepted by the Federal Constitutional Court, the school authority waived immediate enforcement.

The constitutional complaint against the order of the Higher Administrative Court (Oberverwaltungsgericht) that dismissed the petition for interim relief was ultimately unsuccessful.

Extract from the Grounds:

B.

The constitutional complaint is admissible.

In view of the likely duration of the proceedings in respect of her action, the complainant could not reasonably be expected to exhaust all legal remedies prior to seeking a decision from the Federal Constitutional Court (see BVerfGE 86, 15 [22]).

Her interest in judicial relief also does not cease to exist because the local government rescinded the administrative order in respect of the transfer with immediate effect of the complainant to the school for the disabled during the constitutional complaint proceedings, and the complainant is now attending seventh grade at a general school. The interest in judicial relief remains intact despite disposition of the relief originally sought through the constitutional complaint since clarification of a constitutional issue of fundamental importance would otherwise be lacking and an especially serious encroachment on a fundamental right is challenged (see BVerfGE 91, 125 [133] with further references; established case law). This is the case here. The question as to whether and with what consequences Article 3.3 sentence 2 of the Basic Law must be taken into account in cases involving school law of the nature at issue here is of considerable constitutional importance and has not yet been decided by the Federal Constitutional Court.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

C.

The constitutional complaint is, however, not founded. The challenged order cannot as a result be objected to on constitutional grounds.

I.

1. Under the provision contained in Article 3.3 sentence 2 of the Basic Law - newly created by the Act Amending the Basic Law (Gesetz zur Änderung des Grundgesetzes - GGÄndG) of 27 October 1994 (Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I p. 3146) - persons may not be discriminated against because of a disability.

- a) What qualifies as disability cannot be inferred directly from the legislative materials (see *Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks] 12/6000, pp. 5253; 12/6323, pp. 1112.; 12/8165, pp. 2829).

The legislature that adopted the constitutional amendment did, however, obviously proceed from the common understanding of the term at the time the Basic Law was amended. This is evidenced in particular in s. 3.1 sentence 1 of the Severely Disabled Persons Act (Schwerbehindertengesetz - SchwbG). According to the above, a disability is the effect of a not merely temporary functional impairment that is based on an abnormal physical, intellectual or emotional condition. The same understanding of disability provides the basis for the definition of disability in the Third Report of the Federal Government on the Situation of the Disabled and the Development of Rehabilitation (Dritter Bericht der Bundesregierung über die Lage der Behinderten und die Entwicklung der Rehabilitation), which in turn coincides with the usual delimitations of the term employed internationally (see *Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks] 12/7148, p. 2).

Nothing, on the other hand, speaks against also proceeding on the basis of this definition in principle for the purposes of interpretation of Article 3.3 sentence 2 of the Basic Law (see also Osterloh in: Sachs, *Grundgesetz, Kommentar*, 1996, Article 3 marginal no. 309310; Rübner in: *Bonner Kommentar*, Article 3 marginal no. 870 [May 1996]).

It is not necessary to decide here whether this represents the conclusive definition of disability. The complainant's case provides no occasion for this.

- b) The meaning of the term discrimination and the importance and scope of the prohibition of discrimination embodied in Article 3.3 sentence 2 of the Basic Law also can be inferred only incompletely from their historical development. They can, however, be inferred from the overall substantive content of Article 3.3 of the Basic Law.
- aa) Article 3.3 sentence 2 of the Basic Law was to be sure intentionally aligned with the prohibition of discrimination under the former Article 3.3 and the current Article 3.3 sentence 1 of the Basic Law. This is evidenced by the fact that, like sentence 1, sentence 2 is intended to reinforce protection of the general principle of equality embodied in Article 3.1 of the Basic Law for specific classes of persons and for that reason is intended to prescribe narrower limits to

**60 Years German Basic Law:
The German Constitution and its Court**

governmental authority such that disability may not serve as a ground for - discriminatory - unequal treatment (see BVerfGE 85, 191 [206] and thereafter in particular *Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks] 12/6323, p. 12.). However, the legislature that adopted the constitutional amendment also intentionally refrained from simply expanding the attributes mentioned in the previous Article 3.3 of the Basic Law to include disability. This indicates that Article 3.3 sentence 2 of the Basic Law is also important in its own right. This obviously has to do with the special nature of disability. As in the case of the attributes such as gender, origin, race and language already covered by Article 3.3 sentence 1 of the Basic Law, disability is a personal characteristic, the existence or absence of which an individual can influence, either not at all or only to a limited extent. However, disability not only denotes a mere condition of being different, which is frequently disadvantageous for the persons affected only in connection with the effect of corresponding attitudes and prejudices in that person's societal environment, but can also lose this disadvantageous effect if such attitudes are changed. Moreover, disability is a characteristic that, apart from any such change in attitudes, in principle makes life more difficult for the person affected as compared to those with no such disability. It was the will of the legislature that this special situation leads to neither social nor legal exclusion. To the contrary, such exclusion is to be prevented or overcome (see *Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks] 12/8165, p. 28). This explains the fact that sentence 2 of Article 3.3 of the Basic Law, unlike sentence 1, does not simply prohibit discrimination. The revised provision prohibits only disadvantageous discrimination on the basis of disability. Preferential treatment intended to equalize the situations of the disabled and those who are not disabled is, on the other hand, permitted, albeit not necessarily constitutionally mandated.

bb) Given this background, discrimination exists not only in the case of provisions and measures that aggravate the situation of disabled persons because of their disability, for example, by preventing access to public facilities that would otherwise actually be possible or by denying services that are in principle available to everyone. Moreover, exclusion from opportunities for personal development and activities by public authorities may also constitute discrimination if not adequately compensated by supportive measure commensurate with the disability. It is not possible to determine generally and in the abstract when such exclusion has been compensated to such an extent by supportive measures. Whether refusal to provide a compensatory service desired by a disabled person and referral to another, alternative possibility for personal development are to be considered discriminatory will regularly depend upon assessment, scientific findings and prognostic estimates. It is possible to decide whether a measure is discriminatory in the individual case only on the basis of the overall conclusions of such assessment.

2. In principle, the same applies in the area of education.

a) aa) Under the provision governing state supervision of schools, Article 7.1 of the Basic Law does to be sure grant the state the authority to plan and organize education with a view to ensuring the existence of a school system that offers all young

**Selected Fundamental Decisions of
the Federal Constitutional Court**

people educational opportunities that reflect the needs of contemporary society commensurate with their abilities. The organizational structure of the schools, decisions as regards the formal nature of the educational system and the choice of courses of instruction and educational goals, for example, are therefore the affair of the state (see BVerfGE 34, 165 [182]; 45, 400 [415]); 53, 185 [196]). In this context, the *Länder*, which are responsible for schooling, have extensive discretionary latitude (see BVerfGE 59, 360 [377] with further references). This latitude is, however, restricted to the extent that overriding norms of the Basic Law impose limits (see BVerfGE 6, 309 [354]; 34, 165 [181]; 59, 360 [377]). This is achieved not only through the right of pupils - which may also be restricted - to develop their personalities, aptitudes and abilities with as little interference as possible under Article 2.1 of the Basic Law (see on this BVerfGE 45, 400 [417] with further references) and the right of parents to raise their children arising from Article 6.2 sentence 1 of the Basic Law, which accompanies and has equal status with the responsibility of the state for education under Article 7.1 of the Basic Law (see BVerfGE 52, 223 [236]; established case law). Moreover, the prohibition of discrimination newly created under Article 3.3 sentence 2 of the Basic Law also sets limitations.

Apart from whether it is possible to derive any inherent entitlement to services from this fundamental right (consistently contested in the literature; see, for example, Osterloh, loc. cit., Article 3 marginal no. 305; Scholz in: Maunz/Dürig, *Grundgesetz, Kommentar*, Article 3.3 marginal no.174 [October 1996]), it does follow, especially in conjunction with the above-mentioned freedoms from Article 2.1 and Article 6.2 sentence 1 of the Basic Law, that the state and the legislatures of the *Länder* responsible for education do have a special responsibility towards disabled pupils. The state also has an at least constructive monopoly as regards their education and instruction at the level of the schools; like non-disabled pupils, they are in principle compelled to attend public schools. Taking this into account, the state is in principle obliged under Article 2.1 and Article 6.2 sentence 1 in conjunction with Article 3.3 sentence 2 of the Basic Law to make available educational facilities for disabled children and youth that also allow them to obtain proper education, instruction and training through school attendance. The nature and degree of disability and the requirements of the type of school and the level of instruction must be taken into account in this context, as must the current state of scientific pedagogical knowledge.

- bb) Given the current state of pedagogical knowledge, general exclusion of the possibility of education and instruction of disabled pupils together with non-disabled pupils would not seem justifiable under the Basic Law. Despite the existence of critical opinions, inclusive education is, as is documented by the statements cited in A I 1 and 2, also considered for the most part positive by pedagogical science as well as by relevant political bodies and advocated as an alternative to education and instruction in special and remedial schools that is deserving of implementation. The state legislature of Lower Saxony took this into account by creating the possibility for education and instruction of pupils with special educational needs “in all schools” (s. 4 of the Lower Saxony School Act) and in integration classes for

**60 Years German Basic Law:
The German Constitution and its Court**

goal differentiated education (s. 23.4 of the Lower Saxony School Act) in addition to special schools (s. 14 of the Lower Saxony School Act). According to s. 4 in conjunction with s. 68.1 of the Lower Saxony School Act, instruction is to be inclusive and pursue the same goals for all pupils if it is possible in this way - if necessary with provision of supplementary educational support (cf. in particular s. 14.4 sentence 2 of the Lower Saxony School Act) - to accommodate the individual needs for support of pupils requiring such support and insofar as organizational, staffing and physical circumstances permit. These provisions enable children and youth with special educational needs and their guardians to opt, under the conditions set forth in the law, either for one of the forms of inclusive education or for instruction in special schools, the continued existence of which as an independent type of school within the differentiated school system of the Land may therefore, quite properly, not be called into question.

There are no constitutional grounds for objecting to the fact that under this approach inclusive education and instruction, whether in the form of individual integration or integration classes, are subject to the limits of what is feasible in terms of organizational, staffing and physical circumstances (see ss. 4 and 23.4 in conjunction with 23.5 of the Lower Saxony School Act). This proviso is indicative of the fact that the state can from the very outset meet its responsibility to provide a school system to accommodate differences in abilities only within the limits of its financial and organizational resources (see BVerfGE 34, 165 [183, 184]) and explains why the legislature must take into account other needs of society in its decisions and retain the possibility of using limited available public funds for such other interests as it considers necessary (see BVerfGE 40, 121 [133]; 75, 40 [68]; 82, 60 [80]; 90, 107 [116]). If the legislature decides in favour of offering both individual integration and integration classes in its regulatory plan for inclusive education, it is not prevented under the Basic Law from making actual implementation of these forms of integration dependent upon restrictive conditions of the nature at issue here. Discretionary latitude and the possibility of restriction to what is actually feasible and financially justifiable also exist, however, as regards implementation of the regulatory plan by the legislature. Article 2.1, Article 6.2 sentence 1 and Article 3.3 sentence 2 of the Basic Law do not obligate the legislature of every Land to make all forms of inclusive education available in every Land. Moreover, acting within the limits of its discretionary latitude, the legislature may forgo the introduction of such forms of integration that would not seem to warrant implementation not only on pedagogical grounds, but also for organizational, staffing and financial reasons. This presupposes that the remaining opportunities for inclusive education and instruction adequately take into account the interests of disabled children and youth.

- b) The interpretation and application of legislation governing education are subject to the prohibition of discrimination contained in Article 3.3 sentence 2 of the Basic Law.
 - aa) The decision of school authorities as to the schools chosen to educate, instruct and prepare disabled children and youth for their future lives in society together with non-disabled children and youth must take into account in each individual case

Selected Fundamental Decisions of the Federal Constitutional Court

not only the right of pupils to receive training commensurate to the greatest extent possible with their aptitudes and abilities (Article 2.1 of the Basic Law) and the right of parents under Article 6.2 sentence 1 of the Basic Law to freely choose the educational path for their children in school on the basis of their aptitude (see BVerfGE 34, 165 [184]). It is, furthermore, also necessary to take into account additional constraints upon school authorities arising from Article 3.3 sentence 2 of the Basic Law.

Since, as was set forth above under C.I.1.b.bb, the discriminatory nature of a measure cannot be assessed without taking into account specific accompanying support, the prohibition against discrimination contained in this provision does not mean, however, that the transfer of a disabled pupil to a special school constitutes in and of itself prohibited discrimination. This also applies if the decision of the school authority is made against the will of the disabled child or youth or his or her guardians. Only decisions to effect such a transfer that obviously fail to do justice to the circumstances and conditions involved in the individual case under consideration are prohibited by Article 3.3 sentence 2 of the Basic Law. The existence of such a decision must be assumed not only if a child or youth is assigned to a special school because of a disability despite the fact that education and instruction in a mainstream school would have been suited to his or her abilities and would have been possible without any special resources. Indeed, discrimination within the meaning of Article 3.3 sentence 2 of the Basic Law may also exist if the transfer to a special school is effected despite the fact that attendance of a mainstream school could have been made possible through the reasonable use of supplementary educational support.

Whether this is the case, that is whether, for example, assignment of an additional special education teacher or, insofar as provided for by law, the creation of an integration class would make it possible to achieve inclusive education that the disabled child can absolve with prospects of success, must be determined on the basis of overall assessment in the individual case, taking into account the nature and severity of the specific disability as well as the respective advantages and disadvantages of inclusive education and instruction in a regular school on the one hand, and attendance of a special school or remedial school on the other hand. In this context, overall comparison as regards the assessment of inclusive education must take into account not only the opportunities made available to the disabled child or youth for his or her education and future life as an adult, but also any burden that may be associated with such a measure. This applies as regards the disabled child, who especially in the case of individual integration will be confronted with higher standards of performance, but this is not the only consideration. In addition, overall assessment must also take into account conceivable burden upon fellow pupils and teaching staff as well as the nature of common instruction typically practiced in classes or courses in schools. Finally, it is also necessary to take into account that governmental measures to compensate for disabilities may be requested and granted only within the limits of available financial, staffing, physical and organizational possibilities (see BVerfGE 40, 121 [133]). The resources required for inclusive education in mainstream schools may not be made available

**60 Years German Basic Law:
The German Constitution and its Court**

at the expense of those children whose participation in common instruction is excluded due to the nature or degree of their disability or whose participation in common instruction seems undesirable for pedagogical reasons and who are therefore dependent upon the availability of special and remedial schools with the appropriate staffing and material means required for their special educational task.

The respective advantages and disadvantages of inclusive or separate education must be assessed neither exclusively from the point of view of the disabled pupil and his or her parents nor solely from the point of view of the school administration. The preferences of parents and children and youth as to the nature of their formal education and instruction and the schools at which they commence or pursue such education and instruction are, however, of considerable importance under constitutional law in view of the fundamental rights guaranteed under Article 6.2 sentence 1 and Article 2.1 of the Basic Law. When parents decide in favour of education together with children without disabilities in the interest of their child as seen from their point of view, the school authority may not simply disregard this, claiming, for example, without further justification that assignment to a special school and instruction at such a school would in fact be better suited to serving the well-considered interests of the disabled child. Rather, it is necessary to examine the wishes of the parents thoroughly and consider the educational plans of the parents as manifested in these wishes.

In the Lower Saxony Ordinance Governing Supplementary Educational Services for Children with Special Needs (*Verordnung über sonderpädagogische Förderung*) of 16 November 1994 (Bavarian Law Gazette [*Bayerisches Gesetz und Verordnungsblatt - GVBl.*] p. 502), for example, provision is made for the school authority to have a teacher who has taught or is likely to teach the child prepare a report and have a special education teacher produce an advisory opinion (s. 2 of the Ordinance) before it rules on an application for recognition of a need for supplementary educational support. Provision is also made for appointment of a special needs committee upon application of the guardians, which committee also includes the guardians and on the basis of the report and advisory opinion submits recommendations for recognition of a need for supplementary educational support and future school attendance and in the event of failure to reach a mutual agreement informs the school authority of the various positions (s. 3 of the Ordinance). The report, the advisory opinion and, if appropriate, the recommendation or the various positions of the special needs committee are taken into account by the school authority in its decision concerning supplementary educational support (s. 4 of the Ordinance).

This procedure, which is on the one hand intended to make the official decision making process as objective as possible and on the other hand involves the guardians in the decision making process, obviously with the intention of arriving at a decision that is also acceptable to them, adequately takes into account the potential conflict between parents and their children and the school administration. It not only creates an external framework within which the positions of the disabled pupil and his or her parents in respect of fundamental rights under Article

Selected Fundamental Decisions of the Federal Constitutional Court

2.1 and Article 6.2 sentence 1 of the Basic Law can be appropriately advanced; moreover, it also seems to be a basically suitable procedural and organizational means of enforcing the prohibition of discrimination against disabled persons contained in Article 3.3 sentence 2 of the Basic Law in the area of education (on the protection of fundamental rights through procedural operations, see, for example, BVerfGE 53, 30 [65]; 84, 34 [45, 46]).

The ultimate responsibility of the school authority for deciding whether to recognize needs for supplementary educational support and the form of school attendance for children and youth with special needs is, however, not affected by the provisions of the Ordinance. The school authority is not bound by the content and findings of the report on an individual pupil and the advisory opinion, and this applies equally to the recommendations of the special needs committee. It is therefore also not prevented under the Basic Law from ordering a transfer to a special school even if these decision making aids speak - exclusively or alternatively - in favour of an inclusive form of education in the individual case. In light of Article 3.3 sentence 2 of the Basic Law, the authority is, however, under a greater obligation to justify its position.

The prohibition of discrimination of disabled persons requires, as regards its constitutionality that decisions that are made in respect of a disability and could constitute discrimination against a disabled person be substantiated with reasons, which in the case of a disabled child or youth interested in inclusive education means they must be such that it is possible to recognize in detail the considerations upon which the school authority bases a transfer to a special school. This entails elaboration of those aspects that must be taken into account under Article 3.3 sentence 2 of the Basic Law. Depending on the situation in the individual case, the nature and severity of the disability must be indicated as well as the reasons that may have led the authority to conclude that education and instruction of the disabled child would seem to be best ensured in a special school. If applicable, organizational, staffing or physical difficulties and the reasons why these difficulties cannot be overcome in the concrete case must also be set forth. Finally, consideration of the opposing educational wishes of the disabled child and his or her guardians is in either case a prerequisite to adequate justification of a decision in favour of instruction in a special school or remedial school. They must be juxtaposed with the considerations of the school authority and weighed against its views in such a manner that the governmental measure becomes comprehensible and therefore also verifiable by the courts.

- bb) The decision of the administrative courts to the effect that a transfer ordered by a school authority meets these requirements is only to a limited extent subject to constitutional control. The determination and evaluation of the facts pertinent to the decision as well as interpretation and application of the relevant provisions of the school law of the *Länder* are the responsibility of the administrative courts and in principle removed from review by the Federal Constitutional Court (see BVerfGE 18, 85 [92, 93]; 86, 122 [128, 129]). It is also not the task of the Federal Constitutional Court to control the manner in which the courts render

**60 Years German Basic Law:
The German Constitution and its Court**

concrete and implement in detail on the basis of ordinary law the protection that fundamental rights - in addition to Article 2.1 and Article 6.2 sentence 1 of the Basic Law, in particular in this context Article 3.3 sentence 2 of the Basic Law - afford the parties to a legal dispute and whether the best possible protection is achieved in so doing (see BVerfGE 89, 276 [286]; 92, 140 [153]). Rather, the Federal Constitutional Court intervenes correctively only if contested decisions violate the general principle of equality embodied in Article 3.1 of the Basic Law as regards its importance in terms of prohibiting arbitrariness (see on this BVerfGE 89, 1 [13, 14]) or reveal errors that are based on a fundamentally erroneous view of the importance and reach of a fundamental right, in particular the scope of the area of protection, and are also of a certain material importance for the concrete legal case (see BVerfGE 89, 1 [910] with further references).

II.

Given this background, the order under challenge cannot in the end be objected to on constitutional grounds. It does not to be sure, do justice to the constitutional standards elaborated under C I (1.) in all respects. However, this does not affect the judgment of the Higher Administrative Court to the effect that in view of the concrete actual circumstances of the case of the complainant, more speaks in favour of the conclusion that the transfer order contested by the action is legal (2.).

...

IV. Freedom of Faith, Conscience and Creed - Article 4 of the Basic Law

Some General Comments

The protection of freedom of faith, conscience and creed comprises of two main aspects. Firstly, the provision guarantees the individual liberty to choose and profess any religion or philosophical creed, and the freedom to ensue one's own conscience. That relates mainly to the scope of such liberties and the distinction against other rights.

Secondly, it also includes questions arising from the relationship between the individual and the state or society as far as belief and conscience are concerned. The Constitution had for instance to deal with freedom of religion issues in public schools in several high profile cases. The relationship between the various churches and the state in Germany is noticeably different than the separation of church and state approach taken under the Constitution of the USA or under the laicist approach under the French Constitution. This is evidenced by the fact that the drafters of the Basic Law incorporated the church-state articles of the previous Weimar Constitution of 1919 into the Basic Law.¹⁰ The differences are quite remarkable. For example, Article 137.5 of the Weimar Constitution provides for the possibility of religious societies (churches) to either maintain or apply for corporate status under public law in which case they can use the state's revenue service to collect a 'church tax' from their members. Article 138 implies a right to subsidies from the state and - still very important - Article 139 requires that "Sunday and holidays recognized by the state shall remain protected by law as days of rest from work and of spiritual improvement." To this day this provision makes it difficult or even impossible to treat Sundays and other religious holidays as regular working days with regular opening hours of shops and businesses. The Constitutional Court in a very recent decision regarded as unconstitutional regulations in Berlin allowing for the opening of stores on the four Sundays before Christmas.¹¹

10 See Article 140 of the Basic Law with reference to Articles 136 to 139 and Article 141 of the Weimar Constitution.

11 BVerfG, 1 BvR 2857/07 of 01. Dec.2009 at:
http://www.bverfg.de/entscheidungen/rs20091201_1bvr285707.html;
Press release in English available at: <http://www.bverfg.de/en/press/bvg09-134en.html>.

1. *The Scope of Religious Freedom and Freedom of Conscience*

a) *Lumber Room*, BVerfGE 24, 236

Explanatory Annotation

In this 1965 case the Constitutional Court had to determine the scope of religious freedom. The question arose from a regular court decision where the applicants, a *de facto* catholic youth association¹² with close ties but independent from the Catholic Church were ordered to stop plans of collecting of old rags and clothes for the purpose of helping the poor. This fundraising drive had been announced (“advertised” in the words of the respondent) from church pulpits. The case had been brought by a commercial collector of rags and old clothes who regarded the competition by the association with the help of the catholic church as a violation of the German fair trade practices legislation, pointing to the fact that several million German Marks (as the currency then was) had been earned by the association by essentially taking away his business.

The Constitutional Court had to determine whether the *de facto* association fell within the personal scope of the freedom of religion and whether the organization and the conducting of such collections was an exercise of religion. Only if these questions were answered in the affirmative could the Court engage with the regular court’s decision to see if its interpretation of the relevant provision in the trade practices legislation did indeed take into account the freedom of religion guarantee of Article 4 of the Basic Law.

The Court stated, without any further explanation, that the freedom of religion clause can be invoked by *de facto* associations, rather than just individually by the members. Religious freedom can obviously be invoked by organizations because churches would otherwise not be able to invoke this freedom. The fact that the association here was a *de facto* one is irrelevant if the degree of organization of the association is sufficient to create an entity that exists independently of the will of its members. More importantly the Court held that the conduct of such collections to help the poor is a quintessential part of the exercise of any Christian religion and that one cannot delineate the conduct from announcement in and by the church. Freedom of religion is not limited to church services and religious rites it also includes transporting the message into the world for example by way of aid projects. The court also defined some outer limits for this exercise of Christian “caritas”. The collections must be free of charge, i.e. no money must be paid to the donors. The religious motive must be expressed and communicated and the use of the donated goods or the use of the proceeds achieved from them must be transparent.

12 As opposed to a *de jure* registered and therefore incorporated association.

Selected Fundamental Decisions of
the Federal Constitutional Court

Translation of the Lumber Room Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 24, 236*

Headnotes:

1. The fundamental right under Articles 4.1 and 4.2 of the Basic Law (Grundgesetz) is afforded not only churches, religions and groups that share other beliefs, but also associations that have set themselves the goal of cultivating, not completely, but only partially, a religious life or a life based on other beliefs.
2. Article 4.2 of the Basic Law also guarantees the right to take collections for ecclesiastical or religious purposes. The same applies to supportive activities related to usual religious life such as publicity from the pulpit.

Order of the First Senate of 16 October 1968 - 1 BvR 241/66 -

Facts:

The Catholic Rural Youth Movement of Germany (Katholische Landjugendbewegung Deutschlands), a national association with no legal personality, was the complainant. In the year 1965, the Catholic Rural Youth sponsored a “Lumber Room Campaign” throughout the country; it collected used clothing, rags and scrap paper and sold these materials to large dealers. The proceeds in the amount of several million deutschmarks were intended for rural youth in underdeveloped countries. The complainant publicized the individual campaign activities in various ways, which included announcements from the pulpit in Catholic Churches. In response to an action brought by a commercial enterprise operated in Noerdlingen for the purposes of the collection of scrap, whose operations at times almost came to a standstill because of the campaign, the Regional Court (Landgericht) ordered the complainant to cease preparation for the collection of scrap materials within the operational area of the plaintiff through publicity from the pulpit of Catholic churches. The Regional Court based its judgment on the fact that the plaintiff was competing with the complainant and that publicity from the pulpit constituted in this case an advertising activity that amounted to a violation of public policy.

In response to the constitutional complaint, the judgment was reversed and the matter referred to the Regional Court.

Extract from the Grounds:

III.

The constitutional complaint of the complainant is founded. The challenged decision violates the complainant’s fundamental right to the undisturbed practice of religion (Article 4.2 of the Basic Law) since the interpretation and application of the term “public policy” therein failed to adequately take into account the nature and reach of this fundamental right.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

**60 Years German Basic Law:
The German Constitution and its Court**

1. It is not the task of the Federal Constitutional Court to decide whether the Regional Court was correct in its assessment to the effect that the collections and subsequent sale of the materials collected by the complainant represented an act of commercial competition. The interpretation of s. 1 of the Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb - UWG), insofar as it serves as the basis for the decision, is according to the established case law of the Federal Constitutional Court an interpretation of ordinary law and as such exclusively the affair of the ordinary courts as long as the latter have not failed to recognize the force and reach of the provisions of the Basic Law and in so doing violated the fundamental rights of the parties involved (BVerfGE 18, 85 [9293]).

The very qualification of the collection activities as an activity that constitutes commercial competition precludes the existence of any violation of the fundamental rights of the complainant since the Regional Court basically considers such collections permissible. However, since only aspects having to do with commercial trade are considered relevant for the purposes of prohibition of announcements from the pulpit in the judgment under challenge, this perspective fails to take into account the influence exerted by the right to the undisturbed practice of religion from which the complainant as a religious association involved in a charitable cause can benefit.

2. a) The fundamental right to the undisturbed practice of religion (Article 4.2 of the Basic Law) is actually covered by the freedom of faith and conscience (Article 4.1 of the Basic Law). For this term encompasses - irrespectively of whether applied to a religious faith or religious or non-religious belief - not only the personal freedom to believe or not to believe, i.e., to profess a faith, to harbour a faith in secret or to renounce a previous faith and turn to another faith, but equally so the freedom to worship, proselytize and propagate (BVerfGE 12, 1 [34]).

In that regard, the undisturbed practice of religion is only part of the freedom of faith and conscience afforded individuals as well as religious associations or associations based on other beliefs (BVerfGE 19, 129 [132]).

At least since the Weimar Constitution, the freedom of the practice of religion has been substantively subsumed under freedom of conscience (see Hamel in: Bettermann/Nipperdey-Scheuner, Die Grundrechte, vol. IV 1, 1960, pp. 62, 54). The special guarantee of protection of the practice of religion against encroachment and interference by the state under Article 4.2 of the Basic Law can be explained historically by the notion of a special *exercitium religionis*, but in particular by rejection of the interference with the practice of religion under the National Socialist rule of force. In view of this development, the intention of Article 4.2 of the Basic Law is in particular to make it clear that the holder of the fundamental right can also be a community, whose right to religious existence and activity is protected as regards the form and content of participation and the nature of its exercise - in the family, in the home and in public - as long as that community remains within the bounds of certain basic common moral notions of contemporary civilized peoples.

Since the “practice of religion” is of central importance for every faith and belief, the content of this term must be exhaustively interpreted against its historic background. This is supported by the fact that freedom of religion is no longer restricted by an

**Selected Fundamental Decisions of
the Federal Constitutional Court**

explicit reservation of legislative power such as that contained in Article 135 of the Weimar Imperial Constitution (Weimarer Reichsverfassung), is no longer associated with other provisions governing the relations between church and state (BVerfGE 19, 206 [219, 220]), cannot be forfeited pursuant to Article 18 of the Basic Law and is also protected by special provisions of the Basic Law (see Article 3.3, Article 33.3 of the Basic Law, Article 140 of the Basic Law in conjunction with Article 136.3 sentence 1 of the Weimar Imperial Constitution; Article 136.4 of the Weimar Imperial Constitution, Article 7.3 sentence 3 of the Basic Law and Article 7.2 of the Basic Law). This freedom of the practice of religion also extends not only to Christian churches, but also to other religions and groups that share other beliefs. This follows from the state's obligation to remain neutral as regards belief and religion (BVerfGE 18, 385 [386]; 19, 206 [216]) as well as from the principle of equal treatment of churches and beliefs (BVerfGE 19, 1 [8]).

There can therefore be no justification for an interpretation of freedom of worship that is narrower than the freedom of faith and conscience.

Accordingly, the practice of religion includes not only acts of worship and the practice and observance of religious customs such as worship services, church collections, prayers, the reception of sacraments, processions, the display of church banners and the ringing of church bells, but also religious education, non-religious and atheistic celebrations as well as other expressions of religious life and life based on other beliefs.

- b) The fundamental right under Articles 4.1 and 4.2 of the Basic Law is afforded not only churches, religions and groups that share other beliefs, but also associations that have set themselves the goal of cultivating, not completely, but only partially, a religious life or a life based on other beliefs. However, this presupposes that the purpose of any such association is specifically directed towards the achievement of such goals. This applies without reservation to associations that are organizationally or institutionally affiliated with churches such as church orders, the purpose of whose existence includes more intensive pursuit of general ecclesiastical goals. However, it also applies as regards other independent or non-independent associations if and to the extent their purpose is to cultivate or promote a religious faith or preach the beliefs of their members. The extent of institutional affiliation with a religion or the nature of the goals pursued through the association can constitute a standard for determination of the existence of these prerequisites.

The complainant is to be sure not organizationally part of the Catholic Church. It is, however, institutionally associated with it: Catholic clergy are involved in all of its governing bodies by virtue of their ecclesiastical positions, and diocesan bishops can by virtue of their authority influence diocesan bylaws. The goals of the complainant are also of an ecclesiastical nature. Its bylaws explicitly state that its purpose is to do the work of the living Church worldwide and provide material support to alleviate the world's spiritual and corporeal needs. The complainant must therefore be afforded the fundamental right of undisturbed practice of religion.

**60 Years German Basic Law:
The German Constitution and its Court**

- c) The collections organized by the complainant for religiously motivated charitable purposes and the announcements made from the pulpit at the behest of the complainant fall under the practice of religion protected by Article 4.2 of the Basic Law.

When assessing what in any individual case is to be considered to constitute the practice of religion and belief, the self-identity of the religion or community of believers may also not be ignored. The religiously neutral state must to be sure in principle interpret constitutional terms on the basis of neutral, generally applicable criteria that are not associated with a particular confession or belief (BVerfGE 10, 59 [84, 85.]; 12, 45 [54]; 19, 1 [8]; 19, 226 [238 et seq.]; 19, 268 [278 et seq.]).

However, precisely in a pluralistic society with a legal order predicated on self-identity as regards religion or beliefs as well as freedom of worship, the state would violate the right of churches, religions and communities of believers to autonomy and independence within their own spheres that is guaranteed by the Basic Law if it did not take into account the self-identity of the adherents of a given faith or belief in its interpretation of their practice of their faith or belief (BVerfGE 18, 385 [386, 387]).

The self-identity of the Catholic and Protestant Churches is such that they view the practice of religion as encompassing not only the area of belief and religious services, but also the freedom to live and act according to their beliefs in the world outside in conformity with their religious and charitable duties. According to the New Testament, active love of neighbour is an important duty of Christians and is understood by both the Catholic and Protestant Churches as a basic ecclesiastical activity (Pastoral Constitution on the Church in the Modern World of the Second Vatican Council [*Pastoralkonstitution über die Kirche in der Welt von heute des 2. Vatikanischen Konzils*], Article 88, Rahner Vorgrimler, *Kleines Konzilskompendium*, 1966, pp. 547548. and Article 15.1 of the Basic Order of the Protestant Church in Germany [*Grundordnung der Evangelischen Kirche in Deutschland*] of 13 July 1948 - Abl. EKD 1948, p. 233).

Charitable activities, in particular the collection of donations for charitable purposes, is also recognized as a legitimate role of churches under governmental policy following World War II, and the right of the churches to pursue such activities is guaranteed in agreements and treaties with the churches (see Article 14.1 of the Lower Saxony Protestant Church Agreement (Niedersächsischer Evangelischer Kirchenvertrag) of 18 April 1955 (Lower Saxony Law Gazette [*Gesetz- und Verordnungsblatt - GVBl.*] p. 159); Article 1.1 of the Lower Saxony Concordat (Niedersächsisches Konkordat) of 26 February 1965 (Lower Saxony Law Gazette p. 192); Article 16 of the SchleswigHolstein Protestant Church Agreement (Schleswig-Holsteinischer Evangelischer Kirchenvertrag) of 23 April 1957 (Schlesw.Holst. Law Gazette p. 73) and Article 19 Hessian Protestant Church Agreement (Hessischer Evangelischer Kirchenvertrag) of 18 February 1960 (Hess. Law Gazette p. 54).

How the limits to the fundamental right of freedom of religion and in particular those of the undisturbed practice of religion are circumscribed in a pluralistic society - be it on the basis of the principles of tolerance and equality or the core area of protection

**Selected Fundamental Decisions of
the Federal Constitutional Court**

or the guarantee of the essence of the fundamental right, on the basis of the relationship between state and church described in the Basic Law, on the basis of the human dignity of the individual or taking into account certain constraints inherent in the fundamental right - is of no importance here. In any case, for the purposes of the decision that must be made, it follows from the general considerations of the nature of the freedom of religion entertained here that a charitable collection is of a religious nature and may be afforded protection under Article 4.2 of the Basic Law only under certain conditions.

Donations must be made without receipt of consideration; they must be motivated by a certain religious spirit or attitude on the part of the donor, be it compassion or brotherly love, or be an expression of personal support for a just and good cause born of religious conviction. Christian love is according to the self-identity of the Christian churches therefore not the same thing as a social activity that is limited to concern for the poor, suffering and needy out of a sense of responsibility for one's neighbours in the interest of fostering peaceful coexistence within the state and providing minimum subsistence for others in order to make it possible for them to lead a life within the community that is commensurate with human dignity merely for social reasons. It follows from this characterization alone that Christian love must involve customary solicitude that is provided as a matter of course and in the vein of general religious awareness. The intended purpose and use of the collected materials must be obvious to the donors so that they do not make their decisions on the basis of mistaken ideas and the public is not deceived as to the purpose of the collection. It is irrelevant in this context whether the donations go directly to the needy or whether they receive some form of financial assistance from proceeds from the materials since the decisive criterion for qualification as a charitable religious collection is that a certain offering be made for charitable purposes. This applies all the more so when such sale is planned and announced from the outset. The collection and the realization of proceeds also cannot therefore be separated.

- d) The "Lumber Room Campaign" collection conducted by the complainant remains within the framework of these general prerequisites - also as regards publicity from the pulpit.

The collection of in-kind donations to support the needy is one of the traditional forms of charity engaged in by church-related organizations. The nature of the sale of the donated materials was appropriate and in keeping with the special circumstances of the situation. Since the donations were intended for the needy overseas, maximum efficacy of the assistance could be more purposefully achieved through the sale of the collected materials than through costly shipment of usable clothing. In view of the general awareness of the extent of need in developing countries, expansion of the collection to include not only usable clothing, but also rags and scrap paper in general was also justified. Contrary to the opinion of the complainant, the donations were also of the beneficent nature required of the activities of religious charities. It may well be true that, except in the case of rags, commercial rag collectors in general also usually do not pay. The complainant has, however, itself submitted that the materials collected by charitable organizations contain a higher percentage of usable clothing than the goods

**60 Years German Basic Law:
The German Constitution and its Court**

collected by commercial dealers. It follows from this that in view of the purpose intended by the collection - assistance for the needy - the donors gave more valuable items, which they would not to the same extent have given to commercial rag dealers. The challenged judgment did not contain any findings to the effect that the complainant misrepresented the intended use of the proceeds or that the donors were deceived as to the nature of the use of the collected materials.

The statement of the complainant to the effect that 90% of the rag collectors had to suspend their operations due to the charitable collections is irrelevant for the purposes of assessing whether the “Lumber Room Campaign” is an activity that falls under the practice of religion.

Apart from the fact that, according to the opinion of the Regional Court that is of importance to the Federal Constitutional Court in this respect, the scale of the collection carried out by the complainant was also permissible and that it is not certain whether the decrease in the rag collecting business is not due to structural changes of a general economic nature, even a change in the structure of this area of business due to charitable collections would have to be accepted. In a free market economy, individual businessmen do not have a constitutionally anchored right to any specific volume of business and further business opportunities.

- e) Since the collection of the complainant was therefore part of the practice of religion protected under Article 4.2 of the Basic Law, the Regional Court should also have taken into account the influence exerted by this fundamental right in its assessment of publicity from the pulpit as an activity that constitutes “competition in violation of public policy.”

If the collection itself enjoys special protection precisely because of its nature and purpose as religious charity, this must also hold for supportive activities in connection with usual religious life such as publicity from the pulpit. The sole relevant question is whether the complainant in particular had the right to instigate such announcements from the pulpit. In view of the fact that the collection falls into the area of religion, there can be no doubt about this. When it interpreted the term “violation of public policy” as applied to activity vis-à-vis competitors, the Regional Court should therefore have assessed the special nature of competition between a businessman and a “competitor” acting within the scope of the practice of religion on the basis of the legally protected undisturbed practice of religion, which enjoys precedence, and not qualified it as being contrary to public policy on the basis of the established facts.

Insofar as the Regional Court has ruled against the complainant, the judgment must be overturned (s. 95.2 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerGG)).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

3. Since the constitutional legitimacy of the conduct of the complainant can be inferred in particular from Article 4 of the Basic Law, there can be no question of any violation of general freedom of action (Article 2.1 of the Basic Law) by the complainant (BVerfGE 6, 32 [37]; 10, 55 [58]; 17, 302 [306]).

For the purposes of the present proceedings, it is therefore necessary to ignore the issue as to the extent to which collections by charitable organizations that do not benefit from the protection of Article 4.2 of the Basic Law are covered by Article 2.1 of the Basic Law.

b) Conscientious Objection II, BVerfGE 69, 1

Explanatory Annotation

To this day Germany is a country with a compulsory obligation on young males to military duty. Article 12a.1 of the Basic Law stipulates that such compulsory military or alternative civilian duty may be imposed on young males who have attained the age of 18. Article 12a.2 demands that for persons refusing to serve in the military on grounds of conscience an alternative civilian duty must be provided which must not exceed in length the duration of military service. This provision builds on Article 4.3, which guarantees that no person shall be compelled against his conscience to render armed military service. The statute governing the details as amended in 1983 stipulated that the alternative non-military service for conscientious objectors was one-third longer in time than the time span for the basic military service. The Constitutional Court had to decide whether this deviation of the length of service violated the rights to conscientious objection. The right to conscientious objection of military duty is an absolute right and is valid not only in times of peace but also in times of war. However, there is a limitation insofar as it is not a right to objection for any reason whatsoever. Only those for whom military duty is impossible as a matter of conscience are protected. The extended period of service for non-military alternative duty was justified on the very basis that the willingness to do the extra time was an indication for the validity of the conscientious objection.

The ostensible conflict with Article 12a.2 of the Basic Law was resolved by the Court by arguing that military duty can and - in some but not all cases - will extend beyond the time frame for the basic military duty because of periodic military exercises the conscripts might be called up for or for extra service in times of crises. It follows that Article 12a.2 cannot be interpreted as demanding two identical time periods as this is impossible. Rather the provisions seeks to balance the two alternatives for compulsory service in such a way that in general the burden imposed when rendering alternative non-military service for reasons of conscience is not higher than the burden imposed on those rendering military service.

Translation of the Second Conscientious Objection Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 69, 1*

Headnotes:

1. Provisions of law governing conscientious objection must respect the fundamental right guaranteed in Article 4.3 of the Basic Law (Grundgesetz - GG) and at the same time take into account the basic decision made under the constitution to provide for the effective military defence of the country.
2. The alternative service provided for under Article 12a.2 of the Basic Law is reserved for those persons subject to military service who refuse to render military service involving the use of arms on grounds of conscience. From this follows the legislature's duty to ensure that only those persons subject to military service are recognized as conscientious objectors who can with sufficient certainty be assumed to meet the conditions contained in Article 4.3 sentence 1 of the Basic Law (Confirmation of BVerfGE 48, 127) . The Conscientious Objection Reform Act (Kriegsdienstverweigerungs-Neuordnungsgesetz - KDVNG) satisfies these requirements.
3. According to Article 12a.2 sentence 2 of the Basic Law, the duration of alternative service may not exceed the legally permissible duration of military service. The normative goal of Article 12a.2 sentence 2 of the Basic Law is to ensure a balance between the burden upon those who render military service and that upon those who perform alternative service. The legislature may therefore within the limits prescribed by Article 12a.2 sentence 2 of the Basic Law take into account differences between military service and alternative service for the purposes of establishing the duration of alternative service.
- 4.-7....
8. The Basic Law requires that Article 1.8 sentence 2 of the Conscientious Objection Reform Act (conscription in the event of a state of tension and a state of defence) be interpreted to mean that persons subject to military service may be conscripted only for service not involving the use of arms until the recognition proceedings have been concluded with legal force. Under this interpretation, the provision does not affect the area protected by the fundamental right under Article 4.3 sentence 1 of the Basic Law. It protects only against such activities as are directly related to the use of military weapons as defined by the state of the respective weapons technology.

Judgment of the Second Senate of 24 April 1985 on the basis of the oral hearing of 30 January 1985 - 2 BvL 2, 3 and 4/83 BvR 2/84 -

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

Selected Fundamental Decisions of the Federal Constitutional Court

Facts:

The matter under constitutional review in several abstract judicial review proceedings involved numerous provisions of the Act on the Reform of the Right to Conscientious Objection and Civilian Service (Gesetz zur Neuordnung des Rechts der Kriegsdienstverweigerung und des Zivildienstes - KDVNG) of 28 February 1983 (Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I, p. 203).

The Conscientious Objection Reform Act was the legislature's response to BVerfGE 48, 127. In that decision, the Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) had declared what is referred to as the "postcard amendment" to the Compulsory Military Service Act (Wehrpflichtgesetz - WPfG) void.

The Conscientious Objection Reform Act contains first of all in Article 1.1 (that deals with the Act on Conscientious Objection (Kriegsdienstverweigerungsgesetz - KDVG)) a provision taken over from s. 25 of the Compulsory Military Service Act (old version), pursuant to which only absolute conscientious objection is to be treated as protected under Article 4.3 of the Basic Law. As regards recognition proceedings, decisions as regards the right to refuse to render military service involving the use of arms are made only upon application (s. 2.1 of the Act on Conscientious Objection). The application must be accompanied by a complete curriculum vitae and a comprehensive personal presentation of the reasons for the decision of conscience and a certification of good conduct (s. 2.2 sentence 3 of the Act on Conscientious Objection). The applicant may in principle not be called up for military service during recognition proceedings unless he had already been called up or notified accordingly in writing prior to submission of the application (s. 3.2 of the Act on Conscientious Objection). This exemptive provision does not apply in the event of a state of tension or a state of defence (s. 8.2 of the Act on Conscientious Objection). The Federal Agency recognizes the applicant on the basis of the records unless the grounds advanced would seem to be unsuitable as justification of the right to conscientious objection. In such cases, the Federal Agency forwards the application to the committee for conscientious objectors, which performs a substantive examination of conscience. The same procedure is employed in the case of applications from individuals who have already been called up or soldiers.

The duration of civilian service is regulated by Article 2 of the Conscientious Objection Reform Act such that it always exceeds that of military service by a third.

In its decision, the Federal Constitutional Court found the provision under challenge to be compatible with the Basic Law.

Extract from the Grounds:

B. ... I.

All provisions of law governing the right to conscientious objection must on the one hand respect the fundamental right guaranteed under Article 4.3 of the Basic Law, which stipulates that no person may be compelled to render military service involving the use of arms against his conscience. On the other hand, they must also take into account that the framers of the

**60 Years German Basic Law:
The German Constitution and its Court**

Basic Law decided to make provision for functional military defence of the country and in that connection empowered the legislature in Article 12a.1 of the Basic Law to introduce general military service. Implementation must satisfy the standard of universal military service (Article 3.1 of the Basic Law). The alternative service provided for under Article 12a.2 of the Basic Law is reserved for those persons subject to military service who refuse to render military service involving the use of arms on grounds of conscience. From this follows the duty of the legislature to ensure that only those persons subject to military service are recognized as conscientious objectors who can with sufficient certainty be assumed to meet the conditions contained in Article 4.3 sentence 1 of the Basic Law. The Senate upholds the principles developed in the previous case law of the Federal Constitutional Court (see BVerfGE 12, 45; 28, 243; 32, 40; 38, 154; 48, 127).

1. With the constitutional provisions governing defence issues that were subsequently incorporated into the Basic Law, in particular the currently valid provisions contained in Articles 12a, 73 no.1, 87a and 115b of the Basic Law, the framers of the Basic Law made a fundamental constitutional decision to provide for the effective military defence of the country. The establishment and functional viability of the Federal Armed Forces (Bundeswehr) enjoy constitutional status. In conformity with the prohibition of wars of aggression already included under Article 26.1 of the Basic Law, the above provisions include expression of the unambiguous and unmistakable intention of the framers of the Basic Law that the armed forces serve to defend against armed aggression (see BVerfGE 48, 127 [159, 128]).

With the enactment of the Compulsory Military Service Act of 21 July 1956 (Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I p. 651) in the version promulgated on 6 May 1983 (Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I p. 529), the legislature decided on the basis of the powers conferred by Article 12a.1 of the Basic Law to introduce general military service in the spirit of a free, democratic tradition that dates back to the French Revolution of 1789 and the period of reform in Germany in the early 19th century. Under the democratic constitutional order of the Basic Law, the fundamental right to protection of the individual and the duty of the citizenry towards the community to contribute to the maintenance of this constitutional order go hand in hand (see BVerfGE 48, 127 [161]). General military service is an expression of the general notion of equality. Its implementation is subject to Article 3.1 of the Basic Law (BVerfGE 48, 127 [162]); its fulfilment is democratic normalcy.

2. Article 4.3 of the Basic Law explicitly guarantees the right to refuse to render military service involving the use of arms on grounds of conscience as a fundamental right. The Basic Law proceeds from the dignity of free, independent persons as a supreme legal value (Articles 1.1 and 2. 1 of the Basic Law). In Article 4.1, it guarantees the inviolability of conscience and as a result the freedom not to be compelled to act contrary to dictates of conscience that are personally experienced as binding and absolute. Article 4.3 of the Basic Law then goes further and accords - to a remarkable extent as compared with other democratic constitutions predicated on the rule of law - precedence to protection of the free exercise of conscience on the part of the individual even in serious conflict situations in which the state makes special demands upon its citizens. The fundamental right of conscientious objection represents an insurmountable bar to enforcement of the constitutionally grounded obligation to contribute to the armed defence of the country and as a result to the maintenance of the existence of the state. The legislature may

Selected Fundamental Decisions of the Federal Constitutional Court

also not restrict the substantive content of this fundamental right in provisions based on Article 4.3 sentence 2 of the Basic Law, but only promulgate the limits that are already contained in the terms employed in Article 4.3 sentence 1 of the Basic Law itself (see BVerfGE 48, 127 [163]; established case law). To also subsume decisions of conscience based as regards their substantive content exclusively on a concrete situation under the term conscience within the meaning of Article 4.3 of the Basic Law and grounds of conscience of Article 12a.2 sentence 1 of the Basic Law would of necessity have for effect that refusal to render military service on this basis would not be possible by virtue of these articles of the Basic Law as long as - especially in times of peace - the concrete situation, that is, the specific war or specific type of conduct of war has not occurred or the motive in the sense of a just or unjust ground cannot be discerned, and the situation in which the individual's conscience would forbid military service involving the use of arms has not yet materialized (see BVerfGE 12, 45 [56, 57]). It would not be possible to infer advance protection of such kind from either the fundamental right under Article 4.3 of the Basic Law or Article 12a.2 sentence 1 of the Basic Law.

The framers of the Basic Law granted and reserved for those who consider themselves unable to render military service involving the use of arms on grounds of conscience the right to refuse to render such service. Article 12a.2 of the Basic Law empowers the legislature to require that conscientious objectors perform alternative service in a form that complies with the provisions of Article 12a.2 sentences 2 and 3 of the Basic Law. It follows from this that the framers of the Basic Law did not by any means authorize compulsory service for the common good by all citizens (Article 12.2 of the Basic Law) - therefore also including the female portion of the population in compliance with Article 3.2 of the Basic Law. Moreover, in view of the constitutional decision made in an immediate temporal and substantive context, the Basic Law (Article 12a.1 of the Basic Law) makes provision for a duty to serve in the Armed Forces, the Federal Border Police or a civil defence organization as the only - primary - form of compulsory service for the military defence of the country. Alternative service under Article 12a.2 of the Basic Law is limited to conscientious objectors. It is intended, as is already implied in the choice of terms (alternative service, compulsory alternative service), to be performed only in place of the military service a person refuses to render. Indeed, the inherent justification for compulsory alternative service derives exclusively from the fact that Article 12a.2 of the Basic Law allows for refusal to render military service for the reasons contained in Article 4.3 of the Basic Law; notwithstanding differences as regards the nature of the areas of activity, civilian service replaces military service (BVerfGE 48, 127 [165]).

Constitutionally mandated equality as regards civic duty in the form of universal military service therefore gives rise to the duty of the legislature to ensure that only those persons are exempted from military service who have decided to refuse to render military service involving the use of arms on grounds of conscience under Article 4.3 sentence 1 of the Basic Law; this duty represents an obligation of high order towards the community. This means on the one hand that the state, which gives precedence to decisions to refuse to render military service involving the use of arms even in the event of a threat to its existence, must be protected against abusive invocation of this fundamental right. On the other hand, it is also necessary to protect the freedom of conscience itself, which is threatened precisely when it can be used to avoid fulfilment of general civic duties.

**60 Years German Basic Law:
The German Constitution and its Court**

The legislature must therefore, if it introduces general military service, at the same time ensure that the responsible authorities are able to establish with a sufficient degree of certainty that conscientious objection is based upon a decision of conscience within the meaning of Article 4.3 of the Basic Law. Under constitutional law, this follows on the one hand from its responsibility to afford the holder of the fundamental right protection under Article 4.3 of the Basic Law and on the other hand from its duty to maintain both universal military service within the borders of the state as well as preparedness for defence of the state that guarantees this fundamental right. This does not restrict the fundamental right guaranteed under Article 4.3 of the Basic Law. Moreover, it only makes possible a procedure for ascertaining whether an individual subject to military service who invokes this fundamental right also in fact fulfils the prerequisites. In this - and only in this - regard, the fundamental right to conscientious objection is subject to procedural requirements. The legislature is explicitly empowered by Article 4.3 sentence 2 of the Basic Law to “regulate” - but not to “restrict” - the right to conscientious objection or, more precisely, the manner in which it is invoked. The procedure must be constitutionally objective, suitable and reasonable (see on the right of asylum BVerfGE 60, 253 [295]). Only if it fails to meet these requirements is it in violation of Article 4.3 of the Basic Law.

3. The legislature is in this regard free to choose the manner in which it chooses to have the existence of the elements of a decision of conscience established (see BVerfGE 48, 127 [169]). It is under no obligation to retain the customary recognition procedure (BVerfGE 28, 243 [259]; 48, 127 [166, 167]). It may replace it by a solution that it deems more appropriate to its purposes (BVerfGE 48, 127 [167]). The legislature may also avail itself of other appropriate means in place of a special recognition procedure (see BVerfGE 48, 127 [169]).

4. The legislature intended the provisions of the Conscientious Objection Reform Act under challenge to replace the previous procedure for examination of conscience, which was characterized by an oral hearing of the applicant, including in particular thorough questioning as to the motives for his decision, with another method for verification of the asserted decision of conscience: Knowing acceptance of civilian service, which is five months longer than active military service, is to be considered supportive evidence of the existence of a decision of conscience. The more onerous nature of the regulation of civilian service is primarily intended to ensure that the fundamental right under Article 4.3 sentence 1 of the Basic Law is invoked only by true conscientious objectors. It does to be sure constitute the actual “test of conscience” that gives effect to the will of the legislature, but not the only one. It is complemented by a recognition procedure, which may vary as a function of the respective circumstances:

Persons subject to military service who have not served within the meaning of s. 4.1 of the Act on Conscientious Objection must undergo the procedure before the Federal Agency; such persons have accounted for approximately 85% of applicants in recent years. It does not - as can be inferred from its methodology and in particular the historical development of the Conscientious Objection Reform Act - constitute a recognition procedure in the conventional sense (see *Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks] 9/2124, p. 9]): Recognition of the applicant is no longer dependent upon the results of an oral hearing, which was characteristic of the conventional procedure; the Federal Agency may not, except, if necessary, for a request for further information from the applicant, concern itself with the establishment of facts; a “merely formal examination” takes place (see *Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks.] 9/2124, p.11); conclusive

Selected Fundamental Decisions of the Federal Constitutional Court

evidence of or against a decision of conscience need not be produced; rather, the sole purpose of the procedure is to eliminate without an oral hearing applications that are obviously without merit due to the immediately apparent absence of a relevant decision of conscience.

If in the opinion of the legislature there is generally cause to assume that civilian service alone does not in its present form fulfil its function as supportive evidence of the existence of a decision of conscience, the procedure before the committees and chambers for conscientious objection pursuant to ss. 9 et seq. and 18.1 sentence 2 of the Act on Conscientious Objection is applicable. It corresponds in significant ways to the customary recognition procedure: The substantive criterion for recognition remains unchanged as compared with previous law. S. 14.1 sentence 1 of the Act on Conscientious Objection does not, however, require that the procedure result in conclusive establishment of the existence of a decision of conscience, but rather even allows a sufficiently certain assumption to suffice as evidence of such existence. The personal hearing by the committee may be dispensed with if the prerequisites pursuant to s. 14.3 of the Act on Conscientious Objection exist.

II.

The Conscientious Objection Reform Act guarantees to the extent required under constitutional law that only such individuals subject to military service are recognized as conscientious objectors as can with sufficient certainty be assumed to meet the conditions of Article 4.3 sentence 1 of the Basic Law; it may be assumed that only those who have actually made a decision of conscience against military service involving the use of arms will accept civilian service. Civilian service gives conscientious objectors an alternative to military service that is in any case not significantly less onerous. s. 24.2 sentence 1 of the Alternative Civilian Service Act (*Gesetz über den Zivildienst der Kriegsdienstverweigerer - ZDG*) stipulates that civilian service is to be a third longer than active military service. Since there are currently more positions available for civilian service than can be filled by persons obliged to perform such service and further civilian service positions are to be created in the future, conscientious objectors can today - unlike as recently as 1978 (see BVerfGE 48, 127 [171 et seq.]) - expect with a high degree of probability to be called up for civilian service. At the same time, certain, less appropriate positions - in particular in the area of administration and care - are to be done away with. When new positions of employment are recognized, it is necessary to ensure that the positions made available do not result in obviously unequal treatment of persons performing civilian service as compared with other persons performing such service or those rendering military service (see *Bundestag* document [*Drucksache des Deutschen Bundestages - BTDrucks*] 9/2124, p.10). The burdens inherent in civilian service as such have become more tangible, in particular due to the provisions contained in ss. 6.1 sentence 1, 19.3 and 25a.4 of the Alternative Civilian Service Act.

The organization of civilian service in this manner makes it possible, in any case together with the accompanying recognition procedure, to establish with sufficient reliability the existence of a decision of conscience. In the case of the proceedings before the committees and chambers for conscientious objection, this results from the very fact that it is similar to the previous verification procedure, which was compatible with the Basic Law (see BVerfGE 28, 243 [259-260]; 48, 127 [166]). In the case of the proceedings before the Federal Agency, it must be admitted that it is indeed of only limited evidentiary value; in the meantime, it has assumed an exclusively complementary function in that civilian service, as the actual test of conscience, is

**60 Years German Basic Law:
The German Constitution and its Court**

intended to be combined with a minimum institutionalized procedural examination of individual cases. It can fulfil this limited function in an objective manner. More exhaustive examination by the Federal Agency is not required under constitutional law since civilian service in its present form seems to be generally suitable for preventing false conscientious objectors from abusively invoking the fundamental right under Article 4.3 sentence 1 of the Basic Law to avoid military service.

III.

The provisions of the Conscientious Objection Reform Act under challenge are also otherwise compatible with the Basic Law.

1. The fact that the duration of civilian service under s. 24.2 sentence 1 of the Alternative Civilian Service Act exceeds that of active military service by a third does not constitute a violation of Article 12a.2 sentence 2 of the Basic Law.

- a) Under Article 12a.2 sentence 2 of the Basic Law, the duration of military service represents an independent upper time limit to the duration of alternative service. The duration of military service to be rendered in times of peace under legislation governing such service includes active military service, which is currently 15 months (s. 5.1 sentence 2 of the Compulsory Military Service Act), standby military service and military exercises (s. 4.1 of the Compulsory Military Service Act). Standby military service is credited towards the total duration of military exercises (s. 5a.3 of the Compulsory Military Service Act). The duration of such service may not exceed a maximum of nine months for enlisted personnel, 15 months for non-commissioned officers and 18 months for officers (s. 6.2 of Compulsory Military Service Act). The duration of military service may therefore extend up to 24 months in the case of enlisted personnel. In view of the legislation in effect at that time, the Senate therefore also established that extension of civilian service to 24 months could also come into question (BVerfGE 48, 127 [170-171]). This interpretation of Article 12a.2 sentence 2 of the Basic Law is consistent with the wording of the provision.

In any case, the materials (see the remarks of the Members of Parliament Dr. Arndt and Dr. Schwarzhaupt, Proceedings of the German Federal Assembly [*Verhandlungen des Deutschen Bundestages*], 2nd legislative period, record of the 110th session of the Committee for Legal Affairs and Constitutional Law of 20 February 1956, pp. 9-10, and its 111th session of 21 February 1956, pp. 12 and 14 et seq., as well as the Second Written Report of the Committee for Legal Affairs and Constitutional Law, Proceedings of the German Federal Assembly, 2nd legislative period, stenographic report p. 6857 do not refute this. They make it clear that active military service and military exercises together constitute the basis for determination of the length of alternative service. The legislature that adopted the constitutional amendment cannot therefore have assumed that the time burden would be completely identical for both those persons who render military service and those who perform alternative service; for it was at the time already certain that it was not possible to know whether and to what extent those performing military service would be called up for military exercises after completion of active military service.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

Article 12a.2 sentence 2 of the Basic Law therefore prohibits in any case any legal provisions that call for civilian service that exceeds the legally permissible maximum duration of military service. The provision does not obligate the legislature to make provision for civilian service that falls within the legally permissible maximum duration of military service and corresponds exactly to the actual duration of military service. It also does not prohibit the legislature from making provision for the performance of civilian service that exceeds the actual average duration of military service to be rendered. Moreover, the legislature may establish the duration of civilian service as a function of a time span that it measures abstractly, i.e., on the basis of the legally permissible duration of military service and therefore independently of the actual duration of military service rendered. This follows from these considerations:

The normative goal of Article 12a.2 sentence 2 of the Basic Law is to achieve a balance between the burden imposed upon those who render military service and that imposed upon those who perform alternative service; those who perform alternative service may not be privileged over or placed at a disadvantage as compared with those who render military service. This precludes the possibility of making the actual duration of military service and that of alternative service completely and intrinsically identical. In view of the existing differences between military service and alternative service, the legislature can organize civilian service as a duty that represents a burden identical to that of military service (see BVerfGE 48, 127 [173]) only if it has certain latitude as regards establishment of the duration of alternative service. It would otherwise be possible to achieve identical burdens for those who render military service and those who perform alternative service only by adding “artificial” difficulty to alternative service that does not derive from the actual situation, i.e., from the nature of the service.

...

- c) The legislature did not exceed the bounds of its operating freedom that it is therefore afforded as regards establishment of the duration of civilian service with the provision contained in s. 24.2 sentence 1 of the Alternative Civilian Service Act: The duration of civilian service is to be established so that it on the one hand does not exceed the permissible maximum time period, which is currently 24 months, and on the other hand is suitable for fulfilling its intended function as supportive evidence of the existence of a decision of conscience. This in particular also constitutes no violation of Article 12a.2 sentence 3 of the Basic Law. This article of the Basic Law prohibits legal provisions that discourage conscientious objectors from availing themselves of their fundamental right under Article 4.3 sentence 1 of the Basic Law and therefore exerting undue pressure on decisions of conscience. The Conscientious Objection Reform Act does not create any such pressure. The freedom of those who refuse to render military service involving the use of arms on grounds of conscience to make a decision of conscience is not compromised by the fact that in addition to presenting the reasons for such a decision in the context of a recognition procedure they must perform civilian service with a duration of 20 months. On the other hand, the existing differences between

**60 Years German Basic Law:
The German Constitution and its Court**

military service and civilian service must be taken into account here. In the case of those who perform civilian service, such service is performed without interruption and ends conclusively at a specific time; it involves as a rule less stringent employment and is typically associated with less onerous living conditions.

1. Under the interpretation required by constitutional law, s. 8 sentence 2 of the Act on Conscientious Objection is compatible with the Basic Law.

- a) Under s. 8 sentence 2 of the Act on Conscientious Objection, persons subject to military service who have not served in the military and who have not been called up or received preliminary notice may also be called up for military service during the recognition procedure in the event of a state of tension or a state of defence if they have applied for recognition as conscientious objectors. If the provision were to be interpreted on the basis of its wording to mean that it permits conscription for unrestricted military service, it would be incompatible with Article 4.3 sentence 1 of the Basic Law. The fundamental right of conscientious objection accords precedence to the protection of conscience over the duty anchored in the constitution to participate in the armed defence of the country and as a result in the protection of the existence of the state even in situations of serious conflict in which the state makes special demands upon its citizens (BVerfGE 12, 45 [54]; 28, 243 [260]; 48, 127 [163]).

Its core purview is the protection of conscientious objectors against being compelled to kill other human beings in connection with an act of war in violation of their conscience, which in principle and without exception categorically prohibits killing (BVerfGE 12, 45 [56-57]; 23, 191 [205]; 28, 243 [262]; 32, 40 [46-47]; 48, 127 [163-164]). Conscientious objectors are directly confronted by such compulsion if subjected to unrestricted service, especially in the case of a state of tension and in particular in the event of a state of defence. It cannot be justified under law that is subordinate to the constitution (BVerfGE 12, 45 [53]; 28, 243 [259]). Even conflicting fundamental rights of other parties and other legal values of constitutional rank may only limit the unconditional and unrestricted right to conscientious objection in individual respects, but not, however, its core purview (See BVerfGE 28, 243 [261]).

- b) A law may be nullified only if no acceptable interpretation is possible on the basis of recognized principles of interpretation that is compatible with the Basic Law (BVerfGE 49, 148 [157]). If the wording, the historical development and the overall context of the relevant provisions and their purpose and intent admit of several meanings, of which at least one leads to a result that is compatible with the Basic Law, an interpretation is then available that is compatible with the Basic Law (see BVerfGE 19, 1 [5]; 30, 129 [148]; 32, 373 [383-384]; 49, 148 [157]).

s. 8 sentence 2 of the Act on Conscientious Objection must be interpreted to mean that persons subject to military service may be called up only for service that does not involve the use of arms.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

This is not in contradiction with the wording of s. 8 sentence 2 of the Act on Conscientious Objection. The provision explicitly states only that “conscription” or, as the case may be, “draft into military service” is possible (see s. 3.2 of the Act on Conscientious Objection). It does not conclusively specify the type of service for which the applicant may be called up, that is, whether for unrestricted service or only for service that does not involve the use of arms.

The history of the development and the intent and purpose of s. 8 sentence 2 of the Act on Conscientious Objection also do not speak against a restrictive interpretation. In the interest of upholding a law, which in the case of doubt requires an interpretation in compliance with the Basic Law, whether an interpretation that goes further than the interpretation of the law that is in compliance with the Basic Law would better reflect the subjective will of the legislature cannot be considered to be of decisive importance (BVerfGE 49, 148 [157]). Of sole importance is that an interpretation not be in contradiction with the will of the legislature. This is not the case here. Indeed, the interpretation to the effect that conscription of an applicant only for service that does not involve the use of arms is permissible is essentially consistent with the will of the legislature. The intent of the latter was to ensure to the greatest extent possible the preparedness and capacity for defence of the Federal Armed Forces, especially in the event of a state of tension and a state of defence. To this end, the legislature wanted to preclude that a large number of persons subject to military service who have not served would under the impression of the greater dangers of military service file applications for recognition as conscientious objectors in abuse of the law in order to at least temporarily avoid conscription for military service. Conscription only for service that does not involve the use of arms also takes these goals into account to a considerable extent.

It does not follow that this interpretation runs counter to the will of the legislature, in particular not from Article 3 nos 4 and 7 of the Act on the Reform of the Right to Conscientious Objection and Civilian Service. By deleting the former s. 27 of the Compulsory Military Service Act and the words “or upon application for service that does not involve the use of arms” from s. 48.2 no. 2 of the Compulsory Military Service Act, the legislature simply indicated that there was no (longer) any intention of organizing any special form of service that does not involve the use of arms. This does not mean, quite apart from the fact that this decision can be reversed, that the possibility of conscripting individuals subject to military service for military service and occupying them in a manner that does not compel them to render service involving the use of arms is now excluded.

- c) If persons subject to military service who have not served and have applied for recognition as conscientious objectors are called up for service in the Federal Armed Forces that does not involve the use of arms in the event of a state of tension and a state of defence - for example, in the military administration or the medical corps - this does not encroach upon the area protected by Article 4.3 sentence 1 of the Basic Law. The provision protects only against such activities as are directly related to the

**60 Years German Basic Law:
The German Constitution and its Court**

use of military weapons as defined by the state of the respective weapons technology (Herzog in: Maunz/Dürig/Herzog/Scholz, *Grundgesetz*, October 1984, Article 4 marginal no. 171-172). It does not legitimize refusal to render any military service, but only refusal to render military service involving the use of arms (see BVerfGE 12, 45 [56]; 32, 40 [45]).

- d) Conscription for service that does not involve the use of arms is permissible until such time as persons subject to military service have been officially recognized as conscientious objectors. In the event of a state of tension and a state of defence, in which cases the state is compelled to make use of all available resources to safeguard its existence, it is compellingly necessary that the state be able to make use of persons subject to military service in the Federal Armed Forces until such time as it is definitively established that they may rightfully claim the protection of the fundamental right under Article 4.3 sentence 1 of the Basic Law. In such situations, this is not countervailed by an equally valid interest on the part of persons subject to military service in being exempted from military service for, as it were, precautionary considerations, for such persons cannot in the course of rendering service that does not involve the use of arms find themselves in a situation of compulsion of the nature that the fundamental right under Article 4.3 sentence 1 of the Basic Law is intended to protect against. ...

c) *Hijab, BVerfGE 104, 337*

Explanatory Annotation

Both Islam and Judaism require that animals be slaughtered without prior stunning by severing certain major blood vessels to let the blood drain out. This method is controversial because it is alleged that this causes unnecessary suffering for the animal and this could violate animal welfare law. In Germany this approach to slaughtering animals had always been regarded as legal until the Nazi-regime changed this for reasons that had nothing to do with animal protection and everything with racism and bigotry. After 1945, ritual slaughtering became a tolerated practice. Animal welfare legislation passed in 1986 provided for a prohibition of slaughtering without prior stunning but contained an exception procedure for cases where “compulsory” religious rules require the ritual slaughtering. The necessary exceptional authorization was not granted to a Sunni Muslim butcher on the grounds that his religion does not *per se* prohibit the eating of meat of animals not slaughtered according to Islamic rites. The Constitutional Court objected to this narrow interpretation of the relevant norm in the animal welfare legislation. The question is not what the religion as a whole, i.e. Sunni or Shiite Islam, might generally say to this problem. It is sufficient that such rites can be shown to be part of a concrete religious community and to be of sufficient religious significance to warrant observance by the members of this community.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

The decision was rendered in January 2002, just before an amendment to the Basic Law in which animal welfare became a constitutionally protected legal interest by being included in the “state objectives clause” of Article 20a.¹³ However, this would not have changed the outcome of the decision. Either way the issue is a conflict between religious freedom and animal welfare. Resolution of this conflict is only possible by balancing both rights such that the broadest possible scope of both rights is achieved (“practical concordance”), i.e. the aggregate sum of the two balanced rights must larger than what could be achieved if one right were given absolute prevalence.¹⁴ The absolute prevalence of animal welfare could not achieve that goal.¹⁵

**Translation of the Hijab Judgment - Decisions of the Federal Constitutional Court
(Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 104, 337***

Headnotes:

1. If a non-German butcher who is a pious Muslim wants to slaughter animals without stunning them (ritual slaughter) in order to facilitate to his customers, in accordance with their religious conviction, the consumption of the meat of animals that were ritually slaughtered, the constitutionality of this activity is to be examined in accordance with Article 2.1 in conjunction with Articles 4.1 and 4.2 of the Basic Law (Grundgesetz - GG).
2. In the light of these constitutional norms, s. 4a.1 in conjunction with s. 4a.2, number 2, part 2 of the Tierschutzgesetz (Animal Protection Act) is to be interpreted in such a way that Muslim butchers can be granted an exceptional permission for ritual slaughter.

Judgement of the first Senate of 15th January, 2002 - 1 BvR 1783/99 -

Facts:

The constitutional complaint concerns the grant of exceptional permissions for the so-called ritual slaughter, i.e., the slaughter of warm-blooded animals without previously stunning them.

After the end of the Second World War, ritual slaughter was, in most cases, tacitly tolerated (cf. Andelshauser, *Schlachten im Einklang mit der Scharia*, 1996, pp. 140-141). However, the first regulation with Germany-wide validity on slaughter that, for religious motives, is performed without stunning the animal, was only introduced when the Tierschutzgesetz (hereinafter: TierSchG,

13 Official Gazette of the Federal republic of Germany (BGBl.), Part I, p. 2862.

14 See Introduction at p. 67-72.

15 It should be noted that the Constitutional Court based its decision mainly on the subsidiary freedom of Article 2.1 of the Basic Law, taking into account the religious freedom clause of Article 4.1 only marginally because it saw the main gist of the case in the business interest of the Turkish butcher to supply his customers rather than in his own religious beliefs. This was arguably a dogmatically wrong approach, which is also evidenced by the fact that the Court mainly engaged in a religious freedom argument. It is for this reason that the decision is dealt with under the heading of religious freedom.

* © Bundesverfassungsgericht (Federal Constitutional Court).

**60 Years German Basic Law:
The German Constitution and its Court**

Animal Protection Act) was amended by provisions on slaughter. Since the entry into force of the first amending law of the Animal Protection Act, dated 12th August, 1986 (Federal Law Gazette I, p. 1309; the latest amendments of the Act were promulgated on 25th May 1998, cf. Federal Law Gazette I, p. 1105 ...), s. 4a of the Animal Protection Act contains, in s. 1, a general ban on the slaughter of warm-blooded animals without previously stunning them. s. 4a.2, number 2, however, provides the possibility of granting exceptional permissions for religious reasons. In the legislative procedure, the regulation contained in the second part of s. 4a.2, number 2, of the Animal Protection Act was seen in the context of Jewish as well as of Islamic dietary laws (cf. Bundestagsdrucksache [BT-Drucks, Records of the Bundestag] 10/5259, p. 38).

At present, the wording of s. 4a of the Animal Protection Act reads as follows:

(1) A warm-blooded animal may only be slaughtered if it was stunned before the draining of its blood begins.

(2) Notwithstanding s. 1, no stunning is required

...

2. if the responsible authority has granted an exceptional permission for slaughter that is performed without stunning the animal (ritual slaughter); the responsible authority may only grant the exceptional permission to the extent that this is necessary for meeting the needs of members of specific religious groups in the area of applicability of this law, to whom mandatory provisions of their religious group prescribe ritual slaughter or prohibit the consumption of the meat of animals that were not ritually slaughtered; or

3. if this has been established as an exception by a decree pursuant to s. 4b, number 3.

2. Pursuant to the judgement of the Bundesverwaltungsgericht (Federal Administrative Court) dated 15th June, 1995 (BVerwGE [Decisions of the Federal Administrative Court] 99, p. 1), ... s. 2, number 2 ... of the provision ... requires that for the grant of an exceptional permission, it must be objectively established that a religious group has mandatory provisions about the ban on stunning animals before slaughtering them. According to the Court, it is required (1) that definite norms that are issued by the respective religious group exist; and (2) that these norms are regarded as mandatory in the conception that the group has of itself; this conception is what the state can assess. The Court held that an individual view, which only focuses on the subjective religious conviction of the members of a religious group - even if they regard this conviction as mandatory - is not compatible with the wording, the purpose and the history of the origins of the law (cf. loc. cit., pp. 4 et seq.).

The complainant is a Turkish citizen and ... a pious Sunni Muslim. He has been living in the Federal Republic of Germany for 20 years and operates ... a butcher's shop that he ... took over from his father. Until September, 1995, he was granted, pursuant to s. 4a.2, number 2 of the Animal Protection Act, exceptional permissions for slaughter that is performed without previously stunning the animal for attending his Muslim customers. ... Afterwards, the complainant filed further applications for the grant of such permissions. They were unsuccessful due to the above-mentioned judgement of the Federal Administrative Court dated 15th June, 1995. The

**Selected Fundamental Decisions of
the Federal Constitutional Court**

action that the complainant brought, in the original proceedings, against the rejection order and against the order that ruled on the complainant's objection against the rejection order, was dismissed by the Administrative Court; in the grounds, also the Administrative Court referred to the above-mentioned judgement and, apart from this, to the appeal judgement in these proceedings.

Extracts from the Grounds:

B.

The constitutional complaint is well-founded. Certainly, s. 4a.1 in conjunction with s. 4a.2, number 2, second part, of the Animal Protection Act is compatible with the Basic Law. However, the challenged decisions that are based on this regulation do not stand up to review by the Federal Constitutional Court.

I.

1. The Federal Constitutional Court's basis for review is, first and foremost, Article 2.1 of the Basic Law. In the original proceedings, the complainant, a pious Sunni Muslim, sought an exemption from stunning prescribed by s. 4a.1 of the Animal Protection Act in order to facilitate to his customers, by practising his occupation as a butcher, the consumption of the meat of ritually slaughtered animals. In comparison to this, the complainant's providing of such meat for his own consumption comes second. The second part of s. 4a.2, number 2 of the Animal Protection Act, on the basis of which the administrative authorities and administrative courts examined the complainant's application, therefore primarily affects the complainant's occupational activity as a butcher.

Because the complainant is not a German but a Turkish citizen, this activity is not protected by Article 12.1 of the Basic Law. The relevant statute that provides protection in this context is Article 2.1 of the Basic Law in the form that results from the special link between Article 12.1 of the Basic Law, which only applies to Germans, and Article 2.1 of the Basic Law, which is only of subsidiary validity for foreigners (in this context, cf. BVerfGE 78, 179 [196-197]). For the complainant, however, ritual slaughter is not only a means for obtaining and preparing meat for his Muslim customers and for himself. It is, according to his statements, which have not been called into question in the challenged decisions, also an expression of a basic religious attitude that for the complainant as a pious Sunni Muslim, includes the obligation to perform the slaughter in accordance with the rules of his religion, which he regards as binding (in this context, cf. the general statements in: Andelshäuser, loc. cit., pp. 39 et seq.; Jentzsch, *Das rituelle Schlachten von Haustieren in Deutschland ab 1933*, 1998, pp. 28 et seq.; Mousa, *Schächten im Islam*, in: Potz/Schinkele/Wieshaider, *Schächten. Religionsfreiheit und Tierschutz*, 2001, pp. 16 et seq.). Even if ritual slaughter itself is not seen as an act of religious practice, the above-mentioned statements are to be given due consideration by enhancing the protection of the complainant's occupational freedom under Article 2.1 of the Basic Law by the special liberty rights (Freiheitsgehalt) that are contained in the fundamental right of the freedom of religion under Articles 4.1 and 4.2 of the Basic Law.

**60 Years German Basic Law:
The German Constitution and its Court**

2. The legal position which the complainant thus enjoys with a view to his occupational activity as a butcher, is, however, pursuant to Article 2.1 of the Basic Law, only guaranteed in the framework of the constitutional order. The constitutional order includes all legal norms that are, formally and as far as substance is concerned, compatible with the Basic Law (cf. BVerfGE 6, 32 [36 et seq.]; 96, 375 [397-398]; consistent case law). As concerns substance, this presupposes, above all, the safeguarding of the principle of proportionality and, in this context, the observance of the freedom of religion.

II.

S. 4a.1 in conjunction with s. 4a.2, number 2, part 2 of the Animal Protection Act lives up to these standards.

1. It is true that the regulation encroaches upon the fundamental right under Article 2.1 in conjunction with Articles 4.1 and 4.2 of the Basic Law, because it permits slaughter without stunning, in the framework of the occupational activity of a Muslim butcher, only under the restricting preconditions established by the second part of s. 4a.2, number 2 of the Animal Protection Act as an exception from mandatory stunning stipulated by s. 4a.1 of the Animal Protection Act. This encroachment, however, is not objectionable because it can be sufficiently justified under constitutional law.

- a) It is the purpose of the Animal Protection Act to protect the life and well-being of animals out of responsibility for animals as humankind's fellow creatures. No one may, without reasonable cause, inflict pain, suffering or damage upon an animal (s. 1 of the Animal Protection Act). The aim of a protection of animals that is based on ethical principles (cf. BVerfGE 36, 47 [56-57]; 48, 376 [389]; 101, 1 [36]) is also served by the regulation under s. 4a.1 in conjunction with s. 4a.2, number 2, part 2 of the Animal Protection Act. By incorporating in the Animal Protection Act the principle that warm-blooded animals are to be stunned before their blood is drained, the parliament intended to extend the fundamental concept of the Animal Protection Act, which is delimited in its s. 1, to the area of slaughter (cf. Records of the Bundestag 10/3158, p. 16). This is a legitimate aim of a regulation, which also takes the feelings of broad sections of the population into consideration (cf. BVerfGE 36, 47 [57-58]), and especially with a view to ritual slaughter, Records of the Bundestag 10/5259, p. 32, under I 2a, no. 3).
- b) S. 4a.1 in conjunction with s. 4a.2, no. 2, part 2 of the Animal Protection Act complies with the requirements of the principle of proportionality.
 - aa) The regulation is suitable and necessary for achieving the purpose of the regulation, i.e., for extending a protection of animals that is based on ethical principles also to the slaughter of warm-blooded animals.

As concerns the appraisal of the means that the parliament chooses for enforcing the legislative aims of regulations with a view to their suitability and requisiteness, the Constitution grants the parliament a certain discretion. This also applies to the appraisal of the factual basis of a legislative regulation. In this respect, it cannot

**Selected Fundamental Decisions of
the Federal Constitutional Court**

be assumed that an erroneous appraisal has occurred here. Certainly there are opinions that call into doubt that slaughter that is performed after the animal was stunned causes considerably less suffering and pain to the animal than slaughter without stunning (as concerns sheep and calves, see, e.g., the overview provided in the paper by Schulze/Schultze-Petzold/Hazem/Groß, *Deutsche Tierärztliche Wochenschrift* 85 [1978], pp. 62 et seq.). It seems, however, that there is no final scientific answer to this question as yet. For reasons of animal protection, other opinions, e.g., the one expressed by the German Association for the Protection of Animals during the oral argument, give a clear preference to slaughter that is performed with previous stunning. Article 12 of the European Convention for the Protection of Animals for Slaughter dated 10th May, 1979 (Federal Law Gazette 1983 II, p. 771) and Article 5.1, letter c of Directive 93/119/EC of the Council of the European Union on the protection of animals at the time of slaughter or killing dated 22nd December, 1993 (Official Journal L 340/21) proceed on the assumption that slaughter causes less pain and suffering to animals if they are stunned before their blood is drained. Under these circumstances, the German parliament's appraisal, which concurs with this opinion, and the parliament's assumption that mandatory stunning prescribed by s. 4a.1 of the Animal Protection Act is suitable for achieving the aims of s. 1 of the Animal Protection Act and is also necessary for lack of an equally effective alternative, is at least justifiable.

The same applies to the appraisal of the exemption provisions pursuant to s. 4a.2, no. 2, part 2 of the Animal Protection Act. The parliament placed the exemption from mandatory stunning prescribed by s. 4a.1 of the Animal Protection Act under the reservation that it requires an exceptional permission because the parliament wanted to submit ritual slaughter to an increased supervision by the state. In particular, the parliament intended to create, apart from examining the applicants' expertise and personal aptitude, the possibility to ensure, through collateral clauses to the exceptional permission, that the animals that are bound for slaughter are spared any avoidable pain and suffering during transport, immobilisation and the ritual slaughter itself. This was supposed to be achieved, for instance, by orders about suitable premises, equipment and other devices (cf. Records of the Bundestag 10/3158, p. 20 on no. 5). Thus, the regulation intends to prevent, wherever possible, domestic or other private slaughter, which often does not ensure due ritual slaughter and which therefore can result in particularly offensive suffering of the animals concerned; instead, it intends to promote slaughter in approved slaughterhouses (cf. Records of the Bundestag 10/5259, p. 39 on Article 1, no. 5).

Apart from this, the prerequisite for the grant of an exceptional permission pursuant to s. 4a.2, no. 2, part 2 of the Animal Protection Act is that in the specific case, the needs of adherents of a religious group are to be met, who are, by mandatory provisions of their religious group, prohibited from consuming the meat of animals that were not ritually slaughtered. The fact that the law permits only exemptions from the mandatory stunning prescribed by the Animal Protection Act if these prerequisites are met inevitably results in a decrease of the possible

**60 Years German Basic Law:
The German Constitution and its Court**

exemptions. In the case of Islam, it must also be taken into account that this religion itself, as the Muslims' Central Council in Germany stated in its opinion, requires that the killing of animals be performed as gently as possible (also see Andelshausen, loc. cit., pp. 35, 62, 79-80). Ritual slaughter in accordance with the rules of Islam must be conducted in such a way that the death of the animal is effected as speedily as possible and that the animal's suffering is restricted to a minimum, with any kind of cruelty to the animal being avoided (also see Österreichischer Verfassungsgerichtshof [Austrian Constitutional Court], EuGRZ [Europäische Grundrechtszeitung] 1999, p. 600 [at p. 603]). Also on this basis, the parliament could proceed on the assumption that the reservation of an exemption under s. 4a.2, no. 2, part 2 of the Animal Protection Act constitutes a measure that is suitable, and also necessary, for ensuring a protection of animals that is based on ethical principles.

- bb) The legal regulation that is in question here is also proportional in a narrower sense. In an overall weighing of the severity of the encroachment upon fundamental rights that is connected with s. 4a.1 in conjunction with s. 4a.2, no. 2, part 2 of the Animal Protection Act, and the importance and the urgency of the reasons that justify the encroachment, it can be reasonably required of the person concerned (cf. BVerfGE 90, 145 [173]; 101, 331 [350]), under the conditions established by the parliament, to conduct the slaughter of warm-blooded animals without stunning only on the basis of an exceptional permission.
- (1) The encroachment upon Muslim butchers' fundamental right to occupational freedom, however, carries much weight. Without the reservation of an exemption, it would no longer be possible for pious Muslims like the complainant to practice the occupation of a butcher in the Federal Republic of Germany. If they want to maintain their businesses at least as sales outlets, and not, as the complainant stated with regard to himself, give up their businesses to gain their livelihood in a different manner, they would have to restrict themselves to either selling imported meat of ritually slaughtered animals or meat of animals that were not ritually slaughtered, i.e., that were slaughtered after having been stunned. Each of these decisions would lead to far-reaching consequences for the person concerned. The decision to only market the meat of ritually slaughtered animals as a salesperson would not only mean to forego the activity of a slaughterer but would also result in the uncertainty whether the meat that he offers really comes from ritually slaughtered animals and thus is suitable for consumption in accordance with the rules of the butcher's own faith and that of his customers. The decision to convert the butcher's business to selling the meat of animals that were not ritually slaughtered would mean that the owner of the business would have to win new customers. Finally, a complete occupational re-orientation, provided that it is still possible in the specific situation of the individual concerned, would mean that this person would have to make a completely new start.

The ban does not only concern the Muslim butcher but also his customers. When they demand meat of animals that were ritually slaughtered, this is obviously based on the fact that they are convinced that their faith prohibits them, in a binding manner, from

**Selected Fundamental Decisions of
the Federal Constitutional Court**

eating other meat. If they were required to, basically, forgo the consumption of meat, this would not sufficiently take the eating habits in the Federal Republic of Germany into consideration. In Germany, meat is a common food, and it can hardly be regarded as reasonable to involuntarily renounce its consumption. It is true that the consumption of imported meat makes such renunciation dispensable; however, due to the fact that in this case, the personal contact to the butcher and the confidence that goes with such contact do not exist, the consumption of imported meat is fraught with the insecurity whether the meat really complies with the commandments of Islam.

- (2) These consequences for pious Muslim butchers and their pious customers must be weighed against the fact that the protection of animals constitutes a public interest that is attached high importance among the population. The parliament has taken this into consideration by not regarding animals as objects but as fellow creatures, which also feel pain, and by intending to protect them by special laws (cf. s. 90a, sentences 1 and 2 of the Civil Code (Bürgerliches Gesetzbuch - BGB), s. 1 of the Animal Protection Act). Such protection is, above all, enshrined in the Animal Protection Act.

However, the protection that is provided by the Animal Protection Act does not mean that animals, by virtue of law, must be spared any impairment of their well-being. Rather, the basic idea of the law merely is not to inflict, “without reasonable cause, pain, suffering or damage” upon an animal (cf. s. 1 of the Animal Protection Act and BVerfGE 36, 47 [57]; 48, 376 [389]).

Accordingly, the Animal Protection Act, not only in s. 4a.2, no. 2, provides exemptions from the obligation to kill animals only after previous stunning. Exemptions from mandatory stunning also exist in the case of emergency slaughter to the extent that stunning is not possible under the circumstances in the specific case (cf. s. 4a.2, no. 1 of the Animal Protection Act), and they can also be granted, for the slaughter of poultry, by an order pursuant to s. 4a.2, no. 3 in conjunction with s. 4b.1, no. 3 of the Animal Protection Act. Moreover, s. 4.1 sentence 1 of the Animal Protection Act generally permits the killing of vertebrate animals without stunning them to the extent that this is reasonable under the specific circumstances and to the extent that pain can be avoided. If the killing of a vertebrate animal without stunning is permissible in the framework of the huntsman-like performance of hunting or due to other legal provisions, or if it occurs in the framework of permissible measures of pest control, the killing may be performed pursuant to s. 4.1 sentence 2 of the Animal Protection Act, if it does not cause more than inevitable pain. Especially the exceptions that were mentioned last show that the parliament has regarded it as compatible with a protection of animals that is based on ethical principles to move away from mandatory stunning in cases where factual considerations or reasons of tradition and social acceptance suggest exemptions.

- (3) Under these circumstances, an exemption from the mandatory stunning of warm-blooded animals before their blood is drained cannot be precluded if the intention connected with this exemption is to facilitate, on the one hand, the practice of a profession with a religious character, which is protected by fundamental rights, and, on the other hand, the observation of religious dietary laws by the customers of the person who practices

**60 Years German Basic Law:
The German Constitution and its Court**

the occupation in question. Without such exemptions, the fundamental rights of those who want to perform slaughter without stunning as their occupation would be unreasonably restricted, and the interests of the protection of animals would, without a sufficient constitutional justification, be given priority in a one-sided manner. What is necessary instead is a regulation that, in a balanced manner, takes into consideration: (1) the fundamental rights that are affected; and (2) the aims of a protection of animals that is based on ethical principles.

- (a) S. 4a.2, no. 2, part 2 of the Animal Protection Act basically complies with these requirements. The regulation intends to facilitate, with a view to dietary laws that are valid, in particular, in the spheres of the Jewish and the Islamic faith (cf. Records of the Bundestag 10/5259, p. 38), ritual slaughter for religious motives on the basis of exceptional permissions (cf. Records of the Bundestag 10/3158, p. 20, on no. 5). The instrument of exceptional permissions is supposed to open a way for counteracting public criticism of religiously motivated slaughter, in particular if it is performed in the shape of so-called domestic and private slaughter (cf. Records of the Bundestag 10/5259, p. 32, under I 2a, no. 3). As has already been mentioned, exceptional permissions allow, inter alia through collateral clauses, that the animals bound for slaughter are spared any avoidable pain and suffering (cf. Records of the Bundestag 10/3158, p. 20, on no. 5, and also Records of the Bundestag 10/5259, p. 39, on Article 1, no. 5). This shows that it is the aim of the regulation to guarantee the protection of the fundamental rights of pious Muslims without abandoning the principles and obligations of a protection of animals that is based on ethical principles. Thus, also the complainant's rights are given due consideration.
- (b) The situation would be different, however, if . . . s. 4a.2 no. 2, part 2 of the Animal Protection Act were to be understood in the same way as it was construed by the Federal Administrative Court in its judgement dated 15th June, 1995 (BVerwGE 99, 1). The Federal Administrative Court held that the case at hand did not provide the legal elements required by this statute, because Sunnite Islam, of which the complainant is an adherent, just as Islam in general, does not mandatorily ban the consumption of the meat of animals that were not ritually slaughtered (cf. loc. cit., p. 9). The Court found that s. 4a.2 no. 2 of the Animal Protection Act requires the definite existence of mandatory provisions that a religious group issues about the ban on stunning before slaughter. The Court concluded that an individual view that only focuses on the subjective religious conviction of the members of such a group - although this conviction is regarded by them as mandatory - is not compatible with the scope of regulation of the law (cf. loc. cit., pp. 4 et seq.).

This interpretation does not live up to the meaning and the scope of the fundamental right under Article 2.1 in conjunction with Articles 4.1 and 4.2 of the Basic Law. The result of this interpretation is that s. 4a.2, no. 2, part 2 of the Animal Protection Act is rendered ineffective for Muslims irrespective of their religious convictions. This interpretation prevents a butcher from exercising his occupation who intends to perform ritual slaughter because he, with a view to the faith that he and his customers adhere to, wants to ensure their supply with the meat of animals that were slaughtered without

**Selected Fundamental Decisions of
the Federal Constitutional Court**

being stunned. This is an unreasonable burden for the persons concerned, which, in a one-sided manner, only takes the interests of the protection of animals into account. If it were interpreted in this manner, s. 4a.2 no. 2, part 2 of the Animal Protection Act would be unconstitutional.

- (c) This result, however, can be avoided by interpreting the legal elements “religious group” and “mandatory provisions” in a manner that takes the fundamental right under Article 2.1 in conjunction with Articles 4.1 and 4.2 of the Basic Law into account.

As the Federal Administrative Court itself has, in the meantime, decided in its judgement dated 23rd November, 2000, (BVerwGE 112, 227), the concept of a “religious group” under s. 4a.2.2 of the Animal Protection Act does not require that such a group: (1) fulfils the prerequisites for the recognition as a religious body under public law pursuant to Article 137.5 of the Weimarer Reichsverfassung [WRV, Constitution of the German Reich of August 11, 1919]; or (2) is entitled to engage in imparting religious instruction pursuant to Article 7.3 of the Basic Law. The Court found that for granting an exemption pursuant to s. 4a.2 no. 2 of the Animal Protection Act, it is sufficient that the applicant belongs to a group of persons who are united by a common religious conviction (cf. loc. cit., pp. 234-235). This means that groups within Islam whose persuasion differs from that of other Islamic groups may also be considered as religious groups under the terms of s. 4a.2, no. 2 of the Animal Protection Act (cf. loc. cit., p. 236). This interpretation of the concept of a “religious group” is in accord with the Constitution and, in particular, takes Articles 4.1 and 4.2 of the Basic Law into consideration. This interpretation is also compatible with the wording of the above-mentioned provision and corresponds to the parliament’s intention to extend the scope of application of s. 4a.2 no. 2 of the Animal Protection Act not only to members of the sphere of the Jewish faith, but also to members of Islam and its different persuasions (cf. Records of the Bundestag 10/5259, p. 38).

Indirectly, this interpretation has consequences also when it comes to dealing with the concept of “mandatory provisions” that prohibit the members of the religious group in question from the consumption of the meat of animals that were not ritually slaughtered. The competent authorities, and in the case of disputes, the courts, are to examine and to decide whether the religious group in question complies with this prerequisite, because this is the legal element that is required for the grant of the exceptional permission that is sought. In the case of a religion that, as Islam does, takes different views as regards mandatory ritual slaughter, the point of reference of such an examination is not necessarily Islam as a whole or the Sunnite or Shiite persuasions of this religion. The question whether mandatory provisions exist is to be answered with a view to the specific religious group in question, which may also exist within such a persuasion (also cf. BVerwGE 112, 227 [236]).

In this context, it is sufficient that the person who needs the exceptional permission pursuant to s. 4a.2 no. 2, part 2 of the Animal Protection Act in order to supply the members of a religious group, states, in a substantiated and understandable manner, that the common religious conviction of the religious group mandatorily requires the

**60 Years German Basic Law:
The German Constitution and its Court**

consumption of the meat of animals that were not stunned before they were slaughtered (cf. BVerwGE 94, 82 [87-88]). If such a statement has been made, the state, which may not fail to consider such a concept that the religious group has of itself (cf. BVerfGE 24, 236 [247-248]), is to refrain from making a value judgement concerning this belief (cf. BVerfGE 33, 23 [30]). In the light of Article 4 of the Basic Law, the state cannot negate the “mandatory” nature of a religious norm for the sole reason that the respective religion has also rules that take its adherents’ pressure of conscience into consideration by admitting exemptions, e.g, with a view to present environment of its adherents and the dietary habits that prevail there. An applicant who seeks an exceptional permission is to be granted such a permission to the extent that such grant is not precluded for other reasons. In this context, (1) collateral clauses to the permission; (2) the control of the compliance of such clauses; and (3) the examination of the applicant’s expertise and personal aptitude, also with a view to the special skills required in ritual slaughter, are to ensure that the interests of the protection of animals are safeguarded as comprehensively as possible (also cf. BVerwGE 112, 227 [236]).

2. If the possibility of an exemption that is regulated in the provision that was last referred to is interpreted in the above-mentioned sense, s. 4a.1 in conjunction with s. 4a.2 no. 2, part 2 of the Animal Protection Act is, also in its other aspects, in accord with the Basic Law. In particular, there is no room for assuming an infringement of the principle of equality enshrined in Article 3.1 of the Basic Law or for assuming an infringement of the ban on discrimination under Article 3.3(1) of the Basic Law; in accordance with this interpretation, also Muslims may be granted an exceptional permission pursuant to s. 4a.2 no. 2, part 2 of the Animal Protection Act who, as butchers, want to supply the meat of ritually slaughtered animals to their customers, who, by mandatory provisions of their religious group, are prohibited from the consumption of the meat of animals that were not ritually slaughtered.

III.

1. The challenged decisions that were issued by authorities and courts violate the complainant’s fundamental right under Article 2.1 in conjunction with Articles 4.1 and 4.2 of the Basic Law. The authorities and administrative courts misjudged the necessity and the possibility of a constitutional interpretation of s. 4a.2 no. 2, part 2 of the Animal Protection; they therefore restricted the above-mentioned fundamental right in a disproportionate manner when applying the exemption regulation concerning the ban on ritual slaughter. The denial of the exceptional permission that the complainant applied for and the confirmation of this decision in the objection proceedings and in the proceedings before the administrative courts are based on this circumstance. It cannot be ruled out that the complainant’s customers, like the complainant himself, are members of a religious group in the above-mentioned sense that mandatorily requires that they observe ritual slaughter, and that, if the decision had been based on this fact, the complainant would have been granted the exceptional permission to facilitate the consumption of the meat of ritually slaughtered animals to his customers and to himself.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

2. As regards the challenged decisions, the decisions made by the administrative courts are to be overturned pursuant to s. 95.2 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG). The matter is referred back to the Administrative Court because it can be expected that the dispute on a point of administrative law will be terminated there on the basis of the present judgement. ...

2. Religion and State under the Basic Law

a) *School Prayer, BVerfGE 52, 223*

Explanatory Annotation

The issue of communal school prayers in public schools has arisen not only in Germany. Unlike the Supreme Court of the USA, the German Constitutional Court, (on the basis of a much less stringent separation of church and state under the Basic Law) has ruled that such school prayers are not necessarily precluded under the Basic Law. There are certainly not in violation of the positive freedom of religion of those that want to pray as a manifestation of their belief. However, they might be problematic in the light of the negative freedom of religion of those students (and potentially teachers) who do not want to pray. The Constitutional Court therefore mandated that school prayers must be conducted in such a way that anyone is free to decide, without any pressure or even coercion, to participate in the prayer. In other words, the Court mandates tolerance from those who do pray and a certain degree of latitude to bear the exceptionality that might come with not participating in the prayer from those who do not want to pray. Only if exceptional circumstances to be determined on a case-by-case basis imply that this tolerance is not provided or that the pressure for those not wanting to participate is too high and that it therefore is in fact too difficult for those who do not want to pray to exercise their right will the school prayer become unconstitutional.

Translation of the School Prayer Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 52, 223*

Headnotes:

1. It is left to the Länder (states) in the framework of the supreme authority in school matters guaranteed by Article 7.1 of the Basic law (*Grundgesetz* - GG) to decide whether to permit voluntary, interdenominational school prayer outside religious instruction in interdenominational schools.
2. School prayer is in principle also constitutionally unobjectionable if a pupil or his or her parents object to the holding of the prayer: their fundamental right to negative freedom to profess a belief is not violated if they may choose freely and without coercion as to whether or not to participate in prayer.

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**60 Years German Basic Law:
The German Constitution and its Court**

3. The voluntary aspect which as a rule can be presumed where the precept of tolerance is adhered to is exceptionally not safeguarded if due to the circumstances of the individual case the pupil is afforded no reasonable opportunity to avoid participation.

Order of the First Senate of 16 October 1979 -1 BvR 647/70 and 7/74 -

Facts:

The constitutional complaints relate to the matter of the permissibility of school prayer outside religious instruction in state compulsory schools if the parents of a pupil object to the prayer.

The constitutional complaints pursue opposite goals. Whilst the complainant in proceedings 1 BvR 647/70 object to the official prohibition of school prayer, the complainant in proceedings 1 BvR 7/74 complains of his fundamental rights being violated precisely because school prayer was held, and he had allegedly been denied legal protection against it.

I. Constitutional complaint proceedings 1 BvR 647/70

The complainants (hereinafter referred to as: complainants *re I*) are the parents of school-age children who at the time of the filing of the constitutional complaints attended classes 3b and 5 of Eichendorff School, a Rural Primary School in Kirschhausen in Bergstraße district in Hesse. In this school, it was usual at that time for a joint interdenominational school prayer to be said daily at the start of lessons. A mother and father whose children attended these classes objected to school prayer, and applied to have it prohibited. The competent schools inspector thereupon ordered that there was to be no prayer in these classes in future. At the instruction of the head teacher, school prayers was ceased in classes 3b and 5.

The complainants *re I*) submitted an objection to the prohibition order of the schools inspector. The latter was rejected by the Administrative District Officer. The latter stated the following as grounds : The Hesse Constitutional Court (*Staatsgerichtshof*) had found in the judgment of 27 October 1965 that the fundamental rights of a pupil under Article 48.2 and Article 9 of the Constitution of the *Land Hesse (Verfassung des Landes Hessen)* were violated if school prayer was said in the class despite his or her objection. The complainants *re I*) have filed an action to rescind on which no decision has yet been made.

The complainants *re I*) have submitted constitutional complaints against the orders of the schools inspector and of the head teacher. The complaint concerns the violation of Articles 3, 4, 6, 7 and 33 of the Basic Law and 140 of the Basic Law in conjunction with Articles 136.2 of the Weimar Constitution (*Weimarer Reichsverfassung - WRV*).

II. Constitutional complaint proceeding 1 BvR7/74

The complainant (hereinafter referred to as: complainant *re II*) is the father of a pupil who had initially commenced attendance at an Evangelical primary school in Aachen. He applied for cessation of school prayer in his daughter's class. The education authority did not comply with his request since it was a denominational school, and school prayer was a major element of the

Selected Fundamental Decisions of the Federal Constitutional Court

children's education in the spirit of their faith. The complainant's objection was unsuccessful. Later, the Evangelical primary school was divided. Both successor schools were continued as interdenominational primary schools (*Gemeinschaftsgrundschulen*). The daughter of the complainant was now attending one of these schools, at which school prayer continued to be said at the start and end of lessons.

Before the school had been converted, the complainant had already filed an action to the Administrative Court (*Verwaltungsgericht*). The action with the goal of prohibiting school prayer in the Evangelical primary school; after conversion of the school, he requested prohibition of school prayer at the interdenominational primary school.

The Administrative Court largely upheld the major points of the action, invoking the negative freedom to profess a belief (right to remain silent). The respondent town was ordered to prohibit school prayer being ordered outside religious instruction or teachers calling to prayer in the class attended by the daughter of the complainant re II) in the interdenominational primary school insofar as this pupil attended lessons.

The Higher Administrative Court (*Oberverwaltungsgericht*) rejected the appeal on Points of fact and law of the education authority with the following reasoning: In the interdenominational schools of North-Rhine/Westphalia the children were said to be taught and brought up together on the basis of Christian educational and cultural values. The binding nature of these values, including the values described in the North-Rhine/Westphalia *Land* Constitution (*Landesverfassung*) by the words "respect for God" for teaching in interdenominational schools however allegedly did not mean that it was permissible to hold school prayer in lessons - outside religious instruction - despite the objection of a child or of his or her parents. ...

In response to the education authority's appeal on points of law, by means of the impugned judgment (Decisions of the Federal Administrative Court (*Entscheidungen des Bundesverwaltungsgerichts* - BVerwGE 44, 196), the Federal Administrative Court overturned the ruling of the Higher Administrative Court (*Oberverwaltungsgericht*) and rejected the action.

Extracts from the Grounds:

B.

The constitutional complaints are admissible.

I.

The constitutional complaint of the complainants re I) is directed prior to exhaustion of the appeals against the orders of the school authorities prohibiting school prayer. An action to rescind has been filed before the Administrative Court; however, in agreement between the parties these proceedings have been suspended pending a ruling of the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz* - *BverfGG*) are met for a ruling prior to exhaustion of the appeals.

II.

Even if the children of all complainants have now left the schools in question, their protectable interest in the determination of any violation of fundamental rights has not ceased to apply, particularly in the religious-ideological area which is particularly sensitive to constitutional violation by virtue of the passage of time on which they had no influence. If in such a case one were to deny the need for legal protection, the fundamental rights protection of the complainants would be unreasonably reduced (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* - BVerfGE) 34, 165 (180) ...; 41, 88 (105) ...).

C.

The constitutional complaint of the complainant re I) leads to the overturning of the impugned administrative acts; by contrast, the constitutional complaint of the complainant re II) cannot be successful.

I.

1. The standard for review of a judgement of the constitutional questions arising with school prayer are primarily Article 6.2 sentence 1 of the Basic Law (right of the parents to bring up their children), Article 4.1 and 4.2 of the Basic Law (freedom of faith and right to undisturbed practice of religion) as well as Article 7.1 of the Basic Law (state educational mandate).

Article 6.2 sentence 1 of the Basic Law grants to the parents the right and the duty to plan the care and upbringing of their children in accordance with their own ideas freely and - subject to Article 7 of the Basic Law - with priority over other educators (see BVerfGE 24, 119 [138, 143-144]; 47, 46 [69-70]). This also includes the right to educate the children in religious and ideological convictions that they regard as right (BVerfGE 41, 29 [47-48]).

On the other hand, Article 7.1 of the Basic Law grants to the state a constitutional educational mandate for schooling (BVerfGE 34, 165 [181-182]). The discretion open to the state in the school system, which is assigned to the *Länder* (see BVerfGE 6, 309 [355]), includes not only the organisational structure of the school, but also the content definition of the courses and educational objectives. The state may hence in principle pursue its own educational goals in schools independently of the parents (BVerfGE 34, 165 [182]; 47, 46 [71-72]). The state educational mandate is separate and equal to the right of the parents to bring up their children; neither the parents' right nor the state educational mandate has absolute priority (BVerfGE 41, 29 [44]; 47, 46 [72]).

2. The problem of school prayer is initially to be seen in the further framework of whether religious references in public interdenominational (compulsory) schools are permissible at all, or whether the state must refrain from any religious and ideological reference when organising schooling - with the exception of the religious instruction expressly guaranteed in Article 7.3 of the Basic Law - in those schools that are not denominational schools.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

The Federal Constitutional Court dealt with this question in great detail in the orders of 17 December 1975 on interdenominational schools in the Baden tradition (BVerfGE 41, 29 [44 et seq.]) and on Bavarian interdenominational schools (BVerfGE 41, 65 [77 et seq.]).

...

Accordingly, the introduction of Christian references in organising state schools is not absolutely forbidden, even if a minority of persons with parental rights who cannot avoid these schools in the education of their children do not want them to have a religious education. The school however may not be a missionary school, and may not claim exclusive truth for Christian articles of faith; it must also be open to ideological and religious values. The educational objective of such a school may not be tied to a Christian denomination - outside religious instruction, which no one may be forced to attend. The affirmation of Christianity in the secular refers primarily to its recognition as the formative cultural and educational factor as which it has developed in Western history, not to its truths of faith, and is hence also legitimate in relation to non-Christians by the continuation of historical circumstances. This factor includes not lastly the concept of tolerance for persons holding different views.

In comparison to these specific constitutional requirements of the organisation of schooling by the *Länder* concerning the religious-ideological character of state schools, the institutional principles of the relationship between state and church set out in the Basic Law may not set a primary standard. Insofar as these church policy provisions lead to a principle of non-identification, this may certainly not determine the organisation of schooling if this corresponds to the specific requirements put forward in view of the express constitutional provisions.

On the basis of these considerations, the Federal Constitutional Court has considered the Christian interdenominational schools introduced in Baden-Württemberg and in Bavaria to be constitutional; there was also no constitutional objection to the North Rhine/Westphalia interdenominational schools (BVerfGE 41, 88).

3. If considering the principles developed by the Federal Constitutional Court religious references in public compulsory schools are not prohibited, the holding of school prayer is in principle constitutionally unobjectionable if its implementation also remains within the framework of the school organisation granted to the *Länder* in Article 7.1 of the Basic Law, and if other constitutional principles, in particular fundamental rights of participants under Article 4 of the Basic Law, are not violated thereby. In the judgment impugned by the complainant (re II), the Federal Administrative Court has affirmed the permissibility of prayer, referring to Article 7 of the Basic Law, albeit based for the religious references of school on Article 7.3 and 7.5 of the Basic Law. These considerations are constitutionally unobjectionable.

- a) School Prayer, as subject matter of the present constitutional complainant proceedings, constitutes an interdenominational (ecumenical) call to God held on the basis of the Christian faith. School prayer in this form - particularly because it should be acceptable for both major Christian denominations - is not the expression of the faith of a specific denomination in the framework of the respectively defined tenets of faith; it is hence not part of the exercise of the actual religious creed of the denomination to which the pupil belongs.

**60 Years German Basic Law:
The German Constitution and its Court**

Nonetheless, this general prayer remains an act of religious profession, in that it takes the form of calling on God on the basis of the Christian faith. In this respect, prayer is a religious act (see on this BVerfGE 24, 236 [246]) in which no one is obliged to participate in accordance with Article 136.4 of the Weimar Constitution.

School prayer as an act of religious profession spoken outside religious instruction is not a part of general schooling given in the framework of the state educational mandate. It is not instruction as characterised by lessons as such, it is not a passing on of the knowledge to the pupils, and it is not targeted educational influence by the school and the teachers on the children, but is a religious act which as a rule is carried out together with the teacher. In this, school prayer also is not a part of teaching Christian cultural and educational values as considered permissible by the Federal Constitutional Court in the framework of general lessons at Christian interdenominational schools (BVerfGE 41, 29 [52]). The permissibility of such schools does not mean *per se* the constitutional permissibility of school prayer.

- b) Since school prayer is not a part of lessons within the meaning of school teaching, it can also not be an element of a binding curriculum. Its implementation must be completely voluntary - a factor also generally undisputed in view of the provisions contained in Article 4.1 and 4.2 of the Basic Law, as well as in Article 140 of the Basic Law in conjunction with Article 136.4 of the Weimar constitution. This applies not only to pupils, but also to the teacher of each class in which school prayer takes place (see on this also Article 7.3 sentence 3 of the Basic Law).

School prayer cannot therefore be held on the basis of instructions, but only of suggestions - which are ultimately not binding - which may emanate from the state's school administration, from the head teacher, from the teacher of the class in question, from the pupils themselves or from persons with parental rights. School prayer can take place during the time planned lessons, for instance immediately after the beginning of the first or shortly before the end of the last lesson, but also outside lesson time. It may take place in the classroom, or together for several classes or the whole school; the teacher may initiate the prayer, may sing it along with the pupils, or may leave it to the pupils altogether. The cases at hand relate to school prayer spoken during lesson time in the classrooms, with the participation of the teacher. It was manifestly a normal event in all classes of these schools.

Even if school prayer is not and cannot be a part of the bindingly regulated lessons, it nevertheless remains - in each of the above forms - a school event to be attributed to the state. This certainly applies if school prayer takes place during lesson time at the suggestion of the teacher. The role of the state is however restricted to creating the organisational framework for school prayer and permitting prayer at the request of the parents or pupils or suggesting it itself. The state does not order it, it makes an offer which the school class may choose to take up.

- c) If the state in the named sense permits school prayer outside religious instruction as a religious act and a "school event". It promoted, however, the view of Christianity and hence a religious element in the school over and above the religious references emerging

Selected Fundamental Decisions of the Federal Constitutional Court

from recognition of the characterising cultural and educational factor of Christianity (BVerfGE 41, 29 [52]). Prayer links also in its interdenominational form to a faith-based truth, namely to faith that God can grant what is asked for. Nevertheless, permission of this religious element in the interdenominational (compulsory) school - if voluntary participation is adhered to - is still in the framework of the discretion which the *Länder* have as bearers of supreme authority in school matters in accordance with article 7.1 of the Basic Law, even if the fundamental right of dissenters is included in accordance with Article 4 of the Basic law to achieve concordance in the evaluation:

Article 4 of the Basic Law grants not only the freedom to believe, but also the external freedom to profess faith in public (BVerfGE 32,98 [106]; 33,23 [28]; 41, 29 [49]);

Article 4.1 and 4.2 of the Basic Law ensures in this sense scope for the active exercise of religious conviction. If the state permits school prayer in interdenominational schools, it is doing no other than exercising the right of school organisation granted to it in accordance with Article 7.1 of the Basic law such that those pupils who so wish may give witness to their religious faith - even if only in the restricted form of general and interdenominational invocation of God. The state gives scope here to the positive freedom to profess a belief in an area which it has taken care of entirely and in which religious and ideological ideas have always been relevant (BVerfGE 41, 29 [49]).

From the outset, the state must however strike a balance between this scope to exercise positive freedom to profess a belief by permitting school prayer and the negative freedom to profess a belief of other parents and pupils who reject school prayer. The compensation takes place here in principle by guaranteeing the voluntary nature of participation for pupils and teachers. In contradistinction to the Christian-religious references of a school which determine its character as a whole, and - because they are a part of the lessons - permeate its educational goals, and hence the curriculum which is binding on all pupils, school prayer does not belong within compulsory instructions, but is a school event permitted in addition to this - characterised by volition. Even if school prayer, if it is to have a purpose, presumes a faith-based truth, the school in this instance does not claim absolute truth for the Christian faith; it merely enables those who so wish to profess such a faith. Subject to the completely voluntary nature of participation, hence, the permissibility of the religion element "school prayer" by the *Länder* in an interdenominational (compulsory) school organised by it not without a religious reference is in principle not constitutionally objectionable.

4. If the *Länder* may permit school prayer in the above sense for the organisation of schooling, they are on the other hand not forced to always permit the holding of school prayer in interdenominational schools.

Constitutionally the *Länder* are only obliged to provide for religious instruction in denominational schools as a standard subject (Article 7.3 sentence 1 of the Basic Law). The parents do not have a positive right of determination to the introduction of school prayer any more than they have such a right to the establishment of schools of a specific religious or ideological leaning; they also have no right to have their children brought up in the desired

**60 Years German Basic Law:
The German Constitution and its Court**

ideological form (BVerfGE 41, 29 [46, 48]). The right of pupils to undisturbed practice of religion does not mean that they must be offered school prayer by the state in the area of school outside religious instruction. In designing schooling in the religious area within the meaning of its concordance of the constitutional values, the state has to strike a balance between the various fundamental rights, including between the right to carry out religious acts and the right of dissenters to be left in peace by them. How the state carries out this balancing out is left in the context of its supreme authority in school matters under Article 7 of the Basic Law in principle to its discretion: It can give interdenominational schools religious references, or it may forsake them. It may permit school prayer in those interdenominational schools which it provides with religious elements to the permissible degree (BVerfGE 41, 29[52]); it may however also - irrespective of whether it otherwise equips the school with religious references - choose to do without school prayer in general.

5. As the Federal Administrative Court rightly presumes in the judgment impugned by the complainant re II), the organisation of the schools in the individual *Länder* is also significant to the question of the permissibility of school prayer outside religious instruction; here lies the priority fundamental decision of the *Länder* as to whether or not they wish to permit generally religious references - over and above the religious instruction which the constitution requires to be offered - in compulsory schools. Reservations against school prayer could certainly exist in an interdenominational school if the *Land* legislature had emphatically disfavoured religious references in the school from implemented by it. This is however not the case either in Hesse or in North-Rhine/Westphalia. In neither of the two *Länder* is the school to be adjusted a non-denominational school within the meaning of Article 7.3 of the Basic Law or a school which was emphatically kept free of Christian values; rather, both *Länder* have decided to maintain religious references in the interdenominational schools.

- a) In North-Rhine/Westphalia (see on this BVerfGE 41, 88) in accordance with Article 12.3 of the *Land* Constitution of North-Rhine/Westphalia (*Landesverfassung -LV NW*) primary schools are interdenominational schools, denominational schools or ideological schools. In accordance with Article 12.6 of the *Land* Constitution of North-Rhine/Westphalia, in interdenominational schools children are taught and brought up together on the basis of Christian educational and cultural values in openness to the Christian creeds and to other religious and ideological convictions. In accordance with Article 7.1 of the *Land* Constitution of North-Rhine/Westphalia, the goal of education is also to awaken respect for God. At the interdenominational schools in accordance with Article 14 of the *Land* Constitution of North-Rhine/Westphalia religious instruction is a standard subject of instruction.

A provision corresponding to Article 12.6 of the *Land* Constitution of North-Rhine/Westphalia is contained in s. 19 of the First Act on the Order of the School System in the *Land* North-Rhine/Westphalia in the *Landtag* ..., general agreement had been reached that interdenominational schools were not valued-neutral schools. Rather, they were schools in which Christian educational and cultural values had their place not only in the meaning of non-committal cultural Christianity. ...

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- b) In Hesse, on the basis of Article 56.2 of the Hesse *Land* Constitution (*hessische Landesverfassung - HV*) children of all religious denominations and ideologies are as a rule taught together. In accordance with Article 56.3 of the Hesse *Land* Constitution, consideration should be given to the religious and ideological perceptions of all pupils. Article 56.7 of the Hesse *Land* Constitution provides that the details are to be governed by a statute which must take precautions against violating in school the religious and ideological principles in accordance with which the persons with parental rights seek to have their children educated. In accordance with s. 1.1 of the Hesse Act on Maintenance and Administration of State Schools and School Supervision (*hessisches Gesetz über die Unterhaltung und Verwaltung der öffentlichen Schulen und die Schulaufsicht - SchVG*) pupils are to be enabled to act on the basis of the Christian and Humanist tradition, as well as to respect religious and cultural values. In article 15.1 of the treaty between the Land Hesse and the Evangelical *Land* Churches in Hesse (*Vertrag des Landes Hessen mit den Evangelischen Landeskirchen in Hessen*) of 18 February 1960 state schools are referred to as interdenominational schools on a Christian basis. On the basis of these legal provisions, the Hesse school is largely regarded as a Christian interdenominational school.

...

II.

Were there to be no fundamental constitutional objections to school prayer, this could be judged differently if in the concrete case a pupil or his parents objected to prayer being held. This view was put forward by the Hesse Constitutional Court in the judgment of 27 October 1965, and, with different reasoning, by the Münster Higher Administrative Court in judgment of 28 April 1972. It is impossible to go along with the considerations of either court.

1. The Hesse constitutional Court opines that school prayer must be prohibited if a pupil rejects it because the pupil must not be placed in a situation of having to express his or her religiously or ideologically motivated rejection of school prayer through non-participation. Such an extension of the right to remain silent which was violated not only by virtue of being compelled to reveal what one oneself believes or thinks, but already by announcing a positive or negative attitude to denominational conduct of others, is not covered by the fundamental right to negative freedom to profess a belief ... This is already shown by a consideration based on constitutional systematics: The freedom to decide for oneself whether to participate in a religious act is contingent on such religious acts taking place at all. By exercising the fundamental right *not* to participate, the person concerned reveals by that action that he or she does not agree with the conviction as precondition for the exercise of the fundamental right to refuse in particular, just as with non-participation in religious instruction (Article 7.2 of the Basic Law) or in refusal to render war service involving the use of arms (Article 4.3 of the Basic Law).

This is closely linked to the legal view of the Hesse constitutional Court, according to which negative freedom to profess a belief applies without restriction or exception, is neither restricted, nor can it be restricted, since it does not encroach on third-party legal spheres; by contrast, the positive freedom to profess a belief is alleged to be subject to the boundaries of Article 2.1 of

**60 Years German Basic Law:
The German Constitution and its Court**

the Basic Law. This is not so. Article 4.1 of the Basic Law grants a special fundamental right which is *not* subject to the boundaries of Article 2.1 of the Basic Law (BVerfGE 23, 50 [55-56]; 32, 98 [107]); on the other hand, if a sovereign measure is compatible with Article 4 of the Basic Law (BVerfGE 6, 32 [37]; 17, 302 [306]; 28, 243 [264]). Having said that, the fundamental right under Article 4.1 and 4.2 of the Basic Law is not granted without restriction; this however applies both to the positive and to the negative freedom to profess a belief. However, this fundamental right is not subject to a constitutional requirement of the specific enactment of a statute. Boundaries may nevertheless be imposed on the freedoms of Article 4 of the Basic Law in accordance with the principle of the unity of the constitution by other provisions of the Basic Law (BVerfGE 32, 98 [107-108]; 33, 23 [29]; 44, 37 [50]). In particular, the freedom to profess a belief comes up against boundaries where the exercise of this fundamental right by a subject of fundamental rights meets the conflicting fundamental rights of dissidents (BVerfGE 28, 243 [260-261]; 32, 98 [108]; 41, 29 [50]). As part of the fundamental rights based system of values, the freedom to profess a belief is related to human dignity, which in turn is protected in Article 1.1 of the Basic Law, which prevails over the entire value system of fundamental rights as the supreme value (BVerfGE 6, 32 [41]; 27, 1 [6]; 32, 98 [108]), and hence is attributed to the precept of tolerance. In every case where conflicts occur between negative and positive freedom to profess a belief, particularly in schools, where such conflicts as to the joint education of children of widely differing ideological and faith based leanings are ultimately unavoidable (see BVerfGE 41, 29 [50]), a balance must be sought taking into consideration the precept of tolerance. By contrast, a misunderstood right to remain silent must not be given absolute priority over the practice of religion of others, as was done by the Hesse Constitutional Court.

2. The Münster Higher Administrative Court refers to school prayer said during lessons in its judgment of 28 April 1972 as a teaching and educational act of the school implemented with coercive participation from which dissident, objecting children were unable to remove themselves with regard to the general obligation to attend school. The Federal Administrative Court had already refuted this argument in the judgment impugned by the constitutional complaint. The general obligation to attend school is overlapped when it comes to participation in religious acts by the fundamental right of Article 4.1 of the Basic Law to be able to decide freely on participation in such a religious act Moreover, school prayer as an act of religious profession is a school event, but is not a part of the lessons aimed to teach and instruct pupils.

3. The objection of a dissident pupil or of the persons with parental rights could only make school prayer non-permissible if the right of the deviating pupil to decide freely, with no coercion, on his or her participation in school prayer were not guaranteed. As a rule, however, a pupil can reasonably avoid participation, so that he or she may decide in complete freedom for non-participation in prayer.

- a) Possible means of avoidance are: The pupil can leave the classroom during the prayer; he or she can for instance not enter the room until after the prayer has finished, or can leave the room at the end of the lesson, before the final prayer is said. The dissident pupil can however also remain in the classroom during the prayer, but not say the prayer; in doing so, he or she may remain seated - unlike the fellow pupils praying.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- b) It must be admitted that each of these possibilities for avoidance always emphasises the conduct of the pupil in question when the school prayer takes place as against the praying pupils. This applies particularly if there is only one dissident pupil: He or she visibly acts differently than all fellow pupils. This emphasis could be unacceptable for the person concerned if it would of necessity place him or her in the role of an outsider and discriminate against him or her with regard to the rest of the class. Indeed, the position of the pupil in a class is different and much more difficult than that of an adult citizen who reveals their different conviction in public by not participating in certain events. This applies in particular to younger school children who as yet are hardly able to assert their own position critically towards their environment; in general, the child is placed into a conflict as to the matter of school prayers not by himself or herself, but by the persons with parental rights on the one hand, and the parents of other pupils or the teachers on the other.

4. Nevertheless, one may not presume that avoidance of school prayer pushes the dissident pupil as a rule or even only in a considerable number of cases into the depicted unreasonable position of an outsider. An evaluation of the framework conditions in which prayer is to take place, of the tasks which the teacher has to carry out in this context, and of the actual circumstances at school, means that certainly as a rule one need not fear discrimination of the pupil not participating in the prayer.

- a) The Federal Administrative Court in the judgment impugned by the complainant re II) had already set conditions for the organisational holding of school prayer which is to prevent unsuitable burdens on dissident pupils. Firstly, the duration and frequency of school prayer should be within suitable limits; for instance, it may not be said at the beginning and end of every lesson. Indeed, it appears to be much less onerous on a non-participant for instance if a short prayer is said only at the start of each school day, as was evidently done in the cases to be ruled upon here. Secondly, with pupils who have not reached the age of personal determination in religious matters, as the subjects here, all persons with parental rights must be informed of the fact of the organisation of school prayer and the possibility to not participate. This requirement, intended to make participation truly voluntary, is also justified. The persons with parental rights can where necessary be informed that in a liberal legal and social order it is a natural right of each individual to decide completely freely on participation in a religious act, and that neither participation nor non-participation will be valued in any manner.
- b) Over and above these external and organisational measures, discrimination of the pupils not participating in school prayer can be ruled out as a rule by teachers in line with the educational goal of the school encouraging all pupils to adhere to the principles of respect for one another's convictions, toleration and tolerance. Teachers are obliged to do so both in North-Rhine/Westphalia and in Hesse.

In accordance with Article 7.2 of the *Land* Constitution of North-Rhine/Westphalia, young people are to be taught in the spirit of freedom to show tolerance and to respect the conviction of others. In accordance with Article 7.2 of the *Land* Constitution of

**60 Years German Basic Law:
The German Constitution and its Court**

North-Rhine/Westphalia, children are to be educated and brought up in openness to the Christian creeds and to other religious and ideological convictions. These educational goals are set out once more in s. 1.2 ... and ... s. 19 of the First Act on the Order of the School System in the *Land* North-Rhine/Westphalia goes on to provide that everything is to be avoided in education and lessons which might hurt the feelings of dissenters.

Article 56.3 of the Hesse *Land* Constitution provides as follows: The principle on which all teaching must be based is tolerance. The teacher shall in each subject respect the religious and ideological sensitivities of all pupils, and shall present the religious and ideological views in accordance with the facts. In accordance with Article 56.4 of the Hesse *Land* Constitution, young people are to be taught respect and tolerance amongst other things. In accordance with s. 1.1 of the Hesse Act on Maintenance and Administration of State Schools and School Supervision, schools should also enable pupils to have fundamental rights become effective for themselves and others and create relationships with other people in accordance with the principles of tolerance, justice and solidarity.

This binding educational goal of the spirit of tolerance must lead the teachers of a class in which one or several pupils - unlike their fellow pupils - do not participate in school prayer to teach the pupils in a suitable form and with the necessary pedagogical emphasis about the rights of each individual to freedom of faith and to participate or not to participate in religious acts; the teacher will have to strive to create such an atmosphere in the class that the praying pupils consider as natural the different conduct of their dissident fellow pupil and not treat him or her as an outsider. Where appropriate, the teacher will have to attempt to persuade those parents who - on the basis of their own intolerant religious attitudes - disapprove of the different conduct of a fellow pupil of their children not participating in the prayer.

On the other hand, the pupil not wishing to participate in the prayer, or who is not to participate according to his or her parents' instructions, will have to learn to show tolerance of the interests of the fellow pupils and their parents in holding school prayer, in their undisturbed practice of religion. They may not feel neglected because their fellow pupils follow a creed from which they wish to or are supposed to exclude themselves.

In this context, particular significance attaches to the fact that fundamental right of the positive and the negative freedom to profess a belief is associated with the precept of tolerance (see on this BVerfGE 32, 98 [109-110]; 41, 29 [51]; 47, 46[77]). The question of whether non-participation in school prayer is reasonable for dissenters cannot be solved without considering that two instances in which fundamental rights are exercised, collide which can only be balanced out if the Basic Law's precept of tolerance is respected. The effort to injure as little as possible the rights and feelings of the dissenter emerging from respect for this principle by all concerned, primarily by the teachers and parents of all the pupils in a class, as well as by the pupils themselves, as a rule precludes placing a pupil who not does participate in the prayer in a marginal position.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- c) The dissident pupil will have to bear, and indeed will be able to bear, any elements nevertheless remaining of a special position as a result of his or her non-participation. To certain degree, there is also no express provision of the constitution to spare him or her from this situation in other circumstances: The pupil not participating in school prayer will as a rule also not attend religious instruction. In this case, the Basic Law manifestly requires in Article 7.2 that, in accordance with the precept of tolerance, there must be no discrimination.
- d) Apart from this, it also may not be disregarded that it is hardly possible today to speak of a closed Christian stance on the part of pupils and their parents in a large number of school classes which would be suited to drive a dissident pupil into discriminatory isolation. In a pluralistic society, and in a time in which it is no longer an exception for people to resign church membership, in accordance with which many pupils remove themselves from religious instruction or are removed by their parents, a stance also externally expressed rejecting religion and the church is no longer unusual. Certainly, differences will be recorded between the circumstances in the cities, in small towns and in rural areas, possibly also between types of schools, as well as age groups, and in turn from one school to another. On the whole, however, the trend can probably not be doubted that a stance rejecting religious ties is less and less understood as a special characteristic deviating from “normal” conduct, even in schools.

5. Taking account of all these considerations, it will generally be possible to preclude a marginal role threatening to discriminate against a pupil not participating in school prayer. Certainly, one may not presume that avoiding school prayer is unreasonable and discriminatory for dissident pupil. There are neither factual nor legal preconditions for this presumption. Rather, one may conversely presume that an unreasonable situation leading to an impairment of fundamental rights for the dissident pupil does not occur.

On the other hand, it will also not be possible to rule out entirely that there may be exceptional circumstances in which a not inconsiderable emotional impairment of the dissident pupil could occur. It is conceivable for an emotionally particularly unstable pupil in a school atmosphere characterised by set prejudices which the teachers are unable to move towards tolerance, to be pushed into an exceptional situation which in this concrete case leaves no other option but to eliminate the occasion of the exceptional situation, in other words to completely eliminate school prayer. Whether the factual preconditions of such a situation apply, which would lead to a violation of a fundamental right by the continuing to permit school prayer, must be left to a decision to be taken in individual cases.

Apart from such exceptional cases, the objection of the dissident pupil or of his or her parents may not force the prohibition of school prayer which is still wished for by the fellow pupils or their parents.

III.

Measured against the standards of these principles, the judgment of the Federal Administrative Court impugned by the complainant (re II) is constitutionally unobjectionable. By contrast, the administrative acts impugned by the complaints (re I) violate fundamental rights of these complainants.

1. There are no constitutional reservations against the considerations with which the Federal Administrative Court in the proceedings of the complainant (re II) finds holding school prayer to be permissible despite the objection of this complainant. The fundamental rights of the complainant (re II) have not been violated. His children were free not to participate in school prayer. The decision on participation or non-participation could in this case be taken in complete discretion, with no coercion. The complainant (re II) has not submitted any indications that remaining away from school prayer would be unreasonable, and none are manifest, rather, his counsel, as specifically noted by the Federal Administrative Court, expressly denied in the oral hearing before the appeal on points of law court that such an unreasonable situation applied. The constitutional complaint of the complainant (re II) is hence unfounded.

2. By contrast, the notices of the schools inspector, of the head teacher and of the Administrative District officer acting in the objection proceedings impugned in proceedings 1 BvR 647/70, violate the complainants (re I) in their fundamental rights under Article 6.2 and Article 4.1 and 4.2 of the Basic Law. The persons with parental rights have no right safeguarded by the Basic Law to the holding of school prayer at state schools in Hesse on their request in the classes which their children attend. If however the state has generally permitted school prayer, and if prayer has thus far actually been held, it violates the above fundamental rights of the persons with parental rights concerned if the prayer is prohibited in specific classes with no justifying reason. This is the case here.

The prohibition orders are based neither on generally valid factual considerations, nor on the consideration that because of the concrete circumstances of the individual case it would be unreasonable for the objecting pupil to non-participate in school prayer; there is no manifest indication of an exceptional situation which would lead to unreasonableness. Rather, the prohibition is based exclusively on the judgment of the Hesse Constitutional Court of 27 October 1965, in accordance with which school prayer is said to be non-permissible *per se* in the event of an objection by a pupil or the persons with parental rights over him or her. The administrative authorities have considered themselves to be bound by the ruling of the Constitutional Court, without carrying out their own factual examination of the individual case. The prohibition orders hence do not have a tenable legal basis. The ruling of the Hesse Constitutional Court is not in compliance with federal constitutional law; for this reason, the judgment is null and void with regard to its binding effect (see BVerfGE 24, 289 [289]). The prohibition of school prayer, with the reasoning stated, and with no review of the individual case, encroaches on the fundamental rights of the complainants (re I) protected by Article 6.2 and Article 4.1 and 4.2 of the Basic law. The impugned administrative acts were therefore to be overturned.

Selected Fundamental Decisions of
the Federal Constitutional Court

b) *Classroom Crucifix*, BVerfGE 93, 1

Explanatory Annotation

In what was certainly one of the more (or even most) controversial decisions of the Constitutional Court the Court banned the Christian Cross from classrooms in obligatory state schools with no religious affiliation. Bavarian school regulations for those schools providing the basic 9-year minimum education mandated that a cross be present in each and every classroom.¹⁶ The Court saw a violation of the negative freedom of religion of the children who did not want to learn “under the cross”.¹⁷ The issue here was again the balancing of the positive freedom of those who either do not mind at all or even wish for this Christian symbol to be present with the negative freedom of those who find this offensive. The difference to the school prayer case lies in the fact that the students cannot escape the cross in the classroom and it was this point that moved the Court to take a more pronounced approach in this instance. In this sense the decision of the Court is only consequent. Fundamental rights in general and freedom of religion in particular are rights protecting minorities, especially those perhaps regarded as somewhat obnoxious in the eyes of the majority. One wonders what the harsh critics of this decision would say if a school in Germany with a majority of Muslim students - not uncommon in bigger cities - were to request that Islamic symbols be put up in the classroom and the Christian children would just have to ignore that as it does not pertain to them.

Interestingly the Bavarian legislator reacted to the decision in a fashion more akin to the Court’s approach in the school prayer case. The cross is still mandatory but can now be removed on a case-by-case basis if a student takes issue with it and no other solution can be found.¹⁸

Translation of the Classroom Crucifix Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 93, 1*

Headnotes:

1. The affixation of a cross or crucifix in the classrooms of a State compulsory school that is not a denominational school infringes Article 4.1 of the Basic Law.
2. s. 13.1 sentence 3 of the School Regulations for Elementary Schools in Bavaria is incompatible with Art. 4.1 of the Basic Law and is null and void.

Order of the First Panel of 16 May 1995 - 1 BvR 1087/91 -

16 It is interesting to note that the Bavarian regulator saw the necessity of the cross in the class room in this lower tier of schools and not in those preparing children for tertiary education despite the fact that the children up to grade 9 will be the same age.

17 BVerfGE 91, 1 (18), see <http://www.servat.unibe.ch/law/dfr/bv093001.html>.

18 Cf. BVerfG, 1 BvR 1604/97 of 27.10.1997, para. 4, http://www.bverfg.de/entscheidungen/rk19971027_1bvr160497.html.

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**60 Years German Basic Law:
The German Constitution and its Court**

Facts:

The constitutional complaint concerns the affixation of crosses or crucifixes in schoolrooms.

By s. 13.1 sentence 3 of the School Regulations for Elementary Schools in Bavaria (Volksschulordnung - VSO) of 21 June 1983 (GVBl. p. 597), a cross is to be affixed in every classroom in the public elementary schools. The Volksschulordnung is a legal regulation issued by the Bavarian State Ministry for Education and Cultural Affairs, based on a power delegated in the Bavarian Act on Education and Public Instruction (BayEUG) and in the (since repealed) Elementary Schools Act (VoSchG). S. 13.1 VSO reads:

The school shall support those having parental power in the religious upbringing of children. School prayer, school services and school worship are possibilities for such support. In every classroom a cross shall be affixed. Teachers and pupils are obliged to respect the religious feelings of all.

Complainants (3) - (5) are the school age minor children of complainants (1) and (2). The latter are followers of the anthroposophical philosophy of life as taught by Rudolf Steiner, and bring up their children accordingly. Since their eldest daughter, complainant (3), went to school they have been objecting to the fact that in the schoolrooms attended by their children first of all crucifixes and later in part crosses without a body have been affixed. They assert that through this symbol, in particular through the portrayal of a “dying male body”, their children are being influenced in a Christian direction; which runs counter to their educational notions, in particular their philosophy of life.

In February 1991 complainants (1) and (2) brought an action against the Free State of Bavaria before the administrative court, in their own behalf and that of their children, with the aim of having the crosses removed from all rooms frequented or yet to be frequented in public schools by their children in connection with attending school. At the same time they applied for the issuing of a temporary order pending conclusion of the action for removal of crucifixes. The administrative court refused the urgent request. The appeal against this was rejected by the Higher Administrative Court. The main case is pending before the appellate court since the administrative court rejected the suit. The constitutional complaint is brought directly against the orders issued in the summary proceedings and indirectly against s. 13.1 sentence 3 VSO. The complainants object to infringement of their fundamental rights under Article. 4.1, Article. 6.2, Article 2.1 and Article 19.4 of the Basic Law.

Extract from the Grounds:

B.

The constitutional complaint is admissible.

The complainants have exhausted the legal remedies (s. 90.2 sentence 1 of the Federal Constitutional Act - BVerfGG). With the order of the Higher Administrative Court, a decision of last instance terminating the procedure for temporary protection of rights is present. Certainly, the principle of subsidiarity may in such cases oppose admissibility of the constitutional complaint where constitutional infringements are complained of that do not specifically relate to the urgent procedure but raise questions that present themselves equally in the main proceedings, so that

Selected Fundamental Decisions of the Federal Constitutional Court

the latter are capable of redressing the alleged constitutional grievance (see BVerfGE 77, 381 [401]; 80, 40 [45]). On the other hand, the complainant may not be remitted to the main proceedings when the infringement of fundamental rights is brought about through the urgent decision itself or where the decision does not depend on any further clarification as to facts or other than constitutional law and the preconditions are present whereby pursuant to s. 90.2 sentence 2 of the federal Constitutional Court Act the requirement for exhaustion of legal remedies may be disregarded (see BVerfGE 79, 275 [279]).

These prerequisites are present here. Insofar as the complainants assert infringement of Article 19.4 of the Basic Law through the refusal of provisional legal protection, they are making a fundamental rights complaint affecting the urgent proceedings specifically. As regards the other (substantive) fundamental rights complaint, no further clarification as to facts or other than constitutional law is required. In particular, the specialized courts have dealt comprehensively with the relevant legal questions in the decisions challenged. No further return is to be expected from the main proceedings. Nor can the complainants reasonably be expected, in view of the advance of time and the continuation of schooling, to be remitted to the conclusion of the main proceedings.

For the admissibility of the constitutional complaint it is irrelevant whether the child complainants are still attending elementary school (see BVerfGE 41, 29 [43]).

C.

The constitutional complaint is justified.

Insofar as the Higher Administrative Court denied a ground for an order, its decision infringes Article 19.4 of the Basic Law (I.). The denial of a claim to an order is incompatible with Article 4.1 and Article 6.2 sentence 1 of the Basic Law (II.).

I.

1. Art. 19.4 of the Basic Law opens up recourse to the law against any alleged infringement of subjective rights by an action of the public power. Not just the formal right to invoke the courts but also the effectiveness of the legal protection are guaranteed (cf. BVerfGE 35, 263 [274]; 35, 382 [401 seq.], with further references). Effective legal protection means also legal protection within an appropriate time. It follows that judicial legal protection, particularly in urgent proceedings, must as far as possible avert the creation of accomplished facts that can no longer be reversed if a measure proves unlawful on (final) judicial review (cf. BVerfGE 37, 150 [153]; 65, 1 [70]). There follow requirements on the courts as to the interpretation and application of the various statutory provisions on urgent legal protection (cf. BVerfGE 49, 220 [226]; 77, 275 [284]). Thus, the specialized courts are bound when, say, interpreting and applying s. 123 VwGO to grant provisional legal protection where the petitioner would otherwise be threatened with considerable infringement of rights, going beyond marginal areas, that could no longer be removed by the decision in the main case, unless, exceptionally, preponderant, particularly weighty grounds oppose this (cf. BVerfGE 79, 69 [74 seq.]).

**60 Years German Basic Law:
The German Constitution and its Court**

2. These requirements are not met by the Higher Administrative Court's order. It denies the requisite ground of order for issuing the temporary order desired, and therefore the urgency of the matter, because the complainants had for years hesitated to invoke the courts and during that period put up with at least the affixing of crosses instead of the originally present crucifixes. It had been their aim to continue searching with the school administration for a transitional solution in this sense acceptable to them.

With this justification the Higher Administrative Court does justice neither to the actual course of events nor to the importance of the complainants' concern. In fact the complainants had since their eldest child went to school brought their demand before all levels of the school administration - from local up to ministerial. The fact that they originally hoped for an extra-judicial agreement and that time thereby elapsed ought not to count to their disadvantage; such conduct directed initially at avoiding conflict is rather that of a reasonable party. Further, the complainants had agreed to a compromise which however was called in question by the school administration repeatedly when the children changed classroom or school. A definitive concession in this sense has not been made by the school administration.

For this reason, the Higher Administrative Court's view that the complainants ought to have continued to strive for compromise also fails to do justice to the obligation to guarantee effective legal protection. It would rather have been a matter for the court to sound out whether the school administration was prepared to make a temporary order superfluous by giving an assurance along the lines of the compromise solution.

In answering the question whether grounds for an order were present, the Higher Administrative Court further failed to take adequate account of the fact that the matter was one of a provisional arrangement in the context of current school attendance, that is, of a life situation where the mere advance of time towards conclusion of school (complainant 3 is now sixteen years old) makes judicial legal protection particularly urgent. Legal disputes in school matters particularly are often decided only at the level of provisional legal protection, because the claim can often no longer, because of elapsed time, be asserted in the main proceedings. The specialized courts ought not to duck the need for effective legal protection by overstraining the requirements as to the existence of grounds for an order.

II.

The decisions challenged further infringe the fundamental rights of complainants (1) and (2) under Article 4.1 in conjunction with Article 6.2 sentence 1 of the Basic Law, and the fundamental rights of complainants (3) - (5) under Article 4.1 of the Basic Law. They are based on s. 13.1 sentence 3 VSO, which is itself incompatible with the Basic Law and is null and void.

1. Article 4.1 of the Basic Law protects freedom of religion. The decision for or against a faith is according to it a matter for the individual, not the State. The State may neither prescribe nor forbid a faith or religion. Freedom of religion does not however mean just the freedom to have a faith, but also the freedom to live and act in accordance with one's own religious convictions (cf. BVerfGE 32, 98 [106]). In particular, freedom of religion guarantees participation in acts of worship a faith prescribes or is expressed in. This implies, conversely, the freedom to stay away from acts of worship of a faith not shared. This freedom relates similarly to the

**Selected Fundamental Decisions of
the Federal Constitutional Court**

symbols in which a faith or religion presents itself. Art. 4(1) Basic Law leaves it to the individual to decide what religious symbols to acknowledge and venerate and what to reject. Certainly, in a society that allows room for differing religious convictions, the individual has no right to be spared from others' manifestations of faith, acts of worship or religious symbols. This is however to be distinguished from a situation created by the State where the individual is exposed without possibility of escape to the influence of a particular faith, to the acts through which it is manifested and to the symbols in which it is presented. Accordingly, Article 4.1 of the Basic Law develops its effect of guaranteeing freedom in the very areas of life that are not left to society's spontaneous organization but taken in hand by the State (cf. BVerfGE 41, 29 [49]). Article 140 of the Basic Law in conjunction with Article 136.4 of the Weimar Constitution (WRV) takes account of this by explicitly prohibiting compelling anyone to take part in religious practices.

Article 4.1 of the Basic Law does not however confine itself to barring the State from intervening in the religious convictions, actions and presentations of individuals or of religious communities. Instead, it further imposes the duty on it to guarantee room for them to operate in which the personality can develop in the philosophical and religious area (cf. BVerfGE 41, 29 [49]), and to protect them against attacks or obstruction by adherents of other religious tendencies or competing religious groups. Article 4.1 of the Basic Law, however, does not confer on the individual or on religious communities any entitlement in principle to give expression to their religious conviction with State support. On the contrary, the freedom of religion of Article 4.1 of the Basic Law implies the principle of State neutrality towards the various religions and confessions. The State, in which adherents of different or even opposing religious and philosophical convictions live together, can guarantee peaceful coexistence only if it itself maintains neutrality in questions of belief. It may thus not itself endanger religious peace in a society. This precept finds its basis not only in Article 4.1 of the Basic Law, but also in Article 3.3, Article 33.1 and Article 140 of the Basic Law, in conjunction with Article 136.1 and 4 and Article 137.1 WRV. These bar the introduction of legal forms of establishment of religion and forbid the privileging of particular confessions or the exclusion of those of other beliefs (cf. BVerfGE 19, 206 [216]; 24, 236 [246]; 33, 23 [28]; consistent case law). Numerical strength or social importance does not come into it (cf. BVerfGE 32, 98 [106]). The State must instead ensure treatment of the various religious and philosophical communities on an equal footing (cf. BVerfGE 19, 1 [8]; 19, 206 [216]; 24, 236 [246]). Even where it cooperates with them or promotes them, this may not lead to identification with particular religious communities (cf. BVerfGE 30, 415 [422]).

Taken together with Article 6.2 sentence 1 of the Basic Law, which guarantees parents the care and upbringing of their children as a natural right, Article 4.1 of the Basic Law also covers the right to bring up children in religious and philosophical respects. It is a matter for the parents to convey to their children those convictions in matters of belief and philosophy of life that they find right (cf. BVerfGE 41, 29 [44, 47 seq.]). This implies the right to keep the children away from religious convictions that seem to the parents wrong or harmful.

2. This fundamental right is infringed by s. 13.1 sentence 3 VSO, and by the decisions challenged, which are based on this provision.

**60 Years German Basic Law:
The German Constitution and its Court**

- a) S. 13.1 sentence 3 VSO prescribes the affixing of crosses in all classrooms of the Bavarian elementary schools. The term cross, according to the interpretation by the courts in the initial case, covers crosses with and without a body. In reviewing the norm, accordingly, both meanings are to be included. It is true that in their application for provisional legal protection the complainants have according to the wording asked only for the removal of crucifixes. The Higher Administrative Court has however explicitly assumed that this may also mean crosses without a body, and rejected the application in this farther reaching meaning, too.

Taken together with universal compulsory schooling, crosses in schoolrooms mean that pupils are, during teaching, under State auspices and with no possibility of escape, confronted with this symbol and compelled to learn “under the cross”. This distinguishes the affixing of crosses in classrooms from the frequent confrontation with religious symbols of the most varied religious tendencies arising in everyday life. Firstly, the latter does not proceed from the State but is a consequence of the spread of various religious convictions or religious communities in society. Secondly, it does not have the same degree of inescapability. Certainly, the individual cannot control encounters in the street, in public transport or when entering buildings with religious symbols or manifestations. As a rule, however, these are fleeting encounters, but even in the case of longer confrontation this is not based on a compulsion enforceable where necessary through sanctions.

In duration and intensity, the effect of crosses in classrooms is still greater than that of crosses in courtrooms. Yet the Federal Constitutional Court saw the compulsion to engage in legal proceedings under the cross, against one’s own religious or philosophical convictions, as infringement of the religious freedom of a Jewish party to proceedings who saw that as identification of the State with the Christian faith (cf. BVerfGE 35, 366 [375]).

Nor is the inescapability of the encounter with the cross in schoolrooms removed by the setting up of private schools allowed by Article 7.4 of the Basic Law. First, the setting up of private elementary schools is tied in Article 7.5 of the Basic Law to particularly strict conditions. Secondly, since these schools are as a rule financed by fees paid by parents, a large part of the population lacks the possibility of recourse to them. Such is also the complainants’ case.

- b) The cross is a symbol of a particular religious conviction and not merely an expression of the Western culture marked partly by Christianity.

Undoubtedly, through the centuries numerous Christian traditions have been incorporated in the general cultural foundations of society, and even opponents of Christianity and critics of its historical heritage cannot elude them. These must however be distinguished from the specific content of beliefs of the Christian religion, and still more from a particular confession including its ritual presentation and symbolic portrayal. The State’s professing of these contents of belief, to which third parties too are exposed in contacts with the State, affects religious freedom. The Federal Constitutional Court took that as a basis in the decision on the constitutionality of the

**Selected Fundamental Decisions of
the Federal Constitutional Court**

non-denominational schools of Christian character traditional in Baden, when it found that the admissible affirmation of Christianity related primarily to acknowledgment of the major cultural and educational factor it constituted in Western history, but not to the Christian religion's truths of faith. Only with such a limitation can this affirmation be legitimated, in relation to non-Christians too, through the continued operation of historical facts (cf. BVerfGE 41, 29 [52]).

The cross continues to be one of the specific faith symbols of Christianity. It is, indeed, its symbol of faith as such. It symbolizes the salvation of man from original sin brought about through Christ's sacrificial death, but at the same time also Christ's victory over Satan and death and his lordship over the world: suffering and triumph simultaneously (see the entry "Kreuz" in: Höfer/Rahner [eds.], *Lexikon für Theologie und Kirche*, 2nd ed. 1961, vol. 6, col. 605 et seq.; Fahlbusch et al. [eds.], *Evangelisches Kirchenlexikon*, 3rd ed. 1989, vol. 2 col. 1462 et seq.). For the believing Christian it is accordingly in many ways an object of reverence and of piety. The equipping of a building or a room with a cross is still today understood as an enhanced profession of the Christian faith by the owner. For the non-Christian or the atheist, just because of the importance that Christianity attaches to it and that it has had in history, the cross becomes a symbolic expression of particular religious convictions and a symbol of their missionary dissemination. It would be a profanation of the cross running counter to the self-perception of Christianity and the Christian churches to regard it, as the decisions challenged do, as a mere expression of Western tradition or cult token without a specific reference to faith. That the cross has a religious reference is also clear from the context of s. 13.1 VSO.

- c) Nor can the cross be denied effect on pupils, as the decisions challenged do.

It is certainly true that the affixation of the cross in classrooms is not associated with compulsion to identification or with particular manifestations of reverence or modes of behaviour. It equally does not follow from it that specialized teaching in the profane subjects is marked by the cross or oriented to the Christian faith and the requirements as to conduct symbolized by it. But this does not exhaust the possibilities of the effect of the cross. School education is not just for learning basic cultural techniques and developing cognitive capacities. It is also intended to bring the pupils emotional and affective dispositions to development. Schooling is oriented towards encouraging their personality development comprehensively, and particularly also to influencing their social conduct. It is in this context that the cross in the classroom takes on its importance. It has appellative character and identifies the contents of belief it symbolizes as exemplary and worthy of being followed. This takes place, moreover, in relation to persons who because of their youth are not yet fixed in their views, still have to learn critical capacity and the formation of viewpoints of one's own, and are on that account particularly easily susceptible to mental influencing (cf. BVerfGE 52, 223 [249]).

The decisions challenged too do not completely disavow the appellative character of the cross. They do deny its specifically Christian significance in relation to other-minded pupils. For the Christian pupils, however, they see in it an essential expression of their

**60 Years German Basic Law:
The German Constitution and its Court**

religious convictions. Similarly, the Bavarian Minister-President opines that in general teaching the cross has only non-specific symbolic value, whereas at school prayers and in religious instruction it turns into a specific symbol of faith.

3. The basic right to religious freedom is guaranteed without reservation. This does not however mean that it might not be subject to some sort of restrictions. These would, however, have to follow from the constitution itself. The setting up of limits not already laid out in the constitution is not something the legislature can do. Constitutional grounds that might have justified intervention are not however present here.

a) No such justification follows from Article 7.1 of the Basic Law.

Article 7.1 of the Basic Law certainly gives the State an educational mandate (cf. BVerfGE 34, 165 [181]). It has not only to organize schooling and itself set up schools, but may also establish the goals of education and the course of training. In that, it is independent of parents (cf. BVerfGE 34, 165 [182]; 47, 46 [71 seq.]). Accordingly, not only can schooling and family upbringing come into conflict. It is, rather, even inevitable that at school the differing religious and philosophical convictions of pupils and their parents confront each other particularly intensively.

This conflict among various bearers of a fundamental right guaranteed without reservation, and between that fundamental right and other constitutionally protected objects, is to be resolved on the principle of practical concordancy, which requires that no one of the conflicting legal positions be preferred and maximally asserted, but all given as protective as possible an arrangement (cf. BVerfGE 28, 243 [260 seq.]; 41, 29 [50]; 52, 223 [247, 251]).

This sort of arrangement does not require the State totally to abandon religious or philosophical references in carrying out the educational mandate bestowed by Article 7.1 of the Basic Law. Even a State that comprehensively guarantees religious freedom and thereby commits itself to religious and philosophical neutrality cannot divest itself of the culturally conveyed, historically rooted values, convictions and attitudes on which the cohesion of society is based and the carrying out of its own tasks also depends. The Christian faith and the Christian churches have in this connection, however one may today wish to assess their heritage, been of overwhelmingly decisive force. The traditions of thought, mental experiences and patterns of conduct deriving from them cannot be a matter of indifference for the State. This is particularly true for schools, where the cultural foundations of society are principally handed down and renewed. Moreover, a State that obliges parents to send their children to State schools may give consideration to the religious freedom of those parents who desire a religiously cast upbringing. The Basic Law has recognized this by allowing in Article 7.5 for State denominational or philosophically based schools, providing for religious instruction as an ordinary subject of teaching (Article 7.3 of the Basic Law) and over and above that allowing room for the active exercise of religious conviction (cf. BVerfGE 41, 29 [49]; 52, 223 [240 seq.]).

Selected Fundamental Decisions of the Federal Constitutional Court

To be sure, it is impossible in a pluralistic society to take full account of all educational conceptions in designing the public elementary schools. In particular, the negative and positive sides of religious freedom cannot be realized without problems in one and the same State institution. It follows that the individual cannot in the school context appeal unrestrictedly to Article 4.1 of the Basic Law.

Resolving the unavoidable tension between negative and positive religious freedom while taking account of the precept of tolerance is a matter for the Land legislature, which must through the public decision-making process seek a compromise acceptable to all. In its arrangements it may take as a guide the fact that on the one hand Article 7 of the Basic Law allows religious and philosophical influences in the area of schooling, and on the other Article 4 of the Basic Law commands the exclusion as far as at all possible of religious and philosophical compulsions when opting for a particular form of school. Both provisions have to be seen together and reconciled with each other through interpretation, since it is only concordance of the objects of legal protection under both articles that can do justice to the decision contained in the Basic Law (cf. BVerfGE 41, 29 [50 seq.]).

The Federal Constitutional Court has drawn the conclusion that the Land legislature is not utterly barred from introducing Christian references in designing the public elementary schools, even if those with parental power who cannot avoid these schools in their children's education may not desire any religious upbringing. There is a requirement, however, that this be associated with only the indispensable minimum of elements of compulsion. That means in particular that the school cannot treat its task in the religious and philosophical area in missionary fashion, nor claim any binding validity for contents of Christian beliefs. The affirmation of Christianity accordingly relates to acknowledgement of a decisive cultural and educational factor, not to particular truths of faith. But Christianity as a cultural factor includes the idea of tolerance for the other-minded. Their confrontation with a Christianity-marked image of the world will not involve discriminatory denigration of non-Christian philosophies of life, at least as long as the object is not the conveying of beliefs but the endeavour to realise autonomous personality in the religious and philosophical sphere, in accordance with the basic decisions of Article 4 of the Basic Law (cf. BVerfGE 41, 29 [51 seq.]; 41, 65 [85 seq.]). The Federal Constitutional Court has accordingly pronounced the provision for Christian non-denominational schools in Article 135 sentence 2 of the Bavarian Constitution compatible with the Basic Law only when given an interpretation conforming with the constitution (cf. BVerfGE 41, 65 [66 and 79 et seq.]), and has stressed in relation to the non-denominational school of Christian character in the traditional sense in Baden that this is not a bi-denominational school (cf. BVerfGE 41, 29 [62]).

The affixing of crosses in classrooms goes beyond the boundary thereby drawn to the religious and philosophical orientation of schools. As already established, the cross cannot be divested of its specific reference to the beliefs of Christianity and reduced to a general token of the Western cultural tradition. It symbolizes the essential core of the conviction of the Christian faith, which has undoubtedly shaped the Western world

**60 Years German Basic Law:
The German Constitution and its Court**

in particular in many ways, but is certainly not shared by all members of society, and is indeed rejected by many in the exercise of their fundamental right under Article 4.1 of the Basic Law. Its affixation in State elementary schools is accordingly incompatible with Article 4.1 of the Basic Law insofar as these are not Christian non-denominational schools.

- b) The affixation of the cross cannot be justified from the positive religious freedom of parents and pupils of the Christian faith either. Positive religious freedom is due to all parents and pupils equally, not just the Christian ones. The conflict arising cannot be resolved according to the majority principle, for the fundamental right to religious freedom specifically is aimed in a special degree at protecting minorities. Moreover, Article 4.1 of the Basic Law does not confer on the bearers of the fundamental right an unrestricted entitlement to activate their religious convictions in the context of State institutions. Insofar as the school, in harmony with the constitution, allows room for this, as with religious instruction, school prayers and other religious manifestations, these must be marked by the principle of being voluntary and allow the other-minded acceptable, non-discriminatory possibilities of avoiding them. With affixation of crosses in classrooms, the presence and demands of which the other-minded cannot escape, this is not the case. Finally, it would not be compatible with the principle of practical concordancy for the feelings of the other-minded to be completely suppressed in order that pupils of the Christian faith might be able, over and above religious instruction and voluntary devotions, to learn the profane subjects too under the symbol of their faith.

D.

Accordingly, the provision of s. 13.1 sentence 1 VSO that underlies the dispute is incompatible with the fundamental rights mentioned and is to be pronounced null and void. The decisions in the proceedings for provisional protection of rights challenged are to be set aside. Since the proceedings in the main case are now pending before the Bavarian Higher Administrative Court, the case is referred back to it (s. 95.2 of the Federal Constitutional Court Act - BVerfGG). The order for the reimbursement of costs is on the basis of s. 34a.2 of the Federal Constitutional Court Act.

Dissenting opinion of Judges Seidl, Söllner and Haas:

The Panel majority view that s. 13.1 sentence 3 of the School Regulations for Elementary Schools in Bavaria, according to which a cross is to be affixed in every classroom, infringes the Basic Law is not shared by us. The court's decisions challenged in the constitutional complaint do not infringe the complainant's fundamental rights under Article 4.1 and Article 4.1 in conjunction with Article 6.2 sentence 1 of the Basic Law.

I.

1. According to Article 7.1 of the Basic Law, the whole school system is under the supervision of the State. The setting up and operation of elementary schools is, as follows from Article 7.5 of the Basic Law which associates the licensing of private elementary schools with particularly

**Selected Fundamental Decisions of
the Federal Constitutional Court**

stringent requirements, in principle a matter for the State itself. To this extent, the State has an educational mandate of its own and therefore also the authority to lay down educational objectives (cf. BVerfGE 52, 223 [236]).

The Basic Law, however, allots educational law exclusively to the sovereign sphere of the Länder. Education law does not appear in the catalogue of competences in Art. 73 et seq. Basic Law. The Federal Government accordingly has - by contrast with the constitutional order of the Weimar Republic, which in the area of schooling assigned to the Reich the right of legislation in principle, by Article 10.2 of the Weimar Constitution (WRV) - no legislative authority (Article 70 seq. of the Basic Law) or administrative sovereignty (Article 30 of the Basic Law) for this area. The genesis of Article 7 of the Basic Law shows that far-reaching autonomy for the Länder as regards the philosophical and religious character of State schools was intended. Here the federalist principle prevailed. Proposals aimed at farther-reaching parental rights (“confessional parental right”) and a secured position for confessional schools in the Basic Law were already rejected in the preliminary discussions on Article 7 of the Basic Law. It was repeatedly stressed that the Länder were not to be restricted in their power to regulate educational policy questions (cf. in detail BVerfGE 6, 309 [356] with further references; also BVerfGE 41, 29 [45]).

2. Constitutional assessment of the questions raised in the constitutional complaint must accordingly start from the circumstances existing in the Free State of Bavaria, and may not take conditions that may apply in other Länder of the Federal Republic as the starting point.

The Constitution of the Free State of Bavaria of 2 December 1946 (BV) contains, in its section on education and schools, the following provision on the educational objectives to be pursued in all schools: Article 131

- (1) ...
- (2) The foremost objectives of education are reverence for God, respect for religious conviction and for the dignity of man, self-control, sense of responsibility and willingness to accept responsibility, helpfulness, openness to everything true, good and beautiful, and an awareness of responsibility for nature and the environment.
- (3-4) ...

While the educational objective “awareness of responsibility for nature and the environment” was added only with the Fifth Act amending the Constitution of the Free State of Bavaria of 20 June 1984 (GVBl p. 223), the other educational objectives have remained unaltered since the Bavarian State Constitution came into force.

For elementary schools, Article 135 of the Constitution of the Free State of Bavaria originally provided for denominational or nondenominational schools, with a preference for the denominational school. With developments in school policy (on which see BVerfGE 41, 65 [79 seq.]), this constitutional provision was amended by referendum, through the Act amending Article 135 of the Constitution of the Free State of Bavaria of 22 July 1968 (GVBl p. 238). It has since read as follows:

**60 Years German Basic Law:
The German Constitution and its Court**

Article 135

The public elementary schools shall be joint schools for all children of elementary-school age. In them pupils shall be taught and brought up in accordance with the principles of the Christian confessions. Details shall be specified by the Elementary Schools Act.

In Article 135 sentence 2 of the Bavarian Constitution in its current version Christianity is not to be understood in a confessional sense. The principles of the Christian confessions within the meaning of this provision instead comprise the values common to the Christian confessions and the ethical norms derived from them (cf. BVerfGE 41, 65 [84]). These are values and norms which, decisively marked by Christianity, have largely become the common property of the Western cultural area. Applying these principles, pupils are to be guided towards the educational objectives described in Article 131.2 BV. An educational objective marked by specifically Christian beliefs is not, by contrast, embodied in the Bavarian constitution (cf. BVerfG, loc. cit. p. 84 seq.). The affirmation of Christianity relates not to the content of belief but to recognition of the decisive cultural and educational factor, and is therefore justified in relation to non-Christians too, by the history of the Western cultural area (cf. BVerfGE 41, 29 [64]).

In accordance with these considerations, there are no constitutional objections to the school type of the Christian non-denominational school based on Article 135 sentence 2 BV (cf. BVerfGE 41, 65 [79 et seq.]).

3. It is, pursuant to Article 7.1 and 5 of the Basic Law, incumbent on the federal Länder as the bodies responsible for the elementary school system to enact the requisite provisions on the organization of elementary schools. The various Länder legislators have broad discretion here. The provision of s. 13.1 sentence 3 of the School Regulations for Elementary Schools in Bavaria, according to which a cross is to be affixed in every classroom, does not exceed the limits of this discretion. Since the State legislature may in constitutionally unobjectionable fashion introduce the school type of the Christian non-denominational school, it cannot be barred from symbolizing the value conceptions characterizing those schools by the cross in classrooms.

- a) The provision of s. 13.1 sentence 3 of the School Regulations is a part of the organizational design of the Christian non-denominational school. The cross in the classroom brings the supra-denominational Christian, Western values and ethical standards to be conveyed by this form of school symbolically before the eyes of teachers and pupils. In enacting this provision the State legislature was entitled to take account of the fact that the majority of the citizens living on its territory belong to a Christian church (cf. BVerfGE 41, 29 [50 seq., 60]). It could further take it that the affixation of a cross in the classroom would, because of its symbolic nature for the supra-confessional Christian, Western values and ethical standards, also be welcomed or at least respected by a large proportion of the persons not in a church. This notion is supported not least by the fact that the provisions of the Bavarian Constitution on the Christian non-denominational school received the assent of the majority of the population (cf. BVerfGE 41, 65 [67]).
- b) The State, which through compulsory schooling is deeply involved in the upbringing of children by the parental household, is largely dependent on acceptance by parents of the school system it organizes. It is therefore not barred from upholding as far as possible the concurrence of school and parental household in views as to values (cf.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

BVerfGE 41, 29 [60]; 41, 65 [87]). Affixing crosses in classrooms may also contribute to this; it is moreover in line with a long tradition in Bavaria that met with resistance only in the period of National Socialism.

4. Affixing crosses in classrooms does not infringe the State's duty of philosophical and religious neutrality. Within the validity of the Basic Law, the precept of philosophical and religious neutrality ought not to be understood as an obligation on the State to indifference or secularism. The reference to the church articles of the Weimar Constitution in Article 140 of the Basic Law has given the neutrality precept the sense of cooperation by the State with churches and religious communities, also including their promotion by the State.

In the decisions on the constitutional admissibility of Christian non-denominational schools, the Federal Constitutional Court stated in connection with the precept of neutrality that the school, insofar as it may influence children's decisions as to belief and conscience, may contain only the minimum of elements of compulsion. It may, further, not be a missionary school nor claim any binding validity for Christian beliefs; it must also be open to other philosophical and religious contents and values (cf. BVerfGE 41, 29 [51]; 41, 65 [78]).

The provision of s. 13.1 sentence 3 of the Bavarian School Regulations for Elementary Schools, found unconstitutional by the Panel majority, meets all these requirements. The mere presence of a cross in the classroom does not compel the pupils to particular modes of conduct nor make the school into a missionary organization. Nor does the cross change the nature of the Christian non-denominational school; instead it is, as a symbol common to the Christian confessions, particularly suitable for acting as a symbol for the constitutionally admissible educational content of that form of school. The affixation of a cross in a classroom does not exclude consideration for other philosophical and religious contents and values in education. The form of teaching is, additionally, subject to the precept of Article 136.1 BV, according to which, at all schools, the religious feelings of others are to be respected.

II.

By contrast with the Panel majority view, the complainants' religious freedom (Article 4.1 of the Basic Law and Article 4.1 in conjunction with Article 6.2 sentence 1 of the Basic Law) is not infringed by the presence of crosses in classrooms.

1. Through compulsory schooling and the taking of responsibility itself for elementary schooling, the State has taken an area of life decisive for the upbringing of young people fully under its care. This has the consequence that there must be room here for the exercise of liberties. These may certainly be restricted in the light of the legitimate purpose of the institution - here the school - but not suspended. The public school, which the State has brought under its organizational and largely also substantive design, is an area of life in which State action and civil freedom intersect. In such an area the State may also, by making available visible value symbols in line with widespread practice in the Federal State concerned, create an organizational framework in which at the same time the religious convictions present among a large part of the pupils and their parents can develop (cf. Higher Administrative Court for the State of North Rhine Westphalia, NVwZ 1994, p. 597). By contrast, the equipping of courtrooms with crosses, which may infringe the fundamental right under Article 4.1 of the Basic Law of a party to

**60 Years German Basic Law:
The German Constitution and its Court**

proceedings (cf. BVerfGE 35, 366), falls within the area of original sovereign functions of the State and is therefore subject to different constitutional constraints from the affixation of crosses in the classrooms of State schools (cf. in detail Böckenförde, *Zeitschrift für evangelisches Kirchenrecht* Vol. 20 [1975], p. 119 [127 seq., 134]).

The religious freedom of Article 4.1 of the Basic Law is, something not at all brought into view by the Panel majority, still further enhanced and emphasized by the guarantee of undisturbed exercise of religion in Article 4.2 of the Basic Law (cf. BVerfGE 24, 236 [245 ff]). Article 4.1 and 2 of the Basic Law jointly guarantee the individual room for active practice of religious conviction. If, accordingly, a voluntary, supra-denominational school prayer is in principle constitutionally unobjectionable (cf. BVerfGE 52, 223), this is equally true of the cross in the classroom. The State is thereby giving positive religious freedom room in an area which it has taken entirely under its protection and in which religious and philosophical positions were always relevant (cf. BVerfGE 41, 29 [49]; 52, 223 [241]).

2. The religious freedom of the complainants is not infringed thereby.

- a) The complainants do not appeal to the freedom of exercise of religion under Article 4.2 of the Basic Law. Nor do they assert any infringement of their positive religious freedom that follows from Article 4.1 of the Basic Law, but object only to infringement of their negative religious freedom, similarly protected by Article 4.1 of the Basic Law. For they do not ask for affixation in the classroom of a symbol of their own philosophy of life alongside or in place of the cross, but only for the removal of crucifixes, which they regard as symbols they do not wish to tolerate of a religious conviction they do not share. In the order of 5 November 1991 (BVerfGE 85, 94) in which the complainants' application for issue of a temporary order was rejected, the Panel put the constitutional question as follows, more accurately than now in deciding the main case: "whether and in what circumstances the use of religious symbols in a school affects negative religious freedom and how far it is to be put up with by the minority because they have to take account of the majority's positive religious freedom" (BVerfG, loc. cit. p. 96).

Admittedly, this is not a problem of the relation between majority and minority, but one of how in the area of State compulsory schools the positive and negative religious freedom of pupils and their parents can in general be brought into harmony. Resolving this tension, unavoidable in the area of schooling, between negative and positive religious freedom is a matter for the democratic State legislature, which must in the public decision-making process seek a compromise acceptable to all, taking account of the various views (cf. BVerfGE 41, 29 [50]; 52, 223 [247]). Here negative religious freedom is not some superior fundamental right that displaces the positive expressions of religious freedom where they come together. The right of religious freedom is not a right to prevent religion. The necessary adjustment between the two manifestations of religious freedom must be brought about through tolerance (cf. Schlaich, in *Kirche und Staat in der neueren Entwicklung*, 1980, p. 427 [439]; Starck, in: v. Mangoldt/Klein, *Das Bonner Grundgesetz*, Article 4.1 Rdnr. 17, with further references).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- b) These principles have been done justice to by the Bavarian State legislature in enacting s. 13.1 sentence 3 of the Elementary School Regulations. The requisite balancing of interests with those of non-believers and people with different beliefs shows no breach of the constitution.
- aa) In assessing and evaluating these interests, one cannot as the Panel majority does take as a general basis the Christian theological view of the importance and meaning of the cross symbol. The decisive thing is rather what effect the sight of the cross develops with individual pupils, in particular what feelings the sight of the cross may induce in the other-minded (on this cf. also BVerfGE 35, 366 [375 seq.]). It may be that in a pupil of Christian faith the sight of the cross in the classroom may in part awaken those notions described by the Panel majority as the meaning of the cross (grounds, C II 2 b). For the non-believing pupil, by contrast, this cannot be assumed. From his viewpoint the cross in the classroom cannot have the meaning of a symbol for Christian beliefs, but only that of a symbol for the objectives set for the Christian nondenominational school, namely the conveying of the values of Christianity-marked Western culture, and alongside that, a symbol of a religious conviction he does not share, rejects and perhaps combats.
- bb) In view of this meaning that the cross in the classroom has for non-Christian pupils, they and their parents have to put up with the presence of crosses. They are so obliged by the precept of tolerance. Unacceptable burdens on them do not arise thereby.

The psychic impairment and mental burden that non-Christian pupils have to endure from the enforced perception of the cross in class is of only relatively slight weight. The minimum of elements of compulsion which in this respect is to be accepted by pupils and their parents (cf. BVerfGE 41, 29 [51]) is not exceeded. The pupils are not obliged to particular modes of conduct or religious exercises before the cross. They are accordingly - by contrast with school prayer (cf. BVerfGE 52, 223 [245 et seq.]) - not forced to display their differing philosophical or religious conviction by non-participation. The danger of their being discriminated against accordingly does not exist from the outset.

Nor are the pupils constitutionally inadmissibly influenced in missionary fashion by the cross in the classroom (cf. BVerfGE 41, 29 [51]). Direct influence on the content of teaching or educational objectives in the sense of propaganda for Christian beliefs does not proceed from the cross in the classroom. Moreover, the particular conditions in Bavaria must be taken as a starting point. Pupils are there confronted, even outside the narrower church sphere, with the sight of crosses in many other areas of life. As examples, mention will be made only of the roadside crosses frequently to be met with in Bavaria, the many crosses in secular buildings (such as hospitals and old-age homes, but also hotels and restaurants), and finally also the crosses present in private dwellings. In such circumstances the cross in the classroom too remains within the framework of the ordinary; no missionary character attaches to it.

III.

Accordingly, the Bavarian State legislature has with the affixation of crosses in the classrooms of elementary schools admissibly made use of the discretion due it in the organization of elementary schooling, without exceeding the limits to its margin of discretion. The administrative court decisions challenged do not in this respect meet with any constitutional objections.

Dissenting opinion of Judge Haas

I further share neither the Panel majority's justification for the admissibility of the constitutional complaint nor its arguments on the ground for the order.

1. Insofar as doubt may exist as to the admissibility of the constitutional complaint because perhaps in the interim the complainant's cause of complaint has lapsed, say because of a change of school by complainants (3) - (5) or removal of the remaining crucifixes in the schoolrooms - which was all the complainants' petition referred to in the urgent proceedings for the protection of rights - that need not be gone into. The admissibility of the constitutional complaint cannot however here be affirmed on the same grounds as for lapse of the cause of complaint in the main proceedings (cf. BVerfGE 41, 29 [43]). For the assumption of a continued interest in a finding does not take adequate account of the special features of the procedure of the temporary protection of rights, the importance of which is not exhausted in the settlement of a merely temporary situation. However, this question need not, in the light of the legal view presented here that the constitutional complaint is unjustified, be further gone into.

2. The decision of the Bavarian Higher Administrative Court challenged is constitutionally unobjectionable also insofar as the existence of grounds for an order is denied; in particular, Article 19.4 of the Basic Law is not infringed. The Administrative Courts grant provisional protection of rights *inter alia* in accordance with s. 123 VwGO. Article 19.4 of the Basic Law calls for the granting of temporary protection of rights in proceedings concerning the carrying out of an act too, at any rate where otherwise severe, unacceptable and not otherwise avoidable detriment would arise which the decision in the main case would not longer be capable of subsequently removing (cf. BVerfGE 46, 166 [179]; 51, 268 [284]).

That was also the starting point for the Bavarian Higher Administrative Court. In testing the presence of the requirements for grounds for an order the Court rightly, taking account of the constitutional precept for the granting of effective legal protection, starts from whether unacceptable and irreparable detriment would arise for the complainants were a temporary order not issued.

In the context of testing this detriment it - constitutionally unobjectionably - tested the urgency and importance of the claim. It accordingly seems more than doubtful whether the Court's considerations on the advance of time, summarized in a single sentence, can be taken in isolation and assessed to the effect that the Court denied the urgency of the complainants' concern. Instead, the arguments as to the duration of the situation complained of must be seen and understood in their overall context. As part of the assessment of detriment by the Court, however, the duration of the situation has specifically also the significance of indicating the

**Selected Fundamental Decisions of
the Federal Constitutional Court**

severity of the detriment. The Court's consideration that tolerating a particular situation for a period of some five years may have an influence on the assessment of a detriment as acceptable is constitutionally unobjectionable. It is at any rate not unreasonable to assess the question of the acceptability of the detriment to those concerned by how the position took shape for them in the past and how they handled it. That the detriment arising for the complainants from the sight of a crucifix had become unacceptable only with the course of time cannot be derived from the statements of the Higher Administrative Court, which were not challenged by the complainants. Nor have the complainants brought forward anything to show that any such presentation was left out of account by the Higher Administrative Court. Moreover, the Court evaluated still other aspects legally in the context of assessing detriment. It considered that complainants 1) and 2) would if the desired provisional order were not made still have enough freedom for upbringing in accordance with parental responsibility, and that the sight of a crucifix in the schoolrooms would be only a comparatively slight burden on complainants 3) -5), since they were exposed to the sight elsewhere too. Where the Bavarian Higher Administrative Court accordingly arrived at the conviction that unacceptable, irreparable detriment does not arise for the complainants if a temporary arrangement is not made, there can be no constitutional objection to this. This assessment by the Bavarian Higher Administrative Court was, moreover, manifestly shared by the adjudicating Panel, in itself declining to issue the temporary order applied for by the complainants, because it could not be established in weighing the consequences that the detriment arising to the complainants was predominant (cf. BVerfGE 85, 94 [96 ff]). The adjudicating Panel had to take account in this connection of the fact that the situation complained of by the constitutional complainants would have to be put up with by them for several more years, in view of the number of years that constitutional complaint proceedings take.

In view of its assessment of the detriment as of minor gravity, the Higher Administrative Court did not need either to test further whether the issuing of a temporary order might have been necessary because the complainants could not otherwise have been protected against the unacceptable, irreparable detriment arising for them (cf. BVerfGE 46, 166 [179 ff]). The Court's assumption that against the background of the administration's willingness to compromise, extra-judicial compromise solutions like the existing ones would be reachable in the future too is constitutionally unobjectionable.

Nor did the principle of guaranteeing effective protection of rights require the Court to "sound out" possibilities of an interim solution by amicable settlement, in order to make a temporary order "superfluous". It is already doubtful whether the essence of the principle of guaranteeing effective protection of rights is met by a line of conduct aimed at making a decision made by the Court superfluous. However, in ordinary law alone there is no need to carry out mediation negotiations in proceedings for temporary protection of rights, because it is within the Court's discretion what arrangement to make in detail in the context of the legal protection applied for (frequent case law and literature; see references in Kopp, VwGO, 1994, s. 123 no. 17), where the requirements for issuing a temporary order are met. If however, as here, the requirements for issuing a temporary order are in the court's view not present, so that the matter is ripe for decision and the application is to be rejected, then it cannot, at any rate from the viewpoint of guaranteeing effective protection of rights, be required through traditional mediation negotiations to seek agreement by the parties, with an outcome that would not have been attainable through the remedy sought.

60 Years German Basic Law:
The German Constitution and its Court

c) *Head Scarf Ban, BVerfGE 108, 282*

Explanatory Annotation

The Islamic headscarf has been an issue in a number of high profile court decisions in several jurisdictions and Islamic dress in general promises to stay at the centre of the fundamental rights debate for some time with efforts under way in several European countries, most notably Belgium and France, to ban certain forms of Islamic dress - the full concealment Burka - from the public sphere.¹⁹ This will in all likelihood be challenged within the jurisdictions concerned and perhaps also before the European Court of Human Rights (ECtHR) in Strasbourg. The ECtHR has already decided that the prohibition to wear the Islamic headscarf in Turkish Universities does not violate the freedom of religion guarantee of the European Convention (Article 9 ECHR).²⁰

The underlying issue in all of these constellations is the question to what degree Islamic dress in general or the Islamic headscarf in particular is - only - a symbol and expression of religious belief and/or to what degree such dress is also a means to oppress and subordinate women. Whereas the former is generally unproblematic and raises issues only in the context of schools or other state institutions where the issue of religious - or even political - symbols has been the subject of many decisions, the latter is utterly unacceptable and raises the question of whether and how the state might even be obligated to step in to protect the equality of women and combat the rise of parallel societies where half of the population is treated like second class citizens. The problem is that the distinction is so difficult if not impossible. One could certainly not dispute that many Muslim women wear such dress completely voluntarily and as a proud expression of their faith. At the same time it is also obvious that there is a strong element of discrimination against women and the expression of the “mobile prison” amply illustrates the problem. To find fair and just solutions that respect religious feelings and beliefs and foster a climate of equality and non-discrimination is indeed a difficult task.

The difficulty of the issue also comes to the fore in the decision of the Constitutional Court in the headscarf case. At issue was a German citizen and Muslim of Afghan heritage who had sought a teaching position in the German public service but was refused on the grounds that she had expressed her unwillingness to refrain from wearing the Islamic headscarf when exercising her duties in the public schools. This, it was argued, violated the obligatory neutrality of state schools in religious matters, especially in the light of the political meaning of the headscarf as a political symbol of “cultural disintegration”. The Constitutional Court, while deciding in favour of the Muslim applicant in essence handed the problem back to the legislature of *Baden-Württemberg*, the *Land* where the case had unfolded, and, by implication, to all state legislatures as the power to regulate school matters lies with the *Länder* and not the federal government. The Court held

19 See, for example, <http://news.bbc.co.uk/2/hi/8652861.stm>.

20 ECHR, Appl. No. 44774/98, 10.11.2005, Leyla Sahin/Turkey (Grand Chamber); see also the Chamber decision in this case of 29.6.2004. See also ECHR, Appl. No. 27058/05, 4.12.2008, Dogru/France concerning the expulsion of a female muslim student from a French school for refusing to take off the headscarf during sports lessons. The ECtHR saw no fault in the French actions. Cases available through the HUDOC-database of the ECtHR at <http://echr.coe.int/echr/en/hudoc>.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

that the decision not to employ the applicant because of her refusal to discard the headscarf did not have a sufficient basis in statutory law. This goes back to the principal constitutional requirement that all “significant” limitations of rights require a statutory legal foundation and limitations without such foundation are *per se* unjustified. The Court held that the prohibition of wearing the headscarf while teaching in a public school is such a “significant” limitation and hence requires statutory regulation. However, the Court did not address the question of whether a statutory prohibition of wearing the Islamic headscarf in such circumstances would actually be unconstitutional or not. This notwithstanding, there is little in this decision to imply that it might not be. In a sense this decision could be counted as an example of judicial restraint or a cautionary approach to an issue, where the wisdom of the Court in the final analyses is not any greater than the wisdom of the legislature if that legislature attempts to reach a balanced decision by taking all sides of the issue and all rights concerned into account in an adequate fashion. In a strong dissenting opinion three justices of the Court criticized the majority for holding this to be a “significant” violation of the applicants religious freedom rights when in their view this was only a modification of employment duties in an employment situation the applicant had chosen to pursue under her own free will and for mandating the state legislature to act when the issue of the scope and extent of employment duties and obligations should be dealt with on a case-by-case basis at the discretion of the employing authorities.

Translation of the Head Scarf Ban Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 108, 282*

Headnotes:

1. There is no sufficiently definite statutory basis in the current law of the Land (state) Baden-Württemberg for a prohibition on teachers wearing a headscarf at school and in lessons.
2. Social change, which is associated with increasing religious plurality, may be the occasion for the legislature to redefine the admissible degree of religious references permitted at school.

Judgment of the Second Senate of 24 September 2003 on the basis of the oral hearing of 3 June 2003 - 2 BvR 1436/02 -

Facts:

The complainant was born in Kabul, Afghanistan in 1972; since 1987 she has lived without interruption in the Federal Republic of Germany, and in 1995 she acquired German nationality. She is of the Muslim religion. After passing the First State Examination and doing teaching practice, in 1998 the complainant passed the Second State Examination for the teaching profession at the primary school and the non-selective secondary school, with the main emphasis on the secondary school and the subjects German, English and social studies/economics.

* © Bundesverfassungsgericht (Federal Constitutional Court).

**60 Years German Basic Law:
The German Constitution and its Court**

The Stuttgart Higher School Authority refused the complainant's application to be appointed to the teaching profession at the English primary school and the non-selective secondary school in the Land Baden-Württemberg on the grounds of lack of personal aptitude. By way of a reason, it was stated that the complainant was not prepared to give up wearing a headscarf during lessons. The headscarf, it was stated, was an expression of cultural separation and thus not only a religious symbol, but also a political symbol. The objective effect of cultural disintegration associated with the headscarf, it was said, was not compatible with the requirement of state neutrality. The administrative courts confirmed the authority's decision.

...

B.

The constitutional complaint is admissible and is well-founded. The decisions challenged violate Article 33.2 of the Basic Law in conjunction with Article 4.1 and 4.2 of the Basic Law and with Article 33.3 of the Basic Law. In the context to be assessed here, wearing a headscarf makes it clear that the complainant belongs to the Islamic religion and identifies herself as a Muslim. Defining such conduct as a lack of aptitude for the office of a teacher at the primary school and non-selective secondary school encroaches upon the complainant's right to equal access to every public office under Article 33.2 of the Basic Law in conjunction with the fundamental right of freedom of faith guaranteed to her by Article 4.1 and 4.2 of the Basic Law, without the necessary, sufficiently definite statutory basis for this being satisfied at present. In this way, the complainant has in a constitutionally unacceptable manner been denied access to a public office.

I.

Constitutional review in connection with a constitutional complaint concerning a judgment is normally restricted to examining whether the decisions challenged, in their interpretation and application of law below the constitutional level, are based on a fundamentally erroneous view of the meaning and scope of the fundamental right relied on or are arbitrary (on this, cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts*, BVerfGE 18, 85 [93]; established case law). However, to the extent that the court whose decision is challenged by the constitutional complaint directly interpreted and applied provisions of fundamental rights itself, the Federal Constitutional Court has a duty to determine the scope and limits of the fundamental rights and to establish whether fundamental rights were taken into account without any error of constitutional law with regard to their extent and weight. This is the situation in the present case. The Federal Administrative Court and also the lower courts based their decisions on a particular interpretation of Article 33.2 of the Basic Law in conjunction with Article 4.1 and 4.2 of the Basic Law. In accordance with its duty of preserving, developing and extending constitutional law and in particular interpreting the various functions of a legal provision containing a fundamental right (cf. BVerfGE 6, 55 [72]; 7, 377 [410]), the Federal Constitutional Court in this regard, in its relation to the nonconstitutional courts, is not restricted to examining whether the non-constitutional courts applied constitutional law in a non-arbitrary manner, but must itself take final and unappealable decisions on the interpretation and application of constitutional law.

Selected Fundamental Decisions of
the Federal Constitutional Court

II.

1. Article 33.2 of the Basic Law grants every German, in accordance with his or her aptitude, qualifications and professional achievement, equal access to every public office.

The right in Article 33.2 of the Basic Law, which is equivalent to a fundamental right, guarantees the degree of free choice of one's occupation or profession (Article 12.1 of the Basic Law) that is possible in view of the number of positions in the civil service, which is, and is permitted to be, restricted by the public corporation responsible in each case (cf. BVerfGE 7, 377 [397, 398]); 39, 334 [369]). Article 33.2 of the Basic Law grants no right to be appointed to a public office (cf. BVerfGE 39, 334 [354]); Decisions of the Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts*, BVerwGE 68, 109 [110]). The access to activity in a public office (admission to an occupation, which also relates to free choice of occupation) may in particular not be restricted by subjective requirements for admission (cf. BVerfGE 39, 334 [370]). This is done in accordance with s. 7 of the Civil Service Law Framework Act (*Beamtenrechtsrahmengesetz - BRRG*) of 31 March 1999 (Federal Law Gazette, *Bundesgesetzblatt, BGBL, I p. 654*) in the Civil Service Acts of the Länder by provisions on the personal requirements necessary for those appointed to the status of civil servants. S. 11.1 of the Baden-Württemberg Land Civil Service Act as amended on 19 March 1996 (Baden-Württemberg Law Gazette, *Gesetzblatt, GBl, p. 286*) which applies in the present case, provides that appointments are to be made on the basis of aptitude, qualifications and professional achievement, without taking into account gender, descent, race, belief, religious or political convictions, origin or connections.

- b) When laying down aptitude criteria for the relevant office and when defining official duties by reference to which the aptitude of applicants for the civil service is to be assessed, the legislature in general has a broad legislative discretion. Limits to this legislative discretion follow from the value decisions in other constitutional norms; the fundamental rights in particular impose limits on the legislature's legislative discretion. Even for those with the status of civil servants, the fundamental rights apply, although the civil servant's sphere of responsibilities under Article 33.5 of the Basic Law restricts the civil servant's legal possibility of relying on fundamental rights (cf. BVerfGE 39, 334 [366, 367]): Limits may be imposed on the civil servant's exercise of fundamental rights in office; these limits follow from general standards imposed on the civil service or from particular requirements of the public office in question (cf. e.g. BVerwGE 56, 227 [228, 229]). However, if even access to a public office is refused by reason of future conduct on the part of the applicant that is protected as a fundamental right, then the assumption that there is a lack of aptitude for this reason must in turn be justifiable with regard to the fundamental right affected.
- c) The evaluation by the employer of an applicant's aptitude for the public office applied for relates to the applicant's future occupation in office and at the same time contains a prediction, which requires a concrete assessment of the applicant's whole personality based on the individual case (cf. BVerfGE 39, 334 [353]; 92, 140 [155]). This also includes a statement with regard to the future as to whether the person in question will fulfil the duties under civil-service law that he or she is subject to in the office

**60 Years German Basic Law:
The German Constitution and its Court**

applied for. In this assessment with regard to the future, the employer has a wide scope of discretion; the review by the non-constitutional courts is essentially restricted to determining whether the employer proceeded on the basis of incorrect facts, misjudged the civil service law and constitutional law context, disregarded generally valid standards of value or took irrelevant matters into consideration (cf. BVerfGE 39, 334 [354]; BVerwGE 61, 176 [186]; 68, 109 [110]; 86, 244 [246]). The employer's prediction as to an applicant's aptitude for a particular office must be based on the civil servant's duties (ss. 35 et seq. of the Civil Service Law Framework Act; ss. 70 et seq. of the Baden-Württemberg Land Civil Service Act). Official duties that the applicant is expected to carry out must be sufficiently specified in law and must respect the limits imposed by the applicant's fundamental rights.

2. If a duty is imposed on the civil servant that, at school and in lessons, teachers may not outwardly show their affiliation to a religious group by observing dress rules with a religious basis, this duty encroaches upon the individual freedom of faith guaranteed by Article 4.1 and 4.2 of the Basic Law. It confronts those affected with the choice either to exercise the public office they are applying for or obeying the religious requirements as to dress, which they regard as binding.

Article 4.1 of the Basic Law guarantees freedom of faith, conscience and religious and ideological belief; Article 4.2 guarantees the right of undisturbed practice of religion. The two subsections of Article 4 of the Basic Law contain a uniform fundamental right which is to be understood comprehensively (cf. BVerfGE 24, 236 [245, 246]; 32, 98 [106]; 44, 37 [49]; 83, 341 [354]). It extends not only to the inner freedom to believe or not to believe, but also to the outer freedom to express and disseminate the belief (cf. BVerfGE 24, 236 [245]). This includes the individual's right to orientate his or her whole conduct to the teachings of his or her faith and to act in accordance with his or her inner religious convictions. This relates not only to imperative religious doctrines, but also to religious convictions according to which a way of behaviour is the correct one to deal with a situation in life (cf. BVerfGE 32, 98 [106, 107]; 33, 23 [28]; 41, 29 [49]).

The freedom of faith guaranteed in Article 4.1 and 4.2 of the Basic Law is guaranteed unconditionally. Restrictions must therefore be contained in the constitution itself. This includes the fundamental rights of third parties and community values of constitutional status (cf. BVerfGE 28, 243 [260, 261]; 41, 29 [50, 51]; 41, 88 [107]; 44, 37 [49, 50, 53]; 52, 223 [247]; 93, 1 [21]). Moreover, restricting the freedom of faith, which is unconditionally guaranteed, requires a sufficiently definite statutory basis (cf. BVerfGE 83, 130 [142]).

3. Article 33.3 of the Basic Law is also affected. It provides that admission to public offices is independent of religious belief (sentence 1); no one may suffer a disadvantage by reason of belonging or not belonging to a faith or to an ideology (sentence 2). Consequently, a connection between admission to public offices and religious belief is out of the question. Article 33.3 of the Basic Law is directed in the first instance against unequal treatment directly linked to the profession of a particular religion. In addition, the provision at all events also prohibits refusing admission to public offices for reasons that are incompatible with the freedom of faith protected by Article 4.1 and 4.2 of the Basic Law (cf. BVerfGE 79, 69 [75]). This does not exclude

**Selected Fundamental Decisions of
the Federal Constitutional Court**

creating official duties that encroach upon the freedom of faith of office-holders and applicants for official offices, and that thus make it harder or impossible for religious applicants to enter the civil service, but it does subject these to the strict requirements of justification that apply to restrictions of freedom of faith, which is guaranteed unconditionally; in addition, the requirements of strictly equal treatment of the various religions must be observed, both in creating and in the practice of enforcing such official duties.

4. a) The wearing of a headscarf by the complainant at school as well as outside school is protected by the freedom of faith, which is guaranteed in Article 4.1 and 4.2 of the Basic Law. According to the findings of fact made by the non-constitutional courts and not disputed in the proceedings relating to the constitutional complaint, the complainant regards the wearing of a headscarf as bindingly imposed on her by the rules of her religion; observing this dress rule is, for her, the expression of her religious belief. The answer to the controversial question as to whether and how far covering the head is prescribed for women by rules of the Islamic faith is not relevant. It is true that not every form of conduct of a person can be regarded as an expression of freedom of faith, which enjoys special protection, purely according to its subjective intention; instead, when conduct by an individual that has been claimed to be an expression of the individual's freedom of faith is assessed, that his or her particular religious group's concept of itself may not be overlooked (cf. BVerfGE 24, 236 [247, 248]). A duty of women to wear a headscarf in public may, by its content and appearance, as a rule of faith founded in the Islamic religion, be attributed with sufficient plausibility to the area protected by Article 4.1 and 4.2 of the Basic Law (on this, see also BVerfGE 83, 341 [353]); this was done by the non-constitutional courts in a manner that cannot be constitutionally objected to.
- b) The assumption that the complainant lacks the necessary aptitude to fulfil the duties of a teacher at the primary school und non-selective secondary school, because, contrary to an existing official duty, she wanted to wear a headscarf at school and in lessons, and this headscarf showed clearly that she was a member of the Islamic religious group, and the refusal to admit her to a public office, which was based on this, would be compatible with Article 4.1 and 4.2 of the Basic Law if the intended exercise of freedom of faith conflicted with objects of legal protection of constitutional status and this restriction of the free exercise of religion could be based on a sufficiently definite statutory foundation. Interests that are protected by the constitution that conflict with freedom of faith here may be the state's duty to provide education (Article 7.1 of the Basic Law), which is to be carried out having regard to the duty of ideological and religious neutrality, the parents' right of education (Article 6.2 of the Basic Law) and the negative freedom of faith of school children (Article 4.1 of the Basic Law).
- aa) In Article 4.1, Article 3.3 sentence 1 and Article 33.3 of the Basic Law, and in Article 136.1, Article 136.4 and Article 137.1 of the Weimar Constitution (Weimarer Reichsverfassung) in conjunction with Article 140 of the Basic Law, the Basic Law lays down for the state as the home of all citizens the duty of religious and ideological neutrality. It bars the introduction of legal structures in the nature of a state church and forbids giving privileged treatment to particular faiths and

**60 Years German Basic Law:
The German Constitution and its Court**

excluding those of a different belief (cf. BVerfGE 19, 206 [216]; 24, 236 [246]; 33, 23 [28]; 93, 1 [17]). The state must be careful to treat the various religious and ideological communities with regard to the principle of equality (cf. BVerfGE 19, 1 [8]; 19, 206 [216]; 24, 236 [246]; 93, 1 [17]) and may not identify with a particular religious community (cf. BVerfGE 30, 415 [422]; 93, 1 [17]). The free state of the Basic Law is characterised by openness towards the variety of ideological and religious convictions and bases this on an image of humanity that is marked by the dignity of humans and the free development of personality in self-determination and personal responsibility (cf. BVerfGE 41, 29 [50]).

However, the religious and ideological neutrality required of the state is not to be understood as a distancing attitude in the sense of a strict separation of state and church, but as an open and comprehensive one, encouraging freedom of faith equally for all beliefs. Article 4.1 and 4.2 of the Basic Law also contain a positive requirement to safeguard the space for active exercise of religious conviction and the realisation of autonomous personality in the area of ideology and religion (cf. BVerfGE 41, 29 [49]; 93, 1 [16]). The state is prohibited only from exercising deliberate influence in the service of a particular political or ideological tendency or expressly or impliedly identifying itself by way of measures originated by it or attributable to it with a particular belief or a particular ideology and in this way itself endangering religious peace in a society (cf. BVerfGE 93, 1 [16, 17]). The principle of religious and ideological neutrality also bars the state from evaluating the faith and doctrine of a religious group as such (cf. BVerfGE 33, 23 [29]).

Until now, the understanding of the relationship between state and religion, as it is reflected in the case law of the Federal Constitutional Court, this applies above all to the area of the compulsory school, for which the state has taken responsibility, and for which, by its nature, religious and ideological ideas have always been relevant (cf. BVerfGE 41, 29 [49]; 52, 223 [241]). In this view, Christian references are not absolutely forbidden in the organisation of state schools; however, school must also be open to other ideological and religious content and values (cf. BVerfGE 41, 29 [51]; 52, 223 [236, 237]). In this openness, the free state of the Basic Law preserves its religious and ideological neutrality (cf. BVerfGE 41, 29 [50]). For the tensions that are unavoidable when children of different ideological and religious beliefs are taught together, it is necessary, giving consideration to the requirement of tolerance as the expression of human dignity (Article 1.1 of the Basic Law) to seek a balance (cf. BVerfGE 41, 29 [63]; 52, 223 [247, 251]; 93, 1 [21 seq.]; for more detail, see dd) below).

- bb) Article 6.2 sentence 1 of the Basic Law guarantees to parents the care and education of their children as a natural right, and together with Article 4.1 of the Basic Law it also includes the right to educate children in religious and ideological respects; it is therefore above all the responsibility of the parents to convey to their children the convictions in religious and ideological matters that they regard as right (cf. BVerfGE 41, 29 [44, 47, 48]; 52, 223 [236]; 93, 1 [17]). Corresponding to this is the right to keep the children away from religious

**Selected Fundamental Decisions of
the Federal Constitutional Court**

convictions that appear to the parents to be wrong or harmful (cf. BVerfGE 93, 1 [17]). However, Article 6.2 of the Basic Law does not contain an exclusive right of education for the parents. Separately and in its sphere given equal rights beside the parents, the state, to which under Article 7.1 of the Basic Law the supervision of all education is delegated, exercises its own duty to provide education (cf. BVerfGE 34, 165 [183]; 41, 29 [44]). How this duty is to be carried out in detail, and in particular to what extent religious references are to have their place at school, is subject within the limits laid down by the Basic Law, above all in Article 4.1 and 4.2 of the Basic Law, to the freedom of organisation of the Länder (cf. BVerfGE 41, 29 [44, 47, 48]; 52, 223 [242, 243]; for details, see dd) below).

- cc) Finally the freedom to exercise religious conviction relied on by the complainant conflicts with the negative freedom of faith of the pupils in her wearing of a headscarf at school and in lessons. Article 4.1 and 4.2 of the Basic Law, which protects equally the negative and the positive manifestations of freedom of faith, also guarantees the freedom to stay away from cultic acts of a religion that is not shared; this also applies to cults and symbols in which a belief or a religion represents itself. Article 4 of the Basic Law leaves it to the individual to decide what religious symbols he or she recognises and reveres and which he or she rejects. Admittedly, in a society that affords space to differing religious convictions, he or she has no right to be spared cultic acts, religious symbols and professions of other faiths. But this must be distinguished from a situation created by the state in which the individual is exposed without an alternative to the influence of a particular faith, to the actions in which this manifests itself and the symbols through which it presents itself (cf. BVerfGE 93, 1 [15, 16]). In this respect, Article 4.1 and 4.2 of the Basic Law have the effect of securing freedom precisely in areas of life that are not left to be organised by society itself but that the state has taken responsibility for (cf. BVerfGE 41, 29 [49]); this is affirmed by Article 140 of the Basic Law in conjunction with Article 136.4 of the Weimar Constitution, which prohibits forcing anyone to take part in religious exercises.
- dd) The Basic Law gives the Länder a broad freedom of organisation in education; in relation to the ideological and religious character of state schools too, Article 7 of the Basic Law takes account of the fact that the Länder are to a large extent independent and within the limits of their sovereignty in education matters may in principle organise compulsory schools freely (cf. BVerfGE 41, 29 [44, 45]; 52, 223 [242, 243]). The relationship between the positive freedom of faith of a teacher on the one hand and the state's duty of religious and ideological neutrality, the parents' right of education and the negative freedom of faith of the pupils on the other hand, taking into account the requirement of tolerance, is inevitably sometimes strained, and it is the duty of the democratic Land legislature to resolve this tension; in the public process of developing an informed opinion, the legislature must seek a compromise that is reasonably acceptable to everyone. When legislating, the legislature must orientate itself to the fact that on the one hand Article 7 of the Basic Law permits ideological and religious influences in the area of education, provided the parents' right of education is preserved, and on the

**60 Years German Basic Law:
The German Constitution and its Court**

other hand Article 4 of the Basic Law requires that ideological and religious constraints are excluded as far as at all possible when the decision is made in favour of a particular form of school. The provisions must be seen together, and their interpretation and their area of influence must be coordinated with each other. This includes the possibility that the individual Länder may make different provisions, because the middle course that needs to be found may also take into account school traditions, the composition of the population by religion, and whether it is more or less strongly rooted in religion (cf. BVerfGE 41, 29 [50, 51]; 93, 1 [22, 23]).

These principles also apply to the answer to the question as to the extent to which teachers may be subjected to duties as to their appearance and conduct at school, restricting their individual fundamental right of freedom of faith, in connection with the preservation of the ideological and religious neutrality of the state.

5. If teachers introduce religious or ideological references at school, this may adversely affect the state's duty to provide education, which is to be carried out in neutrality, the parents' right of education and the negative freedom of faith of the pupils. It at least opens up the possibility of influence on the pupils and of conflicts with parents that may lead to a disturbance of the peace of the school and may endanger the carrying out of the school's duty to provide education. The dress of teachers that is religiously motivated and that is to be interpreted as the profession of a religious conviction may also have these effects. But these are only abstract dangers. If even such mere possibilities of endangerment or of a conflict as a result of the appearance of the teacher, rather than concrete behaviour that presents itself as the attempt to influence or even proselytise the school children for whom the teacher is responsible, are to be seen as an infringement of duties under civil service law or as a lack of aptitude which prevents appointment as a civil servant, then, because this entails the restriction of the unconditionally granted fundamental right under Article 4.1 and 4.2 of the Basic Law, it requires a sufficiently specific statutory basis permitting it. This is lacking in the present case.

- a) In considering the question of whether a specific form of dress or other outward sign has a religious or ideological significance in the nature of a symbol, attention must be paid to the effect of the means of expression used and to all possibilities of interpretation that are possible. Unlike the Christian cross (on this, see BVerfGE 93, 1 [19, 20]), the headscarf is not in itself a religious symbol. Only in connection with the person who wears it and with the conduct of that person in other respects can it have such an effect. The headscarf worn by Muslim women is perceived as a reference to greatly differing statements and moral concepts:

As well as showing the desire to observe dress rules that are felt to be binding and have a religious basis, it can also be interpreted as a symbol for upholding traditions of the society of the wearer's origin. In the most recent times, it is seen increasingly as a political symbol of Islamic fundamentalism that expresses the separation from values of western society, such as individual self-determination and in particular the emancipation of women. However, according to the findings of fact in the non-constitutional courts, which were also confirmed in the oral hearing, this is not the message that the complainant wishes to convey by wearing the headscarf.

Selected Fundamental Decisions of the Federal Constitutional Court

The expert witness Dr. Karakasoglu, who was heard in the oral hearing, carried out a survey of about 25 Muslim students at colleges of education, twelve of whom wore a headscarf, and on the basis of this survey she showed that the headscarf is also worn by young women in order to preserve their own identity and at the same time to show consideration for the traditions of their parents in a diaspora situation; in addition, another reason for wearing the headscarf that had been named was the desire to obtain more independent protection by signalling that they were not sexually available and integrating themselves into society in a self-determined way. Admittedly, the wearing of the headscarf was intended to document in public the value one placed on religious orientation in one's own life, but it was understood as the expression of an individual decision and did not conflict with a modern lifestyle. As understood by the women questioned, preserving their difference is a precondition for their integration. It is not possible to make any statements that are representative of all Muslim women living in Germany on the basis of the interviews conducted and evaluated by the expert witness, but the results of the research show that in view of the variety of motive, the interpretation of the headscarf may not be reduced to a symbol of the social repression of women. Rather, the headscarf can for young Muslim women also be a freely chosen means to conduct a self-determined life without breaking with their culture of origin. Against this background, there is no evidence that the complainant, merely because she wears a headscarf, might for example make it more difficult for Muslim girls who are her pupils to develop an image of woman that corresponds to the values of the Basic Law or to put it into effect in their own lives.

To assess whether the intention of a teacher to wear a headscarf at school and in lessons constitutes a lack of aptitude, the decisive question is what effect a headscarf can have on someone who sees it (the objective standpoint of the onlooker); therefore all conceivable possibilities as to how the wearing of a headscarf might be regarded, must be taken into account in the assessment. However, this has no effect on the fact that the complainant, who plausibly stated that she had religiously motivated reasons for her decision always to wear a headscarf in public, can rely for this conduct on the protection of Article 4.1 and 4.2 of the Basic Law, which is closely related to the paramount constitutional value of human dignity (Article 1.1 of the Basic Law; cf. BVerfGE 52, 223 [247]).

- b) With regard to the effect of religious means of expression, it is necessary to distinguish whether the symbol in question is used at the instigation of the school authority or on the basis of one single teacher's personal decision; such a teacher may rely on the individual right of freedom in Article 4.1 and 4.2 of the Basic Law. If the state tolerates teachers wearing dress at school that they wear by reason of a personal decision and that can be interpreted as religious, this cannot be treated in the same way as a state order to attach religious symbols at school (on this, cf. BVerfGE 93, 1 [18]). The state that accepts the religious statement of an individual teacher associated with wearing a headscarf does not in so doing make this statement its own and is not obliged to have this statement attributed to it as intended by it. The effect of a headscarf worn by the teacher for religious reasons may, however, become particularly intense because the pupils are confronted with the teacher, who is the focal point of

**60 Years German Basic Law:
The German Constitution and its Court**

lessons, for the whole time when they are at school without a possibility of escape. On the other hand, the teacher may differentiate when explaining to the pupils the religious statement made by a garment, and in this way she may weaken its effect.

- c) There is no confirmed empirical foundation for the assumption that the complainant would commit an infringement of her official duty because of the feared controlling influence of her headscarf on the religious orientation of the school children.

In the oral hearing, the expert witness Professor Dr. Bliesener was heard on this point; he stated that from the point of view of developmental psychology there is at present no confirmed knowledge that proves that children are influenced solely because every day they meet a teacher who wears a headscarf at school and in lessons. Only if there were also conflicts between parents and teacher that might arise in connection with the teacher's headscarf were onerous effects to be expected, in particular on younger pupils. The two other expert witnesses heard by the Senate, Ms Leinenbach, Director of the Psychology Department, and Professor Dr. Riedesser, presented no information that contradicted this. Such an unconfirmed state of knowledge is not sufficient as the basis of an official application of the indeterminate legal concept of aptitude, which encroaches substantially upon the complainant's fundamental right under Article 4.1 and 4.2 of the Basic Law.

- d) At all events, there was not a sufficiently definite statutory basis for rejecting the complainant for lack of aptitude as a result of her refusal to remove the headscarf at school and in lessons.

The school authority and the non-constitutional courts present the view that the complainant's intention to wear a headscarf as a teacher constitutes a lack of aptitude because pre-emptive action should be taken against possible influence on the pupils, and conflicts, which cannot be ruled out, between teachers and pupils or their parents should be avoided in advance; at present this view does not justify encroaching upon the complainant's right under Article 33.2 of the Basic Law, which is equivalent to a fundamental right, nor the accompanying restriction of her freedom of faith. No tangible evidence could be seen in the proceedings before the nonconstitutional courts that the complainant's appearance when wearing a headscarf created a concrete endangerment of the peace at school. The fear that conflicts might arise with parents who object to their children being taught by a teacher wearing a headscarf cannot be substantiated by experience of the complainant's previous teaching as a trainee. The current civil service and school legislation in the Land Baden-Württemberg is not adequate to permit a prohibition on teachers wearing a headscarf at school and in lessons on the grounds of abstract endangerment. The mere fact that conflicts cannot be ruled out in future does not, in the absence of a legal basis designed for this purpose, justify deriving from the general civil service law requirement of aptitude an official duty on the part of the complainant to give up exercising her religious conviction by wearing a headscarf.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

Under civil service law, in view of the state's duty of religious and ideological neutrality at school described above under B. II 4. b) aa), neither the concept of aptitude contained in s. 11.1 of the Baden-Württemberg Civil Service Act nor the duties for civil servants laid down in ss. 70 et seq. of the Baden-Württemberg Civil Service Act, which are to be taken into consideration as orientation in assessing the aptitude of an applicant for a public office, can serve as the basis for a duty of teachers not to permit their affiliation to a particular religion or ideology to be outwardly discernible, in order in this way to pre-emptively counter potential dangers.

Under s. 70.1 sentence 1 of the Baden-Württemberg Civil Service Act, the civil servant serves all the people, and under s. 70.1 sentence 2 the civil servant must fulfil his or her duties impartially and fairly, and must take account of the welfare of the public in carrying out his or her duties. Under s. 70.2 of the Baden-Württemberg Civil Service Act, the civil servant must acknowledge the free democratic fundamental order of the Basic Law and stand up for its preservation in all his or her conduct. It is not apparent that the complainant would be prevented from doing this by wearing a headscarf. Nor does the requirement of moderation in s. 72 of the Baden-Württemberg Civil Service Act, which provides that a civil servant who is involved in politics shall observe the moderation and restraint that follow from his or her position *vis-à-vis* the whole of society and from the consideration for the duties of his or her office, cover the case of wearing a headscarf for religious reasons. The same applies to the duty of civil servants to devote themselves with full dedication to their office (s. 73.1 of the Baden-Württemberg Civil Service Act), to exercise their office unselfishly to the best of their belief (s. 73.2 of the Baden-Württemberg Civil Service Act) and to base their conduct both on duty and off duty on doing justice to the respect and the confidence demanded by their profession (s. 73.3 of the Baden-Württemberg Civil Service Act). A prohibition preventing teachers at a state primary school and non-selective secondary school from wearing a headscarf for religious reasons and that restricts fundamental rights cannot be derived from these general duties under civil-service law. Finally, s. 94 of the Baden-Württemberg Civil Service Act contains no regulations on a particular form of working dress for teachers.

Nor do the provisions in Articles 11 to 22 of the Constitution of the Land Baden-Württemberg of 11 November 1953 (Baden-Württemberg Law Gazette p. 173) on education and teaching and the Baden-Württemberg Education Act (Schulgesetz für Baden-Württemberg - SchG) as amended on 1 August 1983 (Baden-Württemberg Law Gazette p. 397), in particular ss. 1 and 38 thereof, contain any provision under which the general civil service law duties of moderation and restraint for teachers could be interpreted in concrete terms to mean that they were not permitted at school to wear any dress or other symbols that show that they belong to a particular religious group. At present, therefore, the necessary sufficiently definite statutory basis does not exist to decide that teachers of the Islamic faith, by reason of their declared intention to wear a headscarf at school, lack aptitude for service at the primary school and non-selective secondary school and thus to restrict their fundamental right under Article 4.1 and 4.2 of the Basic Law.

**60 Years German Basic Law:
The German Constitution and its Court**

6. However, the Land legislature responsible is at liberty to create the statutory basis that until now has been lacking, for example by newly laying down the permissible degree of religious references in schools within the limits of the constitutional requirements. In doing this, the legislature must take into reasonable account the freedom of faith of the teachers and of the pupils affected, the parents' right of education and the state's duty of ideological and religious neutrality.

- a) The Federal Administrative Court, in the judgment challenged, emphasised *inter alia* that with growing cultural and religious variety, where an increasing proportion of schoolchildren were uncommitted to any religious denomination, the requirement of neutrality was becoming more and more important, and it should not, for example, be relaxed on the basis that the cultural, ethnic and religious variety in Germany now characterised life at school too. In the oral hearing, the representative of the Stuttgart Higher Education Authority, Professor Dr. F. Kirchhof, argued that the state's duty of ideological and religious neutrality in schools must now be treated more strictly, in view of the changed circumstances.

Social change, which is associated with increasing religious plurality, may be the occasion for redefining the admissible degree of religious references permitted at school. A provision to this effect in the Education Acts may then give rise to concrete definitions of teachers' general duties under civil service law, including duties with regard to their appearance, to the extent that the latter shows their affiliation to particular religious convictions or ideologies. It is therefore conceivable that there could also be statutory restrictions of the freedom of faith, in compliance with the constitutional requirements. If it is apparent from the outset that an applicant will not comply with such rules of conduct, this can be stated to the applicant as a lack of aptitude.

A provision prohibiting teachers from continuously showing their membership in a particular religious group or belief by external signs is part of the law determining the relationship between state and religion in schools. The religious diversity in society, which has evolved gradually, is reflected here particularly clearly. School is the place where differing religious views inevitably collide and where this juxtaposition has particularly great effects. Tolerant coexistence with people of other beliefs could be practised here with most lasting effect through education. This need not mean denying one's own convictions; instead, it would give a chance for insight and to strengthen one's own point of view, and for mutual tolerance that does not see itself as reducing all beliefs to the same level (cf. BVerfGE 41, 29 [64]). Reasons could therefore be given for accepting the increasing variety of religions at school and using it as a means for practising mutual tolerance and in this way making a contribution to the attempt to achieve integration. On the other hand, the development described above is also associated with a greater potential for possible conflicts at school. There may therefore also be good reasons to accord the state duty of neutrality in schools a stricter importance that is more distanced than it has been previously, and thus, as a matter of principle, to keep religious references conveyed by a teacher's outward appearance away from the pupils in order to avoid conflicts with pupils, parents or other teachers.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- b) It is not the duty of the executive to decide how to react to the changed circumstances, and in particular what rules of conduct with regard to dress and other aspects of behaviour towards schoolchildren should be imposed on teachers to define more specifically their general obligations under civil service law and to preserve religious peace at school, and what requirements therefore are part of aptitude for a teaching post. Rather, it is necessary for the democratically legitimated Land Legislature to make provisions in this respect. Only the legislature has a prerogative of evaluation to assess the actual developments; it depends on this assessment whether conflicting fundamental rights of pupils and parents or other values of constitutional status justify legislation that imposes on teachers of all religions extreme restraint in the use of symbols with religious reference; authorities and courts cannot exercise this prerogative of evaluation themselves (cf. BVerfGE 50, 290 [332, 333]; 99, 367 [389, 390]). The assumption that a prohibition of wearing headscarves in state schools may be a permissible restriction of freedom of faith as an element of a legislative decision about the relation between state and religion in the education system is also in harmony with Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (cf. European Court of Human Rights, decision of 15 February 2001, *Neue Juristische Wochenschrift* 2001, pp. 2871et seq.).
- aa) The constitutional necessity of legislation follows from the principle of the requirement of parliamentary approval. The principle of a constitutional state and the requirement of democracy oblige the legislature to pass the provisions essential for the realisation of fundamental rights itself (cf. BVerfGE 49, 89 [126]; 61, 260 [275]; 83, 130 [142]). How far the legislature must itself determine the guidelines necessary for the area of life in question depends on its relation to fundamental rights. The legislature does have such an obligation if conflicting fundamental civil rights collide with each other and the limits of each are fluid and can be determined only with difficulty. This applies above all if the fundamental rights affected, like positive and negative freedom of faith in the present case and the parents' right of education are, by the wording of the constitution, guaranteed without a constitutional requirement of the specific enactment of a statute and a provision intended to organise this area of life is necessarily obliged to determine and specify their limits inherent in the Basic Law. Here, the legislature has a duty at all events to determine the limits of the conflicting guarantees of freedom at least to the extent that such a determination is essential to the exercise of these civil rights and liberties (cf. BVerfGE 83, 130 [142]).

When it is necessary for parliament to pass legislation can be decided only in view of the subject area and the nature of the object of constitutional definition involved. The constitutional criteria of evaluation here are to be derived from the fundamental principles of the Basic Law, in particular the fundamental rights guaranteed there (cf. BVerfGE 98, 218 [251]). Admittedly, the mere fact that a provision is politically controversial does not mean that it would have to be seen as essential (cf. BVerfGE 98, 218 [251]). Under the constitution, however, the restriction of fundamental freedoms and the balancing of conflicting fundamental rights are reserved to parliament, in order to ensure that decisions with such

**60 Years German Basic Law:
The German Constitution and its Court**

repercussions result from a procedure that gives the public the opportunity to develop and express its opinions, and that requires parliament to clarify the necessity and extent of encroachments upon fundamental rights in public debate (cf. BVerfGE 85, 386 [403, 404]).

In the education system in particular, the requirements of a constitutional state and the principle of democracy of the Basic Law oblige the legislature to make the essential decisions itself and not to leave them to the school board (cf. BVerfGE 40, 237 [249]; 58, 257 [268, 269]). This also applies, and applies in particular, if and to the extent that, in reaction to changed social circumstances and increasing ideological and religious variety at school it is intended to respond with a stricter restraining of all religious references and thus to newly define the state's duty of neutrality within the boundaries laid down by the constitution. Such a division is of considerable significance for the realisation of fundamental rights in the relationship between teachers, parents and children, and also the state.

- bb) A provision that one of the duties of a teacher is to refrain in class from wearing a headscarf or any other indications of religious conviction is a material (wesentlich) provision in the meaning of the case law on the requirement of parliamentary approval. It encroaches substantially upon the freedom of faith of the person affected. It also affects people belonging to various religions with varying intensity, depending on whether they regard the observance of particular dress customs as part of the exercise of their religion or not. As a result, it has special effects of exclusion for particular groups. Because of this relation to groups, the creation of such an official duty for teachers is of material significance, over and above its significance for the exercise of the individual fundamental right, for the function of social organisation inherent in the freedom of faith.

Finally, the introduction of an official duty that prohibits teachers from allowing their outward appearance to show their religion must be expressly laid down by statute, for one reason because such an official duty can only be justified and enforced in a constitutional manner - *inter alia* compatible with Article 33.3 of the Basic Law - if members of different religious groups are treated equally by it. This is not guaranteed to the same extent if it is left to authorities and courts to decide from case to case whether such an official duty exists and what its scope is, depending on their predictions as to the potential for influence and conflict of identifying characteristics of religious affiliation in the appearance of the teacher in question.

III.

As long as there is no statutory basis that indicates specifically enough that teachers at the primary school and non-selective secondary school have an official duty to refrain from identifying characteristics of their religious affiliation at school and in lessons, then on the basis of prevailing law it is incompatible with Article 33.2 in conjunction with Article 4.1 and 4.2 of the Basic Law and Article 33.3 of the Basic Law to assume that the complainant lacks aptitude. The decisions challenged by the constitutional complaint therefore infringe the legal position of the complainant

**Selected Fundamental Decisions of
the Federal Constitutional Court**

guaranteed in these provisions. The judgment of the Federal Administrative Court is overturned and the matter is referred back to the Federal Administrative Court (s. 95.2 of the Federal Constitutional Court Act, Bundesverfassungsgerichtsgesetz - BVerfGG). It is to be expected that the proceedings can be concluded there on the basis of s. 11.1 of the Baden-Württemberg Land Civil Service Act, which under s. 127 number 2 of the Civil Service Law Framework Act admits an appeal on a point of law; in these proceedings, the decisive concept of aptitude must be interpreted and applied in accordance with the provisions - amended if applicable - of the law of school education of the Land.

Extracts from the Dissenting Opinion of the judges Jentsch, Di Fabio and Mellinghoff

The majority of the Senate assumes that particular official duties of a civil servant, if they are connected to the civil servant's freedom of religion or ideology, may be created only by a law passed by parliament. Until now, this view has been stated neither in case law nor literature, nor by the complainant herself. If this point of view is adopted, not only does the fundamental constitutional question submitted to the court as to the state's neutrality in the school's sphere of training and education remain undecided; the view also results in an erroneous weighting, not based on the Basic Law, in the system of the separation of powers and in the understanding of the normative power of fundamental rights in connection with access to public offices. The decision disregards the expressly stated intention of the Baden-Württemberg Land parliament that it would not pass a formal statute by reason of the complainant's case; in addition, it leaves the parliament uncertain as to how a constitutional provision can be made. Finally, the majority of the Senate gives the Land legislature no possibility of preparing itself for the new situation under constitutional law that the Senate assumes will exist, and neglects to inform the judiciary and the administration how they are to proceed until a Land statute is passed.

I.

In order to justify the constitutional requirement that a statute must be specifically enacted, the majority of the Senate wrongly assumes that there was a serious encroachment upon the complainant's freedom of religion and ideology. In this they fail to appreciate the functional restriction, with regard to civil servants, of the protection of fundamental rights. In the case of access to a public office, there is no open situation where legal interests of equal value are weighed up; the legal relationship that is essential to the realisation of fundamental rights at school is shaped in the first instance by the protection of the fundamental rights of pupils and parents.

1. Those who become civil servants place themselves by a free act of will on the side of the state. A civil servant can therefore not rely on the effect of the fundamental rights to guarantee freedom in the same way as someone who is not part of the state organisation. In exercise of their public office, therefore, civil servants are protected by the promise of freedom as against the state guaranteed by fundamental rights only to the extent that no restrictions arise from the special reservation to civil servants of the exercise of sovereign powers. Teachers with the status of civil servants, even within the scope of their personal pedagogical responsibility, do not teach in exercise of their own freedom, but on the instructions of the general public and with responsibility to the state. Teachers who are civil servants therefore from the outset do not enjoy the same protection by fundamental rights as parents and pupils: instead, the teachers are bound by the fundamental rights because they share in the exercise of state authority.

**60 Years German Basic Law:
The German Constitution and its Court**

In formulating official duties for the civil servants, the state administrative authority also fulfils the requirements of its obligation under Article 1.3 of the Basic Law; the civil servant's official duty is the reverse side of the freedom of the citizen who is confronted by state authority in the person of the official. If official duties are imposed on the teacher for the exercise of his or her office, therefore, this is not a matter of encroachments upon society outside the state-controlled sphere or an occasion for the ensuing call for law passed by parliament to protect the citizen. The state relies on official duties to ensure in its internal sphere uniform administration complying with statute and the constitution.

The majority of the Senate did not take this difference in structure adequately into account. As a result, the situation of the teacher on the one hand and of the pupils and parents on the other hand, which differ with regard to fundamental rights, are not correctly understood. In particular the legal position of the applicant, who has no legal claim to enter the sphere of state control as he or she desires, may not be seen under the aspect of a subject of fundamental rights defending himself or herself against the state. Voluntary entry into the status of a civil servant is a decision made by the applicant in freedom, choosing obligation to the public interest and loyalty to an employer that, in a democracy, acts for the people and is monitored by the people. A person who wishes to become a civil servant may therefore not reject the requirement of moderation and of occupational neutrality, neither in general nor with reference to specific official or private constellations that can be recognised in advance. At all events it cannot be reconciled with these duties if the civil servant plainly uses his or her employment, within the sphere of that civil service, as a space to profess beliefs, and thus effectively as a stage on which to develop the civil servant's own fundamental rights. The duty conferred on the civil servant consists in expertly, objectively, dispassionately and neutrally assisting in giving effect to democratic intention, that is, the intention of legislation and of the responsible government, and in taking second place as an individual where the civil servant's claims to realisation of his or her personality are likely to create conflicts in his or her employment and thus obstacles to the realisation of democratically formed will.

2. Civil servants are fundamentally different from those citizens who are subjected to a special status relationship by measures of public authority but do not in this connection enter the sphere of the state, merely a special legal relationship, such as pupils and their parents, who have the right to educate them, in the compulsory state school (BVerfGE 34, 165 [192, 193]; 41, 251 [259, 260]; 45, 400 [417, 418]; 47, 46 [78 seq.]) or prisoners in prison (BVerfGE 33, 1 [11]). It is therefore an error to believe that it is possible to fight another battle for the Basic Law's idea of freedom, following the struggle against the institution of the special relationship of subordination (*besonderes Gewaltverhältnis*), by emphasising fundamental rights positions in the internal sphere of the civil service. The opposite is the case. If one sees teachers, who are bound by fundamental rights, primarily as subjects of fundamental rights, and thus sees the teacher's personal liberty rights in opposition to those of pupils and parents, one reduces the freedom of those for whose sake the theory of materiality (*Wesentlichkeitstheorie*, the theory that material decisions must be laid down by the legislature rather than decided by the executive), broadened the constitutional requirement in school education law that matters should be specifically enacted in statutes.

Selected Fundamental Decisions of the Federal Constitutional Court

The relationship of the civil servant to the state is a particular relationship of proximity with its own inherent rules, which are recognised by the constitution and regarded as worth preserving. Under the balanced concept of the Basic Law, civil servants are certainly intended to be freedom-conscious citizens - if not, loyalty to the free constitution would only be lip service - but at the same time they are to observe the fundamental priority of official duties and the intention of the democratic institutions embodied in it. As a personality, the civil servant is not a mere “instrument of execution”, even if he or she decides to work for the public good. Those who wish to become civil servants, however, must loyally identify themselves with the constitutional state in important fundamental questions and when observing their official duties, because the state, conversely, is represented by its civil service and is identified with the concrete civil servant. All the principles of the permanent civil service are dominated by this idea of reciprocity and proximity.

Fundamental personal liberty rights of a civil servant or of a person applying for a public office are therefore from the outset guaranteed only to the extent that they are compatible with these laws inherent to the civil service. They form part of these necessities of the civil service if there is no fear of obstructions to the working routine. Any other approach than such a priority of the exercise of sovereign powers with regard to fundamental rights of the civil servants in office would be incompatible with the constitutional requirement of practical concordance. Failing this, the interpretation of the constitution would give rise to a contradiction that is not contained in the Basic Law itself. The fundamental rights are intended to guarantee distance between political power and society outside state control, and they are not intended to take effect in the very context where the constitution intends there to be a particular proximity and therefore excludes mutual distancing.

The fundamental rights preserve distance between citizens and state authority precisely in order to place limits upon state rule (Loschelder, in: Isensee/Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. V, 2nd ed., 2000, s. 123, marginal number 16; Di Fabio, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, VVDStRL, 56, p. 235 [253, 254]). This most elevated function of the fundamental rights may not, however, develop without restriction where the distance is specifically intended to be removed by incorporation into the state and therefore the constitution does not intend the distance to exist. In a relationship of proximity that is institutionally desired by the constitution, therefore, the most basic function of a fundamental right cannot assert itself without calling into question the relationship of proximity and the constitution’s decision in favour of a democratically guided civil service.

3. The evaluation of aptitude in connection with the special right of equality under Article 33.2 of the Basic Law must not be mistaken for an encroachment upon the freedom under Article 4.1 of the Basic Law.

The requirement and, as it were, the normal case of classical civil rights and liberties is an intrusion by state authority into the sphere of the citizen. The constellations in which the citizen approaches the state, claims benefits from the general public or offers his or her services to the general public deviate from this normal case. Here, state authority does not intrude on society, but subjects of fundamental rights seek proximity to the state organisation, desire the state to act, seek a legal relationship.

**60 Years German Basic Law:
The German Constitution and its Court**

The constitutional complaint challenges the violation of Article 33.2 in conjunction with Article 33.3 of the Basic Law and therefore relies on a special right of equality. If rights of equality are asserted in isolation or connection with a claim for performance, however, the constitutional requirement of the specific enactment of a statute cannot be relied on. The infringement of equality does not give rise to an encroachment upon a right of freedom that could trigger the requirement of the specific enactment of a statute. The constellation surrounding the encroachment is different: the appointment of a teacher whose person does not offer a guarantee that he or she will carry out his or her duties neutrally in class indirectly affects fundamental rights of the pupils and their parents; as a result, at best there could be a discussion as to whether a statute is necessary with regard to protecting the freedom of the pupils and parents.

If the state forbids a person to wear a headscarf, which is at least in part motivated by religion, in a public place, it undoubtedly encroaches upon the fundamental right of freedom of religion. If the civil servant, on the other hand, wishes to display indications that are understood as religious in a space that the constitution has already defined as neutral - in this case when teaching in a compulsory state school - and as a representative of the general public, the civil servant is not exercising, in the social sphere, a freedom to which he or she is entitled as an individual. The civil servant's exercise of freedom at work is from the outset restricted by the necessities and above all the constitutional definition of the office; if this were not so, the realisation of the will of the people would fail for an excess of personal liberty rights on the part of the representatives of the state. When carrying out his or her official duties, the teacher must respect the fundamental rights of the pupils and their parents; the teacher is not merely on the state's side, but the state also acts through the teacher. Those who see the civil servant, except in questions of status, as having unrestricted fundamental rights *vis-à-vis* the civil servant's employer dissolve the boundary that has been drawn, in order to create liberty for children and parents, between the state and society. In this way they accept the risk that the democratic development of informed opinion will become more difficult, and in place of this they prepare the way for the courts to weigh the fundamental rights of teachers, parents and pupils, a process which is difficult to monitor.

4. Finally, another reason for which there is no need for a statute is that the evaluation of the aptitude of a civil servant has indirect effects in a legal relationship that is material for fundamental rights. Admittedly, in the past the application of the constitutional requirement in education law that a statute be specifically enacted was extended for the sake of the parents and pupils, but not to protect the teachers who were civil servants. The situation of civil servants, as a relationship of particular proximity between citizen and state, was, unlike education law with its character of a benefit directed outwards and affecting the rights of parents, specifically not understood as a legal relationship shaped by the civil servant's claim to fundamental rights (cf. Oppermann, *Verhandlungen des 51. Deutschen Juristentages 1976*, vol. I, part C, reports, *Nach welchen rechtlichen Grundsätzen sind das öffentliche Schulwesen und die Stellung der an ihm Beteiligten zu ordnen?*, C 46-47).

From the point of view of materiality, therefore, it could be of significance only if a Land permitted the headscarf, or other religious or ideological symbols likely to lead to conflict, in class. For then, even without the encroachment upon fundamental rights affecting the rights of

**Selected Fundamental Decisions of
the Federal Constitutional Court**

pupils and parents, already specifically asserted, a dangerous situation from the point of view of fundamental rights would have arisen that needed to be legislated for. An extension of the constitutional requirement of the specific enactment of a statute, under the aspect of materiality, to include civil rights and liberties of the teacher in exercising his or her official duties, on the other hand, has not yet been advocated.

II.

The civil servant's duty of neutrality follows from the constitution itself; it does not need to be further supported by Land statutes. Civil servants who give no guarantee that in their conduct as a whole they will carry out their duties neutrally and in a way appropriate to the requirements of the particular employment lack aptitude in the meaning of Article 33.2 of the Basic Law (cf. BVerfGE 92, 140 [151]; 96, 189 [197]).

The grounds given by the majority of the Senate push the constitutional personal liberty rights a long way into civil-service law without giving appropriate weight to the structural decision made by the Basic Law in Article 33 of the Basic Law. These grounds can therefore not be brought into accord with fundamental statements of the constitution on the relationship between society and state. In particular, they misjudge the position of the civil service in realising democratic will.

1. Those who aspire to a public office seek in the status activus (rights to take part in a democratic state) proximity to public authority and, like the complainant, wish to create a particular relationship of service and loyalty to the state. This particular position of duty, which is constitutionally protected by Article 33.5 of the Basic Law, takes precedence over the protection of the fundamental rights (cf. BVerfGE 39, 334 [366, 367]), which in principle applies to civil servants too, to the extent that the duty and purpose of the public office so require. Accordingly, the citizen's right arising under Article 33.2 of the Basic Law grants equal access to public offices only if the applicant fulfils the factual requirements of the right, which is equivalent to a fundamental right, - aptitude, qualifications and professional achievement. The employer is authorised and constitutionally obliged to determine that an applicant is fit for a public office (Article 33.2 of the Basic Law).

In this discretionary decision, it is necessary to assess aptitude, qualifications and professional achievement; this is an act of evaluative decision-making, and it is to be reviewed by the court only to a restricted extent, to determine whether the administrative authority based the assessment on incorrect facts and whether it misjudged the civil service law and constitutional-law framework within which it can move without restriction. Apart from this, since there is no right to be accepted into the status of a civil servant, the review is restricted to checking for arbitrariness (cf. BVerfGE 39, 334 [354]). The interpretation of the indeterminate legal term "aptitude" necessitates a predictive decision in which the employer must comprehensively evaluate all the characteristics that the office in question requires of its holder (cf. BVerfGE 4, 294 [296, 297]; BVerwGE 11, 139 [141]).

Here, the employer must also give a prediction as to whether the applicant will fulfil his or her professional duties in future in the office sought. Aptitude includes not only a guarantee that the civil servant is equal to the professional tasks, but also that the civil servants person satisfies

**60 Years German Basic Law:
The German Constitution and its Court**

the fundamental requirements that are indispensable for the exercise of a public office that has been conferred. One of these requirements, which are protected by Article 33.5 of the Basic Law with constitutional status, is the guarantee that the civil servant will observe his or her official duties neutrally. What degree of restraint and neutrality can be required of the civil servant in the individual case is determined not only by general principles, but also by the concrete requirements of the office.

2. The state whose constitution is the Basic Law needs the civil service in order that the will of the people may take effect in practice. The civil service realises the decisions of parliament and of the responsible government; it puts the principle of democracy and the constitutional state into a concrete form (Article 20.1 of the Basic Law). The design of the constitution aims at democratic rule in a legally constituted form. Both the legislation passed by parliament and the political leadership given by the government therefore require the neutral civil service with its expert knowledge (cf. BVerfGE 7, 155 [163]). Statute and law are a promise for the citizen who is subject to state authority that the form in which a fact situation will be legislated on will be abstract and general and without respect of person. In conformity with this, the civil servant too, who is called to implement the law and to realise the political will of the government in a legal form, acts as a neutral fiduciary *vis-à-vis* the citizen.

The decision in favour of the constitutional state requires the civil servant to be bound by statute, as a counterweight to the political leadership of the government. He or she realises the democratic will. Under the design of the Basic Law, sovereign duties are normally assigned to civil servants (Article 33.4 of the Basic Law). The permanent civil service, founded on factual knowledge, expert performance and loyal fulfilment of its duties, is intended to secure a stable administration and thus to act as a balancing factor in face of the political forces that shape life in the polity (cf. BVerfGE 7, 155 [162]; 11, 203 [216, 217]). Civil servants must carry out their tasks impartially and justly; in exercising their office they must take account of the public welfare, be loyal to the state and behave, both inside and outside their office, in such a way that they do justice to the respect and the trust that their position requires (cf. s. 35.1 of the Civil Service Law Framework Act; s. 73 of the Baden-Württemberg Land Civil Service Act). Their conduct in office must be oriented solely towards factual correctness, faithfulness to the law, justice, objectivity and the public interest. These obligations form a fundamental basis for the trust of the citizens that the duties of the democratic constitutional state will be fulfilled.

3. The requirement of neutrality and moderation for civil servants that follows from this is one of the tradition fundamental principles of the permanent civil service (Article 33.5 of the Basic Law); it has been enacted in nonconstitutional law in s.s. 35.1, 35.2 and 36 of the Civil Service Law Framework Act and in the civil service Acts of the Länder (cf. s. 72 of the Baden-Württemberg Land Civil Service Act: cf. BVerfGE 7, 155 [162]; Battis in: Sachs, Grundgesetz 3rd ed., Article 33, marginal number 71; Lübke-Wolff in: Dreier, Grundgesetz, vol. II, 1998, Article 33, marginal number 78). This corresponds to the basic duty of neutrality of the state, which also applies in the sphere of religion and ideology, which is derived precisely from the freedom of faith of Article 4 of the Basic Law in conjunction with Article 3.3, Article 33.3 of the Basic Law and from Article 140 of the Basic Law in conjunction with Article 136.1, 136.4 and Article 137.1 of the Weimar Constitution (cf. BVerfGE 19, 206 [216]; 93, 1 [16, 17]; 105, 279 [294]). To this extent, the principles of the permanent civil service under Article 33.5 of

Selected Fundamental Decisions of the Federal Constitutional Court

the Basic Law create a direct constitutional reservation that in advance restricts the scope for civil servants to exercise their fundamental rights: to protect the fundamental rights of those who are not integrated into the state organisation.

The previous case law of the Federal Constitutional Court derived rights and duties of the civil servant directly from Article 33.5 of the Basic Law. Non-constitutional provisions governing the civil servant's rights and duties are possible and to a certain extent desirable here, but they are not constitutionally required (BVerfGE 43, 154 [169, 170]). The duties of the civil servant created directly under Article 33.5 of the Basic Law include moderation and restraint, in particular when carrying out his or her official business. If the civil servant in office behaves in a way that is not neutral politically, ideologically or in religion, he or she violates his or her official duties if the behaviour is objectively likely to lead to conflicts or obstruction in observing public duties (cf. BVerfGE 39, 334 [347]). Especially in religious and ideological matters, the civil servant must be restrained, because this is required of the state for whom the civil servant acts, for the sake of the freedom of the citizens.

Under Article 4.1 of the Basic Law and under Article 3.3 sentence 1, Article 33.3 and Article 140 of the Basic Law in conjunction with Article 136.1, 136.4 and 137.1 of the Weimar Constitution, the state and its institutions are obliged to conduct themselves neutrally in questions of religious and ideological belief and not to endanger religious peace in society (BVerfGE 105, 279 [294]). For this reason too, when the civil servant first joins the civil service he or she must, constitutionally, already offer a personal guarantee of neutral conduct that neither provokes nor challenges in carrying out his or her future duties (Article 33.5 of the Basic Law).

4. What degree of restraint and neutrality can be required of the civil servant in the individual case is determined not only by these general principles, but also by the concrete and changing requirements of the office. These requirements too need not be separately laid down by statute as official duties, because it is a specific mark of the permanent civil service that official duties are not understood as restrictions on the civil servant's freedom, but are laid down by the employer in accordance with the relevant needs of a constitutional and factually effective administration. The standard for the assessment of aptitude is marked out for the authority in its essential lines in this respect too by Article 33.5 of the Basic Law with regard to the principle of neutrality and moderation. These principles, which constitutionally apply directly, need no further statutory definition, even in relation to school. The non-constitutional law requirements of the civil servant's duty of political neutrality are to this extent declaratory and not integral to the assessment of aptitude on entry into public offices in the meaning of Article 33.2, Article 33.5 of the Basic Law.

The general duty of neutrality applies to a particular degree for civil servants who exercise the office of a teacher at state schools. Teachers carry out the state's duty to provide education and training (Article 7.1 of the Basic Law). In this, they have direct pedagogical responsibility for teaching and the education of the pupils. By reason of their function, they are put in a position to exercise influence on the development of the pupils entrusted to them in a way comparable to the parents. Connected with this is a restriction of the parents' right of education, which is guaranteed as a fundamental right (Article 6.2 sentence 1 of the Basic Law); this restriction can be accepted only if schools endeavour to achieve objectivity and neutrality not

**60 Years German Basic Law:
The German Constitution and its Court**

only in the political sphere, but also in religious and ideological matters. One reason why this is the case is that under Article 6.2 sentence 1 of the Basic Law the parents also have the right to bring up children in religious and ideological respects and they can in principle keep convictions that they feel are wrong away from their children (cf. BVerfGE 41, 29 [48]; 41,88 [107]). Observing these rights is one of the essential duties of school, required by the Basic Law itself; at the same time, they are a mirror image of the official duties to be observed by the teachers.

III.

A teacher at a primary school or non-selective secondary school violates official duties if, in lessons, she uses symbols as part of her dress that are objectively likely to result in obstacles at school or even constitutionally significant conflicts in relation to school. The uncompromising wearing of the headscarf in class that the complainant seeks is incompatible with the requirement for a civil servant to be moderate and neutral.

1. When civil servants exercise a public office, even if they are modern, open and courageous, fundamental rights are guaranteed by the constitution only if there is no suspicion that there will be a marked conflict with the employer's development of informed political opinion and no obstacle to the exercise of the public office conferred. When the majority of the Senate assume that only the existence of tangible evidence of a "concrete endangerment of the peace of the school" is sufficient to deny the aptitude of an applicant for a civil service post, they misjudge the standard for the assessment of aptitude.

The Senate majority themselves also admit that religiously motivated dress of teachers may influence schoolchildren, lead to conflicts with parents and in this way disrupt the peace of the school. In the case of conflict in particular, they state, it must also be expected that there will be onerous effects on younger pupils. This potential situation of danger, however, cannot be cited in response to a prospective teacher at the stage of "abstract danger", but only when tangible evidence of the endangerment of the peace of the school has materialised. In this view, if conflicts have not crystallised, the authority making the appointment can no longer find there is a lack of aptitude.

In this view, the majority of the Senate misjudge the standard of evaluation for the assessment of aptitude under Article 33.2 of the Basic Law. For because the removal from office of a person retaining civil service status for life on account of violation of his or her official duties is possible under the traditional principles of permanent civil service only to a restricted extent and by way of formal disciplinary proceedings, the employer must in advance see to it that no one becomes a civil servant who cannot be guaranteed to observe the official duties under Article 33.5 of the Basic Law. The constitutionally legitimate means for this is the consideration and decision of whether the applicant has the necessary aptitude for the office applied for. Doubts as to this that cannot be removed permit the appointing authority to make a negative prediction, since here it is not possible to establish aptitude positively (cf. BVerfGE 39, 334 [352, 353]). Preventive measures to protect children and the parents' right of education, moreover, do not in principle require that a situation of danger be scientifically and empirically proved (cf. BVerfGE 83, 130 [140]).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

Reference to the concept of “abstract danger”, which is taken from police law, cannot therefore appropriately solve the conflicts in the assessment of aptitude. On the contrary, the free constitutional state is prohibited from postponing denying that civil servants have the necessary aptitude until it becomes probable that their foreseeable conduct in office will cause damage to particular objects of legal protection, as the concept of danger implies. The distinction between concrete and abstract danger may therefore be used to describe the classical threshold of interference in the relationship between the citizen and the state, but not to describe the standard for the discretion in appointment incumbent on state administration. It cannot accord with the civil service law reservation to civil servants of the exercise of sovereign powers if the constitutional state would have to rely on the threshold of danger under police law against its own civil servants who represent the state and through whom the state acts in order to control their conduct in office. This applies all the more in that the complainant wishes to teach primary school and non-selective secondary school pupils in a state compulsory school, that is, in an area that is sensitive for pupils and parents from the point of view of fundamental rights. In this respect it is therefore not a question of potential dangers or modalities of danger under police law, but merely whether the school authority, in putting into specific terms not only provisions of Land law, but also the constitutionally valid principles of permanent civil servants in the meaning of Article 33.5 of the Basic Law assumed on a basis that can be followed that there was a risk of a violation of duty. This is clearly the case.

2. The school board, on the evidence of the record of the conversations relating to aptitude and according to the statements in the oral hearing before the Federal Constitutional Court, certainly showed understanding of the complainant’s religious convictions; conversely, however, the complainant clearly showed no understanding for the employer’s desire to show neutrality. Except in extreme cases such as the immediate threat of violence, she found she would not be capable of refraining from wearing a symbol of strong religious and ideological expressiveness while teaching. Apart from the fact that this rigidity gives rise to doubts as to the complainant’s prior loyalty to the political aims of her employer and the order of values in the Basic Law, inter alia in a possible conflict with religious convictions of Islam, in this way, even at the early stage of evaluation of aptitude, circumstances became known that would make it substantially more difficult to use the applicant in every function at school and that would bring the Land authority of the state into conflicts with pupils and their parents, but possibly also with other teachers, that can be predicted even today.

The headscarf worn by the complainant is here not to be assessed abstractly or from the point of view of the complainant, but in her concrete relationship to school. The requirements of the office of a teacher at the primary school and non-selective secondary school include the duty to avoid for his or her person political, ideological or religious symbols that are objectively expressive. In the teaching profession, teachers must refrain from using such meaningful symbols, which are likely to awaken doubts as to their neutrality and professional distance in topics that are controversial politically or from the point of view of religion or culture. Here it cannot be relevant what subjective meaning the teacher who is a civil servant associates with the symbols he or she uses. What is decisive is the objective effect of the symbol.

**60 Years German Basic Law:
The German Constitution and its Court**

Assessing such an effect in concretely changing situations is fundamentally the duty of the employer and can be reviewed for plausibility and conclusiveness by courts only to a limited extent. The professionally competent administration is best suited to carry out the assessment; putting official duties into specific terms is traditionally a domain of the employer. In doing this, the employer must react to changing situations. The use of symbols changes over the course of time, as does the violence of the resonance created by them: sometimes slogans on political badges (e.g. “Stop Strauß”; “Nuclear Power - No Thanks”) are in the foreground, sometimes symbols derived from religion such as the orange-coloured dress of the followers of Bhagwan (Osho) (BVerwG, *Neue Zeitschrift für Verwaltungsrecht*, NVwZ 1988, p. 937). The employer, in the last instance the competent Land minister in his parliamentary and political responsibility, with his particular expertise with regard to the requirements for functions in the school situation, must assess in each case what use of symbols by the civil servant is compatible with the requirements of civil-service law in general and with the special requirements in the teaching profession, or is to be prohibited.

3. A distinction between abstract and concrete danger, such as the majority of the Senate regard as significant, is of no importance here, and as a result has to date not been relied on to determine official duties or in connection with decisions as to aptitude. All that is important if there are proceedings at a non-constitutional court challenging the decision as to aptitude is whether the assessment that particular symbols are incompatible with the requirement of neutrality in the civil service was based on a clearly erroneous factual foundation or on conclusions that cannot be understood.

The assumption on which the decisions challenged rest that if the complainant were employed in a general primary school or non-selective secondary school in Baden-Württemberg there would be apprehension of possible interference with the peace of the school is understandable. The majority of the Senate also assume that a teacher who permanently wears the headscarf in lessons as an Islamic symbol does at least give rise to “abstract danger”. A symbol worn by the teacher that is - at present - expressive and has objective religious, political and cultural meaning is indeed likely to encroach upon the negative freedom of religion of pupils and parents and upon the parents’ right of education (Article 6.2 of the Basic Law). Especially the wearing of a garment that unequivocally indicates a particular religious or ideological conviction of a teacher at state schools may encounter lack of understanding or rejection among pupils who are of a different opinion or the persons entitled to educate them and may affect this category of persons in their fundamental right of negative freedom of belief because the pupils cannot escape such a demonstration of religious conviction.

Teaching and education at state schools are benefits given by the state; accepting these benefits has been made a statutory duty for the children. For children and their parents, therefore, taking part in school lessons is for all intents and purposes unavoidable. In addition, the children’s opportunities in life depend substantially on their level of achievement and on the competence of school institutions and their practice with regard to appropriate support and education. Consequently, neither the parents nor the state can reasonably be expected to wait and see how conflicts develop in the individual case when a future conflict situation becomes evident during the job interview. In addition, it seems likely that some parents will fail to protest

**Selected Fundamental Decisions of
the Federal Constitutional Court**

because they fear there might be disadvantages for their child if they did so. The possibility that peace at school might be disrupted has, apart from this, already taken on a concrete form in the case of the complainant, as is shown by experience in teaching practice and the negative reaction of other teachers.

4. The assumption of the majority of the Senate that the cross on a classroom door and the headscarf of a teacher in class are not comparable, a comparison decided in favour of the complainant, misjudges the fundamental rights position of the pupils and parents affected. The decisive factor here is the influence to which the individual pupil in a compulsory state school and under state responsibility is subjected. If, in surroundings with a Christian influence, a cross hangs above the school door - not a large crucifix behind the teacher (cf. BVerfGE 93, 1 [18]) - this can scarcely any longer be regarded as an encroachment upon the negative freedom of religion or the parents' right of education. Children have too few associations with a mere everyday object on the wall that has no immediate relation to a concrete person or real world fact situation. The cross, over and above its religious significance, is too much a general cultural symbol for a culture, fed by Jewish and Christian sources, bound by values but open, that has become tolerant as a result of wide historical experience, some of it painful.

In contrast, teachers, as persons and as personalities, have a material moulding effect on the children, especially at primary school and in the function of class teachers. If a teacher wears striking dress, this creates impressions, gives rise to questions and encourages imitation. In the oral hearing, the expert witness Professor Dr. Bliesener stated on this point that the conduct of the teacher encourages the pupils to imitate it: this happens because the pupils at a primary school often have a close emotional relationship, and the teacher is also expected to aim for this, for pedagogical reasons, and because the attention of children is clearly directed at the teacher and the teacher's authority is also perceived in the context of the school.

The complainant's statement that if there were questions about the headscarf she would answer these untruthfully and in contradiction to her religious conviction, saying it was only a fashion accessory, is not appropriate to avoid a conflict of fundamental rights. For children too are aware of the religious significance of wearing a headscarf permanently, that is, even indoors. In addition, school children interact not only with the teacher, but also with their parents and wider social surroundings. Parents who answer their children's questions truthfully within their own understanding of education will not be able to avoid explaining that the teacher wears the headscarf because only in this way can she preserve in public her dignity as a woman. But here there are the seeds of a conflict with the moral concepts of children with non-Islamic parents, and possibly even with Islamic parents who do not believe in a requirement that women cover themselves in public. The objective irritation effect of a symbol that is also political and cultural may easily reach the child, by way of reactions in its social surroundings, and lead the child to ask whether, in a conflict of values that it cannot judge, it should take the side of the teacher or the side of its social surroundings, which decidedly reject the headscarf, and which may include its parents. In the oral hearing, the expert witness Professor Dr. Bliesener in this connection referred to the possibility that children of primary school age might be emotionally overtaxed if a permanent conflict developed between the teacher on the one hand and the parents or individual parents on the other hand.

**60 Years German Basic Law:
The German Constitution and its Court**

5. In order that an official duty, directed towards moderation in the civil servant's dress, can lawfully be put into concrete terms by the employer, no empirical proof of "dangerous situations" is needed, and still less is it necessary for the Land legislature to carry out scientific surveys in order to establish the "endangerment". A constitutional requirement of the specific enactment of a statute with a duty for the legislature to offer proof, for the mere purpose of putting official duties into concrete terms and ordering them to be applied, is not merely foreign to the system, but also takes the free constitutional state further into an immobility that obstructs its effectiveness. It is quite adequate for the assessment of aptitude that the use of meaningful symbols as part of dress a conflict appears reasonably possible or even likely.

This is the case, because the headscarf clearly, at least in part, carries a heavy symbolic meaning as a symbol of political Islamism - this is shown even by the public reactions to the court proceedings instigated by the complainant - and corresponding defensive reactions are to be expected. This objective content also includes the emphasis of a moral distinction between women and men that is likely to lead to conflicts with those who in turn support equality, equal value and equal treatment in society of women and men (Article 3.2 of the Basic Law) as a high ethical value.

The assessment that permanently wearing a headscarf in lessons is incompatible with the civil servant's duty of ideological and religious neutrality was convincingly described as free from errors in all three administrative court judgments. The headscarf as a religious and ideological symbol for the necessity that women cover themselves in public is at all events at present objectively likely to give rise to contradiction and polarisation.

6. The complainant stated that she felt her dignity was violated if she appeared in public with her hair uncovered. Even if the complainant did not expressly state it in so many words, this suggests the converse conclusion that a woman who does not cover her head gives up her dignity. Such a distinction is objectively qualified to give rise to values conflicts at school. This applies even in the relationship between the teachers, but particularly in relation to parents; their children, experience shows, develop a special relationship to their teacher in the primary school in particular.

Whether it is politically or pedagogically right or wrong to confront children as soon as possible with other standards of value or a lives based on a different understanding of the dignity of women than that of their parents is legally immaterial. The only significant factor is whether the appointing authority's assessment is understandable when it argues that there is a possibility of conflicts at school that could perfectly well have been avoided if the teacher had shown moderation in this respect. The responsible school board assumed without error that this was the case.

The headscarf, worn as the uncompromising compliance with an Islamic requirement that the complainant assumed existed for women to cover themselves, at present represents for many people inside and outside the Islamic religious group for a cultural and political statement with a religious foundation, relating in particular to the relationship of the sexes to each other (cf. e.g. Nilüfer Göle, *Republik und Schleier*, 1995, pp. 104 et seq.; Erdmute Heller/Hassouna Mosbahi, *Hinter den Schleiern des Islam*, 1993, pp. 108 et seq.; Rita Breuer, *Familienleben im Islam* 2nd ed. 1998, pp. 81 et seq.; Tariq Ali, *Fundamentalismus im Kampf um die Weltordnung*, 2002,

**Selected Fundamental Decisions of
the Federal Constitutional Court**

pp. 97 et seq.). The majority of the Senate did not attach enough significance to this circumstance. As a result, they also did not consider the question as to whether, among the adherents of the Islam faith in Germany, there was a not insignificant or even growing number of people who regard the headscarf and the veil as a cultural challenge made to a society whose value system they reject, and above all, whether defensive reactions are to be expected from among the majority of the citizens of different faiths, and if so, what form these reactions might take. At all events, important commentators on the Koran are also of the opinion that the requirement that women cover their heads is based on the necessity of keeping women in their role of serving men, independently of the question as to whether a strict requirement to this effect even exists. This distinction between men and women is far removed from the values of Article 3.2 of the Basic Law.

It is therefore not important whether such an opinion is the only valid opinion within Islamic society or merely the predominant opinion, or whether the opinion submitted by the complainant in the proceedings, that the headscarf is, instead, a sign of the growing self-confidence and emancipation of women of Islamic faith, is held by a large number of persons. It is sufficient that the opinion that if women cover their heads this guarantees that they are subordinated to men is clearly held by a not insignificant number of the adherents of the Islam religion and is therefore likely to lead to conflicts with the equal rights of men and women, which is strongly emphasised in the Basic Law too.

7. In the claim asserted by the complainant to the right to work as a school teacher wearing a headscarf, she enters a grey area that is culturally and legally problematic and full of tension. Even one further step to completely covering her face, which is also practised in the Islamic religious community, might be regarded under an understanding of the German constitution, as incompatible with the dignity of humanity: free human beings show their faces to others.

But the Basic Law, in the sphere of society, also respects religious and ideological views that document a relation between the sexes that is difficult to reconcile with the order of values in the Basic Law, as long as they do not overstep the limits of the state's order of peace and law. The value system of the Basic Law, including its understanding of the equality of men and women, does not close itself to all change; it confronts challenges, reacts and preserves its identity in change.

This openness and tolerance does not, however, go so far as to grant entry into the civil service to symbols that challenge the existing standards of value and are therefore likely to result in conflicts. The fundamental openness and tolerance in society may not be transferred to the state's internal relationships. On the contrary: there is a constitutional requirement to keep the internal organisation of state administration free from the obvious possibility of such severe conflicts, in order that - in the concrete case - school lessons and education at school can proceed without interruption, and in general, because the state must remain capable of acting and must be able to conduct itself with a minimum of uniformity.

IV.

The majority of the Senate extend the constitutional requirement of the specific enactment of a statute to an area which, because it is dependent on the individual case and because it is subject to existing constitutional obligations, is in practice not accessible to control by statute (cf. BVerfGE 105, 279 [304]).

1. The parliament of the Land Baden-Württemberg expressly and with good reasons refused to pass a formal statutory provision occasioned by the assessment of aptitude in the present case. In the period relevant for this litigation, the Land parliament twice dealt with the problem of teachers who wish to wear a headscarf in class (Minutes of plenary proceedings (PlenarProt.) 12/23 of 20 March 1997, pp. 1629 et seq.; Minutes of plenary proceedings 12/51 of 15 July 1998, pp. 3977 et seq.). The concrete case of the complainant was debated in detail in the plenary debate of 15 July 1998 (Minutes of plenary proceedings 12/51 of 15 July 1998) and a resolution was passed on a motion by the parliamentary Republikaner party; the motion was for legislation to be passed (Land parliament document, LTDrucks, 12/2931 of 9 June 1998). By a large majority, with only the votes of the Republikaner party opposing, the parliament voted not to pass legislation on the question of assessment of aptitude with regard to the wearing of religious symbols in class. The decision was stated to have been made because broader and more detailed legislation was not necessary; statutory provision would make it more difficult to make the appropriate assessment of aptitude based on the individual case and thus also to exercise the scope for interpretation in awarding public offices and at the same to do justice to personal liberties.

The call for a formal statute, based on the federal constitution, does not result in any advantage from the point of view of materiality for the democratic basis of an administrative decision. In complex questions of the individual assessment of applicants for a public office, a formal statute that in principle encourages freedom can have the reverse effect of reducing freedom, since in this way measures designed for the individual case are made more difficult. A general statutory provision, which in any case is foreign to the system for laying down official duties and assessing aptitude under civil service law, does not create more justice in the individual case, but less. Under the scheme of school policy of the Land government and the Land parliament, it would certainly be possible to appoint a teacher wearing a headscarf to a teaching post in the individual case if it could be seen that she was prepared to refrain from wearing the headscarf not only in extreme situations, as submitted by the complainant in the oral hearing, but also in everyday teaching situations in a primary school.

The school authority, the minister and the Land parliament, however, took offence specifically at the fact that the complainant categorically refused to take a step in the direction of a more flexible approach to her attitude to the headscarf. From this, the authority responsible for assessing her aptitude was entitled to conclude that in the case of conflicts with the negative freedom of religion of parents and children, solutions adapted to the individual case at mixed-religion schools would be very much more difficult (cf. Article 15.1, Article 16 of the Constitution of the Land Baden-Württemberg). It was also entitled to conclude that the persistence of the applicant's refusal was capable of arousing doubts as to her neutrality and moderation, although this did not appear beyond objective justification and arbitrary.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

2. The majority of the Senate requires the Land legislature to put constitutional restrictions inherent in the Basic Law into concrete terms, although they can be determined concretely enough from the Basic Law. It is therefore doubtful whether the Land legislature is even authorised to put these inherent restrictions into concrete terms, beyond making a declaration confirming them or clarifying them.

The Federal Constitutional Court has to pass a final and unappealable decision on the extent and scope of inherent restrictions of fundamental rights. It is not the task of a Land legislature to repeat in a declaration the restrictions that arise directly from constitutional law. Nor is the appropriate respect accorded to the Land parliament if it is forced to pass statutory wording that on the one hand it expressly and in a well-considered way did not desire and that on the other hand - in the opinion of the majority of the Senate - put direct constitutional barriers in concrete form which will again be tested in later proceedings before the Federal Constitutional Court. A competent court that in such a controversial fundamental constitutional question refers to the legislature must at least inform the legislature how the latter is to carry out the task presented to it of putting direct constitutional limits into a concrete form.

In the present case, however, all questions remain open as to how the legislature is to draft legislation incorporating its political will, which it has already declared openly in the Land parliament. Is it sufficient if the legislature makes it an official duty for teachers to avoid religious and ideological dress symbols that are likely to result in negative effects on the peace of the school? Would it be admissible to prohibit the use of such religious, ideological or political symbols in the teaching profession that are likely to endanger the equality of men and women and its enforcement in practice (Article 3.2 of the Basic Law)? May civil service law for teachers be defined in such a way as the then Republikaner party group in the Land parliament demanded in its motion of 9 June 1998 (Land parliament document 12/2931), “that the wearing of the headscarf as the symbol of Islam in class represents an inadmissible, one-sided, ideological and political statement”? Must the Land legislature, because this is said by the majority of the Senate to be required by the Basic Law, carry out empirical research with regard to possible disruptions, and if so, to what extent? Or must it constitutionally and for reasons of equality prohibit without exception all religious symbols in the dress of the teachers, even if, like a small ornamental cross, they make no significant statement and therefore are from the outset unlikely to result in conflicts of values at school? Could such a prohibition of dress symbols without any objective provocative content whatsoever be justified at all?

3. The Senate did not do justice to the task of answering a fundamental constitutional question, although the case is ripe for a decision. As a result, the Land legislature must now pass a statute, which according to the dissenting opinion is not even necessary, and this without being granted a transitional period for this surprising necessity. In addition, it would scarcely be compatible with the principle of equality to incorporate a statutory basis for a general prohibition of significant religious or ideological symbols in office, as suggested by the majority of the Senate, only in the Education Act and not generally in the Land Civil Service Act; the relevant conflict situations may occur in other areas of the civil service too, for example in connection with the youth welfare service, social work, public safety or the administration of justice.

**60 Years German Basic Law:
The German Constitution and its Court**

4. The majority of the Senate ought at least to have granted the legislature a transitional period. Taking into account earlier decisions of the Federal Constitutional Court on the constitutional requirement of the specific enactment of a statute, this would have been appropriate and would have reduced the effects of a surprise decision.

- a) The Federal Constitutional Court derived the prohibition of surprise decision from the requirement of a fair hearing under Article 103.1 of the Basic Law. The parties to the proceedings may be surprised neither by a judicial decision in itself (BVerfGE 34, 1 [78]) nor by its factual (BVerfGE 84, 188 [190, 191]) or legal (BVerfGE 86, 133 [144, 145]) content. A judicial decision may be based only on facts and results of evidence to which the parties were able to respond. Merely informing the parties to the proceedings is not enough; they must also have a concrete opportunity to express a reaction to the facts (BVerfGE 59, 330 [333]). A statement relating to the circumstances and facts is regarded as satisfying the requirements of a fair hearing in the meaning of Article 103.1 of the Basic Law, and the possible to make a statement on the legal situation is deemed equivalent to this (BVerfGE 60, 175 [210]; 64, 125 [134]; 86, 133 [144]; 98, 218 [263]). The parties must be given the possibility of asserting their point of view by way of arguments on fact and law in the proceedings. In special cases, it may here be necessary to draw the attention of the parties to a legal opinion on which the court intends to base the decision. Granting a fair hearing in a way that satisfies the constitutional right requires that the party, using the care to be expected of him or her, is capable of recognising the aspects on which the decision may depend. If the court relies on a legal point of view without prior reference, and even a conscientious and informed party to the proceedings, even taking into account the variety of legal opinions that might be held, could not expect the court to rely on this legal point of view, the result may be the equivalent of prevention of submissions on the legal situation. This applies in particular if the court's interpretation of the law has to date not been argued either in case law or in literature, albeit in principle there is no right to a judicial dialogue or a reference to the court's legal viewpoint (BVerfGE 86, 133 [144, 145]; 96, 189 [204]; 98, 218 [263]).

The majority of the Senate fail to adequately take into account the procedural right to a fair hearing that is also due to the state as a party to the proceedings when they introduce a requirement of the specific enactment of a parliamentary statute in order to create official duties in connection with the freedom of religion and ideology of the civil servant, where until now neither case law and literature nor the complainant herself have called for such a requirement, and this was not made a serious subject of the judicial dialogue in the oral hearing before the Senate. The Land Baden-Württemberg had neither occasion nor opportunity to express its opinion on this legal opinion, which was surprising for all parties and a major factor in the decision. The Land should have been given an opportunity to express an opinion on this aspect. The majority of the Senate accuse the Land of an omission. They state that it had not created a sufficiently definite statutory basis for the encroachment upon the complainant's right under Article 33.2 in conjunction with Article 4.1 and 4.2 of the Basic Law. The Land was unable to react to this charge, because it did not know of it nor was it obliged to know of it.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

b) In view of this procedural omission, the majority of the Senate ought at least to have laid down a reasonable period of time for the Land legislature within which the legislature was able to take account of the requirement of the specific enactment of a statute by creating a provision that, in the opinion of the majority of the Senate, does justice to the situation under constitutional law. In earlier decisions, the Federal Constitutional Court recognised this problem and when it made a new demand for the specific enactment of a statute it made it possible for the executive for a transitional period to make a decision encroaching upon fundamental rights without a corresponding statutory provision. In this way, for example, in the interest of the prison regime and schools, the monitoring of prisoners' letters was declared to be provisionally permissible because there was insufficient authorisation below the level of a statute (cf. BVerfGE 33, 1 [12, 13]; 40, 276 [283]) as was expulsion from school that was not governed by a parliamentary statute (cf. BVerfGE 58, 257 [280, 281]).

5. A reasonable transitional period would not only have been needed by reason of respect for the legislature, but would also have taken seriously the requirement of the specific enactment of a statute that was assumed by the majority of the Senate and given the Land legislature the possibility of creating an effective statutory basis for the present case. The Federal Administrative Court is also left by the reasoning of the majority of the Senate in a state of uncertainty, in a manner that is constitutionally questionable, as to how it is to proceed in future with regard to the proceedings that have been referred back. For if - as the majority of the Senate assume - the decision challenged by the complainant is unconstitutional, then at present the Federal Administrative Court should find in favour of the plaintiff. Since the dispute related only to the question of the religious symbol, therefore, the complainant would have to be appointed a civil servant by the Land Baden-Württemberg. In this way, under civil service law, a *fait accompli* would be created, which the legislature could scarcely correct. The alternative, not excluded even by individual elements of the grounds given by the majority of the Senate, of suspending the proceedings before the administrative courts until the Land parliament has created a statutory basis in the law relating to teachers who are civil servants, should have been clearly stated.

V. Freedom of Expression, the Media, Arts and Research - Article 5 of the Basic Law

Some General Comments

Article 5 of the Basic Law protects free speech in a broad sense and does so by distinguishing several important aspects: The personal right to free speech and freedom of opinion, the freedom to inform oneself from any and all generally available sources (without, however, creating a freedom of information entitlement as in recent years has been enacted in many jurisdictions both in Germany and elsewhere under the administrative term “freedom of information”), the freedom and independence of the press as well as the freedom and institutional importance of broadcasting, including a special guarantee for public broadcasting to secure plurality of opinion and the freedom of the arts, and of research and teaching. The Constitutional Court has consistently emphasised that these communication freedoms are constituent elements for the liberal-democratic order laid down in the Basic Law²¹.

1. Article 5.1, sentence 1 - Freedom of Expression

a) *Lüth*, BVerfGE 7, 198

Explanatory Annotation

The *Lüth* decision is one of the very fundamental decisions of the Constitutional Court, with great influence on the subsequent development of the freedom of communication in Germany. The decision has already been mentioned in the Introduction with an emphasis on the objective function of the fundamental rights in the Basic Law.²²

Mr. Lüth had, in his capacity as a private citizen, publicly called for a boycott of a movie shown in German cinemas because of the movie director’s past racist propaganda work for the Nazi regime. The production firm of the movie feared economic loss from this call to boycott the movie and sought and was granted an injunction on the basis of a norm in the Civil Code that prohibits the intentional and malicious infliction of economic loss on another individual. The term malicious, of course, requires interpretation and the Constitutional Court held that this interpretation would have to take into account the enormous significance of the free speech guarantee in Article 5.1 of the Basic Law. The Court regarded the dispute as a legitimate controversy and so long as this controversy was conducted by voicing opinions and the power

21 See for instance the decision of the Constitutional Court in the Lüth Case, BVerfGE 7, 198.

22 See Introduction, p. 86-87.

Selected Fundamental Decisions of the Federal Constitutional Court

of persuasion, as opposed to, for example, the use of a dominant market position or other means of extortion²³, it was protected by the free speech guarantee and the respective private law provisions invoked in this case had to be interpreted restrictively to comply with the Basic Law.

The development of this ‘objective function’ i.e. the obligation of the courts to interpret all norms of law in the light of the significance of the fundamental rights guarantees of the Basic Law, is obviously of vast significance. It pulled the fundamental rights of the Basic Law into the realm of any and all courts and enlisted them in their enforcement and it put this enforcement under the supervision of the Constitutional Court. This was important because the German legal system had evolved as a more positivist system with a tendency to “compartmentalize” the various fields of law into independent subsystems. Hence it was not a self-evident - and subsequently harshly criticized - notion that fundamental rights of the Basic Law should play a role in the construction of norms of the Civil Code or similar ‘technical fields’ such as civil procedure or the law of conflicts (private international law).²⁴ The long-standing common law tradition that the common law should be interpreted in such a way that individual rights are interfered with as little as possible had never found its way into the German civil law tradition. The establishment of just the permeating nature of fundamental rights throughout the entire legal order is one fundamental consequence of the *Lüth* decision.

The other, no less important consequence of the decision is the emphasis of the Constitutional Court of the paramount importance of the freedom of communication as protected by Article 5.1 of the Basic Law. As the decision was rendered in 1958 the Court in effect put the new Republic on the only possible track for a democracy - the free flow of ideas even if these ideas are disturbing or even offensive to some or perhaps even to the majority. The Court did this by construing the principle of proportionality in such a way that any limitations of the freedom of communication by governmental authority, which could in principle be possible under Article 5.2 of the Basic Law, would themselves have to be scrutinized in the light of the fundamental importance of the freedom of speech for a democratic society. This construction of limiting the scope of the possible limitation of a right by the scope of the right itself has been a blessing for free speech in Germany, albeit one of dogmatic impurity.

23 See the contrasting decision of the Constitutional Court in the Blinkfuer Case, BVerfGE 25, 256, available in German at <http://www.servat.unibe.ch/dfr/bv025256.html>. In this case a large publishing house had threatened its wholesale organization with a removal of its complete line of newspaper and magazines, among them leading national titles, if they continued to sell a tiny magazine (“Blinkfuer”) that published the East-German television schedule.

24 See, for example, the decision of the Court in BVerfGE 31, 58, available in German at <http://www.servat.unibe.ch/dfr/bv031058.html>, where the Constitutional Court held that the provisions of the German private international law, the law of conflicts, had to measure up to fundamental rights guarantees, and that this might necessitate modifications if the foreign law to which the German conflict norms point for the resolution of a dispute are not in line with fundamental rights of the Basic Law. See also the decision of the Court concerning contracts of guarantee, BVerfGE 89, 214, available in German at <http://www.servat.unibe.ch/dfr/bv089214.html>, where the Court held that fundamental rights of the Basic Law require the regular courts to engage in a content review of private contracts to protect weaker contracting parties from unfair disadvantage.

60 Years German Basic Law:
The German Constitution and its Court

**Translation of the Lueth Judgment - Decisions of the Federal Constitutional Court
(Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 7, 198***

Headnotes:

1. Basic rights are primarily to protect the citizen against the state, but as enacted in the Constitution (Grundgesetz - GG) they also incorporate an objective scale of values which applies, as a matter of constitutional law, throughout the entire legal system.
2. The substance of the basic rights is expressed indirectly in the rules of private law, most evidently in its mandatory provisions, and is best effectuated by the judges' use of the general clauses.
3. Basic rights may be infringed by a judicial decision, which ignores the effect of basic rights on private law (s. 90 of the Federal Constitutional Court Act - BVerfGG)). Judicial decisions on private law are subject to review by the Constitutional Court, only in respect of such infringements of basic rights, not for errors of law in general.
4. Rules of private law may count as 'general laws' which may restrict the basic right of freedom of expression under Article 5.2 of the Basic Law.
5. Such 'general laws' must be interpreted in the light of the special significance in a free democratic state of the basic right to freedom of expression.
6. The basic right in Article 5 of the Basic Law protects not only the utterance of an opinion as such, but also the effect it has on others.
7. The expression of an opinion favouring a boycott does not necessarily infringe proper conduct (*boni mores*) under s. 826 of the Civil Code (Bürgerliches Gesetz-buch - BGB); depending on all the circumstances such an expression may be justified as a matter of constitutional law.

Judgment of the First Senate of 15 January 1958 - 1 BvR 400/51 -

Facts:

At the opening of 'German Film Week' on 20 September 1950 the complainant, then a Senator of the Free and Hanseatic City of Hamburg and Head of the State Press Office, gave an address, in his capacity as President of the Hamburg Press Club, to an audience of film distributors and directors. He said, *inter alia*:

The person least likely to restore the claim to morality which the German film forfeited during the Third Reich is the man who directed 'Jud Süß' and wrote the script for it. If this very man is chosen to represent the German film industry, who can tell what harm we may

* Translation by J.A. Weir; © Basil Markesinis.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

suffer throughout the world? True he was acquitted in a formal sense in Hamburg, but substantially the judgment was a condemnation. We must call on the distributors and cinema owners to show character-not cheap, but worth the price. And I want the German film to show character as well. If it shows character in its imagination, visual daring and sterling craftsmanship, it will merit every assistance and achieve what it needs in order to survive: success with the public here in Germany and abroad.

Domnick-Film-Produktion GmbH immediately challenged the complainant to justify these charges against Veit Harlan, under whose direction and with whose screen-play they were making 'Unsterbliche Geliebte'.

On 27 October 1950 the complainant released an 'open letter' to the Press by way of reply which contained the following:

The court did not gainsay the fact that for much of the Hitler régime Veit Harlan was the 'Nazi film-director no. 1' or that his film 'Jud Süß' showed him to be a committed exponent of the Nazis' murderous purge of the Jews. Some businessmen here and abroad may not be opposed to Veit Harlan's re-emergence, but the moral integrity of Germany must not be destroyed by hard-faced money-makers. Harlan's return can only reopen wounds barely healed, and resuscitate diminishing distrust fatal to German reconstruction. For all these reasons it is not only the right but the duty of all decent Germans to protest against, and even to boycott, this ignominious representative of the German film industry.

Domnick-Film-Produktion GmbH and Herzog-Film GmbH (the distributor of 'Unsterbliche Geliebte' in the Federal Republic), obtained an interlocutory injunction from the Landgericht Hamburg ... and the Oberlandesgericht dismissed the complainant's appeal. At the complainant's request the two film companies were required to bring suit within a certain time. They did so, and on 22 November 1951 the Landgericht Hamburg issued the following judgment:

The defendant is ordered, on pain of fine or imprisonment as determined by the court, to refrain (1) from calling on theatre managers and film distributors not to programme the film 'Unsterbliche Geliebte' and (2) from calling on the German public not to go to see the film.

...

B. I.

The complaint is admissible since the preconditions for the application of s. 90.2 sentence 2 of the Federal Constitutional Court Act are satisfied (decision before exhaustion of legal remedies).

II.

The complainant alleges that the Landgericht's judgment infringes his basic right to free expression of opinion as laid down in Article 5.1 sentence 1 Basic Law.

The judgment of the Landgericht, an act of the public power of judicature, could infringe the complainant's basic right by its content only if the court was bound to take account of the complainant's basic right.

**60 Years German Basic Law:
The German Constitution and its Court**

By enjoining the complainant from making statements apt to lead others to endorse his views about Harlan's re-emergence and to follow him in discriminating against Harlan's films, the judgment clearly restricts the complainant's freedom of expression of opinion. The Landgericht granted the injunction as a matter of private law order on the basis that the complainant's statements were tortious under s. 826 of the Civil Code. Thus the public power has restricted the complainant's freedom of expression on the basis of the plaintiff's private law claim. This can constitute an infringement of the complainant's basic right under Article 5.1 sentence 1 of the Basic Law only if the applicable rules of private law are so substantially affected that they can no longer support the judgment.

The question whether basic rights affect private law, and if so in what manner, is much debated. The extreme positions are, on the one hand, that basic rights constrain only the state, and, on the other, that basic rights (or at any rate the most important of them) prevail against everyone in private legal relations. Previous decisions of this Court support neither of these extreme positions, the conclusions drawn by the Federal Labour court in its decision of 10 May 1957 (NJW 1957, 1688) from our decisions of 17 and 23 January 1957 (BVerfGE 6, 55 and 6, 84) being unwarranted. Nor is it necessary today to deal with all aspects of the debated question of the 'effect on third parties' (Drittwirkung) of basic rights. The matter can be properly resolved by the following considerations:

1. There is no doubt that the main purpose of basic rights is to protect the individual's sphere of freedom against encroachment by public power: they are the citizen's bulwark against the state. This emerges from both their development as a matter of intellectual history and their adoption into the constitutions of the various states as a matter of political history: it is true also of the basic rights in the Basic Law, which emphasizes the priority of human dignity against the power of the state by placing the section on basic rights at its head and by providing that the constitutional complaint (Verfassungsbeschwerde), the special legal device for vindicating these rights, lies only in respect of acts of the public power.

But far from being a value-free system the Constitution erects an objective system of values in its section on basic rights, and thus expresses and reinforces the validity of the basic rights. This system of values, centring on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision. It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.

The legal content of basic rights as objective norms informs private law by means of the rules which directly control this area of law. Just as new rules must conform to the value-system of the basic rights so existing and older rules receive from it a definite constitutional content which thereafter determines their construction. From the point of view of substantive and procedural law a dispute between private citizens on the rights and duties that arise from rules of conduct thus influenced by the basic rights remains a dispute of private law. It is private law which is interpreted and applied even if its interpreters must follow the public law of the constitution.

Selected Fundamental Decisions of the Federal Constitutional Court

The influence of the value-system of the basic rights is clearest in those rules of private law which are mandatory (*zwingendes Recht*) and form part of *ordre public* in the wide sense, i.e. those rules which in the public interest apply to private legal relations whether the parties so choose or not. Such provisions, being functionally related and complementary to public law, are especially exposed to the influence of constitutional law. 'General clauses', such as s. 826 of the Civil Code, by which human conduct is measured against extralegal standards such as 'proper conduct' (*gute Sitten*), allow the courts to respond to this influence since in deciding what is required in a particular case by such social commands, they must start from the value-system adopted by the society in its constitution at that stage of its cultural and spiritual development. The general clauses have thus been rightly described as 'points of entry' for basic rights into private law.

The judge is constitutionally bound to ascertain whether the applicable rules of substantive private law have been influenced by basic rights in the manner described; if so, he must construe and apply the rules as so modified. This is what is meant by saying that the civil judge is bound by the basic rights (Article 1.3 Basic Law). If he issues a judgment which ignores this constitutional influence on the rules of private law, he contravenes not only objective constitutional law by misconceiving the content of the objective norm underlying the basic law, but also, by his judgment, in his capacity as a public official, contravenes the Constitution itself, which the citizen is constitutionally entitled to have respected by the judiciary. Quite apart from any remedies he may have to correct this error in the courts of private law, the citizen can invoke the Federal Constitutional Court by means of a *Verfassungsbeschwerde*.

The Constitutional Court must determine whether the reach and effect of the basic rights in private law has been correctly ascertained by the regular courts. But this is also the limit of its investigation: it is not for the Constitutional Court to check judgments of civil courts for errors of law in general; the Constitutional Court simply judges of the 'radiant effect' of the basic rights on private law and implements the values inherent in the precept of constitutional law. The function of the *Verfassungsbeschwerde* is to test all acts, whether of the legislature, the executive or the judiciary, for 'compatibility with the Constitution' (s. 90 of the Federal Constitutional Court Act - *BVerfGG*). The Federal Constitutional Court is certainly not to act as a court of review, much less over-review, for the civil courts, but neither may it abjure consideration of such judgments entirely or leave uncorrected any instance which comes to its notice of the misapplication of the rules of basic rights.

2. The basic right to freedom of expression of opinion (Article 5 of the Basic Law) seems to pose special problems with regard to the relationship between basic rights and private law. As in the Weimar Constitution (Article 118), this right is constitutionally guaranteed only within the limits of 'general laws' (Article 5.2 of the Basic Law). Before inquiring what laws are 'general laws' in this sense, one might suppose that the constitution's reference to such laws must be to such laws as judicially construed, with the result that no judicial construction of such a law which limited the basic right could be regarded as a 'breach' of the basic right.

This is not, however, the sense of the reference to 'general laws'. The basic right to freedom of expression, the most immediate aspect of the human personality in society, is one of the most precious rights of man (Declaration of the Rights of Man and Citizen (1789) Article 11). It is absolutely essential to a free and democratic state, for it alone permits that constant

**60 Years German Basic Law:
The German Constitution and its Court**

spiritual interaction, the conflict of opinion, which is its vital element (BVerfGE 5, 85 [205]). In a certain sense it is the basis of freedom itself, 'the matrix, the indispensable condition of nearly every other form of freedom' (Cardozo).

Given this fundamental importance for the free democratic state of freedom of expression of opinion, it would be illogical for a constitution to make its actual scope contingent on mere statute (and thus necessarily on the holdings of courts construing it). What was said earlier about the relationship between basic rights and private law applies here also: general laws which have the effect of limiting a basic right must be read in the light of its significance and always be construed so as to preserve the special value of this right, with, in a free democracy, a presumption in favour of freedom of speech in all areas, and especially in public life. We must not see the relationship between basic right and 'general laws' as one in which 'general laws' by their terms set limits to the basic right, but rather that relationship must be construed in the light of the special significance of this basic right in a free democratic state, so that the limiting effect of 'general laws' on the basic right is itself limited.

In its function as ultimate guardian of the basic rights through the medium of the Verfassungsbeschwerde, the Federal Constitutional Court must therefore have the power to supervise the decisions of courts whose application of a general law in this area may unduly restrict the scope of the basic right in the individual case. This Court must be competent to uphold as against all organs of public power, including the civil courts, the special value it represents for a free democracy, and thus to reconcile, as required by constitutional law, the conflicting restrictive tendencies of the basic right and the 'general laws'.

3. The concept of general law has always been controversial. Leaving on one side the question whether the concept may not be due to an error in the drafting of Article 118 of the 1919 Constitution, we may note that it was then construed to include all which 'do not forbid an opinion as such and do not envisage the expression of opinion as such', but rather 'serve to protect a legal interest which deserves protection without regard to any particular opinion', and protect 'a community value superior to the activity of freedom of opinion'. Exponents of the Grundgesetz agree with this ('laws which do not inhibit the purely intellectual effect of a mere expression of opinion').

If the term 'general laws' is so understood, we may state the protection of the basic right as follows:

It is unacceptable to hold that the Constitution protects only the expression of opinion, and not its inherent or intended effect on others, for the whole point of an expression of opinion is to have 'an effect on the environment of ideas'. Thus value-judgments, which always have an intellectual aim, namely to persuade others, are protected by Article 5.1 sentence 1 of the Basic Law; indeed it is the stance of the speaker as expressed in the value-judgment by which he hopes to affect others which is principally protected by this basic right. To protect the expression and not to protect its effect would be a nonsense.

In this sense the expression of opinion is free in so far as its effect on the mind is concerned; but that does not mean that one is entitled, just because one is expressing an opinion, to prejudice interests of another which deserve protection against freedom of opinion. There has

**Selected Fundamental Decisions of
the Federal Constitutional Court**

to be a 'balance of interests'; the right to express an opinion must yield if its exercise infringes interests of another which have a superior claim to protection. Whether such an interest exists in a particular case depends on all the circumstances.

4. From this point of view the rules of private law may perfectly well be ranked as 'general laws' in the sense of Article 5.2 of the Basic Law. If this has not been done by commentators hitherto, that is simply because basic rights have been considered good only as against the state, so it was natural to consider as 'general laws' having limiting effect only those laws which regulated state activity *vis-à-vis* the individual, that is, laws of a public law nature. But if the basic right to free expression of opinion affects relations of private law as well and favours free expression of opinion against the fellow citizen also, then rules of private law which operate to protect superior legal interests must also be taken into account as possibly limiting the basic right. After all, if provisions of criminal law designed to protect honour or other essential aspects of human personality can set limits to the exercise of the fundamental right to freedom of expression, it is not obvious why similar provisions of private law should not equally do so.

b) Leipziger Volkszeitung (Leipzig People's Daily) - BVerfGE 27, 71

Explanatory Annotation

This decision is a reminder of the absurdities that happened during the "cold war" period, when the Soviet Union led communist block and the democratic western states were pitted against each other, among them former West-Germany and former communist East-Germany. At issue was the confiscation of East-German communist newspapers that some people had subscribed to by mail on the basis that this was qualified as abetting the activities of the prohibited Communist Party in West-Germany.²⁵ The Court, in one of its weaker moments, allowed these confiscations insofar as they could be qualified as abetting a prohibited political party, namely the Communist Party of Germany. However, it did so only because it went on to argue that the confiscation of the East-German newspaper in question violated another element of the freedom of communication clause of Article 5.1 of the Basic Law, the freedom of information.

25 The prohibition of political parties in Germany is possible under Article 21.2 of the Basic Law: "Parties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality." Only the Constitutional Court can declare a political party unconstitutional and it has only done so twice in the history of the Republic. The first decision in 1952 declared unconstitutional a successor party to the National-Socialist German Workers Party (so-called 'Nazis') of Adolf Hitler, the "Socialist Reich Party (SRP)", see BVerfGE 2, 1 and the second case pertained to one of the several communist parties in then West-Germany, the Communist Party of Germany (KPD). In order to be declared unconstitutional political parties must pursue the political goal of removing the democratic and rights based order in Germany and (sic!) they must be shown to be willing to pursue this goal with violence. It is not sufficient for a declaration of unconstitutionality to merely demand amendments of the Basic Law, as long as those amendments are legally possible, i.e. not prohibited by the eternity clause of Article 79.3. It is also not sufficient for such a declaration if the party calls for the abolition of the Basic Law but restricts itself to peaceful means. This approach to the legality and possible prohibition of political parties is shared by the European Court of Human Rights, see ECtHR (Grand Chamber), Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13/2/2003, Refah Partisi (The Welfare Party)/Turkey (available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>).

**60 Years German Basic Law:
The German Constitution and its Court**

The Court held that the freedom of information guarantees the right to receive information from any source generally available. What is generally available cannot be determined by legislation regulating the legality of this or that lest the freedom of information were rendered ineffective. Even the fact that the information source in question might, in another context be qualified as a violation of criminal norms, i.e. abetting prohibited political parties, does not mean that the freedom of information must step back because just wanting to read a paper cannot be qualified as such a criminal act.

The broader significance of this decision lies in its construction of the freedom of information and this interpretation is still valid today. It should be noted that the freedom of information under Article 5.1 of the Basic Law cannot be understood in the same way as many freedom of information statutes in various countries. These “FOI-statutes” usually grant an entitlement to be granted access to certain information, e.g. documents etc. on request and subject to defined exceptions. The freedom of information of Article 5.1 of the Basic Law is limited to information that is publicly available and constitutes a defence right against government action restricting access to such generally available information. It is not a positive right for access to information that is not generally available and it does not entitle individuals to demand that such information to be made available to them.²⁶

Translation of the ‘Leipziger Volkszeitung’ Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 27, 71*

Headnotes:

1. The right of citizens to inform themselves from generally accessible sources without hindrance that is guaranteed under Article 5.1 sentence 1 of the Basic Law (Grundgesetz - GG) (freedom of information) is an independent fundamental right that enjoys status equivalent to that of freedom of expression and freedom of the press.
2. A source of information is generally accessible if it is technically suitable for and intended to provide the general public with information. It does not lose this character through legal measures intended to prevent distribution.
3. Article 5.1 sentence 1 of the Basic Law protects not only the act of procurement of information, but just as much so the actual receipt of such information.

²⁶ Whether this interpretation of the freedom of interpretation of Article 5.1 of the Basic Law needs to change is controversial. See Jürgen Bröhmer, *Transparenz als Verfassungsprinzip - Grundgesetz und Europäische Union*, 2004. Freedom of information legislation granting access to information and regulating this access and possible exceptions was passed on the federal level in 2005, see *Gesetz zur Regelung des Zugangs zu Informationen des Bundes (Informationsfreiheitsgesetz)* of 5/9/2005, Official Gazette (BGBl.), Part I, p. 2722, German version available at <http://bundesrecht.juris.de/ifg/>. This federal legislation had been preceded by legislation in some of the Länder. There are also statutes regulating access to environmental information. For the respective federal legislation see http://bundesrecht.juris.de/uig_2005/.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

4. Decision on the balance of interests between freedom of information and those provisions of criminal law constituting general laws which are intended to ward off threats to the constitutional order within the meaning of Article 5.2 of the Basic Law in the case of confiscation.

Order of the First Senate of 3 October 1969 - 1 BvR 46/65 -

Facts:

Pursuant to the Act to Monitor Criminal and Other Transportation Prohibitions (Gesetz zur Überwachung strafrechtlicher und anderer Verbringungsverbote - GÜV) of 24 May 1962 Federal Law Gazette (*Bundesgesetzblatt* - BGBL) I, p. 607, the postal and customs authorities were charged with ensuring that materials - such as, among other things, newspapers and magazines - are not brought into the territorial sphere of operation of this Act if importation or distribution is prohibited for reasons of national security. In 1964, the complainant had daily newspapers, including a copy of the 8 May 1964 edition of the "Leipziger Volkszeitung" in one parcel, mailed to him in Münster, Westphalia from the GDR (Deutsche Demokratische Republik - DDR) by acquaintances for information purposes. The complainant did not receive this newspaper since the Lüneburg Regional Court (Landgericht) had ordered that this edition of the "Leipziger Volkszeitung" be withdrawn from general circulation, due, among other things, to perpetration of various violations of national security (ss. 90a, 94 and 97 of the Criminal Code (Strafgesetzbuch - StGB), and it was then confiscated by the customs authorities. The Regional Court grounded its decision in the fact that the publication originated from the Socialist Unity Party of Germany (Sozialistische Einheitspartei Deutschlands - SED) - in the GDR. The Court reasoned that the parcel was sent for the purposes of supporting the efforts of the Communist Party of Germany (Kommunistische Partei Deutschlands - KPD), which was controlled by the Socialist Unity Party and whose activities were illegal, to introduce the rule of force and arbitrariness prevailing in the GDR to the Federal Republic.

The complainant's constitutional complaint directly challenging the order of the Lüneburg Regional Court issued in the objective proceedings was successful.

Extract from the Grounds:

C. I.

The constitutional complaint is founded.

1. The Regional Court did not explicitly take into account the freedom of expression and the freedom of the press of the publishers and distributors of the newspaper that was confiscated when it found that publication and distribution of that newspaper violated the provisions of law mentioned in the operative part of the order and when it ordered confiscation of the newspaper. There can be no objection to this on constitutional grounds. Although the order does not make it possible to discern which of the various commentaries in the newspaper article were considered to be in violation of the Basic Law, it can be inferred from the context of the grounds that the Regional Court assumed that the purpose of the publication and distribution of the newspaper was to support the efforts of the Communist Party of Germany, which was controlled by the

**60 Years German Basic Law:
The German Constitution and its Court**

Socialist Unity Party and whose activities were illegal, in violation of ss. 42 and 47 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG) and ss. 128, 94 and 90a of the Criminal Code. In the presence of any such direct support for the organizational cohesion of the prohibited Communist Party of Germany, restriction of freedom of expression and freedom of the press is permissible due to the encouragement of the organization and there can in that regard be no objection on constitutional grounds to application of the provisions of criminal law (see BVerfGE 25, 44 [55 et seq]).

There could also be no objection if the Regional Court had at the same time based its order on s. 97 of the Criminal Code (defamation of governmental institutions) only in the grounds, but not in the operative part. Despite all permissible acerbity in the struggle for public opinion, the nature of an attack can, however, trigger effects that may no longer be tolerated (see also BVerfGE 4, 352 [355 et seq.] on the constitutionality of s. 187a of the Criminal Code [protection of politicians against defamation]).

2. However, when ordering confiscation the Regional Court did not take into account the influence exerted by the right of recipients or readers of the newspaper to inform themselves from generally accessible sources without hindrance that is guaranteed under Article 5.1 sentence 1 of the Basic Law (freedom of information). The decision to confiscate the newspaper under criminal law encroaches upon this fundamental right in that it hinders access to newspapers, which represent one of the most important sources of information.

When the Eighth Criminal Law Amendment Act (Strafrechtsänderungsgesetz) was being drafted, the various parties who took the position that making it difficult to obtain newspapers from the GDR did not interfere with the fundamental rights of citizens of the Federal Republic. See the comments of the Member of the Bundestag Dr. Gradl, Stenographic Record of the 177th session of the Bundestag of 29 May 1968, p. 9527, and the Members of the Bundestag Dr. Güde and Dr. Schwarzhaupt at the 85th session of the Special Committee of the Bundestag for the Criminal Law Reform of 8 November 1967, Minutes pp. 1698 and 1701) (see the comments of the Member of the Bundestag Dr. Gradl, Stenographic Record of the 177th session of the Bundestag of 29 May 1968, p. 9527, and the Members of the Bundestag Dr. Güde and Dr. Schwarzhaupt at the 85th session of the Special Committee of the Bundestag for the Criminal Law Reform of 8 November 1967, Minutes pp. 1698 and 1701) failed to recognize that access to newspapers involves a two-way communication process that enjoys constitutional protection not only because of the freedom to express and disseminate opinions, also because of the freedom of information. For that reason, encroachment upon the process of communication affects both areas.

The provisions of criminal law (ss. 86 and 98.2 of the Criminal Code) cited as the basis for the decision of the Regional Court do not provide for compulsory confiscation, but leave this to the discretion of the court. As provisions of general laws that restrict the fundamental right within the meaning of Article 5.2 of the Basic Law, they must pursuant to the case law of the Federal Constitutional Court be viewed in the light of the importance of the fundamental right of freedom of information and construed in such a manner as to guarantee that the special value embodied in that fundamental right is always preserved (see BVerfGE 7, 198 [208 et seq.]; 25, 44 [55]). In exercising its discretion, the Regional Court should have sought to achieve a

**Selected Fundamental Decisions of
the Federal Constitutional Court**

balance between interests protected by the fundamental right of freedom of information and the interests protected by the provisions of criminal law. This requires that the content and reach of the fundamental right first be defined more precisely.

II.

1. Prior to the year 1945, there had been no independent fundamental right in German constitutional history that enabled citizens to inform themselves from generally accessible sources without hindrance. This freedom of information initially found its way into the constitutions of various *Länder* (see, for example, Article 11 of the Constitution of the former *Land* of Württemberg-Baden of 28 November 1946; Article 13 of the Hessian Constitution of 1 December 1946) Article 112.2 of the Bavarian Constitution of 2 December 1946 after World War II and thereafter into the Basic Law. The reason for the independent constitutional guarantee of freedom of information in the Basic Law lay in the experience with restrictions on information that were common practice under the National Socialist regime, which included governmental control of opinion, governmental prohibition of reception of foreign radio broadcasts and bans on literature and art.

2. a) The status of freedom of information in the constitutional order is equivalent to that of freedom of expression and freedom of the press. It is not merely an integral part of the right to express and disseminate opinions. This right does to be sure also encompass protection of the reception of opinions by others; this protection is, however, afforded exclusively the persons expressing opinions by virtue of their freedom of expression. The recipient plays only a passive role in that regard. Freedom of information, by contrast, is the actual right to inform oneself. On the other hand, this freedom is a prerequisite to the formation of opinion, which precedes expression of opinion. Because only through comprehensive information, which is made possible by the availability of adequate sources of information, can individuals and society freely form and express opinions. Finally, a free press makes it easier for citizens to form opinions and make political decision by providing comprehensive information (BVerfGE 20, 162 [174]).

Accordingly, the nature of the freedom of information guaranteed under Article 5.1 sentence 1 of the Basic Law is defined by two elements. The one is the reference to the principle of democracy contained in Article 20.1 of the Basic Law: A democratic state cannot exist without free public opinion and a public that is as well-formed as possible. In addition, freedom of information involves a personal element that derives from Article 1 and Article 2.1 of the Basic Law. The ability to inform themselves from as many sources as possible, to widen their knowledge and to thereby develop their personalities is one of the most basic needs of human beings. Additionally, the possession of information is of significant importance for the social standing of the individual in modern industrial society. The fundamental right of freedom of information is, like the fundamental right of free expression of opinion, one of the most important prerequisites for a free democracy (see BVerfGE 7, 198 [208]). It is only by virtue of this right that citizens are able to acquire on their own the necessary prerequisites for the exercise of their personal and political duties in order to be able to act responsibly in a manner conducive to democracy. As they become better informed, citizens recognize interactions in politics and their importance for their existence and can draw consequences; their freedom to

**60 Years German Basic Law:
The German Constitution and its Court**

share responsibility and voice criticism grows. Not of least importance is the fact that information can enable the individual to become familiar with the opinions of others, weigh them against one another, and thereby eliminate prejudices and develop an understanding for those with other views.

Special importance is also assigned to freedom of information at the international level, which is reflected in international efforts made since 1945 to secure this freedom as an independent right. Following the Resolution of the General Assembly of the United Nations of 14 December 1946, which embodied an understanding of freedom of information in a broad sense that even included freedom of expression, the General Assembly of the UN enshrined the principle in Article 19 of the General Declaration of Human Rights of 10 December 1948:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 10.1 sentences 1 and 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 is similarly worded:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

- b) Article 5.1 sentence 1 of the Basic Law protects not only the act of procuring information, but just as much so the actual receipt of information. The Basic Law is intended to ensure that the individual is able to inform himself to the greatest extent possible. It is also possible for individuals to be “informed” by sources that find their way into their sphere of cognizance without any active intervention on their part. For only through possession of information is it possible to make an independent choice. This aspect of being able to make such a choice is a fundamental element of any act of acquiring information. If freedom of information did not guarantee that sources of information are made available to individuals in the first place, that would also prevent them from actively making a choice. The act of “informing oneself” therefore also includes the purely intellectual process of acquiring information. An individual is already “informing himself” in this manner when information is being brought to him by mail. If such access is interrupted, subsequent reliance on freedom of information cannot be refuted by arguing that the printed matter was never received and that there was for that reason no interference with the freedom “to inform oneself.” That the desire to inform one-self may not manifest itself until after receipt of the matter sent by mail lies in the nature of this right.
- c) Freedom of information is constitutionally guaranteed only if the source of information is generally accessible.

This will regularly be the case if the source of information is technically suitable for and intended to provide the general public, i.e., a class of persons that is not specifically defined, with information. Newspapers and other means of mass communication are therefore by their very nature generally accessible sources of information. They also do

**Selected Fundamental Decisions of
the Federal Constitutional Court**

not lose that characteristic of being generally accessible sources even if the possibility of general access is impaired by governmental measures such as confiscation and prohibition or regulation of importation. Such restriction of unhindered access to a source of information does not negate its general accessibility (see also Herzog in MaunzDürigHerzog, *Kommentar zum Grundgesetz*, Article 5 marginal notes 89 et seq.; Lerche, entry under “*Informationsfreiheit*” [“Freedom of information”] in *Evangelisches Staatslexikon*, 1966, column 785 [786]).

The actual nature of dissemination is the sole criterion, not any governmental provision or order.

The view to the effect that general accessibility may be significantly influenced by acts of government (Hamann, *Das Grundgesetz*, 2nd ed., 1961, note B 5 on Article 5; Dürig, *AöR*, vol. 81, p. 117 [139]; see also Bundestag document [*Drucksache des Deutschen Bundestages - BTDrucks*] IV/2476 p. 34 and Bundestag document V/1319 p. 75) runs counter to the purpose of the constitutional guarantee of freedom of information. It must be possible for individuals to form opinions on the basis of a broad spectrum of informational materials. The choice of such materials may not be subject to governmental influence. Since freedom of information is by virtue of its association with the principle of democracy also specifically intended to permit preparation for the formation of judgments as regards the policies of one’s own governmental institutions, the fundamental right must enjoy extensive protection against restriction by those institutions.

The historical development, which is particularly important due to the recent nature of the fundamental right to freedom of information, also shows that general accessibility must be gauged exclusively against objective criteria. Freedom of information was specifically guaranteed under the Basic Law in reaction to the National Socialist bans and restrictions on information in order to ensure that individuals are also able to inform themselves from sources lying outside the territorial jurisdiction of the governmental powers of the Federal Republic. If a source of information is generally accessible at some place, be it even outside the Federal Republic, then even a legally enforceable confiscation order cannot deprive this source of information of its characteristic of general accessibility.

The structure of Article 5 of the Basic Law leads to the same conclusion. The “general laws” restriction in Article 5.2 of the Basic Law refers to all fundamental rights set forth in s. 1. The restriction contained in s. 2 would, however, be largely devoid of meaning in respect of freedom of information if the government could define general accessibility and thereby arbitrarily limit the scope of the fundamental right.

A generally accessible source also does not lose this characteristic if it constitutes the content of a postal item. In addressing the question as to general accessibility, not a single copy, but the entire circulation of a publication is what counts. That is what constitutes the source within the meaning of Article 5.1 sentence 1 of the Basic Law. Procurement of a single copy is only a concrete manifestation of the freedom to inform oneself.

III.

1. Accordingly, no. 126 of the “Leipziger Volkszeitung” of 8 May 1964, which was the issue affected by the confiscation order of the Regional Court, must be considered a generally accessible source within the meaning of Article 5.1 sentence 1 of the Basic Law. Confiscation therefore restricted the freedom of information of the complainant. The confiscation order must be lifted since the Regional Court did not take into account the influence exerted by the freedom of information.

2. The Regional Court must seek a balance on the basis of the meaning of freedom of information set forth here and in so doing take into account in particular the following:

- a) Although there can be no objection on constitutional grounds to the assumption that a publication to be confiscated violates provisions of criminal law, this does not in itself mean that the right to information must be subordinated. The balance of interests between freedom of expression and freedom of the press of the publisher and distributor of a publication and the legal interests protected by the provisions of criminal law involves an active undertaking that engenders dangers. On the other hand, freedom of information does not become operative in the case of such publications until general access to information has already been provided. The fundamental right of citizens desirous of informing themselves requires a special balance of interests. Only dangers resulting from the information process can justify restriction of the individual, who, seen from the perspective of the Basic Law, has the right to his opinion and is called upon to take part in the public decision-making process.

...

3. The very complaint of a violation of Article 5.1 sentence 1 of the Basic Law requires reversal of the challenged decision due to deficiencies in the application of substantive law governing confiscation. In addition, Article 2.1 of the Basic Law does not come into question as a standard of review (see BVerfGE 11, 234 [238]).

It need not be decided here whether the fundamental right to freedom of information requires a specific procedural form, for example, provision of further legal remedies against decisions to make confiscation orders, the possibility of new proceedings or more extensive consultation of the affected party in the confiscation proceedings than is to be inferred from the relevant provisions of law (s. 431.2 of the Criminal Procedure Code old version - now ss. 440 and 431 of the Criminal Procedure Code in the version of Article 2 no. 16 of the Introductory Act to the Regulatory Offences Act (Einführungsgesetz zum Gesetz über Ordnungswidrigkeiten - EGOWiG) according to prevailing opinion.

Selected Fundamental Decisions of
the Federal Constitutional Court

c) *Ausschwitz Lie (Holocaust Denial)*, BVerfGE 90, 241

Explanatory Annotation

This decision of the German Constitutional Court addresses the scope of the freedom of speech in the context of the most painful chapter of German history, the annihilation of the Jewish population, often referred to as the Holocaust, and other ethnic minorities such as the Roma or other groups of society such as homosexuals or disabled persons. Despite the vast array of undisputable evidence of this historic fact, old and new Nazis have repeatedly claimed that the Holocaust never took place, especially not the genocide of the Jewish population of Europe with about six million victims. Such claims have been supported by a few revisionist historians, perhaps most notably and notoriously by the British historian David Irving. German criminal law prohibits the so-called “Auschwitz-lie” and threatens criminal sanctions of up to five years in prison or fines to those who deny the Holocaust.²⁷

At issue in this case where certain requirements placed on the - extreme right wing - organizers of an indoor appearance of the British historian Irving. The organizers were required by the city of Munich to see to it that no criminal activity under the relevant sections of the German Criminal Code, especially s. 130, would take place and to take active steps if that were to happen and they were informed that, *inter alia*, the denial of the Holocaust is criminally prohibited. The Constitutional Court saw this as a justifiable restriction on free speech. The Court noted that the scope of the freedom of speech clause predominantly covers opinions and not statements of fact. The difficulty lies in the distinction between the opinion and fact because opinions are often based on factual assertions. As far as the denial of the Holocaust itself was concerned, the Court regarded that as a denial of facts and factual assertions do not join in the protection of Article 5.1 of the Basic Law. This protection could only become relevant if the denial took place in some broader concept of voicing an opinion. The Court also held that such a denial violates the personality rights of the victims of the Holocaust and the protection of personality rights is specifically mentioned as a possible restriction for the freedom of communication in Article 5.2.

Whether and how the various forms of “hate speech” are or should be compatible with the guarantee of free speech has caused much controversy not only in Germany²⁸ but also in other European countries, with the seemingly more libertarian approach in the United States serving as a point of contrast. The European Court of Human Rights in Strasbourg (ECtHR), whose jurisprudence is a very significant cornerstone of the legal freedom of communication framework in Europe, has consistently held that member states are not obligated to accept such forms of speech under the Article 10 of the European Convention of Human Rights (ECHR).²⁹

27 S. 130.3 Criminal Code. S. 130 generally prohibits various forms of “hate-speech”. For an English translation of the German Criminal Code see http://www.gesetze-im-internet.de/englisch_stgb/index.html (in this translation ‘s.’ are referred to as ‘sections’).

28 See the instructive article of Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law*, 4 GERMAN LAW JOURNAL 1 (2003), available at http://www.germanlawjournal.com/pdf/Vol04No01/PDF_Vol_04_No_01_01-44_Public_Brugger.pdf.

29 Most recently in the case of *Le Pen/France*, ECtHR, Application No. 18788/09, 20/4/2010; see also *Féret/Belgium*, Application No. 15615/07, 16/7/2009. Decisions of the ECtHR available at the HUDOC-database of the ECtHR: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>.

**60 Years German Basic Law:
The German Constitution and its Court**

The approach of the German Constitutional Court and the ECtHR are correct. Free speech never was absolute. Libel, slander, defamation etc. have always been accepted as limitations and the only question is the balancing of these exceptions with the free speech guarantee, which is of such central importance for any democratic system. It is hard to fathom a more fundamental insult than to tell those who have lost family members and friends, and indeed those who have suffered in the concentration camps and survived, that their suffering is only imagined and never took place. This is not to say that the determination of historical facts and their interpretation is often difficult and painful. And whereas the benefit of the doubt must always be given to free speech, there is no doubt with regard to the Holocaust.

Translation of the Auschwitz Lie Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE), 90, 241*

Headnote:

Judgment on the question as to whether application of s. 5 no. 4 of the Assembly Act (Versammlungsgesetz - VersG) to assemblies at which denial of the persecution of Jews is to be expected is in violation of Article 5.1 sentence 1 of the Basic Law (Grundgesetz - GG).

Order of the First Senate of 13 April 1994 pursuant to s. 24 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG) - BvR 1 23/94

Facts:

When the complainant, a regional organization of the NPD, invited David Irving, a historian who is widely considered to be a revisionist on the extreme right, to a symposium, the local authority with jurisdiction for the complainant invoked s. 5 no. 4 of the Assembly Act, making permission to hold the event contingent on the condition that appropriate measures be taken to ensure that the persecution of Jews during the Third Reich not be the subject of any discussion that involved denial of such persecution or doubt as to whether it took place. The authority required that it be announced at the beginning of the event that such talks were punishable by law and that any such talks be immediately prohibited; if necessary, the meeting was to be interrupted or householders' rights invoked to end the event. The authority found it necessary to take these measures because there was reason to assume that criminal acts under ss. 130, 185, 189 and 194 of the Criminal Code (Strafgesetzbuch - StGB) would be committed at the planned event. The administrative appeal against these conditions was unsuccessful.

The Federal Constitutional Court dismissed the constitutional complaint as obviously unfounded.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

Selected Fundamental Decisions of
the Federal Constitutional Court

Extract from the Grounds:

B. II.

The challenged decisions are not in violation of Article 5.3 sentence 1 of the Basic Law.

1. Article 5.1 sentence 1 of the Basic Law guarantees every person the right to freely express and disseminate his or her opinion.

- a) The decisions must be measured primarily against this fundamental right. The condition that the complainant contests does to be sure relate to a public assembly. At issue, however, are specific statements that the complainant, as the sponsor of the event, may neither make nor tolerate. Assessment of the condition under constitutional law hinges primarily upon whether such statements are allowed or not. A statement that may not be prohibited on constitutional grounds may pursuant to s. 5 no. 4 of the Assembly Act also not constitute a reason for a measure that restricts assembly. However, the standards for resolving this issue do not derive from the fundamental right to freedom of assembly (Article 8 of the Basic Law), but rather from freedom of expression.
- b) The fundamental right protected under Article 5.1 sentence 1 of the Basic Law pertains to opinions. Freedom of expression and dissemination relates to opinions. Opinions reflect a subjective relationship between a person and the content of his or her statements (see BVerfGE 33, 1 [14]). A characteristic element of opinions is that they involve taking and holding a position (see BVerfGE 7, 198 [210]; 61, 1 [8]). In that regard, opinions also cannot be proven true or false. They enjoy the protection of the fundamental right regardless of whether the statements are considered founded or unfounded, emotional or rational, valuable or worthless, dangerous or harmless (see BVerfGE 33, 1 [14-15]). The protection of the fundamental right also extends to the form of statements. An expression of opinion does not lose the protection afforded fundamental rights because its formulation is cutting or injurious (see BVerfGE 54, 129 [136 et seq.]; 61, 1 [7]). In that regard, the only question can be whether and to what extent the freedom of expression may be limited under Article 5.2 of the Basic Law.

Representations of fact, on the other hand, are not in the strictest sense expressions of opinion. Unlike opinions, representations of fact are such that the objective relationship between the statement and reality is in the foreground. To that extent, they are also amenable to verification of the truthfulness of their content. This does not mean, however, that representations of fact are automatically excluded from the scope of protection offered by Article 5.1 sentence 1 of the Basic Law. Since opinions are generally based on factual assumptions or involve taking a position as regards actual situations, representations of fact also enjoy the protection of the fundamental right - in any case insofar as they represent a prerequisite for the formation of opinion - that is guaranteed by Article 5.1 of the Basic Law taken as a whole (see BVerfGE 61, 1 [8]).

As a result, representations of fact are protected only until such time as they can no longer make the contribution to the formation of opinion required under constitutional law. Under this aspect, incorrect information does not constitute an interest that merits

**60 Years German Basic Law:
The German Constitution and its Court**

protection. The Federal Constitutional Court has in its established case law consistently held that representations of facts that are deliberate misrepresentations which have been demonstrated to be untrue are not covered by the protection of freedom of expression (see BVerfGE 54, 208 [219]; 61, 1 [8]). However, the standards to be met in terms of truthfulness may not be chosen such that the function of freedom of expression suffers and permissible statements are also suppressed for fear of sanctions (see BVerfGE 54, 208 [219-220]; 61, 1 [8]; 85, 1 [22]).

It can of course be difficult to distinguish between expressions of opinion and representations of fact since the two are frequently associated with one another and only together yield a meaningful statement. In such cases, separation of factual and subjective elements is permissible only if the meaning of the statement is not distorted. When this is not possible, the statement must be considered in its entirety to represent an expression of opinion and included within the scope of protection of freedom of expression in the interest of effective protection of the fundamental right since there would otherwise be a danger of significant curtailment of the protection of the fundamental right (see BVerfGE 61, 1 [9]; 85, 1 [15-16]).

- c) Freedom of expression is not, however, guaranteed without reservation. According to Article 5.2 of the Basic Law, it is subject to the restriction imposed by the provisions of general laws and statutory provisions governing the protection of youth and personal honour. However, it is necessary to take into account the importance of freedom of expression when interpreting and applying laws that have a restrictive effect on the freedom of expression (see BVerfGE 7, 198 [208-209]). As a rule, this makes it necessary to find a balance between the restriction of the fundamental right and the legally protected interest that the statute restricting the fundamental right is intended to protect as a function of the constitutive elements of the relevant statutes.

The Federal Constitutional Court has developed various rules for balancing such interests. According to these rules, freedom of expression by no means always takes precedence over the protection of personality, as the complainant would argue. In fact, protection of personality regularly takes precedence over freedom of expression in the case of statements of opinion that can be considered to constitute formal insults or invective (see BVerfGE 66, 116 [151]; 82, 272 [281, 283 et seq.]). In the case of statements of opinion accompanied by representations of fact, the degree of protection may depend upon the truthfulness of the underlying assumptions of fact. If these facts are shown to be untrue, freedom of expression is regularly subordinated to protection of personality (see BVerfGE 61, 1 [8-9]; 1 [17]).

In addition, it is necessary to determine which legally protected interest merits precedence in the individual case. However, it is to be noted that freedom of speech will be afforded precedence in the case of issues of significant public interest (see BVerfGE 7, 198 [212]).

This must therefore also always be taken into account when weighing the legal interests of the parties involved against one another.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

2. In this respect, no apparent violation of Article 5.3 sentence 1 of the Basic Law can be discerned. The condition imposed upon the complainant as the organizer of the assembly to ensure that the persecution of Jews during the Third Reich not be denied or doubted is compatible with this fundamental right.

- a) The complainant did not contest the assumption made by the authority responsible for approving the meeting and confirmed by the administrative courts to the effect that there was a danger that such statements would be made in the course of the meeting. In fact, it is argued that the complainant has a right to make such statements.
- b) The prohibited statement to the effect that there was no persecution of Jews during the Third Reich is a representation of fact that has been demonstrated to be untrue by countless eyewitness accounts and records, the findings of the courts in numerous criminal proceedings and the results of historical research. Taken on its own, a statement with this content does not therefore enjoy the protection of freedom of expression. This represents a significant difference between denial of the persecution of Jews during the Third Reich and denial of German culpability for the outbreak of World War II, which was dealt with in the decision of the Federal Constitutional Court of 11 January 1994 (BVerfGE 90, 1 et seq.).

In the case of statements regarding the assignment of guilt and responsibility for historic events, complex assessment is always involved that cannot be reduced to a representation of fact, whereas the denial of an occurrence itself will regularly be of the nature of a representation of fact.

- c) However, the decisions under challenge withstand constitutional review even if one does not take the statement responsible for the condition imposed by the authority on its own, but instead views it in the context of the subject of the meeting and considers it a prerequisite to formation of an opinion on the susceptibility of German politics to “extortion.” The prohibited statement does then to be sure enjoy the protection of Article 5.1 sentence 1 of the Basic Law. However, the restriction of that right cannot be objected to on constitutional grounds.
 - aa) A legal basis for such restriction exists that is consistent with the Basic Law.

The public authorities and administrative courts based the condition restricting expression of opinion on s. 5 no. 4 of the Assembly Act. According to this provision, an assembly in closed rooms may be prohibited if facts are established that show that the organizer or the organizer’s followers will advocate views or tolerate statements that constitute an indictable offence or a summary offence subject to prosecution *ex officio*. This provision is compatible with the Basic Law.

In particular, it is not in violation of Article 8.1 of the Basic Law. Freedom of assembly in closed rooms is to be sure guaranteed without reservation. That does not, however, mean that statements of opinion at meetings enjoy protection beyond that afforded by Articles 5.1 and 5.2 of the Basic Law. Statements of opinion that are punishable under a provision of law that is compatible with Article 5.2 of the Basic Law are also forbidden at meetings. In view of Article 8.1 of the Basic Law,

**60 Years German Basic Law:
The German Constitution and its Court**

it is also in principle not possible to object to the fact that the legislature would seek to prevent criminal acts that can with a high degree of probability be expected to occur at a meeting before they are actually committed. Limitation of the reasons for prohibition to indictable offences and summary offences to be prosecuted *ex officio* and the principle of proportionality, which is to be respected in the case of all measures taken to limit freedom of assembly, provide protection against excessive restriction of freedom of assembly.

There is also no evidence of a violation of Article 5.1 sentence 1 of the Basic Law. s. 5 no. 4 of the Assembly Act does not itself provide for restriction of freedom of expression, but relies on restrictions contained in the Criminal Code. Measures that restrict freedom of assembly under s. 5 no. 4 of the Assembly Act may therefore only be taken if there is a threat that statements will be made at an assembly that are otherwise punishable and are prosecuted *ex officio*. However, the provision does not involve subsequent sanctions by the courts, but rather preventive prohibition by the authorities. The concomitant dangers for freedom of expression are, however, countervailed since stringent requirements are imposed as regards the likelihood of danger and there must be no doubt as to the criminal nature of the statements under existing case law.

There is no doubt as to the constitutionality of the penal provisions underlying the condition imposed on the organizer of the meeting. The existence of the offence of defamation protects personal honour, which Article 5.2 of the Basic Law explicitly identifies as a legally protected interest that justifies the restriction of freedom of expression. s. 130 of the Criminal Code is a general law within the meaning of Article 5.2 of the Basic Law that is intended to protect humanity (see Bundestag document [*Drucksache des Deutschen Bundestages* - BTDrucks.] III/1746, p. 3) and finds its ultimate constitutional justification in Article 1.1 of the Basic Law.

- bb) The interpretation and application of s. 5 no. 4 of the Assembly Act in conjunction with s. 185 of the Criminal Code in the decisions under challenge are also compatible with Article 5.1 sentence 1 of the Basic Law.
- (1) The administrative authorities and administrative courts based their decisions on the interpretation of criminal law that they were provided with by the ordinary courts. According to this interpretation, the Jews living in Germany constitute a class that it is possible to insult because of the fate to which the Jewish population was exposed under the rule of National Socialism; denial of the persecution of the Jews is considered to constitute an insult to this class of persons. The Federal Court of Justice commented as follows on this issue:

The very historical fact that human beings were ostracized on the basis of the criteria of descent in what are referred to as the Nuremberg Laws and robbed of their individuality for the purposes of extermination gives Jews living in the Federal Republic a special personal relationship with their fellow citizens; what took place in the past is still with us today. It is part of their personal self-perception to consider themselves members of a class of persons that has been singled out by fate toward which all others have a special moral responsibility, and this constitutes part of their dignity. Respect for this self-

**Selected Fundamental Decisions of
the Federal Constitutional Court**

perception is for each of them indeed one of the guarantees against the repetition of such discrimination and a fundamental prerequisite for life in the Federal Republic. Anyone who would attempt to deny those events deprives each and every one of them of this personal esteem to which they are entitled. For those affected, this represents a continuation of the discrimination against the class of persons to which they belong and at the same time against them personally (Decisions of the Federal Court of Justice in Civil Matters [*Entscheidungen des Bundesgerichtshofes in Zivilsachen* - BGHZ] 75, 160 [162-163]).”

The legislature has relied on this case law and included an exception to the requirement for a request by the victim in the case of such insults in s. 194.1 sentence 2 of the Criminal Code (see Bundestag document 10/3242, p. 9).

The opinion of the Federal Court of Justice has to be sure been contested in the literature on criminal law. Some authors feel that the definition of the elements of the offence of defamation is too broad (Schönke/Schröder-Lenckner, StGB, 24th ed., s. 185 marginal note 3; Dreher/Tröndle, StGB, 46th ed., s. 194 marginal note 1; Köhler, NJW 1985, p. 2390 fn. 11). However, it is not the task of the Federal Constitutional Court to determine whether an interpretation of the Criminal Code under ordinary law is correct or whether other opinions would also be tenable. For the purposes of assessment under constitutional law, the sole consideration is whether the interpretation is based on a failure to recognize fundamental rights. This is not the case here.

The fact that denial of the persecution of Jews is viewed as a serious violation of the right of personality in the decisions under challenge based on this case law provides no reason for misgivings. There can be no objection on constitutional grounds to the logical connection established by the Federal Court of Justice between the denial of the racially motivated annihilation of the Jewish population during the Third Reich and attacks on the right to respect and human dignity of the Jews alive today. Here too, there is a difference between the denial of the persecution of the Jews and the denial of German responsibility for the war (see Federal Constitutional Court, Order of 11 January 1994 - BVerfGE 90, 1 et seq.). The latter opinion, regardless of its questionable historical accuracy, does not in any case impair any legal interests of others.

The objection of the complainant to the effect that the conditions for assembly were based on an understanding of s. 185 of the Criminal Code underlying the draft of s. 140 of the Criminal Code in the 21st Criminal Law Amendment Act (Strafrechtsänderungsgesetz, Bundestag document 10/1286, p. 4), which was not enacted by the German Bundestag, also does not make this interpretation unconstitutional. Although the legislature did refrain from introducing a specific offence subject to more severe punishment to cover denial of the persecution of the Jews, this does not make it possible to conclude that the act is not punishable under the more general provision contained in s. 185 of the Criminal Code, especially since - as has been shown - the legislature relied on the case law under which denial of hateful persecution is construed as an insult.

**60 Years German Basic Law:
The German Constitution and its Court**

- (2) It is also not possible to detect a flaw of constitutional significance in the balance between injury to reputation on the one hand and restriction of freedom of expression on the other hand. The severity of the respective impairment plays a decisive role in such a balance. In the case of derogatory statements that include a representation of fact, whether the representation of fact is true or not is important. Representations of fact that have been proven to be incorrect are not interests that merit protection. When such representations are inextricably associated with opinions, they do benefit from protection under Article 5.1 sentence 1 of the Basic Law, but any encroachment upon the freedom of expression is from the outset less serious than in the case of statements of fact that have not been proven to be untrue.

That is the case here. Even if the statement that the complainant was prohibited from making at the meeting is considered to be an expression of opinion in the context of the subject of the meeting, this does not in any way change the fact that the actual content has been proven to be incorrect. The encroachment upon the freedom of expression as regards this statement is therefore not particularly serious. In view of the importance attributed to injury to reputation, there can be no objection to the fact that protection of personality is given precedence over freedom of expression in the decisions under challenge.

This is also not changed by the fact that the attitude of Germany towards its National Socialist past and the political implications thereof, which is what the meeting was about, represents an issue of significant public interest. In this case, there is to be sure a presumption in favour of free speech. However, this does not apply in the case of statements that constitute formal insults or invective or offensive statements based on representations of fact that have been proven to be untrue.

There is also no reason to fear overextension of the standard of truthfulness required of the factual core of the statements from this balance of interests that is incompatible with Article 5.1 sentence 1 of the Basic Law. The limitation of the duty of care required by the Federal Constitutional Court in the interest of free communication and the critical and control function of the media applies to representations of fact when the accuracy of the facts is at the time the statement is made still uncertain and cannot be immediately verified. It does not, however, apply when it has already been established that a statement is not true, as is the case here.

- (3) Since the condition imposed by the authority under challenge cannot be objected to on the basis of s. 185 in conjunction with s. 194.1 sentence 2 of the Criminal Code as it is, whether this also applies for the purposes of establishing culpability under ss. 130 and 189 of the Criminal Code is no longer of any importance.

III.

The same considerations apply as regards review of the decisions under challenge against the standard of Article 8.1 of the Basic Law. No other conclusion can therefore be inferred from this fundamental right.

Selected Fundamental Decisions of
the Federal Constitutional Court

d) *Soldiers - Murderers*, BVerfGE 93, 266

Explanatory Annotation

This decision of the Constitutional Court is certainly one of the more controversial ones and was subject to heated debates. At issue were a number of cases, joined together in this decision, where the various applicants in expression of their pacifist conviction in various public settings had referred to soldiers in general and German soldiers in particular as “murderers” or “potential murderers”. The German translation for “murderer” (“Mörder”) is also used to describe the person who commits one of the most serious crimes of the German Criminal Code.³⁰ Active soldiers confronted with this label had brought criminal action against the perpetrators under s. 185 of the German Criminal Code under which insulting another person is punishable. The regular criminal courts had held that the description of another person as a “murderer” and hence a heinous criminal constitutes such an insult and fines had been ordered.

The Court argued very carefully and acknowledged that a person could well feel insulted if referred to as a murderer. However, the Court also emphasized the quintessential importance of Article 5.1 of the Basic Law and therefore deemed it necessary in the light of the significance of free speech to scrutinize what was said to see if it could not be understood in a different manner. The fact that in all incidents soldiers in general were dealt with under the epithet and German soldiers were only included in this amorphous larger group would also have to lessen the potential for insult in one individual soldier. As a result the Court quashed all regular court decisions as unconstitutional in the light of the freedom of speech protected in Article 5.1 of the Basic Law.

The decision was met with harsh criticism, even alleging that, insofar as foreign soldiers were referred to as murderers the decision violated public international law. The balance between free speech and the protection of personality rights such as personal honour and integrity is of course a problem, which has kept many constitutional and other courts busy and has given rise to many controversies. That the Constitutional Court decided correctly can be illustrated by a simple test. Pacifist convictions have been around for centuries and are based on the belief that killing other human beings is morally wrong and not justifiable even in case of war and even if the war is one fought in self-defence. A non-justifiable killing is always tantamount to a serious crime. If that assumption is correct, a pacifist could never voice his opinion without being in danger of accusing someone of being a criminal. Free speech must prevail under such circumstances because curtailing such a fundamental debate is not acceptable under a liberal free speech clause.

30 See s. 211 of the German Criminal Code: “(1) Whosoever commits murder under the conditions of this provision shall be liable to imprisonment for life. (2) A murderer under this provision is any person who kills a person for pleasure, for sexual gratification, out of greed or otherwise base motives, by stealth or cruelly or by means that pose a danger to the public or in order to facilitate or to cover up another offence”, see http://www.gesetze-im-internet.de/englisch_stgb/index.html (in this translation ‘s.’ are referred to as ‘sections’).

60 Years German Basic Law:
The German Constitution and its Court

Translation of the Soldiers - Murderers Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 93, 266*

Judgment of 10 October 1995 -1 BvR 1476, 1980/91 and 102,221/92 -

Facts:

These constitutional complaints are about criminal court convictions for “insult” in the sense of the Criminal Code of the Federal Army and individual soldiers by statements like “Soldiers are murderers” or “Soldiers are potential murderers”. The first complainant (1 BvR 1476/91) displayed a blanket with the words (in English) “A SOLDIER IS A MURDERER” written on it in red at a cross roads where NATO manoeuvres were taking place.

The second complainant (Case 1 BvR 1980/91) distributed a leaflet written by him at an exhibition by the Federal Army at a college in his hometown. It stated as follows: “Are soldiers potential murderers? One thing is clear: Soldiers are trained to be murderers. “Thou shall not kill” is changed to “Thou shall kill”. World wide. And in the Federal Army too. Mass extermination, murder, destruction, brutality, torture, mercilessness, terror, threats, inhumanity, revenge, retaliation practiced in peace, perfected in war.

That is the trade of soldiers. World wide. And in the Federal Army too. If soldiers carry out “their duty”, give commands and obey commands, then civilians are in for it. Militarism kills, even without weapons and even without war. There is only one answer to this: For peace, disarmament and humanity - refuse military service! Resistance against militarism!” A soldier R, and the Federal Defence Minister, started criminal proceedings in respect of this.

The Amtsgericht fined the complainant for insult of soldiers and the Federal Army. An appeal and a further appeal in law against this were unsuccessful. The third complainant (Case 1 BvR 102/92) wrote a letter, which was published in a newspaper after Dr. A was acquitted in the “Frankfurt soldiers trial”. The letter repeated the “soldiers-are-murderers” quote from Kurt Tucholsky in 1931. The third complainant then argued that a decision in favour of military defence and an army always includes readiness for war and for mass murder legitimated by the state. He concluded with a declaration of complete solidarity with Dr. A and stated “All soldiers are potential murderers!”. The Amtsgericht and the Landgericht fined the third complainant in several criminal prosecutions by members of the Federal Army, for insult of every member of the Federal Army (and therefore of the prosecutors). The Oberlandesgericht rejected his appeal in law. The fourth complainant (Case 1 BvR 221/92) appeared with five other people at a Federal Army information stand at a motorbike show. Some of them distributed leaflets; the fourth complainant and another person held up a banner on which were the words: “Soldiers are potential MURDERERS”. The lower third of the word murderers had “conscientious objectors” written across it. The leaflet lamented the fact that the Federal Army only presented the fascination of technology but was silent about the reality of war. The other side of the leaflet consisted of pictures of weapons and the victims of war.

* © Bundesverfassungsgericht (Federal Constitutional Court).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

The Federal Constitutional Court quashed the criminal convictions and referred the cases back to the criminal courts. The grounds for the decision are given only insofar as they relate to the second and third complainants. Part of the dissenting judgment by Judge Haas is also given.

Extract from the Grounds:

The constitutional complaints are, insofar as they are permissible, well founded. The decisions challenged did not have sufficient regard to the basic right of the complainants under Article 5.1 sentence 1 of the Basic Law (Constitution of 1949 - GG).

I.

1. The statements for which the complainants have been punished for insult enjoy the protection of Article 5.1 sentence 1 of the Basic Law.

This constitutional norm gives everyone the right to express and disseminate his opinion freely in word, writing, and picture. In contrast to assertions of fact, opinions are characterised by the subjective attitude of the person expressing himself to the object of the statement (see BVerfGE 90, 241 [247 seq.]). They contain his judgment about facts, ideas or persons. The protection of the basic right relates to this personal attitude. It therefore exists independently of whether the statement is rational or emotional, well founded or groundless, or regarded by others as useful or harmful, valuable or valueless (see BVerfGE 30, 336 [347 seq.]). The protection does not only relate to the content of the statement, but also to its form. The fact that a statement is formulated in a polemical or hurtful way does not remove it from the area of protection of the basic right (see BVerfGE 54, 129 [138 seq.]; 61, 1 [7 f.]). Further, the choice of the place and time of a statement is protected. The person making the statement does not only have the right in general to make his opinion known. He may also choose for it those circumstances from which he expects the widest dissemination or the strongest effect of making it known.

The statements for which the complainants have been punished for insult are opinions in this sense, which are always covered by the protection of the basic right. The complainants in their statements that soldiers are murderers or potential murderers did not claim that particular soldiers had committed a murder in the past. They were instead expressing a judgment about soldiers and about the profession of soldier which under certain circumstances compels the killing of other human beings. The criminal courts also proceeded on the basis that it was a value judgment, not an assertion about facts.

2. Punishment for these statements is an intrusion into the protected area of the basic right to freedom of opinion.

3. The basic right to freedom of opinion is certainly not guaranteed without reservation. According to Article 5.2 of the Basic Law it is limited by the provisions of general statutes, the statutory provisions for the protection of young people, and the right to personal honour. S. 185 of the Criminal Code, which forms the basis of the decisions that are being challenged belongs to this category. In order to be able to support the conviction, the provision must agree with the Basic Law and besides this be interpreted and applied in a constitutional manner (see BVerfGE 7, 198 [208 seq.]; constant case law).

II.

No effective constitutional law objections exist against s. 185 of the Criminal Code.

1. The criminal provision is reconcilable with Article 5.1 sentence 1 of the Basic Law.
 - a) The provision primarily protects personal honour. Within the framework of the general right of personality derived from Article 2.1 in combination with Article 1.1 of the Basic Law honour, itself, enjoys basic right protection. It can primarily be harmed by expressions of opinion. Therefore it is expressly recognised in Article 5.2 of the Basic Law as a ground justifying limitations on the freedom of opinion. It certainly does not follow from this that the legislature could limit freedom of opinion in the interest of personal honour as it pleases (see BVerfGE 7, 198 [208]). It should instead, when making use of the authorisation in Article 5.2 of the Basic Law, keep in mind the restricted basic right, and avoid excessive limitations of freedom of opinion. However, s. 193 of the Criminal Code takes account of this requirement in that it excludes punishment for a statement that has been made for the protection of justified interests. This provision, which is to be taken into consideration before any conviction under s. 185 of the Criminal Code, is widely formulated. It is therefore open to the influence of freedom of opinion in a special way, and permits a careful adjustment of the conflicting legal interests (see BVerfGE 12, 113 [125 seq.]).
 - b) As may be deduced from s. 194.3 sentence 2 of the Criminal Code, the protection of s. 185 of the Criminal Code does not only apply to persons. It also applies to authorities or other offices, which look after tasks of public administration. The norm cannot be justified here from the point of view of personal honour, because state institutions have no personal honour, nor can they have the general right of personality. s. 185 of the Criminal Code as a protective norm in favour of state institutions ranks however with the general laws in the sense of Article 5.2 of the Basic Law. This is to be understood as including all laws which do not forbid an opinion as such and are not directed against the expression of the opinion as such, but serve to protect a legal interest which is simply to be protected, without regard to any particular opinion. (See BVerfGE 7, 198 [209]; constant case law). That is the case with s. 185 of the Criminal Code. State institutions cannot fulfil their function without a minimum degree of social acceptance. They ought, therefore, in principle to be protected from verbal onslaughts which threaten to undermine this prerequisite (see BVerfGE 81, 278 [292 seq.]). The criminal law protection ought not however to lead to state institutions being shielded from public criticism, even if it takes a harsh form. This should be guaranteed in a special way by the basic right of freedom of opinion. But s. 193 of the Criminal Code again takes sufficient account of this requirement, as it gives room for the influence of Article 5.1 sentence 1 of the Basic Law. It acquires increased significance if s. 185 of the Criminal Code is used for the protection of public institutions and not for the protection of personal honour.
2. S. 185 of the Criminal Code is also not too uncertain and therefore does not violate Article 103.2 of the Basic Law.

Selected Fundamental Decisions of
the Federal Constitutional Court

III.

The interpretation and application of criminal statutes are matters for the criminal courts. But for statutes which limit the freedom of opinion, according to a constant case law of the Federal Constitutional Court, the restricted basic right is at the same time to be taken into account so that its significance in setting values remains intact even at the level of application of the law (see BVerfGE 7, 198 [208 seq.]).

1. At the level of interpretation of the norm, Article 5.1 sentence 1 of the Basic Law requires a balancing operation, between the importance on the one hand of freedom of opinion and on the other hand of the legal interest for the benefit of which it has been limited. This is to be undertaken within the framework of the features of the definition of the statutes concerned. An interpretation of s. 185 of the Criminal Code would therefore be incompatible if it extends the concept of insult so widely that it exceeds the requirements of the protection of honour or protection of institutions (see BVerfGE 71, 162 [181]) or leaves no more room for taking freedom of opinion into consideration. Likewise Article 5.1 sentence 1 of the Criminal Code forbids an interpretation of ss. 185 seq. of the Criminal Code by which people would be deterred from the use of the basic right, which would lead to even permissible criticism remaining unspoken through fear of sanctions.

Especially in relation to the interpretation of s. 193 of the Criminal Code, weight must be given to the fact that freedom of opinion is simply constitutive for the free democratic order (see BVerfGE 7, 198 [208]). A justified interest can therefore exist not only when the person affected has himself given cause for the statement or when someone defends himself against personal attacks, but also if he participates in a public debate about questions which are socially or politically relevant. Special account must be taken of this if the provisions for the protection of honour in ss. 185 seq. of the Criminal Code are applied not to persons but to state institutions. They do not then serve the protection of personal honour, but seek to guarantee the public recognition needed by state institutions to fulfil their function. If this protective aim comes into conflict with the freedom of opinion, the importance of that freedom is to be rated particularly highly because the basic right has grown from the special need for protecting the criticism of authority and invariably is of importance here.

2. At the level of application of ss. 185 seq. of the Criminal Code in the individual case, Article 5.1 sentence 1 of the Basic Law requires weighing of the injury threatened to personal honour on the one hand and to freedom of opinion on the other. In this connection all the material circumstances are to be considered (see BVerfGE 7, 198 [212]; constant case law). The result of this balancing operation cannot be determined in advance in a general and abstract manner, because of its relationship to the facts of the individual case. But in the case law a series of approaches have been developed which provide criteria for the actual balancing operation.

Freedom of opinion must always take second place if the statement violates the human dignity of another. This principle, stated in relation to artistic freedom, is valid for freedom of opinion as well, because human dignity, as the root of all the basic rights, is not capable of being weighed against any individual basic right. But as not merely the individual basic rights but

**60 Years German Basic Law:
The German Constitution and its Court**

also the basic rights as a whole are concrete manifestations of the principle of human dignity, it always needs careful reasoning if it is to be assumed that the use of a basic right affects inviolable human dignity.

Likewise, where disparaging statements are concerned which appear to be insult in the formal sense or abuse, freedom of opinion as a rule takes second place to protection of honour (see BVerfGE 61, 1 [12]). But because of its effect in suppressing freedom of opinion, the Federal Constitutional Court has defined narrowly the concept of abusive criticism developed in the specialist courts. According to this, an exaggerated or even rude criticism does not of itself turn a statement into abuse. Instead, the prominent feature about the statement should be defamation of the person rather than debate about the issue. It must be personal disparagement beyond even polemical and overstated criticism. On this basis abusive criticism will only exceptionally be present in statements about a question materially affecting the public and incidentally will more be limited to the so-called private feud. If a court incorrectly holds a statement to be insult in the formal sense or abuse the result will be to dispense with an actual balancing exercise taking into account all the circumstances of the individual case. There will then be a material error in constitutional law here, which will lead to the quashing of the decision if this is based on it (see BVerfGE 82, 272 [281]).

If the statement can be classified neither as an attack on human dignity nor as insult in the formal sense nor abuse then, for the purposes of the balancing exercise, it is a question of the seriousness of the interference with the legal interests affected. But here, in contrast to the case of assertions of facts, whether the criticism is justified or the value judgment is “right” plays in principle no role (see BVerfGE 66, 116 [151]). On the other hand, weight must be given to the question of whether use is being made of the basic right of freedom of opinion, within the framework of a private dispute, for the pursuit of personal interests or in connection with a question materially affecting the public. If the statement in question represents a contribution to formation of public opinion, according to constant case law of the Federal Constitutional Court, there is a presumption in favour of the freedom of speech (see BVerfGE 7, 198 [208, 212]). Deviations from this consequently need a basis that takes account of the constitutive importance of freedom of opinion for democracy, in which the presumption is rooted.

3. A prerequisite of every legal assessment of a statement is that its sense has been understood accurately. If this is absent in a conviction for a crime relating to a statement, this can lead to suppression of a permissible statement. Besides this, the danger exists that such a conviction would operate disadvantageously for the exercise of the basic right of freedom of opinion in general, because those wishing to make statements would risk punishment because of remote or untenable meanings of their statements (see BVerfGE 43, 130 [136]). Under these circumstances preliminary decisions are made at the level of meaning about the permissibility or impermissibility of statements. Article 5.1 sentence 1 of the Basic Law therefore generates requirements not only about the interpretation and application of statutes restricting the basic right, but also requirements about the meaning of the statements in question.

The purpose of the meaning is the communication of the objective sense of a statement. Neither the subjective intention of the person making the statement nor the subjective understanding of the person affected by the statement is therefore decisive. It is instead the sense that the statement has according to the understanding of an unprejudiced and sensible public. In

Selected Fundamental Decisions of the Federal Constitutional Court

this connection, the starting point is always the literal meaning of the statement. But this does not establish its sense conclusively. It is also determined from the linguistic context of the statement in question and the accompanying circumstances in which it is made, insofar as these can be known to the recipient. The isolated study of a disputed part of a statement does not therefore as a rule fulfil the requirement for reliably deducing its sense (see BVerfGE 82, 43 [52]).

Judgments that clearly overlook the sense of the statement in dispute and base their legal assessment upon this violate the basic right of freedom of opinion. The same applies if a court faced with statements with more than one meaning takes as a basis the meaning leading to the conviction without having previously excluded the other possible meanings on conclusive grounds. In this connection the court does not of course need to go into remote alternatives supported neither by the literal meaning nor by the circumstances of the statement. Nor does it have to develop abstractly possible meanings for which there are no grounds of any kind in the actual circumstances. If, however, the wording or the circumstances permit a meaning that is not defamatory, a criminal conviction which ignores this violates Article 5.1 sentence 1 of the Basic Law. It must also be taken into consideration here that many words or concepts can have different meanings in different communication contexts. This is amongst other situations the case with concepts that are used in legal specialist terminology in a different sense than in colloquial speech. It is therefore also an error of substance in constitutional law if the sense specific to a specialism is taken as the basis of the conviction even though the statement was made in a colloquial context (see BVerfGE 7, 198 [227]).

The requirements which Article 5.1 sentence 1 of the Basic Law makes for deducing the sense of statements are subject to examination by the Federal Constitutional Court and especially when, as with criminal decisions, it is a matter of an intensive invasion of a basic right. The Federal Constitutional Court has always emphasised this (see BVerfGE 43, 130 [136 seq.]; 54, 129 [136 seq.]; 61, 1 [6, 9 seq.]; 82, 43 [50]; 82, 272 [280]; 85, 1 [13 f.]). There is no deviation in this from the constant case law on the extent of the authority of the Federal Constitutional Court to carry out an examination. This is because even in the case of conviction for crimes relating to statements, the Federal Constitutional Court only examines whether the courts have misunderstood the meaning and scope of the basic right of freedom of opinion. Otherwise it remains a matter for the sole competence of the specialist courts. In connection with crimes relating to statements, the enquiry focuses on whether the statement was in fact made. It also looks at what literal meaning it had, from whom the statement originated, and under what circumstances was it made - especially if the findings are based on the totality of the impression given at the oral hearing (see BVerfGE 43, 130 [137]). The contents of the minority judgment which deviate from this constant case law provide no cause for the giving up what has been the practice so far and for the restriction of the basic right protection for statements of opinion.

IV.

The decisions under challenge do not completely fulfil these requirements.

1. It certainly meets with no objection that the courts saw in the description of a soldier as a murderer a grave attack on his honour. Even if this description is not accompanied by an accusation that the person concerned actually committed murders, rating him on a level with a

**60 Years German Basic Law:
The German Constitution and its Court**

murderer still remains a deep insult. This weighs particularly heavily if the expression is used in the criminal law sense by incorporating the subjective characteristics of murder of s. 211 of the Criminal Code. But it is also so if it is used in the colloquial sense, because in this case, also, it describes a person who contributes (or is ready to do so) to the destruction of human life in a morally unjustifiable manner. In this there is likewise a condemnation of such a nature as appreciably to disparage the person affected in the eyes of those around him. That applies especially if the accusation refers not to occasional behaviour but to the totality of vocational activity.

But the courts have not sufficiently ensured that the statements for which punishment was imposed also really did have this sense. They ought to have investigated alternative meanings insofar as these would have been assessed more leniently in criminal law. Otherwise the danger exists that the person making the statement will be punished for a statement which does not contain the assumed insult. The courts ought not to have closed their eyes to such alternatives by an isolated consideration of the criminalised part of the statement. Consideration must, instead, be given to the context insofar as this was perceivable by the addressees of the statement. That applies first to the linguistic context of the statement in dispute, but can also include circumstances external to the statement.

In the present cases, there were alternatives to the meaning assumed by the courts that the soldiers in the Federal Army were equated to murderers in the criminal law or in the colloquial sense (implying that they were capable of committing especially despicable behaviour against other human beings). That arises principally from two circumstances.

Firstly the statements of the complainants according to their literal meaning refer to soldiers in general, without exception, but not to individual soldiers or specially to those of the Federal Army. If the Federal Army is also occasionally mentioned, that only occurs in order to confirm that the statement about all soldiers also applies to the soldiers of the Federal Army. This circumstance had to give cause to reflect whether the statement might not simply be directed against soldiery and soldiering; and that this was condemned because it was connected with the killing of other human beings which may take place in a cruel way and also affects the civil population. The fact that the complainants predominantly did not speak impersonally of “murder” but personally of “murderer” is, taken on its own, not sufficient to exclude this meaning. This is because an accusation against the individual soldier of seriously criminal conduct or a seriously criminal attitude need not necessarily be contained even in the use of the word “murderer”. The person making the statement may instead be drawing attention in an especially challenging form to the fact that killing in war is not an impersonal event but is effected by a human hand. It should not therefore be excluded from the outset that the phraseology was to awaken consciousness of personal responsibility with those carrying out military service and those in a soldier’s vocation for the totality of the events condemned and thus foster preparedness to become conscientious objectors.

Secondly, the statements that soldiers are murderers or potential murderers are, as to the second, third, and fourth complainants, in a wider linguistic context. This was as to the second complainant in the form of a leaflet, as to the third complainant in the form of a reader’s letter, and as to the fourth complainant in the form of leaflet used together with the banner and distributed simultaneously at the Federal Army stand. It was predominantly concerned with the

**Selected Fundamental Decisions of
the Federal Constitutional Court**

destruction of human life, amongst soldiers as well as in the civil population, as an accepted consequence of the maintenance of armies and the associated readiness to carry on war, whether for the purposes of attack or defence. On the other hand, it was not a question of criticism of especially reprehensible individual behaviour or even of character defects of soldiers. From the context of the criminalised statements, there are no grounds at all for equating soldiers with murderers in the sense of fulfilling the subjective characteristics of murder of s. 211 of the Criminal Code.

2. Further, it is not open to objection constitutionally that the courts in certain circumstances see an attack on the personal honour of the members of a collective in a disparaging statement which neither names nor recognisably refers to certain persons, but covers the collective without any individual classification of it.

The personal honour of a human being, which should be protected from attacks by the threat of punishment under s. 185 of the Criminal Code, cannot be regarded in a purely individual way, removed from the collective relationships in which he stands. The individual moves in numerous interrelations, which transcend his individuality, some of which he chooses freely and some of which he must accept without any involvement by him. On the basis of these he is subject to expectations about roles and behaviour. He is also more or less identified by those around him with the collectives to which he belongs and the social roles that he plays. His reputation in society depends in these circumstances not only on his individual qualities and behaviour but also on the characteristics and activities of the groups to which he belongs, or of the institutions in which he is active. In this respect disparaging statements about collectives can also adversely affect the honour of their members.

In the case of disparaging statements based on a collective term, the boundary certainly cannot be precisely drawn between two things. One is an attack on personal honour, which is protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law and which according to Article 5.2 of the Basic Law justifies restrictions on freedom of opinion. The other is criticism of social phenomena, institutions of state or society or social roles and role expectations for which Article 5.1 sentence 1 of the Basic Law guarantees free scope. The danger of excessive limitations on freedom of opinion is therefore always inherent in punishment for statements of this kind. Certain foreign legal systems, in particular those of the Anglo-Saxon legal family, do not therefore recognise collective insult at all and only punish injury to honour which expressly or recognisably refers to individuals. (See, for instance, Robertson / Nicol, *Media Law*, 3rd edition (1992), 57.)

Whether s. 185 of the Criminal Code could also be interpreted in this way is not for decision here. The Basic Law does not in any case demand such a restrictive interpretation of the provisions for the protection of honour. But when s. 185 of the Criminal Code is applied to disparaging statements related to a collective name, it is always necessary to examine whether they really impugn the “personal” honour of the individual members of the group. Above all it must be taken into account that it ought not to extend to the suppression of critical statements about political and social phenomena or institutions for which the protection of freedom of opinion applies in a special way. Criminal jurisprudence also emphasises this.

**60 Years German Basic Law:
The German Constitution and its Court**

The courts have in this connection relied on a decision of the Bundesgerichtshof which was in fact made because of disparaging statements about soldiers (see BGHSt 36, 83). The Bundesgerichtshof proceeds in this decision on the basis that the requirements which the Reichsgericht had placed on the criminality of collective insults, namely that the group must be delimitable and easily comprehensible, did not satisfy the demands of the rule of law as to the limiting of definitions of criminal acts. The Bundesgerichtshof, therefore, requires additionally that the disparaging statement should be linked to a characteristic, which is present with all members of the collective. A link to characteristics, which certainly apply to some but obviously not to all members, does not, according to this case law, diminish the personal honour of each individual member. As it would be clear to every addressee of such a statement that every individual cannot be intended, and particular persons are not named no one is insulted by such a statement.

The Bundesgerichtshof obviously proceeds on the basis that even after this delimitation, very large collectives still remain whose members would have to be treated as personally insulted by disparaging statements related to a collective description. In order to avoid this, it adheres to the view that disparaging statements about groups so large as not to be easily comprehensible (like all Catholics or Protestants, all trade union members, or all women) do not affect the personal honour of every individual member of the group. Criminal jurisprudence also accepts that otherwise the limiting of the definition of the criminal act that is held to be necessary would again be sacrificed.

This interpretation takes account of the point of view of freedom of opinion. Article 2.1 in conjunction with Article 1.1 of the Basic Law as well as Article 5.2 of the Basic Law serve to protect personal honour. The larger the collective to which a disparaging statement refers, the weaker the extent to which an individual member can be personally affected. This is because with accusations against large groups, it is mostly not a question of individual inappropriate behaviour or individual characteristics of the members, but of the demerits, as they exist in the view of the speaker, of the group and of its social function, as well as the requirements for the behaviour of the members connected with this. Thus, on the one end of the scale we find the insult of a single person described by name or otherwise rendered identifiable, and on the other pejorative statements about human qualities or the criticism of social institutions or phenomena that are not, as such, able to affect the personal honour of an individual.

These considerations also apply to disparaging statements about soldiers, so far as they refer to all soldiers in the world. On the other hand, the criminal courts are not prevented on constitutional grounds from seeing in the (active) soldiers of the Federal Army a group that is sufficiently easily comprehensible. Therefore, a statement which refers to them can also insult every individual member of the Federal Army if it is linked to a characteristic which obviously or at least typically applies to all members of the collective.

It is inconsistent to apply specifically to soldiers of the Federal Army a disparaging statement, which without closer delimitation has all soldiers as its object, just because these soldiers are part of soldiers as a whole. As all large collectives divide into smaller sub-groups, even an entirely non-specific and therefore innocent statement changes by the application of it to any of them into a personal and therefore criminal insult. The limiting of the definition of the criminal act undertaken by the Bundesgerichtshof on the grounds of the rule of law is thereby in effect removed again.

Selected Fundamental Decisions of the Federal Constitutional Court

This inconsistency is also pertinent in constitutional law. Freedom of opinion may only be limited to the extent that is necessary for the protection of personal honour, and this is not affected by disparaging statements about large collectives which are not easily comprehensible. Therefore according to the view of the criminal courts which is not open to objection on constitutional law grounds, punishment for statements of this kind represents an impermissible restriction of Article 5.1 sentence 1 of the Basic Law. If someone who has made a disparaging statement about soldiers in general is punished for insult of soldiers of the Federal Army, it does not therefore suffice to show that the soldiers of the Federal Army form a sub-group of all soldiers. It must, instead, be demonstrated that it is the soldiers of the Federal Army that are meant, even though the statement refers simply to soldiers. Such a divergence of linguistic form and objective sense is not by any means impossible. But the courts must then identify the circumstances from which the understanding arises, even though it is not discernible from the literal meaning of the statement alone. If there are none, a violation of Article 5.1 sentence 1 of the Basic Law is present.

3. Finally there is no constitutional law objection to the courts balancing freedom of opinion and protection of honour and giving preference to the latter when there is no wider contribution to discussion about the issue in the statement in dispute, defamation of the person being the dominant feature. That corresponds to the case law of the Federal Constitutional Court on abusive criticism.

But it is a prerequisite that the statement in question really amounts to abusive criticism. The courts have assumed this predominantly with reference to the decision of the Bavarian Obersten Landesgericht (NJW 1991, p. 1493) referred to, which concerned a very similar statement about soldiers. It is true that this decision reproduces accurately the principles on abusive criticism developed in the constitutional case law; but it does not orientate the application of the law to this sufficiently. The narrow concept of abuse developed in the constitutional case law taking freedom of opinion into consideration does not form the basis of the minority judgment either.

The characteristic of abuse is personal insult forcing the objective issue completely into the background. For the complainants, however, it was obviously a question of a debate about the issue, in fact about the question of whether war and military service and the killing of human beings connected with it are morally justified or not. That arises for the second, third and fourth complainants from the context of the criminalised statement which the courts had to consider under the label of abusive criticism. As to the first complainant, the choice of the word “murder” instead of “murderer” as well as the situational context at least point in this direction. The conflict between preparedness for defence and pacifism is a question substantially affecting the public as to which there is a presumption in favour of freedom of speech. In the face of this the courts would have had to demonstrate that in the actual statements, even taking into consideration their context, debate about the issue had been forced into the background by defamation of people.

But there are no doubts about this, for the very reason that the statements according to their literal meaning did not refer to particular persons but covered all soldiers without distinction. It is certainly not impossible that even with disparaging statements about large collectives, defamation of the persons belonging to them is the dominant feature. That applies especially if

**60 Years German Basic Law:
The German Constitution and its Court**

the statements are connected to ethnic, racial, physical or intellectual characteristics from which the inferiority of a whole group of persons and therefore at the same time every individual member is deduced. But as a rule only statements about definite persons or associations of persons will come to be considered as abusive criticism. The concept has only been used in this sense so far in the case law of the Federal Constitutional Court and the Bundesgerichtshof. If, on the other hand, it is a question of groups of persons that are united by a definite social function, it is rather to be presumed that the statement is not characterised by defamation of persons but is linked to the activity undertaken by them. The statement can then nevertheless be injurious to honour. But it no longer falls within the concept of abusive criticism, which makes superfluous an actual balancing exercise with the interests of freedom of opinion, taking into consideration all the circumstances of the case.

Contrary to the minority judgment, no different assessment is required just because the statement affects soldiers. In particular, the circumstance that soldiers carry out armed service, are called up for this purpose by the state as conscripts and in this connection must show obedience does not make their personal honour more worthy of protection than that of members of groups of the civil population. A constitutional law principle according to which certain duties of obedience are to be compensated by increased protection of honour does not exist. The fact that someone who is abused has a claim to state protection of his honour is rather the product of the constitutional law protection of the personality, which is the right of all human beings in the same way. The protection does not of course make the proof that the statement in dispute is injurious to honour or even abusive unnecessary, but makes it a prerequisite.

V.

For the individual decisions which have been the subject of a permissible challenge, the following applies:

...

2. Case 1 BvR 1980/91

- a) According to the opinion of the Amtsgericht, the statement of the complainant gives expression to the view “that every soldier at the end of his training is a murderer, someone who kills out of a reprehensible state of mind”. The court has no more explained what this interpretation is based on than it has considered alternative possible interpretations of the leaflet. It has instead described the interpretation presented by the complainant as “insignificant”, because the statement could have no other sense than the one assumed. However the leaflet itself as composed by the complainant would have offered clues for other interpretations. It is true that it uses the noun “murderer” in connection with the training goal of the military, but in characterising a soldier’s activity reverts immediately to the verb “killing” for which in the German language there is no corresponding noun. For this reason the concept of the murderer is common in colloquial speech even for persons who have killed without fulfilling the characteristics of murder in s. 211 of the Criminal Code. The text which follows, with its allusion to “soldier’s trade” and “militarism”, also makes it appear possible that the

**Selected Fundamental Decisions of
the Federal Constitutional Court**

complainant did not make the accusation against soldiers of killing out of a reprehensible state of mind, but indicated the possible consequences of soldiers' training and the conduct of war.

The court has not explained to what extent the statement referred to the soldier R (who laid the criminal charge) as a member of the Federal Army (rather than as a statement about all soldiers -a group not easily comprehensible- leaving his personal honour unaffected).

The protection of justified interests has been denied to the complainant by the assertion that his text debased human dignity, and overstepped the boundary between sharp criticism and polemical defamation. A reason is lacking for both these claims. The court has thereby evaded the necessity for a balancing between freedom of opinion and protection of honour.

For the further assumption that the statement insulted not only individual soldiers but also the Federal Army as a whole, the court limited itself to the comment that the capacity of the Federal Army to be insulted was recognised. But it neither explained how far the Federal Army had in fact been insulted, nor set out why the disparagement of its reputation is of greater weight than the interference with freedom of opinion.

- b) The Landgericht also did not concern itself with an interpretation of the statement, but contented itself with the finding that the complainant had answered the question put by himself as to whether soldiers were potential murderers in the affirmative. It certainly reproduced in detail the complainant's understanding associated with his statement, but did not investigate it.

In contrast to the Amtsgericht, the Landgericht did explain how the disparaging statement referred to soldiers of the Federal Army and thereby also to the soldier R who laid the criminal charge. That is inferred from the fact that in the text of the leaflet the Federal Army had been "twice mentioned expressly by the phrase 'in the Federal Army'". But the text of the leaflet does not support this meaning. The Landgericht ignored the fact that in both cases general statements were made about soldiers as well as about soldiers' trade. The universal validity of these statements was expressed by the complainant by the word "world wide" immediately preceding the words "in the Federal Army as well" on two occasions. Grounds were therefore needed for saying why the statement nevertheless referred not to all the soldiers in the world but to those of the Federal Army.

The Landgericht denied that justified interests were being protected because it regarded the statement as abuse for which freedom of opinion always takes second place to protection of the personality. It gave as its reasoning that the disparagement of the reputation of soldiers played a dominant role because murder was to be regarded as killing due to a reprehensible state of mind. In its view, equating soldiers with murderers was not substantially mitigated by the "supposed" extension of the statement to cover all soldiers of the world and by the addition of the word "potential". However, the whole content of the leaflet, as well as the cause for its distribution, should have

**60 Years German Basic Law:
The German Constitution and its Court**

given grounds for considering whether it contained in substance a defamation of persons or whether it was merely a contribution to a wider public debate which, as a rule, excludes the assumption of abusive criticism.

The judgment lacks a basis for saying that the Federal Army has been insulted as a whole.

- c) The decision of the court hearing the appeal in law suffers from the same defects as the judgment of the appeal court.

3. Case 1 BvR 102/92

- a) The judgment of the Landgericht contains no explanations about the meaning of the statement in dispute. The Landgericht proceeded instead simply on the basis that it was a question of an insult to honour.

On the other hand, it obviously gave legal significance to and investigated the objection of the complainant that his statement referred to all soldiers of the world and thereby to a group which was not capable of being insulted because it was not easily comprehensible. It sought, however, to refute this with the argument that the complainant had in his reader's letter declared solidarity with Dr A, the accused in the so-called Frankfurt soldiers trial, whose statement that every soldier was a potential murderer also referred to Captain W (who was present) because he was likewise a soldier. Apart from the fact that the conclusion that the complainant had thereby directed his statement at the soldiers of the Federal Army does not follow from this, the reasoning in other respects also does not stand up to examination. If a disparaging statement refers to all soldiers in the world and thereby to individual soldiers only insofar as these form a part of the totality of all soldiers, then those soldiers are not more precisely identified. The assumption that, contrary to the text of the reader's letter, the statement does not cover all the soldiers of the world but specially the soldiers of the Federal Army, would therefore have required further findings.

The Landgericht omitted to carry out a balancing between freedom of opinion and the protection of honour, indicating that it was a question of abusive criticism. The judgment does not contain a separate reason for this. Instead it reproduces the considerations of the Bavarian Obersten Landgericht in the decision mentioned and explains that nothing is to be added to this. No subsuming under the principles developed there is undertaken. But the assumption that it is a question of abusive criticism is prevented in the present case because of the context in which the statement in dispute stood. This made clear that for the author it was a question of the problematic issue of the support of the military and the readiness to kill in war connected with this. Whether he had expressed that in a way which takes account of the requirements of the protection of honour must therefore be elucidated by a balancing exercise based on the actual case.

The decision of the Oberlandesgericht shows the same defects as the appeal judgment.

Selected Fundamental Decisions of
the Federal Constitutional Court

VI.

It is possible that in any of the four cases the courts would have come to other conclusions if they had considered the other possible and natural interpretations of the statements; taken account of the difference between a disparaging statement about all soldiers of the world and the soldiers of the Federal Army; and applied the concept of abusive criticism in a constitutional manner. The decisions under challenge must therefore be quashed and the cases referred back. But this does amount to an acquittal of the complainants nor to a declaration that insults of individual soldiers or of the members of specific armed forces by statements like “soldiers are murderers” are permissible. Rather the actual statements must be assessed afresh taking into consideration the requirements of Article 5.1 sentence 1 of the Basic Law which have been explained.

This decision is made in respect of the first, third and fourth constitutional complaints by a majority of five votes to three, and in respect of the outcome of the second constitutional complaint unanimously.

Dissenting opinion of Judge Haas:

I do not share the opinion of the majority of the Senate that the decisions of the Bavarian Obersten Landesgericht and the Oberlandesgericht of Koblenz as well as the Landgericht judgments (as the courts of last instance for the finding of facts) are unconstitutional. The basic right of the complainant under Article 5.1 of the Basic Law is not violated. The freedom of expression of opinion is limited by the right to personal honour.

1. The courts in the initial proceedings have made a correct legal assessment of the facts, on the basis of the findings made by them. This is to the effect that the statement “soldiers are murderers” or “soldiers are potential murderers” contains a negative value judgment about soldiers of the Federal Army, which is not open to another interpretation, taking into consideration the content of the expression in colloquial speech, than that which they gave it. This is not open to objection in constitutional law.

In principle, the position is as follows: the elucidation and assessment of the facts of a case are a matter for the specialist courts. The Federal Constitutional Court in constant case law proceeds on the basis that court decisions can only be examined within narrow boundaries under the constitutional complaints procedure. In particular, it considers that the establishment and assessment of the facts of a case and the interpretation of ordinary law and its application to the individual case are matters for the courts which have general jurisdiction for this and are removed from the scope of examination undertaken by the Federal Constitutional Court (see BVerfGE 18, 85 [92 seq.]; 22, 93 [99 seq.]; 30, 173 [196 seq.]; 42, 143 [148]; 76, 143 [161]; 82, 6 [11]; 89, 276 [285]). The Federal Constitutional Court has stressed its special function and position in relation to other holders of judicial power. It has therefore always emphasised that it could not put its own assessment of the circumstances of the individual case in the manner of a court of appeal in place of that of the competent judge where the assessment of the established circumstances is decisive for the constitutional law judgment.

**60 Years German Basic Law:
The German Constitution and its Court**

I cannot subscribe to the laying down by the Senate of another yardstick for testing the interpretation of statements, nor its application sometimes of the “full” constitutional law examination. Nor can I accept it requiring that the judge of fact must, from several possible interpretations, choose one which has a “convicting” or “conclusive” basis. “Conviction” (whose?) is not a constitutional law yardstick; “conclusiveness” cannot be required in the assessment of statements, because understanding follows its own laws, not simply those of logic. Finally, the wider yardstick for examination has led to the Federal Constitutional Court claiming for itself extensively the interpretation competence of a judge of fact. It has also resulted in it interfering in areas of decision-making which are reserved to the specialist jurisdiction which is closer to the case with its specific opportunities for elucidation and especially investigation in the oral hearing. This is meeting with increasing criticism (see Bertrams, DVBl. 1991, p. 1226; Herdegen, NJW 1994, p. 2934; OLG Mamburg, NStZ 1994, p. 406). It is not clear which special features could justify or even require a more thorough examination here. The fact that the constitutional law assessment under Article 5.1 of the Basic Law depends upon the outcome of the assessment of the facts of the case does not suffice for this purpose; it applies to other basic rights in the same manner. Here, as there, the constitutional court control must limit itself to violations of specific constitutional law. It is true that the constitutional complaint opens up to examination by the Federal Constitutional Court the question of whether the circumstances which are important for interpretation purposes have been taken note of by the court, and considered and weighed bearing constitutional law guidelines in mind. Whether the specialist judge has interpreted the sense of an ambiguous statement with accuracy in every respect is however not a question of constitutional law. I cannot therefore share the opinion of the majority of the Senate that the Federal Constitutional Court can nevertheless examine whether all possible interpretations which it recognises as conceivable have been considered by the specialist court.

2. It is quite understandable that the specialist courts, taking into consideration the findings of fact that they have made, should attribute to the concept “murderer” the sense of a negative value judgment of substantial weight. Even on the basis of the view of the majority of the Senate, this interpretation is not open to objection. In colloquial speech, the word “murderer” is associated with a type of criminal who stands out as having a particularly negative profile. Murderers form the most abhorrent category of criminals. There is no evident alternative interpretation that could take away the deep injury to honour from the accusation of being a murderer. Even the majority of the Senate did not produce such an alternative interpretation that could impress the mind of the objective unprejudiced observer. That the word “murder” in case 1 BvR 1476/91 conveys the message that the soldier is at the same time the perpetrator and the victim seems scarcely probable; it would however be unimportant anyway because this interpretation still equates soldiers with murderers. Finally, the total context of the statement on each occasion also allows no other interpretation. Thus in the case of the complainant in case 1 BvR 221/92 the discriminatory message of the banner which was widely visible was not toned down for individual readers of the leaflet. Regardless of this, an interpretation, which takes into account the text of the leaflet, should not be considered here anyway. This is simply because the specialist court did not establish (and according to all experience of life cannot establish) that all readers of the banner would also have become aware of the content of the leaflet. The specialist court cannot avail itself of an alternative interpretation based on facts not established by it.

Selected Fundamental Decisions of the Federal Constitutional Court

What the maker of the statement intended to say is in the end unimportant for interpreting the concept “murderer”, if it found no expression in the statement. At first, only what he actually said is in question; the decisive thing is then the objective sense: how the statement was to be understood by the average observer in the position of the recipient of the statement at the point in time when it was communicated. Therefore a possible intention by the complainant to awaken, by the choice of words, consciousness of personal responsibility with those concerned cannot, contrary to the view of the majority of the Senate, influence the truth content of the statement. This is because such an intention changes nothing in the content and sense of the words chosen. Besides this, consideration of such an intention would depend on the specialist court having made appropriate findings; this is lacking, for instance, in case 1 BvR 102/92.

3. The courts established as a fact that the statement which was injurious to honour referred expressly (or obviously, from the total context) to soldiers of the Federal Army. On this basis, the courts could also affirm that the soldiers of the Federal Army (and therefore every single member of the armed forces) were an addressee of the statement. To what extent the arguments of the majority of the Senate on defamation of collectives can be followed can be left undecided here. There are doubts anyway about the majority of the Senate understanding the decision of the Bundesgerichtshof (which was quoted with approval) (BGHSt 36, 83 [87]) as meaning that a characteristic present with all members of the group must be added, besides the criterion of the group being easily comprehensible.

4. The statements of opinion by the complainants are not covered by the right to free expression of opinion (Article 5.1 of the Basic Law) which is subject to the reservation of the right to personal honour. It is not evident that the decisions which are under challenge had in this respect misjudged the meaning and scope of the basic right.

The specialist courts have assessed the disparaging comparison of soldiers with murderers as violation of the general right of personality (Article 1.1 in conjunction with Article 2.1 of the Basic Law) but not as violation of human dignity (Article 1.1 of the Basic Law). It might need to be considered whether the accusation of being a murderer does not put in question the moral value of the individual and therefore really affects the essence of the person thus addressed. In any case, the specialist courts have resolved the tension between freedom of opinion and protection of honour in a manner not open to objection in constitutional law. According to the case law of the Federal Constitutional Court, in cases of abusive criticism freedom of opinion regularly takes second place to protection of honour (BVerfGE 82, 43 [51] with further references). Abusive criticism is always to be assumed if the disparaging statement predominates. Accordingly, the mere presence of a reference to an issue insofar as it is discernible as such by persons to whom the statement is communicated does not get rid of the charge of abusive criticism. The specialist courts, in balancing all the factual circumstances of the individual case, which is a matter for them, came to the conclusion that abusing soldiers dominated the rest of what happened in such a way that the possible expression at the same time of concern about an objective issue takes second place. If - as in the case of the complainant in case 1 BvR 1476/91 - in default of any additional factor going beyond the literal defamatory meaning of the banner an ascertained or even only ascertainable concern with an objective issue is not discernible by the passing observer, this is obvious and needs no special reasoning to support it. In the two other cases as well, the balancing exercise undertaken by the specialist courts is not open to objection from this point of view.

**60 Years German Basic Law:
The German Constitution and its Court**

It is not by chance that the Basic Law has expressly named the right to personal honour as a limitation of freedom of opinion. Even without this special emphasis, the right to personal honour as an expression of the personality and as a result of human dignity (which it is the responsibility of all state power to protect and to respect: Article 1.1 of the Basic Law) would acquire importance of such a nature as to set limits, especially with public statements. This was not sufficient for the author of the Constitution. He wanted, by the limiting of freedom of opinion which is anchored in the Basic Law, emphatically to counteract any spilling over of the conflict of political opinions into the personal realm. Because the protection of honour until then was, against the background of experiences principally in the time of the Weimar Republic, seen on all sides as insufficient, the right to personal honour was taken into the Basic Law in 1949 as an express limitation of freedom of opinion. A basis for the protection of honour which deserves the name was thereby laid. This protection of honour was not contested in the deliberations of the Parliamentary Council from beginning to end. What was self-evident at the time still deserves attention even today. Renunciation of personal defamation in the process of formation of political opinion can only promote this, in that it elevates the culture of political argument.

For public statements with reference to members of the German armed forces this must apply so much the more since these soldiers are under a duty to fulfil the task of defence provided for in constitutional law to the best of their powers. They risk their lives in order to keep the horror of war from the civil population and to protect the lives of that population - and not least the lives of those who disparage their activities and make them contemptible in the eyes of the public. A legal order which obliges young men to carry out armed service and requires obedience from them must guarantee protection to those who fulfil these duties when they are abused because of this service as soldiers and publicly described as murderers. It is not a question here of the construction of a special "soldier's honour". It is a question of the simple self-evident fact that the Constitution, if it does not want to lose its credibility, ought not to leave without protection those who follow its commands and (exclusively) for that very reason are attacked. The correlation between protection and obedience belongs to the elementary principles of a legal order. This cannot be and ought not to be left out of consideration.

Selected Fundamental Decisions of
the Federal Constitutional Court

2. Article 5.1, sentence 2 - Freedom of the Media

a) *Spiegel*, BVerfGE 20, 162

Explanatory Annotation

The magazine 'Der Spiegel' is Germany's leading news magazine, as such an integral part of the political process in Germany, and perhaps even the leading representative of the fourth power, the media in general and the press in particular. The 1966 decision of the German Constitutional Court in this case is Germany's equivalent to the later decision of the US Supreme Court in *New York Times v. United States of America*, where the Supreme Court defended the right of the New York Times to report classified information.³¹

In the German Court's decision, the issue was a search of the editorial rooms of Der Spiegel' magazine to find out how the classified information published in the magazine on the alleged inadequacy of the defense readiness of the West-German defense forces had come to the magazine. Releasing this qualified information constituted an act of treason under German criminal law. Despite the fact that the magazine lost the case on a controversial 4:4 decision³², the decision actually contained important dicta in favour of freedom of the press. The Court held the search to be constitutional to investigate the treason but stated at the same time that the mere publishing of what the government has classified cannot be considered as treason because it is the task of the press to collect information and publish it. Whereas it is not entirely impossible even for a media outlet to commit treason, to so qualify acts of publication would have to be measured against the importance of the freedom of communication as protected by Article 5.1. The decision set in motion a number of statutes protecting the work of the media, especially granting journalists a statutory right to remain silent when questioned about the source of their information even if it is clear that the source itself had acted illegally.

**Translation of the Spiegel Judgment - Decisions of the Federal Constitutional Court
(Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 20, 162***

Headnote:

Judgment concerning the issue of compliance of searches of press offices with the Basic Law (Grundgesetz).

Partial Judgment of the First Senate of 5 August 1996 based on the oral hearing of 25, 26 and 27 January 1966 - 1 BvR 586/62 and 512/64 -

31 *New York Times Co. v. United States*, 403 US 713 (1971), available at: <http://laws.findlaw.com/us/403/713.html>. President Nixon wanted to suspend the publication of classified material in the New York Times claiming executive authority but the Supreme Court held in favour of the freedom of press.

32 A finding of unconstitutionality always requires a majority finding. A tie among the eight justices of one of the senates of the Constitutional Court therefore means that the relevant conduct was constitutional.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

**60 Years German Basic Law:
The German Constitution and its Court**

Facts:

The constitutional complaint brought by Spiegel-Verlag Rudolf Augstein GmbH und Co. KG was directed, among other things, against the search warrants issued by the investigating judge and confirmation thereof by the Federal Court of Justice (Bundesgerichtshof) that provided the basis for searches of the offices of Spiegel-Verlag in Hamburg and its editorial offices in Bonn in October and November 1962. The searches and subsequent seizure of extensive materials were occasioned by an article in the 10 October 1962 issue of the news magazine “Spiegel” entitled “Conditionally Prepared for Defense” (“Bedingt abwehrbereit”), which discussed the military situation of the Federal Republic of Germany and NATO as well as military and strategic problems and plans for the future. The search and arrest warrant issued against the publisher Rudolf Augstein and the responsible editor was based on suspicion of treason pursuant to s. 100.1 of the Criminal Code (Strafgesetzbuch - StGB) (The provisions of the Criminal Code cited in this decision refer to the promulgation of the notice of the Reform of 25 August 1953 [Federal Law Gazette (*Bundesgesetzblatt* - BGBl.) I p. 1083]) with subsequent changes, those of the Criminal Procedure Code in the Act of 1 February 1877 [Reich Law Gazette (*Reichsgesetzblatt* - RGBl. p. 253)] at the time of the search as most recently amended by the Act of 26 July 1957 [Federal Law Gazette I p. 861]).

The Senate being equally divided, the constitutional complaint brought in particular against the search warrant, the seizure orders issued by the investigating judge and against the orders of the Federal Court of Justice confirming the measures carried out in connection with the investigation was not successful.

Extract from the Grounds:

...

C.

I.

1. A free press that is subject neither to control by the public powers nor to censorship is a characteristic element of free government; in particular, a free political press that publishes at regular intervals is indispensable to a modern democracy. If citizens are to be able to make political decisions, they must be not only thoroughly informed, but also be familiar with the opinions of others and be able to weigh them against one another. The press keeps this ongoing debate alive; it provides the information, takes its own positions and functions thereby as a frame of reference for public debate. It is a vehicle for public opinion; positions are elucidated in a process of argument and rebuttal, take on clear contours and in that way make it easier for the public to form judgments and make decisions. In a representative democracy, the press functions at the same time as a permanent communication and control channel between the people and their elected representatives in parliament and government. It provides critical recapitulation of the opinions and exigencies that are in an incessant state of flux within society and its constituent groupings, submits them for discussion and brings them to the attention of the political actors involved in the various bodies of government, which can in this way constantly measure their decisions, including those pertaining to everyday political issues, against the opinions that are actually held by the public.

Selected Fundamental Decisions of the Federal Constitutional Court

The importance of this “public responsibility” assigned to the press makes this responsibility all the less amenable to fulfilment by the organized powers of government. Publishing enterprises must be able to form freely within the framework of society. They operate on the basis of principles of private enterprise and are organized under private law. They engage in intellectual and economic competition with one another, and the public powers may in principle not intervene in this process.

2. The function of a free press in a democratic state reflects its legal status under the Basic Law. Article 5 of the Basic Law guarantees freedom of the press. Although this first of all - by virtue of the standing of the provision within the legal system and the way it has been traditionally understood - represents a personal fundamental right that guarantees individuals and enterprises involved in the area of the press freedom from governmental coercion and under certain circumstances accords them a privileged legal status, the provision at the same time has an objectively legal aspect. It guarantees the existence of the “Free Press” as an institution. The state has - apart from the personal rights of individuals - a duty to respect the principle of freedom of the press in its legal system whenever the sphere of operation of a provision of law affects the press. The freedom to establish publications, free access to journalistic professions and the duty of public authorities to divulge information are principles that follow from this; on the other hand, it is also possible to conceive, for example, of a duty on the part of the state to avert the threat to a free press that could arise from the formation of monopolies on opinion.

The independence of the press guaranteed under Article 5 of the Basic Law extends from the procurement of information to dissemination of news and opinion (BVerfGE 10, 118 [121]; 12, 205 [260]). As a result, freedom of the press also includes a certain protection for the confidential relationship between the press and private informants. This is indispensable since the press cannot function without information from private sources, but this information will continue to flow freely only if informants can in principle be certain that “editorial privilege” will remain intact.

3. Freedom of the press entails the possibility of conflict with other values that are protected by the Basic Law; this may involve rights and interests of individuals, associations or even society itself. The Basic Law makes reference to the general laws, to which the press is also subject, for the purposes of regulating such conflict situations. Legal interests of others and the general public that enjoy at least equal rank with freedom of the press must also be respected by the press. The members of the press are afforded their status, which is in certain respects privileged, because of their responsibility and only in connection with this responsibility. This is not a matter of personal privilege; exemptions from generally applicable laws must be consistently justifiable on the basis of the nature and reach of the matter at hand.

The reference to the general legal order is found in Article 5.2 of the Basic Law, according to which freedom of the press finds its limits in the provisions of general laws. The Federal Constitutional Court addressed the relationship between freedom of expression and general laws in its decision of 15 January 1958 (BVerfGE 7, 198 [208 et seq.]). According to that decision, freedom of expression is to be sure limited by general laws; these laws must, however, be consistently construed with a view to freedom of expression and their restrictive effect upon freedom of expression therefore in turn restricted if appropriate. These principles also apply

**60 Years German Basic Law:
The German Constitution and its Court**

accordingly to freedom of the press; they in fact take on especial importance here since statements in the press are as a rule intended to form public opinion, which means they are initially presumed to be permissible even when they affect the legal sphere of others (op. cit. page 212). As applied to freedom of the press, the purpose of this judgment is therefore to prevent dilution of this freedom by general laws - and the courts applying them - and, by compelling consistent construction of general laws in alignment with the basic value of freedom of the press, to ensure appropriate latitude and prevent any restriction of freedom of the press that is not absolutely necessary in order to respect legal interests of at least equivalent standing. The objectively legal, institutional aspect of freedom of the press and its effect as a standard and principle of construction for the general legal system are especially pronounced here.

4. The provisions pertaining to treason (ss. 99 and 100 of the Criminal Code) are “general laws” within the meaning of Article 5.2 of the Basic Law. There are no grounds for doubting their compatibility with the Basic Law. In particular, the occasional reservations expressed as regards the lack of a sufficiently specific description of the elements of a criminal offence (Article 103.2 of the Basic Law) are not compelling. Construction of the provisions to determine conformity with the Basic Law also does not reveal any violation of such Law insofar as the provisions include disclosure of state secrets through publication in the press, i.e., “treasonable publication.”

Protection of the continued existence of the Federal Republic of Germany against external enemies, which the provisions of criminal law governing treason are intended to achieve, conflicts with freedom of the press when the press publishes facts, subject matter or knowledge whose secrecy would be in the interest of national defense. This conflict cannot be resolved summarily and in general by arguing against freedom of the press that the existence of the Federal Republic of Germany is a necessary prerequisite for freedom of the press and that freedom of the press itself would be lost with the destruction of the Federal Republic of Germany. For the existence of the Federal Republic of Germany, which must be protected and preserved, is to be understood to mean not only its organizational structure, but also its basic free democratic order. It is endemic to this order that the affairs of state, including military affairs, albeit conducted by the responsible bodies of government, are subject to constant criticism or approval by the people.

In this regard, the necessity of military secrecy in the interest of national security and freedom of the press are not mutually exclusive. Rather, the two are complementary because of the superior goal of preservation of the existence of the Federal Republic of Germany - understood in the proper sense. In view of this goal, conflicts between the two necessities of state must therefore be resolved. In this context, it is necessary to take into account the importance of the disclosed information, etc., not only for potential enemies, but also for the purposes of formation of public opinion on political issues, in the individual case; the threat to the security of the country that may arise from publication must be weighed against the need to be informed of important developments, including such as pertaining to the area of defense policy. In this sense, Article 5.1 of the Basic Law has in principle a restrictive effect on the construction of the above provisions of criminal law.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

D.

It follows from the review of the search warrant on the basis of the above constitutional standards that pursuant to s. 15.2 sentence 4 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerGG) it is not possible to establish a violation of Article 5.1 sentence 2 of the Basic Law through application of substantive criminal law.

E.

The necessity of taking into account freedom of the press and its importance for the basic free democratic order in the context of the construction and application of general laws also applies as regards the Criminal Procedure Code (Strafprozessordnung - StPO), especially as regards coercive measures in connection with criminal proceedings such as searches and seizures carried out against a publishing company or a member of the press due to or in connection with publication in the press.

These coercive measures, which are ordered at the discretion of a judge or otherwise responsible authorities, will by their very nature regularly constitute significant encroachment upon the sphere of life protected by fundamental rights and in particular upon the fundamental rights under Articles 2 and 13 of the Basic Law. The use of such measures is therefore from the outset subject to the general legal principle of proportionality (BVerfGE 19, 342 [348-349]; 17, 108 [117]; 16, 194 [202]). The coercive measure must be commensurate with the severity of the criminal offence and the strength of the existing suspicion; in addition, this specific measure must be necessary for the investigation and prosecution of the criminal offence, which is not the case if other, less severe, means are available. Finally, the search must be likely to yield appropriate evidence.

In the case of searches and seizures involving a publishing enterprise, possible or probable encroachment upon freedom of the press must also be taken into account. This pertains first of all to the obstruction of the exercise of the fundamental right that may occur - for example, as a result of the sealing of necessary working areas or deprivation of materials required for current work - but even more so intrusion upon editorial privilege, which is regularly associated with such coercive measures. Since the confidential relationship between the press and its employees and informants constitutes an essential prerequisite for the functional viability of an organ of the press and jeopardization of this confidential relationship may entail negative effects upon other organs of the press and freedom of the press that go beyond the respective individual case, this necessarily entails a conflict between the interest in prosecution of criminal offences and the protection of the freedom of the press that must be resolved with the help of the balance of interests elaborated in the case law of the Federal Constitutional Court cited above.

It is in principle the affair of the legislature to undertake this balance of interests. The Criminal Procedure Code takes this requirement into account only to a limited extent: the relevant provisions (ss. 53.1 no. 5 and 97.5 of the Criminal Procedure Code) cover only the case of publication of illegal content that constitutes grounds for prosecution of the author, contributor or informant. They operate on the assumption of what is referred to as guarantor liability, according to which the greater difficulty in the prosecution of criminal offences is accepted in

**60 Years German Basic Law:
The German Constitution and its Court**

the interest of the confidential relationship between informants and members of the press if at least one editor of the printed publication involved is or may be punished. In this context, it is necessary to take into account the provisions of law governing the press, according to which the “responsible editor” and under certain circumstances also other members of the press involved in the production and distribution of the respective publications are held to higher standards of responsibility under criminal law for the appearance of illegal content in periodical publications. If these conditions for guarantor liability are satisfied, then the responsible editor or other members of the press involved benefit from the right to refuse to give testimony under s. 53.1 no. 5 of the Criminal Procedure Code and - to preclude circumvention of this right to refuse to give testimony - prohibition of any seizure in respect of the above members of the press pursuant to s. 97.5 of the Criminal Procedure Code as well immunity from searches as inferred therefrom in the case law. According to the revision of the above provisions by the Third Criminal Law Reform Act (Drittes Strafrechtsreformgesetz) of 4 August 1953 (Federal Law Gazette I p. 735), the prohibition of seizure applies only to investigations of authors, contributors or informants of illegal publications, but not to all written correspondence between members of the press with the right to refuse to give testimony and not to all informants or records made by members of the press of information entrusted to them.

No provision is made for editorial privilege when an investigation is directed against a source of information that is not illegal or in the case of investigatory proceedings involving the responsible editor or another member of the press as a suspect. Such members of the press may to be sure refuse to testify in this capacity; however, they are then not immune from searches and seizures even if such measures relate to documents that could yield the name of an informant.

All *Länder* have since enacted new provisions in their press laws that despite significant differences in detail all reinforce the protection of editorial privilege, but at the same time depart from guarantor liability and to a certain extent separate the prohibition of searches and seizures from the right to refuse to give testimony. The question as to whether these provisions remain within the area of authority of the Land legislature need not be decided in the present case since the Criminal Procedure Code provided the only legal basis for issuance of the search warrant at the relevant time.

Since the above provisions of the Criminal Procedure Code in any case partially serve to protect editorial privilege, they are compatible with Article 5.1 sentence 2 of the Basic Law. These provisions contain no exhaustive regulation of the matter. They do not exclude the possibility that the protection of editorial privilege may be taken into account to a greater extent in the context of the exercise of discretion by the courts as to whether and to what extent a search or seizure is to be ordered. In the absence of legal reform, it was therefore at the time that is at issue here the responsibility of the judge to strike the required balance, taking into account the importance of the fundamental right of freedom of the press as a standard.

...

Selected Fundamental Decisions of
the Federal Constitutional Court

G.

It follows from further review of the search warrant on the basis of the constitutional standards mentioned under E. that pursuant to s. 15.2 sentence 4 of the Federal Constitutional Court Act it is not possible to establish a violation of Article 5.1 sentence 2 of the Basic Law through application of the Criminal Procedure Code.

(The opinion of the four dissenting justices, who held that the search warrant constituted a violation of the fundamental right of freedom of the press, is summarized below:)

3. In summary, it must be concluded that the balance of interests required by the principle of proportionality and the value judgment of Article 5.1 sentence 2 of the Basic Law were ignored when the search warrant was issued. If these requirements had been taken into account when the law was applied in the present case, it would have been obvious that such an extensive search represented disproportionate encroachment.

The severity of the offence of treason and the potential threat to national security through the betrayal of military secrets do not in and of themselves suffice to suppress the protection of freedom of the press in principle and justify every sort of coercion by legal process. This would ignore the importance of the press for the free system of government and place editorial treason on the same level as high treason. Furthermore, this would constitute failure to acknowledge that what is at issue here is not whether to let the publication of illegal content go unpunished or to privilege such publication in general as regards prosecution, but solely whether the use of a specific instrument of criminal procedure was appropriate under the circumstances of a given case. In accordance with the opinion advanced here, freedom of the press may also not be used as a subterfuge for serious criminal offences against the security of the state. However, an already proven violation of the supreme legal interest that is protected by the provisions of *Land* law governing treason is not involved in the present case; rather what was to be determined was whether and, if so, to what extent such a violation took place. If the very fact that treason is made the subject of the investigation at this stage in the proceedings, at which the presumption of innocence applies pursuant to Article 6.2 of the European Convention on Human Rights, were to suffice to dispense with the process of balancing of interests that would actually be required or to impose less stringent standards for the purposes of such balancing of interests, free public debate would be unjustifiably restricted in a significant area of public life.

For this reason alone, reference to the duty to report a crime under s. 138 of the Criminal Code fails to convince, apart from the fact that distinctions depending on the nature of the offence are not even recognized for the purposes of the limited protection of editorial privilege afforded under the Criminal Procedure Code. Moreover, the purpose of this provision of criminal law is to prevent the occurrence of a capital offence that has not been committed; that it is applicable to offences involving the content of a publication is not evident.

With the sole exception of the Baden-Württemberg Press Act (*Pressegesetz*), the press laws of all other German *Länder* afford journalists and other members of the press a right to refuse to give testimony that is independent of the nature and punishability of the prosecuted offence. Such a provision has already been in place in Bavaria for 17 years without providing any occasion for disagreement. Comparison with the legal systems of other democratic countries also

**60 Years German Basic Law:
The German Constitution and its Court**

provides no convincing arguments against the opinion advanced here if such comparison is limited exclusively to the existence or non-existence of a specific independent provision of law, and neither the respective legal system - which as in the case of England or the federal law of the USA affords no profession the legal right to refuse to give testimony - is examined in its entirety nor are legal practice and democratic awareness of the respective society taken into account.

The importance of freedom of the press requires that the use of coercive measures for the purposes of prosecution of criminal offences be subject to stringent conditions and at the same time justifies extensive review of procedural operation in the concrete case by the Federal Constitutional Court. To the extent required for the purposes of protection of the fundamental right, aspects of effective procedural conduct that are themselves important must also be sacrificed and procedural inconvenience accepted (see BVerfGE 17, 108 [118]). The extent to which a different situation would have to apply in the case of a state of defense or similar crises due to emergency legislation is not under discussion here. ...

(The opinion to the effect that the search warrant was in compliance with the Basic Law, which provided the basis for the judgment pursuant to s. 15.2 sentence 4 of the Federal Constitutional Court Act, is supported, *inter alia*, by the following arguments:)

By continuing to characterize these proceedings as “frivolous,” the complainant exaggerates the legitimate demands of the state. The point at issue was to determine whether to pursue a suspicion. It cannot be expected that such a decision will be made with the degree of “certainty” required for conviction or acquittal. If searches of press offices are not to be prohibited from the outset, it is not possible to make that which is to be established through a search a condition for ordering such a search in the first place.

The press enjoys no privileges in criminal proceedings; like any citizen who through his conduct awakens serious suspicion of a criminal act, the press must tolerate the investigative measures of the prosecution authorities. The correlate to freedom of the press is a press that carries out its work responsibly (BVerfGE 12, 113 [130]). In particular, freedom of the press is reciprocated by co-responsibility for national security on the part of the press in a free democratic state. The various organs of the press may set themselves different goals and pursue them with different means and journalistic methods. In any case, it is not possible to accept a “presumption” to the effect that an organ of the press will in the case of doubt have carried out its work responsibly and be therefore from the outset above suspicion of criminal conduct.

2. The task of the Federal Prosecutor’s Office and the investigating judge was to decide whether it was permissible to consider a search of the business premises of the complainant for the purposes of discovering evidence as a possible course of action in view of the nature of the matter in order to achieve elucidation of the facts.

Measures to obtain evidence such as searches and seizures constitute by their very nature serious encroachment upon a citizen’s fundamental rights. Since they are, however, indispensable for effective prosecution of criminal offences under certain circumstances, innocent persons who come under suspicion must also tolerate such measures to a certain extent. When such measures are taken against an organ of the press, the conflict with the fundamental right of freedom of the press that inevitably results compels special caution and careful balancing of the aspects that speak in favour of and against the permissibility of the procedural measure. The upshot of this is

**Selected Fundamental Decisions of
the Federal Constitutional Court**

the postulate of proportionality of the measure in the individual case under the rule of law. What in such cases must be balanced against the requirements of freedom of the press has already been set out in detail above: the general standing of the legal interest that is to be protected by the coercive measures; the threat to that interest posed by the concrete act that is the subject of investigation; the degree of suspicion; the suitability and necessity of the procedural measure envisaged.

It has already been said - and the complainant also concurs in this - that the press is not completely exempted from application of the provisions of criminal procedure governing searches and seizures. An objective balancing of values is required in the individual case, not respect for a privilege "of the press" that exists once and forever because of "public responsibility" and so forth.

The suitability of the means requires no further justification in the present case. It was to be assumed with a high degree of probability that the search of the premises of the "Spiegel" would lead to the discovery of evidence (s. 102 of the Criminal Procedure Code). Records pertaining to news items that had been (and under circumstances were to be) published such as could be expected with certainty in the editorial offices made it possible to elucidate not only the secret nature of various facts as well as the nature of collaboration with informants from the Ministry of Defense (Verteidigungsministerium), but also the aspect of suspicion of treason by the members of the "Spiegel" editorial staff. The federal prosecutors who were primarily involved, Dr. Wa. and Dr. K., were motivated by the idea that there must be a "record," "dossier" or "exposé" in the editorial offices that would significantly help to clear up the entire case and its ramifications quickly and completely if obtained.

In reviewing the necessity of the measure, it was to be assumed that the work of the press is to remain free from any interference by the public powers that is not absolutely essential (this was in particular the opinion of the Federal Prosecutor's Office, which it explicitly emphasized before the investigating judge and communicated to its enforcement officers as a general guideline at the meeting of 22 October 1962); on the other hand, it was also necessary to take into consideration that a serious suspicion of a criminal act directed against the security of the state was involved, which meant that there was a possibility of a threat to a legal interest that is in any case not subordinate to freedom of the press. It was necessary to assess whether the suspicion was so serious, the criminal offence at issue so dangerous and the public interest in complete clarification of the case so great that restriction of freedom of the press in a manner that did not in any way threaten the existence and further appearance of the magazine could be accepted. The Federal Prosecutor's Office and the investigating judge decided that this was the case; their decision does not indicate that they failed to assess the situation as required or that they in principle misconstrued the standards of the Basic Law. When the press enters the realm of individual issues involving military technology, the balance shifts; the public's need for information becomes relatively less important, first of all because readers cannot in any case form an independent opinion due to a lack of adequate technical expertise and secondly because they do not need this knowledge to form a political opinion. On the other hand, however, published details that are relatively unimportant for the domestic public may be of value to a foreign intelligence service with the requisite expertise. The press must therefore also weigh the need for information against governmental interests in the case of such publications. This cannot be avoided through reliance on "freedom of the press."

**60 Years German Basic Law:
The German Constitution and its Court**

Treason potentially threatens the existence of the state and justifies in principle a sharp reaction by the forces of government. Article 21.2 and Article 91 of the Basic Law make it possible to recognize that uncompromising intervention is also required by the Basic Law in the face of a threat to the continued existence of the Federal Republic of Germany. In concreto, the danger was especially pronounced in view of the political situation at the time (“Cuban Missile Crisis”); there seemed to be some question as to the reliability of the Federal Republic of Germany within the Atlantic alliance. If one also takes into account the high degree of probability to be inferred from the article that illegal cooperation with senior members of the Federal Armed Forces (Bundeswehr) was to be suspected, there can be no denying an urgent public interest in speedy and complete clarification of the entire affair. The Federal Prosecutor’s Office and the investigating judge were able to assume that complete clarification would be possible only through discovery of concrete documentary evidence, which they expected from the search of the editorial offices. Such evidence was vastly more valuable than witness testimony. This was the only possible way to obtain precise information on the documents that were used in the article, on their nature as state secrets (an important indication of which could be, for example, formal classification as secret), on the existence of any further secret materials slated for publication, but especially on how the documents came into the possession of the “Spiegel” and on the presence of the element of the offence of treason by the responsible individuals from the “Spiegel” and on the extent of any involvement in criminal acts on the part of informants from the Federal Ministry of Defense (Bundesverteidigungsministerium). None of this could have been expected to be forthcoming from interrogations, which would initially have necessarily been random. The first interrogation would have warned all parties involved; a subsequent search would no longer have resulted in the discovery of incriminating material.

3. The complainant’s objection to the effect that the search of the editorial offices was illegal and in violation of the Basic Law in view of the protection of informants of the press that derives from freedom of the press is unfounded.

There can be no doubt that a certain protection of editorial privilege and informants of the press does follow from the fundamental right of freedom. However, the legislature enjoys broad operational latitude as regards such protection. There is no constitutional requirement of protection of informants with a specific content.

(According to the prevailing opinion that follows, the provisions of criminal procedure in effect at the time were compatible with the Basic Law as measured by this standard. Finally, the Court can - also because of s. 15.2 sentence 4 of the Federal Constitutional Court Act - also find no violation of the requirements of the rule of law by the search warrant (on the constitutional requirements for search warrants see BVerfGE 42, 212).

...

**Selected Fundamental Decisions of
the Federal Constitutional Court**

The Decisions Caroline of Monaco II, BVerfGE 101, 361 and Soraya, BVerfGE 34, 269

Explanatory Annotation

This Soraya-case is the nucleus of a development that many years later was aggressively moved forward by a number of cases brought by Princess Caroline of Monaco with an emphasis on photos often obtained by the so-called paparazzi.³³

At issue in the Soraya case was the question whether the rainbow press is subject to limitations when reporting about celebrities and their private lives. The celebrity in this decision of 1973, Soraya, was the wife of the former Shah of Iran and an icon of society journalism at the time. A rainbow magazine of a large German publishing house had published a completely fictitious ‘interview’ with Soraya concerning her divorce from the Shah. The interview had never taken place and its content had not been authorized. Soraya successfully sued for a modest amount as compensation for immaterial damages sustained because of the violation of her personality rights. The publisher unsuccessfully argued before the Constitutional Court that the decision of the Federal Supreme Court violated the freedom of the press as guaranteed by Article 5.1 of the Basic Law. The Constitutional Court saw no fault with the Federal Supreme Court’s interpretation of the relevant clauses of the Civil Code as providing for immaterial damages. The Court, however, emphasized the point that the protection of the personality rights of Soraya only prevailed because the damages sought and won were only modest in nature and because the publication was driven exclusively by business interests. A larger sum, the Court implied, would tilt the balancing act in favour of the freedom of the press.

The Caroline decisions of the Federal Supreme Court (*Bundesgerichtshof*, BGH) and the Constitutional Court not only pushed the boundaries for monetary compensation for immaterial damages considerably, the Constitutional Court also clarified other important matters. The Court undertook to delineate the private sphere of celebrities, regardless of whether they are entertainment stars or politicians, from the public sphere, the latter being open for reporting, the former being protected as part of the privacy and personality rights of the affected individual. The Court made it clear that there are no general delineation criteria for all cases and that each case must be looked at separately. The privacy of the home is one such area where persons are protected regardless of their status. However, the Court held that the private sphere extends beyond the walls and fence of one’s private dwellings. The determination of this protected sphere depends on the concrete situation. Excluded are public areas where the affected person is among many others. Excluded from the protection are areas where the affected person consented to private affairs becoming available to the public. The Court specifically stated that privacy protection is not afforded to protect a commercial interest. Hence the constitutional protection of the private sphere is not available to protect against the interference of third persons with an exclusive contract to publish certain otherwise private events. The Court also held that children require special protection. Parental interaction with their children is therefore in principle privacy protected unless the celebrity seeks publicity.

³³ See, for example, BGH 160, 298 where the first instance District Court had awarded 150.000 German Marks in 2001. The Federal Supreme Court held that monetary damages are the only means of legal redress against privacy and personality rights’ violations by printing photos.

**60 Years German Basic Law:
The German Constitution and its Court**

The Constitutional Court also largely upheld the Federal Supreme Court in its interpretation of the right to one's own picture, which is governed by a special statute. Under this statute the publication of photographs requires the consent of the persons depicted. There is, however, an exception for images of "contemporary history" and a counter-exception for legitimate interests of the depicted person. The Constitutional Court balanced the freedom of the press against the privacy interests of Caroline regarding the published images in favour of the freedom of the press. The European Court of Human Rights, to whom the case was consequently brought, came to a different conclusion because Caroline had no official or political function in Monaco and hence her privacy rights with regard to the images in question prevailed.³⁴

b) Translation of the Caroline of Monaco II Judgment, Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 101, 361*

1. Privacy, which is protected by the general right of personality under Article 2.1 in conjunction with Article 1.1 of the Grundgesetz (Basic Law), is not restricted to the domestic sphere. It must, in principle, be possible for an individual to move in other places that are recognisably secluded without being disturbed by the activities of photo journalists.
2. The general right of personality is not meant to serve the interest of the commercialisation of the person of an individual. The protection of privacy from being portrayed comes second to the extent that someone declares his or her consent that specified matters that are usually regarded as private are made public.
3. The scope of protection provided by the general right of personality of parents is enhanced by Articles 6.1 and 6.2 of the Basic Law to the extent that the publication of images is concerned the subject of which is the specifically parental care of their children.
4. The guarantee of the freedom of the press provided by Article 5.1(2) of the Basic Law also covers entertaining publications and articles as well as the images that they contain. In principle, this applies as well to the publication of images that show persons with roles in public life in everyday or private contexts.

Judgment of the First Senate of 15 December 1999 on the basis of the oral hearing on 9 November 1999 - 1 BvR 653/96 -

Facts:

The constitutional complaint concerns the publication of photographs from the daily and private life of prominent persons. The defendant in the original proceedings, the company Burda GmbH, publishes the magazines "Freizeit Revue" and "Bunte". Photographs of the complainant, Princess Caroline of Monaco, were published in these magazines to illustrate various articles. The photographs gave rise to the original proceedings, seeking to block their publication.

³⁴ See BVerfG, 1 BvR 653/96 of 15.12.1999, http://www.bverfg.de/entscheidungen/rs19991215_1bvr065396en.html and ECtHR, Appl. No. 59320/00, 24.6.2004, (available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>).

* © Bundesverfassungsgericht (Federal Constitutional Court).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

For the assessment of these photos the civil courts have mainly been guided by s. 22 and s. 23 of the Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie (Act concerning the copyright of works of visual art and photographic works), of 9 January 1907 (Reichsgesetzblatt [RGBL, Reich Law Gazette] p. 7, hereinafter referred to as Kunsturhebergesetz [KUG, Art Copyright Act]). These regulations have the following wording:

Images may be distributed or presented for public display only with the consent of the subject. In case of doubt, the consent is deemed to have been granted when the subject receives a payment for allowing the images to be made. After the death of the subject and until the expiration of 10 years, the consent of the subject's relatives is required.

...

S. 23 states:

- (1) The following images may be distributed and presented for display without the consent required by s. 22:
 1. Images from the sphere of contemporary history;
 2. Pictures in which the subjects appear only as part of the backdrop in a landscape or other locality;
 3. Pictures of assemblies, demonstrations and similar events in which the depicted individuals have taken part;
 4. Images, though not produced by request, in so far as the distribution or display serves a higher interest of art.
- (2) The authority does not, however, extend to a distribution and display by which the subject, or in the case the subject is dead, his relatives, suffers an injury to a legitimate interest.

Extract from the Grounds:

B.

The constitutional complaint is partly founded.

I.

The challenged judgments affect the complainant's general right of personality that follows from Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law.

1. The constitutional safeguard of the protection of the general right of personality also extends to images of an individual made by third parties.
 - a) The fundamental right that safeguards the legal protection of the general right of personality has the objective of safeguarding elements of an individual's personality that are not the subject of the freedoms that are especially guaranteed by the Basic Law

**60 Years German Basic Law:
The German Constitution and its Court**

but do not come second to these freedoms as concerns their importance for the formation of the personality (cf. BVerfGE 54, 148 [153]; BVerfGE 99, 185 [193]). The necessity of such a safeguard for filling gaps in the legislation exists in particular as regards new threats to the free development of one's personality that mostly occur in the wake of scientific and technical progress (cf. BVerfGE 54, 148 [153]; BVerfGE 65, 1 [41]). The standard for ascertaining whether, in the framework of a specific legal action, the general right of personality is affected and if so, which manifestation thereof, is, first and foremost, a question of the threat to one's personality. This must be inferred from the concrete situation.

b) The authority to publish photographs that show individuals in private or everyday contexts depends on the right to one's own image and on the guarantee of privacy that characterise the right to develop one's personality.

aa) Contrary to the complainant's opinion, Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law does not establish a general and comprehensive individual right to determine the manner in which one is portrayed. To the extent that the complainant would like to infer such a right from former decisions of the Federal Constitutional Court (cf. BVerfGE 35, 202 [220]; BVerfGE 54, 148 [155-156]; BVerfGE 63, 131 [142]), this is an incorrect generalisation of the scope of protection of the guarantee provided by the fundamental right, which was formulated in the Court's consideration of the concrete cases. As the Federal Constitutional Court has emphasised on several occasions already, the general right of personality does not confer to the individual the right to be portrayed by others only as he or she views him- or herself or only as he or she wants to be perceived (cf. BVerfGE 82, 236 [269]; BVerfGE 97, 125 [149]; BVerfGE 97, 391 [403]; BVerfGE 99, 185 [194]). Such a broad protection would not only exceed the aim of protection, i.e. to avoid risks to the development of an individual's personality, but would also extend far into third parties' sphere of freedom.

The complainant does not criticise the way in which she is portrayed in the photographs at issue, which had been regarded as altogether positive by the civil courts that dealt with the case. Rather, the question with which she is concerned is whether images of her may be made and published at all if she does not move in public in an official function but as a private individual or in everyday contexts. The answer to this question can be ascertained from those aspects of the general right of personality that protect the right to control over one's own image as well as privacy.

bb) The right to control over one's own image (cf. BVerfGE 34, 238 [246]; BVerfGE 35, 202 [220]; BVerfGE 87, 334 [340]; BVerfGE 97, 228 [268-269]) ensures that the individual has the opportunity to influence and decide the taking and the use of photographs or recordings of his or her own person. In principle, it is of no importance whether the photographs or recordings show the individual in private or public contexts. The protection required for the right to control over one's own image is similar to, and developed after, the protection required for the right to control over one's own words. Both find support in constitutional jurisprudence (cf.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

BVerfGE 34, 238 [246]). The need for protection, in the case of the right to control over one's own image, results from the fact that it is possible to detach the image of an individual in a specific situation from this individual, to record the image in a data format and to reproduce it at any time for an immeasurable audience. The progress in recording technology, which permits the taking of images from a great distance, most recently even by satellite and under bad lighting conditions, has considerably expanded this possibility.

The existing technology of image and sound reproduction make it possible to change (1) the public setting in which one appears, and (2) the breadth of the public by which one may be observed. In particular, the limited public, in which an individual moves under normal circumstances, can be substituted by a public that is created by the media. The audience that is present in a courtroom, for instance, is the feature that distinguishes the public in court proceedings from the public created by television, because the public in the courtroom witnesses the events itself and can, in turn, be perceived and assessed by the parties to the legal action (cf. BVerfGE, 3rd Chamber of the First Senate, NJW [Neue Juristische Wochenschrift] 1996, 581 [583]). Apart from that, the change of the context in which an image is reproduced can also change, unintentionally or intentionally, the sense of the message that the image conveys.

Among the different aspects of the protection of the right to control over one's own image, only the aspect that concerns the production of specified photographs and their transfer to a broader public is of importance in this context. The proceedings do not deal with manipulated photographs or distortions by a change of context, with which the protection is particularly concerned. The complainant, on the contrary, assumes that the photographs that are at issue in the proceedings and the accompanying text, which is also relevant for the message conveyed by the photographs, correctly depict situations from her life in a way in which observers, had they been present at the occasion when the pictures were taken, could have perceived them. The complainant simply does not want these situations to be captured in photographs and presented to a broader public as these situations, in her opinion, are part of her privacy.

- c) As distinguished from the right to control over one's own image, the protection of privacy, which also flows from the general right of personality, does not refer to images in particular but is determined by the subjects of the images and the places in which they are taken. On the one hand, the protection of privacy comprises matters that, due to the information conveyed, are typically regarded as "private", because their public discussion or display is regarded as unseemly, because they are regarded as embarrassing if they become known, or if they provoke adverse reactions from the environment. This applies e.g. to reflections about oneself in diaries (BVerfGE 80, 367); to confidential communication between husband and wife (BVerfGE 27, 344); to the sphere of sexuality (BVerfGE 47, 46); in the case of socially deviant behaviour (BVerfGE 44, 353) and in the case of diseases (BVerfGE 32, 373). If such matters were not protected from others taking note of them, the reflection about oneself, the uninhibited communication among

**60 Years German Basic Law:
The German Constitution and its Court**

individuals who are close to each other, the development of one's sexuality and the resort to medical aid could be impaired or made impossible even though these types of behaviour are protected by fundamental rights.

On the other hand, protection extends to a physical space in which the individual can recover, relax and also let him- or herself go (cf. BVerfGE 27, 1 [6]). It is true that such a space also provides the possibility to behave in a way that is not meant for the public and the observation and display of which by outside observers would be embarrassing or detrimental for the individual affected. In essence, this is a space in which it is possible for the individual to be free from public observation, and thus free from the self-control imposed by the public even if the individual affected does not necessarily behave differently in this space than he or she would in public. If such a possibility of retreating no longer existed, this could overstrain the individual psychically because he or she would always have to be aware of the effect he or she has on others and would always have to consider whether he or she is behaving correctly. This would deprive the individual of phases in which he or she can be alone and recover; such phases are necessary for the development of one's personality, and without them the development of one's personality would be seriously impaired. Such need for protection also exists in the case of individuals who, on account of their rank or reputation, of their position or influence or of their abilities or actions are the subject of particular public attention. The fact that someone, whether wanted or unwanted, has become a person, upon whom the public focuses, does not mean that this person has lost his or her right to a sphere of privacy that is withdrawn from the observation of the public. This also applies to democratically elected office holders. They are certainly accountable to the public for the way in which they administer their office, and they have to tolerate public attention in this context. They do not, however, have to tolerate the same extent of public attention regarding their private life in so far as their private life does not affect the administration of their office.

By common consent, the domestic sphere constitutes such a protected area. Due to its connection with the free development of one's personality, the area of withdrawal must not, from the outset, be restricted exclusively to the domestic sphere. This holds true if only for the reason that the functions that the area of withdrawal serve do not end at the walls of one's house or at the boundaries of one's property. The free development of an individual's personality would be seriously impaired if the individual could only evade public curiosity in his or her own home. In many cases, it is only possible in the seclusion of a natural environment, e.g. in a holiday resort, for an individual to recover from being a part of the public, which is characterised by compulsions to function in a certain way and by the presence of the media. This is why the individual must also have, in principle, the possibility to move in the open country, although it is secluded, and in places that are recognisably secluded from the broad public in a manner that is free from public observation. This especially applies with regard to technologies of imaging that overcome physical seclusion without the person affected being able to recognise this.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

The physical boundaries of privacy outside the home cannot be determined in a general and abstract manner. Rather, they can be determined only from the particular characteristics of the place visited by the concerned person. The decisive standard is whether the individual finds or creates a situation in which he or she can reasonably, i.e. in a way that is also recognisable for others, assume that he or she is not exposed to the observation of the public.

Whether the prerequisites of seclusion are fulfilled can only be ascertained for each particular situation. In one and the same place, there may be a time in which an individual can, with good reasons, feel unobserved, whereas this is not the case at other points in time. Nor does the fact that an individual stays in a closed room always mean that this place is secluded. The decisive question is whether the individual has good reasons to expect that he or she is unobserved or whether the individual visits places in which he or she moves under the eyes of the public. Therefore, seclusion, which is the prerequisite for the protection of privacy outside the domestic sphere, can be lacking in closed rooms as well.

Places in which the individual is among many people, lack, from the outset, the prerequisites of the protection of privacy within the meaning of Article 2.1 in conjunction with Article 1.1 of the Basic Law. Such places cannot cater to an individual's need of withdrawal, and they therefore do not justify the protection of fundamental rights that this need deserves for reasons of the free development of one's personality. Neither can the individual, by showing a behaviour that would not usually be displayed in public, redefine these places in such a way that they become part of his or her sphere of privacy. It is not the individual's behaviour, whether alone or with others, that constitutes the sphere of privacy but the objective characteristics of the place at the time in question. Thus, if an individual behaves, in places that do not show the characteristics of seclusion, in the manner he or she would behave if he or she were not under observation, this individual eliminates the need for protection of behaviour that is of no concern to the public.

The protection of privacy, over and against the public's observation, is also eliminated if someone declares his or her agreement with the fact that certain matters that are usually regarded as private are made public, e.g. if someone enters into exclusive contracts concerning media coverage of his or her private sphere. The constitutional protection of privacy provided by Article 2.1 in conjunction with Article 1.1 of the Basic Law is not meant to serve the interest of the commercialisation of the person of an individual. Certainly no one is prohibited from opening his or her private sphere in such a manner. When doing so, however, one cannot claim protection of privacy, because privacy is the status of being removed from the observation of the public. Therefore, someone who expects that others may only to a limited extent or not at all observe matters or behaviour that take place in an area that normally serves for the withdrawal from the observation of the public, must express this expectation in a consistent manner that is not bound to a particular situation. This also applies if someone revokes his or her decision to permit or tolerate reporting about certain issues in his or her private sphere.

**60 Years German Basic Law:
The German Constitution and its Court**

dd) There is no previous Federal Constitutional Court case law about the meaning of the protection of privacy with respect to the family relationship, especially between parents and children. It has been acknowledged, however, that children need special protection because they still have to develop into responsible persons (cf. BVerfGE 24, 119 [144]; BVerfGE 57, 361 [383]). This need for protection extends as well to the protection of children from threats posed by the interest of the media and the consumers of media images of children. This interest can constitute a more severe interference with the development of a child's personality than it does for the development of an adult's personality. The sphere in which children can feel free from observation by the public and develop free from such observation must therefore be protected in a more comprehensive way than in the case of adults.

It is the parents who are first of all responsible for the development of a child's personality. To the extent that education depends on an undisturbed relationship between parents and their children, the special protection of the children's fundamental rights does not have a merely automatic impact in favour of the father or the mother (also cf. BVerfGE 76, 1 [44 et seq.]; BVerfGE 80, 81 [91-92]). Rather, the specifically parental care of their children, in principle, also falls into the sphere of protection provided by Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law. In this case, the scope of protection provided by the general right of personality is enhanced by Articles 6.1 and 6.2 of the Basic Law, which oblige the State to secure the living conditions that are necessary for a child to grow up in a healthy way. Of these conditions, parental care is particularly important (cf. BVerfGE 56, 363 [384]; BVerfGE 57, 361 [382-383]; BVerfGE 80, 81 [90 et seq.]).

Article 6 of the Basic Law, thus, enhances the protection to which children are entitled in order to enjoy the general right of personality. The impact that this enhancement has in particular cases cannot be determined in a general and abstract way. As a general rule, there will certainly be no need for protection in cases in which parents deliberately turn towards the public with their children, e.g. if they participate in public functions together or even are the centre of such functions. In such cases, they assent to the conditions of public appearances. As regards all other cases, the protection of the general right of personality as enhanced by the specific relationship between parents and children can, in principle, arise in contexts in which the prerequisite of seclusion is not otherwise fulfilled.

3. The challenged decisions impair the complainant's general right of personality. As the contexts in which the images were made enjoy the protection provided by this fundamental right; the courts' finding that they may be published against the complainant's will diminish the required protection, which the courts in private law litigation are also obligated to extend to the complainant (cf. BVerfGE 7, 198).

Selected Fundamental Decisions of
the Federal Constitutional Court

II.

The challenged judgments do not fully meet the requirements stipulated by Article 2.1 in conjunction with Article 1.1. of the Basic Law.

1. However, the provisions of s. 22 and s. 23 of the Art Copyright Act, on which the civil courts based their decisions, are consistent with the Basic Law.

Pursuant to Article 2.1 of the Basic Law, the general right of personality is only guaranteed in the framework of the constitutional order. This also includes the provisions about the publication of photographic images of persons in s. 22 and s. 23 of the Art Copyright Act. The provision can be traced back to an offensive incident (images of Bismarck on his deathbed, cf. *Entscheidungen des Reichsgerichts in Zivilsachen* [RGZ, Decisions of the Supreme Court of the German Reich in Civil Cases] 45, 170) and the subsequent discussion on legal policy (cf. *Verhandlungen des 27. DJT*, 1904, 4th volume, pp. 27 et seq.). The provision seeks to achieve an equitable balance between the respect of an individual's personality and the interest of the general public in being informed (cf. *Verhandlungen des Reichstages*, 11. Legislaturperiode, II. Session, 1. Sessionsabschnitt 1905/1906, No. 30 p. 1526 [at pp. 1540-1541]).

Pursuant to s. 22.1 of the Art Copyright Act, images may be distributed or presented for public display only with the consent of the subject. S. 23.1 of the Art Copyright Act exempts, *inter alia*, images from the sphere of contemporary history (no. 1) from this principle. Pursuant to s. 23.1 of the Art Copyright Act, this exemption does not, however, extend to a distribution by which the subject suffers an injury to a legitimate interest. As this concept of protection consists of several stages, the provision sufficiently takes into account the depicted person's need for protection as well as the public's wish of being informed and the interests of the media that satisfy these wishes. This has already been established by the Federal Constitutional Court on earlier occasions (cf. BVerfGE 35, 202 [224-225]).

The respondents' opinion that the regulation violates the freedom of the press as it, in their opinion, amounts to a Verbot mit Erlaubnisvorbehalt, i.e. a prohibition of publication, with each publication requiring permission in advance, does not lead to a different assessment. That there is no such prohibition can already be discerned from the fact that the provisions only conciliate different, legally protected interests of individuals. Neither does the regulation favour the protection of an individual's rights to protection of his or her general right of personality in a one-sided manner. It is true that on the first and third stages (s. 22.1 and s. 23.2 of the Art Copyright Act), the regulation is primarily concerned with the depicted person's need for protection. In the second stage (s. 23.1 of the Art Copyright Act), however, the interests of the freedom of the press and of the freedom to form one's own opinion, which is at the background of this fundamental right, are sufficiently taken into account. At the same time, the open wording of the regulation provides enough room for an interpretation and application that is in conformity with the fundamental rights.

2. The interpretation and application of the provisions, however, do not in all respects comply with the requirements established by the fundamental rights.

**60 Years German Basic Law:
The German Constitution and its Court**

- a) The interpretation and application of constitutional civil law provisions is the task of the civil courts. In doing so, the civil courts must observe the meaning and the scope of the fundamental rights that are affected by their decisions to assure that their normative content be preserved at the level of judicial application of the law as well (cf. BVerfGE 7, 198 [205 et seq.]; established case law). This requires a balancing between the conflicting interests that are protected by fundamental rights. This balancing is to take place in the framework of the elements of civil law provisions that may be interpreted, and it must take the special circumstances of the case into account (cf. BVerfGE 99, 185 [196]; established case law). Irrespective of the influence of the fundamental rights, the litigation remains a private law action that finds its solution in private law, the interpretation of which is guided by the fundamental rights. The mission of the Federal Constitutional Court is therefore restricted to reviewing whether the civil courts have sufficiently taken into account the influence of the fundamental rights (cf. BVerfGE 18, 85 [92-93]). It is, however, not the task of the Federal Constitutional Court to prescribe to the civil courts the outcome of their decision in the litigation (cf. BVerfGE 94, 1 [9-10]).

A violation of fundamental rights that leads to an objection to the challenged decisions only exists (1) if, in the interpretation and application of constitutional provisions of private law, the fact has been overlooked that fundamental rights were to be respected; or (2) if the scope of protection provided by the fundamental rights that are to be respected has not been determined correctly or completely, or (3) if the weight of the fundamental rights that are to be respected has been misjudged in such a way that the balancing of the legal positions of the parties in the framework of the private law settlement suffers (cf. BVerfGE 95, 28 [37]; BVerfGE 97, 391 [401]), and the decision is based on this mistake.

- b) In the present case, the interpretation and application of ss. 22 and 23 of the Art Copyright Act does not only have to consider the general right of personality but also the freedom of the press, which is affected by these provisions as well.

The right to freely determine the nature and tendency, contents and form of an organ of the press is in the centre of the guarantee of the fundamental right of the freedom of the press (cf. BVerfGE 20, 162 [174 et seq.]; BVerfGE 52, 283 [296]; BVerfGE 66, 116 [133]; BVerfGE 80, 124 [133-134]; BVerfGE 95, 28 [35]). This includes, *inter alia*, the decision whether and how to illustrate an organ of the press. The protection is not restricted to specified subjects of illustrations. It also comprises the depiction of persons. The protection does not depend on the nature or the level of the organ of the press (cf. BVerfGE 34, 269 [283]; BVerfGE 50, 234 [240]). Any distinction of this kind would ultimately amount to public authorities assessing and controlling the press, a fact that would plainly contradict this fundamental right (BVerfGE 35, 202 [222]).

The freedom of the press serves to facilitate, for individuals and the public, the free formation of opinions (cf. BVerfGE 57, 295 [319]). Such formation of opinions can only be successful under the condition that free reporting, i.e. reporting without any prescribed or precluded subjects or manners of presentation, is possible. In particular,

Selected Fundamental Decisions of the Federal Constitutional Court

the formation of opinions is not restricted to the political sphere. In the interest of a functioning democracy, the formation of opinions with regard to the political sphere is certainly of special importance. The formation of opinions in the political sphere, however, is embedded in a comprehensive, highly interconnected communication process that can neither under the aspect of the development of one's personality nor from the point of view of democratic governance, be split up into relevant and irrelevant areas (cf. BVerfGE 97, 228 [257]). The press must be allowed to decide according to its own publishing standards what it regards as being worthy of the public interest and what it does not deem to be worthy of such interest.

The fact that the press has to fulfil an opinion-forming mission does not exclude entertainment from the constitutional free press guarantee. The formation of opinions does not stand in opposition to entertainment. Entertaining articles can also contribute to the formation of opinions. Such articles can, under certain circumstances, stimulate or influence the formation of opinions in a more sustainable way than information that is exclusively fact-related. Moreover, in the media, an increasing tendency toward the elimination of the distinction between information and entertainment can be observed both with respect to specific organs of the press as a whole as well as with regard to individual articles, i.e., to disseminate information in an entertaining manner or to mix information and entertainment ("infotainment"). This means that many readers obtain the information that they regard as important or interesting exactly from entertaining articles (cf. Berg/Kiefer [eds.], *Massenkommunikation*, volume V, 1996).

Nor can it be denied from the outset that mere entertainment has an influence on the formation of opinions. It would be a narrow view to assume that entertainment only satisfies wishes for amusement, relaxation, distraction and escape from reality. Entertainment can also convey images of reality and provides topics for conversation that can be followed by processes of discussion and integration that refer to views on life, to standpoints concerning values and patterns of behaviour, and in this respect, it fulfils important functions in society (cf. BVerfGE 97, 228 [257]; furthermore: Pürer/Raabe, *Medien in Deutschland*, volume 1, 2nd edition 1996, pp. 309-310). For this reason, entertainment in the press cannot be neglected or even be regarded as worthless in the context of the freedom of the press, for which constitutional protection is intended; entertainment is, therefore, also covered by the protection that this fundamental right provides (cf. BVerfGE 35, 202, [222]).

This also applies to reporting about individuals. Personalising a theme is an important journalistic means for attracting attention. Personalising a theme often awakens the interest in certain problems in the first place and is the basis of the wish for factual information. Sympathy for events and situations is often conveyed by personalising the theme. Moreover, prominent persons also stand for certain ethical positions and views of life. Therefore, prominent persons provide orientation for their own concepts of life to many people. Prominent persons become focuses for approval or rejection and thus fulfil the function of role-models or of examples of life-styles from which people want to detach themselves. This is the reason for the public interest in the most varied aspects of the lives of prominent persons.

**60 Years German Basic Law:
The German Constitution and its Court**

As regards persons from political life, the public's interest has always been recognised as legitimate from the point of view of democratic transparency and control. In principle, however, it cannot be denied that such interest also exists concerning other persons with roles in public life. In this respect, the depiction of individuals that is not restricted to specified functions or events complies with the tasks of the press and therefore also falls under the scope of protection provided by the freedom of the press. Only when a balance is established between the freedom of the press and colliding rights of personality, can it be of importance whether questions that essentially concern the public are discussed in a serious, fact related manner or whether merely private matters that only satisfy curiosity are divulged (cf. BVerfGE 34, 269 [283]).

- c) The judgment of the Federal Court of Justice mainly stands up to the review of constitutionality.
 - aa) It is not objectionable from the constitutional point of view that, in order to determine the elements of s. 23.1(1) of the Art Copyright Act, the Federal Court of Justice has taken as its controlling standard the general public's interest in being informed, and that the Federal Court of Justice, for this reason, has regarded the publication of images of the complainant that show her outside her representative function in the principality of Monaco as permissible.

S. 23.1 (1) of the Art Copyright Act establishes that the publication of images from the sphere of contemporary history does not require the subject's consent, as otherwise required by s. 22 of the Art Copyright Act. As concerns the parliament's intention when establishing this provision (cf. *Verhandlungen des Reichstages*, loc. cit., pp. 1540-1541) and as regards the purpose of the regulation, it shows consideration for the general public's interest in being informed as well as for the freedom of the press. Therefore, the interest of the public is to be taken into account especially when interpreting the element "images from the sphere of contemporary history", as the public must not be granted free access to images of persons who are not deemed important in the context of contemporary history; such images instead require the subject's consent for publication. The other element of the Art Copyright Act that is open to the influence of fundamental rights, i.e. the "legitimate interest" in s. 23.2, refers from the outset only to persons who are of importance in the context of contemporary history and therefore cannot sufficiently take the interests of the freedom of the press into consideration if such interests have before been disregarded when delimiting the group of persons who are considered to be persons of importance in the context of contemporary history.

The concept of contemporary history in s. 23.3 (1) of the Art Copyright Act is not linked to the proviso of a judicial definition of its contents, by which its coverage might, for instance, be limited to events of historical or political importance; rather, it is determined by the public's interest in being informed (cf. RGZ 125, p. 80 [at p. 82] already). This takes the importance and the scope of the freedom of the press into account without disproportionately restricting the protection of the general right of personality. The core of the freedom of the press and the freedom of opinion includes that the press has sufficient room to

Selected Fundamental Decisions of the Federal Constitutional Court

manoeuvre, within the boundaries of the law, so that it may decide, according to its publishing standards, which facts claim public interest, and that it becomes apparent in the process of formation of public opinion which matters are matters of public interest. As has been stated, entertaining articles are not exempt from this. Moreover, it is not objectionable that the Federal Court of Justice has also assigned to the “sphere of contemporary history” pursuant to s. 23.1(1) of the Art Copyright Act images of persons who have not attracted public attention at a certain point through their involvement with a specific event of contemporary history but instead encounter general public attention, independently of single events, on account of their status and their importance. In this context, the increased importance that photo journalism has acquired today in comparison with the time in which the Art Copyright Act was enacted carries weight as well. Certainly, the concept of an “absolute person of contemporary history”, to which reference is frequently made in scholarly literature and jurisprudence, in this context, imperatively follows neither from the law nor from the Constitution. If this concept is understood, as the Higher Regional Court and the Federal Court of Justice present it, as describing, in an abridged manner, persons whose images the public deems worthy of notice for the depicted person’s sake, it is unobjectionable from the constitutional point of view. It is important, however, that a balancing take place, in each individual case, between the public’s interest in being informed and the legitimate interest of the depicted person. The general right of personality does not require that the publication of images of persons who are of importance in contemporary history without the consent of the depicted person, must be limited to images that show them when exercising the function that they discharge in society. Frequently, the public interest that such persons claim is characterised exactly by the fact that it is not restricted to the exercise of this person’s public function in the narrower sense. Due to the person’s exposed function and to the effect of the function, the interest can also extend to information about how the persons generally move in public, i.e. when they are not exercising their respective public function. The public has a legitimate interest in learning whether such persons, who are often regarded as a role-model or as an example, convincingly bring into agreement the behaviour that they show in their public function and their personal behaviour.

If the publishing of images was limited to the function of a person who is of importance to contemporary history, this would, however, fail to adequately take into account the interest that such persons legitimately arouse in the public. Moreover, this would encourage a selective manner of representation which would deny the public the required opportunity to assess persons from social and political life on account of their functions as role-models and on account of their influence. This does not open the press unlimited access to images of persons of contemporary history. Rather, s. 23.2 of the Art Copyright Act provides the courts with sufficient possibilities to bring the requirements of protection to bear that are stipulated by Article 2.1 in conjunction with Article 1.1 of the Basic Law (cf. BVerfGE 35, 202 [225]).

**60 Years German Basic Law:
The German Constitution and its Court**

- bb) In principle, the standards that the Federal Court of Justice has developed when interpreting the element of a “legitimate interest” in s. 23.2 of the Art Copyright Act are not objectionable from the constitutional point of view.

Pursuant to the challenged judgment, the privacy that is worthy of protection, to which the so-called absolute persons of contemporary history are also entitled, requires (1) a local seclusion to which someone has withdrawn to be alone; (2) that this wish to be alone is recognisable by an objective person; and (3) that the person, confiding in the seclusion, behaves in a manner in which he or she would not behave in the broad public. The Federal Court of Justice assumes that a violation of ss. 22 and 23 of the Art Copyright Act exists if images of the person affected are published that, in such a situation, were taken secretly or by catching the person unawares.

The standard of physical seclusion, on the one hand, takes the sense of the general right to privacy into account, i.e. to secure to individuals a sphere outside their home in which they are aware that they are not under constant public observation and therefore do not have to control their behaviour in view of such observation but find it possible to relax and to recover. On the other hand, the standard of physical seclusion does not excessively restrict the freedom of the press, as it does not completely withdraw the daily and private life of persons of contemporary history from photojournalism but makes it accessible to pictorial representation to the extent that it takes place in public. In the case of an outstanding public interest in being informed, the freedom of the press can, pursuant to these rulings, also prevail over the protection of privacy (cf. BGH, JZ [Juristenzeitung] 1965, 411 [413]; Oberlandesgericht [OLG, Higher Regional Court] Hamburg, Archiv für Urheber-, Film-, Funk- und Theaterrecht [UFITA, Archive of Copyright, Film, Broadcasting and Theatre Law] 1977, p. 252 [at p. 257]; OLG Munich, UFITA 1964, p. 322 [at p. 324]).

It is also not objectionable that in its ruling, the Federal Court of Justice took the individual’s behaviour in a specific situation as an indicator that he or she is recognisably in a situation of seclusion. The protection against pictorial representations in this sphere, however, is not triggered only if the person affected shows a behaviour in this sphere that he or she would avoid under the eyes of the public. Rather, physical seclusion can fulfil its protective function with respect to its role in the development of someone’s personality only if the seclusion ensures the individual, irrespective of the behaviour in which he or she engages in a given moment, a space for relaxation in which he or she need not constantly expect the presence of photographers or camera teams. This, however, is not the decisive question in this case, as pursuant to the findings of the Federal Court of Justice, the first prerequisite for the protection of privacy was lacking in the first place.

Finally, it is not objectionable from the constitutional point of view that the method of obtaining information is regarded as important when balancing the public interest in information and the protection of privacy (cf. BVerfGE 66, 116

**Selected Fundamental Decisions of
the Federal Constitutional Court**

[136]). There are, however, doubts about whether images that are taken secretly or by catching the subject unawares, without more, violate the privacy that exists outside the depicted individual's home. With regard to the function that the Constitution assigns to this sphere, and in view of the circumstance that one often cannot tell whether an image was taken secretly or by catching the subject unawares, an impermissible encroachment upon privacy can, in any case, not only be assumed if these characteristics exist. As the Federal Court of Justice, as concerns the photographs in dispute in these proceedings, denied in the first instance that the context in which the photos were made constituted a sphere of seclusion, the doubts about the manner in which the photographs were taken do not affect the result of its decision.

- c) The constitutional requirements, however, are not met to the extent that the challenged decisions disregarded the circumstance that the complainant's legal position concerning the protection of her right to personality is enhanced by Article 6 of the Basic Law in situations in which she cares for her children.
- dd) As regards the different images, this leads to the following conclusions:

The decision of the Federal Court of Justice gives no reason for objection from the constitutional point of view as regards the images that show the complainant on her way to the market, accompanied by a bodyguard at the market and with a companion in a frequented restaurant. In the first two cases, the locations that are shown are not secluded, but are visited by the broad public. Certainly, the location of the third image is a bounded location, the complainant, however, finds herself in this location under the eyes of the public that is present. For this reason, the Federal Court of Justice does not, with its judgment to permit the publication of these photos, act in contradiction to the ban on the photos made at the garden restaurant. This ban is the subject of the challenged decisions but was not raised as part of the constitutional complaint. The seat that the complainant took at the garden restaurant with her companion showed all characteristics of seclusion. The circumstance that the photographs at the garden restaurant were obviously taken from a great distance additionally indicates that the complainant could assume that she was not exposed to the observation of the public.

Neither are there objections to the decision to the extent that it deals with the photos in which the complainant is shown alone on horseback or riding her bicycle. On the basis of its views, the Federal Court of Justice also did not assign these photographs to the sphere of physical seclusion but to the public sphere. This is not objectionable from the constitutional point of view. The complainant herself also assigns the images to the secluded sphere of privacy only because, in her opinion, they indicate her wish to be left alone. However, according to the criteria that have been explained, the mere subjective wish is not decisive in this context.

Contrary to this, the three photos that show the complainant together with her children require a new examination under the constitutional standards that were described above. It cannot be excluded that the examination according to these

**60 Years German Basic Law:
The German Constitution and its Court**

standards leads to a different result as concerns some of the images or all of them. To this extent, the judgment of the Federal Constitutional Court is therefore to be reversed and remanded.

- d) As concerns the challenged judgments of the Regional Court and the Higher Regional Court, the violation of a fundamental right already follows from the fact that they--in conformity, however, with case law at that time--restricted the privacy that is protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law to the domestic sphere. However, it is not required to reverse the decisions because the violation concerning this point was remedied by the Federal Court of Justice and because, with regard to the other points, the case was remanded.

III.

...

- c) **Translation of the Soraya Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 34, 269***

Headnote:

The case law of the civil courts that also allows claims for pecuniary compensation for non-material damage is in the case of serious violations of the general right to personality compatible with the Basic Law.

Order of the First Senate of 14 February 1973 - 1 BvR 112/65 -

Facts:

A German illustrated weekly published an interview with the divorced wife of the Shah of Iran, Princess Soraya, in April 1962. The interview, which contained statements made by the Princess on her private life, was freely invented. As a result of her action, the civil courts awarded Princess Soraya damages in the amount of DM 15,000 against the publishing house and the editor in chief of the magazine for violation of her right to personality. Proceeding on the basis of its previous case law, the Federal Court of Justice (Bundesgerichtshof - BGH) found the false interview to be a serious violation of the right to personality of the Princess. The Court ruled that she could claim pecuniary compensation for the non-material damage suffered.

The constitutional complaint brought against the decision of the civil courts was unsuccessful.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

Selected Fundamental Decisions of
the Federal Constitutional Court

Extract from the Grounds:

C. I.

1. The judicial proceedings that resulted in the decisions under challenge constituted a civil dispute that was to be decided on the basis of the private legal order. The Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) must not review the interpretation and application of civil law as such. The objective system of values contained in the fundamental rights provisions of the Basic Law does, however, also affect private law; it constitutes a fundamental decision under constitutional law for all areas of the law. The Federal Constitutional Court is responsible for ensuring that the Basic Law exerts this influence. It therefore determines whether decisions of the civil courts are based on a fundamentally erroneous understanding of the scope and impact of a fundamental right or whether the results of decisions themselves violate the fundamental rights of a party (See on this in general BVerfGE 7, 198 [205 et seq.]; 18, 85 [92, 93]; 30, 173 [187, 188, 196, 197]; 32, 311 [316].

In the case at hand, the complainants challenge not only the results of decisions of the civil courts; they contest in particular the way the courts arrived at these results. The complainants dispute that judges have the right to award pecuniary damages in cases of this nature since they are bound by law. This compels contemplation of the nature and limits of judicial activity as prescribed in the Basic Law. The issue under review here is whether the courts may be used to make decisions involving such substantive content. Judges may not arbitrarily assert the value system of the Basic Law in their decisions. They would also be in violation of the constitution if they arrived at results that are compatible with the value system contained in the Basic Law by using methodological means that fail to respect the constraints imposed on judges in the context of adjudication. The Federal Constitutional Court would also have to object to any decision made in such a manner.

2. The claim in the civil dispute at issue is based on s. 823.1 of the Civil Code (Bürgerliches Gesetzbuch - BGB). Referring to existing case law that is established in detail in the decision of 25 May 1954 (Decisions of the Federal Court of Justice in Civil Matters [*Entscheidungen des Bundesgerichtshofes in Zivilsachen* - BGHZ] 13, 334), the Federal Court of Justice also includes a “general right to personality” among the rights mentioned therein; the Court sees a violation of this right in the actions of the complainants. It is not the task of the Federal Constitutional Court to judge the “correctness” of this decision insofar as its grounds and further development lie in the area of civil law dogma. It suffices to ascertain that the general right to personality - which was still rejected by the legislature that adopted the German Civil Code - has in the course of decades of discussion become an established fact in legal theory and following its recognition in the above decision of the Federal Court of Justice has since been an integral part of our system of private law (See on this, *inter alia*, the abovementioned draft of the law Bundestag document [*Drucksache des Deutschen Bundestages* - BTDrucks.] III/1237, grounds pp. 67; Nipperdey in “*Die Grundrechte*” handbook, vol. IV, book 2, 1962, p. 830; Hubmann, *Die Persönlichkeitsrecht*, 2nd ed., 1967, pp. 5 et seq.; MaunzDürigHerzog, *Grundgesetz*, Article 1.I marginal no. 38).

The Federal Constitutional Court has no occasion to oppose this decision of the Federal Court of Justice on constitutional grounds. The system of values embodied in the fundamental rights lies at the core of free development of human personality and human dignity within the

**60 Years German Basic Law:
The German Constitution and its Court**

social community (BVerfGE 6, 32 [41]; 7, 198 [205]. It is deserving of the respect and protection of all state authority (Articles 1 and 2.1 of the Basic Law). Such protection may be claimed in particular in the private sphere of human beings, which is the area in which they desire to be alone, to make decisions under their own responsibility and to be undisturbed by intrusions of any kind (BVerfGE 27, 1 [6]). The legal concept of a general right to personality also serves this protective purpose in the area of private law; it fills gaps in the protection of personality that have remained despite recognition of the rights to personality of individuals and in the course of time for various reasons become increasingly tangible. The Federal Constitutional Court has therefore never objected to recognition of a general right to personality in the case law of the civil courts (See in particular BVerfGE 30, 173 [194 et seq.]; 34, 118 [135, 136] and order of 31 January 1973 - 2 BvR 454/71 - B II 2).

3. S. 823.1 of the Civil Code is a “general law” within the meaning of Article 5.2 of the Basic Law (BVerfGE 7, 198 [211]; 25, 256 [263 et seq.]). Since the general right to personality belongs to the rights enumerated therein according to the interpretation of this provision, which cannot be objected to on constitutional grounds, it does in view of the intent of the Basic Law have the capacity to restrict the fundamental right of freedom of the press that the complainants invoke.

This potential impact of the general law is reinforced, as has been mentioned, under constitutional law by the protective mandate contained in Articles 1 and 2.1 of the Basic Law. On the other hand, the fundamental importance of freedom of the press for the free democratic order cannot be ignored. It retains its importance in the process of weighing issues against one another that must take place when it is necessary to resolve a conflict between parties under civil law that involves areas of interest that enjoy protection under constitutional law (BVerfGE 25, 256 [263]; 30, 173 [196, 197]). In the case of such a weighing process, the general right to personality may not simply be afforded precedence; freedom of the press may, depending upon the situation in the concrete case, have a restrictive effect on claims deriving from the right to personality (BVerfGE 7, 198 [208, 209]).

4. The decisions under challenge afforded protection of the personal sphere of the plaintiff in the initial proceedings precedence over freedom of the press. On the basis of the facts of the case, there is no reason for any reservations under constitutional law in respect of these decisions. According to these facts, the complainants published an invented interview with the plaintiff in an organ of the entertainment press in which events in her private life were presented as though the plaintiff had portrayed them herself. The courts view this as an unauthorized intrusion into the private sphere of the plaintiff, who may alone decide whether and in what form she wants to make events from her private life accessible to the public.

Indeed, given the facts of this situation, the complainants cannot invoke freedom of the press in defense of their actions. It would be excessive to completely deny the entertainment and sensation-press the protection of this fundamental right, as the Regional Court (Landgericht) did in reliance on various opinions voiced in the literature. The term “press” must be interpreted broadly and formally; it may not be made dependent upon evaluation - no matter what standards serve as the basis - of a single publication. Freedom of the press is not limited to the “serious” press (MaunzDürigHerzog, *Grundgesetz*, Article 5 marginal no. 128129; see also BVerfGE 25, 296 [397] and for radio - BVerfGE 12, 205 [260]). It does not, however, follow from this that

**Selected Fundamental Decisions of
the Federal Constitutional Court**

protection of the fundamental right would have to be afforded in the same manner to every organ of the press in every legal context and for all of the content of its statements. When weighing freedom of the press against other legal interests protected under constitutional law, it is possible in concrete cases to take into account whether the press treats a matter of public interest seriously and objectively to satisfy the desire of its readership for information and contributes thus to the formation of public opinion or whether it satisfies only the need of a more or less broad class of readers for superficial entertainment.

In this case, the need for protection of the private sphere of the plaintiff was not offset by an overriding general interest in public discussion of the matters dealt with in the interview. Readers have no right to be “informed” of the private life of a personality standing for the time being in the public eye through invented disclosures. An invented interview can - even if one chooses to recognize an interest in it as legitimate in this area - make no contribution to genuine formation of public opinion. Protection of the private sphere enjoys absolute precedence over press statements of this kind.

II.

If a “general law” potentially restricts freedom of the press, the manner in which such restriction may be effected is determined exclusively by the substantive content of that law. That means in particular that only those sanctions that are authorized by law may be imposed on the organ of the press and effectively restrict its freedom. This provides the basis for the challenge of the complainants; they argue that there is no “general law” that makes provision for pecuniary compensation for non-material damage in the case of violation of the general right to personality and that such claims are in fact explicitly precluded by s. 253 of the Civil Code. The courts have therefore, it is claimed, by awarding such compensation for damages exceeded the bounds within which the constitution allows them to restrict the freedom of the press; moreover, it is argued further, they have imposed a sanction that constitutes substantive infringement of freedom of the press since it is directed exclusively against the press and burdens the press with an incalculable risk that must eventually threaten its existence. As a result, it is claimed, this constitutes a fundamental failure to recognize the essence and importance of freedom of the press in a free democratic system of government.

It is also necessary in respect of this argumentation to emphasize from the beginning that it does not lie within the decision-making powers of the Federal Constitutional Court to judge whether the legal conclusion derived from the assumed violation of the general right to personality by the Federal Court of Justice can be justified on the basis of civil law dogma or, in other words, whether civil law permits and requires pursuit of the avenue embarked upon through recognition of a general right to personality and extension of the protection provided in related cases under s. 847 of the Civil Code to include this right by awarding compensation for damages.

The Federal Constitutional Court must also limit itself to a review of those aspects of this case law that fall under constitutional law in this case. This gives rise to the questions, on the one hand, as to whether the substantive result of the decisions as such is in violation of the fundamental right of freedom of the press in the first place and, further, whether to come to this result through adjudication despite the absence of an unambiguous basis in written law is compatible with the Basic Law.

**60 Years German Basic Law:
The German Constitution and its Court**

Examination of both questions shows that there are no objections under constitutional law to the case law of the Federal Court of Justice underlying the decisions challenged in this case.

III.

It lies in the nature of things that violations of the general right to personality may be committed in particular by organs of the press since they have at their disposal the technical means required for the acquisition and dissemination of information and it is therefore also made relatively easy for them to intrude upon the private sphere of citizens. Examples from the case law show, however, that the civil courts also apply the rules they have established for the protection of the general right to personality outside the area of the press (See, for example, Decisions of the Federal Court of Justice in Civil Matters [*Entscheidungen des Bundesgerichtshofes in Zivilsachen* BGHZ] 26, 349; 30, 7; 35, 363). For this reason alone, there exists no “special right against the press.”

The imposition of excessively onerous sanctions, which under certain circumstances could also include unpredictably high claims for damages, would, however, restrict the freedom of the press in violation of constitutional law, especially if the legal prerequisites for such claims were not clearly established. Such a case is not, however, at issue here. Pecuniary compensation for non-material damage constitutes a sanction that is not inherently foreign to our legal order, as may be recognized from s. 253 of the Civil Code itself. In s. 847 of the Civil Code, it is provided for in the case of violation of other legal interests identified in s. 823 of the Civil Code as well as in a few specific statutes. In the course of the development of the case law, the classes of cases in which compensation must be made for non-material damage have taken on clear contours. Claims for damages have subordinate character; the courts award pecuniary damages only if natural restitution, for example, through the grant of a right to an injunction or rescission, is impossible or because of the nature of the case inadequate; there can be no serious discussion of “commercialization of honour.” Since a significant encroachment upon the personal sphere and serious fault are required, this ensures that the standards of care are not exaggerated for a press that works responsibly and that not every instance of inaccuracy or objectively false information will entail liability. Finally, a look at the case law shows that - as also in the present case - the amounts of damages awarded are within reasonable limits, especially if one takes into account that the actions of the press organ that give rise to the claim for damages are as a rule themselves motivated by economic interests. The risk to which the press is exposed by this case law does not therefore exceed a reasonable measure. In the case to be judged here, this is especially obvious; the degree of care that must be exercised to prevent dissemination of an invented interview is never unreasonable.

IV.

1. The traditional accountability of judges to the law, which is a mainstay element of the principle of the separation of powers and therefore of the rule of law, is in any case as regards its formulation modified in the Basic Law such that the judiciary is bound by “law and justice” (Article 20.3). This constitutes according to prevailing opinion rejection of narrow legal positivism. This formulation supports awareness of the fact that the law and justice are to be sure in fact generally identical, but not necessarily so and not always. Justice is not identical with the entire body of written law. There may exist under certain circumstances law that surpasses that

Selected Fundamental Decisions of the Federal Constitutional Court

embodied in the positive statutes of the state and has its origins in the legal order under constitutional law as a conceptual whole and can function as a corrective to written law; to find and implement this law in its decisions is the task of the judiciary. Judges are not bound by the Basic Law to apply the mandates of the legislature within the limits imposed by their possible literal meaning in individual cases. Such an understanding would have to predicate the complete absence of any gaps in the positive legal order of the state, which whilst justifiable as a fundamental postulate of legal certainty is in practice unattainable. Judicial activity consists not only in recognition and pronouncement of decisions of the legislature. The task of the judiciary may in particular require bringing to light and rendering in the form of decisions values that are inherent to the constitutional legal order, but have not or have only incompletely found expression in the texts of written laws, through a process of evaluative judgment, which is also not devoid of elements of volition. In so doing, judges must avoid arbitrariness; their decisions must be grounded in rational argumentation. It must be made obvious that the written law has not fulfilled its function of providing an equitable solution to a legal problem. A judicial decision then closes this gap on the basis of standards of practical reason and the “established general notions of justice of the community” (BVerfGE 9, 338 [349]).

The duty and authority of judges with regard to “creative adjudication” have never in principle - in any case not under the Basic Law - been the subject of dispute (See, for example, R. Fischer, *Die Weiterbildung des Rechts durch die Rechtsprechung, Schriftenreihe der Juristischen Studiengesellschaft Karlsruhe*, vol. 100 (1971), and on that Redeker, NJW 1972, pp. 409 et seq., each with further references).

The highest courts have from the very beginning claimed this right (See, for example, Decisions of the Federal Court of Justice in Civil Matters [*Entscheidungen des Bundesgerichtshofes in Zivilsachen* - BGHZ] 3, 308 [315], 4; 153 [158]; Federal Labour Court [*Bundesarbeitsgericht* - BAG] 1, 279 [280, 281]).

The Federal Constitutional Court has always recognized it (See, for example, BVerfGE 3, 225 [243, 244]; 13, 153 [164]; 18, 224 [237 et seq.]; 25, 167 [183]). The legislature itself explicitly charges the Great Senates of the highest federal courts with responsibility for “further development of the law” (see, for example, s. 137 of the Judicature Act (*Gerichtsverfassungsgesetz* - GVG)). In some areas of law, labour law, for example, this has taken on special importance because legislation has lagged behind the flow of social progress.

The sole question that remains concerns the limits that must be imposed upon creative adjudication, taking into account the principle that binds the judiciary to the law, which is an essential prerequisite for upholding the rule of law. Such limits cannot be expressed in a formula that would be equally valid for all areas of law and for all legal situations they give rise to or to which they apply.

2. For the purposes of the present decision, this question can be restricted to the area of private law. In this case, judges are confronted with the large body of codified law that constitutes the German Civil Code, which has been in effect for more than 70 years. This is of twofold importance: firstly, the freedom of judges for creative development of the law necessarily increases with the “aging of the codifications” (Kübler, JZ 1969, p. 645), i.e., in proportion to

**60 Years German Basic Law:
The German Constitution and its Court**

the length of time between the original legal mandate and the judicial decision in the individual case at issue. The interpretation of a provision of law cannot always indefinitely retain the meaning attached to it when it originated. It is necessary to take into account the reasonable purpose it may serve when it is applied. Laws consistently exist in a context of social conditions and socio-political attitudes; their substantive content can and must evolve commensurately when necessary. This is especially the case when conditions of life and legal attitudes have undergone such far-reaching change during the time that has elapsed between the enactment of laws and the application thereof as has been the case in this century. Judges cannot evade the possibility of a conflict arising between a law and the substantive notions of justice of a changed society by relying on the unchanged wording of the law; they are compelled to deal freely with legal norms in order to avoid abdication of their responsibility for the administration of "justice." On the other hand, as experience shows, legislative reforms encounter special difficulties and obstacles precisely when they are intended to lead to revision of major bodies of legislation that characterize the entire legal order to such an extent as the codification of private law in the form of the German Civil Code.

...

However, results that are obtained in a manner that can at least be discussed in terms of civil law and are in any case not obviously in conflict with the hermeneutic rules of civil law cannot be objected to on constitutional grounds if they serve to assert and effectively protect a legal interest that is viewed under the Basic Law itself as being at the core of its system of values. Such results constitute "justice" within the meaning of Article 20.3 of the Basic Law - not as opposed to, but as a complement to and extension of written law.

It is also not possible to object to the method of adjudication of the Federal Court of Justice on constitutional grounds since it deviates from written law only to the extent required to render justice in a concrete case. The Federal Court of Justice neither considers s. 253 of the Civil Code to be no longer valid in its entirety, nor did it by any means want to characterize it as being unconstitutional (a possibility that would have been available to the Court since the issue involves a law that predates the Basic Law). The Court left the principle of enumeration expressed in the provision untouched and merely added to those cases in which the legislature had already made provision for compensation for non-material damage a further instance in which not only change in conditions of life, but also a *jus superveniens* of higher rank, namely, Articles 1 and 2.1 of the Basic Law, made this decision seem compellingly required. The Federal Court of Justice and courts that follow its reasoning have therefore not departed from the system of the legal order and have not asserted their own will in terms of legal dogma, but have only elaborated on basic ideas behind the legal order stamped by the Basic Law using systemic means.

...

**Selected Fundamental Decisions of
the Federal Constitutional Court**

The First and the Sixth Broadcasting Decision, BVerfGE 12, 205 and BVerfGE 83, 238

Explanatory Annotation

The German Broadcasting system, radio and television, has always been the subject of separate and more intensive regulation. Whereas, for example, there has never been a requirement for newspapers to be licensed by the government, broadcasters have always been subjected to such licensing. Whereas there are very few access and content rules regarding newspapers³⁵ other than those of general application such as obscenity or advertising restrictions for alcohol or tobacco there has always been access regulation and rules safeguarding plurality and thus indirectly content in the case of broadcasting. The reason is the structural difference between the press and broadcasting. The press, both in terms of quantity of publications and in terms of the range of opinions and philosophies represented was traditionally more pluralistic than broadcasting with its limited frequencies and the required high capital investment. At the same time the effectiveness of broadcasting as a mass medium can be far greater than that of a newspaper.³⁶

The Constitutional Court has played a major, if not the main role, in defining the structure of the German broadcasting media landscape.³⁷ The result of the Court's jurisprudence is the specific German 'dualistic' broadcasting system with a large and extensively funded public (but not government controlled)³⁸ broadcasting pillar and private, commercially funded broadcasting existing side by side. This result largely came about on the basis of a few words in Article 5.1 of the Basic Law, which stipulate that "freedom of reporting by means of broadcasts and films shall be guaranteed". The perhaps astonishing effect of these few words in the Basic Law on the shape of an entire industry are not only ample evidence of the Court's power but also illustrate that the distinction between the interpretation of law and the making of law is difficult at best, particularly in the area of constitutional law.

The first of these decisions translated here (BVerfGE 12, 205) is important for two very different reasons. The first has to do with the federal structure of Germany. The federal government had attempted to set up a federally controlled television network. The Court denied the federal government this power on the basis that no legal basis for the exercise of such a power could be inferred from the Basic Law and that therefore, under the general safeguarding clause of Article 30 of the Basic Law, any such powers must lie with the *Länder* and not with the federal government. The only powers left on the federal level are the powers concerning the technical side of broadcasting, i.e. powers necessary to regulate the technical infrastructure for

35 The Court has held that it would in principle be unconstitutional for the government to regulate the press as this would interfere with its institutional independence, see BVerfGE 12, 205 (260).

36 See BVerfGE 12, 205 (261).

37 Depending on the count there are about twelve decisions of the Constitutional Court dealing with various broadcasting matters. For a recent overview in English see Witteman, Chris, Constitutionalizing Communications: The German Constitutional Court's Jurisprudence of Communications Freedom (January 22, 2010). Available at SSRN: <http://ssrn.com/abstract=1540906>.

38 The broadcasting and the public welfare sector are the two most noticeable areas operating in this fashion as agencies under public law (Anstalten des öffentlichen Rechts), with their own pluralistically composed governance bodies operating under broad statutory authority.

60 Years German Basic Law:
The German Constitution and its Court

the transmission of broadcasting, which at the time was monopolized in the German Postal Service but has since been privatized.³⁹ Broadcasting as such, however, i.e. the organization of broadcasting and anything to do with the programming was regarded as part of cultural policy and hence as part of the powers of the *Länder*. As a result the federal government had to stay completely out of broadcasting and this has had an effect even beyond the Federal Republic. The Constitutional Court⁴⁰ and, subsequently, the amended Article 23 of the Basic Law made it clear that as far as the regulation of broadcasting on the European Union level is concerned, Germany will not be represented in the European Union's Council of Ministers by a representative of the federal government but by a representative of the *Länder* to be determined by the federal chamber, the *Bundesrat*.

The second principle developed by the Court in this first broadcasting decision is the principle of broadcasting independence. Broadcasting must be organized in such a way that neither the state (government) nor particular groups of society can exercise undue influence. Rather, broadcasting must be structured and organized to guarantee 'intra-plurality' by putting the management into the cooperative hands of all relevant groups of society to be exercised through governing boards ("broadcasting councils") which control the management and which are composed of members from many diverse groups ranging from the political parties, to trade unions, the various churches and many others. The system has recently come under pressure as critics argue that despite the *prima facie* diversity on the governing bodies in fact the political parties and state representatives have too much influence.

In the second decision presented here, known as the fourth broadcasting decision⁴¹, the Constitutional Court developed a concept that is now fundamental to the broadcasting order of Germany, the "*Grundversorgung*", i.e. the provision of basic or primary broadcasting services as a constitutionally protected task of the public broadcasting pillar, whose institutional and financial guarantee is protected by the broadcasting freedom of Article 5.1 of the Basic Law and which is a prerequisite for allowing private broadcasting to take place. This *Grundversorgung* goes beyond just providing information relevant in the broadest sense for the democratic process and encompasses all aspects of cultural life as well, including entertainment and sports. Financially this means that public broadcasting must be financed such that the basic provision of broadcasting services in this public pillar is comprehensively secured. This is largely achieved by levying a broadcasting fee of roughly 18 Euros per month on every owner of a television or radio, regardless of whether the owner chooses to watch public television or not. This fee is set independently by a Commission based on the needs of the public broadcasting pillar to effectively provide the basic services and the decision of this Commission on the relevant fee is only subject to very limited scrutiny by the governments of the *Länder*, whose Parliaments have to legislate on this fee.⁴²

39 Another example for the indirect influence of federal powers of broadcasting is the area of copyright law.

40 BVerfGE 92, 203 - <http://www.servat.unibe.ch/dfr/bv092203.html>.

41 BVerfGE 73, 118.

42 See the 2007 decision of the Court, BVerfGE 119, 181, available in German at <http://www.servat.unibe.ch/dfr/bv119181.html>.

Selected Fundamental Decisions of
the Federal Constitutional Court

d) Translation of the ‘First Broadcasting Decision’ Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 12, 205*

Headnotes:

1. Constitutional review pursuant to abstract norm control proceedings (Abstract Judicial Review) also covers “treaty laws” for treaties between Germany’s states.
2. A federal organ is also deemed to have “not applied” state law within the meaning of s. 76 no. 2 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG) when it “disregarded” this law.
3.
 - a) The postal and telecommunications system within the meaning of Article 73 no. 7 of the Basic Law only covers - apart from the reception of broadcasts - the transmission related area of broadcasting, excluding so-called studio technology.
 - b) Article 73 no. 7 of the Basic Law does not empower the Federation to regulate the organization of broadcasting and that of broadcasters.
4. The Federation’s legislative competence with regard to telecommunications system (Article 73 no. 7 of the Basic Law) also extends to regulations that reserve for the Federation the exclusive right to establish and operate transmission facilities for the purpose of broadcasting.
5. In accordance with the system of the Basic Law, the Federation’s legislative competence describes the outermost boundary of its administrative powers. The “Federal postal service” (Bundespost) in Article 87.1 of the Basic Law therefore cannot comprise more than the “postal and telecommunications system” in Article 73 no. 7 of the Basic Law.
6. In awarding the right to establish or operate broadcasting facilities (s. 2 of the Telecommunications Facilities Act) and in concluding contracts dealing with the use of such facilities, the Bundespost may only regulate transmission aspects. Any “terms” going beyond this area are impermissible.
7.
 - a) In accordance with the development of German law, broadcasting is a public function. When the State exercises this function in some form (including in those cases in which it makes use of forms of private law), it becomes a “State function” within the meaning of Article 30 Basic Law.
 - b) Broadcasting by the Federation cannot be justified under Article 30 in conjunction with Articles 83 seq. Basic Law with the argument that broadcasting is a “supra-regional function” or that the Basic Law permits the broadcasting by the Federation of such programs that are to serve national representation within the country and to assist in safeguarding “continuity of tradition”. By the very nature of the matter, the Federation does not have any competence over this.

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**60 Years German Basic Law:
The German Constitution and its Court**

8. a) Article 30 Basic Law applies to the discharge of public functions both pursuant to law and outside the law.
b) Section VIII of the Basic Law “provides otherwise” within the meaning of Article 30 of the Basic Law both for administration pursuant to law and that outside the law.
9. The procedure and style of the negotiations that become necessary under the Constitution between the Federation and its component parts and between the states are also subject to the mandate that the parties act for the benefit of the Federation.
10. Article 5 Basic Law calls for laws providing that broadcasters be organized in such a way that all pertinent forces are able to have an influence in their organs and to have their say in overall programming; such laws are also to establish binding guidelines for the content of overall programming that guarantee a minimum of substantive balance, objectivity and mutual respect.

Judgment of the Second Panel of 28 February 1961 on the basis of the oral hearing of 28, 29 and 30 November 1960 - 2 BvG 1, 2/60 - in the proceedings relating to the constitutional review of s. 3 of the Interstate Treaty on the Norddeutschen Rundfunk of 16 February 1955, Applicant: the Senate of the Free and Hanseatic City of Hamburg, represented by the President, agent, and in the constitutional dispute on the question of whether by the establishment of Deutschland-Fernsehen-GmbH and by other actions in the area of television, the Federal Government violated Article 5 of the Basic Law and Article 30 in conjunction with Article 87(3) Basic Law as well as the duty to act for the benefit of the Federation. Applicant: for the Free and Hanseatic City of Hamburg, the Senate, represented by the President, agent ...; for the State of Hesse, the State Government, represented by the Minister-President, agents ...; Opponent: for the Federal Republic of Germany, the Federal Government, represented by the Federal Minister of the Interior, agents ...; Other Participants: for the State of Lower Saxony, the State Government, represented by the Minister-President, agents ...; for the Free and Hanseatic City of Bremen, the Senate, represented by the President, agent.

Judgment of the Second Senate of 28 February 1961 - 2 BvG 1,2/60 -

Facts:

Following the end of World War II, the operation of broadcasting facilities by German authorities was initially prohibited. The confiscated radio stations were operated by the Occupying Powers, which gradually returned broadcasting to German control. The Western Occupying Powers pursued the objective of eliminating all forms of State influence over broadcasting. By way of ordinances issued by the military governments or through laws of the states, whose contents were fundamentally influenced by the Occupying Powers, public broadcasting companies were created in the three Western zones of occupation. These received the right of selfadministration and in some areas were subject to precisely described legal supervision.

The public broadcasting companies have united to form the “Working Group of Public Broadcasting Companies in the Federal Republic of Germany” (Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland; ARD). Their cooperative

**Selected Fundamental Decisions of
the Federal Constitutional Court**

efforts in the area of television are based on the “Interstate Television Treaty” concluded on 27 March 1953, which is currently in force in the version of 24 May 1956. The “Agreement regarding the Coordination of the First Television Channel”, which was concluded by the states on 17 April 1959, is intended to provide the companies’ joint programming activities with a legal foundation.

Following the entry into force of the Basic Law, a number of efforts were made to reorganize the broadcasting system, some by way of federal legislation, others by way of agreements between the states or between the states and the Federation.

On 25 July 1960, the Deutschland-Fernsehen-GmbH (Germany Television Corporation) was founded. The Corporation’s function is “the transmission of broadcast television programs that are to provide viewers in all of Germany and abroad with a comprehensive picture of Germany” (s. 2 of the Charter). The Corporation bears sole responsibility for all programming; it is either to produce this itself or have it produced by third parties at its request and under its responsibility (s. 4 of the Charter).

The Free and Hanseatic City of Hamburg and the State of Hesse are of the view that, by founding the Corporation, the Federation has violated their constitutional rights.

Extracts from the Grounds:

...

C.

I.

The applications fall within the jurisdiction of the Second Senate; they are admissible.

D.

S. 3.1 of the Interstate Treaty reserves for the Norddeutschen Rundfunk the exclusive right to disseminate for the general public news and presentations in word, sound and image in the States of Lower Saxony, Schleswig-Holstein and the Free and Hanseatic City of Hamburg (Transmission Territory), i.e., to broadcast programs (monopoly on the broadcasting of programs). The provision further provides the Norddeutschen Rundfunk the exclusive right to establish and operate in its Transmission Territory the radio broadcasting and television broadcasting facilities required for broadcasting programs (monopoly on the establishment and operation of transmission facilities).

The Hamburg Act relating to the Interstate Treaty on the Norddeutschen Rundfunk is, insofar as it refers to s. 3.1 of the Interstate Treaty, incompatible with the Basic Law and therefore null and void to the extent that the provision provides the Norddeutschen Rundfunk with a monopoly on the establishment and operation of transmission facilities. In all other respects, the provision is compatible with the Basic Law.

**60 Years German Basic Law:
The German Constitution and its Court**

I.

1. In the view of the Federal Government, s. 3.1 of the Interstate Treaty is null and void in its entirety. The provision is alleged to be incompatible with the exclusive legislative competence of the Federation with regard to regulation of the telecommunications system (Article 73 no. 7 of the Basic Law).

The Federal Government asserts that the term “postal and telecommunications system” is the result of historical developments. It is said to correspond to that of the “postal and telegraph system” in Article 6 no. 7 and Article 88.1 of the Weimar Constitution, covering radio and - since its origins - also broadcasting. During the period of the Reich postal services, it attached to the “licenses” issued to programming companies for the use of its radio transmission facilities for the purposes of entertainment broadcasting “extensive terms designed to ensure political impartiality in the transmission program and organizational neutrality of the transmission companies”. It is alleged that the wording of the licenses unambiguously reveals “that the Reich postal services controlled both the technical and the organizational side” and “laid claim to all issues concerning the broadcasting area by virtue of its sovereignty in the field of telegraphy (radio sovereignty)” (Scheuner, Expert Opinion, pp. 45 seq.). The Act on Telecommunications Facilities of 1928 is said to have confirmed this legal situation and included in the statutory regulation the Reich’s ability to exercise influence over broadcasting (Scheuner, Expert Opinion, p. 46).

The Federal Government further asserts that the term “telecommunications system” is also unable, insofar as it covers broadcasting, to be divided into a technical, an organization and a programming category, since, from the standpoint of the legislature, broadcasting constitutes an unified whole. It is alleged that sensible regulation of licensing cannot be implemented without imposing terms regarding the organization and programming of broadcasting.

Thus, in the view of the Federal Government, the legislative powers under Article 73 no. 7 of the Basic Law cover broadcasting as a whole. For this reason, the Federation is said also to be empowered to issue statutory rules pursuant to the guiding principles contained in Article 5 of the Basic Law for ensuring freedom of broadcasting. The granting of a monopoly to the Norddeutschen Rundfunk for the broadcasting of programs is therefore alleged to conflict with Article 5 of the Basic Law.

2. The regulation made by s. 3.1 of the Interstate Treaty for the benefit of the Norddeutschen Rundfunk would be incompatible in its entirety with Article 73 no. 7 of the Basic Law if the term “telecommunications system” were to be understood in such a comprehensive manner as asserted by the Federal Government. Not only the exclusive right reserved for the Norddeutschen Rundfunk by s. 3.1 of the Interstate Treaty to establish and operate transmission facilities but also its monopoly on the broadcasting of programs falls in that area that, in the view of the Federal Government, is subject to exclusive statutory regulation by the Federation pursuant to Article 73 no. 7 of the Basic Law.

Selected Fundamental Decisions of
the Federal Constitutional Court

II.

1. The interpretation given by the Federal Government to Article 73 no. 7 of the Basic Law is incorrect. The “postal and telecommunications system” covers only the transmission related area of broadcasting, excluding so-called studio technology, but not broadcasting as a whole. Article 73 no. 7 of the Basic Law in particular does not empower the Federation to regulate the organization of broadcasting and the internal organization of the broadcasters or to enact rules relating to programs. The enacting of statutes called for by Article 5 of the Basic Law in order to give shape to the guiding principles it contains to ensure freedom of broadcasting falls, from both the standpoint of substantive law and from an organizational perspective (see *infra* E III), within the legislative competence of the states and only within that of the Federation to the extent that it might in exceptional cases have the authority to broadcast programs of a special nature (see *infra* III 2 and E I 5).

2. a) Under Article 73 no. 7 of the Basic Law, the Federation has exclusive legislative competence for the “postal and telecommunications system”. Broadcasting could only be attributed to the telecommunications system within the meaning of this provision. The wording of Article 73 no. 7 of the Basic Law can be traced back to older formulations, which assigned to the postal services, in addition to their traditional functions, the telegraph system (cf. ss. 41 *fet seq.* of the Reich Constitution of 1849; Article 4 no. 10 of the Constitution of the North German Alliance of 1867 and the Reich Constitution of 1871; Article 6 no. 7 of the Weimar Constitution). In other words, by “postal system” in Article 73 no. 7 of the Basic Law is meant the “traditional” service branches of the postal services in contrast to the “new” field of the “telecommunications system”. Both of these are a part of the “Bundespost” within the meaning of Article 87.1 of the Basic Law.
- b) Broadcasting (here and in the following, radio broadcasting and television broadcasting) makes use, for the wireless dissemination of programming, of electric waves that are sent out by transmitters. These broadcasting transmitters are radio facilities and thus telecommunications facilities (s. 1 of the Telecommunications Facilities Act [Fernmeldeanlagenengesetz; FAG]); they are a part of the telecommunications system within the meaning of Article 73 no. 7 of the Basic Law.

Under an interpretation following the ordinary meaning of the words and common usage of language, the telecommunications system only comprises the technical steps in the transmission of broadcast presentations. Telecommunications system is a technical term oriented according to the process of disseminating signals. The telecommunications system employs telecommunications facilities, i.e., technical equipment, with the aid of which signals are sent or conveyed “into the distance”. This is confirmed by the Act on Telecommunications Facilities of 1928, whose provisions are limited, to the extent applicable here, by their meaning and their wording to regulations regarding the establishment and operation of radio facilities, i.e., to the regulation of technical processes. The medium of mass communications “broadcasting”, whose political and cultural significance can hardly be overestimated, is not a part but rather a “user” of the equipment of the telecommunications system (cf. Moser, DÖV 1954, 389 [390]; Lademann, JIR 8 [1957/1958] p. 307 [310]; cf. also Haenel, Deutsches Staatsrecht,

**60 Years German Basic Law:
The German Constitution and its Court**

1892, vol. 1, p. 415). The technical aspects of telecommunications may very well have been of predominant significance in the early days of broadcasting and have marked its development. However, viewing broadcasting as a whole, technical telecommunications equipment has for decades only exercised minor, support functions.

- c) If, in accordance with the general usage of language, the telecommunications system only covers the technical processes serving to disseminate signals, then it follows that so-called studio technology does not belong to the telecommunications system. The telecommunications system first begins with the conveyance of transmittable sound and image signals by the broadcasting studio to one or several transmitters (conveyance by cables or by radio waves); it then also covers the sending out of the program and the conceivable, related technical processes up to reception of the program.

Within the meaning of Article 73 no. 7 of the Basic Law, the telecommunications system comprises the technical requirements whose regulation is indispensable for an orderly running of the operations of the broadcasters and the reception of their programs. The transmitters must be assigned specific frequencies that are coordinated with those of other transmitters. In order to avoid overlapping and disturbances, the location and transmission power of the transmitters must be fixed according to radio-technical aspects. The adherence to frequencies and transmission power must be supervised. Care must be taken that the sending out and reception of programs are not disturbed by other telecommunications facilities and electrical equipment, and that they in turn do not disturb general radio traffic. The same applies to the cables and radio traffic through which the sound and image signals are conveyed from the studio to the transmitter.

These things are a part of the telecommunications system. Insofar as they can be made subject to statutory rules, then only the Federation may enact the regulations.

3. It also follows from the relationship of Article 73 no. 7 of the Basic Law to other provisions of the Basic Law that the telecommunications system only comprises the transmission technology of broadcasting.

- a) Article 5.1 sentence 2 of the Basic Law uses the term “broadcasting”, and by this it means broadcasting as an institution. Although this does not rule out that other provisions of the Basic Law regulate sub-areas of broadcasting under other, more specific designations, the mention of “broadcasting” in Article 5.1 sentence 2 of the Basic Law does not permit the assumption that the term “telecommunications system” covers broadcasting as a whole. If only sub-areas of broadcasting can be meant by the “telecommunications system”, then this can only involve those areas that serve the conveyance of presentations, i.e., transmission technology.

As a medium of mass communications, broadcasting belongs in the neighbourhood of press and film. Article 5.1 sentence 2 of the Basic Law refers to all three media in one sentence. The Federation’s legislative competence is expressly provided only for the general legal affairs of press and film (Article 75 no. 2 of the Basic Law). Broadcasting is not mentioned in Article 75 no. 2 of the Basic Law. An interpretation paying regard

**Selected Fundamental Decisions of
the Federal Constitutional Court**

to the interrelationship of the provisions of the Basic Law may therefore not assume that the Federation is entitled to exclusive legislative competence for broadcasting as a whole while it may enact only framework provisions dealing with the general legal affairs of the press and film.

- b) With regard to the structure of legislative competence of the Federation and the states, the Basic Law operates on the principle that the states first have competence (BVerfGE 10, 89 [101]). The Federation only has legislative competence to the extent that the Basic Law endows it with such (Article 70.1 of the Basic Law). The Federation's legislative powers may therefore normally only be supported by an express authorization by the Basic Law. In cases of doubt regarding the Federation's jurisdiction, there is no assumption that argues in favour of federal competence. Rather, the systematic of the Basic Law calls for a strict interpretation of Articles 73 seq. of the Basic Law.

In addition, broadcasting is in any event also a cultural phenomenon. To the extent that cultural matters can be administered and regulated whatsoever by the State (cf. BVerfGE 10, 20 [36 seq.]), they nevertheless fall, in accordance with the Basic Law's fundamental decision (arts. 30, 70 et seq. and 83 et seq. Basic Law), in the area of the states (cf. BVerfGE 6, 309 [354]) when special provisions of the Basic Law do not provide restrictions or exceptions in favour of the Federation. This fundamental decision by the Constitution, which is not least a decision in favour of the federalist structure of the State in the interest of effective separation of powers, forbids especially in the area of cultural matters the assumption that the Federation has jurisdiction without a sufficiently clear, contrary rule of exception. The latter is lacking here.

- c) Article 87.1 of the Basic Law stipulates that the Bundespost is to be managed as direct federal administration. This does not permit any inferences as to the extent of the Federation's legislative competence. It conforms to a principle of German constitutional law that federal competence to legislate extends farther than that to administer (cf. Scheuner, Expert Opinion, p. 48). In accordance with the systematic of the Basic Law, the Federation's legislative competence traces the outermost boundary of its administrative powers (cf. Krüger, *Der Rundfunk im Verfassungsgefüge und in der Verwaltungsordnung von Bund und Ländern*, 1960, p. 78; Zeidler, DVBl. 1960, 573 [579 seq.]). But this means that the Federation's administrative competences follow its legislative competences and not the reverse. No conclusions may therefore be drawn from the alleged powers of the Bundespost under Article 87.1 of the Basic Law as to the extent of the Federation's legislative competence. Moreover, the "postal and telecommunications system" in Article 73 no. 7 of the Basic Law and the "Bundespost" in Article 87.1 of the Basic Law mean the same area. The extent of the area "Bundespost" results from what is to be understood by "postal and telecommunications system". It is also incorrect that broadcasting is considered a matter of the Bundespost. The Federal Government has dictated that broadcasting matters are, apart from technical issues, not to be dealt with officially by the Federal Ministry for the Postal and Telecommunications System but rather by the Federal Ministry of the Interior. It therefore acknowledges that in its view as well, this does not involve matters of the telecommunications system (cf. s. 1 of the Postal Administration Act of 24 July 1953, BGBl. I, p. 676).

**60 Years German Basic Law:
The German Constitution and its Court**

4. The interests of the general public call for an ordering of radio traffic, which can only be effectively accomplished by the Federation. This also applies to broadcasting. The allocation and delineation of transmitter frequencies, the determination of their location and transmission power according to radio-technical aspects, so-called cable technology, supervision of radio traffic, its protection against large-scale and local disturbances, as well as the implementation of international agreements all must be uniformly regulated by virtue of the nature of the matter if chaos in radio traffic is to be avoided.

Article 73 no. 7 of the Basic Law serves the purpose of making possible the indispensable uniform regulation of these and similar matters. This purpose does not, however, require that in addition to radio and, in particular, transmission related issues, the broadcasting of programs must also be submitted to statutory regulation by the Federation. In other words, also following from the purpose of Article 73 no. 7 of the Basic Law is the restriction to transmission related matters of broadcasting.

5. A historical interpretation of the term “telecommunications system” does not lead to different results. Although it is correct that by means of the administrative practice of the Reich postal services, authorities of the Reich exercised a not insubstantial influence in the period from 1926 to the beginning of 1933 on the organization of broadcasters and the structuring of their programs (cf. the depiction in Bausch, *Der Rundfunk im politischen Kräftespiel der Weimar Republik*, 1956, pp. 11 et seq.; Pohle, *Der Rundfunk als Instrument der Politik*, 1955, pp. 27 et seq.), it is not possible to draw from this that the telecommunications system within the meaning of Article 73 no. 7 of the Basic Law covers broadcasting as a whole.

- a) In the period before 1933, statutory rules for broadcasting were not enacted. Neither the Ordinance for the Protection of Radio Traffic of 8 March 1924 (RGBl. I, p. 273) - Radio Ordinance - nor the Act to Amend the Telegraph Act of 3 December 1927 (RGBl. I, p. 331), which provided for the promulgation of the revised Telegraph Act under the title “Act on Telecommunications Facilities”, employs the word “broadcasting”. The reasoning accompanying this Amending Act (RT III/1924 Drucks. No. 3682) merely mentions broadcasting in the context of imposing fees for the establishment and operation of broadcasting reception facilities. According to the reasoning, the purpose of the amendment of the Telegraph Act was the solidification of the State’s radio sovereignty in view of the progress made in radio technology (*id.* at p. 5). The Act was accepted in the Reichstag in all three readings without discussion (RT III/1924, Negotiations vol 394, p. 11719 and 11732; Stenographic Report of the 346th Session on 24 November 1927).

Under an unbiased reading, the wording of the Act on Telecommunications Facilities is restricted to the regulation of radio-technical issues; it does not give rise to any references to the fact that broadcasting as a whole was assigned to the postal and telegraph system within the meaning of Article 6 no. 7 and Article 88.1 of the Weimar Constitution. The same applies to the reasoning behind the draft Act. In the commentaries to the Reich Constitution of 1919, broadcasting is mentioned neither in Article 6 no. 7 nor in Article 88.1, let alone included in the postal and telegraph system.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- b) Thus, for the “historical development” of the term “telecommunications system”, the Federal Government cannot rely on the legislation but rather only on the administrative practice of the Reich postal services and the Reich Minister of the Interior in the period up to 1933. It particularly relies on this for its position that the competence to regulate the telecommunications system also covers to power to give statutory form to the guiding principles of Article 5 Basic Law.

The tool used not only by the Reich but also by the states to gain influence on the broadcasting of programs was primarily the “licenses” - common since 1926 and tied to conditions - for the use of radio transmission facilities of the Reich postal services for the purpose of entertainment broadcasting (“Conditions”), to which were appended guidelines for the news and information service (“Guidelines”) as well as provisions for the Supervisory Committees and the Councils (“Provisions”).

It is only conditionally correct that the influence had by the Reich and the states on the broadcasting of programs served the “political impartiality”, the “organizational neutrality of the transmission companies” and the safeguarding of the right to freedom of expression (Article 118 of the Weimar Constitution) in broadcasting. For this assertion, only no. 1 of the Guidelines can be resorted to, which stated: “Broadcasting shall serve no one party. Its overall news and information service shall therefore be strictly structured in a supra-party fashion” (see also No. 10 of the Provisions for the Council of 1926 and no. 1(c) of the Guidelines on the Revised Regulation of Broadcasting of 1932, reproduced in Pohle, *supra* at pp., 124 et seq.). In all other respects, however, a system of State influence and supervision was established with the aid of the Conditions, which approached censorship.

The programming companies were only allowed to disseminate such political news that they had received from a “News Agency” of the “Wireless Services Corporation for Books and Press” (Drahtloser Dienst AG für Buch und Presse), 51 % of whose shares were held by the Reich (no. 2 of the Guidelines). Only nonpolitical and local news was permitted to be obtained from other agencies. News designated by the News Agency or by the responsible state governments as “priority news” (Auflagenachrichten) had to be disseminated promptly, unabridged and unchanged, as was the case for “priority information” (AuflageVorträge) (nos. 3, 5 and 7 of the Guidelines). The Corporation was required to be constantly informed of the “handling” of the news and information provided by the News Agency (no. 8 of the Guidelines). The Supervisory Committee for the news and information services, which was normally composed of a representative from the Reich and two representatives from the responsible state government, was charged with “deciding on all political issues related to programming” (Article 3.1 of the Conditions). The programming company was obligated “to seek contact with the Supervisory Committee in all political issues of programming and to await its decision” (no. 3 of the Provisions for the Committee). Programs always had to be submitted to its members, and they had to be informed of important program changes. Finally, the Committee had a veto right with regard to all aspects of programming, insofar as not merely issues of art, science or public education were involved (Nos. 5 and 6 of the Provisions). Similar powers were possessed by the Council, whose members were

**60 Years German Basic Law:
The German Constitution and its Court**

appointed, following discussions with the programming company, by the responsible state government in consultation with the Reich Minister of the Interior. The Council was charged with “participating in the structuring of programming with respect to presentations in the area of art, science and public education” (Article 3.2 of the Conditions). The Council also had the right to lodge objections to programming (no. 7 of the Provisions for the Council).

The Supervisory Committees and the Councils were characterized as early as 1927 as “censorship authorities” (Dencker, *Handwörterbuch der Rechtswissenschaft*, vol. 2, 1927, p. 547 [550 seq.]). Doubts were expressed whether this administrative practice was compatible the right to freedom of expression safeguarded by Article 118 of the Weimar Constitution. Häntzschel (*HdbDStR* II, 651 [668]) only considered the censoring activities of the Supervisory Committees to be compatible with Article 118 of the Weimar Constitution because in his view the operation of broadcasting facilities was not a sovereign but rather a fiscal branch of the postal administration aimed at revenues. He stated that broadcasting censorship would be “undoubtedly unconstitutional” if the operation of broadcasting were to be deemed an emanation of a State sovereign right (*id.* at p. 668 n. 38). At the same time, however, there was just as little doubt then as there is today that as of 1926 the legal relations between the Reich postal services and the programming companies were in the nature of public law

(*cf.* the written response of the Reich Minister of the Interior of 2 December 1926 to a resolution of the Reichstag, RT III/1924 Drucks. no. 2776; Neugebauer, *Archiv für Post und Telegraphie* 53 (1925) p. 46 [47]; *id.*, *Fernmelderecht mit Rundfunkrecht*, 3 d ed. 1929, pp. 699 seq.; *id.*, *Archiv für Funkrecht* 3 (1930) pp. 155 [166, 203], 627 [628]; Bredow, *Vier Jahre deutscher Rundfunk*, 1927, p. 20; Freund, *Der deutsche Rundfunk*, 1933, p. 54; Schuster, *Archiv für das Post- und Fernmeldewesen* 1 (1949) p. 309 [314]; Lüders, *Die Zuständigkeit zur Rundfunkgesetzgebung*, 1953, pp. 12 seq.; Peters, *Die Zuständigkeit des Bundes im Rundfunkwesen*, 1954, pp. 6 seq.; Steinmetz, *Bundespost und Rundfunk*, 1959, pp. 11 et seq.).

In this regard, it is irrelevant whether the basis of these public law relations were seen in a “license” or “award” (s. 1 of the Radio Ordinance of 1924; s. 2 FAG) subject to terms (Conditions) permitting the joint operation of transmission facilities (e.g., the Reich Minister of the Interior; Neugebauer, Bredow, Freund and Schuster, *supra*; *cf.* also Article 4.3 of the Conditions) or in public law relations of another kind regulating the practical usage of these facilities, (e.g., Dencker, *supra*; Peters and Steinmetz, *supra*).

Regardless of whether the administrative practice of the Reich postal services and the Reich Minister of the Interior was compatible with Article 118 of the Weimar Constitution, it cannot be ascertained - at least in paying broad regard to the “safeguarding of the official influence on the presentations of broadcasting” (Bredow, *id.* at p. 20) realized with the aid of the Conditions - that this influence served the objective of ensuring the basic right of freedom of expression, including the prohibition of censorship, in the area of broadcasting. The same applies to the possibilities for interference with the various programming companies secured by the Reich via the

**Selected Fundamental Decisions of
the Federal Constitutional Court**

Reich Broadcasting Corporation (cf. Bredow, *supra*, pp. 41 seq.). This cannot be countered with the argument that party-political neutrality in broadcasting may have been achieved to a certain extent.

Thus, the Federal Government improperly relies on administrative practice in the period to 1933 when it asserts that the competence to regulate the telecommunications system enables the Federation to give statutory form to the guiding principles in Article 5 of the Basic Law with regard to broadcasting.

The constitutionality of the administrative practice of the Reich postal services and the Reich Minister of the Interior with regard to broadcasting was furthermore disputed in still other respects as well. The reorganization of broadcasting in 1925-1926 as well as the reform in the summer of 1932 was the result of protracted negotiations between the Reich and the states in the Reich Council and its committees (cf. Bausch, *supra*, at pp. 40 et seq., 91 et seq.). In these negotiations, the states took issue with the Reich regarding the latter's competence to regulate the broadcasting system; they particularly objected to the efforts to gain political influence over programming, which were initiated not by the Reich postal services but rather by the Reich Minister of the Interior. The differences of opinion between the Reich and the states were not carried out. Instead, agreement was reached on compromises that provided the states with a not insignificant amount of influence on the broadcasting of programs. Nevertheless, in 1926 and in 1932 the states contested the comprehensive powers claimed by the Reich and emphasized that on the basis of their police and cultural sovereignty, they had the right to regulate broadcasting on their own (cf. Bausch, *supra*, pp. 55, 102 seq., 199 seq.). In view of these fundamental differences of opinion between the Reich and the states, it is not possible to refer to a "supplement to the Constitution arising by way of custom" in the sense of a Reich competence (e.g., Scheuner, *Expert Opinion*, p. 47).

It must finally be added that the "official influence on the presentations of broadcasting" (Bredow, *supra*) did not emanate from the Reich Postal Minister and the Reich postal services but rather from the Reich Minister of the Interior and the state governments. Schuster (*supra*, p. 320) correctly emphasized that before and after 1933, "the Reich postal services never had anything to do with the programming side but rather . . . limited itself to the technical side of broadcasting". This is confirmed by the fact that "broadcasting law" was only assigned to the area of telecommunications law insofar as it regulated the technical side of broadcasting (cf. Krause, *Die Zuständigkeit zur Ordnung des Rundfunkwesens in der Bundesrepublik Deutschland*, 1960, pp. 80 et seq., in particular, the statements cited there by Ministerial Advisor Dr. Neugebauer in the Reich Postal Ministry).

In all, it therefore cannot be assumed that the administrative practice of the Reich postal services, the Reich Minister of the Interior and the state governments up to 1933 gave rise to a legal term "telecommunications system" covering broadcasting as a whole, which the drafters of the Basic Law could then have adopted.

- c) The period from 1933 to 1945 must be left out of consideration. The development of broadcasting in the years 1945 to 1949 is unable to contribute to the establishment of a term "telecommunications system" covering broadcasting as a whole.

**60 Years German Basic Law:
The German Constitution and its Court**

- d) The historical background of Article 73 no. 7 of the Basic Law confirms that the telecommunications system does not cover broadcasting as a whole. It can only be unambiguously drawn from the negotiations in the Parliamentary Council that, on the one hand, in contrast to the proposal of the Constitutional Convention at Herrenchiemsee (Report, Descriptive Part, p. 32), the technical side of broadcasting was assigned to the telecommunications system and that, on the other hand, the “cultural side”, i.e., the contents of the programs, was to be a matter for the states. The question of whether the organization of the broadcasting system was also to belong to the telecommunications system remained open, without any distinctions having been made between the organization of transmission related processes and the organization of the broadcasting of programs. The materials do not evidence an even remotely clear response to this question

(for the historical background, cf. JÖR 1 (1951), pp. 476 seq.; ParlRat, Ausschuß für Zuständigkeitsabgrenzung, Wortprotokoll über die 2. Sitzung am 22. September 1948, pp. 48, 4452; Wortprotokoll über die 8. Sitzung am 6. Oktober 1948, pp. 3033; Wortprotokoll über die 12. Sitzung am 14. Oktober 1948, pp. 37-40; Verhandlungen des Hauptausschusses, 29. Sitzung am 5. Januar 1949, pp. 351 seq.).

Since the Parliamentary Council did not assign the “cultural side”, i.e., programming, to the telecommunications system but rather viewed this as a matter for the states, then this precludes the assumption that it adopted in the Basic Law a term “telecommunications system” that covers broadcasting as a whole. The statutory regulations permitted or prescribed under Article 5 of the Basic Law mainly have to do with the contents of programs, i.e., - in the language of the Parliamentary Council - the “cultural side” of broadcasting. In accordance with its unambiguous will, such regulations were not to be assigned to the telecommunications system.

6. The competence to regulate the telecommunications system under Article 73 no. 7 of the Basic Law is thus limited to transmission related matters.

- a) The Federation is not entitled to farther-reaching legislative powers for broadcasting, not even by virtue of the context of the subject matter (cf. BVerfGE 3, 407 [421]; BVerfGE 8, 143 [149]). Neither studio technology nor the issue related to the broadcasting of programs entail that the regulation of these - to the extent that it is possible and required - is an indispensable prerequisite for the regulation of transmission related matters of broadcasting (cf. BVerfGE 3, 407 [421]). Transmission technology and the broadcasting of programs are areas that can be separated and regulated individually. To this extent, “broadcasting” is not a whole that can only be sensibly regulated uniformly by the Federation.
- b) To the extent that the Federation can regulate matters of broadcasting under Article 73 no. 7 of the Basic Law, it may also create statutory rules regarding its “organization”. In other words, the Federation has the authority to enact rules on the organization (the operators) of broadcasting transmission facilities. It may be left aside whether the Federation’s legislative competence here is derived from Article 73 no. 7 of the Basic Law directly or by virtue of the interrelated context or whether - to the

**Selected Fundamental Decisions of
the Federal Constitutional Court**

extent that administration is at issue - from Articles 83 et seq. of the Basic Law. The Federation thus might, for instance, establish by law institutions of public law with legal personality, to which could be transferred the construction and transmission related operation of federally owned facilities for broadcasting (Article 87.3 of the Basic Law).

However, the Federation may only enact organizational rules for such institutions that are limited to the establishment and technical operation of transmission facilities (but see *infra* III 1 and E I 5). Organizational regulations for the broadcaster and for the broadcasting of programs are the province of the state legislature. Such regulations have - on account of Article 5 of the Basic Law - much greater significance than provisions on the organization of establishment and technical operation of transmission facilities. To the extent that provisions of an organizational nature have to be enacted for institutions responsible for both the broadcasting of programs and the operation of transmission facilities, the competence for transmission related affairs thus rests with the state legislature by virtue of the contextual interrelationship.

- c) Authority to regulate broadcasting going beyond the area of transmission related matters is also not available to the Federation under Article 73 no. 7 of the Basic Law simply because “awards” under s. 2 FAG to establish and operate radio facilities and contracts on the use of such facilities have to be made subject to terms (conditions) with respect to the organization of the broadcasting of programs and the contents of programs in order to safeguard Article 5 in conjunction with Article 1.3 of the Basic Law (cf. the Reasoning accompanying the Government’s draft of an Act on Broadcasting, BT III/1957 Drucks. 1434). If the competence for the telecommunications system with regard to broadcasting is limited to transmission related matters, then the Bundespost is required in making such awards and contracts to give sole consideration to transmission related aspects (see *infra* E I 4). “Terms” extending beyond this area would be impermissible.

7. a) The Federation’s legislative competence for the telecommunications system also permits regulations that reserve for the Federation the exclusive right to establish and operate radio facilities for the purpose of broadcasting. The radio monopoly of the Reich provided for in the 1928 Act on Telecommunications Facilities can be traced back to the monopoly over telegraphy and, ultimately, to the monopoly over postal services

(cf. s. 1 of the Act on the Telegraph System of the German Reich of 6 April 1892 [RGBl., p. 467], and the Amending Act to the latter of 7 March 1908 [RGBl., p. 79], as well as the Radio Ordinance of 1924; cf. also Krüger, *supra* pp. 5 et seq.).

In this regard, the Basic Law did nothing to change the traditional competence of the Reich. To the extent that its regulations are relevant, s. 1 FAG has thus become federal law.

Article 5 of the Basic Law does not oppose this, since, in contrast to the assertion of the Applicants, it does not require that the broadcasters of programs also control the transmission related facilities and that they must be able to operate these facilities themselves (see *infra* E III).

**60 Years German Basic Law:
The German Constitution and its Court**

b) Nevertheless, the Federation must observe the principle of action for the benefit of the Federation (cf. BVerfGE 4, 115 [140]; BVerfGE 6, 309 [361 seq.]; BVerfGE 8, 122 [138 et seq.]; infra E II). This principle would be violated if the Federation were today to rely on its radio monopoly and make use of its authority to regulate the telecommunications system so as to deprive the existing public broadcasting companies of the right to exercise control over the transmission facilities owned and operated by them. The same would apply if the Federation were to divest these companies by statutory regulation of the frequencies they use and then, in allocating frequencies available now or in the future, not to give them appropriate consideration pursuant to the state regulations on the broadcasters of programs.

8. Thus, under Article 73 no. 7 of the Basic Law, the Federation has the authority to regulate the establishment and operation of broadcasting transmission facilities. s. 3.1 of the Interstate Treaty falls in the area of this sole legislative competence of the Federation insofar as it reserves for the Norddeutschen Rundfunk the exclusive right to establish and operate such transmission facilities. To this extent, s. 3.1 of the Interstate Treaty is incompatible with Article 73 no. 7 of the Basic Law in conjunction with Article 71 of the Basic Law and therefore null and void. Insofar as s. 3.1 of the Interstate Treaty reserves for the Norddeutschen Rundfunk the exclusive right to broadcast programs, it is compatible with Article 73 no. 7 of the Basic Law.

S. 3.1 of the Interstate Treaty regulates only the establishment and operation of transmission facilities, as well as the broadcasting of programs, but not their reception. It may therefore be left unresolved whether and to what extent the Federation may enact regulations on broadcasting reception facilities and on the fees for the operation of such facilities and how these fees are to be legally qualified.

III.

The granting of the exclusive right to broadcast programs to the Norddeutschen Rundfunk does not conflict with the Federation's legislative powers for broadcasting that might result from provisions of the Basic Law other than Article 73 no. 7 of the Basic Law.

1. Provisions of this variety might include, for example, Article 21.3 of the Basic Law (rights of political parties), Article 73 no. 1, of the Basic Law (defence and protection of the civilian population), Article 73 no. 9 of the Basic Law (industrial property rights), Article 73 no. 10 of the Basic Law (*inter alia*, international control of crime), as well as Article 74 no. 21 of the Basic Law (*inter alia*, ocean and coastal shipping, inland navigation, inland waterways, meteorological services) and Article 74 no. 22 of the Basic Law (road traffic). These Federation competences merely permit the regulation of partial aspects of programming (particularly, the allocation of transmission times to political parties and the broadcasting of certain announcements) or various legal questions of broadcasting (e.g., in the nature of copyright). Further Federation competences might be inferred by virtue of contextual interrelationships from its responsibilities, e.g., for national defence, customs and matters of the Federal Office of Criminal Investigations. All of these federal competences, however, do not - even when seen as a whole - engender any legislative powers to regulate the broadcasting of programs. In other words, they do not affect the monopoly of the Norddeutschen Rundfunk provided for under state law, regardless of its

Selected Fundamental Decisions of the Federal Constitutional Court

obligation to observe individual federal regulations. In this regard, it may be left aside to what degree these federal legislative powers have to do exclusive competences and to what extent the Federation has made use of its competences in the area of concurrent legislation.

2. It may remain left aside whether the Federation's responsibilities for foreign affairs and for pan-German issues likewise only permit the regulation of partial aspects of programming and individual issues of broadcasting or whether these responsibilities reach further and allow the Federation to enact regulations for such programs intended for broadcast abroad or for Germans resident in German territories outside the Federal Republic of Germany. It may also be left unresolved whether on account of its responsibilities for foreign affairs and pan-German issues, the Federation may establish by law a superior federal authority or an institution of public law for broadcasting programs and also to set down by statute for this authority or institution the guiding principles resulting from Article 5 Basic Law for the broadcasting and broadcasters of programs. Such broad Federation competences, which are not to be decided upon in the instant proceedings, would only relate to the broadcasting and broadcasters of such programs that are solely or predominantly intended for broadcast abroad or for Germans outside the Federal Republic of Germany.

By way of s. 3.1 of the Interstate Treaty, the Norddeutschen Rundfunk has been reserved the exclusive right to broadcast programs "for the general public". By this is meant - if not exclusively, then at least primarily - "the general public" of the Federal Republic of Germany. The monopoly granted to the Norddeutschen Rundfunk thus may not conflict with the competences that the Federation might have regarding the regulation of programs specifically intended for broadcast abroad or for Germans outside the Federal Republic of Germany.

3. The Federation cannot derive any responsibilities from Article 5 Basic Law. Article 5 of the Basic Law is not a norm describing competences but rather binds that authority entrusted with the regulation of the broadcasting of programs.

IV.

In contrast to the assertion of the Federal Government, the Federation does not have any authority flowing from the nature of the matter to regulate by law the broadcasting of programs intended to serve the supra-regional function of national representation within the country, i.e., the self-depiction of the nation before the population of the Federal Republic of Germany. The Federation is endowed with just as little corresponding administrative competences. It is also unable under Article 87.3 of the Basic Law to establish by law for this purpose a superior federal authority or an institution of public law (see *infra* E I 6). It therefore requires no review whether this might involve exclusive Federation legislative powers or whether the monopoly provided by s. 3.1 of the Interstate Treaty to the Norddeutschen Rundfunk to broadcast programs would be compatible with such federal competence.

V.

The exclusive right of the Norddeutschen Rundfunk to broadcast programs also does not conflict with Article 5 of the Basic Law (see *infra* E III).

VI.

Thus, the Hamburg Act relating to the Interstate Treaty on the Norddeutschen Rundfunk is, insofar as it refers to s. 3.1 of the Interstate Treaty, only incompatible with the Basic Law and therefore null and void to the extent that it reserves for the Norddeutschen Rundfunk the exclusive right to establish and operate transmission facilities for radio and television.

In all other respects, the Act is compatible with the Basic Law to the extent that it refers to s. 3.1 of the Interstate Treaty.

E.

I.

By way of the founding of the Deutschland-Fernsehen-GmbH, the Federation violated Article 30 in conjunction with Articles 83 et seq. of the Basic Law. In accordance with the development of German law, broadcasting is a public function. When the State exercises this function in some form, it becomes a “State function” whose fulfilment under Article 30 of the Basic Law is a matter for the states, insofar as the Basic Law has not prescribed or permitted otherwise. The Basic Law has not prescribed or permitted otherwise in favour of the Federation with regard to the broadcasting of programs (but see *infra* 5).

1. a) It may be left aside whether the provision of Article 30 of the Basic Law, which is fundamental for the federal structure of our constitutional order, covers every State activity whatsoever. In any case, falling under this competence-establishing norm is that activity by the State serving the fulfilment of public functions, regardless of whether the means of public law or private law are resorted to. Any other interpretation would, particularly in view of the growing scope of non-intervening public administration, not do justice to the meaning of Article 30 of the Basic Law. It would also conflict with the historical background of this provision (cf. JÖR 1 (1951) p. 295 et seq.; the comments by Representative Dr. Laforet, Parl.Rat., Ausschluß für Zuständigkeitsabgrenzung, Wortprotokoll über die 5. Sitzung am 29. September 1948, pp. 124, 127 seq., 135, and the remarks by Representative Dr. Hoch, *id.* at pp. 129, 138, 145; cf. also Parl.Rat. Verhandlungen des Hauptausschusses, 48. Sitzung am 9. Februar 1949, p. 626).
- b) The broadcasting of programs has since 1926 traditionally belonged in Germany to the functions of public administration. Decisive for the inclusion of broadcasting in the area of public administration was the fact that “broadcasting was and is a means of publication and a carrier of news and information of the first order” and that it “operated in the political sector” (cf. Hans Schneider, Expert Opinion, p. 8). The fact that some of the presentations of broadcasting may have been termed “free personal activity” that do not exhibit “any internal relationship to public functions” (cf. Scheuner, Expert Opinion, p. 21) has since then only played a minor role in the legal relations between the State and broadcasting. Ever since the origins of broadcasting, dissemination of news in the broadest sense (cf. Hans Schneider, *supra*) prompted, and was used to justify, the inclusion of the broadcasting of programs in the sphere of public functions.

Selected Fundamental Decisions of the Federal Constitutional Court

This is not contradicted by the fact that under the Weimar Constitution, programs were broadcast by companies organized under private law. Controlling in this regard was not the view that the broadcasting of programs was a matter of private commercial activity but rather, *inter alia*, the fact that the Reich postal services lacked as a result of inflation the resources to undertake this function itself (cf. Bredow, *supra*, pp. 12, 19; Bausch, *supra*, p. 19). However, the Reich postal services made an effort to obtain voting majorities in the organs of the broadcasting companies while forgoing financial investments. In 1926 it succeeded in achieving this objective (cf. Bredow, *supra*, pp. 29 seq.; Pohle, *supra*, pp. 39 seq., 48 seq.; Bausch, *supra*, pp. 31 et seq., 58). By way of the reform in 1932, private capital was completely expelled; all shares in the Reich broadcasting corporation and in the regional programming companies that were still privately owned were transferred to the Reich and the states (cf. Pohle, *supra*, pp. 124 et seq.; Bausch, *supra*, pp. 90 et seq.).

It is irrelevant in this context whether the responsibilities claimed by the Reich were compatible with the allocation of competences between the Reich and the states and whether the influence on broadcasting exercised by the Reich and the states (see *supra* D II 5) was compatible with the right of freedom of expression and the prohibition of censorship (Article 118 of the Weimar Constitution). Of sole importance here is that this exercising of influence can only be understood as the result of the view that the broadcasting of programs does not belong simply in the public sector but rather in that of public functions.

The period between 1933 and 1945 must also be left out of consideration here. Following 1945, the view of broadcasting as a public function became even more deeply rooted in that institutions of public law were established as broadcasters of programs. In addition, the Federal Act of 29 November 1960 established two public institutions, and the draft of this Act provided such an institution for the second television channel. The functions fulfilled by the broadcasting institutions of public law belong to the area of public administration (BVerfGE 7, 99 [104]).

- c) In summary, it can be stated that broadcasting in Germany has become a public service under public responsibility. When the State concerns itself with broadcasting in some form, it thus exercises a function of public administration.

Similar in result: Superior Administrative Court of Hamburg, Decision of 10 July 1956, III 11/56 - DVBl. 1957, 67 [68]; Ipsen, *Die Rundfunkgebühr*, 2 d ed. 1958, pp. 40 seq.; Krause, *supra*, pp. 106 et seq.; Krüger, *supra*, pp. 16, 78; Maunz, *BayVwBl.* 1957, 4 [5]; Quaritsch, *JIR* 8 (1957/1958) p. 339 [341 seq.]; Weber, in *Der Rundfunk im politischen und geistigen Raum des Volkes*, p. 67; Ridder, *Kirche, Staat, Rundfunk*, 1958, pp. 42 seq.; but see Superior State Court of Munich, Decision of 24 October 1957 - 6 U 1010/57 - *NJW* 1958, 1298 [1299 seq.]; Aspelt, *Festschrift für Nawiasky*, 1956, p. 375 [381]; Peters, *supra*, p. 33.

Thus, in contrast to the view of the Federal Government, the broadcasting of programs as a function of public administration is covered by the delineation of competences between the Federation and the states (Article 30 of the Basic Law), even in those cases in which the State, as here, has resorted to forms of private law.

**60 Years German Basic Law:
The German Constitution and its Court**

2. The Federal Government has asserted that the fulfilment of functions of public administration with the means of private law is only covered by Article 30 of the Basic Law when this involves the implementation of laws. Because the founding of the Deutschland-Fernsehen-GmbH is allegedly not implementation of law, Article 30 of the Basic Law does not come into play.

However, Article 30 of the Basic Law applies both to the fulfilment of public functions pursuant to law and to that outside the law. This result is compelled by the relationship of Article 30 of the Basic Law to Section VIII of the Basic Law (Articles 83-91 of the Basic Law) and by the fact that this Section has to do with federal administration in that the latter is administration outside the law.

Articles 83 to 86 Basic Law deal with the implementation of federal laws on account of the separation of competence peculiar to German federalist law to enact and implement federal laws. The contrasting of the “implementation of federal laws” and the “federal administration” in the heading to Section VIII would, however, be incomprehensible if the following articles were merely to cover administration pursuant to law. The areas of federal administration listed in Articles 87 to 90 Basic Law and particularly in Article 87.1 of the Basic Law are to a great extent administered outside the law. That applies to the Foreign Services, the Federal Railways and the Bundespost as well as to the administration of the federal highways, federal roadways and federal waterways. Articles 87.1, 89 and 90 of the Basic Law are not limited to according the Federation, in addition to the competence to implement laws, the power to maintain federal administrative structures (cf., in particular, Article 89.2 sentence 2 and Article 87b.1 sentence 2 of the Basic Law, in which the functions of federal administration are detailed). Articles 83 et seq. of the Basic Law thus also regulate federal administration not dealing with the implementation of laws see Laforet, DÖV 1949, 221 et seq.; Nawiasky, Die Grundgedanken des Grundgesetzes, 1950, p. 122; Peters, Festschrift für Erich Kaufmann, 1950, p. 281 [290]; Hans Schneider, Expert Opinion, pp. 18 seq., 36; but see Köttgen, JÖR 3 [1954], p. 67 [73, 78, 80].

But if Section VIII of the Basic Law also deals with federal administration outside of the law, then this means - as was not misinterpreted by the Federal Government - that the principle underlying Article 30 of the Basic Law also applies to this administration. The founding of the Deutschland-Fernsehen-GmbH is thus to be evaluated under Article 30 of the Basic Law, even though it was not undertaken in implementation of a law.

3. The Federal Government asserts that the principle behind Article 30 of the Basic Law - basic jurisdiction of the states - is only restated in Section VIII of the Basic Law in Article 83 of the Basic Law and in that provision, only for administration in implementation of law; this is said to justify the conclusion that the priority of the states (Article 30 of the Basic Law) does not apply to administration outside the law. Section VIII of the Basic Law is alleged to have generally prescribed “otherwise” within the meaning of Article 30 of the Basic Law for this administration.

However, one must look not only at Article 83 of the Basic Law is evaluating the relationship between Section VIII of the Basic Law and Article 30 of the Basic Law. This Section does not merely regulate federal administration in implementation of law but rather also, as explained, that outside the law. For the latter as well, this Section has prescribed “otherwise”

**Selected Fundamental Decisions of
the Federal Constitutional Court**

within the meaning of Article 30 of the Basic Law. Section VIII thus does not in general prescribe “otherwise” with regard to administration outside the law in such a way that it is exempted from the priority of the states set down in Article 30 of the Basic Law.

4. a) The words “postal and telecommunications system” in Article 73 no. 7 of the Basic Law and “Bundespost” in Article 87.1 of the Basic Law describe the same area (see supra D II 3 c). Under Article 73 no. 7 of the Basic Law, the Federation may regulate the establishment and technical operation of broadcasting transmission facilities (see supra D II 2, 3, 4, 6, 7, 8). Similarly, under Article 87.1 of the Basic Law, the Bundespost may also itself establish and operate such facilities. Thus, the Federation has not violated Article 30 in conjunction with Articles 83 seq. of the Basic Law by way of the construction of postal-owned transmitters designed to serve the broadcasting of a second television channel (see supra A III 1).
- b) The broadcasting of programs, on the other hand, does not belong to the “postal and telecommunications system” within the meaning of Article 73 no. 7 of the Basic Law (see supra D II). Although Article 87.1 of the Basic Law provides that the “Bundespost” is to be managed as federal administration, the Basic Law has not prescribed “otherwise” within the meaning of Article 30 of the Basic Law. The founding of the Deutschland-Fernsehen-GmbH is therefore not covered by Article 87.1 of the Basic Law either directly or by virtue of the contextual interrelationship (cf. supra D II 6).
- c) The competence to regulate the postal and telecommunications system does not cover the authority to set down by statute the guiding principles prescribed or permitted by Article 5 of the Basic Law from a substantive or organizational standpoint for the broadcasting and broadcasters of programs (see supra D II, in particular, 3, 5, 6; D III). This means that the Federation may not make awards under s. 2 FAG and contracts regarding the use of federally owned broadcasting facilities dependent on “terms” going beyond the area of transmission related affairs.

In contrast to the view of the Federal Government, farther-reaching administrative competences are also not available to the Federation on account of Article 1.3 of the Basic Law. This provision is just as unable to be considered a competence-establishing norm as Article 5 Basic Law. Pursuant to their responsibilities as delineated by the Basic Law, the Federation and the states are called upon to safeguard basic rights. The states are responsible for ensuring “freedom of broadcasting”. In this regard, the Federation’s possibilities for action are limited to those granted to it by the Basic Law for the event that a state fails to observe the Basic Law.

- d) Legislative and administrative competence for the broadcasting of programs thus rests with the states. The transmission facilities needed for broadcasting programming are subject to the Federation’s legislative competence (but see supra D II 6, 7). Under Article 87.1 of the Basic Law, the Federation is also endowed with corresponding administrative powers and is particularly responsible for the allocation of frequencies to the transmitters; however, it may only undertake this allocation and the conclusion of contracts regarding the use of federally owned transmission facilities from transmission

**60 Years German Basic Law:
The German Constitution and its Court**

related aspects. With respect to the cooperation between the Federation and the states required for this, the principle of action for the benefit of the Federation must be controlling. This also applies to the area of so-called “cable technology”.

It would not be compatible with the principle of action for the benefit of the Federation (cf. *infra* II) if the Federation were to divest these companies of the frequencies they use and then, in allocating frequencies available now or in the future, not to give them appropriate consideration pursuant to the state regulations on the broadcasters of programs. The same would apply were it to rely on its radio monopoly and make use of its administrative powers in such a way as to deprive these companies of the right of control over the transmission facilities owned and operated by them.

5. The founding of the Deutschland-Fernsehen-GmbH is not compatible with Article 30 and Articles 83 et seq. Basic Law simply because the Basic Law prescribes or permits in Article 87.1 of the Basic Law federal administrative competences for foreign affairs and pan-German issues.

It may remain unresolved to what extent the Federation is entitled to administrative competences under this aspect with regard to the broadcasting of programs. These would not extend any further than the legislative powers (see *supra* D III 2). They could at best justify the creation of institutions to transmit programs solely or predominantly intended for broadcast abroad or for Germans resident in German territories outside the Federal Republic of Germany. The fact that the Deutschland-Fernsehen-GmbH is not solely or predominantly to serve such purposes requires no explanation.

6. a) Finally, the founding of the Deutschland-Fernsehen-GmbH can also not be justified from the standpoint of Article 30 and Articles 83 et seq. of the Basic Law with the argument that the broadcasting of programs is a “supra-regional” function or that the Basic Law has permitted the broadcasting by the Federation of such programs that are to serve national representation within the country. In accordance with the nature of the matter, the Federation has no administrative or legislative competences in this area.
- b) Competence in accordance with the nature of the matter is established under the “unwritten principle, which is established by the essence of things and thus not in need of express recognition by the Reich Constitution, that certain areas can be regulated by the Reich and only by the Reich because they represent by their nature matters peculiar to the Reich and a priori removed of specific legislative competence” (Anschütz, *HdbDStR* I, 367; see *BVerfGE* 11, 89 [98 seq.], *BVerfGE* 11, 6 [17]). These prerequisites for the recognition of natural federal competence continue to apply today. Conclusions from the nature of the matter must conform to this term and compel a certain solution that excludes a solution appropriate to other possibilities (*BVerfGE* 11, 89 [99]).

This is not the case here.

- c) Frequencies do not respect state boundaries. To this extent, the broadcasting of programs displays effects that may be termed “supra-regional”. This physical “supra-regionalness” is, however, not capable of establishing natural federal responsibility.

Selected Fundamental Decisions of the Federal Constitutional Court

The broadcasting of programs, particularly television programs, requires substantial financial investment. For this reason, the first television channel is, as currently broadcast, predominantly a cooperative channel, to which all broadcasting companies contribute. The high costs required for producing full television programming would exceed the financial possibilities of individual companies. One may therefore speak of a financially conditioned “supra-regionalness” in the broadcasting of television programs. However, the exceeding of regional financial resources cannot justify the assumption that in accordance with the nature of the matter, the Federation has responsibility (cf. Köttingen, *Die Kulturpflege und der Bund*, in: *Staats- und Verwaltungswissenschaftliche Beiträge*, 1957 p. 183 [191]).

It is also not possible to derive natural federal jurisdiction from the fact that a function (e.g. the broadcasting of television programming) is not performed by each state (the particular broadcasting company) separately but rather by the states (the broadcasting companies) jointly or pursuant to specific agreement. The fact that the joint or coordinated fulfilment of a function by the states (the broadcasting companies) is, regardless of what the motives might be for cooperative work, in and of itself no reason that could justify natural federal jurisdiction. For a federal State, it is a decisive difference whether the states agree or whether the Federation can regulate and administer by law an affair even against the will of the states.

- d) The necessity of national representation within the country, i.e. the self-depiction of the nation before the population of the Federal Republic of Germany, is just as unable to give rise to natural federal competence to broadcast programs as the requirement of safeguarding continuity of tradition.

It is certainly necessary that these matters be supported by the State. However, it is also unmistakable that with these, functions are designated that are unable to be defined more specifically. There are many institutions and presentations of a cultural nature that are intended to serve national representation within the country. Above all, the entire educational system can be understood as the safeguarding of continuity of tradition.

With regard to the furtherance of these functions by way of broadcast programs, controlling is the delineation of the jurisdictions of the Federation and the states by the Basic Law. From the nature of the matter, the Federation would only have jurisdiction to broadcast such programs when these involved affairs of the Federation that from the outset are removed from the jurisdiction of the states and that can thus only be handled by it. This is not the case here. It does not necessarily follow from the nature of the function of “national representation within the country” and “safeguarding continuity of tradition” that the support of these by broadcast programs of the Federation is compelled (cf. BVerfGE 11, 89 [98 seq.]). This is all the more so in that the Federation’s exercise of influence on the content of programs, without which their “national representative” and tradition supporting character would be difficult to achieve, would be subject to narrow boundaries by Article 5 Basic Law.

- e) Article 135.4 Basic Law, which, in the event of an “overriding interest of the Federation”, permits a divergence from the passage of property regulated in Article 135.1-3 of the Basic Law (cf. BVerfGE 10, 20 [36 seq.]), cannot be used to support

**60 Years German Basic Law:
The German Constitution and its Court**

the position of the Federal Government. Article 135.4 Basic Law contains a “special competence” that can be used by the Federation in establishing direct federal administration without its being bound by the requirements of Article 87.3 sentence 1 of the Basic Law (legislative competences of the Federation) (BVerfGE 10, 20 [45]). This provision is intended to enable the Federation to restore the “organical frame work of collections and libraries of national importance which have been torn apart during war times.” (BVerfGE 10, 20 [47]). For instance, only on the basis of the competence granted it under Article 135.4 of the Basic Law was the Federal legislature also able to transfer to the “Prussian Cultural Holdings” Foundation (Act of 25 July 1957, BGBl. I, p. 841) the future administration of Prussian cultural holdings (BVerfGE 10, 20 [45 seq.]). Article 135.4 is a special provision. This rule would be superfluous if the Federation were endowed under other provisions of the Basic Law with the authority to assume responsibility for national representation and the maintenance of tradition.

The founding of the Deutschland-Fernsehen-GmbH thus falls under Article 30 Basic Law. The Basic Law has, within the meaning of this provision, neither prescribed nor permitted “otherwise” in favour of the Federation so as to enable this. Thus, the founding of the Deutschland-Fernsehen-GmbH violates Article 30 in conjunction with Articles 83 et seq. of the Basic Law.

II.

In the German Federal State, all constitutional relations between the overall State and its component parts, as well as the constitutional relations between the component parts, are dominated by the unwritten constitutional principle of the reciprocal duty on the Federation and the states to act for the benefit of the Federation (cf. Smend, *Ungeschriebenes Verfassungsrecht im monarchischen Bundesstaat*, Festgabe für Otto Mayer, 1916, pp. 247 et seq.). The Federal Constitutional Court has developed from this a number of specific legal duties. With regard to its deliberations on the constitutionality of the so-called horizontal equalization of financial burdens, the Court said: “The essence of the federalist principle does not merely establish rights but also duties. One of these duties is that the financially powerful states are, to a certain extent, to provide assistance to the financially weaker states” (BVerfGE 1, 117 [131]). In cases in which the law calls for cooperation between the Federation and the states, this constitutional principle may also establish a stronger duty on the participants to take part and result in the situation where an immaterial objection by one of the participants that conflicts with universal cooperation is legally irrelevant (BVerfGE 1, 299 [315 seq.]). In making decisions with regard to the granting of Christmas bonuses to public employees, the states must maintain federal allegiance and therefore pay regard to the overall financial structure of the Federation and the states (BVerfGE 3, 52 [57]). This legal barrier following from the concept of federal allegiance becomes even more apparent in the exercising of legislative powers: “If the effects of a statutory rule do not remain limited to the territory of a state, the state legislature must pay regard to the interests of the Federation and the remaining states” (BVerfGE 4, 115 [140]). The constitutional principle of the duty to act for the benefit of the Federation can also give rise to the duty on the states to respect international treaties of the Federation (BVerfGE 6, 309 [328, 361 seq.]). Finally, under certain circumstances, a state may be obligated with respect to its duty of federal allegiance to take action pursuant to municipal supervision against communities that interfere with their

**Selected Fundamental Decisions of
the Federal Constitutional Court**

measures with exclusive federal competence (BVerfGE 8, 122 [138 et seq.]). Similarly, with regard to the exercise of federal competences in the area of broadcasting, fundamental significance is, as explained above (cf. supra I 4 d and D II 7 b), attributed to the principle of action for the benefit of the Federation.

It is evident from previous holdings that this principle both gives rise to additional, specific duties on the states as against the Federation that go beyond those expressly set forth in the Constitution and additional duties on the Federation as against the states and results in specific limitations on the exercise of powers provided in the Basic Law to the Federation and the states.

The instant case provides an invitation to develop further the constitutional principle of action for the benefit of the Federation in yet another direction: The procedure and style of the negotiations that become necessary under the Constitution between the Federation and its components parts or between the states also are subject to the requirement of action for the benefit of the Federation. In the Federal Republic of Germany, all states have the same constitutional status; they are States that are entitled to equal treatment in transactions with the Federation. Whenever the Federation seeks a constitutionally relevant agreement on an issue under the Constitution that interests and affects all states, this duty of action for the benefit of the Federation prohibits it from operating according to the principle of *divide et impera*, i.e., to work toward a division of the states, to seek an agreement only with some of them and put pressure on others to accede to it. This principle also prohibits the Federal Government from treating state governments differently in negotiations affecting all states depending on their political composition; in particular, in the politically decisive deliberations, it may not invite only representatives of the state governments with similar political convictions and exclude the state governments siding with the opposition on the federal level. In cases such as these, politicians at the federal and state level belonging to any given party initially have the right in political meetings to clarify and coordinate with one another their positions regarding the solution of the problem of interest to the Federation and the states and then to agree during negotiations between the Federation and the states on further, joint steps. The necessary negotiations between the Federation and the states, i.e. between the governments and their speakers, must also, however, conform with the above-described principles.

The protracted efforts to agree on a new regulation of the broadcasting system entered a new stage when at the start of 1958 the Federal Government proposed federal regulation. After the draft of a federal act had been repeatedly discussed during 1959 with representative of the states, the states agreed in January 1960 to set up a four-member Commission, to be composed of two Christian-Democrat and two Social-Democrat members of state governments; it was to take up the negotiations with the Federation on the part of the state governments. However, this Commission was never invited by the Federal Government to take part in the negotiations. Only one of its members, the Minister-President of the Rhineland-Palatinate belong to the Christian-Democrat Union, took part in a number of discussions - not in this capacity but rather as member of his party - between politicians and representatives of the Christian-Democrat and Christian-Socialist Union, which also included members of the Federal Government (cf. the letter of the Minister-President of the Rhineland-Palatinate to Federal Minister Dr. Schröder of 17 November 1960). Insofar as the participants in these discussions came to pertinent agreements, he took it upon himself to inform this Commission and the remaining state governments.

**60 Years German Basic Law:
The German Constitution and its Court**

Proposals and plans were developed and formulated during these meetings, but they were not made the subject of negotiations by the Federal Government with the state governments or with the Commission set up by them. This particularly applies to the idea, first proposed in one of these talks on 8 July 1960, to establish a corporation with limited liability, to be founded by the Federation and the states for the broadcast of a second television channel, as well as - likewise discussed in a meeting of 15 July 1960 attended solely by politicians of the Christian-Democrat and Christian-Socialist Union - to the draft of articles of incorporation, which were to be signed on 25 July 1960. The fact that the state governments headed by Social-Democrat Minister-Presidents were informed of these plans by the Minister-President of the Rhineland-Palatinate by way of letter of 16 July 1960 and invited by him to a meeting with the other Minister-Presidents to discuss these plans on 22 July 1960 did not relieve the Federal Government of its obligation to negotiate directly with all state governments on the plan proposed by it. Its failure to do so violated the duty to act for the benefit of the Federation.

However, also the way in which the states were treated by the Federal Government in the last days before the founding of the Corporation by the Federal Government is incompatible with this duty. The Federal Government knew that the Minister-Presidents of the states first received on 22 July 1960 the opportunity to discuss in their official capacity the plan to establish a corporation composed by the Federation and the states to broadcast a second television channel. The Minister-Presidents, including those belonging to the Christian-Democrat and Christian-Socialist Union, did not accept the Federal Government's proposal without reservation but rather made counter-proposals. The Federal Government was informed of the results of these meetings by way of letter of 22 July 1960. Nevertheless, the Federal Government insisted that the articles of incorporation be signed on 25 July 1960 in the form it had provided. The Federal Government's letter bears the date 23 July 1960, was posted in Bonn on 24 July 1960 at 5:00 p.m. and received by the addressee, the Minister-President of the Rhineland-Palatinate, on 25 July 1960 at 4:15 p.m., i.e., at a time when the articles of incorporation had already been signed and notarized (cf. the letter of the Minister-President of the Rhineland-Palatinate of 17 November 1960). Such a procedure is simply incompatible with the requirement of action for the benefit of the Federation - even though the Federal Government may have had reason to be annoyed at the persistent opposition of the states or several state governments. It is irrelevant here whether the Federal Government considered the negotiations with the states to have failed and whether it was able to pursue the, in its view, constitutionally permissible course of founding the Corporation without the participation of the states; rather, the point is that each state government, as the constitutional organ of a component State of the Federal Republic of Germany, was able to expect the Federal Government would not respond to the states' counter-proposals, which can be considered a new plan, with a *fait accompli* - and this within an unreasonably short period.

Finally, the duty to act for the benefit of the Federation is contravened by the way in which the Corporation was founded. Again, it is irrelevant whether the Federal Government was able to implement the plan to found the Corporation, which in its view was constitutionally unobjectionable. One may conceive of situations in which the Federation founds a corporation in the interest of the states, whose shareholders include, in addition to the Federation, a "trustee" for the states. However, when it is clear, as here, that the states are unwilling to participate in the corporation with limited liability as planned by the Federation, then the Federation violates the requirement of action for the benefit of the Federation when it selects a "trustee" for the states and, with his assistance, founds a corporation that the states reject.

Selected Fundamental Decisions of the Federal Constitutional Court

The Federal Government's conduct climaxes in the act of foundation that called the Corporation into life. The unconstitutionality of the procedure attaches so grievously to the act of foundation because for this reason as well the situation created by it cannot become the starting point of a constitutionally permissible activity corresponding to the Corporation's charter. In this sense, the founding of the Corporation violates the constitutional requirement of action for the benefit of the Federation.

III.

It may be left aside whether and to what extent a state - with respect to the principle of action for the benefit of the Federation - also has a claim as against the Federation that the latter not disregard the mutual constitutional order in such a way as to violate the interests of the states as component States of the federal State. In any event, the substance of Article 5 Basic Law - which has yet to be described - and the constitutional guarantee of freedom of broadcasting contained therein are of such fundamental importance for the entire public, political and constitutional life in the states that they may demand that in the area of the broadcasting system, the Federation not infringe upon the freedom guaranteed by the Basic Law. This constitutional position of the component State in the federal State may be defended by the state against the Federation in a constitutional dispute pursuant to Article 93.1 no. 3 of the Basic Law and ss. 68 et seq. of the Federal Constitutional Court Act. For this reason, it may also be asserted in this dispute that by founding the Corporation, the Federation has violated Article 5 of the Basic Law.

Article 5 Basic Law contains more than just the citizen's basic individual right against the State that it respect a sphere of freedom within which he may express his opinion without restraint. In particular, by way of Article 5.1 sentence 2 of the Basic Law, the institutional autonomy of the press is also guaranteed, from the procurement of information to the dissemination of news and opinion (BVerfGE 10, 118 [121]). It would conflict with this constitutional guarantee if the State were either directly or indirectly to regulate or control the press or some part of it. The exercising of influence by the State would only be compatible with this constitutional guarantee of freedom of the press if this were not to alter substantially the concept of a free press on account of the competition with the wealth of newspapers and magazines independent of the State.

The significance of Article 5 of the Basic Law for broadcasting cannot be assessed without taking into account the above-described substance of Article 5. Irrespective of a special status of the broadcasting system, which shall be treated in the following, broadcasting is, as the press, one of the indispensable means of modern mass communication, by way of which influence is exercised on public opinion and helps shape this public opinion. Broadcasting is more than just a "medium" for the formation of public opinion; it is an imposing "factor" in the formation of public opinion. This participation in the formation of public opinion is by no means limited to news programs, political commentary, or series on political problems of the present, past or future; the formation of opinion takes place to the same extent in dramas, musical presentations, and broadcasts of comedy programs, up to and including the way in which a presentation is staged. Through the selection and structuring of the programs, every broadcaster's programming

**60 Years German Basic Law:
The German Constitution and its Court**

will exhibit a certain trend, particularly as regards the decision on what is not to be broadcast, what will not be of interest to the viewer or listener, what can be ignored without damage to the formation of public opinion, and how that which is broadcast is to be formed and spoken. It becomes clear from such a perspective that institutional freedom for broadcasting is no less important than for the press, in that broadcasting is also an indispensable means of modern mass communication and factor of public formation of opinion at least as important as the press. This is clearly expressed in Article 5 of the Basic Law, where in para. 1, sentence 2, “freedom of reporting by means of broadcasts and film” are guaranteed alongside freedom of the press.

This does not however answer the question as to the way in which this freedom of broadcasting in general and that of reporting by broadcasting in particular are to be ensured so as to satisfy Article 5 of the Basic Law. It is here that broadcasting’s special status become important, through which it differs from the press. It is of course incorrect that newspaper publishers, newspaper printers and newspapers can be founded and operated in any given number. However, the difference between the press and broadcasting is that within the German press as a whole, there exist a relatively large number of independent publications that compete with one another in their direction, political bias or basic religious stance, whereas in the area of broadcasting, both technical reasons and the extremely large financial investment required for broadcasting programs means that the number of such broadcasters must remain relatively small. This special situation in the area of the broadcasting system calls for special precautions in order to realize and maintain the freedom of broadcasting guaranteed by Article 5 of the Basic Law. One of the means serving this purpose is the principle on which the existing broadcasting companies have been built: for the broadcasting of programs, the law creates a juridical person of public law that is removed from State influence or at most subject to limited State supervision; their collegial organs are de facto composed of a reasonable mix of representatives from all important political, religious and societal groups; they have the power to control the forces responsible for programming structure and to correct them in such a way as to satisfy the principles set forth in the law for the reasonable, proportional inclusion of all parties with an interest in broadcasting. It does not conflict with Article 5 of the Basic Law when an institution subject to such requirements is provided under present technical conditions with a monopoly for the broadcasting of programs on the state level; but Article 5 of the Basic Law does not imply the necessity that such a monopoly be established for an institution within the state.

In order to ensure the freedom in the area of broadcasting, Article 5 of the Basic Law does not, however, call for the form found in the state broadcasting laws and adopted for the broadcasting companies under federal law. In particular, the Federal Constitution does not require that broadcasters of programs may only be public corporations. Private companies can also be operators of broadcasts of this nature when their form of organization offers adequate assurance that all socially relevant forces have their say in a manner similar to that in public corporations and that freedom of reporting remains unfringed. The Constitution does not prohibit such a company when, for example, the law makes available a special form of incorporation ensuring the specific purposes of broadcasting, particularly its institutional freedom, and subjects to State supervision every corporation broadcasting programs that satisfies the requirements, similar to banking or insurance supervision.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

Article 5 of the Basic Law at least requires that this modern instrument for the formation of public opinion is not put at the mercy of the State or one particular social group. Broadcasters of programs must thus be organized in such a way that all conceivable groups are able to have influence in their organs and have their say in overall programming and that for the contents of overall programming, guiding principles are binding that guarantee of minimum of substantive balance, objectivity and mutual respect. This can only be ensured when this organizational and substantive principles are generally made binding by law. Article 5 of the Basic Law therefore calls for the enactment of such laws.

It may not be inferred from Article 5 of the Basic Law that broadcasters necessarily be the owners of transmission facilities or endowed with control over them and, as broadcasters, necessarily have the right to operate these facilities. Article 5 of the Basic Law also does not prevent representatives from the State from being accorded a reasonable share in the organs of the “neutralized” broadcaster. On the other hand, Article 5 of the Basic Law precludes the State from directly or indirectly dominating a public or private company that broadcasts programs.

The Deutschland-Fernsehen-GmbH founded by notarized contract of 25 July 1960, whose purpose is “to broadcast television programs designed to provide broadcasting recipients in all of Germany and abroad with a comprehensive picture of Germany”, was originally composed of the Federal Republic of Germany and Federal Minister Schäffer as shareholders; since the resignation of the shareholder Schäffer, who had provided his capital “on behalf of the states of the Federal Republic of Germany”, the sole shareholder is the Federal Republic of Germany. The Corporation is thus completely in the hands of the State. It is an instrument of the Federation and is dominated by the Federal Government and the Federal Chancellor by virtue of their constitutional competences. This determination cannot be countered by the reference to the contents of the articles of incorporation and the Corporation’s charter, which only forms a component part of the articles. Even if one were to assume that the Corporation’s organs, particularly the Supervisory Council and the Director, work relatively independently and that the principles for programming established in the charter presently take into account the requirements of Article 5 of the Basic Law - the institutional freedom of broadcasting, the decisive fact remains that the law and charter of the Corporation fail to offer any assurance that the present form of the Corporation will not be changed. Just as the charter was amended with the resignation of the shareholder Schäffer, it can also be further amended at any time. The “meeting of the shareholders” can adopt any amendment and can ultimately even decide to dissolve the Corporation and reorganize it with new organs (including associated personnel changes). It is an elementary difference whether the above-stipulated organizational precautions and substantive principles designed to maintain freedom of broadcasting are contained in a law or in articles of incorporation.

The founding and existence of the Deutschland-Fernsehen-GmbH therefore violate Article 5 of the Basic Law.

e) Translation of the Sixth Broadcasting Decision - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 83, 238*

Headnotes:

1. a) Article 5.1 sentence 2 of the Basic Law (Grundgesetz - GG) requires that the state guarantees the basic service to be provided by public broadcasting under a dual broadcasting system.
 - b) The limits to the guarantee of the existence and future development of public broadcasting that this implies follow from the function that the latter must fulfil in connection with the process of communication protected under Article 5.1 of the Basic Law.
 - c) The guarantee of the existence and future development of public broadcasting also extends to new services using new technology that may in the future assume the functions of conventional broadcasting.
2. a) Under a dual broadcasting system, the legislature is not constitutionally bound to maintain strict separation of public and private broadcasters. No obligation to adhere to a “consistent model” can be inferred from the Basic Law.
 - b) To the extent that the legislature opens the way to the possibility of a cooperative broadcasting undertaking or other form of joint responsibility for programming, it must ensure that the ability of public broadcasting to fulfil its mandate to provide basic service remains undiminished. This presupposes in particular that programming content can be identified and attributed to the responsible source.
 - c) The legislature itself must make the decision as regards the choice of a broadcasting model. It may not leave this decision to broadcasters. This is where the legally permissible possibilities for cooperation between public and private broadcasters find their limits.
 - d) The publication of printed matter with content that is primarily related to programming is covered by broadcasting freedom if such publication activities can be attributed to the sphere of activity of broadcasting as a marginal flanking activity.
3. a) Under a dual broadcasting system, the Basic Law permits, but does not require, lower standards for private broadcasting than for public broadcasting in terms of the breadth of programming and the guarantee of balanced diversity.
 - b) Diversity of opinion is an objective criterion for selecting private broadcasters for approval. In this context, the legislature was within its rights to take into account the involvement of editorial employees in the selection of and responsibility for programming (s. 7.2 sentence 3 of the Broadcasting Act for the Land of North Rhine-Westphalia (Rundfunkgesetz für das Land Nordrhein-Westfalen - LRG NW)).

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- c) The legislature must provide adequate criteria for the allocation of transmission capacity between public and private broadcasting.
- 4. a) There can be no objection on constitutional grounds to the goals underlying the North Rhine-Westphalian “two-column model” for local broadcasting. The model is in principle suitable for ensuring broadcasting freedom at the local level.
- b) When the internal organization of private broadcasting is pluralistic in nature, the legislature must determine which social forces and groups may become involved in broadcasting. There can be no objection on constitutional grounds to a statutory catalogue of socially relevant groups as long as the selection is objective in the sense of guaranteeing balanced diversity.
- c) The involvement of municipalities in the cooperative broadcasting undertaking and the operational entity responsible for local broadcasting in North Rhine-Westphalia is not in violation of the freedom of broadcasting from governmental control.
- 5. a) The supervisory bodies that oversee broadcasting are not intended to represent organized interests or opinions, but to ensure diversity of opinion in the area of broadcasting.
- b) The legislature has considerable operating latitude as regards the composition of these supervisory bodies. Article 5.1 sentence 2 of the Basic Law requires only that the composition of the supervisory bodies be suitable for maintaining broadcasting freedom.

Judgment of the First Senate of 5 February 1991 based on the oral hearing of 30 October 1990 - 1 BvL 1/85 and 1/88 - ...

Facts:

The matter submitted for abstract judicial review related to provisions of the Act on “West German Broadcasting Cologne” (Gesetz über den “Westdeutscher Rundfunk Köln”) (WDR-G) in the version promulgated in the year 1985 and the North Rhine-Westphalian Land Broadcasting Act (Landesrundfunkgesetz - LRG) of 1988, which regulates private broadcasting at the Land and local levels. On the one hand, the dual broadcasting system that was also introduced in North Rhine-Westphalia by this legislation ensured WDR a relatively strong competitive position; on the other hand, the requirements imposed upon private broadcasters as regards diversity and programming were similar to those imposed upon public broadcasters. With what is referred to as its “two-column model,” the legislature chose a unique construct for local broadcasting that was intended to ensure the existential viability of the local press on the one hand and prevent dual journalistic monopolies over both broadcasting and the press on the other hand. This construct consists of a press-related operational entity with municipal participation on the commercial and technical end and a combined broadcasting undertaking controlled by representatives of the public and organizations for the journalistic end that may broadcast locally only under cooperation agreements. The composition of the Broadcasting Board (Rundfunkrat) of WDR was fundamentally changed; in particular, the number of representatives of groups from society at large was increased at the expense of representatives of governmental institutions. In addition, representatives of the areas of culture and social affairs were seated on the Broadcasting

**60 Years German Basic Law:
The German Constitution and its Court**

Board with voting rights. The same model was adopted for the composition of the Broadcasting Commission (Rundfunkkommission) of the Land Authority for Broadcasting (Landesanstalt für Rundfunk - LfR), the umbrella institution for private broadcasting in North Rhine-Westphalia.

The Federal Constitutional Court ruled that the challenged laws were essentially compatible with the Basic Law.

Extract from the Grounds:

B.

The challenged provisions of the Act on “West German Broadcasting Cologne” and the Land Broadcasting Act are essentially compatible with the Basic Law, albeit only a few of them if construed in conformity with the Basic Law. Only s. 3.1 of the Land Broadcasting Act is in violation of Article 5.1 sentence 2 of the Basic Law.

I.

As the Federal Constitutional Court has elaborated in its established case law, broadcasting freedom under Article 5.1 sentence 2 of the Basic Law is an instrumental freedom. It serves to permit free formation of personal and public opinion, and to be sure in a comprehensive sense that is not restricted to mere reporting or mediation of political opinions. Free formation of opinion takes place through a process of communication. It presupposes freedom to express and disseminate opinions on the one hand and freedom to take cognizance of opinions and acquire information on the other hand. By guaranteeing the freedoms to express opinions, disseminate opinions and acquire information as fundamental rights, Article 5.1 of the Basic Law at the same time seeks to afford this process of communication constitutional protection (see BVerfGE 57, 295 [319-320]). Broadcasting is a “medium and a factor” in the process through which the formation of opinion takes place, which process enjoys constitutional protection (see BVerfGE 12, 205 [260]). In view of its salient importance for communication, free formation of opinion is possible only to the extent that broadcasting itself is also free to provide comprehensive and truthful information. Given the state of modern forms of mass communication, protection of the mediatory function of broadcasting as a fundamental right is therefore an indispensable prerequisite for achievement of the legislative objective of Article 5.1 of the Basic Law.

An understanding of Article 5.1 sentence 2 of the Basic Law that is limited to prevention of governmental influence and otherwise leaves broadcasting to the forces of society would not do justice to the instrumental character of broadcasting freedom. The fundamental right to broadcasting freedom does to be sure also, and primarily, provide protection against the state. In addition, however, express regulation is required to ensure that broadcasting, like the state, is not delivered into the hands of individual groups within society, but rather takes up on and propagates the variety of issues and opinions that play a role in society as a whole. To this end, material, organizational and procedural regulation is necessary that is aligned with the function of broadcasting freedom and suitable for achieving what Article 5.1 of the Basic Law as a whole is intended to guarantee (see BVerfGE 57, 295 [320]). The decision as to the form this regulation takes in detail is the affair of the legislature. The Basic Law neither prescribes a specific model nor does it compel consistent implementation of a model that is chosen. Indeed, as far as the Basic Law is concerned, only the guarantee of free and comprehensive reporting is what counts.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

If the legislature decides in favour of a dual broadcasting system in which both public and private providers co-exist, it must as a result ensure that the balanced diversity in reporting required by the Basic Law is in the end achieved by the overall offering of all providers. Under a dual system, the Basic Law also does not allow for releasing private broadcasters from this requirement due to the fact that the public broadcasters are obliged to provide balanced coverage. For, in view of the balanced coverage required of public broadcasters, any restriction or one-sidedness on the part of the private sector would result in a lack of balance in the overall offering and thereby defeat the purpose of Article 5.1 of the Basic Law (see BVerfGE 57, 295 [324]).

The legislature may not, however, make approval of private broadcasting, to which there can be no objection on constitutional grounds, contingent upon conditions that would significantly inhibit, if not preclude, private broadcasting (see BVerfGE 73, 118 [157]). In this context, the legislature may also take into account the implications as regards programming selection that result from the fact that private broadcasting is financed by advertising and make it difficult for private broadcasters to comply with the requirements of Article 5.1 sentence 2 of the Basic Law to the same extent as the public broadcasters, which are financed primarily through fees. a) This difference justifies application of standards for private broadcasting that are not as high as those for public broadcasting in terms of breadth of programming and the guarantee of balanced diversity. Concessions of this nature are, however, acceptable and constitute no lasting threat to the purpose of the provision contained in Article 5.1 sentence 2 of the Basic Law only as long as and insofar as it is effectively ensured that the public is provided with the requisite basic service by public broadcasting without any compromises (see BVerfGE 73, 118 [157 et seq.]).

In this context, the term “basic service” stands neither for the minimum service which public broadcasting is obligated to provide or could be obligated to provide without implications for the requirements to be met by private broadcasters, nor does it draw a line between or divide responsibilities between public and private broadcasters, for example, to the effect that the former are responsible for informational and educational programming content and the latter for entertainment offerings. In fact, it is necessary to ensure that public broadcasters offer programs for the entire public that provide comprehensive information covering the full spectrum of responsibility of conventional broadcasting and that this program offering provides diversity of opinion in a manner consistent with the Basic Law (see BVerfGE 74, 297 [325-326]).

If the legislature decides in favour of a dual broadcasting system, it must therefore in view of the still limited reach, variety of programming and scope of private broadcasting ensure that the public is provided with basic service by guaranteeing the availability of the necessary technical, organizational, personnel and financial conditions for public broadcasting (see BVerfGE 73, 118 [158]). It would be incompatible with this duty to restrict public broadcasting to its current level of development in terms of programming, funding and technology. Indeed, given present conditions, the duty to provide basic service under a dual system can be fulfilled if not only the existence of public broadcasting in its present state is secured, but also its future development (BVerfGE 74, 297 [350-351]).

II.

The provisions of the West German Broadcasting Act on the guarantee of the existence and future development of WDR (s. 3.3 and 3.7 to 3.9 in conjunction with s. 33.2 and s. 47 of the West German Broadcasting Act) are compatible with the Basic Law. If construed restrictively, s. 6.2 of the Land Broadcasting Act is also compatible with the Basic Law.

1. a) There can be no reservations on constitutional grounds to the required narrow interpretation of the general clause contained in s. 3.3 sentence 1 of the West German Broadcasting Act.

The question as to whether the legislative power to regulate broadcasting freedom also includes the right to allow WDR to engage in economic activities of all kinds can remain open. For the law does not provide for any such authority. Indeed, the provision forms the statutory basis for a general guarantee of the existence and future development of WDR that is given substance and concretely described in other provisions of the Act. There can be no reservations on constitutional grounds to such a guarantee as has in the meantime also been proclaimed in the preamble to the interstate agreement on the reform of broadcasting (Interstate Broadcasting Agreement [Rundfunkstaatsvertrag]) of 1/3 April 1987. To the contrary, it is constitutionally required under the dual broadcasting system as long as private providers do not completely assume responsibility for conventional broadcasting that is grounded in Article 5.1 sentence 2 of the Basic Law (see BVerfGE 73, 118 [155 et seq.]). Under this condition, which the petitioners also do not dispute, public broadcasters are charged with providing the public with basic service, which is to be understood to mean comprehensive service. The guarantee of the existence and future development of public broadcastings means nothing other than ensuring those conditions that make it possible to provide the public with basic service.

In view of the rapid progress being made in the area of broadcasting, in particular in the area of technology, a guarantee based on the status quo would not suffice to ensure fulfilment of the responsibility to provide basic service. The guarantee can therefore not be limited to the conventional technology involved in terrestrial transmission. If other forms of transmission appear or replace terrestrial transmission, the use of such new forms of transmission will also be covered by the guarantee of basic service. The same applies to the programming offered by public broadcasters, which must remain open to new interests on the part of the public or new formats and content. The term “basic service” is open and dynamic as regards content and time and relates exclusively to the function that broadcasting is intended to fulfil in connection with the process of communication protected by Article 5.1 of the Basic Law. The limits to the guarantee of the existence and future development as regards the provision of basic service therefore follow exclusively from the function of broadcasting. In any case insofar as the statutory guarantee of the existence and future development of public broadcasting is based on its responsibility within the dual system, it is grounded in the Basic Law.

Selected Fundamental Decisions of the Federal Constitutional Court

The regulation under challenge operates within this framework. The general clause contained in s. 3.3 sentence 1 of the West German Broadcasting Act stipulates that the possible activities of WDR mentioned therein are allowed only “in the exercise of its responsibilities.” They are therefore prerequisite to and limit the guarantee of the existence and future development.

The responsibilities that WDR must fulfil are also defined in the Act with sufficient clarity and precision. The definition of responsibilities contained in s. 3.3 of the West German Broadcasting Act refers initially to s. 3.1 of the West German Broadcasting Act. That provision charges WDR with responsibility for broadcasting within the meaning of the conventional formal definition of broadcasting under legislation governing fees. However, this responsibility is then provided with substantive content in s. 4 and ss. 5.4 and 5.5 of the West German Broadcasting Act. s. 4.1 sentence 1 of the West German Broadcasting Act provides the decisive standard here. It contains those normative prescriptions that summarize and define the responsibility for programming and which WDR must therefore respect when taking any measure or making any decision.

Accordingly, WDR produces and transmits broadcasts as both a medium and a factor in the process of free formation of opinion and in the interest of the general public. With this formulation, which is borrowed from the case law of the Federal Constitutional Court, the legislature has emphasized the special conditions that apply to broadcasting freedom as a freedom that serves to form opinion. As a result, it is made clear at the legislative level that the exercise of broadcasting freedom must always serve to guarantee free and comprehensive formation of opinion. It assumes a position of responsibility toward the general public. This leaves room for a public provider’s own interests, including such as serve to secure the existence and future development of the provider, only if such interests seem to be committed in trust for the benefit of the general public and can for that reason be justified.

The duty to serve the interests of the general public is also expressed in the provision contained in s. 4.1 sentence 2 of the West German Broadcasting Act that assigns responsibility for fulfilment of the guarantee to the significant political, intellectual social forces and groups in the transmission area. At the same time, however, it also ensures that the actual exercise of responsibility for broadcasting remains in the hands of the broadcaster and is not transferred to the relevant forces and groups within society. In fact, the purpose of oversight by society is precisely the opposite, i.e., to empower independent broadcasting to discharge its duties responsibly in the interest of free formation of opinion.

This duty is defined more concretely in s. 4.2 of the West German Broadcasting Act. The responsibility of WDR for providing informational content is emphasized in this context: its broadcasts must provide a comprehensive overview of international and national affairs in all significant areas of life. Programming is, however, not limited to this, but must in addition to information also provide education and entertainment. It must offer programs devoted to culture, art and useful advice. Finally, WDR must pursuant to s. 4.3 of the West German Broadcasting Act take into account the regional

**60 Years German Basic Law:
The German Constitution and its Court**

structure and cultural diversity of the transmission area. Withdrawal from certain programming areas by WDR or neglect or preferential treatment of specific areas, for example, with an eye to increasing revenues or competition with private broadcasters, would therefore be incompatible with this provision.

This broadly defined responsibility for programming is expanded to include diversity of content and opinion by s. 5.4 and s. 5.5 of the West German Broadcasting Act. These formulations on the other hand, which are based on pronouncements of the Federal Constitutional Court, are intended to ensure that broadcasting does not distort the process of formation of opinion through programming that is one-sided or neglects the interests of minorities.

Taken as a whole, the provisions of ss. 4 and 5.4 and 5.5 of the West German Broadcasting Act reflect the requirements that public broadcasting must satisfy under the Basic Law as regards basic service within the context of a dual system. These provisions establish the functional obligations imposed upon WDR in connection with the exercise of its powers under s. 3.3 of the West German Broadcasting Act. The guarantee of the existence and future development contained in s. 3.3 of the West German Broadcasting Act is thus coupled with and legitimized and limited by the responsibility for providing basic service. This counteracts the danger that, the petitioners assert, WDR could on the basis of s. 3.3 of the West German Broadcasting Act evolve into a large, quasi-private corporation that would basically pursue exclusively economic goals, thereby undermining the dual broadcasting system.

- b) There can also be no reservations on constitutional grounds as regards s. 3.3 sentence 2 of the West German Broadcasting Act, which stipulates in particular that WDR may offer new services using new technology.

...

2. The possibilities for cooperation with third parties that the legislature has afforded WDR in s. 3.8 in conjunction with s. 47 and s. 3.9 together with s. 47 of the West German Broadcasting Act and in s. 6.2 of the Broadcasting Act are also compatible with the Basic Law.

...

- c) There can be no reservations on constitutional grounds as regards the required restrictive construction of the provision contained in s. 6.2 of the Land Broadcasting Act. Article 5.1 sentence 2 of the Basic Law also does not prevent the legislature from making provision for mixed forms that combine public and private broadcasting. The legislature's regulatory powers are not restricted to choosing between different broadcasting models. It may in fact also combine them or include individual elements of one model in another as long as it respects the requirements of the freedom of formation of opinion.

It is not possible to infer otherwise from the Fifth Broadcasting Decision of the Federal Constitutional Court (BVerfGE 74, 297). Cooperation such as that permitted by s. 6.2 of the Land Broadcasting Act was not at issue in that decision. To the

**Selected Fundamental Decisions of
the Federal Constitutional Court**

contrary, the Federal Constitutional Court affirmed that the Baden-Württemberg legislature could pursue a policy based on essential separation of public and private broadcasting and was therefore not required by the Basic Law to make provision for extensive possibilities for cooperation between the two sectors within the dual system (see BVerfGE 74, 297 [349]).

It is not, however, possible to draw the opposite conclusion to the effect that cooperation between the two sectors is unconstitutional. In fact, the legislature also enjoys operating latitude in this regard.

WDR's interest in private cooperative broadcasting undertakings does not deliver broadcasting into the hands of the state since WDR itself must be organizationally independent of the state and also does not relinquish this form of organization through involvement in a cooperative broadcasting undertaking. The one-sided influence of a specific segment of society is also not to be feared from this involvement since WDR's internal structure is pluralistic and it also cannot discard this structure through involvement in a cooperative undertaking.

The possibility of involvement in cooperative undertakings allowed by s. 6.2 of the Land Broadcasting Act also does not subject private broadcasting to conditions that make its situation significantly more difficult or its existence impossible. The creation of a cooperative broadcasting undertaking consisting of public and private members requires voluntary agreement by both sides. There is no legal compulsion to enter into such an agreement. Nor is it possible to discern any factual circumstances that would constitute such compulsion. In particular, commencement of transmission by a private cooperative broadcasting undertaking is not dependent upon the involvement of public broadcasting. Indeed, private broadcasters whose cooperative undertaking WDR may become involved in must also be economically and organizationally in a position to be able to provide broadcasting that meets accepted journalistic standards without WDR (s. 5.1 of the Land Broadcasting Act). There was obviously never any thought of private broadcasters that can meet the conditions for approval only by partnering with a public broadcaster.

S. 6.2 of the Land Broadcasting Act assigns WDR a minority role in ongoing collaboration. This further reinforces the provision contained in s. 6.1 sentence 2 of the Land Broadcasting Act, which prohibits dominant influence of any one party over programming. The general rule of s. 47.2 of the West German Broadcasting Act, which obligates WDR to secure the necessary influence over management in the case of interests in other enterprises, is superseded in the case of private cooperative broadcasting undertakings by the special provision contained in s. 6.2 of the Land Broadcasting Act. In view of these safeguards, any possible advantage that WDR does in fact retain will not be such that it can stifle private broadcasting.

The legislature adequately counteracted the danger that WDR could escape its obligation to provide the public with basic service through cooperation with private broadcasting undertakings in s. 6.2 of the Land Broadcasting Act through reference to the applicable provisions of law that apply to WDR. However, compliance of public broadcasting with

**60 Years German Basic Law:
The German Constitution and its Court**

its statutory obligations can be ensured and verified only if the programming of the two sectors is kept separate such that programming can be attributed to one of the two broadcasters. Such separation is therefore required on constitutional grounds, precisely as in the case of s. 3.9 of the West German Broadcasting Act, when use is made of the possibility provided for in s. 6.2 of the Land Broadcasting Act.

The possibility afforded by s. 6.2 of the Land Broadcasting Act does not, however, go so far as to allow public broadcasters and private cooperative broadcasting undertakings to agree to a transition from a dual model to a cooperative model that would make it possible to distinguish between the two but would involve broadcasting exclusively in the form of joint programming. The decision as to the choice of broadcasting model represents a matter that is of fundamental importance as regards the exercise of fundamental rights that the legislature may not relinquish and leave to an agreement among broadcasters (see BVerfGE 57, 295 [324]).

This is where the possibility for cooperation under s. 6.2 of the Land Broadcasting Act finds its limits.

...

III.

The requirements that the Land Broadcasting Act lays down for the approval and operation of private broadcasting undertakings in its ss. 11 and 12.3 as well as in s. 7.2 sentence 3 are compatible with the Basic Law. On the other hand, regulation of assignment of frequencies pursuant to s. 3 of the Land Broadcasting Act is in violation of Article 5.1 sentence 2 of the Basic Law.

1. There can be no objection on constitutional grounds to the programming requirements for private broadcasting in ss. 11 and 12.3 of the Land Broadcasting Act. The right to broadcasting freedom granted under Article 5.1 sentence 2 of the Basic Law does not entitle holders of that right to make use of it as they see fit. As an instrumental freedom, the right is guaranteed not primarily in the interest of broadcasting, but rather in the interest of free formation of opinion by individuals and the public. The legislature therefore has a duty to structure the broadcasting system in such a manner as to achieve this end. As regards the legal aspect of programming, it follows from this that both diversity of content and diversity of opinion must be appropriately reflected in overall programming. This requirement to be met by overall programming applies independently of whether the legislature decides in favour of a public or a private broadcasting system.

It is also not possible to infer otherwise from the “consistent model” principle invoked by the petitioners. The Basic Law prescribes no models for the broadcasting system, but only a purpose: freedom of broadcasting. The broadcasting system must be able to fulfil its responsibility to serve free formation of opinion by individuals and the public. This responsibility exists independent of any model. Any organizational form that takes this into account is compatible with the Basic Law. The operating latitude of the legislature is not limited to the choice of a model and subsequent commitment to a consistent model. The legislature may in fact choose

**Selected Fundamental Decisions of
the Federal Constitutional Court**

any combination of models as long as it does not lose sight of the purpose of Article 5.1 of the Basic Law. Accordingly, the Federal Constitutional Court left no doubt but that pluralistic internal structures may also be prescribed for private broadcasters (see BVerfGE 57, 295 [325]; 73, 118 [171]).

The purpose may, however, be achieved in different ways under the various systems. Under a dual broadcasting system in which public and private broadcasters compete with one another, it would appear constitutionally permissible not to impose standards as regards the breadth of programming and the guarantee of balanced diversity upon private broadcasting that are as high as those imposed for public broadcasting as long as and to the extent it is effectively ensured that the responsibility for broadcasting is in any case fulfilled by the latter without any compromises. Even then, a lack of balance may be accepted only if not serious (see BVerfGE 73, 118 [158-159]).

These principles do not, however, make it possible to conclude that the legislature must lower the requirements imposed upon private broadcasters in terms of diversity of content and opinion. In particular, it is not possible to infer from the Lower Saxony judgment that private broadcasters may be held only to a “basic standard” in terms of balanced diversity. Indeed, according to that judgment, such a basic standard suffices only for the purposes of ongoing oversight of private broadcasters, but not for initial approval (see BVerfGE 73, 118 [158-159]).

In fact, in view of the requirement of balanced diversity that applies to the public broadcasting sector without restriction, relaxation of the standard on the side of private broadcasters may result in distortion of the balance of programming as a whole, which given the legislative goal of Article 5.1 of the Basic Law would seem to be acceptable only within narrow limits. The constitutional grounds for this, but also the limits, are found in the principle to the effect that the legislature may not impose requirements on the private broadcasting sector that would make operation significantly more difficult, if not impossible (see BVerfGE 73, 118 [157]). The legislature has the freedom to establish programming requirements for private broadcasters as long it does not exceed these limits.

It cannot be ascertained that the North Rhine-Westphalian legislature has exceeded these limits. The programming requirements that the legislature imposes upon private broadcasters are to be sure more stringent than those of other German *Länder*, but not as stringent as those imposed upon WDR. In both s. 4 of the West German Broadcasting Act as well as in s. 11 of the Land Broadcasting Act, the legislature proceeds from the assumption that, regardless of its legal form and the nature of the providers, broadcasting is both a medium and a factor in the process of free formation of opinion and the affair of the general public (s. 4.1 sentence 1 of the West German Broadcasting Act and s. 11 sentence 1 of the Land Broadcasting Act). For WDR, this entails a responsibility to provide a comprehensive overview of international and national events in all areas of life, to inform, educate and entertain with its content and to offer programs devoted to culture, art and useful advice (s. 4.2 of the West German Broadcasting Act). Private cooperative broadcasting undertakings, on the other hand, must contribute to the availability of comprehensive information and free formation of opinion by individuals and the public, serve to educate, advise and entertain and fulfil the responsibility of broadcasting in the area of culture only within the context of the respective programming category (s. 11 sentence 2 of the Land Broadcasting Act). In addition, WDR must also take into account the regional

**60 Years German Basic Law:
The German Constitution and its Court**

disparity and cultural diversity of the transmission area whereas private broadcasters are only obliged to present public affairs in North Rhine-Westphalia in the case of all full-service stations (s. 4.3 of the West German Broadcasting Act, s. 11 sentence 3 of the Land Broadcasting Act).

The same applies as regards the programming principles of s. 5 of the West German Broadcasting Act and s. 12 of the Land Broadcasting Act. Whereas WDR must reflect the diversity of prevailing opinion and intellectual, scientific and artistic trends with the greatest possible breadth and completeness, the corresponding obligation of private full-service stations is limited to ensuring diversity of opinion (s. 5.4 of the West German Broadcasting Act and s. 12.3 of the Land Broadcasting Act). WDR must ensure that the significant forces of society in the transmission area are heard; the Land Broadcasting Act expands this to include significant political, intellectual and social forces and groups (s. 5.4 no. 2 of the West German Broadcasting Act, s. 12.3 sentence 2 of the Land Broadcasting Act). Both types of broadcasters must devote appropriate time to the treatment of controversial issues of general importance (s. 5.4 sentence 2 WDR-G, s. 12.3 sentence 3 of the Land Broadcasting Act).

It cannot be ascertained that this imposes conditions on private broadcasters that make it significantly more difficult or even impossible for them to produce and disseminate broadcasts. Compliance with the requirements of ss. 11 and 12.3 of the Land Broadcasting Act does to be sure require that they to some extent forgo programs with mass appeal. Since advertising revenues are dependent upon audience ratings, it is not possible to exclude the possibility that this will reduce their earnings. The restrictions do not, however, go so far as to threaten to make private broadcasting totally unprofitable. The law allows broadcasters considerable freedom as regards the decision as to how to comply with program requirements. It prescribes neither a programming plan nor a breakdown of programming. In fact, broadcasters are free to allocate time to and schedule programs with mass appeal and other programs as they see fit. The law therefore only compels operators of full-service stations to forgo programming that consists entirely of entertainment or one-sided informational and educational programs. It is, however, up to them to calculate prices and costs so that the undertaking is still financially viable.

2. The provision regulating approval contained in s. 7.2 sentence 3 half-sentence 2 of the Land Broadcasting Act is not in violation of the Basic Law. The legislature had the right to choose from among several applicants on the basis of various criteria, including the degree of editorial involvement (“internal broadcasting freedom”).

S. 7 of the Land Broadcasting Act contains the provision that governs the standards the Land Authority for Broadcasting must apply when making decisions as to approval in cases in which the number of applicants satisfying the conditions for approval exceeds available transmission capacity. According to constitutional case law, such decisions fall into the area of express regulation of broadcasting, for which the legislature is itself responsible. According to the principles elaborated in the Third Broadcasting Judgment, access to private broadcasting may neither be left to chance or free interaction of the forces at play nor entrusted to the unfettered discretion of the executive. It is possible to take into account the principle of equality through a system that permits allocation of broadcasting time and, if need be, proportionate reduction of such time. If that does not suffice or the legislature opts for a system under which only licenses for full-service stations are issued to individual broadcasters, the legislature must establish criteria

Selected Fundamental Decisions of the Federal Constitutional Court

for selection that ensure that all applicants have the same chances of success. The degree to which these chances materialize must depend upon objectively relevant criteria that can be reasonably met by the individual applicants (see BVerfGE 57, 295 [327]).

The North Rhine-Westphalian regulatory process satisfies these requirements. This results, however, not solely from the fact that the law establishes no legal obligations for private broadcasters. Applicants are to be sure subject to no legal restrictions as regards their choice of activities and may independently decide whether and how they want their editors to take part in the programming process. The provision is, however, binding upon the Land Authority for Broadcasting as regards its selection decision and is in that respect thoroughly suitable for influencing the activities of private broadcasters. It must therefore withstand measurement against the standard of Article 5.1 sentence 2 of the Basic Law.

This standard is, however, adequately respected. The selection criterion “internal broadcasting freedom,” which is the only thing that the applicants consider unconstitutional, is the last in a series of gradated criteria. It is applied only when it was not possible to reach a decision at one of the previous levels. In accordance with the selection principles established by the Federal Constitutional Court, the law is intended first of all to reach an agreement among applicants (s. 7.1 of the Land Broadcasting Act). Only if such agreement is not reached with the help of the Land Authority for Broadcasting does the provision establishing priorities contained in s. 7.2 of the Land Broadcasting Act take effect. In this context, diversity of opinion is the guiding aspect for the legislature: full-service stations take precedence over specialized programs (sentence 1); in the case of several applicants proposing full-service stations, that applicant is to be accorded priority approval that can be expected to provide programming with the greatest diversity of opinion (sentence 2). As indications of such diversity, the law makes mention of the programming schedule, the composition of the cooperative broadcasting undertaking and otherwise the organizational measures serving to provide diversity of opinion (sentence 3 half-sentence 1). Only in this context is the degree of editorial involvement also to be taken into account (sentence 3 half-sentence 2).

Diversity of opinion is an objective criterion for selection within the meaning of constitutional case law. Broadcasting freedom serves free and comprehensive formation of opinion. This can succeed only if plurality of opinion with the greatest possible depth and completeness in broadcasting, which is one of the most important sources of information and a significant factor in the formation of opinion, is taken into account. If the legislature makes a choice from among several applicants for a license on the basis of the degree of diversity of opinion that can be expected from their programming, this contributes to furtherance of the legislative goal of balanced diversity in private broadcasting as well as in public broadcasting.

The legislature also had the right to consider involvement of editorial staff in the selection of and responsibility for programming as a suitable means of securing compliance with the diversity requirements. By reason of the very intention of the legislature, such involvement neither serves to implement co-determination strategies or strategies intended to foster democracy, nor is it intended to increase the influence of any given group within society upon broadcasting programming. The petitioners fail to recognize this. The legislature decided, as it is may, in favour of a pluralistic internal model for private broadcasting as well as for public broadcasting. This legislative concept, unlike in the case of the press, leaves no room for advocacy broadcasting.

**60 Years German Basic Law:
The German Constitution and its Court**

To the contrary, the provider must in principle give equal voice to all existing tendencies of importance in its programming. At the level of legal organization, this requirement is reflected in the fact that approval is issued only to cooperative broadcasting undertakings under s. 6.1 sentence 1 of the Land Broadcasting Act. Dominant influence on the part of any one member within a cooperative broadcasting undertaking must be excluded (s. 6.1 sentence 2 of the Land Broadcasting Act). According to s. 5.1 sentence 3 of the Land Broadcasting Act, cooperative broadcasting undertakings must be in a position to provide broadcasting that meets accepted principles of journalistic practice. s. 13 of the Land Broadcasting Act guarantees editorial staff the right to exercise their journalistic responsibilities independently under the overall responsibility of the broadcaster and their employment contracts.

Further involvement of editorial staff in the selection of and responsibility for programming is intended to strengthen the position of that professional group that is directly involved in fulfilling the responsibility of broadcasting in its capacity as a medium and a factor in the formation of opinion within the broadcasting undertaking, which is based on the division of labour. For that reason, editorial involvement is not a matter of ceding to outside influence, but rather a right to be consulted internally as regards the exercise of the function protected by Article 5.1 sentence 2 of the Basic Law. As such, this right is not afforded to editors in the interest of their professional self-fulfilment or to allow them to assert their subjective views, but rather so that they can fulfil their mediatory function.

Given this understanding, it is also not possible to raise the objection that the provision will in the end tend to threaten rather than be conducive to broadcasting freedom because of its inherent potential for extension. Editorial involvement remains subject to the diversity requirement. It may not therefore be allowed to assume a maximum dimension that would endanger broadcasting freedom, but rather only the optimal dimension conducive to such freedom. Co-determination that no longer served objective broadcasting freedom, but only the personal freedom of editorial staff could not be used to establish priorities as regards the decision of the Land Authority for Broadcasting and therefore also not improve an applicant's chances of receiving approval. For this reason, competition for a broadcasting license among several applicants also cannot be escalated indefinitely. In the case of an internally pluralistic private broadcasting model that does not give broadcasters the freedom to choose programming as they see fit, it is also reasonable to take into account such possibilities for co-determination as a criterion for selection as long as it serves to ensure diversity and not the self-interest of editorial staff.

The provision is also not lacking in respect for the principle of certainty as required under the rule of law because of its non-compulsory nature and the internal limits to the involvement of editors. It does to be sure leave applicants for a license uncertain as to the degree of editorial involvement that must be proposed in order to improve their chances of receiving approval. This results, however, from the competitive situation in which the applicants find themselves. This uncertainty must be accepted since an upper limit beyond which the involvement of editors can no longer serve the interest of balanced diversity can in any case be inferred from s. 7.2 sentence 3 of the Land Broadcasting Act.

Selected Fundamental Decisions of the Federal Constitutional Court

3. The manner in which the allocation of transmission capacity is regulated by s. 3.1 sentence 1 of the Land Broadcasting Act is incompatible with the Basic Law. It is in violation of the requirement of freedom from governmental interference that follows from Article 5.1 sentence 2 of the Basic Law.

The Federal Constitutional Court has from the very beginning emphasized in its case law on broadcasting freedom that freedom of broadcasting within the meaning of Article 5.1 sentence 2 of the Basic Law refers primarily to freedom of reporting from governmental interference (see BVerfGE 12, 205 [262-263]). This requirement relates to the function of broadcasting as a medium and a factor in the formation of opinion. It must be possible to exercise this freedom without governmental influence. On the other hand, Article 5.1 sentence 2 of the Basic Law does not prevent the state from establishing the overall conditions for exercising this function. To the contrary, the Basic Law obligates the state to regulate and safeguard broadcasting freedom in an appropriate manner (see BVerfGE 57, 295 [320]).

This presupposes, among other things, regulation of the issuance of approval to broadcast and criteria for the selection of applicants from the private sector (see BVerfGE 57, 295 [326-327]; 73, 118 [153-154]). The legislature may, however, not allow the government to influence the choice, content and production of programs (see BVerfGE 73, 118 [182-183]).

The regulatory provision contained in s. 3.1 sentence 1 of the Land Broadcasting Act is in violation of these requirements.

The allocation of transmission capacity does not to be sure have any direct influence on programming. It does, however, determine the relative shares of total programming of public and private broadcasters. But broadcasting freedom not only protects against direct governmental influence on programming, but also counteracts indirect influence (see BVerfGE 73, 118 [183]). The danger of any such influence cannot be excluded on the basis of the provision contained in s. 3.1 sentence 1 of the Land Broadcasting Act. This danger results from the persistent shortage of transmission capacity. The Land government consequently does not have a large number of frequencies available when it makes decisions as regards the allocation of broadcasting capacity. As a rule, such decisions will involve the assignment of a single frequency that has become available. Under these circumstances, the Land government not only makes an abstract decision between public or private use of a frequency or channel, but at the same time makes a choice from among concrete applicants for a possibility to broadcast that has become available and the programming they propose. In actual fact, this will regularly involve a choice between additional WDR programming and private programming. When making such decisions, the Land government is bound only by s. 3.2 of the Land Broadcasting Act, which makes provision for the minimum transmission capacity to be allocated private broadcasters. The Land government otherwise enjoys free rein. This does not suffice to effectively exclude the danger of governmental influence on programming.

The requisite approval of the Main Committee of the Landtag cannot assuage these constitutional concerns. The principle of freedom of broadcasting from governmental interference that derives from Article 5.1 sentence 2 of the Basic Law relates not only to the executive branch, but also to the legislative (see BVerfGE 73, 118 [182]). The legislature is also one of the powers of government and is as such subject to public criticism and oversight. Since this, on

**60 Years German Basic Law:
The German Constitution and its Court**

the other hand, is significantly dependent upon the freedom of the media, the parliament and its constituent bodies may not be allowed to have any influence over the programming of broadcasters. The question as to whether s. 3 of the Land Broadcasting Act is also in violation of the principle regarding the reservation of legislative powers is therefore no longer relevant.

The does not, however, mean that the Landtag may not operate in this area at all. The Land government or the Land Authority for Broadcasting would not be prohibited on constitutional grounds from establishing general criteria for making concrete decisions as to the allocation of transmission capacity that satisfy the requirements of the reservation of legislative powers, but would in fact be required to do so.

IV.

The North Rhine-Westphalian regulations governing local broadcasting (ss. 23 to 30 of the Land Broadcasting Act) are compatible with the Basic Law.

...

V.

The provisions governing the composition of the supervisory bodies of WDR and private broadcasters (s. 15 of the West German Broadcasting Act and s. 55 of the Land Broadcasting Act) are compatible with the Basic Law.

1. The composition of the supervisory bodies satisfies the requirements pursuant to Article 5.1 sentence 2 of the Basic Law.

The express regulation of the broadcasting system required of the legislature by Article 5.1 sentence 2 of the Basic Law also incorporates suitable organizational safeguards that in connection with the underlying regulatory model ensure that broadcasting is not delivered into the hands of any individual group or group within society and that the relevant forces of society are heard in the context of the overall offering (see BVerfGE 57, 295 [325]). The Federal Constitutional Court has from the very beginning proceeded in its case law on broadcasting on the basis of the assumption that the supervisory bodies of public broadcasters consisting of representative of the relevant groups within society constitute an organizational means of safeguarding freedom of broadcasting in compliance with the Basic Law (see BVerfGE 12, 205 [261 et seq.]). The same holds for the external supervisory bodies of private broadcasters, which are similarly constituted (see BVerfGE 73, 118 [171]).

However, the purpose of creating supervisory bodies consisting of representatives of the relevant groups within society, which primarily take the form of organizations, is not to delegate responsibility for programming to them and is certainly not to make them the holders of the fundamental right to broadcasting freedom (However, BVerfGE 31, 314 [337] - dissenting opinion).

In fact, the supervisory bodies consisting of representatives of society are custodians of the interests of the general public. Their role is to oversee the individuals and bodies responsible for programming in order to ensure that all major political and intellectual forces and groups within society are adequately heard within the context of overall programming, that programming does

**Selected Fundamental Decisions of
the Federal Constitutional Court**

not serve the interests of a single party or group, interest group, confession or intellectual persuasion and that reporting takes into account adequately and fairly the views of the various individual, groups or institutions involved (see BVerfGE 60, 53 [65-66]).

The responsibility of the supervisory bodies is therefore - regardless of the fact that most members by virtue of their positions represent specific interests - not to represent such interests and certainly not to declaim the interests of their respective organizations through the programming. Indeed, the involvement of organized interests serves only as a means of attracting custodians of the interests of the general public who are independent of governmental bodies and contribute experience from the various areas of society. The members of supervisory bodies are therefore not appointed to align programming with the particular views and goals of the organizations that delegate them for the purposes of promotion of the endeavors of the latter. To the contrary, the pluralistic composition of the supervisory bodies is intended precisely to counter the danger of one-sided influence and programming and ensure that diversity of views and activities in all areas of life is reflected in the programming (see BVerfGE op. cit., p. 66).

This function calls for objective selection and balance of the relevant forces in society to take into account in principle the existing diversity and safeguard the effective influence of the organizations that represents these forces (see BVerfGE 57, 295 [325]). Which of the forces in society are in particular relevant cannot be inferred from Article 5.1 sentence 2 of the Basic Law. It is therefore in principle the affair of the legislature to decide how the supervisory bodies are to be formed. The legislature enjoys broad latitude of operation in this regard. This includes the power to define the concrete criterion for social relevance, to determine which forces are to be considered on the basis of this criterion, to choose the groups to be assigned to these various forces and to select and evaluate those eligible to designate appointees. In this context, the regulatory content of Article 5.1 sentence 2 of the Basic Law requires only that the composition of the supervisory bodies selected by the legislature be suitable for upholding broadcasting freedom. Within these limits, the legislature's decision-making prerogatives are subject to no further restriction by broadcasting freedom.

The operational power of the legislature is not, however, limited only by the prohibition of arbitrariness pursuant to Article 3.1 of the Basic Law, as the Land government submits. By availing itself of the relevant forces in society to oversee broadcasting, the legislature accepts the conditions inherent in the representation of organized interests, which it cannot avoid by committing the members of the supervisory bodies to the interests of the general public. There is likely to be a conflict between the principle chosen to recruit such members and their official duties. The persons who are delegated to the supervisory bodies to represent their interest groups, but are expected to refrain from asserting any special interests within those bodies must make a difficult distinction between these two roles that the law can at best encourage, but cannot guarantee.

Since the law provides that members of the Broadcasting Board and the Broadcasting Committee (Rundfunkausschuss) are not bound by any instructions or duties, those members who want to make decisions independently of the interests they represent are in a position that is temporarily unassailable. This independence cannot, however, preclude voluntary advocacy of specific interests and certainly not assessment of the interests of the general public from a limited perspective. Since actions taken within broadcasting boards will under these circumstances

**60 Years German Basic Law:
The German Constitution and its Court**

regularly be at least partially dictated by special interests, a supervisory body that is grossly one-sided will not be conducive to ensuring diversity of opinion in the area of broadcasting and therefore also not satisfy the requirements of Article 5.1 sentence 2 of the Basic Law. There can on the other hand be no objection to any over- or underrepresentation of comparable groups that does not cross the threshold to gross distortion.

The nature of representation of organized interests is also such that the interests of the general public will not be identical to the sum total of organized interests. In fact, interests exist that are not organized at all or could be organized only with difficulty. Organizational representation is for that reason always only an incomplete means of safeguarding the interests of the general public. If the legislature opts for supervision of broadcasting with the help of the relevant forces in society, it is then not compelled by Article 5.1 sentence 2 of the Basic Law to ignore less relevant forces or interests that defy organization. To the contrary, involvement of persons in such bodies who either represent no organized interests or precisely such whose influence is weak can counteract the restriction of diversity and orientation of supervisory bodies along party lines inherent in representation through organized interests.

S. 15 of the West German Broadcasting Act and s. 55 of the Land Broadcasting Act satisfy these requirements.

The North Rhine-Westphalian legislature has not implemented the principle of enlistment of members of the Broadcasting Board and the Broadcasting Committee from among representatives of relevant groups within society in an absolute manner. In fact, these occupy only the largest of a total of four benches (“organizational bench”). A series of members are chosen by the Landtag (“governmental bench”); others come from different cultural areas (“cultural bench”); and yet others are chosen to represent weakly organized groups, i.e., senior citizens, the disabled and foreigners (“citizens’ bench”). The legislature specifically intends for this mixed principle to counter the dangers that lie in exclusive representation through organized interests. The establishment of a separate “cultural bench” is justified in the draft of the law on the basis of the similarity between the nature of the areas included and that of the purpose of broadcasting. Unlike the members of the “organizational bench,” the members of the “cultural bench” do not become members of the Broadcasting Board in their capacity as representatives of groups or institutions, but because of their involvement in a specific area. Here too, however, groups or institutions have the right to designate them.

Omission of organizations of newspaper publishers, refugees and women is just as much not in violation of Article 5.1 sentence 2 of the Basic Law as the weighting of employee and employer organizations. There is no danger that this could deliver broadcasting into the hands of a single group within society. It is likewise not possible to ascertain any gross distortion in the spectrum of interests. This also applies as regards women’s organizations. The legislature has to be sure not taken women’s organizations into account, but does require that women be appropriately taken into account for the purposes of electing or delegating members of the supervisory bodies. More cannot be required as regards Article 5.1 sentence 2 of the Basic Law. Whether other forms of representation would achieve the goal of the legislature more effectively need not be decided by the Federal Constitutional Court.

2. There is also no violation of Article 3 of the Basic Law.

3. *Article 5.3 - Freedom of Arts, Research and Teaching*

a) *Mephisto* - BVerfGE 30, 173

Explanatory Annotation

In this decision the Court had to balance the freedom of the arts with personality rights of a deceased actor whom his son found unfavourably represented in a novel and who had successfully sought an injunction against the publication of the book. The author had depicted the ruthless adaption to the Nazi regime by the actor to further his acting career. The Court held that the freedom of the arts not only protects the artist himself but also the publisher as one necessary element in bringing the art to the people. The Court also made it clear that the fact that Article 5.3 does not contain any language for the justification of infringements of this right has consequences. Rather than resorting to the limitations spelled out in Article 5.2 for the free speech provision in Article 5.1 or the very broad limitations contained in the subsidiary fallback right contained in Article 2.1, the Court developed the concept of constitutionally inherent limitations of rights, which is to be applied to all rights in the Basic Law not containing specific language for the justification of limitations. Constitutionally inherent limitations arise from a conflict between the fundamental right in question, here Article 5.3, and other rights and interests protected by the Constitution. In this case the conflicting right was the personality rights of the deceased actor. The Court explained that the dignity core of personality rights as protected by Article 1.1 does not cease with the death of the person, whereas the personality rights protected in Article 2.1 only protect living persons. Hence, the freedom of the arts had to balance with the opposing dignity core of the deceased's personality rights.

From then on the Court had to specify its role in relation to the regular courts, which had granted the injunction on the basis of the Civil Code. The Court emphasized that it is not a court of appeal and that it cannot overturn decisions by other courts unless these other courts either did not take fundamental rights of the Basic Law into consideration or misconstrued them in a manifest manner. In this case the regular courts had dealt with the relevant fundamental rights considerations in detail. The balancing act of the regular courts in favour of the actor and against the publisher might have turned out differently at the Constitutional Court. But whereas a Court of Appeal can replace a lower court's decision when it feels that their own interpretation of the respective law is the "better" interpretation, the Constitutional Court can overturn decisions of the regular courts only if that interpretation of the respective law was a constitutionally "wrong". The distinction between 'better interpretation' of regular law and 'constitutional wrong' interpretation of regular law is a fine one and many observers have criticized the Constitutional Court for all too quickly and too often behaving like an appellate court thus interfering with the jurisdiction of the regular courts. This case, however, is rather an example of the Constitutional Court having been too reluctant as the non-publication of a book is a very grave matter.

60 Years German Basic Law:
The German Constitution and its Court

**Translation of the Mephisto Judgment - Decisions of the Federal Constitutional Court
(Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 30, 173***

1. The guarantee in Art. 5 III, 1 is an objective value-laden basic norm regulating the relationship between art and the state. It also guarantees the individual freedom of the artist.
2. The freedom of art guaranteed covers not only the artistic creation as regards the work produced, but also the artwork's exhibition and dissemination.
3. A publisher of a novel may invoke the basic right of artistic freedom, too.
4. The freedom of art is not limited under Article 5.2 of the Basic Law. Nor is Article 2.1 half-sentence 2 of the Basic Law applicable here.
5. The resolution of the tension between the right to the artistic freedom and the protection of the personality must take account of the constitutional value system; thereby it is of special importance to take into consideration human dignity that is guaranteed in Article 1.1 of the Basic Law.

Judgment of the First Senate of 24 February 1971 - 1 BvR 435/68 -

Facts:

The complainant seeks constitutional review of the injunction obtained by the adopted son and sole heir of Gustaf Gründgens, actor and theatre director, against the printing, distribution, or publication of a book by Klaus Mann entitled *Mephisto, a Novel, or How to Get on in the World*.

The novel portrays the rise of Hendrik Höfgen, a talented actor who in order to make a career for himself as an artist in collusion with Nazi powers, is false to his true political leanings and rides roughshod over all human and ethical considerations. The psychological, intellectual, and sociological factors which made such a career possible are all laid out.

The model for Hendrik Höfgen was the actor Gustaf Gründgens, one of the Hamburger Kammerspieler in the 1920s, when he was a friend of Klaus Mann and briefly married to his sister Erika. Gründgens and his career are reflected in numerous characteristics of Hendrik Höfgen, including his physical appearance, the plays he acted in, and his appointments as State Councillor and Director-General of the State Theatre of Prussia.

In August 1963 the complainant announced the publication of *Mephisto*, and suit was brought by the adoptive son and sole heir of Gustaf Gründgens, who died in October 1963. The claim alleged that anyone at all familiar with German theatre in the 1920s and 1930s would link Höfgen with Gründgens; that in addition to many recognizable facts the novel contained

* Translation by J. A. Weir; © Basil Markesinis.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

many hurtful fictions which helped to give a false and highly derogatory picture of Gründgens's character. The novel was not a work of art but a roman-à-clef written to avenge Gründgens's marriage to Mann's sister Erika, which he believed dishonourable.

Extracts from the Grounds:

III.

Article 5.3 sentence 1 of the Basic Law declares that along with science, research, and teaching, art is free. By its terms and intention the guarantee in Article 5.3 sentence 1 is an objective value-laden basic norm regulating the relationship between art and the state. It also guarantees the individual freedom of the artist.

1. The field of 'art' must be determined by the distinctive structural features of the artistic enterprise. The essence of artistic endeavour lies in the free creative process whereby the artist, in his chosen communicative medium, gives immediate perceptible form to what he has felt, learnt, or experienced. Artistic activity involves both the conscious and the unconscious, in a manner not rationally separable. Intuition, imagination, and knowledge of the art all play a part in artistic creation; it is not so much communication as expression, indeed the most immediate expression of the artist's individuality.

The freedom guaranteed covers the artistic creation as regards both the work produced and the effect produced by it. The two form an indissociable unity. The exhibition and dissemination of the work are as important as its creation for art as the specifically artistic enterprise; indeed, the 'area of effect', public access to the work of art, is the ground in which Article 5.3 of the Basic Law is rooted. A glance back at the artistic policy of the Nazi regime shows that to guarantee merely the individual rights of artists cannot ensure the freedom of art: the basic right would prove hollow unless it extends from the personal zone of the artist to the area of impact.

2. It is not here possible to give an exhaustive definition of the scope of the constitutional guarantee of freedom of art in all its various forms. Nor is it necessary for the case in hand, since it is common ground in the courts below, between the parties and probably all experts that the novel in question ranks as a work of art. We may therefore concentrate on factors relevant to the appraisal of an example of the narrative art which by dealing with actual events courts the risk of conflicting with the rights and interests of the persons portrayed.

In putting real events in a work of art the artist 'recreates' them for he sunders them from their actual context and places them in a novel setting dominated by his concern for striking presentation rather than by their own actuality. Artistic unity may, and sometimes must, prime the truth of the occurrence.

The role and purpose of Article 5.3 sentence 1 of the Basic Law is above all to give protection against encroachment by the public power on any specifically artistic undertakings, actions, and decisions. One cannot without inhibiting the free development of the creative artistic endeavour prescribe how the artist should react to reality or reproduce his reactions to it. The artist is the sole judge of the 'rightness' of his response. To this extent the guarantee of artistic freedom means that one must not seek to affect the manner in which the artist goes about his

**60 Years German Basic Law:
The German Constitution and its Court**

business, the material he selects, or the way in which he treats it, and certainly not seek to narrow the area in which he may operate or lay down general rules for the creative process. As to narrative works of art the constitutional guarantee means that the artist must be free to choose and treat his topic free from attempts by the state to limit the area of specifically artistic judgment by rules or binding value-judgments. This applies also, indeed especially, when the artist is dealing with actual events: ‘committed art’ is not excluded from the constitutional guarantee.

3. Article 5.3 sentence 1 of the Basic Law is a comprehensive guarantee of the freedom of artistic activity. Thus where intermediaries are needed in order to establish relations between the artist and the public they too are protected by the constitutional guarantee. As a product of the narrative art needs to be reproduced, distributed, and published in order to have any effect on the public, the publisher’s function as intermediary is indispensable, so the constitutional guarantee extends to his activity as well. Thus, as publisher of the novel, the complainant may invoke the basic right contained in Article 5.3 sentence 1 of the Basic Law (see also BVerfGE 10, 118, [121]; 12, 205 [260] on the freedom of the Press).

4. Art having its special nature and rules, its guarantee by Article 5.3 sentence 1 of the Basic Law is absolute. The clear terms of that provision foredoom any attempt to limit it, whether by narrowing the idea of art in the light of one’s value-judgments or by extending or invoking the limitations applicable to other constitutional provisions.

The Bundesgerichtshof was quite right to state that Article 5.2 of the Basic Law which limits basic rights under Article 5.1 is inapplicable here. The different guarantees in Article 5 of the Basic Law are systematically separated, and this shows that the limitations in Article 5.2 are inapplicable to matters covered by Article 5.3, since Article 5.3 is a *lex specialis* in relation to Article 5.1. Nor is it acceptable to sever parts of a narrative work of art, call them expressions of opinion under Article 5.1 and then apply to them the limitations laid down in Article 5.2. Nor do the *travaux préparatoires* of Article 5.3 support the view that the authors of the Constitution regarded freedom of art as a subspecies of freedom of expression or opinion.

...

Nor can one accept that the freedom of art is limited under Article 2.1 sentence 2 of the Basic Law by the rights of others, by the constitutional order or by the moral law. Such a view would be incompatible with the constant holding of this Court that Article 2.1 of the Basic Law is subsidiary and the individual freedoms special in a manner which bars the extension of the community priority of Article 2.1 sentence 2 of the Basic Law in the light of the use of Article 2.1 of the Basic Law. Nor are these limitations applicable to the area of effect of works of art.

5. Yet there are limits to this freedom. The freedom incorporated in Article 5.3 sentence 1 of the Basic Law, like all basic rights, is rooted in the Constitution’s conception of man as a responsible person free to develop within society. The absolute nature of the guarantee of artistic freedom means that its limits are to be found only within the Constitution itself. The freedom of art is not subject to mere statute, it cannot be qualified by the general legal system or be at the mercy of any vague clause about essential interests of state and society which lacks constitutional basis and is uncontained by the rule of law. If the guarantee of artistic freedom

**Selected Fundamental Decisions of
the Federal Constitutional Court**

gives rise to any conflict, it must be resolved by construction in terms of the order of values enshrined in the Basic Law and in line with the unitary system of values which underlies it. As part of this system of basic rights the freedom of art is coordinate with the dignity of man as guaranteed by Article 1 of the Basic Law, the supreme and controlling value of the whole system of basic rights (BVerfGE 6, 32 [41]; 27, 1 [6]). Given the effect which a work of art may have on the social plane, the guarantee of artistic freedom may come into conflict with the area of human personality, equally protected by the Constitution.

A person's claim to respect and value may be affected by an artist's use of details of character and career of actual people as in addition to being an aesthetic reality, such a work also has existence in the realm of social facts and the social effects are not dissipated by being artistically transmuted. Such social effects while taking place beside the artistic effects must nevertheless be appraised with regard to the scope of the guarantee of Article 5.3 sentence 1 of the Basic Law, since in the work of art the 'real' and 'aesthetic' worlds are unified.

6. The courts below were right in this connection to invoke Article 1.1 of the Basic Law in their appraisal of its protective effect on the area of personality of the late actor Gustaf Gründgens. It would be inconsistent with the constitutional mandate of the inviolability of human dignity, which underlies all basic rights, if a person could be belittled and denigrated after his death. Accordingly, an individual's death does not put an end to the state's duty under Article 1.1 of the Basic Law to protect him from assaults on his human dignity.

In addition, the Bundesgerichtshof and Oberlandesgericht held that Article 2.1 of the Basic Law also had radiant protective effects in private law for Gründgens, though to a degree diminished by his death. However, only a living person is so entitled: the right of personality cannot survive death. An essential precondition of the basic right under Article 2.1 of the Basic Law is the existence of at least a potential or a future person. It is irrelevant that a person may be affected during his lifetime by what the legal situation will be after his death, though this weighed with the Bundesgerichtshof. It is no derogation from the freedom of action and selfdetermination guaranteed by Article 2.1 of the Basic Law to hold that the protection of the personality expires on death.

7. The resolution of the tension between the protection of the personality and the right to the artistic freedom cannot turn solely on the 'social' effects of a work of art but must also take account of specifically aesthetic considerations. The conception of man which underlies Article 1.1 of the Basic Law is as much infused with the guarantee of freedom in Article 5.3 sentence 1 of the Basic Law as the latter is influenced by the value implicit in Article 1.1 of the Basic Law. The individual's claim to social respect and value is not superior to artistic freedom, but neither can art simply ignore the individual's claim to proper respect.

Only by weighing all the circumstances of the given case can one decide whether the publication of a work which artistically deploys true details about an actual person poses a serious threat of encroachment on the protected area of his personality. One consideration must be whether and how far the artistic treatment of the material and its incorporation into the work as an organic whole have made the 'copy' independent of the 'original' by rendering objective,

**60 Years German Basic Law:
The German Constitution and its Court**

symbolical, and figurative what was individualized, personal, and intimate. If such an aesthetic appraisal reveals that the artist has indeed produced, or even intended to produce, a 'portrait' of the 'original', the outcome will depend on the extent of the artistic alienation and how seriously the 'falsification' damages the reputation or memory of the subject.

IV.

This Court must therefore decide whether in balancing the protection afforded by Article 1.1 of the Basic Law to the personality of the late Gustaf Gründgens and his adopted son against the guarantee of artistic freedom under Article 5.3 sentence 1 of the Basic Law the courts below have upheld the principles just stated. However, in this Court the opinions on that matter are equally divided, so it cannot hold that the decisions under attack infringed the Constitution (s. 15.2 sentence 4 of the Federal Constitutional Court Act).

...

3. This Court has always held that a Verfassungsbeschwerde empowers it to review judicial decisions only within narrow limits, and that in particular it cannot review the facts as found and evaluated, the construction of mere law or its application in the individual case, which are matters for the regular courts. These principles apply equally when review is sought of the balancing of the protection afforded to the parties to a civil suit by Article 1.1 of Article 5.3 sentence 1 of the Basic Law.

...

This Court is not, like a court of appeal, empowered to substitute its own opinion of the case for that of the proper judge. In cases like these it can only hold that the basic right of the losing party has been infringed if the judge has either failed to recognize that it is a case of balancing conflicting basic rights or has based his judgment on a fundamentally false view of the importance, and especially the scope, of either of those rights.

When the judgments under attack are so tested, it emerges that the Oberlandesgericht and the Bundesgerichtshof recognized that a balancing act was required in order to resolve the tension between the rights emanating from Article 1.1 of the Basic Law and Article 5.3 sentence 1 of the Basic Law, and that the judgments as a whole do not seem to be based on a fundamentally erroneous view of the importance or scope of the two basic rights.

...

Selected Fundamental Decisions of
the Federal Constitutional Court

b) *Anachronistic Procession*, BVerfGE 67, 213

Explanatory Annotation

Article 5.1 of the Basic Law protects the freedom of speech, press, movies and broadcasting and the freedom of information. Article 5.3 of the Basic Law protects the freedom of the arts and sciences and hence the freedom of artistic expression. The difference between the two provisions is the norm between them, Article 5.2 of the Basic Law. Article 5.2 contains language pertaining to possible limitations of the freedom of communications. It only applies to Article 5.1 and not to Article 5.3, which is one of the few guarantees for which the Basic Law does not contain specific limitation language. That does not mean that these rights are absolute rights. Instead, they belong to the group of fundamental rights, which can only be restricted in the defence of other constitutionally protected rights and interests.⁴³ What that means in detail is controversial but the prevailing view is that these “unconditional” rights should be harder to restrict than those rights of the Basic Law whose scope can be reduced under the limitation language provided and that the “unconditional” rights should not in essence be subject to the same scope of limitations that are available in Article 2.1 or 5.2 of the Basic Law. The result is that it can be legally relevant whether something is qualified as regular communication or as art. However, it should be kept in mind that the Constitutional Court’s approach since the famous *Lüth*-decision has been to emphasize the “constitutive significance” of free speech for a democratic society and to restrictively interpret the limitation language in Article 5.2 of the Basic law in the light of this constitutive significance. Whether the application of Article 5.3 really increases the level of protection in the light of the construction of Article 5.1 of the Basic Law is therefore highly unlikely.

In any case, the political street theatre, which formed the backdrop of this case, with links all the way back to Percy Bysshe Shelley’s poem “The Masque of Anarchy written on the Occasion of the Massacre in Manchester” in 1819/1820 and a Berthold Brecht poem based on Shelley’s work, took place as a protest against the - ultimately unsuccessful - candidature of the late Bavarian politician Franz-Josef Strauss for the chancellorship in 1980. Strauss was a polarizing figure in German politics and the protests were fierce. The Street Theatre depicted him in the context of Nazi symbols, portraying images of World War III, corruption and other unfavourable allegations. Strauss reacted by instituting criminal proceedings under the insult-provision of s. 185 of the German Criminal Code and the organizers were sentenced to fines.

The Constitutional Court did not agree with the regular courts. In its view the interpretation of individual elements of the street theatre as insulting was a wrong approach. Works of art must be looked at in their entirety and - in the context of evaluating any insulting content - must then be interpreted from various angles. The Constitutional Court concluded that this approach leaves open other ways of interpretation that are not altogether insulting.

43 So-called “constitutionally-immanent” restrictions.

**60 Years German Basic Law:
The German Constitution and its Court**

Whereas this decision of 1984 came to the right conclusion it is lamentable that the Constitutional Court did not place the street theatre into the broader context of political controversy and political campaign. The Court's general approach has always been that the closer the incriminated speech is to the political discourse in the broadest sense, the more protected it is. Conversely, the more the incriminated speech is removed from this discourse and largely communicated to defame or injure a private individual, the less protection is warranted. In this case the issue was political campaigning and protest against a candidate for high office. Free speech must prevail and rather technical explanations of how certain artistic expressions can or cannot be understood are really beside the point.

Translation of the Anachronistic Procession Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 67, 213*

Headnote:

Judgment concerning the scope of the guarantee of artistic freedom (Article 5.3 sentence 1 of the Basic Law (Grundgesetz - GG)) for the purposes of assessment under criminal law of a political street theatre.

Order of the First Senate of 17 June 1984 - 1 BvR 816/82 -

Facts:

During the campaign for the 1980 Bundestag elections, political opponents of the CDU/CSU candidate for the chancellorship, Bavarian Minister-President Franz Josef Strauss, staged a political street theater in different cities and communities in the Federal Republic in the form of a procession consisting of vehicles and pedestrians. This street theater took its inspiration from a poem by Bertold Brecht: "The Anachronistic Procession or Freedom and Democracy;" one of the figures in the piece appeared wearing, among other things, a mask of Franz Josef Strauss in a wagon with various "Nazi big-shots."

After a criminal complaint was filed by the Bavarian Minister-President, the complainant, an actor in the street theater, was sentenced to a fine by the Local Court (Amtsgericht); the Local Court considered the very formation in preparation for the procession a defamation of the Bavarian Minister-President. The appeal on points of law to the Bavarian Higher Regional Court (Bayerisches Oberstes Landesgericht) was unsuccessful.

The Federal Constitutional Court reversed the criminal convictions in response to the constitutional complaint of the complainant.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

Selected Fundamental Decisions of
the Federal Constitutional Court

Extract from the Grounds:

C.

The constitutional complaint is founded. The challenged decisions violate the fundamental right of the complainant under Article 5.3 sentence 1 of the Basic Law.

I.

The constitutional complaint is directed against criminal convictions, which are in principle not amenable to review by the Federal Constitutional Court for the purposes of the establishment of facts or the interpretation and application of criminal law. The Court must, however, ensure that the ordinary courts respect fundamental rights and apply the corresponding standards. In this regard, the limits to its possibilities for intervention depend in particular upon the severity of the alleged interference with fundamental rights: The threshold for a violation of objective constitutional law requiring correction by the Federal Constitutional Court is reached when a decision of the criminal courts reveals errors in the establishment of facts or interpretation that are based on a fundamentally erroneous assessment of the importance of a fundamental right and in particular of the scope of its area of protection and which are also of a certain substantive importance in the concrete legal case (see BVerfGE 66, 116 [131] - Springer/Wallraff -; see also in connection with the guarantee of artistic freedom even earlier BVerfGE 30, 173 [188, 196-197]).

Furthermore, the more permanent the ultimate effect of a conviction on the sphere of the fundamental rights of the convicted party, the more stringent the requirements become that must be met in terms of justification of this encroachment and the more extensive the possibilities for review available to the Federal Constitutional Court (see BVerfGE 42, 143 [148-149] - DGB).

Conviction for a criminal offence is as a sanction itself already more severe than conviction for a civil offence, which may involve a cease and desist order, a retraction or payment of damages (BVerfGE 43, 130 [136] - political flier). In the case of a sanction under criminal law for an act that may fall under the guarantee of artistic freedom, there is also the danger that the negative effects as regards the exercise of this freedom, which is guaranteed without a reservation of legislative powers because of its especial importance, may extend beyond the concrete case. Given this situation, the Federal Constitutional Court cannot limit its review to the question as to whether the challenged decisions are based on a fundamentally erroneous assessment of the importance of Article 5.3 sentence 1 of the Basic Law and in particular the scope of its area of protection. Nor may individual errors of interpretation be disregarded (see BVerfGE 42, 163 [169]; 43, 130 [136-137]; 54, 129 [136]; 66, 116 [131]).

II.

The “Anachronistic Procession” event falls into the area protected by the fundamental right of artistic freedom (Article 5.3 sentence 1 of the Basic Law), against which the decisions under challenge must be measured as described below.

**60 Years German Basic Law:
The German Constitution and its Court**

1. This guarantee of freedom contains first of all by virtue of its wording and meaning a basic objective standard that governs the relationship between the area of life subsumed under “art” and the state. At the same time, the provision guarantees everyone who is active in this area a right to personal freedom. It applies in equal measure to both the “creative phase” of artistic activity and the “effective phase” consisting of the presentation and dissemination of works of art, which is the phase that gives the public access to works of art (BVerfGE 30, 173 [188-189]).

This guarantee was included in the Basic Law under the impression of the grievous experiences that artists were compelled to tolerate under the rule of force imposed by the National Socialist regime. This is also of importance for the purposes of interpretation of Article 5.3 sentence 1 of the Basic Law: The guarantee of artistic freedom may not be restricted either by narrowing the definition of art by the application of quality standards or by an expansive interpretation or analogy on the basis of restrictions that apply to other provisions of the Basic Law (BVerfGE, loc. cit., [191]).

2. The area of life referred to as “art” must be defined in terms of the structural characteristics that are determined by the nature of art and unique to art alone. It is not possible to describe by a term that is equally valid for all forms of expression of artistic activity and for all classes of artistic Endeavour how far this extends the scope of the guarantee of artistic freedom under the Basic Law and what it entails in detail (see BVerfGE op. cit. [183-184]).

- a) One cannot infer an adequate definition from previous attempts undertaken in the area of the theory of art (including the reflections of practicing artists on their activities) to achieve clarity as to the nature of art so that it is not possible to proceed from an established definition of art in the extrajudicial area. The fact that there is a lack of any consensus as regards objective standards in the theory of art also has to do with a special characteristic of artistic life: the specific objective of the “avant-garde” is to expand the boundaries of art. This and widespread mistrust on the part of artists and art theoreticians of rigid forms and strict conventions are characteristics of the area of life referred to as art that must be respected and indicate in themselves that only a broad definition of art can lead to appropriate solutions.
- b) The impossibility of defining art in general does not imply a release from the constitutional duty to protect the freedom of the area of life consisting of art, which is to say, to decide for the purposes of concrete legal application whether the prerequisites of Article 5.3 sentence 1 of the Basic Law are in place.

To the extent that formulas and criteria for delimitation have been developed in scholarly literature and case law for dealing in practice with laws that involve “art” as a constituent element, this does not suffice for interpretation of the constitutional guarantee since interpretation under ordinary law is oriented towards the various purposes of the provisions of law.

As far as can be determined, further-reaching attempts to arrive at a definition for the purposes of constitutional law concern only individual aspects; they can claim validity only for individual areas of artistic activity (see from the exhaustive literature, for

**Selected Fundamental Decisions of
the Federal Constitutional Court**

example, Ropertz, *Die Freiheit der Kunst nach dem Grundgesetz*, Diss. Heidelberg 1963; Erbel, *Inhalt und Auswirkungen der verfassungsrechtlichen Kunstfreiheitsgarantie*, 1966; Knies, *Schranken der Kunstfreiheit als verfassungsrechtliches Problem*, 1967; von Noorden, *The Freiheit der Kunst nach dem Grundgesetz [Article 5.3 sentence 1 of the Basic Law] und die Strafbarkeit der Verbreitung unzüchtiger Darstellungen [s. 184.1 no. 1 of the Criminal Code]*, Diss. Cologne 1969; Müller, *Freiheit der Kunst als Problem der Grundrechtsdogmatik*, 1969; Vogt, *Die Freiheit der Kunst im Verfassungsrecht der Bundesrepublik Deutschland und der Schweiz*, Diss. Zurich 1975; each of which with many further references).

Nevertheless, these efforts include viable aspects that in their entirety make it possible to decide in the concrete individual case whether the subject matter falls into the area protected by Article 5.3 sentence 1 of the Basic Law.

3. a) The Federal Constitutional Court has emphasized that “free creative expression” is essential for artistic activity, “in which the impressions, perceptions and experiences of the artist are manifested directly through the medium of a specific visual language.” All artistic activity, the Court stated, consists of intertwined conscious and unconscious processes that defy rational resolution. The Court went on to add that intuition, fantasy and artistic understanding work together in the process of artistic creativity; it is not primary communication, but expression, and to be sure the most direct expression of the unique personality of the artist (BVerfGE 30, 173 [189]). Similar attempts at substantive, value based description in the scholarly literature also emphasize the characteristics of creativity, expression of personal experience, visualization and communicative transmission of meaning (see Scholz in Maunz/Dürig/Herzog/ Scholz, GG, Article 5.3, marginal notes 24 and 29; Scheuner, *Die Bundesrepublik als Kulturstaat*, in *Bitburger Gespräche, Jahrbuch 1977-1978*, p. 113 [126]; Würtenberger, *Vom strafrechtlichen Kunstbegriff*, in *Festschrift für Eduard Dreher*, 1977, p. 79 [89]; Geiger, *Zur Diskussion über die Freiheit der Kunst*, in *Festschrift für Gerhard Leibholz*, 1966, p. 187 [191]).

The visual manifestation of the “Anachronistic Procession” satisfies the requirements so described. Creative elements can be seen not only in Brecht’s poem, but also in the way it was visually transposed. The poem and its presentation can be considered sufficiently “formed.” The intention is to express and make immediately visible general and personal historical experiences - against the backdrop of the current political situation.

- b) Even if one sees the essence of a work of art in the fulfilment of the requirements of the genre of a specific type of work from a formal, typological perspective, that is, if one adopts as a basis a more formal definition of art that derives only from the activity and results of, for example, painting, sculpting or literature (see Müller, *op. cit.*, in particular pp. 41-42; Knies, *op. cit.*, p. 219), it is still not possible to deny the “Anachronistic Procession” the quality of a work of art. The poem that serves as the basis for performance is just as much a classic form of artistic expression as the rendition in the form of theatre staged by actors (with masks and properties) on the

**60 Years German Basic Law:
The German Constitution and its Court**

basis of a concrete script. The fact that the performance involved the specific form of “street theatre” also does not change this in any way; permanently installed stages do not enjoy priority over traveling theatre, a form of theatre with a long tradition.

- c) Even if one considers the characteristic criterion for artistic expression to lie in the fact that it is possible due to the variety of its substantive content to repeatedly derive further-reaching meanings from the presentation through further interpretation such that a virtually inexhaustible transmission of information results (see von Noorden, op. cit., pp. 82 et seq., the “Anachronistic Procession”) fulfils this criterion. The very special form of street theatre described above results in the creation of distance from viewers such that they are aware as they watch that a “play” is being performed. The thrust of the poem, which is already amenable to manifold interpretation, does to be sure more become more explicit when the poem is updated and makes reference to contemporary persons and events, but the statement it makes is nonetheless still ambiguous, especially since this statement is not composed directly, but rather indirectly of various elements (for example, thought provoking texts, puppets, persons in costume, groups of persons).
- d) Since the performance of the “Anachronistic Procession” does therefore fall within the area of protection of Article 5.3 sentence 1 of the Basic Law, this is not changed by the superficial and clearly political motives of the producers. Binding rules and values for artistic activity also cannot be imposed when artists deal with current events; the area of “committed art” is not excepted from the guarantee of freedom (BVerfGE 30, 173 [190-191]).

III.

1. Art is as regards its independence and its own laws guaranteed without reservation by Article 5.3 sentence 1 of the Basic Law; neither the “threefold bar” in the second half of the sentence contained in Article 2.1 of the Basic Law nor the constraints of Article 5.2 of the Basic Law apply directly or by analogy (BVerfGE 30, 173 [191-192]). On the other hand, the limits contained in other provisions of the Basic Law that serve to protect other significant legal interests embodied in the constitutional order under the Basic Law may also be directly imposed on artistic freedom. This applies in particular in the case of the right of personality, which is protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law. However, artistic freedom in turn imposes limits on the right of personality. When defining these limits in a concrete case, it does therefore not suffice to establish through judicial proceedings the existence of an impairment of the right of personality - in the form of defamation in this case - without taking into account artistic freedom: it is necessary to establish whether this impairment is so serious as to require subordination of artistic freedom; a slight impairment or the mere possibility of a serious impairment do not suffice for this purpose in view of the considerable importance of artistic freedom. If of course a serious impairment of the right of personality can be established beyond a doubt, it cannot be justified on the grounds of artistic freedom.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

2. The Local Court failed to recognize the resultant requirements under constitutional law:
- a) Artistic statements are subject to and require interpretation; an overall view of the work constitutes an indispensable element of such interpretation. It is therefore not permissible to remove individual parts of a work of art from its context and subject them to independent examination for the purposes of establishing whether they are to be considered a criminal offence. Constitutional grounds for objection therefore exist if the Local Court assumes that the incriminating actions took place outside the actual performance and concludes from this that Article 5.3 sentence 1 of the Basic Law is not applicable. At the same time, even the purely practical necessity of making visible preparations (formation of the procession) or regrouping (event in Kassel) was not recognized. It is also necessary to take into account here that it is thoroughly possible for visible preparations to constitute part of the overall artistic concept in modern theatre.

Symbolic representation with the use of puppets and banners may to be sure also have a declaratory value outside the performance. However, the producers in fact avoided this by covering the procession when traveling across the country. The fact that the performance of the procession in Sonthofen could not begin immediately also does not in any way change this assessment. Neither the complainant nor the producers were responsible for this; this was caused by orders from regulatory authorities. They can also not be held responsible for the photographs taken by the police “as evidence.” Photographs taken by journalists fall into the category of promotional advertising and are comparable to the preview photos that are commonly used in the case of permanently installed theatres.

Likewise, as follows from the above, it is inconsistent with constitutional law to want to establish a case of defamation not - as is required by Article 5.3 sentence 1 of the Basic Law - on the basis of an overall perspective, but exclusively on the basis of the plague wagon.

- b) The Local Court also failed to recognize that such an overall perspective, which would have been appropriate, would have yielded several possible interpretations.

A definitive decision as to the standard to be applied when artistic statements are to be assessed under criminal law is not necessary here, especially since this is hardly possible either in general or for all art forms. A person who is completely unfamiliar with the forms in which art manifests itself can certainly not set the standards when it comes to understanding art; on the other hand, however, it is also not possible to take as a reference a person with a comprehensive education in art, in any case not if - as here - the manifestation is directed at a random audience on a public street. In this case, it suffices to ask how a passer-by who was prepared to take into account the entire procession and the performance of the poem as well could perceive the “plague wagon.”

Even then it would be possible to think that the joint plaintiff is sitting in the same wagon as the Nazi big-shots, can be equated with them and that he supports their political goals. Taking into account the specific content of the poem, it would be just

**60 Years German Basic Law:
The German Constitution and its Court**

as possible to get the impression that the intention is to be sure to show a struggle against these Nazi big-shots that is, however, just as hypocritical and mendacious as the divorce from the Nazi past portrayed in the Brecht poem.

Another observer could come to the conclusion that the joint plaintiff is combating, albeit unsuccessfully, manifestations of National Socialism. A spectator who indirectly or directly puts the intentions of the script in the foreground of his thoughts would similarly see such a struggle, but accompanied by the additional thought that as an influential politician described as leaning to the right the joint plaintiff would especially require such distance and that the old National Socialist ideas were again prevailing.

It is not in any case proper to decide with the help of the figure of the “reflective passer-by” exclusively in favour of that of the possible interpretations suggested by the description of the facts in the judgment of the Local Court (further possibilities would by no means seem excluded) that is relevant under criminal law and to postulate only a casual, naive observer who ignores the “fight” with the puppets. This also constitutes a violation of Article 5.3 sentence 1 of the Basic Law.

3. The decisions under challenge are based on these errors. The possibility cannot be excluded that the courts would have decided otherwise in view of the requirements of constitutional law presented above. The decisions therefore had to be overruled; the matter was referred back to the Local Court. The court must respect the principles presented above in respect of the relationship between artistic freedom and the general right of personality in the new proceedings and decision.

VI. Marriage, Family and Children - Article 6 of the Basic Law

a) *Life Partnership Act, BVerfGE 105, 313*

Explanatory Annotation

The - often quite controversial - debate over the legal recognition of homosexual partnerships (same-sex unions, same-sex marriage or civil unions) has been raging in a number of countries for quite some time now. The constitutional backdrop to the German civil union legislation of 2000 is Article 6.1 of the Basic Law, which affords to marriage and family the special protection of the law. The Court made it quite clear that, whereas the Basic Law does not explain what a marriage is, it is inherently a union between a man and a woman. It is for this very reason that the Court had no difficulty fending off arguments that the same-sex civil union might infringe on the protection to be afforded to the traditional marriage. The traditional marriage is still open to anyone who wishes to engage in this traditional instrument and homosexual couples are excluded from marriage. The Court also made it clear that a gap in the new legislation pertaining to the relationship between traditional marriage and same-sex unions had to be resolved by interpretation in favour of mutual exclusivity making it impossible for a married person to engage in a parallel civil union and *vice-versa*. In essence the Court followed a “separate-but-equal” doctrine with regard to the two institutions. They are different institutions, must be treated differently and are mutually exclusive. It follows that same-sex couples cannot engage in “marriage” (*Ehe*) and that heterosexual couples cannot engage in a civil union. With regard to other partnerships of mutual support that do not have a sexual context, such as between siblings, the Court saw the distinguishing criterion in the fact that such partnerships are not exclusive and that it does not constitute discrimination to bar such partnerships from the civil union.

The decision is relevant for another constitutional issue that arose in the context of the federal nature of the German state. When the legislation was passed it was evident that it would not gain a majority in the federal chamber of states, the *Bundesrat*. The legislation was therefore split in two pieces, one dealing with the substance matter of the civil union and the other dealing with the procedural implementation, for example the determination of the relevant *Länder* authorities for conducting the civil union. Only the latter invoked the necessity for the federal chamber, the *Bundesrat*, to assent to the legislation. The Court saw no fault in splitting up the legislation in this manner thereby reducing the scope of power of the *Länder* in the federal legislative process and preceding a trend that would be followed in the constitutional federal reform amendments of the Basic Law in 2006.

Translation of the Life Partnership Act Decision - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 105, 313*

Headnotes:

1. A legal provision must be obviously incorrect in order for its correction to be permissible. This must be apparent not only from the wording of the provision, but also apparent in particular from its context and background materials.
2. If the Federal Government or the Bundestag divides up material for treatment in different laws in order to rule out the possibility of the Bundesrat preventing the enactment of provisions which on their own are not subject to its consent, this will not be constitutionally objectionable.
3. The introduction of the legal institution of a registered life partnership for same-sex couples does not violate Article 6.1 of the Basic Law (Grundgesetz - GG). The especial protection of marriage in Article 6.1 of the Basic Law does not prevent the legislature from providing same-sex registered life partnerships with rights and duties which are the same or similar to those of marriage. There is no detriment to the institution of marriage by an institution aimed at persons who are unable to enter into marriage with one another.
4. The fact that different sex *de facto* couples and cohabiting relatives cannot avail themselves of registered life partnerships does not violate Article 3.1 of the Basic Law.

Judgment of the First Senate of 17 July 2002 on the basis of the oral hearing on 9 April 2002
- 1 BvF 1, 2/01 -

Facts:

The Bavarian and Saxony state governments as well as the state government of the Free State of Thuringia filed applications for a judicial review of the Act to End Discrimination Against Same-Sex Life Partnerships (Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Lebenspartnerschaften - LPartDisBG), which was promulgated in February 2001.

The Act regulates the establishment and termination of a registered life partnership for same-sex couples. Under the Act a life partnership is established by a contract between same-sex persons, who must make the necessary declarations before the competent authority. The life partnership is terminated by a judgment upon application by one or both life partners. The life partners are obliged to care for and support one other and to plan their lives together. They have responsibility for one another. The Act does not make sexual relations a prerequisite. The legal consequences of a life partnership are in part modeled on those of marriage, but there are also differences. Accordingly, life partners have an obligation to pay each other maintenance. Life partners must disclose their financial position and may choose between community, property and a contract which regulates their financial relations. They can choose to have a joint name. A

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**Selected Fundamental Decisions of
the Federal Constitutional Court**

parent's life partner or former life partner who has lived with such a parent's child in a joint household for a longer period is entitled to a right of access to the child. A life partner is considered to be a family member of the other life partner. The Act introduces intestacy rights for life partners that are comparable to the intestacy rights of spouses. Entry into a life partnership also has legal consequences under social insurance law. Thus, for example, the state life insurance companies include life partners in family insurance. The family reunification provisions under the law concerning foreign nationals that apply to marital cohabitation apply to same-sex life partnerships. In addition, the Life Partnership Act (Lebenspartnerschaftsgesetz - LPartG) grants the life partner of a parent with sole custody the right to participate in day-to-day decisions concerning a child who is living with the parent if the parent consents., i.e., "small custody right".

The Life Partnership Act does not provide for a pension rights adjustment between the life partners in the event of the dissolution of the partnership, nor does it contain any provisions covering provision for the partner in the event of death. Similarly, there is no provision for joint adoption of a minor child. A Supplementary Act regulates tax and social insurance law; it also contains a series of procedural provisions which had not yet entered into force at the time of deciding the petitions for judicial review of the legislation (The draft Life Partnership Amendment Act [*Lebenspartnerschaftsänderungsgesetz*] tabled by the government fractions was rejected by the *Bundesrat* [Bundestag document] [*Drucksache des Deutschen Bundestages* - BTDrucks]. 14/4545; nor did the amended draft submitted by the FDP fraction in the next legislature period become law [Bundestag document 15/2477]).

The petitions for judicial review of the legislation were unsuccessful before the Federal Constitutional Court.

Extract from the Grounds:

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B. II.

The substantive aspects of the Act to End Discrimination against Same-Sex Life Partnerships are constitutional.

1. It is compatible with Article 6.1 of the Basic Law (Grundgesetz - GG). The introduction of the new institution of a registered life partnership for same-sex couples and its legal form do not violate the freedom to enter into marriage guaranteed in Article 6.1 of the Basic Law or the institutional guarantee contained therein. The registered life partnership is also compatible with Article 6.1 of the Basic Law, which is an Article with an underlying value based decision.

- a) Article 6.1 of the Basic Law protects the freedom to marry the partner of one's choice. (see BVerfGE 31, 58 [67]; 76, 1 [42]. This right to unimpeded access to marriage is not prejudiced by the Act to End Discrimination against Same-Sex Life Partnerships.
- aa) Every person capable of entering into marriage is still free to do so even after the introduction of registered life partnerships by the Act to End Discrimination Against Same-Sex Life Partnerships. Nonetheless, it is only possible to enter into marriage with a partner of the opposite sex since an essential characteristic of a

**60 Years German Basic Law:
The German Constitution and its Court**

marriage is that the partners are of different sexes (see BVerfGE 10, 59 [66]) and the freedom to enter into marriage is restricted to this. Marriage remains unavailable to same-sex couples even after the Act to End Discrimination against Same-Sex Life Partnerships. The Act only offers them the opportunity to enter into a registered life partnership as a legal institution for a long term relationship.

Similarly, the Act does not directly or indirectly affect the freedom of different sex couples to marry. Since registered life partnerships are not available to them, this institution cannot prevent them from marrying.

- bb) Access to marriage is not restricted by the Act to End Discrimination Against Same-Sex Life Partnerships. According to the Act, the fact that a person has already entered into a life partnership will not prevent him or her from entering into marriage. The Act to End Discrimination against Same-Sex Life Partnerships does not provide for any express impediment to marriage in this case. In this kind of situation, a registrar needs, however, to examine whether the prerequisite for entry into marriage exists, i.e., whether the partners seriously intend to enter into marriage. If this intention is missing, he must refuse to conduct the marriage ceremony (s. 1310.1 sentence 2 in conjunction with s. 1314.2 no. 5 of the German Civil Code (Bürgerliches Gesetzbuch - BGB)).

Nonetheless, the legislature has left open whether entry into marriage during an existing registered life partnership will have legal consequences for the continued existence of the life partnership, and if so, what these consequences will be. Thus it leaves it up to the courts to answer these questions.

This gap in the Act can only be closed in conformity with the constitution by taking into account the protection afforded to marriage by Article 6.1 of the Basic Law. In this connection, one needs to consider that a distinguishing aspect of marriage is that it is a close couple relationship between a man and a woman that excludes others. Marriage could lose this essential characteristic if one or both spouses were allowed to maintain a life partnership with another partner that was also intended to be long-term. The protection of marriage in Article 6.1 of the Basic Law requires that a spouse not be allowed to enter into a legally binding partnership in addition to his or her marriage. The legislature itself assumed that this was the case in Article 1 s. 1.2 of the Act to End Discrimination Against Same-Sex Life Partnerships.

For this reason, legal scholars propose that the legal consequence of entry into a marriage during an existing life partnership, which is a possibility that the Act to End Discrimination against Same-Sex Life Partnerships allows, be that the entry into marriage dissolve the life partnership by operation of law (see Schwab, FamRZ 2001, p. 385 [389]). This would be a way of closing the existing legislative gap in a manner that did justice to Article 6.1 of the Basic Law. This solution would adversely affect the other life partner more strongly than a dissolution pursuant to Article 1 s. 15 of the Act to End Discrimination against Same-Sex Life Partnerships, but it is acceptable from the point of view of ensuring compliance with Article 6.1 of the Basic Law.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

It would also be possible to satisfy the requirement that marriage as a living arrangement between a man and a woman be protected by making entry into marriage dependent on a life partnership not existing or no longer existing. An impediment to marriage of this kind would not be an impermissible restriction on the guarantee of freedom in Article 6.1 of the Basic Law because there would be an objective basis for it in the very nature and scope of marriage (see BVerfGE 36, 146 [163]). Just as an existing marriage prevents the entry into a new marriage (s. 1306 of the German Civil Code) so as not to endanger the couple relationship in a marriage, it is in keeping with the protection of marriage to only make it available to persons who are not otherwise legally bound by a partnership. This opportunity to give marriage the necessary protection would in addition protect the legitimate expectations of those persons who have chosen a registered life partnership as a legally binding, long-term partnership of responsible persons made available to them as a living arrangement by the legislature. This would ensure that their partnership could not be terminated simply by the unilateral decision of the other partner to marry. A ban on marrying where a life partnership exists would admittedly be in principle objectively justified. However, it would restrict freedom to enter into marriage. Whether the present Act allows the courts to fill the gap in this respect is not for decision here. If one takes into account the far-reaching consequences which the dissolution or termination of a registered life partnership has for the personal life and the economic position of the individuals concerned and the fact that the consequences can be very different depending on which legal construction is chosen to rule out the co-existence of marriage and life partnership, it would be obvious that the legislature should determine whether the existence of a life partnership prevents entry into a marriage or a marriage leads to the dissolution of an existing life partnership.

- b) The legislature did not contravene the constitutional requirement in Article 6.1 of the Basic Law that marriage should be a living arrangement that is available and protected (Institutional guarantee, see BVerfGE 10, 59 [66-67]; 31, 58 [69-70]; 80, 81 [92]) by introducing registered life partnerships through the Act to End Discrimination Against Same-Sex Life Partnerships. Marriage is not the subject matter regulated by the Act.
 - aa) The Basic Law itself does not contain a definition of marriage, but instead presupposes that it is a special form of human cohabitation. The implementation of the constitutional protection requires in this respect a legal regime that defines and limits which kind of cohabitation should enjoy constitutional protection as marriage. In this context, the legislature has considerable operating latitude to determine the form and content of marriage (see BVerfGE 31, 58 [70]; 36, 146 [162]; 81, 1 [6-7]).

The Basic Law does not guarantee marriage in the abstract, but in the form which corresponds to the prevailing opinions that are expressed in the legislative enactment (see BVerfGE 31, 58 [82-83]). Nonetheless, the legislature must when regulating marriage observe the essential structural principles arising from Article

**60 Years German Basic Law:
The German Constitution and its Court**

6.1 of the Basic Law, which derive from the existing living arrangements in conjunction with the freedom incorporated in the guaranteed fundamental right and other constitutional provisions (see BVerfGE 31, 58 [69]).

Part of what constitutes a marriage - which is how it has proved its worth irrespective of social change and the ensuing amendments to its legal form and which is how it has been influenced by the Basic Law - is the fact that it is a union between a man and a woman for long-term cohabitation based on a free decision with state involvement (see BVerfGE 10, 59 [66]; 29, 166 [176]; 62, 323 [330]), in which a man and a woman form a partnership of equals (see BVerfGE 37, 217 [249 et seq.]; 103, 89 [101]) and in which they can freely decide how to shape their joint lives.

- bb) The institution of the registered life partnership is not covered by this protection. It is distinguishable from marriage because the partners are of the same-sex. This is at the same time what establishes it. A registered life partnership is not a marriage within the meaning of Article 6.1 of the Basic Law. The legislature takes into account Articles 2.1, 3.1 and 3.3 of the Basic Law by helping these people to develop their personalities and by reducing discrimination.
- cc) The Act to End Discrimination against Same-Sex Life Partnerships does not affect marriage as an institution in terms of its constitutional structural principles or its regulation by the legislature. Its legal foundation has not been changed. All of the rules which give marriage a legal framework and which attach legal consequences to the institution, remain in place (see BVerfGE, Judgment of 18 July 2001 - 1 BvQ 23/01 and 1 BvQ 26/01 -, NJW 2001, pp. 2457-2458).

Precisely because it refers to marriage, the institutional guarantee cannot be regarded as imposing a ban on allowing same-sex couples to have a partnership in a similar legal form.

- c) Article 6.1 of the Basic Law is not, however, limited to guaranteeing marriage in its essential form, but makes the special protection by the state order a value based decision with respect to the whole area of private and public law related to marriage and the family (see BVerfGE 6, 55 [72]; 55, 114 [126]).

In order to fulfil its protective task the state must in particular refrain, on the one hand, from doing anything that would injure or otherwise interfere with marriage, and, on the other hand, take suitable measures to promote it (see BVerfGE 6, 55 [76]; 28, 104 [113]; 53, 224 [248]; 76, 1 [41]; 80, 81 [92-93]; 99, 216 [231-232]).

The legislature did not fail to fulfil this task by enacting the Act to End Discrimination against Same-Sex Life Partnerships.

- aa) The Act to End Discrimination Against Same-Sex Life Partnerships does not injure or interfere with marriage.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

The special protection afforded to marriage under Article 6.1 of the Basic Law does not permit it to be placed in an overall worse position than other living arrangements (see BVerfGE 6, 55 [76]; 13, 290 [298-299]; 28, 324 [356]; 67, 186 [195-196]; 87, 234 [256 et seq.]; 99, 216 [232-233]).

- (1) This does not occur through the fact that the Act to End Discrimination Against Same-Sex Life Partnerships gives same-sex couples the opportunity to enter into a registered life partnership with rights and duties comparable to those in a marriage.

The legislature has to be sure in broad areas modeled the new institution of the registered life partnership on marital provisions. This does not place marriage or spouses in a worse position than they were previously in and does not disadvantage them in relation to a life partnership or life partners. There is no detriment to the institution of marriage by an institution aimed at persons who are unable to enter into marriage with one another.

- (2) Nor does the Act to End Discrimination Against Same-Sex Life Partnerships violate the prohibition on discrimination because the legislature refrained from using it to extend at the same time the Federal Social Assistance Act (Bundessozialhilfegesetz) by including provisions which make it necessary to consider the income and assets of both life partners when examining whether a partner is needy as required for the grant of social assistance.

Accordingly, under current social assistance law, spouses are surely treated as an economic unit, but life partners are not expressly also so included. This can in the case of spouses lead to the reduction or loss of the right to social assistance because the other spouse's income must be considered, while life partners are entitled to enjoy unreduced grants of social assistance without consideration of their partner's income. However, it was not the Act to End Discrimination against Same-Sex Life Partnerships that disadvantaged spouses, but rather the lack of a corresponding provision in the Federal Social Assistance Act. The Act to End Discrimination against Same-Sex Life Partnerships does not privilege life partners in comparison to spouses with regard to mutual duties of support. If the necessary legal consequences are not drawn from this in social insurance law, this can amount to a violation of the prohibition on discrimination in Article 6.1 of the Basic Law, but not however a violation of the prohibition by the provisions of the Act to End Discrimination Against Same-Sex Life Partnerships, which is alone the subject of the abstract judicial review proceedings.

- bb) Nor did the legislature by introducing the new institution of the registered life partnership violate the requirement that it promote marriage as a living arrangement. The Act does not deprive marriage of any promotion that it previously enjoyed. It simply provides legal protection to another type of cohabitation and allocates rights and duties to it.
- cc) The constitutional protection of marriage in Article 6.1 of the Basic Law does not prevent the legislature from favouring it over other living arrangements (see BVerfGE 6, 55 [76]). The fact that the legislature is permitted in fulfilling its duty to promote and regulate marriage to privilege it in comparison to other living

**60 Years German Basic Law:
The German Constitution and its Court**

arrangements cannot be used as the basis for a finding that Article 6.1 of the Basic Law contains a requirement that other living arrangements have to be discriminated against in favour of marriage. Judge Haas ignores this in her dissenting opinion when she considers the requirement that marriage be promoted in Article 6.1 of the Basic Law as a requirement that other living arrangements be discriminated against. Article 6.1 of the Basic Law privileges marriage by affording it protection to which it alone is entitled and obliges the legislature to promote it by suitable means. However, it is not possible to infer from this a requirement that the legislature discriminate against other living arrangements. The degree of legal protection given to marriage and the promotion of marriage is not reduced in any way if the legal system recognizes other living arrangements which cannot compete with marriage as a partnership of different sex partners. There is no constitutional justification for inferring from the special protection-afforded marriage that other forms of cohabitation should be regulated significantly differently from marriage and granted fewer rights. However, the legislature is obliged by its duty to protect and promote marriage to ensure that marriage can fulfil the function allocated to it by the constitution.

- (1) What is special about Article 6.1 of the Basic Law placing marriage under special protection is that, besides the family, it is the only institution that is given constitutional protection; other kinds of living arrangements are not protected. Without amending the constitution, marriage cannot be abolished and its essential structural principles cannot be altered (von Mangoldt: the Committee for Fundamental Questions of the Parliamentary Council, in: *Der Parlamentarische Rat 1948-1949*, files and minutes, vol. 5/II, 1993, prepared by Pikart/Werner, p. 826). The constitutional duty of promotion is limited to marriage. Neither the wording of the fundamental right nor the history of its development lend support to the view that additional meaning should be attached to the special nature of the protection with the result that marriage should always be afforded a broader scope of protection than other forms of cohabitation (Same result in Badura, in: *Maunz/Dürig, Grundgesetz, Article 6.1 marginal note 56* [version: August 2000]; Burgi, in: *Der Staat*, vol. 39, 2000, pp. 487 et seq.; Krings, *ZRP* 2000, pp.409 et seq.; Pauly, *NJW* 1997, pp. 1955-1956; Scholz/Uhle, *NJW* 2001, pp. 393-394; Tettinger, in: *Essener Gespräche zum Thema Staat und Kirche*, vol. 35, 2001, p. 140).

Numerous changes were made to Article 6.1 of the Basic Law in the course of the Parliamentary Council's deliberations and often formulations swayed between providing marriage with protection or special protection (see Parliamentary Council, Main Committee, 21st Meeting, Minutes, p. 239; Minutes of the 32nd Meeting of the Committee for Fundamental Questions, in: *Der Parlamentarische Rat 1948-1949*, op cit. vol. 5/II, 1993, p. 910 [935]; Minutes of the 43rd Meeting of the Main Committee, pp. 545 [554-555]; Opinion of the General Editorial Committee on the 2nd Reading of the Main Committee, p. 121; Parliamentary Committee, Main Committee, Minutes of the 57th Meeting, pp. 743-744).

It is not apparent from the debates that the amendments to the wording were made in order to give marriage and the family protection that was either stronger or weaker. Instead there are clear indications that the changes were simply stylistic. Thus, for

**Selected Fundamental Decisions of
the Federal Constitutional Court**

example, von Mangoldt's reaction to the Deutscher Sprachverein's suggestion that the word "special" should be deleted and replaced by the words "marriage and family ... shall enjoy the protection of the constitution" was that the content was exactly the same, but the wording was better (Der Parlamentarische Rat 1948-1949, vol. 5/II, op cit.).

During the debates about Article 6.1 of the Basic Law, the question of the protection of new living arrangements also played an important role (see the contributions of Helene Weber, in: Minutes of the 21st Meeting of the Main Committee, p. 240, and Elisabeth Selbert, in: Minutes of the 43rd Meeting of the Main Committee, pp. 552-553).

In this connection, the argument that the special protection enjoyed by the family excluded equal treatment of illegitimate children in Article 6.5 of the Basic Law (see Weber and Süsterhenn in: Minutes of the 21st Meeting of the Main Committee, pp. 242-243) was unsuccessful. The reporter von Mangoldt states in his written report on Article 6.1 of the Basic Law that this fundamental right is not much more than a declaration whose effects as directly applicable law can hardly be foreseen (Attachment to the stenographic report of the 9th Meeting of the Parliamentary Council, p. 6), this shows that there was agreement that marriage and family should be afforded constitutional protection, but that there was, however, no clarity on what this meant for their relationship to other kinds of living arrangements. A duty to keep a significant distance between them cannot in any case be based on this.

- (2) Article 6.1 of the Basic Law protects marriage in the form given to it by the legislature taking into account its essential basic principles (see BVerfGE 31, 58 [82-83]).

As a form of cohabitation adopted by people, it is an area in which they are free but at the same time a part of society and not cut-off from changes that occur. The legislature can react to these and amend the way marriage is regulated as required by these changes. At the same time it alters the relationship between marriage and other forms of human cohabitation. The same applies where the legislature does not change the way marriage is regulated, but instead lays down rules for other forms of cohabitation. Thus there is no set distance between living arrangements; instead they must be seen as relative to one another. At the same time, they can differ from or resemble one another not just in terms of how they are formulated or the rights and duties they are assigned, but also in terms of their function and the group of persons to which they are accessible. Accordingly, the protection afforded marriage as an institution cannot be separated from the class of persons addressed by the provision for whom marriage must be kept available as a protected living arrangement.

- (3) The state's duty to promote marriage must be guided by the protective purpose of Article 6.1 of the Basic Law. If the legislature itself contributed to a diminution in marriage's function through the laws it enacted, it would be in violation of the duty to promote it in Article 6.1 of the Basic Law. There would be a risk of this if the legislature were to create another institution with the same function to compete with marriage and equip it with the same rights and duties so that both institutions were interchangeable. The creation of the registered life partnership does not, however, result in such

**60 Years German Basic Law:
The German Constitution and its Court**

interchangeability. It cannot compete with marriage simply because the class of persons addressed by the institution are not those affected by marriage. On account of this difference, the registered life partnership is also not a mislabelled marriage as was held in both of the dissenting judgments, but rather something different to marriage. Its difference is not based on its name, but rather the fact that a man and a woman cannot enter into it, but only two same-sex partners. The totality of the structural principles that characterize marriage give it the form and exclusivity on the basis of which it enjoys as an institution with constitutional protection. Article 6.1 of the Basic Law does not, however, reserve individual structural elements for marriage alone. It does not prohibit the legislature from offering other legal forms for the long-term cohabitation of constellations of people different to that of man and wife. The fact that such legal relationships are long-term does not make them marriages. Nor is there anything else that indicates they could damage the framework of this institution.

2. The Act to End Discrimination against Same-Sex Life Partnerships does not violate either the prohibition of discrimination in Article 3.3 sentence 1 of the Basic Law nor the general principle of equality in Article 3.1 of the Basic Law.

- a) Different sex couples are not discriminated against on the basis of gender pursuant to Article 3.3 sentence 1 of the Basic Law by virtue of the fact that the Act to End Discrimination Against Same-Sex Life Partnerships makes a registered life partnership available to same-sex couples (Article 1 s. 1(1) of the Act to End Discrimination Against Same-Sex Life Partnerships).

The Act does not make rights and duties dependent on a person's gender, but rather on the gender combination of the union of people to which it makes a registered life partnership available. It assigns rights and duties to the people in this union. Just as marriage, which is limited to a couple relationship between a man and a woman, does not discriminate against same-sex couples on the basis of gender, life partnerships do not discriminate against heterosexual couples on account of gender. Men and women are always treated equally. They can enter into marriage with another person, but not with someone of their own sex. They can establish a life partnership with a person of their own sex, but not of the opposite sex.

- b) The fact that different sex *de facto* couples and cohabiting relatives cannot avail themselves of registered life partnerships does not violate Article 3.1 of the Basic Law.

Indeed, Article 3.1 of the Basic Law prohibits the legislature from treating one class of persons addressed by a statute differently from another addressed by the statute despite the fact that no difference exists between the two classes of such nature or weight as to justify such unequal treatment (see BVerfGE 55, 72 [88]; 84, 348 [359]; 101, 239 [269]; consistent case law). Such differences exist, however, between same-sex couples and other social unions.

- aa) The registered life partnership allows same-sex couples to obtain legal recognition for their cohabitation and to make a long-term commitment to one another, which is something they have previously been unable to do because they were not

**Selected Fundamental Decisions of
the Federal Constitutional Court**

permitted to enter into marriage. On the other hand, the wish of different sex couples to enter into a long-term, legally binding relationship is in the eyes of those concerned just as important as it is for same-sex couples and similar in its nature (see Buba/Vaskovics, *op cit.* pp. 16, 245 et seq.). However, unlike same-sex couples they have the institution of marriage open to them. The difference that joint children can result from a long-term couple relationship between a man and woman but not from a same-sex partnership does on the other hand justify recommending to same-sex couples that they marry if they wish to make their cohabitation legally binding in the long-term. This does not discriminate against them.

- bb) There are also differences between same-sex couples cohabiting and siblings or other relatives cohabiting, which justify treating them differently. One such difference is the exclusive nature of the registered life partnership, which excludes the simultaneous possibility of other relationships of the same kind; on the other hand, siblings and other relatives who cohabit are often in other comparable relationships and also maintain other ties through marriage or partnership. Cohabiting relatives already enjoy under current law a certain security which was first offered to same-sex couples by life partnership. Accordingly, relatives have the right to refuse to give evidence, have inheritance rights and in part also forced heirship rights as well as tax advantages for same.
- cc) The legislature is to be sure not generally prevented from offering different sex couples or cohabiting relatives new opportunities for legally formalizing their relationship as long as it avoids legal forms that are interchangeable with marriage when doing so. There is, however, no constitutional requirement that creates such opportunities.

3. Nor are the provisions of the Act dealing with custody and inheritance rights of life partners or their maintenance rights constitutionally objectionable.

- a) aa) Article 1 s. 9 of the Act to End Discrimination Against Same-Sex Life Partnerships grants the life partner of a parent with sole custody the right to participate in day-to-day decisions concerning a child who is living with the parent if the parent consents. At the same time the partner has a right to make decisions about the child in cases of extreme urgency in which the well-being of the child makes taking action necessary. The same applies to the spouse of a parent with custody who is not himself or herself the child's parent (Article 2 No.13 of the Act to End Discrimination Against Same-Sex Life Partnerships: s. 1687 b of the Civil Code). In establishing this "small custody right" for the life partner, the legislature does not encroach on the parental right of the non-custodial parent in Article 6.2 of the Basic Law.

Article 6.2 sentence 1 of the Basic Law protects the care and upbringing of children as the natural right of parents and a duty primarily incumbent on them. In this connection, the protective scope of the parental right also covers in principle the right to decide who has contact with the child and who through being

**60 Years German Basic Law:
The German Constitution and its Court**

given decision-making powers should be allowed to influence the child's upbringing. Nevertheless, the parental right must be formulated by the legislature (see BVerfGE 84, 168 [180]). The legislature is required to assign the individual parents certain rights and duties if the prerequisites for joint exercise of parental responsibility do not exist (see BVerfGE 92, 158 [178-179]), or to assign the courts the task of deciding which parent should be awarded custody in a given case.

Article 1 s. 9 of the Act to End Discrimination against Same-Sex Life Partnerships follows on from this kind of situation where one parent has sole custody rights. It is not the "small custody right" deriving from the sole custody of the parent living with a life partner which deprives the non-custodial parent of his or her custody rights; instead it is the family law provisions which refuse him or her custody or the family court decisions which award sole custody to the other parent that do so. If he or she does not have custody rights anyway, such parent cannot claim that his or her rights have been infringed if a third person who is living with the child partially exercises joint responsibility for the child with the custodial parent's consent.

- bb) The creation by the legislature in connection with long-term, legally binding forms of cohabitation such as marriage or registered partnerships of a new custodial right for spouses and life partners of custodial parents, who are not themselves the parent of the child, does not violate the general principle of equality in Article 3.1 of the Basic Law. This provision does not unfairly discriminate against non-custodial parents who do not live in a legally established partnership with the custodial parent. They are granted other legal possibilities for obtaining custody rights for their child alone or together with the other parent. Whether non-custodial parents should otherwise be granted "small custody rights" for other reasons does not have to be decided here.
- b) aa) Article 1 s. 10.6 of the Act to End Discrimination Against Same-Sex Life Partnerships, which grants the surviving life partner forced heirship rights with regard to the deceased partner's estate, does not violate the testamentary freedom protected by Article 14.1 of the Basic Law.

Testamentary freedom is the right of the testator to direct during his or her lifetime that his or her property be distributed in a way that differs from the rules of intestate succession (see BVerfGE 58, 377 [398]; 99, 341 [350-351]). In this connection, it is left to the legislature to determine the content and limits of inheritance law. When formulating the details of the above, the legislature must respect the basic content of the constitutional guarantee in Article 14.1 of the Basic Law, conform with all other constitutional provisions and, in particular, abide by the proportionality principle and the equality principle (see BVerfGE 67, 329 [340]).

How the statutory regulation of the forced heirship rights of the surviving life partner exceeds such limits is not apparent without general clarification as to the constitutional limits which apply to the law on forced heirships.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

The inheritance and forced heirship rights of the life partner are components of the legal institution of a registered life partnership, which imposes mutual rights and duties on partners who are bound together for life. By declaring their wish to enter into a life partnership, they mutually agree to care for and support one another and to pay maintenance. This duty of complete mutual care is justification - as it is in the case of spouses - for ensuring through forced heirship rights that the life partner has financial support from the deceased's assets even after his or her death.

- bb) Article 14.1 of the Basic Law is also not violated by virtue of the fact that the life partner's rights under intestacy and forced heirship laws reduce the inheritance of other heirs. Even if Article 6.1 of the Basic Law contained a constitutional requirement that next of kin be granted a reasonable minimum share of the deceased's estate and such family members thus enjoyed constitutional protection under Article 14.1 of the Basic Law as heirs - which does not have to be decided here (see BVerfGE 91, 346 [359-360]) - this would not reveal anything about the amount of the share of estate to which they would be entitled. This is determined solely by the legal rules for the distribution of assets which must be drafted objectively in order to be in conformity with the guaranteed right of inheritance (see BVerfGE 91, 346 [360, 362]).

The inheritance and forced heirship rights of the surviving life partner do not deprive the relatives of the deceased life partner, who are otherwise already entitled to inherit, of their rights of inheritance. Another heir who must be considered in the distribution of the estate is simply added to the class of heirs. The situation for the relatives of the deceased who are entitled to inherit is thus no different than it would be if the deceased had left behind a wife or a husband and not a life partner. This arrangement does not result in the remaining heirs not being treated properly.

- c) The fact that maintenance obligations cannot be recognized for income tax purposes, which was intended by Article 1 ss. 5, 12 and 16 of the Act to End Discrimination Against Same-Sex Life Partnerships, because the provisions have been included in the draft of the Act to Supplement the Act to End Discrimination Against Same-Sex Life Partnerships (Gesetz zur Ergänzung des Lebenspartnerschaftsgesetzes - LPartGErgG) and this Act has not yet been promulgated, does not lead to the maintenance provisions of the Act to End Discrimination Against Same-Sex Life Partnerships being unconstitutional.

The economic burden for a person obliged to pay maintenance is to be sure a special and unavoidable circumstance that reduces his or her financial capacity; its non-recognition can violate Article 3.1 of the Basic Law (see BVerfGE 68, 143 [152-153]; 82, 60 [86-87]). The introduction of a duty to pay maintenance for the life partner has not, however, resulted in a legal situation in which this burden is not recognized for income tax purposes. Pursuant to s. 33a of the Income Tax Act (Einkommensteuergesetz - EstG) a taxpayer can apply to have his or her income tax reduced by the expenses incurred for the maintenance of a person who is entitled to

**60 Years German Basic Law:
The German Constitution and its Court**

receive maintenance from him or her; the amount assessed for the relevant calendar year is deducted from his or her total income. Since the life partner has a statutory right to maintenance, payments must be recognized pursuant to s. 33a of the Income Tax Act as extraordinary expenses which reduce income tax. Whether this recognition is adequate in comparison to the tax treatment of spouses is not a question that affects the Act to End Discrimination against Same-Sex Life Partnerships. It would have to be clarified through a constitutional examination of the income tax provision, which is not covered by the petitions for judicial review.

...

b) *Parental Duty of Contact, BVerfGE 121, 69*

Explanatory Annotation

This decision⁴⁴ illustrates the relationship between constitutional provisions and those of regular statutory law and it touches upon an aspect of the law where it is questionable whether legal resolution, necessary as it was because of the existing dispute, was really the right avenue. A married father of two and father of an extramarital illegitimate child has been sued by the mother of the illegitimate child, who wanted to force the father to engage in contact with his child, which the father refused because of the negative effect this would have on his family. Section 1684.1 of the German Civil Code (family law section) entitles the child to contact with his or her parents and obligates the parents to engage in such contact. The lower court, while acknowledging the difficulty of forcing a parent to contact with his child, had, on the basis of a psychological expertise decided that this obligation of the father could be enforced and ordered the father to engage in such contact every three months and threatened a considerable fine if the father did not obey the order.

The Constitutional Court regarded the regular court's order as unconstitutional. It did so under the subsidiary personality rights guarantee of Article 2.1 of the Basic Law. However, there is a strong link to Article 6.2 of the Basic Law.⁴⁵ The reason for this approach lies in the procedural constellation: The father was invoking a right against the duty spelled out in Article 6.2 of the Basic Law and that "counter-right" could only flow from Article 2.1. The Constitutional Court saw no principal problem with s. 1684.1 of the Civil Code and its potential to force contact if that is deemed to serve the welfare of the child. However, as such enforcement of contact will invariably interfere with the right protected in Article 2.1 of the Basic Law to do or not to do as one pleases, the only question here is the welfare of the child as the third person involved. The test then, must not be whether such contact could perhaps benefit the child, but whether such contact could cause damage to the child. If a plausible risk is established, enforcement of the contact obligation is unconstitutional. As the psychologists in this case had determined that such contact could benefit the child they had also submitted that there is a plausible risk of damage should the father not open up.

⁴⁴ For the official press release in English see <http://www.bverfg.de/pressemitteilungen/bvg08-044en.html>.

⁴⁵ Article 6.2 of the Basic Law: "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."

**Selected Fundamental Decisions of
the Federal Constitutional Court**

The case illustrates that the law cannot choose what disputes are brought before it. This is also true for the German Constitutional Court in the light of Article 2.1 of the Basic Law, which has the propensity to turn any situation into a dispute on constitutional rights and thus elevate it to the constitutional level. In combination with the constitutional complaints procedure, which grants an individual right to bring such complaints to the Constitutional Courts, the Court must deal with such questions, which, for example in the United States, would in all likelihood fall victim to the *certiorari* procedure and would not be accepted by the Supreme Court and hence left to the regular courts.

Translation of the Parental Duty of Contact Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 121, 69*

Headnotes:

1. The duty to care for and bring up their child which is imposed on parents by Article 6.2 sentence 1 of the Basic Law (Grundgesetz - GG) is not owed exclusively to the state but also to the child. The child's right to parental care and upbringing in Article 6.2 sentence 1 of the Basic Law corresponds with this parental duty. It is for the legislature to elaborate the right and duty.
2. The encroachment on the fundamental right to protection of personality contained in Article 2.1 in conjunction with Article 1.1 of the Basic Law, which is associated with the imposition of an obligation on a parent to have contact with his or her child, is justified by the responsibility for his or her child imposed on the parent by Article 6.2 sentence 1 of the Basic Law and the child's right to parental care and upbringing. It is reasonable to oblige a parent to have contact with his or her child if this is in the child's best interests.
3. If coercive measures are necessary to force an unwilling parent to have contact with a child, this contact is not usually in the best interests of the child. The encroachment on the parent's fundamental right to protection of his or her right of personality which results from the threat to apply coercive measures is not justified in this context unless there are sufficient indications which suggest that enforced contact will be in the child's best interests in an individual case.

Order of the First Senate of 1 April 2008 - 1 BvR 1620/04 -

Facts:

The constitutional complaint relates to the question of whether a parental duty of contact, which is enforceable by execution pursuant to s. 1684.1 of the Civil Code (Bürgerliches Gesetzbuch - BGB) against a parent who refuses to have contact with his or her child, can be enforced with the aid of coercive measures that may be threatened and imposed by s. 33.1 and s. 33.3 of the Act on Matters of Non-Contentious Jurisdiction (Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit - FGG).

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

**60 Years German Basic Law:
The German Constitution and its Court**

The complainant has two children, who are both minors, from his current marriage. The complainant also has a son from an extramarital relationship, who was born in February 1999. The complainant has recognized his paternity and pays child maintenance for his child. The complainant refuses, however, to have contact with his illegitimate son.

The Higher Regional Court (Oberlandesgericht) ordered that the complainant should have contact with the child in the presence of a social worker for two hours every three months. It threatened to impose a fine on him of up to to •25,000 if he did not comply.

The complainant's constitutional complaint alleges a violation of his fundamental rights under Article 2.1 in conjunction with Article 1.1 of the Basic Law and of Article 6.1 of the Basic Law; it is directed against the threat of a fine ordered by the Higher Regional Court on 21 January 2004 and indirectly against s. 33.1 sentence 1 and s. 33.3 of the Act on Matters of Non-Contentious Jurisdiction which authorizes the Court to make such order.

Extract from the Grounds:

...

C.

The constitutional complaint is founded.

The order of the Higher Regional Court encroaches on the complainant's fundamental right to protection of his personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law to the extent that it contained the threat of a fine should the complainant refuse to have contact with his child (I.). The statutory duty of a parent to have contact with his or her child in s. 1684.1 of the Civil Code concretizes parental responsibility under Article 6.2 sentence 1 of the Basic Law in a manner which is not constitutionally objectionable. Under Article 6.2 sentence 1 of the Basic Law, a child has a right to parental care and upbringing which corresponds with the parental responsibility and which has also been concretized by the legislature in the right of a child to have contact with its parent in s. 1684.1 of the Civil Code. The legislature pursues a legitimate purpose in providing for the possibility of the threat of an imposition of a fine where a parent is unwilling to have contact with his or her child (II.). However, the threat of a fine to enforce the duty of contact of a parent who refuses to have contact with his or her child is not usually in the child's best interests and thus does not justify the encroachment on the parent's right of personality (III.). s. 33.1 sentence 1 and s. 33.3 of the Act on Matters of Non-Contentious Jurisdiction are thus to be interpreted in accordance with the constitution as meaning that compulsory enforcement of the duty of contact of a parent who refuses to have contact with his or her child must be avoided unless there are sufficient indications in a specific case that enforcement would be in the child's best interests (IV.). The Higher Regional Court failed to take this sufficiently into account in its decision (V.).

I.

The threat of a fine based on s. 33.1 sentence 1 in conjunction with s. 33.3 sentence 1 of the Act on Matters of Non-Contentious Jurisdiction to enforce the complainant's duty to cultivate contact with his child against his will encroaches on his fundamental right to protection of his right of personality.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

1. This fundamental right protects the narrower personal sphere and the prerequisites for it. It extends to the right of respect for one's privacy. This includes the family sphere and personal relationships with other family members (see BVerfGE 96, 56 [61]). The same applies to the relationship between a parent and his or her child. What form their relationship takes will be determined by their respective personal feelings, attitudes and experiences which influence each other. The decision to have or to refuse contact with one's child expresses the parent's personal understanding of parenthood and his or her emotional relationship with the child. Nonetheless, it is not included in the inviolable core area of private conduct of life since it has a significant social connection with the child concerned whose interests and personal sphere are affected by this decision (see BVerfGE 96, 56 [61]).
2. If coercive measures are threatened to force a person to have contact with his child against his will, this constitutes an encroachment on his right to have his private sphere respected. He is compelled to meet with his child and cultivate personal contact with it contrary to his own wishes. This influences his personal relationship with the child and puts him under pressure to behave in a manner towards the child that he does not wish to behave in.
3. The fundamental right to the protection of privacy is not, however, guaranteed without restriction outside the inviolable core area of private conduct of life. It is restricted pursuant to Article 2.1 of the Basic Law through the constitutional order and the rights of others (see BVerfGE 99, 185 [195]).

A statutory basis is necessary for such restrictions from which their prerequisites and scope can be determined. Individuals are required to accept the restrictions which are undertaken in the overriding general interest or are undertaken in view of the constitutionally protected interests of third parties subject to the principle of proportionality (see BVerfGE 96, 56 [61]).

S. 33.1 sentence 1 in conjunction with s. 33.3 of the Act on Matters of Non-Contentious Jurisdiction is the statutory basis upon which the Higher Regional Court relied in its decision to threaten to fine the complainant if he did not fulfil his duty of contact and with which it encroached on the complainant's fundamental right to protection of his personality. However, this provision itself only provides a general description of a duty to act which is imposed by the court and which depends on the will of the person concerned as the prerequisite for the threat of a fine; furthermore, it states that the purpose of the threat of a fine is to make the person concerned comply with the duty to act ordered by the court. Thus s. 1684.1 of the Civil Code must also be included in the examination of whether the purpose pursued by s. 33.1 sentence 1 in conjunction with s. 3.3 of the Act on Matters of Non-Contentious Jurisdiction is justified. The court ordered the complainant to have contact with his child on the basis of the provision in the Civil Code which obliges a parent to have contact with his or her child; this provision justifies the duty to act referred to in s. 33.1 sentence 1 of the Act on Matters of Non-Contentious Jurisdiction. Whether the encroachment on a fundamental right resulting from the threat of a fine can be justified must be measured against this duty of contact.

II.

The legislature pursues a legitimate purpose in providing the courts in s. 33.1 sentence 1 in conjunction with s. 33.3 of the Act on Matters of Non-Contentious Jurisdiction with the possibility of threatening to fine a parent to enforce a court-imposed obligation to have contact with his or her child.

1. The statutory duty of a parent to have contact with his or her child as laid down in s. 1684 of the Civil Code is a permissible concretization of the responsibility allocated to parents by the Basic Law.

- a) Article 6.2 sentence 1 of the Basic Law guarantees parents the right to care for and bring up their child, but at the same time also makes this task a primary duty imposed on them. In this connection, parents may in principle decide to be free of state influence and may wish to live up to their responsibility as parents, according to their own ideas (see BVerfGE 107, 104 [117]). Nevertheless, their actions must be guided by what is in the best interests of the child since the parental right is a right to be exercised in the interests of the child (see BVerfGE 103, 89 [107]). They are guaranteed it for the sake of the child. The duty of parents to care for and bring up their child is not owed exclusively to the state which must guard the exercise of parental authority and which is obliged to intervene to protect the child if the parents do not live up to this responsibility (see BVerfGE 60, 79 [88]; 107, 104 [117]). Parents also directly owe their child a duty of care and upbringing.

The child has its own dignity and rights. As a subject of fundamental rights it is entitled to the protection of the state and the guarantee of its constitutionally anchored rights. When regulating interpersonal relationships, a constitution which places human dignity at the centre of its value system may not in principle grant anyone rights to the person of another who does not have duties attached to them and who does not respect the human dignity of the other person. The same applies to the relationship between a parent and his or her child. The parental right *vis-à-vis* the child is justified by the fact that the child requires protection and help so that it can develop into a responsible member of society in keeping with the Basic Law's image of man (see BVerfGE 24, 119 [144]).

Thus this right cannot be separated from the duty of parents to offer this protection and help to the child for its well-being. In this context, the duty does not merely relate to the child, it is also owed to the child since the child is not the subject of the parental exercise of rights; it is a legal person and a subject of fundamental rights in whose best interest parents are obliged to act.

- b) The child's right to parental care and upbringing under Article 6.2 sentence 1 of the Basic Law corresponds with the parental duty to care for and bring up the child which is imposed by Article 6.2 sentence 1 of the Basic Law. If a duty is imposed on one person which relates to another person and which is at the same time connected with a right to influence the other person, a right to make decisions for the other person, a right to represent the other person's interests and a right to have a significant and

**Selected Fundamental Decisions of
the Federal Constitutional Court**

dominant influence on the development of the other person's personality, this will affect the core of such a person's life development and restrict his exercise of free will. The only justification for granting parents such far-reaching influence over the life of their child is the fact that the child cannot bear responsibility for itself and would come to harm if it were not given any help. If the child needs such support from its parents and if as a result its parents have a responsibility to act only in the child's best interests, then the child also has a right to expect its parents to care first and foremost for it and a right to also have its parents fulfil the duty which cannot be separated from their parental right. Thus the right of the child is based on parental responsibility and it is therefore protected by Article 6.2 sentence 1 of the Basic Law. It is closely connected to the fundamental right of the child to protection of its personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law since it guarantees the child family ties which are significant for the development of its personality. The personal relationship with its parents, their care, help and warmth and affection contribute significantly to the child being able to develop into a person who knows that he or she is respected and who learns to respect himself or herself as well as to respect others.

- c) Nevertheless, the parental right with its concurrent duty requires statutory regulation as does the right of the child to the care and upbringing by its parents under Article 6.2 sentence 1 of the Basic Law. This applies to the parental right in particular because parents are jointly entitled to it. If parents are unable to agree on how to exercise their parental responsibility, then rules must be made which allocate them rights and duties *vis-à-vis* their child (see BVerfGE 92, 158 [61]).

In addition, statutory rules are necessary because legal authority in relation to the child is a prerequisite for the care and upbringing of a child also *vis-à-vis* third parties (see BVerfGE 84, 168 [180]) and, because of the watchdog position established for it by Article 6.2 sentence 2 of the Basic Law, the state has to ensure that the exercise of the parental right is guided by the best interests of the child and that the child's rights are respected. It must therefore regulate, on the one hand, how the child's right to the care and upbringing by its parents in accordance with its best interests can be safeguarded and, on the other hand, when and under what circumstances it will limit the free exercise of the parental right for the child's sake.

- d) Contact between parent and child is not merely a possible expression of parental upbringing, but a fundamental basis for the parent-child relationship and thus an essential part of Article 6.2 sentence 1 of the Basic Law. Especially in the case of a parent who does not live with his or her child, access to it is a significant prerequisite for personal contact with the child that would allow the parent to establish or maintain a closer relationship with it. Contact ensures that he or she can devote himself or herself to the child and can be involved in its development; it ensures that payment of maintenance is not the only way that the parent can exercise his or her parental responsibility. This is in keeping with the legislature's decision in s.1684.1 of the Civil Code, which grants a right of contact to parents irrespective of whether they have custody rights. Particularly in the case of a non-custodial parent, a right of contact is the main basis for exercising his or her parental right under Article 6.2 sentence 1 of the Basic Law.

**60 Years German Basic Law:
The German Constitution and its Court**

On the other hand, the parental right to bring up a child which is protected by Article 6.2 sentence 1 of the Basic Law, is intended as a right in the interests of the child (see BVerfGE 75, 201 [218]; 103, 89 [107]) and has as its aim the child's well-being. However, it is in principle in the child's best interests if through contact with its parents it gains the opportunity to get to know its father and mother, to become close with them and with the help of the contact is able to continue a personal relationship with them. Through communication with its parents, the child can experience affection, can learn and can receive inspiration and advice that give it direction, help it to form opinions and aid it in developing into an independent and responsible person. As far as the child and its development are concerned, refusal to have contact with it and thus the severance of personal ties with it represent a significant withdrawal of parental authority; at the same time, it constitutes neglect of one of the significant parts of the duty of upbringing imposed on parents by Article 6.2 sentence 1 of the Basic Law. Article 6.2 sentence 2 of the Basic Law allocates the state a duty to monitor the exercise of parental responsibility in the best interests of the child, and parental contact is an important prerequisite for this; in exercise of this duty, the legislature has therefore obligated parents in s. 1684.1 of the Civil Code to have contact with their child and urged them to fulfil their responsibility to their child. In this connection, it has at the same time granted the child a right to have contact with its parents and thus concretized the right of the child under Article 6.2 sentence 1 of the Basic Law to care and upbringing by its parents.

2. It is of course true that - through its regulation of their right to maintain their privacy and their personal relationships - the obligation of parents to have contact with their child does encroach on their fundamental right to protection of their right of personality since it obliges them to enter into a personal relationship with their child even if they do not wish to start or continue such a relationship. This encroachment is, however, justified in particular due to the responsibility for their child guaranteed as well as imposed on parents by Article 6.2 sentence 1 of the Basic Law and due to the child's right to parental care and upbringing, which is also protected by this fundamental right.

The parental duty of contact serves the purpose pursued by the legislature in s. 1684.1 of the Civil Code of reinforcing the legally recognized right of the child to parental contact by imposing a corresponding duty on parents in order to enable the child to have the opportunity to meet with its parents. Such contact is of outstanding significance for the development of the child. The assumption of the legislature, when it imposed this duty on parents, that ongoing personal contact between a parent and a child would have a positive influence on the child's development and be in principle in the child's best interests is supported by scientific findings and therefore no objection can be raised in this connection. The duty of contact is also a suitable means of promoting the relationship between a child and its parents. The possibility cannot be ruled out that a parent subject to a duty of contact could be influenced by the duty to have contact with his or her child in s. 1684.1 of the Civil Code or a judicial order concretizing such duty, and that the parent could allow himself or herself to be persuaded to fulfil this duty in the interests of the child and thus allow the child to establish or continue a relationship with him or her, even where the parent was initially not interested in regular meetings with the child

**Selected Fundamental Decisions of
the Federal Constitutional Court**

and did not of his or her own initiative seek personal contact with the child. Since no more lenient means of reinforcing the child's right of contact in its own interests and assisting in the enforcement of same are evident, a parental duty to have contact is also necessary.

After all, it is also reasonable to urge a parent to cultivate contact with his or her child. There is to be sure an encroachment on the parent's fundamental right to protection of his or her right of personality associated with the duty of contact and this encroachment is not slight. As a rule, the parent is not just expected to endure a meeting with his or her child. Instead, the parent is expected to give the child warmth and affection, to communicate with it and to establish or continue a personal relationship with it. This can lead to not insignificant psychological pressure for a parent who is not prepared to do this. However, one has to take into account that under Article 6.2 sentence 1 of the Basic Law parents do not merely have a right, but also a duty to care for and bring up their child. It is true that parents can fulfil this duty by committing their child to the care of another. However, parents do not release themselves from the responsibility that they bear for their child by delegating its upbringing to another. Without contact with a child, it is scarcely possible for a parent to exert the influence that is necessary for its best interests and instrumental for its personal development. Contact with the child is in this respect a significant prerequisite and the basis for the exercise of the parental right in the interests of the child.

If the legislature concretizes the duty of upbringing imposed on parents in Article 6.2 sentence 1 of the Basic Law by raising contact with the child to a parental duty, it makes clear the importance to be attached to contact between a parent and child in the upbringing of a child. Seen in this light the encroachment on the parent's right of personality following from the imposition of a duty of contact does not appear particularly serious. In addition, the parental duty of contact corresponds with the child's right to have contact with its parents that the legislature granted the child in s. 1684.1 of the Civil Code. The legislature took into account the child's right to care and upbringing by its parents based on Article 6.2 sentence 1 of the Basic Law by concretizing and securing one significant point in an ordinary law which makes exertion of an influence on the child's upbringing possible. If one weighs the child's interest in having steady contact with both parents against a parent's interest in not wanting or no longer wanting to have personal contact with it, then one should accord the child's desire considerably more weight than the parent's wishes. This is because as a significant basis for the development and maintenance of a family relationship and for the receipt of parental support and upbringing, the contact of a child with its parents is of considerable importance for the development of its personality and is something that contributes in principle to its well-being.

It is thus reasonable to oblige a parent to have contact with his or her child - even if this entails an encroachment on the parent's personal sphere if this is in the best interests of the child. Thus the legislature followed a legitimate purpose that is supported by the Basic Law by making it possible through s. 33.1 sentence 1 in conjunction with s. 33.3 of the Act on Matters of Non-Contentious Jurisdiction to threaten parents with a fine for failure to comply with their legal duty to have contact with their own child and with an order from the court instructing them to do so.

III.

However, as a rule, the threat of a fine to enforce the duty of contact of a parent against his or her express will is not suitable for achieving the sought purpose, i.e. to make it possible for the child to have contact with its parent in a way that would benefit the development of its personality and to assist in the enforcement of the child's right to have the parent exercise his or her responsibility in the child's best interests. If coercive measures are necessary to force an unwilling parent to have contact with a child, this contact is not usually in the best interests of the child. Where this is the case, the threat by the court to apply coercive measures constitutes an unjustified encroachment on the parent's fundamental right to the protection of his or her personality.

1. The effect of the threat of a fine may well be to motivate a parent who is actually not willing to have contact with his or her child, to have a meeting with the child, even against his or her will. The psychological and financial pressure exerted through the threat of a fine may bend the will of the parent and prompt him or her to exercise his or her right of contact.

Unlike in the case of a judicial duty of contact, which initially only urges the parent concerned to fulfil his or her parental responsibility and which clarifies his or her legal duty with concrete orders and thus gives him or her the option of reconsidering and following the order to have contact with the child without incurring a fine, the threat of a fine pressures him or her to meet the child and be confronted by it against his or her will. However, that which it is intended to compel the parent to do by the use of pressure does not just conflict with the parent's will. The compulsory enforcement of the duty of contact, which requires not just his or her presence, but his or her emotional warmth towards the child, conflicts with the feelings the parent harbours towards the child. Where a parent's rejection of any contact with the child has been declared and demonstrated in this manner, any contact with the child that eventuates cannot fail to affect the child; the pressure exerted on the parent alone would suffice to have an impact on the child. If the parent does not change his or her hostile attitude towards the child at a forced meeting with it, the child is faced with a situation in which it does not experience the parental warmth and affection which is the purpose of the contact, but instead experiences personal rejection, and this not from just anyone but from, of all people, a parent. This poses a big risk that the child's self-esteem could be damaged. For it can scarcely understand why its parent does not want to know it and why he or she acts in such an unfriendly way and it could therefore blame itself. This usually does not benefit the child's well-being, but instead damages it.

Nevertheless, the possibility that a forced meeting with the child could lead to the parent opening himself or herself to the child and that this would not result in any mentionable damage to the child's well-being cannot be ruled out. However, if a parent does not show cooperation and if he or she still stubbornly refuses to meet the child in spite of a court order stating that he or she has a duty to do so, it is doubtful whether enforced contact can lead him or her to develop a positive attitude to the child. Thus there is much that would suggest that the child's best interests could at least be significantly impaired through contact enforced by applying coercive measures. It is, however, very difficult to predict with certainty whether this will occur in an individual case and whether the child will be damaged since it depends on the feelings of the parent and his or her reactions at the time which are scarcely foreseeable.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

2. a) What counts in deciding if it would be suitable to use coercive measures to force a parent to have contact with his or her child in cases where he or she does not want such contact is not whether the contact could endanger the best interests of the child, but whether such contact is in the child's best interests. The legislature imposed a duty on parents to have contact with their child in order to strengthen the child's right of contact with its parents. This right was granted the child as being in its well-understood best interests. The legislature assumed that a child's contact with its parents was of outstanding significance for its development. This is an expression of its view that contact can establish or maintain an emotional relationship between a child and its parents and that the parent's warmth and affection during the contact is beneficial for the child's development so that contact is in the child's best interests. This benefit in relation to the child's best interests justifies the imposition on the parents of a duty to have contact with their child even though this encroaches on their fundamental right to protection of their rights of personality. However, this is only true to the extent that and for as long as contact with its parent actually serves the best interests of the child. If this is not achieved through the statutory means intended for this purpose, then this purpose cannot justify the encroachment on the parent's right of personality. This applies to not only the duty of contact imposed on parents, but in particular to the possibility offered by the law of enforcing the duty of contact against the parent's declared will through the threat of coercive measures. The proper metric for determining the suitability of contact achieved through coercion is whether the contact is in the child's best interests.

The fact that s. 1684.4 of the Civil Code only permits restrictions on and the exclusion of the right of contact if the best interests of the child would otherwise be endangered does not hinder the foregoing. This provision deals with the limits on the parental right of contact and not with the enforcement of the duty to have contact. Therefore, it does not apply to the relationship between a parent with a duty of contact and his or her child with a right to have contact.

If a parent wishes to exercise his or her right of contact, he or she may only be restricted from doing this over an extended period or permanently pursuant to s. 1684.4 of the Civil Code if the child's best interests would otherwise be endangered. By making the existence of a danger to the child's well-being the standard, the legislature has taken the parental right into account and sought to give it as much room as possible for development. Thus a limit on the parental right of contact is set at the point where the exercise of the right of contact threatens to conflict significantly with the best interests of the child.

The situation is different, however, in relation to the compulsory enforcement of a duty of contact against the will of a parent subject to this duty. In this case the function of enforcement is not the realization of the parent's right of contact; it instead represents an encroachment on the parent's right of personality. This kind of encroachment can, however, only be justified if the right of the child to contact with its parent, which is intended to be realized in this way, also achieves its objective of serving the child's best interests. If there is a risk that instead of the effect which the child's right to

**60 Years German Basic Law:
The German Constitution and its Court**

contact was intended to achieve the opposite will arise, then the exercise of the right is of no use to the child but can instead harm it. In such case the reason for limiting the right of a parent to conduct the relationship with his or her child according to his or her own wishes and needs disappears. Thus in the case of the compulsory enforcement of contact against the will of the parent obliged to have contact, the standard can only be whether this contact serves the child's well-being.

- c) In view of the emotional and psychological strain to which a child can be exposed at a meeting with a parent who rejects it and who only attends the meeting under duress, one cannot, as a rule, start by assuming that contact under such circumstances is in the child's best interests. To be sure, there are - as far as can be seen - no social science studies on the reactions and attitudes adopted in relation to his or her child by a parent compelled by coercive measures to have contact with the child or on the effects on the child of a forced meeting with a parent who refuses contact with it which one could use as a basis for assessing whether, and if so, under what circumstances contact of such kind could be in the child's best interests in spite of the unfavourable conditions under which it takes place. The reason for this is presumably that until now only very few cases have occurred or have become known in which contact was brought about by means of coercive measures. For most of the contact disputes brought before the courts relate to cases in which, contrary to the will of the other parent, one parent complains about his or her right of contact with the child. On the other hand, the reason might be that the course such meetings take and how they can affect a child's psyche depend on the psychological state of the relevant persons at the time so that it is difficult to make generalizations on the basis of the results in an individual case. However, even if there are no valid scientific findings on the effects of enforced contact on a child to fall back on, it would seem evident that a parent who obviously does not want to have contact with his or her child and who does not allow a court order clarifying his or her duty to affect or change his or her hostile attitude towards the child will exhibit his or her unwillingness and hostility towards the child at a forced meeting. This is confirmed by the German Institute for Youth Research (Deutsches Jugendinstitut) which assumes on the basis of its findings that the hostile attitude of a parent is a prognosis factor for difficult or damaging contact for the child. For if the child's own parent really does demonstrate his or her rejection, then this is likely to leave its mark on the child's psyche; especially since the first meeting or a meeting that occurs after a longer period with its parent will be a particularly emotional event which will trigger feelings of fear and expectation in the child. If the child is not only disappointed, but also feels that it is not accepted as a person, then it seems probable that the child will suffer emotional damage. Contact with its parent, during which such detriment to the child is likely, is not in the best interests of the child.

Nevertheless, one cannot rule out the possibility that there are cases in which there is a realistic chance that through its uninhibitedness towards strangers and its psychological stability a child might be able to overcome the resistance of the parent who wants to avoid it thanks to its open and friendly behaviour so that what was initially enforced contact can be in the child's best interests after all. There may also be cases in which

**Selected Fundamental Decisions of
the Federal Constitutional Court**

forced contact between the child and its parent can be in the child's interests, even if the parent expresses his or her resistance to the meeting. As was stated by the German Institute for Youth Assistance and Family Law (Deutsches Institut für Jugendhilfe und Familienrecht) and the German Institute for Youth Research in their opinions, an interest in meeting an unknown parent arises in the course of a child's development, usually in adolescence or early adulthood. If a child or adolescent has developed this strong interest and if he or she is primarily concerned with meeting the parent to make his or her acquaintance - even if it is only a one-time meeting - then the fulfilment of this need can be more important for the child than the possibly associated experience of finding out that the parent wants to have nothing to do with it. This is to be clarified, if necessary, with the help of an expert. In such a case, even an enforced meeting with the parent can be in the best interests of the child. The older a child is and the more developed its own personality is, the more it can be assumed that even the compulsory enforcement of its own express and emphatic wish to have contact with its parent will be in its best interests. In such cases, the encroachment on the right of privacy of the parent concerned which is associated with enforced contact is not only suitable for achieving the sought purpose of allowing the child to have contact which would be in its best interests, but also justified. More weight should be attached to ensuring the child's best interests are met than to the interest of the parent in being spared from having to have contact with his or her child. In such a case, it is reasonable to expect a parent to have contact with his or her child and, if necessary, to use coercive measures to force him or her to do so.

In the case of children who have not yet developed stable personalities, on the other hand, one can usually begin by assuming that forced contact with the reluctant parent will not serve the child's best interests unless there are enough indications to the contrary in a concrete case. Where a parent unwilling to have contact with his or her child is threatened with coercive measures in order to enforce contact and these measures fail to achieve their purpose, then the encroachment on the fundamental right to protection of personality of the parent refusing contact is not justified unless such coercive measures are suitable for achieving contact which is in the best interests of the child (see BVerfGE 99, 145 [164]).

IV.

The fact that pursuant to s. 33.1 sentence 1 and s. 33.3 of the Act on Matters of Non-Contentious Jurisdiction, a parent who is unwilling to have contact with his or her child may be threatened with a fine even though this violates the parent's fundamental right to protection of his or her personality does not lead to a violation of the Basic Law by these provisions. This provision is thus to be interpreted in accordance with the constitution as meaning that compulsory enforcement of the duty of contact of a parent who refuses to have contact with his or her child must be avoided unless there are sufficient indications in a specific case that enforced contact would be in the child's best interests.

**60 Years German Basic Law:
The German Constitution and its Court**

S. 33 of the Act on Matters of Non-Contentious Jurisdiction is a general provision on enforcement in non-contentious matters that covers a multitude of court imposed obligations relating to acts that depend on the will of the person obliged; the provision allows the courts to reinforce such obligations through the threat and imposition of a fine. This also applies, for example, to the duty of the parent with whom the child lives to hand over the child to the other parent who has a right of contact so as to allow contact at the times set down by the court. The provision is discretionary. It leaves the decision as to whether non-compliance with an imposed obligation should result in enforcement to the due discretion of the court. It thus allows the court to refrain from compulsory enforcement of the obligation. Thus the provision can also be interpreted in conformity with the Basic Law in the case of a duty of contact which the court has imposed on one parent. It leads to a finding that the use of coercive measures against a parent who stubbornly refuses contact should be avoided unless there are enough indications in a concrete case that forced contact will serve the child's best interests because as a rule such contact is not in the best interests of the child. In this respect the discretion granted to the courts by s. 33.1 sentence 1 of the Act on Matters of Non-Contentious Jurisdiction is restricted by the Basic Law.

V.

The challenged decision of the Higher Regional Court does not satisfy the constitutional requirements and violates the complainant's fundamental right to the protection of his right of personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law, insofar as it threatened him with a fine.

When exercising the discretion to use coercive measures to compel a parent to have contact that s. 33.1 sentence 1 of the Act on Matters of Non-Contentious Jurisdiction grants the courts, the Court failed to take into account that that it should have examined whether forced contact against the complainant's will would be in the child's best interests. Instead the standard it used for its examination was whether forced contact could endanger the child's best interests and answered this question in the negative. The Court assumed on the basis of the expert opinion it obtained that there was no risk of serious long-term damage to the child if the child had contact with the complainant in the company of a social worker. To this extent it did not exclude the possibility of detrimental effects on the child, but considered them acceptable for the purposes of encouraging the complainant through the threat of coercive measures to comply with his duty of contact and to thus bring about contact between him and his child. However, this is not sufficient to justify an encroachment on the complainant's right of personality. For the Court did not give adequate consideration to the best interests of the child or the complainant's right to protection of its personality. It failed to recognize that contact may only be enforced against a parent who is obliged to have contact when this contact achieves its objective of serving the child's best interests.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- c) *Fundamental Rights Protection under the Basic Law and the European Convention of Human Rights*
- *The Görgülü Decision, BVerfGE 111, 307*

Explanatory Annotation

The right place for the Görgülü judgment to be explained in the context of a norm of the German Basic Law is not easy to find. The German Federal Constitutional Court referred to Article 6 because a father's right was at stake. Hence this decision is reported here as a matter of Article 6 of the Basic Law. Yet, the Görgülü judgment has another dimension which is of utmost importance under German constitutional law. The judgment deals with the question of the relationship between fundamental rights of the Basic Law and their protection by the Constitutional Court and fundamental rights of the European Convention of Human Rights and their interpretation and protection by the European Court of Human Rights.

This relationship between the Basic Law and the European Convention of Human Rights must be distinguished from the relationship between German law in general and the Basic Law in particular and the law of the European Union (EU). The EU is a supranational body to which the member states have transferred enumerated powers and the law of the European Union precedes the law of its member states, in principle even their constitutional law.

The European Convention of Human Rights and Fundamental Freedoms (ECHR) and the subsequent protocols⁴⁶ are treaties under international law within the framework of the Council of Europe⁴⁷. Under Article 59.2 of the Basic Law, certain international treaties require “the consent or participation, in the form of a federal law [...]” of Parliament. The ECHR therefore has the status of a federal law within the legal system of Germany. It follows that the provisions of the Convention do not have the status of constitutional norms, they are inferior in hierarchy. This notwithstanding, ECHR norms differ significantly from domestic statutory norms. Conflicts between domestic statutory norms are usually resolved by the application of conflict rules such as the principle expressed in “*lex posterior derogat legi priori*”, i.e. the later norm prevails over the earlier one. In the case of the European Convention, however, this conflict rule does not apply. The Constitutional Court has always maintained, and confirmed in the decision reproduced here, that all courts must apply and interpret domestic law in conformity with Convention law. In an earlier decision the Court had stated even more clearly that this also applies to domestic norms that entered into force after the Convention and its protocols⁴⁸: in other words, the *lex posterior* rule does not apply when a post Convention norm of domestic German law stands in conflict with a norm of the European Convention of Human Rights.

The case at issue concerns a dispute between the applicant and the foster parents of the applicant's son. The applicant claimed the right to bring up his son to whom he had no had contact with because the mother had given up the child for adoption directly after birth and he had found out about the birth only later. The applicant's legal battle in Germany remained

46 For a hyperlinked list of Convention and protocols see
<http://www.conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG>.

47 For more information on the Council of Europe see <http://www.coe.int/>.

48 BVerfGE 74, 358 (370), <http://www.servat.unibe.ch/fallrecht/bv074358.html>.

**60 Years German Basic Law:
The German Constitution and its Court**

without success but the European Court of Human Rights (ECtHR) interfered and saw a violation of Article 8 of the ECHR⁴⁹. The matter went back to the German courts and the lower court reacted in accordance with the ECtHR. However, the appellate court rejected this finding arguing that the ECtHR's decisions are binding only on the Federal Republic of Germany but not its courts and other organs. The Constitutional Court flatly rejected this truly absurd argument of the Court of Appeal. However the Constitutional Court also took the opportunity to explain its view of the relationship between the law of the ECHR and domestic constitutional law. The Court mainly confirmed what was already clear. Domestic statutory law must be applied in the light of the Convention and its guarantees and in the light of the concrete content of these guarantees as developed in the case law of the ECtHR. The ECHR is part of the domestic law of Germany and partakes in the rule of law. All other norms must therefore be interpreted in the light of the requirements of the norms of ECHR and, as shown above, this is also true for post ECHR domestic norms. In this decision the Court addressed the hypothetical constellation where a ECHR norm stands in conflict with a domestic constitutional norm. The Court held that if such a conflict cannot be resolved by interpretation of the constitutional norm, the provision of the Basic Law must prevail and the conflict between the two sets of norms can then only be resolved by an amendment of the Basic Law.

This finding is not surprising at all and legally absolutely correct. What surprises is the length with which this “non-question” was treated by the Court in the light of the fact that in the context of norms as abstract as the fundamental rights of the Basic Law and those protected by the ECHR it is hardly conceivable if not downright impossible to envisage a norm conflict that could not be resolved by interpretation.

**Translation of the Görgülü Judgment - Decisions of the Federal Constitutional Court
(Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 111, 307***

Headnotes:

1. The principle that the judge is bound by statute and law (Article 20.3 of the Basic Law (Grundgesetz - GG)) includes taking into account the guarantee of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the decisions of the European Court of Human Rights (ECHR) as part of a methodologically justifiable interpretation of the law. Both a failure to consider a decision of the ECHR and the “enforcement” of such a decision in a schematic way, in violation of prior-ranking law, may violate fundamental rights in conjunction with the principle of the rule of law.

⁴⁹ Article 8 states that “[E]veryone has the right to respect for his private and family life, his home and his correspondence.” See ECtHR, Appl. No. 74969/01, Judgment of 26.2.2004, Görgülü, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=699523&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

* © Bundesverfassungsgericht (Federal Constitutional Court).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

2. In taking into account decisions of the ECHR, the state bodies must include the effects on the national legal system in their application of the law. This applies in particular when the relevant national law is a balanced partial system of domestic law that is intended to achieve an equilibrium between differing fundamental rights.

Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04 -

Facts:

In his constitutional complaint, the complainant challenges *inter alia* what he regards as the unsatisfactory enforcement of the judgment of the European Court of Human Rights (ECHR) of 26 February 2004 pronounced in his case and the disregard of international law by the Naumburg Higher Regional Court.

The complainant is the father of the child, Christofer, who was born illegitimate on 25 August 1999. The mother of the child, who at first did not name the complainant to the authorities as the father of the child, gave the boy up for adoption one day after his birth and first declared her prior consent to the adoption by the foster parents in a notarial deed of 1 November 1999; she repeated her consent on 24 September 2002. The boy has been living with the foster parents since 29 August 1999.

The complainant learned in October 1999 of the child's birth and released for adoption; his contact with the mother of the child had broken off in July 1999. Thereupon he proceeded with the adoption his son; he encountered difficulties at first, since his paternity was not recognised. Finally, his paternity was established by a judgment of the Wittenberg Local Court (Amtsgericht) of 20 June 2000.

In an order of 9 March 2001, the Wittenberg Local Court transferred the sole parental custody of Christofer to the complainant in accordance with his application. Upon the appeal of the foster parents and the Wittenberg Youth Welfare Office (Jugendamt), which was appointed official guardian after the birth, the Local Court's custody decision was reversed by order of 20 June 2001 of the Naumburg Higher Regional Court, and the complainant's application for transfer of custody was dismissed on the merits. At the same time, the Higher Regional Court, of its own motion, excluded rights of access between the complainant and the boy until 30 June 2002 on the grounds of the best interest of the child.

The Third Chamber of the First Senate of the Federal Constitutional Court, by an order not stating grounds of 31 July 2001 - 1 BvR 1174/01 - refused to admit for decision the complainant's constitutional complaint against the order of the Higher Regional Court.

In September 2001, the complainant filed an individual application under Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) at the European Court of Human Rights.

In a judgment of 26 February 2004, a chamber of the Third Section of the ECHR declared unanimously that the decision on custody and the exclusion of the right of access violated Article 8 of the Convention. On the basis of Article 41 of the Convention, the ECHR awarded the complainant EUR 15,000.00 in damages and EUR 1,500.00 to reimburse costs and expenses (see ECHR, No. 74969/01, Judgment of 26 February 2004 - Görgülü).

**60 Years German Basic Law:
The German Constitution and its Court**

Thereupon, in the parallel proceedings on custody, the Wittenberg Local Court transferred sole parental custody to the complainant by an order of 19 March 2004 in accordance with his application. In addition, the Local Court, of its own motion by an order of the same date and with reference to this custody decision, issued a temporary injunction on the access rights of the complainant to his son. He was given the right, from April 3 2004, to have access to his son for two hours every Saturday, until there was a final and non-appealable decision in the custody proceedings.

- b) The official guardian and the children's guardian appealed against the decision of the Local Court on access rights. The Naumburg Higher Regional Court first, by order of 30 March 2004, suspended the execution of the temporary injunction, and by a further order of 30 June 2004 cancelled the temporary injunction.

In his constitutional complaint, the complainant challenges a violation of his fundamental rights under Article 1, Article 3 and Article 6 of the Basic Law, and of the right to fair trial. At the same time he applies for a temporary injunction on access to his son to be issued.

...

C.

The constitutional complaint is well-founded. In its order of 30 June 2004, the Higher Regional Court violated Article 6 of the Basic Law in conjunction with the principle of the rule of law.

The authorities and courts of the Federal Republic of Germany are obliged, under certain conditions, to take account of the European Convention on Human Rights as interpreted by the ECHR in making their decisions (I.). The challenged decision of the Higher Regional Court does not do justice to this obligation, since the court does not pay sufficient attention to the judgment of the ECHR of 26 February 2004 in the case of the complainant (II.).

I.

In the German legal system, the European Convention on Human Rights has the status of a federal statute, and it must be taken into account in the interpretation of domestic law, including fundamental rights and constitutional guarantees (1). The binding effect of a decision of the ECHR extends to all state bodies and in principle imposes on these an obligation, within their jurisdiction and without violating the binding effect of statute and law (Article 20.3 of the Basic Law), to end a continuing violation of the Convention and to create a situation that complies with the Convention (2). The nature of the binding effect depends on the sphere of responsibility of the state bodies and on the latitude given by prior-ranking law. Courts are at all events under a duty to take into account a judgment that relates to a case already decided by them if they preside over a retrial of the matter in a procedurally admissible manner and are able to take the judgment into account without a violation of substantive law (3). A complainant may challenge the disregard of this duty of consideration as a violation of the fundamental right whose area of protection is affected in conjunction with the principle of the rule of law (4).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

1. a) The European Convention on Human Rights and its protocols are agreements under public international law. The Convention leaves it to the States parties to decide in what way they comply with their duty to observe the provisions of the Convention (ECHR, Judgment of 6 February 1976, Series A20, no. 50 - Swedish Engine Drivers Union; ECHR, Judgment of 21 February 1986, Series A98, no. 84 - James and Others; see Geiger, *Grundgesetz und Völkerrecht*, 3rd ed. 2002, 405; Ehlers, in: *idem* (ed.), *Europäische Grundrechte und Grundfreiheiten*, 2003, s. 2 marginal nos. 2-3). The federal legislature consented to the above treaty in each case by a formal statute under Article 59.2 of the Basic Law (Act on the Convention for the Protection of Human Rights and Fundamental Freedoms, *Gesetz über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten* of 7 August 1952, *Federal Law Gazette* (Bundesgesetzblatt - BGBI) II, p. 685; by the proclamation of 15 December 1953, *Federal Law Gazette* 1954 II p. 14, the Convention entered into force for the Federal Republic of Germany on 3 September 1953; there was a new proclamation of the Convention as amended by the 11th protocol in *Federal Law Gazette* 2002 II p. 1054). In doing this, the federal legislature transformed the Convention into German law and made an order on the application of the law to this effect. Within the German legal system, the European Convention on Human Rights and its protocols, to the extent that they have come into force for the Federal Republic of Germany, have the status of a federal statute (see BVerfGE 74, 358 [370]; 82, 106 [120]).

This classification means that German courts must observe and apply the Convention within the limits of methodically justifiable interpretation like other statute law of the Federal Government. But the guarantees of the European Convention on Human Rights and its protocol, by reason of this status in the hierarchy of norms, are not a direct constitutional standard of review in the German legal system (see Article 93.1 no. 4.a of the Basic Law, s. 90.1 of the Federal Constitutional Court Act). A complainant can therefore not directly challenge the violation of a human right contained in the European Convention on Human Rights by a constitutional complaint before the Federal Constitutional Court (see BVerfGE 74, 102 [128] with further references; Order of the First Chamber of the Second Senate of the Federal Constitutional Court of 1 March 2004 - 2 BvR 1570/03 -, *Europäische Grundrechte-Zeitschrift - EuGRZ* 2004, p. 317 [318]). However, the guarantee of the Convention influences the interpretation of the fundamental rights and constitutional principles of the Basic Law. The text of the Convention and the case law of the European Court of Human Rights serve, on the level of constitutional law, as guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of the Basic Law, provided that this does not lead to a restriction or reduction of protection of the individual's fundamental rights under the Basic Law - and this the Convention itself does not desire (see Article 53 of the Convention; see BVerfGE 74, 358 [370]; 83, 119 [128]; Order of the Third Chamber of the Second Senate of the Federal Constitutional Court of 20 December 2000 - 2 BvR 591/00 -, *Neue Juristische Wochenschrift - NJW* 2001, pp. 2245 et seq.).

**60 Years German Basic Law:
The German Constitution and its Court**

- b) This constitutional significance of an agreement under international law, aiming at the regional protection of human rights, is the expression of the Basic Law's commitment to international law (Völkerrechtsfreundlichkeit); the Basic Law encourages both the exercise of state sovereignty through the law of international agreements and international cooperation, and the incorporation of the general rules of public international law, and therefore is, if possible, to be interpreted in such a way that no conflict arises with duties of the Federal Republic of Germany under public international law. The Basic Law has laid down in its programme that German public authority is committed to international cooperation (Article 24 of the Basic Law) and to European integration (Article 23 of the Basic Law). The Basic Law has granted the general rules of public international law priority over ordinary statute law (Article 25 sentence 2 of the Basic Law) and has integrated the law of international agreements, by Article 59.2 of the Basic Law, into the system of the separation of powers. In addition, it has opened the possibility of joining systems of mutual collective security (Article 24.2 of the Basic Law), created the duty to ensure the peaceful settlement of international disputes by way of arbitration (Article 24.3 of the Basic Law) and declared that the disturbance of the peace, and in particular preparing a war of aggression, is unconstitutional (Article 26 of the Basic Law). In this complex of norms, the German constitution, as is also shown by its preamble, aims to incorporate the Federal Republic of Germany into the community of states as a peaceful member having equal rights in a system of public international law serving peace (see also BVerfGE 63, 343 [370]).

However, the Basic Law did not take the greatest possible steps in opening itself to international law connections. On the domestic level, the law of international agreements is not to be treated directly as applicable law, that is, without an Act subject to the consent of the German parliament under Article 59.2 of the Basic Law, and - like customary international law (see Article 25 of the Basic Law) - not endowed with the status of constitutional law. The Basic Law is clearly based on the classic idea that the relationship of public international law and domestic law is a relationship between two different legal spheres and that the nature of this relationship can be determined from the viewpoint of domestic law only by domestic law itself; this is shown by the existence and the wording of Article 25 and Article 59.2 of the Basic Law. The commitment to international law takes effect only within the democratic and constitutional system of the Basic Law.

The Basic Law aims to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty contained in the last instance in the German constitution. There is therefore no contradiction with the aim of commitment to international law if the legislature, exceptionally, does not comply with the law of international agreements, provided this is the only way in which a violation of fundamental principles of the constitution can be averted.

The Basic Law is intended to achieve comprehensive commitment to international law, cross-border cooperation and political integration in a gradually developing international community of democratic states under the rule of law. However, it does not seek a submission to non-German acts of sovereignty that is removed from every constitutional

**Selected Fundamental Decisions of
the Federal Constitutional Court**

limit and control. Even the far-reaching supranational integration of Europe, which accepts the order to apply a norm, when this order originates from Community law and has direct domestic effect, is subject to a reservation of sovereignty, albeit one that is greatly reduced (see Article 23.1 of the Basic Law). The law of international agreements applies on the domestic level only when it has been incorporated into the domestic legal system in the proper form and in conformity with substantive constitutional law.

- c) On this basis, the legal effect of the decisions of an international court that was brought into existence under an international agreement is determined according to the content of the incorporated international agreement and the relevant provisions of the Basic Law as to its applicability. If the Convention law of the European Convention on Human Rights, and with it the federal legislature on the basis of Article 59.2 of the Basic Law, has provided that the legal decisions are directly applicable, then they have this effect below the level of constitutional law. Under domestic law, it is first the duty of the competent non-constitutional courts to establish this legal effect.
2. a) The decisions of the ECHR have particular importance for Convention law as the law of international agreements, because they reflect the current state of development of the Convention and its protocols. Convention law itself accords varying legal effects to the ECHR's decisions on the merits. Under Article 42 and Article 44 of the Convention, the judgments of the ECHR become final and thus formally non-appealable. In Article 46 of the Convention, the States parties have agreed that in all legal matters to which they are party they will abide by the final judgment of the ECHR. It follows from this provision that the judgments of the ECHR are binding on the parties to the proceedings and thus have limited substantive *res judicata* (see H.-J. Cremer, in: Grote/Marauhn (eds.), Konkordanzkommentar, 2004, Entscheidung und Entscheidungswirkung, marginal nos. 56-57 with further references).

The substantive *res judicata* in individual application proceedings under Article 34 of the Convention is restricted by the personal, material and temporal limits of the matter in dispute (see Order of the Second Senate of the Federal Constitutional Court (preliminary examination committee) of 11 October 1985 - 2 BvR 336/85 - Pakelli, Europäische Grundrechte-Zeitschrift 1985, p. 654 [656]; see also E. Klein, Binding effect of ECHR judgments, Festschrift für Ryssdal, 2000, p. 705 [pp. 706 et seq.]). The decisions of the ECHR in proceedings against other States parties merely give the states that are not involved an occasion to examine their domestic legal systems and, if it appears that an amendment may be necessary, to orient themselves to the relevant case law of the ECHR (see Ress, Wirkung und Beachtung der Urteile und Entscheidungen der Straßburger Konventionsorgane, Europäische Grundrechte-Zeitschrift 1996, p. 350). In this respect, Convention law has no provision comparable to s. 31.1 of the Federal Constitutional Court Act, under which all the federal and Land constitutional bodies and all courts and authorities are bound by the decisions of the Federal Constitutional Court. Article 46.1 of the Convention provides only that the State party involved is bound by the final judgment with regard to a specific matter in dispute (*res judicata*).

**60 Years German Basic Law:
The German Constitution and its Court**

- b) In the question of fact, the ECHR pronounces a declaratory judgment; the decision establishes that the State party in question - with regard to the specific matter in dispute, - complied with the Convention or acted in contradiction to it; however, there is no judgment of cassation that would directly quash the challenged measure of the State party (see Ehlers, loc. cit., s. 2 marginal no. 52; Polakiewicz, *Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte*, 1993, pp. 217 et seq.; Steinberger, *Human Rights Law Journal* 1985, p. 402 [407]).

If it is declared that there has been a violation of the Convention, the first consequence is that the State party may no longer hold the view that its acts were in compliance with the Convention (see Frowein, in: Isensee/Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. VII, 1992, s. 180 marginal no. 14). In principle, the decision also obliges the State party affected with regard to the matter in dispute to restore, if possible, the state of affairs without the declared violation of the Convention (see Polakiewicz, loc. cit., pp. 97 et seq.; on the possibility of attaining the goal of *restitutio in integrum*, see the Recommendation of the Committee of Ministers of the Council of Europe No. R (2000) 2 of 19 January 2000). If the violation that has been found is still continuing, for example in the case of continued arrest in violation of Article 5 of the Convention or an encroachment upon private and family life in violation of Article 8 of the Convention, the State party is under an obligation to end this state (see most recently ECHR, No. 71503/01, Judgment of 8 April 2004, no. 198 - Assanidze, *Europäische Grundrechte-Zeitschrift* 2004, p. 268 (275); see also Breuer, *Europäische Grundrechte-Zeitschrift* 2004, p. 257 [259]; Grabenwarter, *European Convention on Human Rights*, 2003, s. 16 marginal no. 3; Polakiewicz, loc. cit., pp. 63 et seq.; Villiger, *Handbuch der Europäischen Menschenrechtskonvention*, 1999, s. 13 marginal no. 233). The State party would therefore commit a new violation of the European Convention on Human Rights if it failed to terminate or repeated its conduct that has been established to be contrary to the Convention (see E. Klein, *Binding effect of ECHR judgments*, *Festschrift für Ryssdal*, 2000, p. 705 [708]). However, it should be taken into account that the effect of the decision relates only to the *res judicata* and that the factual and legal position may change before new domestic proceedings to which the complainant is a party.

- c) The fact that the ECHR may award the complainant a “just compensation” in the form of money if the domestic law of the State party involved permits only inadequate compensation (see Article 41 of the Convention) shows that the Convention allows the State party involved some latitude with regard to the correction of decisions that have already been made and that are non-appealable.

However, in its more recent case law relating to Article 41 of the Convention, the ECHR points out that the States parties, in ratifying the Convention, agreed to ensure that their domestic legal systems are in accordance with the Convention (Article 1 of the Convention). It is therefore, according to the ECHR, for the defendant state to remove every obstacle in domestic law that prevents a redress of the complainant’s situation (see ECHR, loc. cit., *Europäische Grundrechte-Zeitschrift* 2004, p. 268 [275] with reference to ECHR, No. 39748/98, Judgment of 17 February 2004, no. 47 - Maestri).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

If the State party affected is ordered to pay compensation to the successful complainant under Article 41 of the Convention, this judgment of the ECHR creates an obligation to perform (see Stöcker, *Wirkungen der Urteile des Europäischen Gerichtshofs für Menschenrechte in der Bundesrepublik*, *Neue Juristische Wochenschrift* 1982, p. 1905 (1908)). The granting of compensation is not necessarily part of the decision in the principal proceedings, but may be made at a later date, in order to give the parties the opportunity to reach an amicable agreement. In this way, Convention law recognises that in general only the State party affected can assess what legal possibilities of action exist in the national legal system for the enforcement of the decision.

- d) The legal effect of a decision of the ECHR, under the principles of public international law, is directed in the first instance to the State party as such. In principle, the Convention takes a neutral attitude towards the domestic legal system, and, unlike the law of a supranational organisation, it is not intended to intervene directly in the domestic legal system. On the domestic level, appropriate Convention provisions in conjunction with the consent Act and constitutional requirements (Article 20.3, Article 59.2 of the Basic Law in conjunction with Article 19.4 of the Basic Law) bind all organisations responsible for German public authority in principle to the decisions of the ECHR.

This legal position corresponds to the conception of the European Convention on Human Rights as an instrument for protection and for the enforcement of particular human rights. The obligation of the States parties, integrated into federal law by the consent Act, to create a domestic instance at which the person affected can have an “effective remedy” against particular conduct by the state (Article 13 of the Convention) already extends into the domestic structure of the state system and is not restricted to the executive branch, which is competent to act externally. In addition, the States parties must guarantee the “effective implementation of any of the provisions” of the European Convention on Human Rights in their domestic law (see Article 52 of the Convention), which is possible in a state under the rule of law governed by the principle of the separation of powers only if all the organisations responsible for sovereign power are bound by the guarantees of the Convention (on this, see Order of the Second Senate of the Federal Constitutional Court (preliminary examination committee) of 11 October 1985 - 2 BvR 336/85 - Pakelli, *Europäische Grundrechte-Zeitschrift* 1985, p. 654 [656]). In this view, the German courts too are under a duty to take the decisions of the ECHR into account.

3. The binding effect of decisions of the ECHR depends on the area of competence of the state bodies and the relevant law. Administrative bodies and courts may not free themselves from the constitutional system of competencies and the binding effect of statute and law (Article 20.3 of the Basic Law) by relying on a decision of the ECHR. But the binding effect of statute and law also includes a duty to take into account the guarantees of the Convention and the decisions of the ECHR as part of a methodologically justifiable interpretation of the law. Both a failure to consider a decision of the ECHR and the “enforcement” of such a decision in a schematic way, in violation of prior ranking law, may therefore violate fundamental rights in conjunction with the principle of the rule of law.

**60 Years German Basic Law:
The German Constitution and its Court**

- a) The obligation created by the consent Act to take into account the guarantees of the European Convention on Human Rights and the decisions of the ECHR at least demands that notice is taken of the relevant texts and case law and that they are part of the process of developing an informed opinion of the court appointed to make a decision, of the competent authority or of the legislature. Domestic law must if possible be interpreted in harmony with public international law, regardless of the date when it comes into force (see BVerfGE 74, 358 [370]).

If there are decisions of the ECHR that are relevant to the assessment of a set of facts, then in principle the aspects taken into account by the ECHR when it considered the case must also be taken into account when the matter is considered from the point of view of constitutional law, in particular when proportionality is examined, and there must be a consideration of the findings made by the ECHR after weighing the rights of the parties (see Order of the First Chamber of the Second Senate of the Federal Constitutional Court of 1 March 2004 - 2 BvR 1570/03 -, *Europäische Grundrechte-Zeitschrift* 2004 p. 317 [319]).

If, in concrete application proceedings in which the Federal Republic of Germany is involved, the ECHR establishes that there has been a violation of the Convention, and if this is a continuing violation, the decision of the ECHR must be taken into account in the domestic sphere, that is, the responsible authorities or courts must discernibly consider the decision and, if necessary, justify understandably why they nevertheless do not follow the international law interpretation of the law. Precisely in cases in which national courts, as in private law, have to structure multipolar fundamental rights situations, it is always important that various subjective legal positions are sensitively weighed against each other, and if there is a change in the persons involved in the dispute or a change in the actual or legal circumstances, this weighing up may lead to a different result. There may therefore be constitutional problems if one of the subjects of fundamental rights in conflict with another obtains an ECHR judgment in his or her favour against the Federal Republic of Germany and German courts schematically apply this decision to the private law relationship, with the result that the holder of fundamental rights who has “lost” in this case and was possibly not involved in the proceedings at the ECHR would no longer be able to take an effective part in the proceedings as a party.

- b) aa) If the ECHR has declared a domestic provision to be contrary to the Convention, either this provision may be interpreted in conformity with public international law when applied in practice, or the legislature has the possibility of altering this domestic provision that is incompatible with the Convention. If the violation of the Convention consists in effecting a specific administrative act, the authority responsible has the possibility of cancelling this act under the provisions of the law of administrative procedure (s. 48 of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz - VwVfG*)). Administrative practice that is in violation of the Convention can be amended, and courts may establish the duty to do this.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- bb) If judicial decisions violate the Convention, neither the European Convention on Human Rights nor the Basic Law imposes an obligation to accord to a judgment of the ECHR that establishes that a decision of a German court was made in violation of the European Convention on Human Rights the effect of removing the non-appealability of this decision (see Federal Constitutional Court, *Europäische Grundrechte-Zeitschrift* 1985, p. 654). Admittedly, it cannot be concluded from this that decisions of the ECHR need not be taken into account by German courts.

Under Article 20.3 of the Basic Law, judicial decisions are bound by statute and law. The constitutionally guaranteed independence of the judge, who is subject to the law, is not affected by this commitment, which is derived from the principle of the rule of law (Article 97.1 of the Basic Law; see BVerfGE 18, 52 [59]; 19, 17 [31-32]). Both the commitment to law and the commitment to statute put into concrete terms the judicial power that is entrusted to the judges (Article 92 of the Basic Law). Since the European Convention on Human Rights - as interpreted by the ECHR - has the status of a formal federal statute, it shares the primacy of statute law and must therefore be complied with by the judiciary.

With regard to the principle of legal certainty, it must be noted that the federal legislature in the year 1998, in s. 359 no. 6 of the Code of Criminal Procedure (Strafprozessordnung - StPO), introduced into the law of criminal procedure a new ground for reopening criminal proceedings (Act on the Reform of the Reopening of Proceedings under Criminal Law; Gesetz zur Reform des strafrechtlichen Wiederaufnahmerechts of 9 July 1998, Federal Law Gazette I p. 1802). This provides that it is admissible to reopen proceedings that ended in a non-appealable judgment if the ECHR has established that there was a violation of the European Convention on Human Rights or its protocols and the German judgment is based on this violation. This amendment of the law is based on the idea that a violation of the Convention whose effect continues in a specific individual case should be terminated, at all events in the area of criminal law, which is a particularly sensitive one for human rights, even if it is already non-appealable (see s. 79.1 of the Federal Constitutional Court Act), if the judgment of the ECHR is relevant to the national proceedings. In this way, the competent court is given the opportunity to deal again, on application, with the case which has actually been closed, and to include the new legal facts in its development of an informed opinion. In this connection, the statute expresses the fundamental expectation that the court will change its original decision - which was contrary to the Convention - to the extent that this is based on the violation.

In other rules of procedure, there is no conclusive answer to the question as to how the Federal Republic of Germany, if the ECHR rules against it, is to react, if national court proceedings have been completed and are non-appealable. There may be facts and circumstances in which German courts may make a new decision, not about the *res judicata*, but about the matter on which the ECHR has established that there has been a violation of the Convention on the part of the Federal Republic of Germany. This may be the case, for example, when the court is intended to consider the matter again on the basis of a new application or

**60 Years German Basic Law:
The German Constitution and its Court**

changed circumstances, or the court in another constellation is still dealing with the matter. In the last instance, it is decisive whether a court, within the scope of the applicable law of procedure, has the possibility of making a new decision in which it can take account of the relevant decision of the ECHR.

In such case constellations, it would not be acceptable merely to refer the complainant to money damages, although restoration would fail neither for factual nor for legal reasons.

- c) In taking into account decisions of the ECHR, the state bodies must include the effects on the national legal system in their application of the law. This applies in particular with regard to a partial system of domestic law whose legal consequences are balanced and that is intended to achieve an equilibrium between differing fundamental rights.

Individual application proceedings under Article 34 of the Convention before the ECHR are intended to decide specific individual cases in the two-party relationship between the complainant and the State party, by the measure of the European Convention on Human Rights and its protocols. The decisions of the ECHR may encounter national partial systems of law shaped by a complex system of case law. In the German legal system, this may happen in particular in family law and the law concerning aliens, and also in the law on the protection of personality (on this, see, recently, ECHR, No. 59320/00, Judgment of 24 June 2004 - von Hannover v. Germany, *Europäische Grundrechte-Zeitschrift* 2004, pp. 404 ff.), in which conflicting fundamental rights are balanced by the creation of groups of cases and graduated legal consequences. It is the task of the domestic courts to integrate a decision of the ECHR into the relevant partial legal area of the national legal system, because it cannot be the desired result of the international law basis can it nor express the will of the ECHR, for the ECHR through its decisions itself to undertake directly any necessary adjustments within a domestic partial legal system.

In this respect, it is necessary for the national courts to evaluate the decision when taking it into account; in this process, account may also be taken of the fact that the individual application proceedings before the ECHR, in particular where the original proceedings were in civil law, possibly does not give a complete picture of the legal positions and interests involved. The only party to the proceedings before the ECHR apart from the complainant is the State party affected; the possibility for third parties to take part in the application proceedings (see Article 36.2 of the European Convention on Human Rights) is not an institutional equivalent to the rights and duties as a party to proceedings or another person involved in the original national proceedings.

4. The constitutional review of the interpretation and application of agreements under international law that have been given by statute the power of domestic German law is governed by the same principles that elsewhere too define the authority of the Federal Constitutional Court to review judicial decisions. The interpretation and application of agreements under international law by the ordinary courts can in principle be examined only to assess whether they are arbitrary or are based on a fundamentally incorrect view of the significance of a fundamental right or are incompatible with other constitutional provisions (see BVerfGE 18, 441 [450]; 94, 315 [328]).

Selected Fundamental Decisions of the Federal Constitutional Court

Admittedly, as part of its competence the Federal Constitutional Court is also competent to prevent and remove, if possible, violations of public international law that consist in the incorrect application or non-observance by German courts of international law obligations and may give rise to an international law responsibility on the part of Germany (see BVerfGE 58, 1 [34]; 59, 63 [89]; 109, 13 [23]). In this, the Federal Constitutional Court is indirectly in the service of enforcing international law and in this way reduces the risk of failing to comply with international law. For this reason it may be necessary, deviating from the customary standard, to review the application and interpretation of international law treaties by the ordinary courts.

Against this background, it must at all events be possible, on the basis of the relevant fundamental right, to raise the objection in proceedings before the Federal Constitutional Court that state bodies disregarded or failed to take into account a decision of the ECHR. In this process, the fundamental right is closely connected to the priority of statute embodied in the principle of the rule of law, under which all state bodies are bound by statute and law within their competence (see BVerfGE 6, 32 [41]).

II.

The challenged decision of the Naumburg Higher Regional Court of 30 June 2004 violates Article 6 of the Basic Law in conjunction with the principle of the rule of law. The Higher Regional Court did not take sufficient account of the judgment of the ECHR of 26 February 2004 when making its decision, although it was under an obligation to do so.

1. The challenged decision does not reveal whether and to what extent the Higher Regional Court considered the fact that the right of access asserted by the complainant is in principle protected by Article 6 of the Basic Law. This constitutional protection is to be seen against the background of the court's remarks on the complementary guarantee in Article 8 of the Convention. The Higher Regional Court should have considered in an understandable way how Article 6 of the Basic Law could have been interpreted in a manner that complied with the obligations under international law of the Federal Republic of Germany.
2. The Higher Regional Court in particular assumes in a manner that is not acceptable under constitutional law that a judgment of the European Court of Human Rights binds only the Federal Republic of Germany as a subject of public international law, but does not bind German courts. All the state bodies of the Federal Republic of Germany are - to the extent set out here under C. I. above - bound by operation of law within their jurisdiction by the Convention and the protocols that have entered into force in Germany. They must take into account the guarantees of the Convention and the case law of the ECHR when interpreting fundamental rights and constitutional guarantees.

In the present case, the Higher Regional Court, by reason of the judgment of the ECHR of 26 February 2004, had particular cause to consider the grounds of that judgment, because the judgment, which established a violation of the Convention by the Federal Republic of Germany, dealt with the matter with which the Higher Regional Court was again concerned. Neither does the duty to take the decision into account adversely affect the Higher Regional Court's constitutionally guaranteed independence, nor does it force the court to enforce the

**60 Years German Basic Law:
The German Constitution and its Court**

ECHR decision without reflection. However, the Higher Regional Court is bound by statute and law, which includes not only civil law and the relevant procedural law, but also the European Convention on Human Rights, which has the status of an ordinary federal statute.

In the legal analysis in particular of new facts, in weighing conflicting fundamental rights such as those of the foster family and in integrating the individual case in the overall context of family law cases relating to the right of access, the Higher Regional Court is not bound in its particular conclusion. The order challenged, however, lacks a discussion of the connections set out above.

3. It is not necessary to decide whether the Higher Regional Court, in a way that is constitutionally unacceptable, proceeded on the assumption that a temporary injunction can be issued only on application and not - as in the present case - also of the court's own motion, and thus that the complaint was admissible (see for example Saarbrücken Higher Regional Court, OLG-Report 2001, p. 269 on the one hand, Brandenburg Higher Regional Court, OLG-Rechtsprechung Neue Länder - OLG-NL 1994, 159 and Naumburg Higher Regional Court, OLG Naumburg, Justiz-Ministerialblatt für Sachsen-Anhalt 2003, p. 346 on the other hand). At all events, the Higher Regional Court made its procedural remarks too without taking correct account of the judgment of the ECHR of 26 February 2004. However, this was of importance for the question as to whether the Local Court was obliged or entitled of its own motion to examine the granting of a right of access and if the factual requirements were satisfied - as was the case - to make contact by access possible by way of a temporary injunction.

D.

With the decision on the constitutional complaint in the principal proceedings, the application for a temporary injunction is also disposed of.

VII. Freedom of Assembly - Article 8 of the Basic Law

a) *Right of Assembly, BVerfGE 87, 399*

Explanatory Annotation

Article 8 of the Basic Law guarantees the right to peacefully assemble and demonstrate. The details are regulated in a federal statute specifying under what conditions the police can interfere with the demonstration. The most severe interference is the dissolution of a demonstration, i.e. its break-up in case the demonstration turns violent or when other breaches of public security occur. Public security is a standing legal term defined as any breach of the law, especially of criminal law norms. If such a dissolution order is issued, the statute requires all participants to leave the venue of the demonstration immediately. Failure to do so constitutes a criminal offence usually punishable by monetary fines.

In this case the applicants had been sentenced to a fine of roughly 80 and 60 German Marks (now roughly 40 and 30 Euros) for taking part in a sit-in blockade of a military installation in Germany as part of a peace movement protest. Sit-in blockades interfere with the rights of others who can no longer enter or leave the installation blocked in this way. They can therefore in principle constitute a criminal offence. On these grounds the police issued a dissolution order, which the applicants had disobeyed.

The Constitutional Court, however, quashed the fines. It found that the regular courts could not just rely on the fact that the dissolution had been disobeyed but also needed to determine whether that dissolution order was in fact in compliance with the assembly statute. There were strong indications that this was not the case as the demonstrators had announced their intention to use a blockade as a means of demonstration and the relevant authorities had, in correct application of the principle of proportionality, only set some conditional requirements which had all been met. For example, the demonstrators had only blocked one of three entry points to the military barracks.

The case raises the issue of the difficulty that lies in having to make administrative decisions on the spot, with no time for legal analysis. It is clear that police orders have to be followed and that those affected by them at the time cannot be free to make their own individual assessment on the legality of the order and behave accordingly. Hence, if there is good cause for a police order issued “in action” the standard for its legality is usually determined on the basis available to the persons acting at the scene and in consideration of the circumstances under which the administrative decision had to be reached. Hence the legality of a dissolution order for a demonstration based on a credible bomb threat cannot depend on whether a bomb is actually found and the dissolution must be immediately enforceable as well, regardless of the personal views of those affected by the order on the scope of the risk. At the same time, the freedom of demonstration is one of the core communication freedoms and to levy a fine on someone because they disobeyed an order which later turns out to have been issued illegally would threaten this freedom. The risk of illegality must be borne by the governmental authorities at least when it comes to interference with fundamental rights.

60 Years German Basic Law:
The German Constitution and its Court

Translation of the Right of Assembly Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 87, 399*

Headnote:

A conviction by the criminal courts for refusal to immediately leave the site of an assembly that has been dispersed pursuant to s. 29.1 no. 2 of the Assembly Act (Versammlungsgesetz - VersG) is incompatible with Article 8 of the Basic Law, if it fails to take into account the legality of the order to disperse.

Order of the First Senate of 1 December 1992 - 1 BvR 88, 576/91 -

Facts:

S. 15.2 of the Assembly Act permits dispersal of an outdoor assembly, in particular in the case of deviation from information provided upon registration or violation of conditions imposed for holding such assembly or if recognizable circumstances indicate that holding the assembly poses an immediate threat to public safety or order. Pursuant to s. 29.1 no. 2 of the Assembly Act, it is a regulatory offence not to leave a public assembly or procession immediately despite an order to disperse from the responsible authority.

The complainants took part in sit-in blockades in front of a Federal Armed Forces (Bundeswehr) base on 7 and 9 May 1989. The authority responsible for the assembly had previously restricted the blockade action by imposing certain conditions. After the police enforcement officers present on site dispersed the respective blockades, the complainants did not leave the site and were carried from the street by police officers. The Local Courts (Amtsgerichte) then sentenced them to low fines for violation of s. 29.1 no. 2 of the Assembly Act. The Local Courts failed to examine the legality of the underlying order to disperse more closely in making their decision. The appeals of the complainants to the Higher Regional Court (Oberlandesgericht) were without success. In response to the constitutional complaints of the complainants, the Federal Constitutional Court reversed the judgments of the Local Courts, declared the orders of the Higher Regional Court invalid and referred the matters back to the Local Courts.

Extract from the Grounds:

...

B.

The constitutional complaints are founded. The challenged decisions violate the fundamental rights of the complainants under Article 8.1 and Article 103 of the Basic Law (Grundgesetz - GG).

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

I.

1. Imposition of a fine by the criminal courts under s. 29.1 no. 2 of the Assembly Act without taking into account the legality of the dispersal of the assembly constitutes a violation of Article 8 of the Basic Law.

- a) Article 8.1 of the Basic Law guarantees all Germans the right to assemble peacefully and unarmed. This right also covers the choice of the place, time, nature and subject of the event. Protection is afforded not only at events where opinions are made known or exchanged in verbal form, but also those at which participants give voice to their opinions in other ways (see BVerfGE 69, 315 [343]).

Sit-in blockades also enjoy the protection of the freedom of assembly. Apart from whether or not they are to be considered to constitute the use of force within the meaning of s. 240 of the Criminal Code (Strafgesetzbuch), they do not contain the elements of an offence of unpeaceable conduct within the meaning of Article 8.1 of the Basic Law that would deprive them of the protection of this fundamental right. Indeed, an assembly is not unpeaceable unless acts occur that constitute a certain danger such as, for example, violence or aggressive excesses against persons or property, but not simply because of inconvenience to third parties, even if such inconvenience is intended and not merely tolerated (see BVerfGE 73, 206 [248]).

The freedom of assembly is not, however, absolutely guaranteed. In the case of outdoor assemblies, interferences with fundamental rights are permissible by or pursuant to a law under Article 8.2 of the Basic Law. The Basic Law thus takes into account the fact that such assemblies necessitate precautionary measures to put in place the conditions for the exercise of the fundamental right on the one hand and protect colliding interests of third parties on the other hand (see BVerfGE 69, 315 [348]). Laws that restrict the freedom of assembly must, however, be compatible with the Basic Law and applied in complete compliance with it. Governmental bodies must construct laws that restrict fundamental rights in the light of the fundamental importance of Article 8.1 of the Basic Law and limit measures taken to that which is necessary for the protection of other legal interests of equivalent importance (see BVerfGE 69, 315 [349]).

- b) The provision contained in s. 29.1 no. 2 of the Assembly Act is compatible with Article 8 of the Basic Law if construed in conformity therewith.
 - aa) Just as the dispersal of an assembly can occasion no misgivings as regards the principle of proportionality if the conditions pursuant to s. 15.2 of the Assembly Act exist (see BVerfGE 69, 315 [352]), it is also not possible to object to the refusal to leave the site of an assembly that has been ordered dispersed under s. 29.1 no. 2 of the Assembly Act being prosecuted as a regulatory offence. There are also no constitutional grounds for objection to the reference to the provisions of administrative law contained in s. 15.2 of the Assembly Act. The legislature may make provision for penalties or fines for violation of duties under provisions of administrative law and administrative orders in order to encourage compliance.

**60 Years German Basic Law:
The German Constitution and its Court**

Whether this is done in the respective special legislation, i.e., in separate penal statutes, or in the Criminal Code itself is for the legislature to decide (see BVerfGE 75, 329 [343]).

Blanket offences, which become completely defined only through administrative provisions, are also compatible with the Basic Law if sufficiently specific (see BVerfGE 14, 245 [252]); established case law.

However, this type of regulatory method necessarily results in interaction between administrative law and laws governing criminal and regulatory offences. This can bind criminal court judges to administrative decisions on the one hand, but can on the other hand serve to establish adjudicatory authority as regards such decisions without thereby entailing any violation of the principles of separation of powers (see BVerfGE 75, 329 [346]; 80, 244 [256]).

No general statement on the reach of these constraints and this adjudicatory authority can be inferred from the Basic Law. It is primarily the affair of the legislature to decide whether punishability or prosecutability in connection with violations of administrative orders is to depend on whether such orders are legal or not. The legislature is, of course, bound to the requirements of the Basic Law, in particular those of the restricted fundamental right.

- bb) It is uncertain whether s. 29.1 no. 2 of the Assembly Act implies protection of legal interests and therefore makes provision for fines only in the case of legal dispersals of assemblies or whether it even sanctions disregard for orders to disperse regardless of their legality. Different answers to this question are found in the case law and legal literature (see on the one hand, for example, Dusseldorf Higher Regional Court, NStZ 1984, p. 513, and Ott, *Gesetz über Versammlungen und Aufzüge*, 5th ed., 1987, s. 29 marginal note 9; Dietel/Gintzel/Kniesel, *Demonstrations und Versammlungsfreiheit*, 10th ed., 1991, s. 29 marginal note 7; Offczors, in: Ridder *inter alia*, *Versammlungsrecht*, 1992, s. 29 marginal notes 24 et seq., in particular 28; on the other hand, for example, Stuttgart Higher Regional Court, NJW 1989, p. 1870, and Meyer/Köhler, *Das neue Demonstrations und Versammlungsrecht*, 3rd ed., 1990, s. 29 note 4b).

Neither the text of the law nor the legislative materials permits an unambiguous conclusion.

The absence of any mention of enforcement in s. 29.1 no. 2 of the Assembly Act (in contrast to ss. 23, 26 no. 1, 29.1 nos. 1 and 3 of the Assembly Act) also permits no reliable conclusion since the materials show that this was included in the Assembly Act for other reasons (see *Bundestag* document [*Drucksache des Deutschen Bundestages* - BTDrucks] VII/550, p. 375).

Moreover, contradictions would result if prosecutability were to be dependent upon whether the elements of enforceability were explicitly mentioned. For example, persons taking part in an assembly who violate an illegal, but enforceable condition pursuant to s. 29.1 no. 3 of the Assembly Act would be committing a regulatory

**Selected Fundamental Decisions of
the Federal Constitutional Court**

offence because the elements of the fineable offence include the subjoinder “enforceable” in 1978, whereas the organizer of the assembly would escape punishment in the same case because s. 25 of the Assembly Act lacks this subjoinder.

- cc) Under these circumstances, according to the construction of s. 29.1 no. 2 of the Assembly Act that follows from Article 8.1 of the Basic Law, violations of orders to disperse may not be prosecuted without taking into account their legality.

Like freedom of expression, freedom of assembly is of fundamental importance for the development of a person’s personality and the democratic order (see BVerfGE 69, 315 [343 to 347]). Prohibition and dispersal of an assembly represent the most extreme interferences with fundamental rights. They are therefore subject to stringent conditions and may be invoked only if necessary to protect legal interests of equivalent importance and if an immediate danger to public safety and order must be averted (see BVerfGE 69, 315 [353]).

Such decisions may be based only on actual circumstances; suspicion and presumption alone do not suffice (see BVerfGE op. cit. p. 353-354).

Dispersal of an assembly that does not satisfy these requirements is in violation of Article 8 of the Basic Law. Persons taking part in assemblies must nevertheless initially accept such orders. The duty to leave the site of an assembly that has been ordered dispersed cannot be made dependent upon the illegality of the order to disperse. Since it is always possible to determine this with certainty only in retrospect, dispersal of any assembly would become impossible as soon as one of the participants invokes the legality of the dispersal. When persons taking part in an assembly disobey a police order, the use of forcible means by the governmental is in principle permissible (s. 80.2 no. 2 of the Code of Administrative Court Procedure (Verwaltungsgerichtsordnung - VwGO)). The persons taking part in the assembly are left with only the possibility of having the illegality and, if appropriate, the violation of the Basic Law by the actions of the police established retrospectively by the courts. The violation of fundamental rights that occur through the illegal dispersal of an assembly can, of course, no longer be cured in this manner. The resultant impairment of the fundamental right to the freedom of assembly is, however, unavoidable without subordination of the protection of the other legal interests to be served by the restriction of the freedom of assembly.

What pertains to the enforcement of orders to disperse under administrative law does not, however, apply in the same manner to prosecution for disobedience under criminal law or laws governing regulatory offences. It is necessary to distinguish between the two. The reason why legality is not the critical aspect in the case of the execution of an order to disperse has to do with the situational dependence of the decision, the enforcement of which cannot be postponed until the legal issue is definitively or even tentatively resolved. This reason is lacking when it comes to the imposition of a sanction for failure to obey the order. This always takes place only after the occurrence and therefore permits definitive

**60 Years German Basic Law:
The German Constitution and its Court**

clarification of the legal issue. If the legality of the order to disperse were nonetheless of no regard, the unavoidable impairment of the freedom of assembly that is inherent in an illegal order to disperse would without any commensurate necessity remain in effect against those persons who - as is subsequently found - legitimately invoked the right to freedom of assembly.

The question as to whether the legislature should nevertheless have been allowed to prosecute disobedience can remain open here. Such an intention cannot be inferred from the law. There is therefore also no occasion to examine the issue as to whether there is any reason that could be construed to legitimate such far-reaching interference under the Basic Law. Under these circumstances, it is possible to accommodate the right to freedom of assembly only if the sanction provided for by s. 29.1 no. 2 of the Assembly Act is restricted to cases involving legal dispersal of assemblies. Legality must therefore be established before a criminal court judge can impose a fine.

The dispute as to whether criminal court judges must await clarification of legality under administrative law, if such is requested, and whether they are bound by the results need also not be decided here. Since prior recourse to the administrative courts to contest dispersals of assemblies pursuant to s. 15.2 of the Assembly Act is not possible and a subsequent action as regards only the possibility of subsequent regulatory proceedings cannot be reasonably expected of the parties affected, criminal court judges must in any case when the legality of the dispersal of an assembly has not been clarified by the administrative courts themselves establish whether this is the case since it would otherwise not be possible to satisfy the requirements of Article 8 of the Basic Law.

2. A construction that permits prosecution for violation of an order to disperse pursuant to s. 29.1 no. 2 of the Assembly Act without taking into account its legality also violates Article 103.2 of the Basic Law.

According to this provision, an act may be punished only if punishability was provided for by law before the act was committed. This protection also extends to the prosecution of regulatory offences (see BVerfGE 81, 132 [135]; established case law).

This provision is intended on the one hand to ensure that the public addressed by a provision can anticipate what conduct is subject to a penalty or a fine and on the other hand to guarantee that the legislature makes decisions as regards punishability or prosecutability so that this is not left up to the courts. Article 103.2 of the Basic Law therefore excludes the application of any law that goes beyond the substantive content of a legal sanction (see BVerfGE 47, 109 [120]; 82, 236 [269]).

The legislature is certainly not prevented from the outset from imposing a penalty or fine on disobedience of an order without requiring that the legality of the order be prerequisite to such imposition (see BVerfGE 80, 244 [256]). A legislative decision to prosecute failure to obey orders to disperse without taking into account their legality cannot, however, as has been shown,

**Selected Fundamental Decisions of
the Federal Constitutional Court**

be unambiguously inferred from the law even if the legislative materials are taken into account. Under these circumstances, prosecution may not be construed to extend to include cases of illegal dispersal of assemblies, but must be restricted to violations of legal orders to disperse.

II.

The challenged judgments do not withstand review against these standards.

1. The Local Court should have taken Article 8 of the Basic Law into account for the purposes of construction and application of s. 29.1 no. 2 in conjunction with s. 15.2 of the Assembly Act. The sit-in demonstrations in which the complainant took part are included in the area of protection of Article 8.1 of the Basic Law. The imposition of fines for failure to leave protected assemblies represents an interference with the fundamental right. On the basis of the principles set forth, this is compatible with Article 8 of the Basic Law only if the dispersal of the assembly was legal. The Local Court neglected to examine this aspect.

In the proceedings involving the second complainant, it was not established that the dispersal of the assembly was legal. In the proceedings involving the first complainant, the Local Court did to be sure state that there was no indication to the effect that the dispersal of the assembly was illegal. The grounds do, however, suggest that the Court had considered only the correctness of the form of the announcement of the order to disperse. This is supported by the verbal announcement of the order and limitation to the finding that it was made twice and also taken note of. The Court did not, however, address the question as to whether the dispersal was ordered by the responsible authority as required by s. 29.1 no. 2 of the Assembly Act. The judgment in the proceedings involving the second complainant does not even specify who ordered the dispersal. It is only established that the police enforcement officers announced the dispersal.

The judgment in the proceedings involving the first complainant does certainly establish that the officer in charge of the police enforcement officers ordered the dispersal pursuant to s. 46.2 no. 2 of the Baden-Württemberg Police Act (Polizeigesetz) because the authority responsible for assemblies could not be reached. However, actual findings as to what sequence of events represented an imminent danger, which according to this provision is a prerequisite for intervention by police enforcement officers, are absent. The decisions do not contain any findings whatsoever as to the concrete events that posed an immediate danger to public safety. In that regard, the findings are limited to repetition of the pronouncement of the dispersal order, according to which there was an immediate danger of coercion. The factual basis for this assessment - whether, for example, vehicles were approaching the gate and other possibilities for entering or leaving the grounds of the base did not exist - cannot be inferred from the decisions under challenge.

It would, however, have been appropriate to review the legality of the dispersal. The authority responsible for assemblies did not prohibit the sit-in demonstrations, but only imposed conditions on the organizers with explicit reference to the principle of proportionality. The first complainant has submitted that the conditions were complied with and that only one of the three gates to the base was blocked. Under these circumstances, concrete findings would have been necessary to show why the means chosen by the authority responsible for assemblies, i.e., avoidance of danger, was inadequate and the police enforcement officers had to proceed to disperse the assembly.

**60 Years German Basic Law:
The German Constitution and its Court**

The conviction of the complainant is based on a misapprehension of Article 8 of the Basic Law. It is not possible to exclude the possibility that the Local Court would have come to a different conclusion if it had adequately considered the fundamental right of freedom of assembly.

2. Apart from the issue of the legality of the order to disperse, since the complainants were sentenced to fines although it is not obvious that this is provided for in s. 29.1 no. 2 of the Assembly Act, the decisions under challenge are also in violation of Article 103.2 of the Basic Law.

b) *Brokdorf*, BVerfGE 69, 315

Explanatory Annotation

Brokdorf is a small town on the Elbe river just north of Hamburg. It is also the site of a nuclear power plant which during its planning and construction stages became the focus point of wide spread opposition and resistance by all kinds of groups ranging from citizen initiatives to political groups, environmentalists, anti-nuclear power activists and other more militant groups. The case concerned the prohibition of a mass demonstration of an expected 50,000 demonstrators for fears that the violence ensuing from it could not be contained. The Constitutional Court held this to be unconstitutional in the light of the freedom of demonstration as guaranteed by Article 8.1 of the Basic Law.

The decision is significant for several reasons. It clarified the relationship between Article 8 of the Basic Law and the federal statute on assemblies and demonstrations. Article 8.1 clearly stipulates that assemblies⁵⁰ can take place without official authorization or even notification to the relevant authorities. The assembly statute however requires such notification, at least 48 hours before the event. The Constitutional Court held that this regular statutory provision could escape unconstitutionality only if interpreted very restrictively. Notification can only be required where such notification does not interfere with the purpose of the demonstration and where the notification only serves the purpose to facilitate the demonstration or assembly itself and reduce the impact it has on the third parties. Its purpose is therefore restricted to giving the authorities the possibility to prepare, for example by informing the public of possible traffic jams etc. and to provide the necessary security and protection for the assembly and demonstration. If the notification is impossible because the assembly is an ad-hoc assembly it must not be required.

The second significance lies in the use of procedure to safeguard fundamental rights. The Court held that the administrative authorities and the organizers of such mass demonstrations must cooperate to ensure the safe conduct of the event. The more cooperation on the side of the organizers the higher the threshold will be for the necessary risk prognosis to justify the prohibition of the demonstration.

⁵⁰ The term is applicable to stationary assemblies and moving demonstrations.

Selected Fundamental Decisions of the Federal Constitutional Court

Finally the Court also stated that a demonstration or assembly cannot be prohibited or dissolved just because of a - real - risk of or actual occurrence of violent behaviour by some. If that were so any mass assembly or demonstration would be in danger of being prohibited because it is almost inherent that at least some will use the occasion for other than peaceful purposes. The right to assemble for the peaceful majority remains in place and a preventive prohibition of the whole assembly could only be justified as a *ultima ratio* measure if all else - preparation, cooperation with organizers, joint steps to secure the peaceful part of the event, deployment of riot police etc. - has failed and the exercise of this fundamental right for the peaceful majority cannot be secured because of the verified risk level.

Translation of the Brokdorf Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 69, 315*

Headnotes:

1. The citizen's right to actively participate in the process of the formation of political opinion and will by exercising the freedom of assembly ranks among the indispensable functional elements of a democratic society. The fundamental importance of this freedom must be taken into account by the legislature when enacting provisions of law that restrict fundamental rights and by the authorities and courts when interpreting and applying such provisions.
2. The provision of the Assembly Act (Versammlungsgesetz - VersammlG) that governs registration of events held outdoors and the conditions for the dispersal or prohibition of such events (s.s. 14 and 15) satisfies the constitutional requirements if it is interpreted and applied in such a manner
 - a) that compulsory registration does not apply in the case of spontaneous demonstrations and non-compliance does not justify systematic dispersal or prohibition; and
 - b) that dispersal and prohibition are possible only to protect equivalent legal interests and if in strict compliance with the principle of proportionality and only if an immediate threat to these legal interests can be inferred from discernible circumstances.
3. Governmental authorities are constrained to act in a manner favourable to demonstrations by taking as their model peaceful mass demonstrations and may not without adequate reason ignore positive experience. The more the organizers are for their part willing to take confidence building measures on their own or provide demonstration-friendly cooperation, the higher the bar becomes for governmental intervention on the grounds of a threat to public safety.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

**60 Years German Basic Law:
The German Constitution and its Court**

4. Unless it is to be feared that a demonstration will on the whole turn non-peaceful, or that the organizer and the organizer's supporters will strive for or at least tolerate such a turn of events, the protection of the freedom of assembly of peaceful participants that the Basic Law guarantees every citizen is preserved, even if excesses are to be expected from individuals or a minority of the participants. In such cases, preventive prohibition of an entire event requires as antecedent conditions stringent standards in respect of the assessment of dangers and previous exhaustion of all reasonably applicable means that would make it possible for peaceful demonstrators to exercise their fundamental rights.
5. The administrative courts must already at the level of injunctive relief proceedings take into account through more intensive examination the circumstance that immediate enforcement of a ban on a demonstration results as a rule in irreversible impairment of the exercise of fundamental rights.

...

Order of the First Senate of 14 May 1985 - 1 BvR 233, 341/81 -

Facts:

In early 1981, numerous civic action groups called for a mass demonstration against the construction of the nuclear power plant in Brokdorf on 28 February 1981. Before the assembly was even registered, the responsible county commissioner issued in the form of a blanket order a general ban on the assembly on the construction site covering an area of about 210 square kilometres and ordered that it be immediately enforced. This order was based on knowledge acquired by the police to the effect that there was a significant number of persons with violent intentions among the approximately 50,000 expected demonstrators who intended to forcibly occupy and disturb the construction site and commit other acts of violence. When the organizers subsequently applied for registration, the county commissioner referred to the ban on the demonstration which had already been ordered. A few of the organizers, the subsequent complainants before the Federal Constitutional Court (Bundesverfassungsgericht), appealed this decision and the general order and petitioned the court to restore the suspensory effect of the appeal. This petition was denied by the Lüneburg Higher Administrative Court (Oberverwaltungsgericht) in the second instance. The Higher Administrative Court gave as its grounds the late registration of the demonstration and the expected disturbances. The appropriate balancing of interests resulted therefore in the denial of the petition of the complainant for injunctive relief.

The constitutional complaints challenging immediate enforcement of the general order and the decision of the Higher Administrative Court were successful in part.

Selected Fundamental Decisions of
the Federal Constitutional Court

Extract from the Grounds:

...

B.

The constitutional complaints are admissible.

...

Immediate enforcement of the ban on the demonstration and confirmation thereof by the court prevented the complainants from conducting an authorized demonstration at locations indicated to the authority at the planned times. The complainants view these acts on the part of the public authorities as an encroachment upon legal positions that are protected by the Basic Law (Grundgesetz - GG). Since these acts were contested in court and since all legal remedies have therefore been exhausted, the legally prescribed conditions for admissibility have been met for their constitutional complaints, which were submitted on a timely basis (Article 93.1 no. 4a and Article 94.2 of the Basic Law, ss. 90 et seq. of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG). According to established case law, the admissibility of their constitutional complaints cannot be objected to on the grounds that all legal remedies have not been exhausted in the main proceedings since the injunctive proceedings are pursuant to s. 80.5 of the Code of Administrative Court Procedure (Verwaltungsgerichtsordnung - VwGO) legally independent of the former proceedings (BVerfGE 53, 30 [52]; 59, 63 [82] with further references.)

2. The constitutional complaints also do not lack the required legal interest. This interest is in particular not extinguished because the date of the demonstration has been exceeded and immediate enforcement of the ban has therefore become irrelevant. According to established case law, a legal interest remains intact even after the relief sought through the constitutional complaint becomes irrelevant, in any case if clarification of a constitutional issue of fundamental importance would otherwise be omitted and the interference involves an especially important fundamental right (BVerfGE 53, 30 [52]; 59, 63 [82] with further references.

That these conditions have been met follows from the preceding considerations.

The existence of this legitimate interest can also be affirmed in the case of the first complainants although they did not initiate an action in respect of the main issue after their appeal was dismissed. There were originally no reservations of any sort as regards the admissibility of their constitutional complaint, which was already lodged in the night prior to the planned demonstration (see the order on the temporary order applied for, BVerfGE 56, 244 [246]).

Their interest in judicial relief could therefore have been extinguished only due to subsequent circumstances. It is, however, in any case necessary to decide on the relief sought with their constitutional complaint in the proceedings of the second complainants; there is therefore no reason to apply stringent requirements as a prerequisite for admissibility in respect of the continued existence of the interest in judicial relief of the first complainants (see BVerfGE 50, 290 [320]; 62, 117 [144]).

**60 Years German Basic Law:
The German Constitution and its Court**

Since, as was mentioned, the proceedings pursuant to s. 80.5 of the Code of Administrative Court Procedure must be considered legally independent for the purposes of constitutional review and since the first complainants have an interest in clarification of the conditions under which immediate enforcement of the ban on the demonstration would have been allowed under constitutional law, the mere circumstance that they did not lodge a constitutional complaint in respect of the main issue after the date of the demonstration elapsed, does not compel the assumption that the interest in judicial relief that originally existed was subsequently extinguished.

C.

The constitutional complaints are justified insofar as they are directed against the fact that the Higher Administrative Court confirmed in response to the appeal of the joined parties, immediate enforcement of the ban on the demonstration to an extent that exceeded that approved by the Administrative Court. The provisions of the Assembly Act contested indirectly that are relevant to the decisions under challenge ultimately withstand constitutional review.

I.

The fundamental right to freedom of assembly (Article 8 of the Basic Law) is the standard of constitutional review.

1. The measures under challenge in the initial proceedings and the underlying statutory provisions restricted the freedom of the complainants to conduct the planned demonstrations. This freedom is guaranteed in Article 8 of the Basic Law, which protects assemblies and processions - in contrast to mere gatherings or popular entertainment - as an expression of collective development of personality for the purposes of communication. This protection is not limited to events that involve argumentation and disputes, but covers multiple forms of collective activity, including non-verbal forms of expression. This also includes activities of the nature of demonstrations, where the freedom of assembly is used for the purposes of conspicuous or sensational expression of opinion. Since there was no evidence in the initial proceedings to the effect that the expression of certain opinions - for example, in speeches and songs or on banners - was to be prevented, it is not necessary to determine how the fundamental right to freedom of expression might also be applied as a standard of review in conjunction with Article 8 of the Basic Law for measures taken against demonstrations.

2. As a defensive right that also and primarily benefits minorities with differing opinions, Article 8 of the Basic Law guarantees holders of fundamental rights freedom of self-determination as regards the place, time, nature and content of an event and at the same time prohibits governmental compulsion to take part in or stay away from a public assembly. For this reason alone, fundamental rights enjoy a special status under a free system of government; the right to assemble freely with others without any special permission has always been a sign of the freedom, independence and empowerment of self-confident citizens. However, as applied to political events, the guarantee of freedom embodies at the same time a basic decision whose importance extends beyond protection against governmental encroachment upon the unhindered development of personality. In Anglo-American legal circles, the freedom of assembly rooted in the concept of natural law was recognized very early as an expression of popular sovereignty and accordingly as

**Selected Fundamental Decisions of
the Federal Constitutional Court**

the democratic right of citizens to participate actively in the political process (see Quilisch, *Die demokratische Versammlung*, 1970, pp. 36 et seq.; Schwäble, *Das Grundrecht der Versammlungsfreiheit*, 1975, pp.17 et seq.).

The importance of this freedom is also emphasized in the statements made by the Federal Minister of the Interior, the Trade Union of the Police (*Gewerkschaft der Polizei*) and the Federal Association of Citizens' Initiatives for Environmental Protection (*Bundesverband Bürgerinitiativen Umweltschutz - BBU*) and is now consistently acknowledged in the scholarly literature.

...

- a) Freedom of expression has long been considered one of the indispensable and fundamental functional elements of a democratic society in the constitutional case law, which has up to now not dealt with the freedom of assembly. It is considered to be the most direct expression of human personality and as one of the very foremost human rights constitutive for a free democratic governmental order; for it is what makes the continuous intellectual debate and the confrontation of opinions that constitute a vital aspect of this form of government possible in the first place (see BVerfGE 7, 198 [208]; 12, 113 [125]; 20, 56 [97]; 42, 163 [169]). If the freedom of assembly is construed as the freedom of collective expression of opinion, it cannot in principle be treated differently. This is not opposed by the fact that the aspect of argumentation, which is as a rule characteristic of the exercise of freedom of expression, is less pronounced in the particular case of demonstrations. By expressing their opinions through their physical presence in full view of the public and without the intervention of media, demonstrators also develop their personalities in a direct manner. In their ideally typical form, demonstrations constitute the collective physical manifestation of convictions; on the one hand, the participants can experience confirmation of these convictions in community with others and, on the other hand, if only through their mere presence, the nature of their appearance and the way they interact with one another or the choice of the location, take a position - literally - and bear outward testimony to their standpoint. The danger that such manifestations of opinion will be abused for demagogic ends and emotionalized in a questionable manner, must be considered just as irrelevant for the purposes of basic assessment in the area of freedom of assembly as in the areas of freedom of expression and freedom of the press.
- b) The fundamental importance of the freedom of assembly becomes especially discernible when the unique nature of the process of forming opinions in a democratic society is considered. As regards the free democratic order, the Communist Party of Germany (*Kommunistische Partei Deutschlands - KPD*) judgment states that it is predicated on the assumption that the existing governmental and social conditions that have developed over time are capable and in need of improvement; this presents a never-ending challenge that must be resolved through constant renewal of decisions of will (BVerfGE 5, 85 [197]). The path to formation of these decisions of will is described as a process of "trial and error" that through constant intellectual debate, reciprocal controls and criticism provides the best guarantee for a (relatively) correct political line as a resultant

**60 Years German Basic Law:
The German Constitution and its Court**

and a balance between the political forces at work within the state (Op. cit. [135]; see also BVerfGE 12, 113 [125]). The subsequent judgment on party finance builds on these considerations and stresses that the process of formation of will in a democracy must flow from the people to the bodies of government and not the other way around, and the right of the citizenry to participate in the process of formation of political will is manifested not only by voting in elections, but also in the exercise of influence on the constant process of formation of political opinion, which in a democratic state must take place freely, openly, without regulation and be in principle “state-free.” (BVerfGE 20, 56 [98-99]).

Citizens are involved in this process to varying degrees. Large associations, financially strong contributors of funds or mass media can exert considerable influence whereas the citizens tend to feel rather powerless. In a society in which direct access to the media and the opportunity to express opinions through the media is limited to a few, the individual is generally left, apart from organized participation in parties and associations, with only the possibility of collective influence by taking advantage of the freedom of assembly to hold demonstrations. The unhindered exercise of this freedom not only counteracts the feeling of political powerlessness and dangerous tendencies toward indifference to government. It is therefore ultimately in the well-considered public interest since the parallelogram of forces involved in the formation of political will cannot generally produce a relatively correct resultant unless all vectors are fairly strongly developed.

Moreover, assemblies are correctly identified in the scholarly literature as an essential element of democratic openness: “They offer ... the possibility of public influence on the political process, development of pluralistic initiatives and alternatives or also criticism and protest ...; they embody a certain primordial, unrestrained direct democracy that is suitable for protecting the political enterprise against stagnation in routine business” (Hesse, op. cit., p. 157; in agreement Blumenwitz, op. cit. [132-133]).

For in democracies with representative parliamentary systems and few rights to cast direct votes, the freedom of assembly assumes the importance of a fundamental and indispensable functional element. In this case - even when decisions are involved that have serious consequences for everyone and cannot be reversed following a change in power - the doctrine of majority rule applies in principle. On the other hand, even the influence of the electoral majority is quite limited between elections; governmental power is exercised by special agencies and administered by a dominating bureaucratic apparatus. Quite generally, the more effective the protection of minorities, the more legitimate become the decisions made by these agencies on the basis of the principle of majority rule; the acceptance of these decisions being influenced by whether the minority was able to exert adequate influence on the formation of opinion and will beforehand (see BVerfGE 5, 85 [198-199]). Demonstrative protest can become necessary in particular if the representative bodies fail to recognize possible abuses and undesirable developments or fail to recognize them on a timely basis or tolerate them out of consideration for other interests (see also BVerfGE 28, 191 [202]). The stabilizing function of the freedom of assembly within the representative system is correctly described in the

Selected Fundamental Decisions of the Federal Constitutional Court

scholarly literature as allowing those who are dissatisfied to openly voice and vent their discontent and criticism and functions as a necessary prerequisite for a political early-warning system that indicates potential disruption, reveals shortcomings as regards integration and therefore also makes possible changes in the direction of official policy (Blanke/Sterzel, op. cit. [69]).

II.

The provisions of the Assembly Act that were relevant in the initial proceedings satisfy constitutional requirements if the fundamental importance of the freedom of assembly is taken into account when they are interpreted and applied.

1. Despite its elevated status, the freedom of assembly is not guaranteed without reservation. Article 8 of the Basic Law guarantees only the “right to assemble peacefully and unarmed” (see on this III 3.a below; pages 359-360 of the Official Collection [Amtliche Sammlung]) and also stipulates that this right to hold such events outdoors may be restricted by enactment of a specific law. As a result, the Basic Law takes into account the fact that a special need for regulation exists for the exercise of the freedom of assembly outdoors because of the contact with the outside world, namely, organizational and procedural regulation, in order to create the physical conditions for the exercise of the right on the one hand and to adequately protect conflicting interests on the other hand.

Whereas the Weimar Constitution specifically stipulated in Article 123 that outdoor assemblies could “be made subject to registration by Reich law and prohibited in the case of an immediate threat to public safety,” the Basic Law makes do with a simple provision for restriction by enactment of a specific law that is apparently unlimited. This does not, however, mean that the force of this guarantee of the fundamental right is limited to the area to which the legislature assigns it on the basis of its substantive content. In fact, as the Federal Minister of the Interior also correctly stated, the same applies as in the case of the freedom of expression, which according to the wording of the Basic Law is subject to restriction within limits imposed by general laws, but its reach may not be arbitrarily relativized by ordinary laws (of fundamental importance on this BVerfGE 7, 198 [207-208]; see also BVerfGE 7, 377 [404]).

The legislature must in the case of all restrictive provisions respect the fundamental constitutional decision embodied in Article 8 of the Basic Law addressed above; the legislature may limit the exercise of the freedom of assembly only to protect other legal interests of equal weight and must strictly observe the principle of proportionality.

When the public authorities and courts interpret and apply laws formulated by the legislature that restrict the fundamental rights, the same also applies as in the case of the interpretation of provisions that restrict the freedom of expression (BVerfGE 7, 198 [208]; 60, 234 [240]; on the Law of Assembly - Decisions of the Federal Administrative Court [*Entscheidungen des Bundesverwaltungsgerichts* - BVerwGE] 26, 135 [137]).

Intervention that restricts such freedom may prove necessary in the area of the freedom of assembly when the exercise of the fundamental right by a demonstrator interferes with the legal positions of others. In the case of such intervention, governmental bodies must also

**60 Years German Basic Law:
The German Constitution and its Court**

consistently interpret laws that restrict fundamental rights in the light of fundamental importance of this fundamental right in a free democratic state and restrict their measures to that which is necessary to protect equivalent legal interests. Governmental measures that go beyond the application of laws that restrict fundamental rights and, for example, make access to a demonstration unreasonably difficult by obstructing access routes and carrying out tedious preventive controls or modifying the state-free, unregulated character of the demonstration through excessive observation and registration would be even more incompatible with these requirements (see on this BVerfGE 65, 1 [43]).

2. Of the provisions of the Assembly Act that the legislature enacted by virtue of the reservation of legislative power contained in Article 8.2 of the Basic Law, only compulsory registration, which is regulated in s. 14.1, and the constituent elements required for dispersal and prohibition contained in s. 15 were relevant for the purposes of reaching a decision in the initial proceedings. The provisions of law-governing assemblies that relate to prior registration and the submission of the name of a responsible leader do not require review; neither the administrative authority nor the courts have based their decisions on these provisions.

- a) Compulsory registration pursuant to s. 14.1 of the Assembly Act was explicitly provided for under the Weimar Constitution as a permissible restriction on the freedom of assembly. According to the opinion of the Federal Administrative Court, registration as a rule restricts the fundamental right only insignificantly (BVerwGE 26, 135 [137-138]).

The Federal Court of Justice (see “Decisions of the Federal Court of Justice in Criminal Cases” [*Entscheidungen des Bundesgerichtshofes in Strafsachen* - BGHSt 23], 46 [58-59]) considers the provision compatible with the Basic Law as do the majority of legal scholars. This is to be agreed with if it is taken into account that compulsory registration is not required without exception and that violation of this requirement does not automatically justify prohibition or dispersal of an event.

Compulsory registration applies only to assemblies held outdoors because they often necessitate special measures due to the way they affect their surroundings. The particulars to be provided upon registration are intended to give the public authorities the information they need to be able to envision what traffic control and other measures have to be taken to ensure that the event is held with as little disturbance as possible on the one hand, and what is required in the interest of others and the community on the other hand, and how the two can be reconciled (see Bundestag document 8/1845, p. 10). According to the very prevalent view, timely registration is not mandatory in the case of spontaneous demonstrations that are held suddenly for reasons of the moment (see, for example, BVerwGE 26, 135 [138]; Supreme Court of the State of Bavaria [*Bayerisches Oberstes Landesgericht* - BayObLG], NJW 1970, p. 479; Dietel/Gintzel, op. cit., marginal notes 23 on s. 1 and marginal note 18 et seq. on s. 14 of the Assembly Act; Herzog, op. cit., marginal notes 48, 82 and 95 on Article 8 of the Basic Law; v. Münch, op. cit., marginal note 10 on Article 8 of the Basic Law; Hoffmann-Riem, op. cit., marginal note 47 on Article 8 of the Basic Law; Frowein, op. cit. [1085-1086]; Ossenbühl, op. cit. [65 et seq.]; P. Schneider, op. cit. [264-265]).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

These are covered by the guarantee contained in Article 8 of the Basic Law; provisions of law-governing assembly do not apply to them if compliance with such provisions would make it impossible to achieve the end pursued through a spontaneous event. Recognition of such demonstrations despite the failure to comply with such provisions can be justified by the fact that Article 8 of the Basic Law in principle guarantees the freedom of assembly “without prior notification or permission” in its paragraph 1, that this freedom may certainly be restricted by statute in the case of assemblies held outdoors under paragraph 2, that such restrictions do not, however, completely set aside the guarantee contained in paragraph 1 for certain types of events and that this guarantee provides an exception from compulsory registration under the conditions mentioned above.

This appraisal of spontaneous demonstrations is based on the fact that regulatory requirements pertaining to assemblies must be applied in the light of the fundamental right of freedom of assembly and if appropriate yield to that right. The fundamental right and not the Assembly Act guarantees the admissibility of assemblies and processions; the Assembly Act only provides for restrictions if any are necessary. It is therefore consistent with this that failure to comply with the compulsory registration requirement does not in itself automatically result in prohibition or dispersal of an event. To be sure, anyone who acts as an organizer or leader and “conducts” an assembly that is not registered is liable to prosecution (s. 26 of the Assembly Act). s. 15.2 of the Assembly Act otherwise stipulates only that the responsible authority “may” disperse outdoor assemblies and processions if they are not registered. The Federal Minister of the Interior also considers preventive prohibition a possible sanction if and to the extent that this represents a more lenient means than dispersal, which is explicitly mentioned in the law. Dispersal and prohibition are, however, in any case not legal duties of the responsible authority, but rather permissible courses of action that the authority may in view of the considerable importance of the freedom of assembly in general properly avail itself of only in the presence of further prerequisites for intervention; failure to register and the concomitant deficiency of information merely facilitate such intervention.

Since compulsory registration is not required without exception and non-compliance does not peremptorily result in dispersal and prohibition, then it is not possible to discern any reason why the obligation to register, which is based on important considerations of public interest, could be considered disproportionate under normal conditions. Whether and to what extent special considerations exist in the case of mass demonstrations that would, much as in the case of spontaneous demonstrations, justify a different assessment, is discussed in another context (see III.2 below; pages 357 et seq. of the Official Collection [Amtliche Sammlung]).

- b) The provision contained in s. 15 of the Assembly Act, according to which the responsible authority may require that certain conditions be satisfied to hold an assembly or ban or disperse an assembly “if at the time of issuance of the order circumstances indicate that the public safety or order is immediately threatened by holding the assembly or procession”, also withstands constitutional review when interpreted in conformity with the constitution.

**60 Years German Basic Law:
The German Constitution and its Court**

The complainants and the Federal Association of Citizens' Initiatives for Environmental Protection raise doubts as regards the imprecision of the prerequisites for intervention, i.e., "threat to public safety or order," which for them becomes all the more problematic since the decision in respect of intervention is left to the discretion of lower administrative authorities and the police responsible for enforcement. The content of the above terms has in the meantime, as the Federal Minister of the Interior correctly submits, been made sufficiently clear by police law (see, for example, Drews/Wacke/Vogel/Martens, *Gefahrenabwehr*, 8th ed, 1977, vol 2, pp. 117-118 and 130-131).

According to this law, the term "public safety" encompasses the protection of central legal interests such as the life, health, freedom, honour, property and assets of the individual and the integrity of the legal order and governmental institutions, the existence of a danger to public safety generally being assumed in the case of a threat of a punishable violation of these protected interests. "Public order" is construed as the entire body of unwritten rules that must be observed because in accordance with the respective prevailing social and ethical views they are considered to represent an indispensable prerequisite for orderly human coexistence within a specific area.

These definitions do not alone, however, guarantee application of the law in conformity with the Basic Law. For the purposes of assessment under constitutional law, two restrictions are important that are contained in the law itself and have for effect that bans and dispersal essentially may be considered only to protect fundamental legal interests, whereas mere danger to the public order will generally not suffice.

Prohibition or dispersal is a last resort that presupposes on the one hand that the more lenient means of requiring that certain conditions be met has been exhausted (also according to BVerwGE 64, 55). This is based on the principle of proportionality. However, it limits not only the discretionary choice of means, but also the decision making discretion of the responsible authorities. The freedom of assembly protected by the fundamental right is subordinate only when it follows from a balance of interests that takes into account the importance of this freedom that it is necessary to protect other equivalent legal interests. Accordingly, in no case can simply any given interest justify restriction of this freedom; others must generally tolerate the inconveniences that necessarily result from the mass of people involved in the exercise of this fundamental right and cannot be avoided without detriment to the purpose of the event. Bans on demonstrations merely for reasons having to do with traffic issues can be excluded all the more since it is as a rule possible to achieve simultaneous use of roads by demonstrators and flowing traffic by imposing conditions.

The powers of the authorities to intervene are also limited by the fact that demonstrations may be banned and dispersed only in the case of an "immediate threat" to public safety or public order. The immediacy requirement represents a stronger restriction as regards the prerequisites for intervention than those provided under general police law. In any given case, it is necessary to assess the dangers. To be sure, this always involves an estimate of probability, but the bases for the estimate can and must be revealed. Accordingly, the law stipulates that this must be based on "discernible circumstances," which means it must be based on circumstances, facts and other details;

Selected Fundamental Decisions of the Federal Constitutional Court

mere suspicion or conjecture cannot suffice. Taking into account the fundamental importance of the freedom of assembly, the authority may in particular if it issues a preventive ban not set the requirements for the assessment of danger too low, especially since the possibility of subsequent dispersal always remains available if the assessment should prove to be incorrect. It is otherwise left to the competent courts to initially determine what specific requirements are appropriate (see, for example, on the one hand Dietel/Gintzel, op. cit., marginal note 12 on s. 15 of the Assembly Act with reference to BVerwGE 45, 51 [61]; on the other hand Ott, op. cit., marginal note 5 on s. 15 of the Assembly Act and Werbke, NJW 1970, p. 1 [2]; similarly Bremen Higher Administrative Court (*Oberverswaltungsgericht*), DÖV 1972, p. 101 (102); Saarlouis Higher Administrative Court, DÖV 1973, p. 863 [864] and also the Report of the Committee on Legal Affairs on the Amendment [*Bericht des Rechtsausschusses zur Gesetzesnovelle*] 1978, Bundestag document 8/1845, p. 11).

They can hardly be prescribed by the Basic Law in isolation from concrete circumstances and may depend, for example, in the case of mass demonstrations upon the willingness of the organizers to cooperate during preparations and whether disruptions are feared only from outsiders or on the part of a small minority (see III.1. and 3.III below on this; pages 355 et seq. and 359-360 [of the Official Collection]).

All in all, s. 15 of the Assembly Act is in any case compatible with Article 8 of the Basic Law if it is interpreted and applied such that it can be guaranteed that bans and dispersal result only to protect equivalent legal interests in keeping with the principle of proportionality and only if an immediate threat to these legal interests can be inferred from the obvious circumstances.

III.

It is not possible to object on constitutional grounds if the provisions of law governing assembly discussed above are also applied to mass demonstrations. When they are applied, however, it is also necessary to take advantage of experience that has subsequently been gained and put to the proof in an effort to make it also possible to conduct such demonstrations peacefully.

1. On the basis of the reports on past experience obtained during the initial proceedings and the results of the Stuttgart Talks (see A.I.2. above; pages 319-320 [of the Official Collection]), various circumstances can contribute to the peaceful conduct of events such as the 1979 Gorleben Trek, the 1981 Bonn Peace Demonstration or the 1983 Southern German Human Chain. Apart from timely clarification of the legal situation, this also means that both sides must avoid provocations and incitement of aggression, that the organizers must exercise their influence on participants to encourage peaceful conduct and isolate perpetrators of violence, that the governmental authorities - if appropriate by making provision for areas with no police presence - remain discreetly in the background and avoid overreaction and in particular that the two sides establish contact on a timely basis so that they can get to know one another, exchange information and possibly even establish a basis for cooperation in a spirit of mutual trust that would also facilitate management of unforeseen conflict situations.

**60 Years German Basic Law:
The German Constitution and its Court**

It is not necessary to determine whether an obligation to take this experience into account can already be inferred from the protective duty of the governmental authorities that in the opinion of the Trade Union of the Police derives from the basic constitutional decision embodied in Article 8 of the Basic Law, much as in the case of other fundamental rights of high standing guaranteed by the Basic Law and that it is intended to make it possible to conduct assemblies and processions and to protect the exercise of the fundamental right against disruption and disturbance by third parties. It is in any case necessary to draw upon recent constitutional case laws, according to which the fundamental rights not only influence the formulation of substantive law, but at the same time establish standards for the nature of the organizational and procedural means used to effect protection of fundamental rights as well as for application of existing procedural provisions in a manner conducive to protection of the fundamental rights (see the references BVerfGE 53, 30 [65-66 and 72-73]; from the period thereafter also BVerfGE 56, 216 [236] and 65, 76 [94]; 63, 131 [143]; 65, 1 [44, 49]).

There are also no objections to applying this case law to the freedom of assembly, especially since this fundamental right also contains significant implications in terms of law governing matters of a procedural and organizational nature; as a freedom, it embodies no statement as to the substantive form of assemblies and processions, but leaves this to the free self-determination of the organizers and is itself limited to organizational prerequisites for holding such assemblies and processions. The requirement that governmental authorities take as their model peaceful mass demonstrations held in the past and proceed in a manner favourable to demonstrations and not without adequate reason ignore positive experience reflects the effort to effect rights of freedom at the level of procedural law. A duty to not only consider such experience, but also to actually attempt to apply it can be justified on constitutional grounds by the fact that this is a more lenient means than intervention in the form of bans or dispersal. The more seriously governmental authorities support the peaceful conduct of mass demonstration in this manner, the more likely subsequent bans or dispersal are on the other hand to withstand review by the administrative courts if such efforts should fail.

The requirements may in the first place not be allowed to become so broad at the level of procedural law mentioned above as to fundamentally change the nature of the responsibility of the police for averting danger or, for example, make the use of flexible deployment strategies impossible. Likewise, and even more so, neither the organizers of mass demonstration nor the participants may be required to meet conditions that would detract from the character of demonstrations as contributions to the formation of political opinion and will that are in principle state-free, unregulated or dilute the organizers' right to freely determine the nature and content of demonstrations. This is not the case when organizers and participants are simply required to refrain from unruly conduct and keep the impairment of the interests of others to a minimum. This duty follows directly from the very guarantee of the fundamental right and harmonization of this right with the fundamental rights of others. Further reaching obligations in terms of procedural law could possibly be justified since the exercise of this fundamental right affects the greater community and the originators share responsibility for the consequences of mass demonstrations. It must remain the affair of the legislature to precisely define such obligations within the context and limits of its powers to restrict fundamental rights by enactment of a specific law, taking into account assessment of the above experience at the level of ordinary law. Even in the absence of such precise definition by the legislature, both the organizers of

**Selected Fundamental Decisions of
the Federal Constitutional Court**

demonstrations and participants would do well to take into account at their own initiative the recommendations for mass demonstration that can be inferred from proven experience insofar as possible. As regards administrative practice and the rulings of the courts, such willingness must in any case be honoured for constitutional reasons; for the more the organizers are prepared to take confidence building measures on their own or even cooperate in a manner conducive to the demonstration when a mass demonstration is registered, the higher the bar becomes to governmental intervention on the grounds of a threat to public safety and order.

2. Despite the opinion to the contrary of the Federal Association of Citizens' Initiatives for Environmental Protection, the Basic Law does not require that mass demonstrations be exempted from compulsory registration pursuant to s. 14 of the Assembly Act in much the same way as spontaneous demonstrations are.

...

Due to the organizational stratification of sponsorship of large scale events, it would, however, seem that an interpretation of s. 14 in conjunction with s. 15.2 of the Assembly Act that allows for the eventuality that individual groups or individuals may not feel able to assume general responsibility for registration or organization would be compatible with the Basic Law. Even if responsibility for registration and organization has been assigned only to a limited extent and the willingness to exhibit a capacity for dialogue and accept responsibility is present only to a limited degree, this may not be ignored when assessing possible sanctions for failure to register. The only result of such absence of a registrant with overall responsibility is that the threshold for intervention by the responsible authorities is lower in the case of disruptions - much as in the case of spontaneous demonstrations - if the authority has itself done everything within its power to make it possible to conduct a peacefully organized demonstration by fulfilling its procedural duties, for example, by offering to cooperate in a spirit of fairness.

3. In particular in the case of mass demonstrations, the important question, which was also of importance in the initial proceedings, frequently arises as to whether and under what conditions public disturbances caused by individuals or a minority can justify a ban on a demonstration or its dispersal due to an immediate threat to public safety and order pursuant to s. 15 of the Assembly Act.

- a) The Basic Law guarantees only the "right to assemble peacefully and unarmed." The requirement of peacefulness, which was already contained in the St. Paul's Church Constitution as well as in the Weimar Constitution, clarifies something that already follows from the legal nature of the freedom of assembly when it is understood as a means of conducting intellectual debate and exercising influence on the process of formation of political will (see also Federal Court of Justice [*Bundesgerichtshof* - BGH] NJW 1972, p. 1571 [1573]).

The case involved in the initial proceedings, which did result in violence, provides no occasion for drawing a more precise line between acceptable forms of influence and unruly conduct. A participant is in any case unruly if that person commits an act of violence against persons or property. A legal order that follow the departure from medieval government by force has given the state a monopoly on the exercise of force,

**60 Years German Basic Law:
The German Constitution and its Court**

not least of all in the interest of weaker minorities, must strictly insist upon avoidance of such violence. That is also an essential prerequisite for the guarantee of the freedom of assembly as a means of active participation in the political process and - as the experience of the battles in the streets during the Weimar Republic showed - for a free democracy since the avoidance of violence involves measures that limit freedom. Peaceful conduct can be expected of demonstrators all the more so since they can only gain from this, whereas they will in the end inevitably be subdued in the case of violent confrontations with the forces of government and at the same time obscure the goals they are pursuing.

- b) The issuance of an order prohibiting assembly also presents no special problems as regards constitutional issues in the case of mass demonstrations if it can be expected with a high degree of probability that the organizer and the organizer's followers are planning to commit violence or will at least tolerate such conduct on the part of others. Since they are not peaceful, such demonstrations are not even covered by the guarantee contained in Article 8 of the Basic Law in the first place; dispersal or a ban cannot therefore be construed as a violation of this fundamental right. The legal situation seems clear if, conversely, the organizer and the organizer's followers conduct themselves peaceably and disruptions are caused only by outsiders (counter demonstrations, disruptive groups). The scholarly literature correctly requires in such cases that measures taken by the authorities be directed primarily against those causing disturbances and that steps be taken against an assembly as a whole only under special circumstances that constitute a police emergency (Hoffmann-Riem, *op. cit.*, marginal notes 23 and 53 on Article 8 of the Basic Law; Dietel/Gintzel, *op. cit.*, marginal note 14 on s. 15 of the Assembly Act; see *v. Münch*, *op. cit.*, marginal note 39 on Article 8 of the Basic Law; Drosdzol, *Grundprobleme des Demonstrationsrechts*, JuS 1983, p. 409 [414]; Frowein, *op. cit.* [1084]).

Unless collective disturbances are to be feared, i.e., if it is therefore not expected that a demonstration will as a whole turn violent or disruptive (see s. 13.1 no. 2 of the Assembly Act) or that the organizer and the organizer's followers will strive for (see s. 5 no. 3 of the Assembly Act) or at least tolerate such a turn of events, the protection of the freedom of assembly of peaceful participants that the Basic Law guarantees every citizen must then be preserved even if other individual demonstrators or a minority do commit disturbances (see *v. Münch*, *op. cit.*, marginal note 18 on Article 8 of the Basic Law; Herzog, *op. cit.*, marginal notes 59 and 60, 89 and 90 on Article 8 of the Basic Law; Hoffmann-Riem, *op. cit.*, marginal note 23 on Article 8 of the Basic Law; Blanke/Sterzel, *op. cit.* [76]; Schwäble, *op. cit.*, pp. 229 and 234; Schmidt-Bleibtreu/Klein, GG, 6th ed., 1983, marginal note 4 on Article 8).

Were the disruptive conduct of individuals be allowed to deprive the entire event and not only the perpetrators of the protection of fundamental rights, this would enable such individuals to "co-opt" demonstrations and make them illegal against the will of the other participants (also previously Saarlouis Higher Administrative Court, DÖV 1973, p. 863 [864-865]); in practice, any mass demonstration could then be banned since it is virtually always possible to produce "knowledge" of disruptive intentions on the part of some of the participants.

Selected Fundamental Decisions of the Federal Constitutional Court

The fact that the protection offered by Article 8 of the Basic Law therefore remains in effect, must affect the provisions of law that restrict the fundamental rights (On measures involving criminal law and liability in the case of partially unpeaceful demonstrations see BGHSt 32, 165 [169]; Decisions of the Federal Court of Justice in Civil Matters [*Entscheidungen des Bundesgerichtshofes in Zivilsachen* - BGHZ] 89, 383 [395]; see also the decision of the European Commission for Human Rights, EuGRZ 1981, p. 216 [217]).

The guarantee of fundamental rights, which may be restricted by enactment of a specific law, also does not prevent the authorities from ordering that measures, which may go so far as to include a ban, be taken against an entire demonstration on the basis of s. 15 of the Assembly Act to protect public safety. However, the preferred alternative is to consider dispersal at a later point in time, which does not from the outset deprive peaceful participants of an opportunity to exercise a fundamental right and leaves it primarily up to the organizer to isolate unruly participants. A preventive ban on an entire event due to fears of excesses by a violence prone minority is on the other hand - which is dictated by a duty to preserve optimal freedom of assembly with the appropriate resultant requirements of procedural law - permissible only under strict conditions and under application of s. 15 of the Assembly Act in compliance with the Basic Law. These include a high degree of probability of danger (see Saarlouis Higher Administrative Court, DÖV 1973, p. 863 [864]; Bavarian Administrative Court [*Bayerischer Verwaltungsgerichtshof* - BayVGH], DÖV 1979, p. 569 [570]; similarly Schwäble, op. cit., p. 229 and Drosdzol, op. cit. [415]) and previous exhaustion of all reasonably applicable means that would permit exercise of fundamental rights by peaceful demonstrators (e.g., through restriction of the ban to a specific physical area). In particular, a ban on an entire demonstration is a last resort that follows from the assumption that the more lenient expedient of cooperation with peaceful demonstrators to avoid any danger has failed or that such cooperation was impossible for reasons the demonstrators were responsible for. In the event a general preventive ban on a demonstration is being considered due to specific circumstances, it would seem appropriate in the case of mass demonstrations with participants who for the most part have peaceful intentions that such an unusual and severe measure be announced in advance as a rule, with a period set for the purposes of discussion of the feared dangers and appropriate counter measures.

...

VIII. Freedom of Association - Article 9 of the Basic Law

Short-Work Benefits (s. 116 of the Employment Protection Act), BVerfGE 92, 365

Explanatory Annotation

The freedom of association as protected in Article 9 of the Basic Law has two constitutive elements. The first is the general freedom of association protected in Article 9.1 for German citizens, i.e. the freedom to form and act through commercial and non-commercial associations. Article 9.2 of the Basic Law provides a constitutional basis to prohibit and dissolve such associations if they pursue criminal activities or aim at the abolition of the constitutional order.⁵¹

The second element is the special right spelled out in Article 9.3 of the Basic Law to form associations to safeguard and improve working and living conditions, namely trade unions and the complementing employers' associations. Not only does Article 9.3 of the Basic Law guarantee the right to form and act through trade unions and employers' associations, it also reserves to these associations the right to negotiate enterprise bargaining agreements. The government's role in setting the working conditions is only a reduced one and limited to working conditions applicable across all sectors of the economy. In principle, the government has no power to regulate matters typically contained in enterprise bargaining agreements. Legislation demanding a wage freeze or increase, for example, would be unconstitutional.⁵²

In the case at issue the Constitutional Court upheld a legislative amendment, which made it harder for employees indirectly affected by a strike to be paid unemployment or so-called 'short-hour' benefits by the Federal Employment Agency. The issue had arisen in the wake of a new strike strategy by some German unions by which strikes were strategically targeted at certain vulnerable points in the supply chain thus crippling many businesses with relatively minimal strike action. Non-striking employees indirectly affected by this strategy by being laid-off or put on shorter hours for lack of supplies would then apply for unemployment benefits. The new legislation curtailed access to these benefits arguing that the Federal Employment Agency is bound by an obligation of neutrality in such employment disputes and must not indirectly finance the strike action of trade unions. The Court regarded the reasoning for the new legislation as within the margin of appreciation of the legislator because it could not be shown that the tougher access rules for social benefits could weaken the trade unions in their relationship with the employers' associations in such a way as to endanger the balance of power between these two sides and thus violate the guaranteed right of these associations to negotiate enterprise bargaining agreements.

51 Article 9.2 of the Basic Law does not apply to political parties for which Article 21.2 contains a special provision. Whether Article 9.2 applies to religious associations is controversial. The Statute on Associations (Vereinsgesetz) exempted religious associations from its scope until 2001. This privilege was legislated out of the statute in the wake of the terrorist attacks of September 11, 2001. However, regular statutory law does not regulate the application of the constitutional norms to certain constellations. Much speaks for the view that Article 4, the freedom of religion, is a special clause for religious associations and whereas this does not mean that religious associations cannot be controlled when acting criminally, it could mean that such associations, if indeed religious, could not be prohibited for lack of a legal basis specifying the details for a prohibition.

52 Cf. BVerfGE 94, 268 (284-5), available in german at <http://www.servat.unibe.ch/fallrecht/bv094268.html>.

Selected Fundamental Decisions of
the Federal Constitutional Court

Translation of the Short-Work Benefits Judgment, s. 116 of the Employment Promotion Act (Arbeitsförderungsgesetz - AFG) - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 92, 365*

Headnotes:

1. S. 116.3, sentence 1 of the Employment Promotion Act is compatible with the Basic Law (Grundgesetz - GG). If this provision of law results in a structural imbalance between parties to a collective bargaining agreement and such imbalance no longer permits equitable negotiation of employment and economic conditions and cannot be rectified on the basis of case law, the legislature must take measures to preserve collective bargaining autonomy.
2. The fundamental right to freedom of association must be regulated by the legal system insofar as relationships between parties with conflicting interests are involved. The legislature enjoys broad operating latitude in this context. In judging whether parity between the parties to a collective bargaining agreement has been impaired and what ramifications a provision of law has on the balance of forces, the legislature enjoys the prerogative of assessment.

Judgment of the First Senate of 4 July 1995 on the basis of the oral hearing of 4 April 1995 - 1 BvF 2/86 and 1, 2, 3 and 4/87 and 1 BvR 1421/86 -

Facts:

The petitions for judicial review and a constitutional complaint submit provisions of law for review by the Federal Constitutional Court that govern the conditions under which income replacement benefits (regularly short-work benefits) due to industrial actions in connection with a regionally limited labour dispute are paid to employees in the same industry in other collective bargaining regions who are temporarily unemployed.

S. 116.3 of the Employment Promotion Act stipulates that these benefits are to be suspended if demands of the same scope and nature are asserted for such employees and the outcome of the labour dispute will in all probability be adopted in their region (“principle of participatory involvement”). This version of s. 116 of the Employment Promotion Act together with complementary procedural rules, including the creation of a “neutrality committee”, stem from the Act amending the Employment Promotion Act of 15 May 1986 (Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I, p. 740) - the Neutrality Act. The Neutrality Act was occasioned by the fact that the legislature felt that the previous legal situation, which allowed for uninterrupted payment of short-work benefits in regions not involved in disputes, represented a violation of the neutrality of the Federal Labour Office (Bundesanstalt für Arbeit - BfA) in the case of labour disputes.

In response to the abstract judicial review proceedings initiated by several Land governments and members of parliament belonging to the SPD fraction in the German Bundestag, the Federal Constitutional Court found that the provision under challenge was

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**60 Years German Basic Law:
The German Constitution and its Court**

compatible with the Basic Law for the reasons set forth in its decision The Federal Constitutional Court dismissed the constitutional complaint filed by IG Metall [trade union] directly against s. 116 of the Employment Promotion Act.

Extract from the Grounds:

...

C.

The petitions for judicial review and the constitutional complaint are unfounded. The provision submitted for review does not in any case at the present time violate the freedom of association of the complainant and is otherwise also compatible with the Basic Law; this applies, however, to a certain extent only in the case of its interpretation in conformity with the Basic Law.

I.

S. 116.3 sentence 1 no. 2 of the Employment Promotion Act as amended by the Neutrality Act is not in violation of Article 9.3 of the Basic Law. The provision does to be sure restrict the freedom of association of trade unions. However, it does respect the constitutional limits to the regulatory power of the legislature.

1. a) The fundamental right under Article 9.3 of the Basic Law is primarily a freedom. It guarantees individuals the freedom to form associations for the purposes of the improvement of working and economic conditions and for the collective pursuit of this end. The parties involved must in principle be able to do so in freedom from the influence of government, independently and as they see fit. However, the right of associations to pursue themselves the ends mentioned in Article 9.3 of the Basic Law, through activities that derive from the specific nature of such associations is also protected (see BVerfGE 50, 290 [367] with further references). In principle, Article 9.3 of the Basic Law leaves the choice of the means that associations consider appropriate for achieving these ends to the associations themselves. The fundamental rights also protect industrial actions taken for the purposes of concluding collective bargaining agreements as activities of such associations. They are subsumed under freedom of association as to the extent that they are necessary to ensure functional collective bargaining autonomy (see BVerfGE 84, 212 [224-225]).

This also includes strikes (see BVerfGE 88, 103 [114]).

- b) The fundamental right to freedom of association must be regulated by the legal system insofar as relationships between parties with conflicting interests are involved. Both parties to a collective bargaining agreement enjoy equal protection under Article 9.3 of the Basic Law although they exercise this right in opposition to one another. They also enjoy protection against governmental influence if they employ confrontational means to resolve their conflicting differences that have a significant effect on their opponents and the general public. This protection necessitates rules for coordination to guarantee that their respective fundamental rights can coexist despite their opposition. The possible

Selected Fundamental Decisions of the Federal Constitutional Court

use of confrontational means presupposes a general legal framework to ensure that the intent and purpose of this freedom and its integration into the constitutional order are preserved⁵³.

The legislature enjoys broad operating latitude as regards the creation of this framework. The Basic Law does not stipulate how the legislature must define the opposing positions under the fundamental right in detail. It also does not require optimization of the conditions for confrontation. It is in principle left to the parties to a collective bargaining agreement themselves to adapt the confrontational means they use as circumstances change in order to maintain equality with the opposing side and achieve equitable collective bargaining agreements. The legislature is on the other hand also not prevented from modifying the overall framework for labour disputes either for reasons having to do with public interest or to restore parity (see BVerfGE 84, 212 [228-229]).

- c) The limits to the operating latitude of the legislature are defined by the objective content of Article 9.3 of the Basic Law. Collective bargaining autonomy must be preserved as an area in which the parties to a collective bargaining agreement can in principle regulate their affairs on their own and without governmental influence (see BVerfGE 50, 290 [367]). Its functional viability may not be compromised. Associations must be able to achieve their constitutionally recognized purpose, which is to defend and improve the working and economic conditions of their members, in particular by concluding collective agreements. The system of collective bargaining agreements is designed to compensate for the structural disadvantage of individual employees in the context of concluding employment contracts through collective action, thereby permitting the negotiation of wages and working conditions to be fairly balanced. Collective bargaining autonomy is as a result functionally viable only as long as an approximate balance of forces - i.e., parity - exists between the parties to a collective bargaining agreement (see BVerfGE 84, 212 [229]).

A provision of law is therefore in any case incompatible with Article 9.3 of the Basic Law if the ability of one of the parties to a collective bargaining agreement to negotiate, which includes the ability to effectively conduct a labour dispute, is no longer given and its activities as an association are restricted to a greater extent than would be necessary to balance the opposing positions under the fundamental right (see BVerfGE 84, 212 [228-229]).

Concrete standards for assessing the balance of forces of the parties to a collective bargaining agreement cannot be inferred from Article 9.3 of the Basic Law. The details are the subject of strong disagreement in the scholarly literature on labour law. In its case law on labour disputes, the Federal Labour Court (Bundesarbeitsgericht - BAG) takes into account the effect the negotiating strength of the opposing parties can have in

53 See BVerfGE 88, 103 (115).

**60 Years German Basic Law:
The German Constitution and its Court**

the context of the negotiation of collective bargaining agreements and how it can be influenced by confrontational means (Federal Labour Court [*Bundesarbeitsgericht* - BAG], Working Paper no. 64 on Article 9 of the Basic Law - labour disputes).

There are good reasons for this perspective. It gives the competent courts an appropriate standard for the review of disputed industrial actions against the principle of proportionality. There can be no reservations in this regard on constitutional grounds (BVerfGE 84, 212 [229 et seq.]). The legislature is, however, not bound to this perspective when regulating the freedom of association. It may also establish other rules to prevent one of the parties to a collective bargaining agreement from gaining a disproportionate advantage in collective bargaining negotiations. Its approach is not unconstitutional unless it is from the outset not suitable for achieving this end.

The legislature is, however, under no obligation to compensate for any disparity that is not of a structural nature, but based instead on the internal weaknesses of an association. The degree of organization of an association, its ability to attract and mobilize its members and similar factors lie outside the purview of responsibility of the legislature. The legislature is not bound to provide weak associations with the ability to assert their positions in the context of collective bargaining negotiations.

- d) The answer to the question as to whether the provision deprives trade unions of the ability to carry out effective industrial actions is left to the discretionary judgment of the legislature. The adversarial strength of an association of employees in a dispute is dependent upon myriad factors that can scarcely be apprehended individually and have effects that are difficult to assess. The possibilities available to a trade union for adapting to changes in circumstances through the use of special means of conducting a dispute also cannot be readily discerned. In such a situation, the legislature bears the political responsibility for accurate recognition and assessment of the relevant factors. The Federal Constitutional Court may not apply its own assessment in place of that of the legislature. A statute does not become unconstitutional unless it becomes clearly evident that a false assessment has been made or the measure under challenge was from the outset such as to disturb an existing balance of forces or reinforce an imbalance.
- e) An assessment of a provision of law pertaining to labour disputes that the legislature initially assumes to be unobjectionable may retrospectively prove to be inaccurate. Assumptions that are originally plausible may be refuted by subsequent developments; well-founded expectations as regards complex causal relationships may be disappointed. For example, protracted interference with the functional viability of collective bargaining autonomy may set in despite the fact that the original situation was in conformity with the constitution. Such developments must be corrected insofar as it becomes evident that structural imbalances have occurred that no longer permit equitable negotiation of working and economic conditions, and these cannot be compensated within the framework established by case law. The legislature then has a duty to take measures to protect freedom of association (see BVerfGE 25, 1 [13]; 49, 89 [130]; 50, 290 [335]).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

2. Measured against these standards, the statute under challenge withstands constitutional scrutiny.

- a) The regulatory principle chosen by the legislature is compatible with Article 9.3 of the Basic Law.

The legislature adopted the statute because it felt that payment of short-work benefits would represent interference in labour disputes to the advantage of the trade unions, thereby unjustifiably contributing to its position of strength; it was thought that payment of short-work benefits to employees outside the region affected by the dispute violated the neutrality of the Federal Labour Office if these employees were likely to benefit from the desired outcome of the labour dispute. The revised statute is based on the principle that those employees who are not themselves involved in a labour dispute should bear the risk of any loss of income in the case of such a dispute if they have (nearly) the same interest in a successful outcome as the striking employees themselves since they are also likely to benefit from that success. This cannot occasion any reservations on constitutional grounds. Participatory involvement is an obvious criterion for shifting the risk of lost income from the unemployment insurance system to employees whose interests coincide with those of their colleagues who are directly involved in a labour dispute. It is natural to take this coincidence of interests as the basis for the suspension of short-work benefits.

- b) In actual fact, the legislature proceeded from the assumption that it would be easily possible for the complainant to cause considerable disruption of production in different regions through a strike in a single region due to the high level of integration of production in the metalworking industry. This assumption is not disputed by the complainant and is also confirmed by the labour dispute of the year 1984. When a dispute is conducted in this manner, strong pressure is exerted on the employer's side. The efforts made by the employers affected by the remote effects and their regional organizations to persuade the employers directly affected by the dispute and their regional organizations to make compromises will vary as a function of the economic burden they must bear due to production stoppages. The assumption to the effect that internal pressure from employees "locked out in the cold" upon the trade union is lessened by the payment of short-work benefits is also sufficiently plausible.
- c) There can be no objection to the evaluative assessment of the legislature to the effect that a shift in parity resulted from the construction of the previous version of s. 116 of the Employment Promotion Act that stemmed from the case law of the social courts as based on the case law of the labour courts regarding the risk of lost income. The legislature makes such evaluations of complex issues as part of its political responsibility for safeguarding the interests of the public.

No sufficient indications exist to the effect that the functional viability of collective bargaining autonomy is impaired by the statute under review in such a way as to justify the constitutional reservations of the complainant and the petitioners.

**60 Years German Basic Law:
The German Constitution and its Court**

- aa) Such impairment would manifest itself most probably in its effect on the ability of the complainant to conduct a dispute, which as is generally acknowledged is most affected by the statute. The complainant has long been conducting collective bargaining disputes in various regions and is according to its submissions, which have not been contradicted in this regard, dependent upon being able to conduct disputes in such a manner. Due to the high degree of integration in the metalworking industry, disruption of production outside the region in which industrial actions are carried out is especially frequent.

It has become clear, however, that the complainant is able to avoid suspension of payment of short-work benefits in other regions by asserting principal demands in those regions that differ significantly from those at issue in the region involved in the labour dispute. The complainant's assertion to the effect that it is hardly possible to advance demands in the various collective bargaining regions that differ significantly as regards wages and working hours within an area that is on the whole as economically homogeneous as the Federal Republic of Germany is clearly documented by the catalogue of demands presented by the complainant.

Finally, it is also evident that the revised statute restricts the complainant's ability to employ confrontational means. This was illustrated in particular by the collective bargaining dispute in Bavaria in the year 1994/95. The complainant selectively struck enterprises that produce end-user products and are therefore integrated to a relatively limited extent with other enterprises at the technical level. Much was spoken in favour of the fact - and this is also not called into question by the employers - that the complainant was forced to adopt this tactic in order to avoid the consequences of the statute and the internal pressure that would otherwise have been expected from the other regions. It is obvious that employees cannot hold out without any support in the case of a lengthier labour dispute since their livelihood depends upon a regular income. It is also obvious that it would represent a significant burden for the complainant to have to provide strike benefits for all indirectly affected members throughout Germany.

Overall, it is therefore not possible to ignore the fact that the statute under challenge restricts the ability of the complainant to conduct disputes. The complainant is not only prevented from employing a coercive strategy that is intended to selectively provoke production stoppages in other regions in order to exert pressure on the employer side in those regions. Indeed, the opposite obtains and the complainant must see to it that the ramifications of a labour dispute are restricted to the region involved in the dispute since employees in other regions would bear the full brunt of the remote effects, as they could not survive very long without short-work benefits. In that regard, the effect of the statute goes beyond the declared goal, which is to prevent what are referred to as strikes by proxy: The trade union is also subject to significant restrictions as regards industrial actions if it attempts to limit the actions to the territory involved in the labour dispute. For practical purposes, it no longer can strike enterprises whose production is integrated with that of other enterprises in the same industry in other collective bargaining regions.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- bb) Despite this restriction of the ability of the complainant to conduct disputes, it is not (yet) possible to ascertain unconstitutional interference with the functional viability of collective bargaining autonomy.

...

- cc) On the other hand, this labour dispute has also revealed further risks as regards the functional viability of collective bargaining autonomy. Had it come to lock outs by the employer side, unemployment in other regions could have taken on a dimension that would have significantly weakened the complainant's coercive power. The complainant submits in that regard that this would have been virtually inevitable since a lockout would have been possible only in the case of those enterprises that were not struck by the complainant, which are to a great extent integrated with enterprises in the metalworking industry in other regions. In any case, the employers would themselves have had the possibility to deliberately provoke remote effects in other regions through lockouts by selected enterprises. Assuming that it would in this case also have resulted in suspension of short-work benefits for the respective employees, the statute could in fact have resulted in disruption of parity if employers had conducted the dispute in such a manner.

However, these risks also do not (yet) suffice to question the constitutionality of the statute under challenge. On the one hand, it is not at present possible to ascertain whether the employers can actually employ a lockout tactic to deliberately achieve remote effects in a labour dispute in such a manner as to result in structural imbalance between the parties to a collective bargaining agreement. They too expose themselves to internal pressure if they provoke production stoppages in other regions to any significant extent. This could overtax the solidarity among their members, which is already weak since they compete against one another. In addition, the legal issues raised by such conduct of a labour dispute have not been clarified. The representative of *Gesammetall* [umbrella association of regional employers' associations in the German metal and electrical industry] and the Federal Labour Minister (Bundesarbeitsminister) have referred in this regard to the case law on labour disputes of the Federal Labour Court with respect to proportionality in the case of defensive lockouts. The Federal Labour Court has up to now dealt exclusively with lockout orders in this context and in so doing not taken into account employees that are indirectly affected (see Federal Labour Court, Working Paper no. 64 and 84 on Article 9 of the Basic Law - labour disputes). However, this case law relates to labour disputes that were still carried out under the former version of s. 116 of the Employment Promotion Act. It is evident that the Federal Labour Court proceeded at the time on the basis of the assumption to the effect that short-work benefits would regularly be paid in those regions not involved in the dispute. Despite the Court's original assumptions to the effect that defensive lock outs may not result in disproportionate restriction of the adversarial strength of employees, lockouts may, however, result in effective limitation of the indirect effects of such industrial actions under the revised statute. In addition, the Federal Social Court also had no opportunity to deal with application of s. 116.3 of the Employment Promotion Act in the case of employees who were put out of

**60 Years German Basic Law:
The German Constitution and its Court**

work due to the remote effects of lockouts. The wording of the statute under challenge does not make any distinction between the indirect effects of strikes on the one hand and lockouts on the other hand, but a construction to the effect that such a distinction exists cannot be excluded. It could be required to preserve the functional viability of collective bargaining autonomy if a disproportionate structural advantage of employers would otherwise result in the case of labour disputes.

Accordingly, it is on the whole both factually and legally uncertain whether the statute under challenge will result in such an imbalance in the adversarial strength of the parties to collective bargaining agreements in future labour disputes, as to make negotiations on an approximately equal basis no longer possible. If this should occur, the legislature would be required to take appropriate measures to preserve collective bargaining autonomy. As long as this does not happen, it is the affair of the courts to construe and apply the applicable rules in the light of Article 9.3 of the Basic Law.

II.

Based on the reasoning that follows, s. 116.3 sentence 2 second alternative of the Employment Promotion Act, which stipulates that a demand is also considered to have been asserted if it can be viewed as having been adopted on the basis of the conduct of a party to a collective bargaining agreement in connection with the intended conclusion of a collective bargaining agreement, is also compatible with Article 9.3 of the Basic Law.

1. Freedom of association also protects self-determination of associations as regards their own organization, their decision making procedures and their conduct of affairs (BVerfGE 50, 290 [373-374]). The government must make available appropriate legal forms to associations that guarantee adequate possibilities for legal action in order to guarantee this protection. This applies as regards both their internal structures as well as their ability to act externally. In addition, the government may impose only such restrictions on the right of association to self-determination as may be required to protect other fundamental rights or constitutionally protected legal interests.
2. The statute does not encroach on the right to self-determination when its purpose is to prohibit abusive suppression of a demand within the meaning of s. 116.3 sentence 1 of the Employment Promotion Act. Abusive conduct does not merit protection.

A construction of s. 116.3 sentence 2 of the Employment Promotion Act that goes any further would on the other hand encroach on the right to self-determination of associations in a manner that would be unconstitutional.

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III.

The revised provision contained in s. 116.3 sentence 1 of the Employment Promotion Act is not in violation of Article 14.1 of the Basic Law. Even if it did encroach on protected property rights, encroachment would be justified.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

1. The right to property guaranteed under Article 14.1 of the Basic Law also includes rights to social security benefits that by virtue of their nature as exclusive rights inure to the holders for their private use; these rights enjoy the protection afforded to property if they derive from not insignificant contributions of the insured and serve to secure their livelihood (see BVerfGE 53, 257 [289 et seq.]; 72, 9 [18-19]; 74, 203 [213]). This includes rights to unemployment compensation in any case if the employee through payment of contributions during the legal vesting period has fully earned the benefits (BVerfGE 72, 9 [18-19]).

There is some question as to whether any further rights under unemployment insurance fall into the guaranteed area of protection of property and this has not yet been clarified in the case law of the Federal Constitutional Court. It is in particular doubtful whether short-work benefits, which are primarily at issue as regards the area of application of s. 116.3 sentence 1 of the Employment Promotion Act, inure to the insured for their private use. They are also based on contributions of the insured and serve to secure their livelihood in the event of loss of wages due to short-work hours. Unlike in the case of unemployment compensation, however, it is not necessary to await the end of a vesting period. In addition, payment of short-work benefits is also intended primarily to enable enterprises affected by short-work hours to retain experienced employees. The right to short-work benefits does not therefore automatically apply in the case of foreseeable short-term unemployment. In fact, it is contingent upon announcement of suspension of work that cannot be made by the employee, but only by employers or representatives of employees (s. 72.1 of the Employment Promotion Act). Although financed by contributions, short-work benefits represent solidarity based compensation that benefits both employers and employees.

2. The question as to the extent to which rights to short-work benefits may nevertheless be considered protected property rights need not be conclusively decided here. Even if that is assumed to be the case, the statute under challenge does not encroach upon these rights in a manner that is unconstitutional.

Whether the Act worsens the previous legal situation at the expense of the insured and therefore possibly encroaches upon their protected interest in insurance benefits or only clarifies that which was already intended to be achieved by the version of the law from 1969 also need not be decided. For the reduction in insurance benefits asserted by the petitioners is justified by the end pursued by the legislature.

S. 116.3 sentence 1 of the Employment Promotion Act is intended to ensure the neutrality of the Federal Labour Office in labour disputes. This is a legitimate goal. There can be no objection on constitutional grounds to the actual assumptions underlying the concern of the legislature to the effect that this neutrality would no longer be guaranteed if short-work benefits were to be paid. Here too, reference may be had to the comments on Article 9.3 of the Basic Law.

The statute is also suitable for guaranteeing the neutrality of the Federal Office in the case of labour disputes with remote effects. The notion of participatory involvement permits categorization of recipients of benefits on the basis of criteria designed to achieve this purpose. No equally effective means can be ascertained that encroaches less extensively upon the rights of employees to insurance benefits.

**60 Years German Basic Law:
The German Constitution and its Court**

The encroachment would also not be disproportionate in the narrower sense. On the one hand, the right that would be encroached upon is afforded the insured for their private use at most to a very limited extent. In addition, the effect of the statute is in practice to motivate trade unions - and possibly also employers - to proceed in such a manner as to avoid short-work hours in other regions in the case of labour disputes. Moreover, the rights of only those employees who can be expected to share in the benefits from the successful outcome of a labour dispute would be encroached upon.

On the other hand, the guarantee of the neutrality of the Federal Labour Office is an important consideration to which the legislature had the right to afford precedence over these rights.

IV.

The statute does not violate the general equality provision (Article 3.1 of the Basic Law). In the case of work stoppages due to strikes, it does to be sure result in unequal treatment of employees in the same industry in regions that are not involved in the dispute as compared with employees in other industries. However, this unequal treatment is objectively justified.

1. Depending on the area of regulation and the distinguishing characteristics involved, the constraints imposed upon the legislature by the general principle of equality vary, ranging from mere prohibition of arbitrariness to strict compliance with the requirements of proportionality. The variance in the scope of operating latitude of the legislature is reflected in the gradation of the intensity of control in the case of constitutional review (see BVerfGE 88, 87 [96 et seq.]). Accordingly, a relatively stringent standard applies here. The statute under challenge results in significant unequal treatment of classes of persons whose members cannot in fact avoid the unequal legal consequences.

2. The restriction of the suspension statute to employees of the same industry is accordingly appropriate.

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IX. Privacy of Communications - Article 10 of the Basic Law

a) *Eavesdropping, BVerfGE 30, 1*

Explanatory Annotation

Article 10.1 of the Basic Law protects the privacy of postal or telecommunication (telephone, email etc.) from interference by the state, i.e. by the state security organizations. This covers measures such as intercepting letters and packages and wiretapping telephone lines insofar as entering the home or office of the victim is not necessary.⁵⁴

As there are few rights without exceptions, Article 10.2 of the Basic Law provides a framework for justified infringements of the right guaranteed in Article 10.1. Any such restriction must be based on a law that spells out the conditions for such infringements in a transparent way and that can be qualified as a proportional limitation of this core privacy right.

This decision of the Constitutional Court, however, deals with the possible restriction spelled out in the second sentence of Article 10.2 of the Basic Law. This provision was added to Article 10.2 in 1968 and subsequently complemented by the passage of a statute regulating the details. The new Article 10.2 made it possible under limited circumstances that the targeted person would not be informed of the measures breaching his or her privacy, not even subsequently, and that no legal remedy to the courts would be available against such measures, again not even subsequently. Instead, there will be a Committee of five members of Parliament, which will be informed every six months on all ongoing measures and which will exercise legal supervision. This constitutional amendment was challenged under Article 79.3 under which amendments of the Basic Law passed in the constitutional amendment process must not violate the principles protected in Articles 1 and 20 of the Basic Law. At issue were especially the human dignity guarantee of Article 1, the right to a legal remedy protected in Article 19.4 and the separation of powers as one constitutive element of Article 20.2 and 20.3 of the Basic Law. Human dignity could be affected if one came to the conclusion that such secretive measures of which the victim is never informed reduce the victim to a mere object of government action. The fact that no recourse to the courts was possible could point in that same direction and the fact that the application of the measures was supervised by a legislative rather than a judicial committee gave rise to the separation of powers issue.

The applicants could not persuade the Court. Article 79.3 of the Basic Law, while restricting possible amendments, does not prohibit such amendments even if they touch on the principles protected. Only the removal of the core of the protected principles could justify a limitation of the constitutional amendment power of Parliament. Here the access to a Court was removed only in a very limited field of application and in addition compensated by a different form of legislative supervision. The same holds true for the separation of powers especially in the light of the fact that the Basic Law and its order of parliamentary order does not follow an absolute

⁵⁴ In which case the issue will become one of Article 13 of the Basic Law, see below.

**60 Years German Basic Law:
The German Constitution and its Court**

approach on the separation of powers in the first place. Finally the Court pointed out that some of the restrictions are inherent: If the collection of information for certain purposes is regarded as possible if only in limited circumstances, informing the addressee of these measures would be senseless and legal protection is indeed impossible.

However, there is one gap: If the information collected leads to criminal proceedings, the victim will know about this by way of the subsequent proceedings. If nothing follows from the collection of the information the victim could at least be informed after the measure has been terminated, if there are no reasons to assume that the effectivity of the measure will be in jeopardy in the case at issue or in similar circumstances. The victim could then seek judicial protection at least after the fact and this could not only be valuable to the affected person but also for future measures undertaken. The Constitutional Court pointed out exactly that and based that finding on the principle of proportionality. This gap in the legislation did not necessitate a finding of unconstitutionality because it can be achieved by interpretation as subsequent information of the affected persons is not precluded.

The Court also pointed out that the Basic Law, whereas providing the framework for a democratic and free society, has consciously opted to also defend this freedom and if necessary to do so by restricting the liberty of those who seek to undermine and abolish the Basic Law's framework for freedom. Provocatively and certainly with a degree of exaggeration one can say that the Basic Law guarantees no - better: a little less - freedom for the enemies of freedom or, to formulate it differently, that the Basic Law does not allow the rights and liberty protected by it to be used to overthrow the democratic and free order.

Translation of the Eavesdropping Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 30, 1*

Headnotes:

1. If a person affected is prevented from contesting an enforcement measure because that person has received no knowledge of an encroachment upon his or her rights, that person must be afforded the possibility of lodging a constitutional complaint directly against the law in the same manner as in those cases in which a constitutional complaint against an enforcement measure is for other reasons not possible.
2. As regards the principle of proportionality, Article 10.2 sentence 2 of the Basic Law (Grundgesetz - GG) must be construed to require subsequent notification of the subject of surveillance in those cases in which a threat to the purpose of the surveillance measure and a threat to the protection of the free democratic fundamental order or the existence or security of the Federation or a Land can be excluded.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

3. In respect of the principle of proportionality, Article 10.2 sentence 2 of the Basic Law requires that the Act on Article 10 of the Basic Law (Gesetz zu Art. 10 GG - G 10) must limit the admissibility of restriction of the privacy of correspondence, posts and telecommunications to cases in which concrete circumstances justify suspicion of anti-constitutional conduct and it is possible to cope with such anti-constitutional conduct in the concrete instance only through encroachment upon the privacy of correspondence, posts and telecommunications, after all other investigatory possibilities have been exhausted.

The constitutional requirement to the effect that surveillance activities must be restricted to that which is unavoidably necessary does not preclude surveillance of channels of communication of third parties that can be assumed to serve the purposes of the suspect.

4. Article 10.2 sentence 2 of the Basic Law requires that the Act on Article 10 of the Basic Law make provision for review that is as regards its substance and procedure the equivalent of review by the courts even if the person affected has no opportunity to participate in such “substitute” proceedings.
5. Article 79.3 of the Basic Law prohibits general abandonment of the principles contained therein, but does not, however, preclude modification of basic constitutional principles through constitutional amendments.
6. The treatment of a person by the public authority that enforces the law must if it is to be considered to violate human dignity constitute a manifestation of disdain for the esteem to which that person is entitled as a human being.
7. The principle of the separation of powers allows, under exceptional circumstances for legal protection against acts of the executive not through the courts, but rather through independent institutions appointed or formed by the legislature within the functional area of the executive.
8. A majority of the legislature can also abuse its rights. A faction or coalition that appoints only persons of its own persuasion as members of the body provided for under s. 9.1 of the Act on Article 10 of the Basic Law and would endeavour to achieve membership by only such persons of the commission provided for under s. 9.3 of the Act on Article 10 of the Basic Law would in case of doubt be acting abusively.

Judgment of the Second Senate of 15 December 1970 on the basis of the oral hearing of 7 July 1970 - 2 BvL 1/69, 2 BvR 629/68 and BvR 308/69 -

Facts:

The currently valid versions of Article 10 and Article 19.4 sentence 3 of the Basic Law, which stipulate in particular that the privacy of correspondence, posts and telecommunications may also be restricted without notification of the person affected and without the possibility of recourse to the courts, stem from the Seventeenth Act to Amend the Basic Law (Siebzehntes Gesetz zur Ergänzung des Grundgesetzes) of 24 June 1968 (Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I p. 709). At the same time, the Act on the Restriction of the Secrecy of Correspondence, Posts and Telecommunications (Gesetz zur Beschränkung des Brief-, Post-

**60 Years German Basic Law:
The German Constitution and its Court**

and Fernmeldegeheimnisses) (referred to as the “G 10 Act”) of 13 August 1968 (Federal Law Gazette I p. 949), which also introduced provisions governing the surveillance of telecommunication traffic in connection with criminal proceedings, regulated the possibilities for such encroachment and the procedure to be followed.

The government of the Land of Hesse initiated abstract judicial review proceedings against Article 10.2 sentence 2 of the Basic Law and against s. 9.5 of the G 10 Act, which excluded the possibility of recourse to the courts against restrictive measures ordered under the G 10 Act except in the form of oversight by a parliamentary control commission. A group of public prosecutors and lawyers also filed a constitutional complaint against the amendment of the Basic Law and against various provisions of the G 10 Act.

The Federal Constitutional Court then ruled by a vote of five to three that the challenged provisions were, with the exception of the exclusion of notification in individual cases involving no danger to the purpose of the restriction pursuant to s. 5.5 of the G 10 Act, in compliance with the Basic Law in the interpretation provided in the decision.

Extract from the Grounds:

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C. I.

A decision as to the compatibility of Article 10.2 sentence 2 of the Basic Law, which was inserted by the constitutional amendment, with Article 79.3 of the Basic Law requires the interpretation of both provisions.

1. Interpretation of Article 10.2 sentence 2 of the Basic Law yields the following:

- a) The privacy of correspondence, posts and telecommunications was from the very outset not unconditionally protected by the Basic Law; indeed, restrictions - which in each case required a legal basis - were always permissible. This very general reservation of the possibility of restriction of the fundamental right was to be sure subject to limits as regards the prerequisite for and scope of restriction; it did, however, as regards the scope of application, from the very beginning also include the possibility of legislation that makes provision for restriction of the privacy of correspondence, posts and telecommunications for the purposes of protection against endangerment of the free constitutional order or the existence of the state. In that regard, the new sentence 2 inserted into Article 10.2 of the Basic Law is nothing new; it merely provides a concrete case for application of sentence 1, in that it circumscribes the measures involved in connection with the restriction of privacy of correspondence, posts and telecommunications that may be rendered permissible by law, for the purposes of protecting the free democratic fundamental order or the existence or security of the Federation or a Land.

Whenever the Basic Law makes provision for restriction of fundamental rights, it is consistently done to provide effective protection for another - individual or collective - legal interest that takes precedence either in general or in a concrete case. Viewed under

**Selected Fundamental Decisions of
the Federal Constitutional Court**

this aspect, the provision contained in sentence 2 loc. cit. is consistent with the intent of the reservation. The existence of the Federal Republic of Germany and its free constitutional order represent a superior legal interest; fundamental rights may be restricted to the extent absolutely necessary for the purposes of providing effective protection of that interest.

What is new about the provision inserted through constitutional amendment is therefore not actually the “restriction” of the privacy of correspondence, posts and telecommunications - such restriction being considered to include “surveillance” of correspondence, post and telegraph traffic, “eavesdropping” on communication and the opening and reading of letters - but rather the additional authority to not inform the persons affected of such restrictions and the substitution of review by agencies and auxiliary agencies appointed by the legislature for recourse to the courts. The relationship between these special measures and the above-mentioned restrictions (eavesdropping and inspection of letters) is clear. Undertakings, plans and measures directed against the constitutional order and against the security and existence of the state are for the most part carried out by groups that conceal and carry out their work in secret and are well organized and especially reliant upon channels of communication that function without being disturbed. The authorities responsible for the protection of the constitution can carry out their work against such an “apparatus” effectively only if their surveillance activities remain secret in principle and are therefore also not divulged in the context of judicial proceedings. Even subsequent disclosure of a surveillance measure and subsequent discussion thereof in the context of judicial proceedings can give enemies of the constitution information on the methods and concrete field of observation of the authorities responsible for the protection of the Basic Law and the identity of previously unknown agents of the authorities, thereby compromising to a significant extent the effectiveness of the latter. The power not to inform a person affected of eavesdropping measures and to assign review of such measures to an authority that is not a court therefore contributes to the effectiveness of the authorities responsible for the protection of the Basic Law, and is actually what makes eavesdropping and the opening of letters purposeful in the first place. Article 10.2 sentence 2 of the Basic Law therefore also allows restriction of the privacy of correspondence, posts and telecommunications for the purposes of protection of the constitution and the state through covert interception and monitoring of telephone communication and radio transmissions, facsimiles, telegrams and letters without disclosure and judicial review afterwards.

- b) A provision of the Basic Law may not be interpreted exclusively on the basis of its wording. Indeed, all interpretations of the provisions of the Basic Law must be compatible with the fundamental principles of the Basic Law and its system of values (BVerfGE 19, 206 [220]). In the case of the interpretation of Article 10.2 sentence 2 of the Basic Law, it is therefore necessary to take into account the context of the Basic Law and in particular fundamental decisions embodied in the Basic Law and general constitutional principles. In the present context, the fact that the Basic Law of the Federal Republic of Germany embodies advocacy of “militant democracy” is of special importance. It does not accept the abusive use of fundamental rights to combat

**60 Years German Basic Law:
The German Constitution and its Court**

the free order (BVerfGE 28, 36 [48]). Enemies of the constitution may not be allowed to invoke liberty guaranteed by the Basic Law and under the protection of this liberty endanger, impair or destroy the constitutional order or the existence of the state (see Article 9.2, Article 18 and Article 21 of the Basic Law). The Basic Law explicitly makes provision for a separate institution for the purposes of protection of the constitution, i.e., the Office for the Protection of the Constitution (Verfassungsschutzamt) (see Article 73 no. 10 and Article 87.1 of the Basic Law). It cannot be the intent of the Basic Law to invest the supreme bodies of the state under the Basic Law with a duty and make provision for a separate office for such purpose on the one hand, but to deprive these constitutionally ordained bodies and the Office of the means required to fulfil their constitutional mandate.

Of no less importance is the fundamental decision embodied in the Basic Law as regards the limits imposed upon the fundamental rights due to considerations of public interest and for the purposes of protection of precedential legal interests (see, for example, Article 2.1 of the Basic Law). “The image of man under the Basic Law is not that of an isolated, independent individual; rather, the Basic Law embodies in negotiating the tension between the individual and the community a decision in favour of civic participation and civic responsibility of individuals without infringement upon the inherent value of the individual. This follows in particular from Articles 1, 2, 12, 14, 15, 19 and 20 of the Basic Law taken in their entirety. That means, however, that individuals must accept those restrictions upon their freedom of action that the legislature imposes in order to maintain and foster social coexistence within the limits of what may generally be considered reasonable in any given situation, provided that the independence of the individual is at the same time preserved” (BVerfGE 4, 7 [15-16]).

Finally, the Federal Constitutional Court has derived the principle of proportionality from a third fundamental decision embodied in the Basic Law, i.e., the principle of the rule of law, whereby the principle of proportionality requires in the case of restriction of issues involving fundamental rights that, only that which is absolutely necessary for the protection of a legal interest recognized by the Basic Law, in this instance the existence of the state and its constitutional order, may be provided by law and ordered in the individual case (see BVerfGE 7, 377 [397 et seq.]). It also follows from the principle of the rule of law that any governmental encroachment upon the freedom or property of citizens must be subject at least to effective judicial review.

This context, which includes Article 10.2 sentence 2 of the Basic Law, first of all provides confirmation of the interpretation that is obtained from the wording of the provision itself under (a). In particular, it follows that non-notification of the persons affected and substitution of another form of control for judicial protection are justified not only by the “nature of the matter” - precisely because the purpose of restriction of the privacy of correspondence, posts and telecommunications would not be achievable without these measures - but also enjoy constitutional legitimacy due to the fundamental decision in favour of militant democracy embodied in the Basic Law.

Selected Fundamental Decisions of the Federal Constitutional Court

As regards the constitutional principle of proportionality, note must also be taken of the following: under Article 10.2 sentence 2 of the Basic Law, the law “may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.” As regards the principle of proportionality, the constitutional provision can only be construed to permit and require subsequent notification of persons subjected to surveillance in cases in which a threat to the purpose of the surveillance measure and endangerment of the protection of the free democratic fundamental order or the existence or security of the Federation or a Land can be excluded. The provision otherwise also leaves room for retention of normal recourse to the courts or institution of special judicial proceedings, instead of review by agencies appointed by the legislature, in the event this should be possible, without compromising protection of the free democratic fundamental order or the existence or security of the Federation or a Land.

Apart from this, the formulation “If the restriction serves to protect the free democratic fundamental order or the existence or security of the Federation or of a Land” allows the interpretation required under the principle of proportionality to the effect that infringement of the privacy of correspondence, posts and telecommunications must be limited to cases in which concrete circumstances justify suspicion of anti-constitutional conduct and it is possible to cope with such anti-constitutional conduct in the concrete instance only through encroachment upon the privacy of correspondence, posts and telecommunications after all other investigatory possibilities have been exhausted. This also limits the number of cases in which the persons affected are not informed.

It follows further from the constitutionally required limitation of surveillance measures to what is unavoidably necessary, that only such persons may be the subject of surveillance activities under Article 10.2 sentence 2 of the Basic Law, who have become subject to concrete suspicion of the above nature, such surveillance of course being not prohibited if in the course of surveillance due to the nature of posts and telephony as means of communication persons with whom a suspect maintains contact also necessarily become subjects of such surveillance. The constitutional requirement to the effect that surveillance activities be limited to that which is unavoidably necessary also does not exclude the possibility of surveillance of channels of communication of third parties that can be assumed to be used for the purposes of the suspect. In view of the above constitutional requirement, Article 10.2 sentence 2 of the Basic Law also authorizes surveillance for the sole purpose of acquiring knowledge of anti-constitutional activities. Finally, the interpretation of Article 10.2 sentence 2 of the Basic Law that follows from that constitutional requirement also prohibits making knowledge gained through surveillance available to other (administrative) authorities for their purposes and requires that materials collected, that are not or no longer of importance for the purposes of protection of the free democratic order, be promptly destroyed.

Finally, as regards “exclusion of recourse to the courts,” the fact that “recourse to the courts shall be replaced” by review by agencies and auxiliary agencies appointed by the legislature assumes special importance in view of the constitutional principle of the rule

**60 Years German Basic Law:
The German Constitution and its Court**

of law. This means that the law must in the context of implementation of this provision provide for review that is as regards its substance and procedure, the equivalent of review by the courts and in particular at least as effective even if the persons affected are given no opportunity to participate in such “substitute” proceedings. Under this interpretation, Article 10.2 sentence 2 of the Basic Law requires that legislation enacted for the purposes of its implementation make provision for and include among the agencies and auxiliary agencies to be appointed by the legislature, an agency that makes decisions independently of the judiciary, that are binding upon all parties involved in preparations for administrative decisions relating to and the execution of surveillance activities as regards the permissibility of surveillance activities and the question as to whether the persons affected are to be informed thereof and prohibits such surveillance activities if the legal prerequisites are not in place. This agency may be constituted within or without the legislature. It must, however, have at its disposal the requisite technical and legal expertise; it may not be bound by instructions; and its members must be appointed for a specific fixed term. It must have the power to oversee all agencies involved in preparations for, decisions relating to and the oversight of encroachment upon the privacy of correspondence, posts and telecommunications and all measures taken by such agencies. This control function must be exercised on an ongoing basis. All records that are relevant to the decision in the specific case must be made available to the controlling agency for this purpose. This control must constitute a judicial control. Article 10.2 sentence 2 of the Basic Law does, however, allow for provisions that also enable the controlling agency to require waiver or suspension of surveillance for reasons of expediency, i.e., to further reduce the number of instances of surveillance, in cases in which the legal prerequisites for surveillance are in place.

2. Interpretation of Article 79.3 of the Basic Law yields the following:
 - a) The purpose of Article 79.3 of the Basic Law, which constitutes a bar to the amendment of the Basic Law by the legislature, is to make it impossible to do away with the substance and principles of the existing constitutional order through the formally legal means of a constitutional amendment and abusively use that order for purposes of subsequent legalization of a totalitarian regime. The provision therefore prohibits general abandonment of the principles enumerated therein. Principles are to begin with not “affected” as “principles” if they are taken into account in general and are modified for obviously objective reasons only for a special situation due to its unique nature. The formulation to the effect that modification of these principles is “inadmissible” has therefore no stricter meaning than the related formulation in Article 19.2 of the Basic Law, according to which “the essence of a fundamental right” may in no case be affected.
 - b) The fact that, apart from the principle of the division of the Federation into Länder and the participation in principle of the Länder in the legislative process, Article 79.3 of the Basic Law describes “the principles laid down in Articles 1 and 20” as inviolate is also of importance in respect of its interpretation. This is different from a formulation - and means to some extent more, to some extent less - to the effect that Article 79.3 of the Basic Law precludes amendment of the constitutional principle of

Selected Fundamental Decisions of the Federal Constitutional Court

respect for human dignity and the principle of the rule of law. More principles are “laid down” in Article 1 of the Basic Law than only the principle of respect for human dignity. Several principles are also laid down in Article 20 of the Basic Law; the “principle of the rule of law” is not, however, laid down therein, but rather only very specific principles underlying the principle of the rule of law: the principle of the separation of powers in paragraph 2 and the principle to the effect that the legislature is bound by the constitutional order and the executive and the judiciary by law and justice in paragraph 3. More can be inferred from the principle of the rule of law than the legal principles of Article 20 of the Basic Law referred to in Article 79.3 of the Basic Law, and the Federal Constitutional Court has developed such legal principles (e.g., prohibition of *ex post facto* laws, the principle of proportionality, resolution of the tension between legal certainty and justice in individual cases, the principle of the most complete legal protection possible). The conditional restriction of the power of the legislature to adopt constitutional amendments inherent in the formulation of Article 79.3 of the Basic Law must be taken all the more seriously for the purposes of interpretation since this is a provision governing exceptions that may in no case also prevent the legislature from modification of basic constitutional principles through constitutional amendment. Under this view, the principle derived from the principle of the rule of law to the effect that citizens must be afforded the greatest possible judicial protection does not figure among the “principles laid down” in Article 20 of the Basic Law; there is no mention of it in Article 20 of the Basic Law. Article 19.4 of the Basic Law, which contains a guarantee of recourse to the courts to this end, is therefore not immune from restriction and modification through constitutional amendment by virtue of Article 79.3 of the Basic Law.

- c) As regards the inviolability of human dignity mentioned in Article 1 of the Basic Law, which according to Article 79.3 of the Basic Law is immune to amendment, everything depends upon the circumstances under which human dignity can be violated. This can obviously not be formulated in general terms, but rather always only in view of a concrete case. General formulations such as that to the effect that human beings may not be degraded to mere objects of state power can only suggest the area in which instances of violation of human dignity may be found. Human beings are not infrequently, mere objects not only of circumstances and social developments, but also of the law insofar as they must submit to the law without regard to their interests. It is not possible to find a violation of human dignity in this alone. They must in addition be subjected to treatment that calls into question in principle their quality as subjects or that constitutes in the specific case arbitrary disregard for human dignity. The treatment of a person by the public powers that enforce the law must if it is to be considered to be in violation of human dignity constitute a manifestation of disdain for the esteem to which that person is entitled as a human being, i.e., it must constitute “disdainful treatment.”

II.

The interpretation of Article 10.2 sentence 2 of the Basic Law under I.1 is compatible with the interpretation of Article 79.3 of the Basic Law under I.2.

**60 Years German Basic Law:
The German Constitution and its Court**

1. The omission of notification to the extent allowed by Article 10.2 sentence 2 of the Basic Law under the interpretation provided above is not incompatible with the principle of respect for human dignity, which under Article 79.3 of the Basic Law is also immune to amendment. For, since it makes reference to Article 1.1 sentence 1 of the Basic Law, Article 79.3 of the Basic Law does not in any case as regards its substantive content provide any more protection than Article 1.1 sentence 1 of the Basic Law itself. It is, however, indisputable that not every provision of law and order that without their consent restricts the freedom of citizens, charges citizens with duties or subjects citizens to measures that are unknown to them and remain unknown to them constitutes a violation of Article 1.1 sentence 1 of the Basic Law. This starts, for example, with the legal duty of physicians and certain authorities to report specific occurrences or with police investigations of certain individuals that ultimately prove to be inconclusive or unwarranted or with interception of private radio traffic. In the present context, the omission of notification is not a manifestation of disdain for an individual human being or that person's dignity, but a burden imposed upon citizens that they are required to bear for the sake of protection of the existence of their state and the free democratic order. The notion that such omission of notification could in practice lead to abusive eavesdropping practices, which would be incompatible with Article 1.1 sentence 1 of the Basic Law, does not constitute the basis for a legal argument in support of the incompatibility of Article 10.2 sentence 2 of the Basic Law in conjunction with Article 79.3 of the Basic Law. The possibility of illegal and unconstitutional abuse does not suffice to make the provision unconstitutional; to the contrary, when interpreting and assessing a provision of law, it must be assumed in a free democracy governed by the rule of law, that it will be applied properly and fairly.

2. The substitution of another form of legal control for recourse to the courts, also does not constitute a violation of human dignity in the present case. Respect for the quality of human beings as subjects does, to be sure normally require that they not only hold rights as subjects, but that they may also initiate proceedings to defend and assert their rights and present their case to the courts and in this sense therefore enjoy the protection of the courts. There have always been exceptions to this rule that do not offend human dignity. In any case, human dignity is not violated if the exclusion of judicial protection is motivated not by disregard or disrespect for an individual human being, but by the necessity of maintaining secret measures intended to protect the democratic order and the existence of the state. On the other hand, exposure of an individual to arbitrariness on the part of the authorities due to the exclusion of recourse to the courts would constitute a violation of human dignity. Precisely this is, however, excluded since it has been shown, Article 10.2 sentence 2 of the Basic Law requires legal control that is to be sure different, but equivalent, and also serves to protect the rights of the person affected.

3. The substitution of a different form of legal control for recourse to the courts as provided by Article 10.2 sentence 2 of the Basic Law also does not violate the principle of separation of powers, which is declared inviolate under Article 79.3 of the Basic Law and which Article 20.2 of the Basic Law guarantees by stating that the authority of the state will be exercised "through specific legislative, executive and judicial bodies." For this principle does not require strict separation of powers, but permits under exceptional circumstances legislation by bodies of the government and administration or government and administration by legislative bodies. The

**Selected Fundamental Decisions of
the Federal Constitutional Court**

principle of the separation of powers allows under exceptional circumstances for legal protection against measures of the executive not through the courts, but instead through independent institutions appointed or formed by the legislature within the functional purview of the executive. What is of the essence in this case is that the reason for the separation of powers is fulfilled, namely, reciprocal limitation and control of the powers of the state. The substitution of an independent institution under the executive for judicial control may not be simply undertaken discretionarily and arbitrarily, but only in cases in which a compelling, objectively obvious reason so requires and such that the core purview reserved to the judiciary is not infringed.

4. Finally, replacement of recourse to the courts by another form of independent legal control as is provided by Article 10.2 sentence 2 of the Basic Law and restricted omission of notification as allowed by Article 10.2 sentence 2 of the Basic Law do not conflict with the principle of the rule of law as referred to in Article 79.3 of the Basic Law. Only the principle mentioned in Article 20.3 of the Basic Law comes into consideration in this context: Executive power is bound by law and justice. This of course applies with the same force to authorities charged with protection of the constitution; the fact that persons affected receive no knowledge of surveillance measures and cannot seek recourse to the courts to verify the legality of the surveillance measures does not in any way change this. A provision of law that has for effect that a party affected need not under specific conditions be informed of surveillance measures and that recourse to the courts is replaced by review by agencies and auxiliary agencies appointed by the legislature cannot therefore infringe the principle of the rule of law, according to which all administrative authorities are bound to law and justice.

5. Finally, apart from the considerations under nos. 1 to 4, the compatibility of Article 10.2 sentence 2 of the Basic Law with Article 79.3 of the Basic Law follows from the general aspect that Article 10.2 sentence 2 of the Basic Law concerns modification of general constitutional principles, which as was shown above is inadmissible under Article 79.3 of the Basic Law.

D.

1. The Act on Article 10 of the Basic Law governs subject matter that falls under the legislative authority of the Federation. The legislative authority of the Federation to enact Article 2 of the G 10 Act, which governs the admissibility of measures to restrict the privacy of correspondence, posts and telecommunications in criminal proceedings through a change in the Criminal Procedure Code (Strafprozessordnung), is based on Article 74 no. 1 of the Basic Law.

The authority of the Federation to enact the provisions governing the restrictive measures in the area of non-criminal proceedings included in Article 1 of the G 10 Act derives from Article 73 nos. 1, 7 and 10 and Article 74 no. 1 of the Basic Law.

Article 1.2 of the G 10 Act serves to defend against anti-constitutional undertakings prior to criminal investigation. Admissible restrictive measures are limited to cases in which actual evidence exists to suspect that certain criminal acts have been planned, are being committed or have been committed. The restrictive measures under Article 1.2 of the G 10 Act therefore serve (at least indirectly) to prevent, investigate and prosecute criminal acts. The legislative authority of the Federation therefore derives in this regard directly from Article 74 no. 1 of the Basic Law.

**60 Years German Basic Law:
The German Constitution and its Court**

...

3. As regards the individual provisions of the Act on Article 10 of the Basic Law that are challenged in the present proceedings, the following applies: ...

- b) As was also set forth under C.I.1, the principle of the rule of law and therefore Article 10.2 sentence 2 of the Basic Law in the mandated interpretation require that restrictive measures be made known as soon as the interests involved no longer justify secrecy. Since s. 5.5 of the G 10 Act excludes notification of the parties affected of restrictive measures in all cases, it is to some extent not covered by the interpretation of Article 10.2 sentence 2 of the Basic Law mandated by constitutional law that is presented above and in that respect incompatible with the Basic Law. This provision therefore had to be declared void since notification of the parties affected of restrictive measures is also excluded even if possible without compromising the purpose of the restriction.
- c) Article 1 s. 2.2 sentence 2 of the G 10 Act and the last sentence of s. 100a of the Criminal Procedure Code in the version contained in Article 2 of the G 10 Act, according to which restrictive measures may also be taken against persons who can on the basis of certain facts be assumed to receive or transmit messages for, or from suspects or accused parties or whose connections can be assumed to be used by suspects or accused parties, are compatible with the Basic Law.

The provisions to be reviewed do not affect the right to occupational freedom. They basically do not even contain a provision at the level of the practice of a profession. Both provisions are not directed against the complainant explicitly in his capacity as a lawyer. They affect him, if at all, the same way they affect any other citizen. It is true, however, that activity as defense counsel is especially likely to bring a lawyer into close contact with suspects within the meaning of Article 1 s. 2 of the G 10 Act or defendants within the meaning of s. 100a of the Criminal Procedure Code. If therefore a lawyer, as the complainant under (3) claims applies in his case, is involved almost exclusively as defense counsel in matters involving the security of the state and in proceedings involving capital crimes, the possibility cannot be excluded that the provisions under challenge will affect the exercise of his profession. This does not, however, make these provisions unconstitutional.

The freedom to exercise a profession may be restricted by law within the meaning of Article 12.1 sentence 2 of the Basic Law if reasonable considerations having to do with the public interest would seem to warrant it. In this case, the protection of the fundamental right is limited to a defense against obligations that are unconstitutional because they represent an excessive burden and are unreasonable (BVerfGE 7, 377 [405 and headnote 6a]); established case law since then. Reasonable grounds of public interest speak in favour of the provisions under challenge: the restrictive measures the legislature considers necessary in the area of the surveillance of correspondence, posts and telecommunications cannot be effective and are susceptible to circumvention if surveillance cannot be extended to cover facilities of certain contact persons of suspects or defendants. This lies in the nature of the means of communication to be monitored. The particular nature of the purpose of the restrictive measures does not allow

**Selected Fundamental Decisions of
the Federal Constitutional Court**

distinctions to be made between individual groups of possible contact persons. Under these circumstances, the extension of surveillance measures to the facilities of specific contact persons and possibly also lawyers' offices is not so unreasonable and burdensome for the party affected that they must not be accepted in view of the compelling necessity thereof.

b) Federal Intelligence Service, BVerfGE 100, 313

Explanatory Annotation

This decision dealt with a specific aspect of state interference with private communication: The intelligence gathering of the German Intelligence Agency. The special statute governing interference with private communication required under Article 10 of the Basic Law had been amended to give a broader role to the Agency in what is referred to as "strategic surveillance". The Agency had been given the power to engage in strategic surveillance only to gather information about a military armed attack on the territory of Germany. The object was not to gain information about persons but only information about relevant activities. In essence the Agency would record international telecommunication in bulk fashion and run computerized searches for certain nonpersonal markers. The amended statute expanded the role of the Agency to international terrorism, drug trafficking into Germany, military arms trafficking and money laundering and counterfeiting activities. Also broadened was the scope of passing on relevant information to the criminal prosecution authorities for gathering personal information. The Court did not mind the recording of international (not national) telecommunication and only exempted the counterfeiting from the scope of this activity because the Court qualified this activity not as sufficiently dangerous to warrant such significant interference with the right guaranteed in Article 10 of the Basic Law. The Court also took issue with some deficiencies of the statute pertaining to the nexus between the reason for gathering the intelligence and the use of that part of the data that is not immediately destroyed. The Court demanded that the statute be amended to clearly address this issue. In addition the Court demanded that insofar as the Agency reports to the Federal Government, the statute will have to clearly limit what the government can in turn do and what the government cannot do with this information to make sure that the information remains closely linked to the purpose of the intelligence gathering, which is not the prosecution of crimes. Insofar as the information is passed on directly to other agencies, e.g. for criminal prosecution, the Court held that the statute must limit the types of crimes to very serious ones in order to limit the effect of the intelligence gathering and remain within the bounds of the proportionality principle.

The decision reinforces the Court's approach that the gathering of information and the use of the data collected are two separate issues and the legality of data gathering does not imply the legality of the use of this data, even if the information pertains to criminal activity. The decision also emphasizes the principle of strict separation between police and criminal prosecution on the one hand and intelligence agencies on the other. Information gathered by intelligence agencies cannot simply be turned over and used by the police and for criminal prosecution purposes.

Translation of the Federal Intelligence Service Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 100, 313*

Headnotes:

1. Article 10 of the Basic Law (Grundgesetz - GG) not only provides protection from the state taking note of telecommunications contacts. Its protection also extends to the procedures by which information and data are processed following permissible acts of taking note of telecommunications contacts, and it extends to the use that is made of the obtained knowledge.
2. The territorial scope of protection of telecommunications privacy is not restricted to the domestic territory. Rather, Article 10 of the Basic Law is also applicable if an act of telecommunication that takes place abroad is, due to the fact that it is screened and evaluated on the domestic territory, sufficiently linked with domestic action of the state.
3. Article 73 no. 1 of the Basic Law grants the Federal government the competence to regulate the screening, utilisation and transfer of telecommunications data by the Bundesnachrichtendienst (Federal Intelligence Service). On the other hand, Article 73 no. 1 of the Basic Law does not entitle the Federal parliament to grant the Federal Intelligence Service powers that are aimed at the prevention or prosecution of criminal offences as such.
4. Whereas the Parliament empowers the Federal Intelligence Service to conduct telecommunications, monitoring that encroaches upon telecommunications privacy. Article 10 of the Basic Law obliges the Federal Intelligence Service to take precautionary measures against the dangers which result from the collection and utilisation of personal data. These precautionary measures include, in particular, that the use of obtained knowledge be bound to the objective that justified the collection of the data in the first place.
5. The competence of the Federal Intelligence Service under s. 1 and s. 3 of the G 10 Act to monitor, record and evaluate the telecommunications traffic for the timely recognition of specified serious threats to the Federal Republic of Germany from abroad and for the information of the Federal government is, in principle, consistent with Article 10 of the Basic Law.
6. The transfer of personal data that the Federal Intelligence Service has obtained from telecommunications monitoring for its own objectives to other government authorities is consistent with Article 10 of the Basic Law; it must, however, comply with the following prerequisites: (1) the data is necessary for the receiving agency's objectives; (2) the requirements placed on changes of objective as set forth in BVerfGE (Decisions of the Federal Constitutional Court) 65, 1 (44 et seq., 62) are met; and (3) the statutory thresholds for transfer comply with the principle of proportionality.

Judgment of the First Senate of 14 July 1999 - (1 BvR 2226/94, 2420/95 and 2437/95)

* © Bundesverfassungsgericht (Federal Constitutional Court).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

Facts:

A.

The constitutional complaints concern the authority of the Bundesnachrichtendienst (Federal Intelligence Service) to monitor, record and evaluate telecommunications traffic and to transfer the data thus obtained to other public agencies. The constitutional complaints also challenge other regulations of the Gesetz zur Beschränkung des Brief, Post und Fernmeldegeheimnisses (Act on the Restriction of the Secrecy of Mail, Posts and Telecommunications) as amended in 1994 by the Verbrechensbekämpfungsgesetz (1994 Fight against Crime Act).

...

B.

With the exception of the constitutional complaint lodged by the second of the two complainants bringing the second constitutional complaint (1 BvR 2420/95), the constitutional complaints are admissible.

...

C.

The challenged regulations are not fully consistent with the Basic Law.

I.

The standard applied to the review of the constitutionality of the challenged legislation is, above all, Article 10 of the Basic Law. Article 10 of the Basic Law protects interests that are distinct from the right to informational self-determination that follows from Article 2.1 in conjunction with Article 1.1 of the Basic Law. As concerns telecommunications traffic, Article 10 of the Basic Law contains a special guarantee which supersedes the general protections of Article 2.1 (cf. BVerfGE 67, 157 [171]). To the extent that the possibility of taking recourse to a court against measures taken pursuant to s. 3 of the G 10 Act is concerned, Article 19.4 of the Basic Law is relevant as well. The same is true regarding the restrictions on the recourse to a court set forth in s. 9.6 of the G 10 Act. Apart from that, the constitutional complaints lodged by the first of the two complainants bringing the second constitutional complaint and both complainants bringing the third constitutional complaint are to be reviewed in accordance with the standards established in Article 5.1(2) of the Basic Law.

1. Article 10 of the Basic Law protects telecommunications privacy.
 - a) Telecommunications privacy covers, first and foremost, the content of an act of communication. Public authority is, in principle, not supposed to have the possibility of obtaining knowledge about the content of the exchange of information and thoughts, whether oral or written that takes place via telecommunications equipment. In this context, Article 10 of the Basic Law draws no distinction between communication of a private nature and other communication, e.g. business or political communication

**60 Years German Basic Law:
The German Constitution and its Court**

(cf. BVerfGE 67, 157 [172]). To the contrary, the protection of fundamental rights extends to all acts of communication that take place by means of telecommunications technology.

The protection of fundamental rights, however, is not restricted to shielding the content of an act of communication against the state taking note of it. The protection of fundamental rights also covers the circumstances of communication, particularly including: (1) information about whether, when and how often telecommunications traffic has taken place or has been attempted; (2) information about the individuals between whom telecommunications traffic has taken place or has been attempted; and (3) information about which subscriber lines have been used (cf. BVerfGE 67, 157 [172]; BVerfGE 85, 386 [396]). The state cannot, in principle, claim to be allowed to take note of the circumstances of acts of communication. The use of the medium of communication is supposed to remain confidential in all respects.

By withdrawing, in principle, individual acts of communication from the state's access, the fundamental right protecting telecommunications privacy intends to preserve the conditions of free telecommunication in general. The inviolability of telecommunications privacy, as a fundamental right, seeks to avoid the following: that the exchange of opinions and information by means of telecommunications equipment ceases altogether or is modified in its form and content because communication partners expect the state: (1) to interfere with their communication; or (2) to take note of the circumstances or the content of their communication.

Apart from that, the freedom of the use of telecommunications that is safeguarded by Article 10 of the Basic Law suffers if there is fear that the state utilises knowledge about the circumstances and the contents of acts of telecommunication in other contexts to the detriment of the telecommunications partners (cf., altogether, BVerfGE 65, 1 [42-43]; BVerfGE 93, 181 [188]). For these reasons, the protection provided by Article 10 of the Basic Law extends not only to the state taking note of acts of telecommunication that the telecommunications partners wish to keep to themselves, but also to the procedures by which information and data are processed that follow the state's taking note of protected acts of communication and the use of the knowledge obtained therefrom (concerning the right to informational self-determination, cf. BVerfGE 65, 1 [46]).

- b) Certainly, Article 10.2 of the Basic Law permits restrictions of telecommunications privacy. Such restrictions, however, require, as does every restriction of a fundamental right, a legal regulation that serves a legitimate aim in the public interest and respects the principle of proportionality. Article 10 of the Basic Law also places special requirements on the parliament that particularly refer to the processing of personal data that has been obtained through interference with telecommunications privacy. The standards the Federal Constitutional Court developed for the right to informational self-determination pursuant to Article 2.1 in conjunction with Article 1.1 of the Basic Law, in its "Census" decision (cf. BVerfGE 65, 1 [44 et seq.]), can largely be applied to the more specific guarantee in Article 10 of the Basic Law.

Selected Fundamental Decisions of the Federal Constitutional Court

One of these standards is that the prerequisites for and the extent to which privacy may be restricted must be clearly recognisable by an objective person in the regulations. In particular, the objective for which telecommunications privacy may be restricted must be precisely specified, naming the area of threat to which it refers. The data collected must also be suitable and necessary for achieving the objective of the restriction on telecommunications privacy. It would be incompatible with this principle to create, for unspecified objectives or for objectives that cannot yet be specified, a stock of data, the sources of which are not anonymous. Therefore, the storage and the use of collected data is, in principle, bound to the objective specified in the law that empowers the respective agency to take note of the collected data in the first place.

Acts of communication do not lose their Article 10 privacy protection because the state has been able to learn of the existence of the telecommunications contact; the standards established pursuant to fundamental rights apply equally to the transfer of data and information that has been obtained by an infringement of telecommunications privacy. The protection applies all the more, as the transfer of data, as a general rule, does not only result in an increase of the agencies or persons who are informed about the act of communication but also leads to the fact that the data is conveyed to a different context for altogether new uses. This after-effect of the transfer of data involves additional, possibly more serious, consequences for the monitored persons than when registered only in its original context of use.

Certainly, the principle of tying an encroachment on telecommunications privacy to a specific objective does not altogether preclude the possibility that the objective for such an encroachment might change. Any changes, however, require a statutory basis consistent in form and substance with the Basic Law. This means, *inter alia*, that a change of the objectives that justify encroachments upon privacy must be justified by interests of the common good that rise above the interests that are protected by the Basic Law. The new intended use of the data must refer to the missions and authorities of the agency to which the data is transferred, and its wordings must respect the principle of clarity. Moreover, the objective for which the data was originally collected must not contradict the new objective being offered as the justification for the collection or use of the data (cf. BVerfGE 65, 1 [51, 62]).

Assurance that the rule, which requires that all encroachments upon telecommunications privacy must be bound to a specific objective, is observed, can only be had if, after the data has been screened, it can still be determined whether the data was collected by means of an encroachment upon telecommunications privacy. Therefore, constitutional law requires that the data be marked accordingly.

Moreover, Article 10 of the Basic Law stipulates that the holders of fundamental rights are entitled to be informed of telecommunications monitoring that involved them. This requirement ensures the effective protection of fundamental rights, as without such notification, the monitored persons can neither claim that the screening and monitoring of their telecommunications contacts were illegal, nor can they assert possible rights regarding deletion or correction with respect to the collected data. Such a claim is not,

**60 Years German Basic Law:
The German Constitution and its Court**

from the outset, restricted to the recourse to a court that follows from Article 19.4 of the Basic Law. First of all, it is rather a specific right to data protection that can be asserted vis-à-vis the state agency that processes information and data.

The Basic Law does not prescribe in detail the manner in which the monitored person is to be informed. The Constitution only requires that the people being monitored be notified in those cases where the data was collected secretly and the monitored persons were not entitled to demand that they be informed of the monitoring, or if the notification to which the monitored persons were entitled did not adequately take their rights into account (cf. BVerfGE 30, 1 [21, 31-32]). The duty to inform, however, is also subject to the reservation of Article 10.2 of the Basic Law. To the extent that the encroachment upon telecommunications privacy cannot achieve its aim if the monitored person is informed of the monitoring activity, it is not objectionable from the constitutional point of view to restrict the notification that monitoring is taking place accordingly. It may be sufficient to inform the monitored person about the encroachment after the fact (cf. BVerfGE 49, 329 [at 342-343]).

An encroachment upon telecommunications privacy can be imperceptible and the subsequent act of processing the obtained data is unfathomable for the unsuspecting subject of telecommunications monitoring; moreover, the possibility of restricting notification about an encroachment leads to gaps in legal protection. For these reasons, Article 10 of the Basic Law requires that controls be incumbent on state agencies and subsidiary agencies that are independent and not bound by instructions (cf. BVerfGE 30, 1 [23-24, 30-31]; BVerfGE 65, 1 [46]; BVerfGE 67, 157 [185]). The Constitution, however, does not prescribe how these controls are to be organised. The Parliament is free to choose the manner it regards as the most suitable, provided that it always adequately takes into consideration fundamental rights. One aspect of adequacy is that the controls cover each step of the process of telecommunications monitoring. The legitimacy of an encroachment upon telecommunications privacy, as well as the compliance with the legal regulations for the protection of telecommunications privacy, must be controlled.

Finally, as the screening and recording of telecommunications traffic and the use of the information thus obtained is bound to specific objectives, the obtained data must be destroyed as soon as it is no longer required for the specified objectives or for legal protection by recourse to a court.

- c) Constitutional jurisprudence has not yet clarified how far the geographical range of the protection provided by Article 10 of the Basic Law extends. The Federal government assumes, though it remains an open question, that the constitutional protection of Article 10 only applies if there is a sufficiently close relationship to the territory of the Federal Republic of Germany. This interpretation leads to the conclusion that the Article 10 protection neither extends to foreign telecommunications traffic nor to persons living abroad. This question has not arisen in this way before because state power, as a general rule, could only be exercised on the territory of the state. Generally, the borders of the state were at the same time the borders of state power. Only the development of technology has made it possible for the state to extend its activities to the territory

Selected Fundamental Decisions of the Federal Constitutional Court

of other states without having to be physically present there in the shape of representative entities. In particular, the use of satellites permits, *inter alia*, the monitoring of acts of communication conducted outside Germany without a physical connection to that foreign territory.

The starting point of the answer to the question about the territorial scope of Article 10 of the Basic Law is Article 1.3 of the Basic Law, which determines the scope of the application of the fundamental rights in general. The fact that this regulation provides that the fundamental rights bind the legislature, the executive and the judiciary in a comprehensive way, does not, however, result in a final determination of the territorial scope of application of the fundamental rights. The Basic Law does not content itself with defining the internal order of the German state but also determines the essential features of the German state's relationship to the community of states. In this respect, the Basic Law assumes that a delimitation between states and legal systems is necessary, and that coordination between states and legal systems is also necessary. On the one hand, the scope of competence and responsibility of organs of the German state must be taken into account when determining the scope of application of the fundamental rights (cf. BVerfGE 66, 39 [57 et seq.]; BVerfGE 92, 26 [47]). On the other hand, constitutional law must be coordinated with international law. International law, however, does not, in principle, preclude the validity of fundamental rights in matters that bear on relations with foreign countries. The territorial scope of the fundamental rights, however, must be drawn from the Basic Law itself, taking into account Article 25 of the Basic Law. When doing so, modification and differentiation may be permissible or required, depending on the relevant rules of constitutional law (cf. BVerfGE 31, 58 [72 et seq.]; BVerfGE 92, 26 [41-42]).

The protection of telecommunications privacy provided by Article 10 of the Basic Law, in accordance with the provisions of international law (cf. Article 12 of the Universal Declaration of Human Rights of 10 December 1948; Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950; in this context, cf. EGMR [Entscheidungen des Europäischen Gerichtshofs für Menschenrechte, Decisions of the European Court of Human Rights], NJW [Neue Juristische Wochenschrift] 1979, p. 1755 [at p. 1756]), aims at assuring that telecommunications remain free of undesired or unnoticed monitoring and that the holders of fundamental rights can communicate in an unhindered way. The protection of telecommunications privacy relates to the medium of communication itself and intends to counteract the threats to confidentiality that result precisely from the use of this medium, which is more likely to be the object of encroachment by the state than direct communication between partners who are physically present (cf. BVerfGE 85, 386 [396]. Modern technology, like satellite and microwave technology, permits access to foreign telecommunications traffic by means of monitoring equipment that is located on the territory of the Federal Republic of Germany.

The screening and recording of telecommunications traffic with the help of the Federal Intelligence Service's reception equipment located on German soil already establishes a technical and informational relation to the respective participants in an act of

**60 Years German Basic Law:
The German Constitution and its Court**

communication and, depending on the particular characteristics of data and information, establishes a contact to a specific territory. The evaluation, by the Federal Intelligence Service, of the acts of telecommunication that were screened in this way takes place on German soil. Under these circumstances, an act of communication abroad is linked with the action of the state on the domestic territory in such a way that the fundamental rights pursuant to Article 10 of the Basic Law are binding even if it must be supposed, for this binding effect to apply, that the territorial reference must be sufficiently close. Secret service activities that do not fall under the G 10 Act are not to be decided in this context, nor is the question of the legal situation of foreign communication partners abroad. In any event, pursuant to Article 19.3 of the Basic Law, Article 10 of the Basic Law does not apply to foreign legal entities.

2. Parts of the challenged regulations are also to be reviewed applying the standards of Article 19.4 of the Basic Law.

Article 19.4 of the Basic Law establishes the citizen's right to effective judicial review in cases in which it seems possible that their rights have been violated by acts of state power (by the German authorities). However, in Article 10.2(2) of the Basic Law makes an exception to this guarantee exclusively with respect to encroachments upon telecommunications privacy. Pursuant to Article 19.4(3) of the Basic Law, this exception is unaffected by the otherwise comprehensive guarantee of legal protection provided by the guarantee of recourse to a court. These provisions, however, do not set forth that the encroachments are not subject to any review whatsoever. Rather, recourse to a court is replaced by a review of the case by agencies and auxiliary agencies appointed by the parliament.

The right provided by Article 19.4 of the Basic Law, however, is not restricted to judicial review and judicial proceedings. If the guarantee of legal protection provided by the right of recourse to a court is supposed to ensure the possibility of safeguarding other material rights, this guarantee can, parallel to Article 10 of the Basic Law, require that a monitored person be informed of the monitoring activities, if this form of granting knowledge is the prerequisite of the monitored person taking recourse to a court (cf. BVerfGE 65, 1 [70]). However, Article 19.4 of the Basic Law, which must be made more concrete and implemented by laws, does not preclude limitations on the right that it secures.

The obligation to destroy data that is no longer needed, which exists in principle, must also be understood in light of Article 19.4 of the Basic Law. The guaranteed right of recourse to a court provided by Article 19.4 of the Basic Law prohibits measures that are aimed at and likely to frustrate the protection of the monitored person's right of recourse to a court (cf. BVerfGE 69, 1 [49]). In cases in which the monitored person strives for judicial review of state measures of information and data processing, the obligation to destroy data must therefore be reconciled with the guarantee of recourse to a court in such a way that legal protection is not undermined or frustrated.

3. The fundamentally private acts of communication protected by Article 10 of the Basic Law, including correspondence, post and telecommunication, can be further protected by guarantee of fundamental rights that are relevant because of the content or the context of a specific act of

**Selected Fundamental Decisions of
the Federal Constitutional Court**

communication. Guarantee of protection in addition to Article 10 may also be necessary in light of the impairment of fundamental rights that might result from use of the obtained data in new contexts.

To the extent that the complainants engage in the press sector and to the extent that they have claimed that they are hindered in this activity by the challenged regulations, the freedom of the press pursuant to Article 5.1(2) of the Basic Law can be considered as an additional guarantee of a fundamental right to telecommunications privacy. The freedom of the press not only refers to the dissemination of news and opinions in the press but also includes the prerequisites and auxiliary activities without which the press is unable to fulfil its function. This especially applies to the secrecy of its sources of information and to the mutual trust between the press and its informants (cf. BVerfGE 20, 162 [176, 187 et seq.]; BVerfGE 50, 234 [240]; BVerfGE 77, 65 [74-75]) as well as to the confidentiality of editorial work (cf. BVerfGE 66, 116 [130 et seq.]).

...

II.

The challenged regulations allow encroachments upon the aforementioned fundamental rights in several respects.

1. The monitoring and recording of acts of wireless international telecommunication by the Federal Intelligence Service encroaches upon telecommunications privacy.

As Article 10.1 of the Basic Law intends to protect the confidentiality of communication, every effort to take note of, record and utilise communication data by the state is an encroachment upon fundamental rights (cf. BVerfGE 85, 386 [398]). There is, therefore, no doubt that the fact that Federal Intelligence Service staff takes note of screened acts of telecommunication constitutes an encroachment upon fundamental rights. In order to determine whether this also applies to the measures that precede analysis by the Federal Intelligence Service, they must be regarded in their context that is determined by the objective of monitoring and of the use of the obtained data.

This means that the screening alone constitutes an encroachment, to the extent that it makes the communication available to the Federal Intelligence Service and is the basis of the subsequent comparison with the search concepts. Screening does not constitute an encroachment to the extent that acts of telecommunication between German subscriber lines were also screened in an untargeted manner and solely for technical reasons but were discarded by technical means immediately after signal editing without leaving any indication that monitoring had taken place. The mere fact that the obtained data cannot be immediately attributed to specific persons does not mean that there has been no encroachment; it was confirmed at the oral argument that in these cases it is also possible, without any difficulty, to establish references, especially to the identity of individuals.

The encroachment upon telecommunications privacy persists through the storage of the screened data, which makes the material available for comparison with the search concepts. The comparison itself constitutes an encroachment, as it comprises the selection of data for further

**60 Years German Basic Law:
The German Constitution and its Court**

evaluation. This applies whether or not the comparison takes place automatically or is carried out by staff of the Federal Intelligence service who, for this objective, takes note of the content of the act of communication. As the further storage after screening and comparison serves to make the data available for evaluation, it is also an encroachment upon Article 10 of the Basic Law.

The examination made pursuant to s. 3.4 of the G 10 Act, which determines whether the personal data obtained by telecommunications monitoring is required for the objectives which justify these measures, also constitutes an encroachment. This examination is an act of selection by which the recorded data is either submitted to further use, stored for further use or destroyed.

An encroachment upon the right to telecommunications privacy also occurs when the Federal Intelligence Service, in the framework of its duty to inform the Federal government, transfers personal data that it has obtained through telecommunications monitoring. This transfer of the collected data expands the circle of those who know of the acts of communication and can make use of this knowledge. The Federal Intelligence Service's transfer of this recorded data to the receiving agencies, an act that is regulated in s. 3.5 and s. 3.3 of the G 10 Act, constitutes an encroachment upon telecommunication privacy, as does the further examination by the receiving agencies, which is regulated in s. 3.7 of the G 10 Act.

The limitation imposed by s. 3.8(1) and s. 3.8(2) of the G 10 Act on the duty to inform the monitored person about the monitoring taking place also constitutes an encroachment upon the fundamental right to telecommunications privacy.

2. Moreover, the guarantee of the right of recourse to a court provided by Article 19.4 of the Basic Law is impaired by: (1) the limitation, contained in s. 3.8(1) and s. 3.8(2) of the G 10 Act, on the duty to inform the monitored person that monitoring has taken place; and (2) the preclusion of the recourse to a court contained in s. 9.6 of the G 10 Act. Apart from that, the obligation to destroy personal data pursuant to ss. 3.6, 3.7 and 7.4 of the G 10 Act can have a detrimental effect on the judicial review of the measures.

3. To the extent that measures ordered on the basis of ss. 1.1 and 3.1 of the G 10 Act also cover telecommunications links of press publishers or journalists, an impairment of the fundamental right of the freedom of the press also occurs as a result of: (1) the authority to examine such acts of telecommunication that is conferred upon the Federal Intelligence Service pursuant to s. 3.4 of the G 10 Act; (2) the duty to inform the Federal government; (3) the authority to transfer data to other agencies pursuant to ss. 3.5 and 3.3 of the G 10 Act; and (4) the authority to examine the received data conferred upon these agencies pursuant to s. 3.7 of the G 10 Act.

III.

The authority to monitor and record telecommunications traffic pursuant to s. 1.1 and s. 3.1 sentence 2 nos. 1-6 of the G 10 Act is, essentially, in accord with Article 10 of the Basic Law. s. 3.1 sentence 2 no. 5 of the G 10 Act is not, however, consistent with this fundamental right to the extent that this provision permits monitoring in order to gather intelligence that is necessary to be able to timely recognise counterfeiting committed abroad and to counteract such a threat.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

1. In the formal sense, there are no problematic constitutional considerations as against the provisions found in s. 1.1 and s. 3.1 of the G 10 Act. The legislative competence for the matters regulated by these provisions belongs to the Federal Republic of Germany. The Federal Republic's competence follows from Article 73 no. 1 of the Basic Law, which exclusively confers legislation in foreign affairs and defence to the Federal Republic of Germany.

...

- b) The regulation in s. 1.1 and s. 3.1 sentence 2 nos. 1 to 6 of the 1994 Fight against Crime Act can be identified as belonging to the legislative competence over foreign affairs. This is obvious as regards the threat of an armed aggression (no. 1), which, apart from this, also belongs to the area of competence over defence, but also applies to the areas of threat specified under nos. 2 to 6.

...

2. The regulations in s. 1.1 and s. 3.1 of the G 10 Act also fulfil the prerequisites laid down by Article 10 of the Basic Law concerning the specificity and clarity of powers of encroachments upon telecommunications traffic.

In particular the Parliament has determined, in a sufficiently specific and clear manner, the objectives for which telecommunications links may be monitored and for which the intelligence thus gathered may be used. The threatening situations that are supposed to be timely recognised by observation or monitoring are described precisely enough and are further specified by reference to other laws. The scope of monitoring is determined by its limitation to international wireless traffic. In view of the mission and the workings of intelligence services, it was not possible to further specify the prerequisites that must exist for monitoring to take place.

3. As regards substance, however, s. 3.1 sentence 2 no. 5 of the G 10 Act disproportionately restricts telecommunications privacy. Apart from this, s. 3.1(2) of the G 10 Act complies with the requirements of the principle of proportionality.

- a) The objective of timely recognising and counteracting the threats specified under numbers 1 to 6 of the provision is a legitimate interest of the common good. It is true that the threats specified under nos. 2 to 6, which were newly incorporated into the law, do not carry the same weight as the threat of an armed aggression, which has from the outset been regarded as a legitimate reason for telecommunications monitoring (cf. BVerfGE 67, 157 [178]). Whereas such an aggression jeopardises the existence of the state, the well-being of the population and the freely chosen liberal order of the state, the newly incorporated threats, as a general rule, do not affect the existence of the state or its order in the same fundamental manner. They do, however, concern high-ranking public interests whose violation would result in serious damage to external and internal peace and to the legal interests of individuals, albeit to different degrees.
- b) Telecommunications monitoring on the basis of s. 3.1 of the G 10 Act is suitable for achieving the objective of the law.

**60 Years German Basic Law:
The German Constitution and its Court**

The wide range of screening, which only in comparatively few cases is likely to yield information, is no argument against suitability. On the legal level, it is sufficient if there is an abstract possibility that the permitted measures achieve the intended objective, i.e. if the measures are not unsuitable from the outset but may contribute to the desired success (cf. BVerfGE 90, 145 [172]). This is the case here.

The requirement of suitability is also sufficiently taken into account on the level of implementation. On the one hand, monitoring takes place in a series of procedural steps that, by rendering the measures more specific, may promote their suitability. The determination of specific telecommunications links and the ordering of restrictions on the privacy of telecommunications links are meant to establish a framework that delimits the monitoring measures. The monitoring measures take place in regulated procedures, the elements of which comprise, in particular: (1) the application by the Federal Intelligence Service (ss. 4.2 no. 2 and 4.3 of the G 10 Act), which requires a statement of reasons; (2) the determination of the search concepts, which according to the text of the law must be suitable for achieving the aims of telecommunications monitoring (s. 3.2[1] of the G 10 Act); and (3) (previous) supervision by the panel of parliamentarians and the G 10 Commission (s. 3.1[1], s. 9.2 of the G 10 Act). On the other hand, monitoring is subject to subsequent control by the G 10 Commission, which is established pursuant to s. 9 of the G 10 Act. The panel of parliamentarians established pursuant to s. 9.1 of the G 10 Act is to be informed by the Federal Minister of the Interior, at intervals not greater than six months, about the state of implementation of the law.

...

In some of the listed areas of threat, however, it is likely that exactly the individuals or organisations that are the targets of monitoring are, due to their high degree of organisation and their use of modern infrastructure, in a position to evade telecommunications monitoring whereas unsuspected individuals who cannot make use of encryption technologies (as is the case with journalists, in view of their working conditions) become subjects of monitoring. The Federal Intelligence Service itself has stated that the poor results of monitoring in the areas of international terrorism and drug trade can, *inter alia*, be explained by the use of code words. In the oral argument the Federal government countered the objection that monitoring is unsuitable by stating that practical experience had shown that only relatively few of the screened telecommunications links were encrypted.

This leads to the conclusion that the question whether monitoring for the objective of early recognition of the respective threats fails due to the use of encryption technologies cannot, at least according to the present state of knowledge, be answered on an abstract level but only on account of practical experience. On the legal level, the permitted measures are not unsuitable from the outset. On the level of implementation, the Federal Intelligence Service and the supervisory bodies that are involved pursuant to the procedural arrangements are to ensure that in spite of the possibility of encryption, the suitability of the measures in the areas of threat that are the subject of an order restricting telecommunications privacy is maintained.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- c) The law is necessary for achieving its aims. There are no means available that are equally effective, which less significantly impair the holders of fundamental rights. In particular, the possibility of cooperation with the states in which the sources of the threats arise is not equally promising. This is, on the one hand, due to the fact that cooperation requires previous knowledge about relevant facts. On the other hand, this is due to the fact that in many cases the threats are caused or condoned by government authorities abroad.
- d) The restrictions on the right to privacy in telecommunication traffic instituted pursuant to s. 1.1 and s. 3.1 of the G 10 Act (screening, recording, storage, comparison) are, in essence, proportional in the narrower sense. Only restrictions instituted for the objective of recognising counterfeiting committed abroad (no. 5) fail to meet this requirement.
- aa) The principle of proportionality requires that a loss of the freedom that is protected by the Basic Law is not disproportionate to the objectives of public interest that are served by the restriction of the fundamental right in question. Due to the fact that the individual is integrated in the community and depends on the community, the individual must tolerate restrictions of his or her fundamental rights if they are justified by prevailing public interests (cf. e.g. BVerfGE 65, 1 [44] with further references). The Parliament must, however, achieve an adequate balance between public interests and the interests of the individual. In this context, the important questions with respect to the fundamental rights of the individual are: (1) under what circumstances and how many holders of fundamental rights are subject to impairments; and (2) what is the degree of intensity of these impairments? The standards for determining this include: (1) which thresholds for intervention have been created; (2) the number of persons affected; and (3) the intensity of the impairments. The intensity of the impairment, in turn, depends on: (1) whether the communication partners' identities remain anonymous; (2) which calls and (3) which contents can be screened (cf. e.g., on the basis of the standard of Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law, BVerfGE 34, 238 [247]); and (4) what disadvantages threaten, or are justly feared by, the holders of fundamental rights on account of the monitoring measures. On the other hand the considerations of the public interests lie, as determined by the weight of the aims and interests served by the telecommunications monitoring. The decisive factors in this context are, *inter alia*: (1) how great are the dangers that are to be recognised with the help of telecommunications monitoring; and (2) how probable is their occurrence.
- bb) Telecommunications privacy is seriously impaired by the challenged regulations.

...

The limitation is, first of all, apparent from the fact that, pursuant to sentence 1 of s. 3.1(1) of the G 10 Act, only wireless international telecommunications traffic is subject to monitoring. Monitoring measures do not extend to domestic telecommunications traffic. Restrictions of telecommunications privacy may include line bound traffic only in order to recognise the threat of an armed aggression,

**60 Years German Basic Law:
The German Constitution and its Court**

but not concerning the other threats which have been newly incorporated into the law (s. 3.1[3] of the G 10 Act). Wireless traffic, i.e. traffic that is transmitted via microwave or satellite, presently amounts to approximately ten per cent of the entire telecommunications traffic but will, according to the independent, court appointed expert Professor Dr. Wiesbeck, continually increase due to technological progress.

Whether a specific act of communication takes place via line bound or wireless telecommunications systems, is, according to the experts' statements, determined automatically depending on the capacity and capacity utilisation of the transmission routes and is therefore unpredictable for the communication partners as well as for the Federal Intelligence Service. For these reasons alone, comprehensive screening is not feasible, at least as far as the international telecommunications traffic is concerned. It is true that in any telecommunications contact abroad, the individual engaged in this contact must be aware of the possibility that the contact is screened by the Federal Intelligence Service. Such a screening will in actuality, however, only rarely occur.

...

Other limitations on the monitoring permitted by the challenged regulations result from the fact that, in order to initiate telecommunications monitoring, it is necessary to determine the specific links and establish the monitoring thereof by specific orders. Furthermore, restrictions on telecommunications privacy resulting from monitoring will only occur if the threatening situation is sufficiently established by the Federal Intelligence Service and, in view of the Federal Intelligence Service's limited capacities, sufficient results are expected. It has become apparent in practice that considerations like limited resources and utility actually achieve a limiting effect: the orders concerning the areas of threat of international terrorism and drug trade, have, pursuant to s. 5.3(2) of the G 10 Act not been renewed due to the poor results of the monitoring.

On the other hand, the assumptions that formed the basis of the Federal Constitutional Court's 1984 decision, which found the weight of the impairment of fundamental rights arising out of telecommunications monitoring to be relatively low (BVerfGE 67, 157), are no longer valid. In that decision the Federal Constitutional Court proceeded on the assumption that the determination of telecommunications links and the ordering of restrictions on the privacy of telecommunications traffic issued after consultation with the parliamentary panel, as required by law, would result in a strong geographic restriction of the monitored areas and to a strong restriction of the monitored routes (cf. BVerfG, loc. cit., 174). Strategic surveillance was regarded as proportional, as the Court claimed that: (1) it serves an especially important objective, i.e. the prevention of an armed aggression against the Federal Republic of Germany; (2) there is very little probability that an individual will become the subject of surveillance; and (3) that surveillance places only a minor burden on the individual due to the fact that anonymity of the communication partners is, in principle, assured (cf. BVerfG, loc. cit., 178-179).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

Certainly, telecommunications monitoring pursuant to s. 3.1 and s. 5.1 of the G 10 Act is still to be determined and ordered by the responsible Federal minister and requires approval by the parliamentary panel established pursuant to s. 9 of the G 10 Act. The change of the factual and legal framework conditions has, however, considerably diminished the limiting effect these procedures can be expected to have on the encroachments on telecommunications privacy, that are permitted by the challenged regulations. As long as strategic surveillance of telecommunications, as based on the original version of the G 10 Act, only referred to the threat of an armed aggression against the Federal Republic of Germany and as long as, according to political analysis, such an aggression only emanated from the Eastern Block, surveillance was restricted to the countries of the Warsaw Pact. Moreover, an order for monitoring under the previous regime, under the existing technical conditions, always referred to individual routes of communication, so-called corridors, e.g. specific collective cables for the transfer of long distance calls to the respective area.

Meanwhile, the incorporation of nos. 2 to 6 into the G 10 Act has considerably increased the quantity of threats about which intelligence should be gathered. Consequently, surveillance is no longer restricted to a single crisis region. This means that the geographical area that may be covered by monitoring measures has been considerably expanded. The observation of satellite radiuses has considerably increased the volume of screened telecommunication traffic links. Under these circumstances, mainly the search concepts as defined by s. 3.2 of the G 10 Act that are approved in the order establishing the monitoring measures, which control the selection of the monitored telecommunications contacts, serve to limit surveillance.

Finally, the anonymity of the act of communication is no longer assured as was the case under the previous regime. It is true that the search concepts as defined by s. 3.2 of the G 10 Act, apart from the exception in sentence 3 that is not under review here, may not contain any characteristics for identification that result in the targeted screening of specific acts of telecommunication traffic. This prohibition, however, no longer shields the subscriber lines to which it applies from the identification of the subscribers in the same way as it used to do. One reason for this is that, due to the development of technology, the information regarding the circumstances of an act of communication, including the parties' identities, is also gathered and retained. On the other hand, the identification of individuals now results from the fact that the threats that have been newly incorporated into the Act are, to a far greater extent, related to specific individuals than was the case with respect to the threat of war. Furthermore, the Federal Intelligence Service concedes that monitoring often only yields the desired intelligence of the identity.

...

When judging the intensity of the impairment of fundamental rights, it is important that every participant in international telecommunications traffic is exposed to the monitoring measures whether or not there is a relationship between the monitoring

**60 Years German Basic Law:
The German Constitution and its Court**

and his or her behaviour and whether or not the monitoring was provoked by his or her behaviour. As regards content, acts of communication of all kinds are screened in their entirety. In this context, it is possible that Federal Intelligence Service staff takes note of the communication. In this respect, the fact that the search concepts, due to the state of technological development, only insufficiently fulfil the function that is assigned to them by the Parliament, i.e. to make human access to the obtained material unnecessary until comparison has taken place, shows its effects.

According to the statements of the Federal Intelligence Service, which have been confirmed by the experts, only in the exceptional case of telex monitoring is fully automatic comparison of search terms feasible. Telex traffic, however, is less and less frequent. Contrary to this, fax traffic can only be automatically compared and reviewed to a limited extent and telephone traffic cannot be automatically compared and reviewed at all. This explains why most intelligence, by far, is gathered by means of so-called formal search concepts (foreign subscriber numbers) based on the exemption provision of s. 3.2(3) of the G 10 Act. According to the statement of the expert Professor Waibel, voice recognition procedures cannot yet be effectively employed, in spite of their continuous improvement, in the implementation of the G 10 Act nor will they be effective in the near future without human contribution. Independent of the practice of the Federal Intelligence Service, the Act does not preclude that the comparison is done by staff, even though the Parliament may have imagined comparisons taking place automatically.

When judging the intensity of the impairment of fundamental rights, the lack of anonymity of the participants in communications is to be considered as well. The fact that the intelligence gathered relates to specific individuals is not restricted to the screening and recording phase. In practical work with the intelligence gathered, this relation is preserved. According to the statements of the Federal Intelligence Service, this is necessary, in some of the cases, in the framework of evaluation, to assess and classify the intelligence. The Federal Intelligence Service eschews the use of technically possible temporary memory systems that would allow it to access the information regarding the circumstances of the call, including the parties' identities, only if it proves necessary to make use of information regarding the individuals involved in the communication contact in order to fulfil the tasks of the Federal Intelligence Service.

The risks that can objectively be expected or must be feared begin to emerge as early in the monitoring process as that point when the Federal Intelligence Service takes note of an act of communication. In fact, even before the Federal Intelligence Service takes note of acts of communication, the fear of being monitored, (and of the dangers of recording, subsequent evaluation, possible transfer and further utilisation by other authorities, that are connected with monitoring), may lead to inhibitions in communication, to communication disturbances and to the individual adapting his or her behaviour, in this context especially in order to avoid specific contents of conversation or specific terms. In

**Selected Fundamental Decisions of
the Federal Constitutional Court**

this context, not only the individual impairment of a large number of holders of fundamental rights must be taken into consideration. Rather, the secret monitoring of telecommunications traffic concerns the communication of society as a whole. Therefore, the Federal Constitutional Court has stated that the right to informational self-determination, which is comparable in this respect, also bears a relation to the common good that goes beyond the interest of the individual (cf. BVerfGE 65, 1 [43]).

- c) On the other hand, it is of importance that the restrictions of fundamental rights serve to protect high-ranking public interests.

Monitoring measures based on s. 3.1(1) and s. 3.1 sentence 2 no. 1 of the G 10 Act are supposed to yield intelligence about facts that are relevant under defence policy aspects so that threats to the Federal Republic of Germany involving armed aggression can be timely recognised. It is true that the nature of such a threat has changed with the dissolution of the Warsaw Pact. The Act, however, is not bound to the historical constellation that the parliament had in mind when enacting the law. Rather, the telecommunications monitoring regime can still be applied even if the threat that such measures are intended to counteract has shifted. This is true in the case of the threat of armed aggression. Even after the dissolution of the Warsaw Pact, this threat still exists.

In the new areas of monitoring, increased threats have developed due to the increase of internationally organised crime, in particular in the area of illegal trade with weapons of war and with drugs as well as in the area of money laundering. Even if such activities cannot, altogether, be put in the same category of importance as armed aggression aimed at the Federal Republic of Germany, they considerably affect, in any case, the foreign and security policy interests of the Federal Republic of Germany. Nor are the threats in the specified areas remote. In the area of weapons proliferation, the Federal government has furnished sufficient examples that are generally known.

The threats, the sources of which are predominantly located abroad and which are supposed to be detected by means of the authority to restrict telecommunications privacy, are of great importance. This still applies to the threat of armed aggression but also, as has been sufficiently established by the Federal Intelligence Service, to the threats of weapons proliferation, arms trade, and international terrorism. The aim behind the mission of foreign surveillance, i.e. to provide the Federal government with information that is of foreign and security policy interest for the Federal Republic of Germany, is of considerable importance if the Federal Republic of Germany is to act effectively in the field of foreign policy and maintain the reputation of its foreign policy.

- dd) In a weighing of interests that takes these aspects into consideration, s. 3.1 sentence 2 nos. 1-4 and no. 6 of the G 10 Act are not objectionable from the constitutional point of view.

**60 Years German Basic Law:
The German Constitution and its Court**

Contrary to the opinion of the complainant bringing the first constitutional complaint, the authority to monitor and record, and the other measures provided by the challenged Act is not out of proportion simply because it lacks intervention thresholds like the traditional concepts of 'konkrete Gefahr' (specific threat) in the field of resistance to threats and of "hinreichender Tatverdacht" (reasonable grounds for the suspicion of a criminal act) in the field of criminal prosecution. Certainly, telecommunications monitoring is conducted without an existing suspicion. Neither is the encroachment upon fundamental rights limited to the general risk that the individual may become the subject of an unjustified suspicion. In the framework of determining and ordering restrictions to telecommunications privacy, anyone can easily become the object of monitoring measures.

The different aims, however, justify that the prerequisites for encroachments on telecommunications privacy are determined differently in the G 10 Act than in police law and law of criminal procedure. On account of the legislative power of the Federal Republic of Germany flowing from Article 73 no. 1 of the Basic Law, the only possible aim of monitoring by the Federal Intelligence Service is foreign surveillance with respect to specified threatening situations that are relevant to foreign and security policy. This type of surveillance shows the following characteristics: (1) it is concerned with the external security of the Federal Republic of Germany; (2) its subject is threatening situations that originate abroad, not predominantly threatening situations and suspected threats that are related to individuals; and (3) intelligence in this respect can only to a limited extent be obtained by other means. In this context, the Federal Intelligence Service's sole mission is to collect and evaluate the information required for obtaining intelligence about foreign countries that are of importance for the foreign and security policy of the Federal Republic of Germany, and, on account of its duty to inform the Federal government, to provide it with information to support it in its decisions.

It is true that even the considerable threats, which telecommunications monitoring is supposed to counteract, would not justify, from the constitutional point of view, telecommunications monitoring for objectives of foreign surveillance without any prerequisites or limitations. The law, however, has not dispensed with such prerequisites. SS. 3.1(1) and 3.1(2) of the G 10 Act contain specified substantive standards and procedural safeguards, chiefly that monitoring is only permissible for collecting information about issues the knowledge of which is necessary for the timely recognition of the threatening situations. Under the procedural aspect, one of the prerequisites of the determination and ordering of monitoring is that the Federal Intelligence Service, in its application, conclusively establishes why the affected telecommunications links can provide, in a timely manner, information about one of the relevant threats.

Taking into account the safeguards provided in the G 10 Act, screening and recording for the objective of informing the Federal government do not appear to be disproportionate. Certainly, the number of screened telecommunications links is not low. It is low, however, compared with the total number of telecommunications contacts, or even in comparison only with the number of international

Selected Fundamental Decisions of the Federal Constitutional Court

telecommunications contacts. In this context, the ban on targeted monitoring of specified individual subscriber lines contained in s. 3.2(2) of the G 10 Act is of great importance. In view of the fact that encroachments on telecommunications privacy are implemented without the existence of a suspicion, in view of the broad range of screened telecommunications contacts and of the possibility of identifying the participants in a telecommunications contact, proportionality would not be ensured without such a ban. The Federal Constitutional Court is not called upon to review the constitutionality of s. 3.2(3) of the G 10 Act because the complainants who have lodged admissible constitutional complaints are not affected by this regulation. Even if free communication, which Article 10 of the Basic Law is supposed to ensure, may be disturbed by the screening and recording of acts of telecommunication, the danger of disturbing it gains its full significance only through subsequent evaluation and especially by the transfer of the gathered information. In this respect, however, it can be adequately counteracted on the level of the authority to evaluate and transfer.

- ee) Proportionality in the narrower sense is not ensured, however, with respect to the threat of counterfeiting committed abroad, as it is listed under no. 5 of the regulation.

Counterfeiting is neither a threat, the seriousness of which is comparable to the threat of armed aggression, nor does it concern legal interests that are as important as the other threats incorporated into s. 3 of the G 10 Act by the 1994 Fight against Crime Act. Counterfeiting also does not show, in all its forms of perpetration, the same potential for danger that characterises the other threats. Counterfeiting neither constitutes a threat to the existence or the safety of the Federal Republic of Germany that is necessarily connected with foreign countries, nor is it necessarily a considerable threat to the existence or the safety of the Federal Republic of Germany. This does not preclude that in individual cases, large scale counterfeiting committed abroad impairs the Federal Republic of Germany's monetary stability, and thus its economic performance, to a degree that is comparable to the other threats. The provision, however, is not limited to such cases. With respect to the threat posed by counterfeiting generally, the degree of the threat and the weight of the impairment of fundamental rights is out of proportion.

By incorporating respective limitations, however, s. 3.1 sentence 2 no. 5 of the G 10 Act can be given a wording that is consistent with the Basic Law. This part of the regulation is therefore not to be declared void but is only to be declared inconsistent with the Basic Law. The Parliament is obliged to create consistency with the Basic Law.

IV.

The provision of s. 3.4 of the G 10 Act, which obliges the Federal Intelligence Service to examine whether the personal data obtained by telecommunications monitoring is required for the objectives that justify these measures is not objectionable from a constitutional point of view

**60 Years German Basic Law:
The German Constitution and its Court**

when considered by itself. This provision does not sufficiently take account of the requirements, which follow from Article 10 of the Basic Law, that: (1) an infringement upon telecommunications privacy be bound to a specific use; and (2) that an infringement upon telecommunications privacy be proportional. To this extent, this provision is inconsistent with telecommunications privacy and the freedom of the press (which is to be considered alongside telecommunications privacy).

It is true that s. 3.4 of the G 10 Act complies with the principle that an infringement upon the right to telecommunications privacy be bound to a specified purpose to the extent that this provision of the G 10 Act requires that the Federal Intelligence Service examine whether the data that is obtained by means of telecommunications monitoring is suitable for a specified objective. Apart from that, this principle is observed by the fact that s. 3.6 (1) of the G 10 Act orders the destruction or deletion of the data if the examination has shown that the data is unnecessary for the objectives of the Federal Intelligence Service. The Act, however, does not sufficiently ensure that the use of the data that is not destroyed or deleted is bound to the objective that justified the collection of data in the first place. Possible uses other than the early recognition of the threats specified in the Act and the corresponding provision of information to the Federal government are not excluded. The regulations provided by the Federal Intelligence Service Act, which address the processing and utilisation of personal data, cannot fill this gap. s. 11 of the Federal Intelligence Service Act excludes the application of the general provisions in s. 14 of the Federal Data Protection Act for which the storage, modification and use of obtained data is permissible. Apart from this, s. 3.4 of the G 10 Act does not acknowledge the duty, which follows from Article 10 of the Basic Law, to identify and mark the object of protection of fundamental rights to make it possible to track the object of fundamental rights protection throughout the remaining steps of processing.

Nor does the challenged regulation make the further evaluation of the data dependent on meeting a threshold of proportionality. s. 3.3 of the G 10 Act, which establishes specified requirements for the utilisation of the data, makes no reference to the Federal Intelligence Service. Instead, the provision's objective (the prevention, resolution or prosecution of criminal offences identified by this article) is addressed to the authorities to which the Federal Intelligence Service, pursuant to s. 3.5 of the G 10 Act, is to transfer information. The Act does not contain provisions that ensure that the Federal Intelligence Service evaluates only the data obtained by telecommunications monitoring that shows a sufficient relevance to the work of the intelligence service for the areas of threat specified in ss. 1.1 and 3.1 of the G 10 Act. The fact that such a threshold is lacking is also of importance with regard to Article 5.1(2) of the Basic Law, because such a threshold would ensure that the Federal Intelligence Service takes the interests of the protection of informants and of the confidentiality of editorial work into account.

An interpretation of the provision that is consistent with the Constitution is not possible as it would not be in conformity with the requirements of specificity and clarity placed on legal regulations by Article 10 of the Basic Law. The challenged provision only requires amendment; its deficiencies do not result in the provision being void but only result in its inconsistency with the Basic Law. The Parliament is obliged to create consistency with the Basic Law.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

V.

S. 12 of the Federal Intelligence Service Act obligates the Federal Intelligence Service to report to the Federal government, the content of the data obtained pursuant to its telecommunications monitoring activities. This obligation is challenged in these proceedings only to the extent that s. 3.3(2) of the G 10 Act excludes the reporting obligation from the requirements of s. 3.3(1) of the G 10 Act. In the framework of the Federal Intelligence Service's obligation to report to the Federal government, telecommunications' privacy is not sufficiently protected.

The effect of Article 10 of the Basic Law and Article 5.1 of the Basic Law (to the extent that acts of communication fall under the freedom of the press) also extends to the Federal Intelligence Service's duty to inform the Federal government of its telecommunications monitoring activities because informing the Federal government is one of the objectives for which the Federal Intelligence Service has been granted the right to conduct telecommunications monitoring. The protection provided by the obligation to report to the Federal government by no means becomes unnecessary simply because personal data obtained as a result of monitoring is judged to be of no importance as regards the fulfilment of the duty to inform the Federal government. The duty to inform the Federal government does not only require that the Federal Intelligence Service draw up situation reports. The Federal Intelligence Service is, as s. 12 of the Federal Intelligence Service Act explicitly emphasises, authorised to transfer personal data.

It certainly cannot be criticised that s. 3.3(2) of the G 10 Act excludes the duty to inform the Federal government established by s. 12 of the Federal Intelligence Service Act from the limitations of use pursuant to s. 3.3(1) of the G 10 Act, as the limitations provided in this sentence are not geared to the tasks of the Federal Intelligence Service. It is, however, inconsistent with Article 10 of the Basic Law that this provision also does not provide that telecommunications monitoring be bound to the objectives established in s. 1.1 and in ss. 3.1(1) and s. 3.1(2) of the G 10 Act that justify telecommunication monitoring. Moreover, the absence of an obligation to mark personal data constitutes a violation of Article 10 of the Basic Law.

...

As the challenged provision, considered on its own, does not contradict the constitution but only requires amendment, its deficiencies also do not result in the provision being void but only results in its inconsistency with the Basic Law. The Parliament is obliged to create consistency with the Basic Law. The Basic Law leaves the decision about the precise place in which this duty is fulfilled to the legislative discretion of the Federal government.

VI.

The provision of s. 3.5(1), in conjunction with s. 3.3(1) of the G 10 Act, that obliges the Federal Intelligence Service to transfer data obtained by telecommunication monitoring to other authorities for the execution of their duties is not entirely consistent with the provisions of Article 10 of the Basic Law and the complementary provisions of Article 5.1(2) of the Basic Law.

**60 Years German Basic Law:
The German Constitution and its Court**

1. The objective of the regulation, however, is not objectionable from the constitutional point of view. The data and information that the Federal Intelligence Service has obtained from telecommunications' traffic when fulfilling its mission, are supposed to be utilised for the prevention, resolution or prosecution of criminal offences to the extent that they indicate offences committed by specified individuals. The Basic Law confers great importance to the prevention and resolution of criminal offences. The Federal Constitutional Court has therefore repeatedly emphasised the irrefutable requirement that criminal offences be effectively prosecuted and of an effective fight against crime. The Federal Constitutional Court has also repeatedly stressed the public interest in the truth being ascertained as completely as possible in criminal proceedings, for the conviction of offenders as well as for the exoneration of the innocent, and has described the effective resolution especially of serious criminal offences as an important mission of a polity governed by the rule of law (cf. BVerfGE 77, 65 [76] with further references; BVerfGE 80, 367 [375]).

2. The parliament has also complied with the requirement that it determines, precisely and specifically for each area, the objectives for which personal data may be transferred and further used (cf. BVerfGE 65, 1 [46]). This provision permits a transfer of data to the receiving agencies specified in s. 3.5 of the G 10 Act only to the extent that this is required for the execution of the receiving agency's duties. Thus, the provision refers to the intelligence service tasks, the administrative and monitoring duties and the missions of crime prevention, of the resistance to threats and of the prosecution of criminal offences that are assigned to the respective receiving agencies. S. 3.3(1) of the G 10 Act further delimits the objectives of use, in the framework of these agencies' tasks, to the prevention, resolution or prosecution of the listed criminal offences.

3. Moreover, the objectives justifying the transfer of data are consistent with the objective for which a restriction of telecommunications' privacy has already taken place, and which resulted in the collection of data (cf. BVerfGE 65, 1 [62]).

It is true that the Federal Intelligence Service's telecommunication monitoring without an existing suspicion is only permissible for strategic surveillance. The characteristic feature of this type of monitoring is that its aim is not to initiate measures against specific individuals but that it concerns threatening situations on an international level about which the Federal government is supposed to be informed. Only this limited objective justifies such a broad scope and the depth of encroachment upon fundamental rights, that results from monitoring without an existing suspicion. If the monitoring were, from the outset, justified by efforts aimed at the prevention or prosecution of criminal offences, the power to conduct such monitoring would not be consistent with Article 10 of the Basic Law (cf. BVerfGE 67, 157 [180-181]). Limitations on employing specified methods of collecting data, which are required by fundamental rights, may not be evaded by making legally gathered data available for objectives that would otherwise not justify monitoring.

Article 10 of the Basic Law does not, however, exclude all transfers of data to agencies that may not or should not be permitted, on their own, to conduct telecommunication monitoring without an existing suspicion. As the Federal Intelligence Service, on account of the liberal methods it is permitted to employ, necessarily screens a large number of acts of telecommunication that are from the outset irrelevant for the receiving agencies, it must, in any case, be ensured that these agencies are not permitted to access the complete stock of data. On

**Selected Fundamental Decisions of
the Federal Constitutional Court**

the other hand, it does not contradict the primary objective for which the data is collected if information that is relevant to the prevention, resolution or prosecution of criminal offences (although it has been collected with different objectives in mind) is transferred to the agencies mentioned under s. 3.5 of the G 10 Act after careful examination of the data by the Federal Intelligence Service. The provisions of the challenged regulation that govern the transfer of data comply with the requirements that must be met in this context: i.e. a threshold for the transfer that is established in s. 3.5(1) as well as in s. 3.1(1) of the G 10 Act, and a particular review by an official who is qualified to hold judicial office established in s. 3.5(2) of the G 10 Act.

4. The challenged provisions are, on the other hand, not fully consistent with the principle of proportionality.

- a) What is lacking, however, is not the suitability and necessity of the regulation for achieving the desired objective.

It is obvious that the transfer of data to agencies whose mission is, *inter alia*, the prevention, resolution or prosecution of criminal offences, aids the fulfilment of this mission. Nor has the circle of receivers been expanded to include agencies that cannot contribute to achieving the objective of the Act. Those agencies that are not entrusted with tasks concerning the prosecution of criminal offences but only perform administrative or intelligence services functions, have, in any case, within the boundaries of their mission, the possibility to prevent criminal offences.

There is no apparent means that would constitute a less intrusive encroachment while at the same time promising similar chances for success. Within the boundaries set by the authority they have been granted, the receiving agencies could not otherwise receive this information, which the Federal Intelligence Service can acquire due to its broader authorisation to monitor telecommunications. Moreover, the Parliament has ensured compliance with the principle of necessity by limiting the duty to transfer data to that data which is necessary for the execution of the receiving agency's duties.

- b) The Parliament, however, has not complied with the requirements that the principle of proportionality, in its narrower sense, places on regulations that permit encroachment upon fundamental rights.

- aa) The more narrowly construed principle of proportionality prohibits encroachments upon fundamental rights of an intensity that is out of proportion to the importance of the matter and the harm the individual citizen must suffer (cf. BVerfGE 65, 1 [54]). Rather, an adequate relationship between the importance of the fundamental rights in question and the seriousness of the restrictions on these fundamental rights must be established. In an overall balancing between the severity of the encroachment on the one hand, and the importance and urgency of the reasons that justify the encroachment on the other hand, the bounds of reasonableness must still be respected (cf. BVerfGE 67, 157 [173, 178]; established case law).

The severity of the encroachment upon telecommunications privacy that results from the transfer permitted by the G 10 Act is best characterised by the fact that the transfer of personal data constitutes another break of telecommunications

**60 Years German Basic Law:
The German Constitution and its Court**

privacy that can result in an even greater impairment than the original encroachment (that took place with the monitoring). The effect of data transfer is not limited to the expansion of the group of persons that obtain knowledge of the circumstances and the content of an act of telecommunication. Taking note of an act of telecommunication may precede measures taken against the subjects of monitoring. The Federal Intelligence Service cannot take any measures that are directed against individuals, and the Federal government, which the Federal Intelligence Service is to inform about specified threatening situations, does not take measures against the participants in an act of communication in the framework of its political counter strategies. But the agencies to which the data is to be transmitted pursuant to s. 3.5(1) of the G 10 Act will, as a general rule, institute investigations against the subjects of monitoring that may lead to further inquiries and, as the case may be, to the institution of criminal proceedings.

In this context it is also of importance, for judging the intensity of the encroachment, that the Federal Intelligence Service has obtained the information by means of a method that, due to the broad scope of its power to monitor telecommunications, including the power to conduct monitoring that is not motivated by suspicion, very severely affects telecommunications' privacy. This is only consistent with Article 10 of the Basic Law because it merely serves strategic objectives and requires the identification of the participants in an act of communication only to facilitate the interpretation of the information, which is always fragmentary and therefore requires interpretation. Under these circumstances, the acceptability of the transfer of data to the designated agencies can only be ensured if the interests served by the transfer prevail over telecommunications' privacy and if there is a safe basis for the assumptions that: (1) the data is relevant to these interests; and (2) that the persons affected by monitoring are, with sufficient probability, involved in criminal offences. If this basis is lacking, the bounds of what is reasonable have been transgressed.

It is therefore imperative that the legal interest (the prevention, resolution and prosecution of the listed criminal offences) justifying the transfer be of great importance. A sufficient factual basis for the suspicion that criminal offences are being planned or have been committed is also imperative. A lower degree of probability (with respect to a possible or actual violation of the applicable legal interest) justifies transfer when the legal interest at stake is very important. Similarly, less cogent facts may form the basis of a suspicion justifying transfer when the legal interest at stake is very important.

The more important the legal interest is, the further the threshold for transfer may be shifted to a point in time prior to the threatening violation of a legal interest. In order for acts of planning, together with the prerequisite of the existence of factual grounds, to be sufficient to serve as a threshold for the transfer of data, the legal interest must be of outstanding importance (cf. BVerfGE 30, 1 [18]). This means that if the Parliament confines itself to a few high-ranking legal interests when identifying the applicable legal interests and ascertaining if the damage that

**Selected Fundamental Decisions of
the Federal Constitutional Court**

threatens them is extraordinarily high, the Parliament is not hindered from keeping the threshold for transfer relatively low. If the Parliament, on the contrary, considerably expands the catalogue of protected legal interests and also includes acts that show a low degree of threat in the success that is to be prevented, it must set a high threshold for transfer.

- bb) The Parliament has not, in all respects, achieved this state of balance with regard to the elements of a criminal offence that justify the transfer of data. Certainly s. 3.5 in conjunction with s. 3.3 of the G 10 Act is not objectionable to the extent that it permits data transfer regarding persons against whom restrictions of telecommunications privacy pursuant to s. 2 of the G 10 Act have been ordered. To the contrary, the scope of the elements of a criminal offence is not sufficiently delimited with respect to suspicion related restrictions. This results from the interplay between the catalogues of relevant criminal offences, the factual basis for the suspicion of criminal offences and the duration of the threat to the legal interest.

...

This results in different consequences for the prevention of criminal offences on the one hand and for the resolution and prosecution of criminal offences on the other hand. These consequences spring from the fact that data transfer for the protection of legal interests can show different degrees of urgency. Whereas the prevention of criminal offences is part of the resistance to threats and is meant to protect the affected legal interest from threatening violation, i.e. is supposed to prevent success, the prosecution of criminal offences is aimed at the state sanctioning the violation of a legal interest that has already taken place and can no longer be prevented. If a telecommunications contact that is screened by the Federal Intelligence Service contains indications concerning the planning as well as the completion of criminal offences contained in the catalogue of s. 3.3(1) of the G 10 Act, this can, consequently, lead to a different legal assessment of a transfer carried out pursuant to s. 3.5 of the G 10 Act.

Because, in the case of the prosecution of a criminal offence, the violation of the legal interest has already taken place and the focus is now on sanctioning it, it is not justified to lower the threshold for the transfer of personal data that was obtained by means of encroachments upon telecommunications privacy pursuant to ss. 1 and 3 of the G 10 Act below the threshold that otherwise applies to encroachments upon telecommunications privacy pursuant to s. 100a of the Code of Criminal Procedure (Strafprozessordnung - stpp) in crime prosecution. In the case of the transfer of the data collected by the Federal Intelligence Service, it appears necessary from the constitutional point of view, with regard to the fact that encroachment in this case is no less serious, to establish the requirement of a factual basis for the suspicion that corresponds to the one prescribed by s. 100a of the Code of Criminal Procedure. Otherwise, the number of holders of fundamental rights affected could not be kept within the bounds of what is reasonable. s. 3.3(1) of the G 10 Act does not comply with this requirement. It

**60 Years German Basic Law:
The German Constitution and its Court**

lowers the threshold for transfer below the bounds of what is reasonable by establishing that factual grounds for the suspicion that criminal offences have been committed are a sufficient standard for the transfer of data, a standard, however, which is considerably lower than that established by s. 100a of the Code of Criminal Procedure.

To the extent that the prevention of criminal offences is concerned, the regulation does not comply with the interests that are protected by the Basic Law. All in all, the following circumstances result in a marked imbalance to the detriment of the fundamental rights affected: (1) that factual grounds are sufficient for a suspicion; (2) that the planning phase is included in the consideration; and (3) that less serious criminal offences also justify the transfer of data. In particular, a result of the circumstances that factual grounds are connected with the planning of criminal offences is that the power to monitor sets in at very early, preliminary stages of the threatened violation of a legal interest, which results in lowering the degree of probability and the certainty of predictions. Another consequence is that the power to monitor may be based on relatively low requirements as regards the factual basis.

...

The provisions cannot be interpreted to be in accord with the Constitution because, on the one hand, the Parliament can remedy the unconstitutionality of the provisions in different ways. The Federal Constitutional Court must not anticipate such a solution. On the other hand, an interpretation of the provisions that is in accord with the Constitution would not be consistent with the requirement of specificity and clarity that the Basic Law places on provisions that permit the transfer of personal data obtained by an encroachment upon fundamental rights and the change of the objective for which this data may be used. The Parliament is obliged to create consistency with the Basic Law.

VII.

S. 3.7 of the G 10 Act is inconsistent with Article 10 of the Basic Law.

Certainly, the regulation is, in itself, not objectionable from a constitutional point of view. When considered on its own, the regulation obliges the receiving agencies to evaluate whether they need the data transferred pursuant to s. 3.5 of the G 10 Act for the objectives specified in s. 3.3 of the G 10 Act. This is a step of selection that corresponds to the step regulated in s. 3.4 of the G 10 Act. This step is meant to ensure, as established in ss. 3.3 and 3.5 of the G 10 Act, that the objective for which data is collected in a specific case is identified and that collecting data in this case is bound to this objective. Thus, it complies with the requirements of Article 10 of the Basic Law. Unlike s. 3.4 of the G 10 Act, the provision in s. 3.7(3) of the G 10 Act explicitly prohibits the further use of the data that is not needed but was not immediately destroyed due to the unreasonable effort this would involve. Moreover, fundamental rights interests, especially that of the freedom of the press, can be sufficiently protected within the framework of the concept of necessity that is established in s. 3.7(1) of the G 10 Act.

Selected Fundamental Decisions of the Federal Constitutional Court

What is lacking, however, in this context as well as in the case of the corresponding powers of the Federal Intelligence Service, is the obligation to mark the data accordingly; the Parliament is to impose this obligation on the receiving agencies as a safety precaution in the context of binding the use of data to a specific objective. Without such an obligation, the data and information from transfers pursuant to the G 10 Act could be stored, after being examined for their relevance as established in s. 3.7 of the G 10 Act in such a way, or mix with other data and information, that their origin from a measure of strategic telecommunications monitoring is no longer recognisable. This would circumvent the restriction of use provided in s. 3.3 of the G 10 Act.

An interpretation consistent with the constitution is ruled out in this case as well. The Parliament is obliged to create consistency with the Basic Law.

VIII.

The provisions of s. 3.8(2) of the G 10 Act, which address the duty to inform the subject of telecommunication monitoring that such monitoring has taken place, is not consistent with the Basic Law.

1.

...

What applies in this context, however, is Article 10.2(1) of the Basic Law, which permits the restriction of telecommunications privacy for other objectives. Justification for such secrecy can include the risk that the disclosure of information or of methods applied, which are in the concrete case in question still to be kept secret, would jeopardise the fulfilment of the involved agency's mission (cf. BVerfGE 57, 250 [284]). Apart from the fulfilment of the involved agency's mission, overriding detriment to the good of the Federal Republic of Germany or to a Land (Federal state) that is to be expected if the affected person is informed, can, under certain circumstances, be taken into consideration as an opposing interest. In the intelligence service sector, this may be the case e.g. when foreign secret services are involved or in the field of counter intelligence (in this context, see the decision of the Oberverwaltungsgericht [Higher Administrative Court] of Berlin, NVwZ [Neue Zeitschrift für Verwaltungsrecht] 1987, p. 817 [at p. 819]). The protection of informants can also be regarded as a legitimate interest that justifies the maintenance of secrecy (cf. BVerfGE 57, 250 [284]).

2. However, s. 3.8 (2) of the G 10 Act violates Article 10 and Article 19.4 of the Basic Law.

Pursuant to this regulation, notification of the measures restricting telecommunications privacy can be excused if the data has been destroyed by the Federal Intelligence Service or a receiving agency within three months after it was obtained. Thus, the regulation only focuses on the point in time when the data is deleted. For the decision whether or not to give notice to the subject of monitoring, it is not of importance what has happened to the data during the three month period. As the oral argument has shown, this results, in practice, in the monitored persons not being informed by the Federal Intelligence Service. Instead, the Federal Intelligence Service applies the regulation as if it established a duty to destroy data after three months.

**60 Years German Basic Law:
The German Constitution and its Court**

Reasons of administrative practicability on which the regulation is based cannot justify such a far-reaching preclusion of the duty to give notice that telecommunications monitoring has taken place. It is true that, in view of the large number of screenings and in view of the fact that the material obtained largely proves irrelevant and is soon destroyed, there are legitimate reasons that justify withholding notification. The mere lapse of time, however, is not sufficient for justifying this, as it does not provide the assurance that within this period of time no further use has taken place.

As a general rule, it is the use to which collected data is put that constitutes the most grievous strain on a subject of telecommunications monitoring. Nonetheless, collecting the data itself constitutes an encroachment upon telecommunications privacy against which recourse to a court, in principle, must be possible. Under these circumstances, the fact that the affected person is not informed about the monitoring could, at most, be justified if the collected data was destroyed immediately, without further steps, as it was regarded as irrelevant. Without such a limitation, s. 3.8(2) of the G 10 Act thus restricts Article 10 and Article 19.4 of the Basic Law in a disproportionate manner.

As the provision can be made consistent with the fundamental rights by amending it, it is not to be declared void but is only to be declared inconsistent with the Basic Law. The Parliament is obliged to create consistency with the Basic Law.

IX.

However, the regulation on the preclusion of the recourse to a court in s. 9.6 of the G 10 Act is consistent with the Basic Law.

This regulation has its constitutional basis in Article 10.2(2) of the Basic Law. This sentence permits, in the case of restrictions on telecommunications privacy that serve to protect the free democratic basic order or the existence or the security of the Federal Republic of Germany or of a Land, the preclusion of the right to the recourse to a court if that right is replaced by a review of the case by agencies and auxiliary agencies appointed by the parliament. The Federal Constitutional Court has declared this regulation, by which the 1968 constitutional amendment altered Article 10 of the Basic Law, consistent with Article 79.3 of the Basic Law (cf. BVerfGE 30, 1 [26 et seq.]).

S. 9.6 of the G 10 Act keeps within the bounds of Article 10.2(2) of the Basic Law. The preclusion of the recourse to a court is limited to orders pursuant to s. 2 and s. 3.1 sentence 2 no. 1 of the G 10 Act and does not cover the threats specified in nos. 2-6 of this regulation. Parliamentary control is ensured by s. 9 of the G 10 Act. Apart from that, the persons affected do have recourse to a court, pursuant to s. 5.5(3) of the G 10 Act, after being informed of the measures restricting telecommunications privacy. s. 9.6 of the G 10 Act is declared to be inapplicable.

The question whether this also opens the recourse to a court in the cases of s. 2 and s. 3.1 sentence 2 no. 1 of the G 10 Act when the subjects of measures restricting telecommunications privacy have been informed is not important from the point of view of constitutional law. As regards the constitutional aspect, it is sufficient to state that when

Selected Fundamental Decisions of the Federal Constitutional Court

interpreting s. 5.5(3) of the G 10 Act, notifying the monitored person may not be made the prerequisite of opening the recourse to a court. Even if the person affected has learned about the monitoring of his or her telecommunications traffic from another source, he or she is free to take recourse to a court. The possibility of taking recourse to a court would be unnecessarily diminished if the person affected by monitoring would also have been in such cases dependent on information about the monitoring activity being provided.

X.

The regulations on the deletion of data in s. 3.6 and in ss. 3.7(2) and 3.7(3) as well as in s. 7.4 of the G 10 Act are also consistent with the Basic Law.

They comply with the requirement, which follows from Article 10 of the Basic Law, that data obtained by means of encroachments upon telecommunications privacy be deleted as soon as it is no longer needed for the objectives that justify the encroachment. It cannot be inferred that the regulations fall short of the required minimum protection of fundamental rights.

Nor can the regulations be criticised from the perspective of Article 19.4 of the Basic Law. The guarantee of recourse to a court, however, prohibits measures that undermine the protection afforded by this guarantee (cf. BVerfGE 69, 1 [49]). The duty to delete data that is no longer required must therefore, for those cases in which a judicial review of telecommunication monitoring conducted by the Federal Intelligence Service is possible, be coordinated with the guarantee of recourse to a court in such a way that this guarantee is not circumvented. The provisions, however, permit such an interpretation.

...

XI.

The provision of s. 9.2 (3) of the G 10 Act, which provides for the control of the monitoring measures by the Commission, is inconsistent with Article 10 of the Basic Law. It does not sufficiently ensure that the control covers the entire process of screening and utilisation of the data. Without such control, the challenged regulations that contain authorisations could not continue to exist. It is true that s. 9.2 (3) of the G 10 Act provides that the Commission decides about the permissibility and necessity of measures restricting telecommunications privacy. It is not clear, however, what is to be understood by measures restricting telecommunications privacy. The subsequent provision of s. 9.2 (4) of the G 10 Act, according to which the responsible Federal Minister is to immediately cancel any orders which the Commission declares impermissible or unnecessary, could be interpreted to mean that the authorisation to control only refers to the ministerial order.

Such a view, which is incompatible with Article 10 of the Basic Law, is not only in the range of possibility. Rather, the Federal government expressed exactly such an interpretation in a letter to the G 10 Commission dated 9 December 1996. In spite of its diverging interpretation of the law, the Commission accepted this view and has since refrained from controlling in the cases of ss. 3.3, 3.5, 3.6 and s. 3.8 of the G 10 Act. Due to the strict requirements placed on specificity when personal data is involved, the regulation therefore requires that the scope of its application be clarified. This clarification is to be made by the Parliament.

**60 Years German Basic Law:
The German Constitution and its Court**

Moreover it must be ensured that the G 10 Commission, in view of the fact that the Fight against Crime Act has considerably expanded the Federal Intelligence Service's monitoring activities, is provided with the staff needed to effectively fulfil its mission. Moreover, it must be ensured that sufficient control exists also in the administrative sector on the level of the Länder (Federal states) level, as far as the data obtained by eliminating telecommunication privacy is transferred to Land (Federal state) authorities pursuant s. 3.5 of the G 10 Act.

XII.

To the extent that this judgement obliges the parliament to create consistency with the Basic Law, its time limit for doing so is 30 June 2001.

In the meantime, s. 3.1 sentence 2 no. 5 of the G 10 Act may only be applied if counterfeiting committed abroad results in a threat to monetary stability in the Federal Republic of Germany. s. 3.3 (2) of the G 10 Act is to be applied with the limitation that the personal data contained in the Commission's report to the Federal government is marked and that it remains bound to the objectives that justified the collection of the data in the first place. s. 3.4 of the G 10 Act is to be applied with the limitation that the personal data may be marked and may not be used for other objectives than those specified in s. 3.1 of the G 10 Act. S. 3.5 (1) in conjunction with s. 3.3 (1) of the G 10 Act is applicable with the limitation that personal data may only be transferred in accordance with the prerequisites of the temporary injunction order issued on 5 July 1995, and that a record of the transfer is kept. In this respect, the Federal Constitutional Court refrains from changing the present state of the law again only for the short transition period until a new regulation is enacted, although this means that in this transition period, the parts of the regulation that the Parliament can enact again in the framework of a new regulation without violating the Basic Law may not be applied. If, on the contrary, the provision that has been declared unconstitutional were to remain applicable until the enactment of the new regulation, transfers of data would be possible that violate fundamental rights. In the oral argument, no evidence was provided that the temporary injunction order resulted in considerable detriment to the Federal Republic of Germany in the past. This aspect was the one that tipped the balance in the weighing of consequences. If the Parliament regards the state of the law that is valid in the transition period as hardly tolerable, it is the duty of the Parliament to change this state of the law by quickly enacting a new regulation.

S. 3.7 of the G 10 Act is to be applied with the limitation that the data must be marked. S. 3.8 (2) of the G 10 Act is applicable with the limitation that no utilisation of the data has taken place before it is deleted. s. 9.2 (3) of the G 10 Act is applicable with the limitation that the Commission's power to control also extends to measures pursuant to ss. 3.3, 3.5, 3.6 and 3.8 of the G 10 Act.

X. Freedom of Occupation - Article 12 of the Basic Law

a) *Pharmacy, BVerfGE 7, 377*

Explanatory Annotation

The “Pharmacy-decision” of the Constitutional Court is one of the early classics of the Court and a “must-know”-judgment for every law student in Germany. The reason for this is that the Court in this early (1958) decision set the standards for the occupational freedom protected in Article 12 of the Basic Law and also developed a detailed and somewhat specific three pronged proportionality test to be applied for any governmental authority impacting on this freedom of Article 12 of the Basic Law. It should also not be overlooked that the decision with its emphasis on individual freedom had a significant impact on the structure of the business world in Germany.

Until this judgment the operation of pharmacies in Germany, albeit being run as private businesses, required special authorization by the relevant authorities, which was only granted if the opening of a new pharmacy was deemed to be in the public interest, economically sound and with no negative impact on the economic soundness of neighbouring pharmacies. This was thought to be necessary so as to maintain a functioning network of pharmacies that were economically able to provide the level of service prescribed by law, for example pertaining to the stocking of a great number of medications at any given time.

The Court regarded this strictly needs-based and administratively-determined access quota to the occupation of a self-employed pharmacist as unconstitutional. It construed the freedom of occupation as a right, protecting the access to and free choice of an otherwise legal occupation and as a right protecting the exercise of this occupation. Article 12.1-2 of the Basic Law contains limitation language pertaining to the exercise or practice of an occupation only. On the basis of this the Court developed its famous three-pronged proportionality test. Government regulations of this exercise or practice, being authorized by the Basic Law, are on the lowest level and require only plausible reasoning and proportionality. Governmental restrictions on the access to a profession, however, must meet stricter proportionality standards. The Court differentiated subjective and objective access rules. Subjective access rules place a requirement on the person wishing to enter this profession such as passing a certain exam or possessing a certain qualification. It is in the hands of the person wishing to enter a profession so regulated to fulfil such subjective criteria. The test for these subjective access rules is a slightly stricter version of proportionality where the government must show that the subjective access rules are really necessary for an orderly exercise of the profession. The most serious interference is created by objective access rules, i.e. governmental regulation that places conditions on access to a profession, which cannot be fulfilled by the person seeking entry. Access quotas would be a good example or the specific access rules of economic soundness and non-interference with neighbouring businesses, as was the case in this decision. Such objective access rules can only be justified if they serve to protect against grave and real risks to an eminently important public interest. In the case at issue, the eminently important public interest was public health and the protection of functioning pharmacies as part of the public health protection system. The Court, however, did not accept that the objective restriction to the profession of self-employed pharmacist was necessary to achieve this goal.

**60 Years German Basic Law:
The German Constitution and its Court**

The decision did have significant impact in the economic sector. However, not all professions are always measured by the same yardstick. The exclusive and legally very interesting institution of the German notary⁵⁵, for example, still today has many parallels with the pre 1958 pharmacist's situation. However, more than 50 years later the objective restrictions in some parts of Germany still stand.

Translation of the Pharmacy Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 7, 377*

Headnotes:

1. Article 12.1 of the Basic Law (Grundgesetz - GG) does not proclaim free enterprise to be an objective principle of the social and economic order, but guarantees the fundamental right of the individual to engage in any legal activity as an occupation or profession even if that activity does not correspond to a traditionally or legally defined "occupational profile".
2. The term "occupation or profession" in Article 12.1 of the Basic Law also includes in principle those activities that are reserved to the state as well as "governmentally regulated" occupations and professions. However, Article 33 of the Basic Law provides and permits a wide range of special conditions for occupations and professions that qualify as "public services".
3. If an activity can be exercised in the form of self-employment or non-self-employment and both forms of employment are of equal social weight, the choice of the one or the other of the two forms of occupational or professional activity and the transition from one to the other then constitutes a choice of occupation or profession within the meaning of Article 12.1 of the Basic Law.
4. The content and scope of the regulatory power of the legislature under Article 12.1 sentence 2 of the Basic Law can be determined rather objectively simply on the basis of an interpretation that takes into account the purpose of the fundamental right and its importance in the context of society; reference to the provision governing restriction of the essence of the fundamental rights (Article 19.2 of the Basic Law) is then not necessary.
5. The regulatory power alluded to in Article 12.1 sentence 2 of the Basic Law covers both the exercise and choice of an occupation or profession, but not to the same extent. This power pertains to the practice of occupations and professions and may only under that

55 There are historically three principal models for notaries in Germany. The "Prussian" model prevalent mainly in northern Germany works with subjective access rules and is hence in principle open to any lawyer. The "Bavarian" model works with objective access restrictions by allowing only for a certain number of notaries per notary district. Finally there is also the institution of the public notary as a civil servant in some pockets of southwestern Germany.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

aspect also encroach upon the freedom to choose an occupation or profession. As far as substantive content is concerned, the more the exercise of an occupation or profession is involved, the greater the latitude; the more the choice of an occupation or profession is involved, the less.

6. The fundamental right is intended to protect the freedom of the individual and the reservation of regulatory power is intended to ensure adequate protection of public interests. As regards encroachment by the legislature, the necessity of doing justice to both requirements entails making distinctions, for example, on the basis of the following principles:
 - a) The freedom to practice an occupation or profession may be restricted if reasonable considerations of public interest would seem to warrant such restriction; the protection afforded by the fundamental right is limited to a defense against requirements of law that are unconstitutional because they represent an excessive burden and are unreasonable.
 - b) The freedom to choose an occupation or profession may be restricted only insofar as compellingly required to protect especially important public interests. If such encroachment is unavoidable, the legislature must consistently choose that form of encroachment that limits the fundamental right the least.
 - c) In the case of the encroachment upon the freedom to choose an occupation or profession through the imposition of specific conditions for commencement of the practice of an occupation or profession, it is necessary to distinguish between subjective and objective prerequisites: in the case of subjective prerequisites (in particular education and training), the principle of proportionality applies in the sense that the prerequisites may not be disproportionate to their intended purpose, which is to ensure that the occupational activity is properly exercised. The standard of proof for the necessity of objective prerequisites for admission to practice must be especially stringent; in general, such measures can be justified only if required to avert dangers to a public interest of overriding importance that have been demonstrated to exist or are extremely likely to occur.
 - d) Regulations permitted by Article 12.1 sentence 2 of the Basic Law must consistently be implemented at the “level” that entails the least encroachment upon the freedom to choose an occupation or profession; the legislature may not move to the next “level” until it can be demonstrated with a high degree of certainty that the feared dangers cannot be effectively averted through (constitutional) means at the lower “level”.
7. The Federal Constitutional Court must establish whether the legislature has respected the restrictions on its regulatory power that follows from the above; when the freedom to choose an occupation or profession is encroached upon by objective prerequisites for admission to practice, the Court may also establish whether this specific form of encroachment is compellingly required to protect a public interest of overriding importance.

**60 Years German Basic Law:
The German Constitution and its Court**

8. In the area of law pertaining to pharmacies, only the freedom of establishment, which is understood to mean the absence of an objective restriction of admission to practice, is currently consistent with the Basic Law.

Order of the First Senate of 11 June 1958 - 1 BvR 596/56 -

Facts:

The complainant had been a licensed pharmacist since 1940; in 1956, he applied for issuance of an operating permit for the purposes of opening a pharmacy in the municipality of Traun-reut in Upper Bavaria. The application was rejected on the basis of the Bavarian Pharmacy Act (Bayerisches Apothekengesetz - BayApothekenG), which in its then current version required that a permit be obtained to operate a pharmacy. In order for an operating permit to be issued, the applicant had to be in any case licensed, be a German citizen within the meaning of Article 116 of the Basic Law, have been active as a licensed pharmacist for a certain period of time and be personally reliable and suitable. In addition, Article 3.1 of the Pharmacy Act required as conditions for issuance of an operating permit

- “a) that the establishment of the pharmacy for the purposes for ensuring provision of the population with pharmaceuticals lie in the public interest and
- b) that it be possible to assume that its economic base is secure and that it will not compromise the economic base of the neighbouring pharmacy to such an extent that the prerequisites for the proper operation of that pharmacy are no longer guaranteed.”

The authority gave as the reason for its refusal to issue the operating permit that the needs of the local population were completely covered by the pharmacy already established in the municipality. The authority claimed that the establishment of the pharmacy did therefore not lie in the public interest (Article 3.1.a of the Pharmacy Act). In addition, it was stated, the economic base of the new pharmacy would not be secured and that of the existing pharmacy also threatened (Article 3.1.b of the Pharmacy Act).

The constitutional complaint challenging the negative decisions of the authority and, indirectly, Article 3.1 of the Pharmacy Act was successful.

Extract from the Grounds:

...

B. IV.

The question as to whether Article 3.1 of the Pharmacy Act is compatible with Article 12.1 of the Basic Law requires consideration of various fundamental aspects in respect of the importance of this provision of the Basic Law.

1. Article 12.1 protects the freedom of citizens in an area that is especially important to a modern society based on the division of labour: it guarantees individuals the right to pursue any activity for which they consider themselves suitable as an “occupation or profession,” i.e., as the basis for their conduct of life. It involves a fundamental right, and not - as, for example, in

Selected Fundamental Decisions of the Federal Constitutional Court

Article 151.3 of the Weimar Constitution (Weimarer Verfassung - WV) - a proclamation of “free enterprise” as an objective principle of the social and economic order. Individuals are guaranteed more than the freedom to operate their own business. The purpose of the fundamental right is indeed to protect economically meaningful work, but such work is also viewed as an “occupation or profession”, i.e., in its relationship to the overall personality of human beings, which is fully formed and completed only through the fact that human beings devote themselves to activities that constitute their life’s work and the basis for their lives and through which they at the same time contribute to the total social product. The fundamental right thus assumes importance for all social classes; as an “occupation or profession,” work has the same value and the same dignity for everyone.

2. When the fundamental right is viewed in this light, a broad definition of the term “occupation or profession” is called for. It encompasses not only all occupations and professions that can be described in terms of specific “occupational profiles” that are defined by custom or law, but also atypical (admissible) activities freely chosen by individuals that may in turn also result in the establishment of new occupational profiles (In principle also BVerwGE 2, 89 [92]; 4, 250 [254-255]).

Occupations and professions involving activities that must, because of current notions as regards the organization of the community be reserved primarily to the state, are also covered by Article 12.1, in any case in the sense that they may also be freely chosen as occupations or professions by individuals and no one may be forced to choose them or prohibited from doing so. There is no reason to assume that the fundamental right does not “because of its nature” apply to such occupations and professions, as did the Federal Administrative Court (Bundesverwaltungsgericht) (BVerwGE 2, 85 [86]; 4, 250 [254]). However, Article 33 of the Basic Law contains and permits extensive special provisions for all occupations that represent “public services”. They stem from the nature of the situation; the number of employment positions (and therefore in extreme cases under certain circumstances the actual impossibility of choosing the occupation for certain individuals) is in this case determined exclusively by the organizational powers (in the broadest sense) of the respective public law entity involved. The degree of freedom for individuals to choose an occupation or profession that therefore results is guaranteed by equal eligibility for all public offices for those who are equally qualified (Article 33.2 of the Basic Law).

“Governmentally regulated” occupations are possible and exist in many forms. They are also covered by Article 12.1. The answer to the question as to where such occupations should be situated between “free” professions, which are subject to certain regulatory requirements, and occupations that are completely integrated directly into the organization of the state will depend upon the nature and importance of the public functions to be fulfilled. The closer an occupation or profession is to “public service” due to regulatory controls and requirements, the greater the possibility that special provisions may in fact roll back the effect of the fundamental right contained in Article 12.1 by virtue of Article 33 of the Basic Law. The operating latitude of the legislature need not be examined more closely here since the Bavarian provision is consistent with the general situation as regards pharmacies in Germany (see BVerfGE 5, 25) - and despite certain regulatory requirements is in terms of its structure a provision that governs trade or business activity.

**60 Years German Basic Law:
The German Constitution and its Court**

Article 12.1 makes no distinction between self-employment and non-self-employed professions; non-self-employment can also be chosen as an occupation or profession and this is in fact becoming increasingly common in modern society. If an activity can be exercised in the form of self-employment or non-self-employment and both forms of employment are of equal social weight, the choice of the one or the other of the two forms of occupational activity and the transition from one to the other then constitutes a choice of occupation or profession within the meaning of Article 12.1 of the Basic Law. This applies to the profession of pharmacists; self-employed pharmacists operate enterprises that constitute the basis of their economic existence, and non-self-employed pharmacists work for such enterprises. The general public and the members of the profession themselves are of the opinion that various “occupations” exist within the “pharmacist” profession; membership in one is not merely a preparatory and transitional phase for entry into the other. It is therefore necessary in the end to concur with the Federal Administrative Court (BVerwGE 4, 167 [170]) that the transition from the activity of an employed pharmacist to that of a self-employed pharmacist constitutes an act of choosing an occupation that is covered by the protection of Article 12.1 sentence 1 of the Basic Law.

3. The decisive aspects of the content and scope of the regulatory power of the ordinary legislature under Article 12.1 sentence 2 can be inferred from the general importance of Article 12.1 as presented above.

- a) If free enterprise were the only principle that is constitutionally established in Article 12.1, it would have been only natural to implement this principle simply in connection with a general reservation of legislative power and guarantee free enterprise - as in the case of the Weimar Constitution - “pursuant to a law.” The legislature would then, to be sure, also be bound by the principle, but could make provision for exceptions that seem proper and desirable within the context of its general economic policy. In view of the complexity of the modern economy, this would likely mean the tendency that has already long been prevalent towards restriction of completely free enterprise that originated during the early liberal period would be more pronounced. It would not be possible to object to this on constitutional grounds.

The scope of discretion of the legislature becomes much narrower if one proceeds from the assumption that a real fundamental right of the individual citizen is involved here, that is also a fundamental right that in terms of the idea behind it is closely related to the development of human personality and which therefore is also in practical terms of paramount importance for the overall conduct of life of every individual - in contrast to those fundamental rights that serve only to protect against occasional isolated encroachments by public powers. In this case, effective protection of this fundamental right requires in principle that narrow limits be imposed on statutory encroachments.

It is of course necessary to note that legislative discretion may be restricted only when it deals with the protection of fundamental rights. The Basic Law is in terms of economic policy neutral in that the legislature may pursue any economic policy it considers proper as long as it respects the Basic Law and in particular the fundamental rights (BVerfGE 4, 7 [17-18]). A statute enacted under Article 12.1 sentence 2 may therefore also not be objected to on constitutional grounds because it happens to

**Selected Fundamental Decisions of
the Federal Constitutional Court**

conflict with the rest of governmental economic policy or because it is not consistent with a specific economic doctrine underlying such general economic policy and of course even less so if the judge does not approve of the interpretation of economic policy manifested in that statute.

The legislature is subject to limitations only where they must be imposed on the basis of the fundamental right, i.e., on the basis of the correct interpretation thereof. The practical difficulty lies in the reconciliation of the freedom of discretion of the legislature that must be preserved in the area of economic, social and employment policy with the protection of the freedom to which, especially as regards the legislature, each individual also has a constitutional right.

- b) If the regulatory possibilities of the legislature in the area protected by the fundamental right are examined on the basis of the definition contained in the Basic Law itself, the wording of Article 12.1 could be construed to indicate that the practice of an occupation or profession is subject to statutory regulation whereas the choice of an occupation or profession is completely beyond the reach of such regulation. This can, however, not be the intent of this provision. For it is not possible to separate the terms “choice” and “practice” when used in respect of an occupation or profession so that each refers only to a specific temporal phase of occupational or professional life that does not coincide with the other; indeed, the commencement of an occupational or professional activity represents not only the beginning of the practice of an occupation or profession, but also the choice of an occupation or profession, which is manifested precisely in the commencement of such activity - and frequently only therein; likewise, the intention of remaining in an occupation or profession that is expressed in the ongoing exercise of that activity and finally voluntary termination of such occupational or professional activity are basically at the same time acts of choice. The two terms describe the same complex of “occupational or professional activity” from different perspectives (Similarly Klein-v. Mangoldt note IV 2 [370 et seq.] on Article 12 following *Über Freiheit des Berufs*, Hamburg 1952).

As a result, an interpretation that would prohibit absolutely every form of encroachment upon the freedom to choose an occupation or profession on the part of the legislature cannot be correct; it would not correspond to the reality of life and would therefore also not yield lucid conclusions as regards the legal issues involved. Furthermore, a provision of law that would seem to regulate primarily the practice of an occupation or profession is in principle admissible even if it has an indirect effect on the freedom to choose an occupation or profession. This occurs especially when conditions are established for the assumption of an occupational or professional activity, i.e., the commencement of the practice of an occupation or profession, in other words when commencement of the practice of an occupation or profession is made contingent upon admission. Article 74 no. 19, which justifies the authority to regulate “admission” to certain occupations and professions, shows that it was not intended to have the Basic Law exclude absolutely all admission requirements. The historical development also shows the intention was to avoid authority to restrict admission in principle, but that there was on the other hand no intention of declaring the numerous existing restrictions

**60 Years German Basic Law:
The German Constitution and its Court**

on admission inadmissible in general (Member of the *Bundestag* v. Mangoldt at the 5th and 23rd sessions of the Committee for Policy Issues [*Ausschuss für Grundsatzfragen*] on 29 September and 19 November 1948).

The framers of the Basic Law did not in this case, however, completely succeed in objective and terminological resolution of the issues involved; they ultimately chose a formulation that derives from the distinction commonly made between “choice” and “practice” in legislation governing trade or business and otherwise deliberately left regulation “largely” to the legislature (see *Jahrb. d. öff. Rechts* [new version] vol. 1 pp. 134, 136).

It is for the most part assumed in the case law and scholarly literature that the regulatory power pursuant to Article 12.1 sentence 2 of the Basic Law pertains to the practice and choice of occupation and professions in the sense elaborated above (see, for example, Hamel DVBl. 1958 p. 37 and the documentation indicated therein); for both the Federal Court of Justice (Bundesgerichtshof) and the Federal Administrative Court are of the opinion that the legislature may make the practice of certain occupations and professions subject to permission - in the form of “admission” - and require fulfilment of certain specific conditions for the issuance of such permission see, for example, BVerwGE 4, 167 [169]; 4, 250 [255]; German Federal Court of Justice in the opinions, “Decisions of the Federal Court of Justice in Criminal Cases” (*Entscheidungen des Bundesgerichtshofes in Strafsachen* - BGHSt). 4, 385 [391]; 7, 394 [399]).

In that respect Article 12.1 is a uniform fundamental right (to “occupational freedom”), in any case in the sense that the reservation of regulatory power in sentence 2 covers “in principle” both the practice and the choice of occupations or professions. This does not mean, however, that the powers of the legislature as regards each of these two “phases” of occupational or professional activity are equally extensive in terms of their substantive content. For the intention of the Basic Law, which is clearly expressed by the wording of Article 12.1, is to guarantee the “free” choice of an occupation or profession, while permitting regulation of practice, and this must always be respected. This can follow only from an interpretation based on the assumption that the regulatory power does not apply to both “phases” with the same objective intensity; in fact, the more the legislature encroaches upon the freedom to choose an occupation or profession, the less latitude it enjoys. This interpretation is also consistent with the basic concepts embodied in the Basic Law and the underlying image of man (BVerfGE 2, 1 [12]; 4, 7 [15-16]; 6, 32 [40]). The choice of an occupation or profession constitutes an act of self-determination and a decision based on the free will of the individual; it must remain to the greatest extent possible free from encroachment by the public powers. Individuals have a direct effect on society when they practice an occupation or profession; they may therefore in this regard be subjected to restrictions in the interest of other individuals and society as a whole.

To summarize: the regulatory power covers both the practice and choice of occupations and professions. However, this power exists in respect of the practice of an occupation or profession and may only under that aspect also encroach upon the freedom of

**Selected Fundamental Decisions of
the Federal Constitutional Court**

choice of an occupation or profession. As far as substantive content is concerned, the more the exercise of an occupation or profession is involved, the greater the latitude; the more the choice of an occupation or profession is involved, the less, it is.

- c) In respect of the substantive content of the regulatory power that is described in such general terms as regards its purview, it is first necessary to clarify the meaning of the term “regulate,” in particular in connection with the freedom to choose an occupation or profession. It cannot mean that the legislature has on the whole broader latitude for discretionary judgment than that otherwise allowed by a general reservation of legislative power and may regulate the entire area of employment law to a greater extent, thereby constitutively establishing the substantive content of the fundamental right in the first place (according to Scheuner, *Handwerksordnung und Berufsfreiheit* [reprint from “*Deutsches Handwerksblatt*”], 1956, for example, pp. 21, 27-28, 31, and Ipsen, *Apothekenerrichtung und Article 12 GG*, 1957, pp. 41-42).

If such an opinion were to prevail, the fundamental right would be debased since its substantive content would be left entirely to the discretion of the legislature although the legislature itself is bound by the fundamental right (Article 1.3 of the Basic Law). This would not be in keeping with the importance of precisely this fundamental right, would hardly be consistent with the specific (pleonastic) emphasis on the “free” choice of occupation or profession in Article 12.1 and would also be incompatible with the general tenor of the section on fundamental rights, which as the Federal Constitutional Court set forth in its decision of 16 January 1957 (BVerfGE 6, 32 [40-41]) no longer recognizes “empty” fundamental rights in the former sense. Moreover, when the legislature operates in the area protected by fundamental rights, the principle elaborated in the decision of 15 January 1958 (BVerfGE 7, 198 [208-209]) to the effect that the legislature must take as the basis for its regulatory acts the importance of the fundamental right within the social order also applies here. The legislature does not freely determine the substantive content of the fundamental right, but, rather, a substantive limit to legislative discretion may follow from the substantive content of the fundamental right. A clear substantive value based decision of the Basic Law for a concrete important area of life also exists in Article 12.1; the legislature does not therefore enjoy as much freedom in this case as, for example, in the case of application of the general equality provision, which represents a principle of law that applies to the public powers in general and the concrete substantive content of which remains to be established by the legislature for specific life situations on the basis of the relevant applicable aspects of justice.

On the other hand, “regulate” does not mean that the legislature may not restrict the fundamental right in any way. In principle, every regulation also involves making limits visible. But the obviously deliberate use of the term “regulate” by the framers of the Basic Law instead of “restrict,” which is otherwise usual in the provisions governing fundamental rights, indicates that more specific prescription of the limits from within is meant, i.e., of the limits inherent in the nature of the fundamental right itself rather than limits through which the legislature itself might determine the substantive content of the fundamental right, namely, by narrowing the natural sphere of operation based on rational interpretation from without.

**60 Years German Basic Law:
The German Constitution and its Court**

- d) The fundamental right is intended to protect the freedom of the individual and the reservation of regulatory power is intended to ensure adequate protection of public interests. As was shown, the more the individual's right to freely choose an occupation or profession is called into question, the stronger is the effect of the individual's right to freedom; the greater the disadvantages and dangers that could arise for the public from complete freedom as regards the exercise of an occupation or profession, the more urgent is the need to protect the public interest. If an attempt is made to do justice in the most effective manner possible to both of these requirements, which are equally legitimate in a social constitutional state, a solution can be found only by carefully balancing the importance of the respective opposing and possibly even conflicting interests. Assuming at the same time that the free human personality is the supreme value from the overall perspective of the Basic Law and that it must therefore also be afforded maximum freedom as regards the choice of an occupation or profession, it then follows that this freedom may be restricted only insofar as is absolutely necessary in the public interest.

Accordingly, the Basic Law requires that certain distinctions be made in the case of encroachment on the part of the legislature on the basis of principles that may be summarized as described below:

The freedom to practice an occupation or profession may be restricted by way of "regulation" if reasonable considerations of public interest would seem to warrant such restriction. The freedom to choose an occupation or profession may on the other hand be restricted only insofar as compellingly required to protect especially important ("overriding") public interests, i.e.: insofar as such protection involves interests that after careful consideration must be accorded precedence over the individual's right to freedom and insofar as such protection cannot be ensured otherwise, namely, through means that restrict the freedom of choice of occupation or profession either not at all or less so. In the event that such encroachment upon the freedom to choose an occupation or profession is unavoidable, the legislature must consistently choose that form of encroachment that least restricts the fundamental right.

Several "levels" as it were exist as regards the scope of regulatory power:

the legislature has most freedom when it regulates only the practice of an occupation or profession without affecting the freedom to choose that occupation or profession and furthermore only specifies in detail the nature and manner in which the members of an occupation or profession must conduct their occupational or professional activities. Considerable latitude exists here for taking into account aspects of a practical nature; such aspects serve to determine what conditions members of an occupation or profession must meet in order to avert disadvantages and dangers to the general public. The desire to promote an occupation or profession and thereby increase the total social product of its members may also justify certain provisions that restrict the freedom to practice an occupation or profession. The protection afforded by the fundamental right is therefore limited to a defense against requirements of law that are unconstitutional because they represent an excessive burden and are unreasonable; apart from these

Selected Fundamental Decisions of the Federal Constitutional Court

exceptions, the impairment of freedom of occupation or profession at issue here does not excessively affect those protected by this basic right since they are already in practice and their license to practice is not affected.

On the other hand, a regulation that makes commencement of the practice of an occupational or professional activity dependent upon fulfilment of specific conditions and thereby affecting the freedom of choice of occupation or profession, can be justified only insofar as it is intended to protect an overriding public interest that takes precedence over the freedom of the individual. In this context, it obviously makes an important difference - which has also long been emphasized in the case law and the scholarly literature (see Scheuner *op. cit.* p. 25 and documentation cited) - whether “subjective” prerequisites for admission to practice are involved, especially as regards education and training, or objective conditions that have nothing to do with personal qualifications and are beyond the control of the candidate.

The regulation of subjective prerequisites for commencement of the practice of an occupation or profession is inherent to the legal order governing that occupation or profession; it allows only candidates who meet certain qualifications, most of which are certainly of a formal nature, access to an occupation or profession. Such restriction is legitimate due to the nature of the matter at issue; it is based on the fact that many occupations and professions require specific technical knowledge and skills (in the widest sense of the term) that can be acquired only through theoretical and practical training and that the exercise or proper exercise of such occupations and professions without such knowledge would be impossible or inappropriate or, indeed, would entail dangers for the general public. The legislature only renders concrete and “formalizes” this exigency, which follows from a given life situation; that which is expected of the individual in the form of mandatory formal training is only something that such an individual would in principle actually have to accept anyway by reason of the matter involved in order to exercise the occupation or profession properly. This restriction of freedom therefore represents an adequate means for avoidance of potential disadvantages and dangers; it is also not unreasonable since it applies equally to all candidates for the occupation or profession and is known to them beforehand, which means that each individual can judge prior to choosing an occupation or profession whether he or she will be able to fulfil the required conditions. In this case, the principle of proportionality applies in the sense that the mandatory subjective prerequisites may not be disproportionate to their intended purpose, which is to ensure the proper exercise of the occupational or professional activity.

The situation is different when objective conditions must be met for admission to an occupation or profession. Fulfilment of such conditions is completely beyond the control of the individual. They run absolutely counter to the spirit of the fundamental right since even those who have already in fact chosen and were allowed to choose an occupation or profession through fulfilment of all required conditions may still be excluded from admission to the respective occupation or profession. The longer and more specialized the education and training, i.e., the more obviously the choice of such training also represents a choice of a specific occupation or profession, the more

**60 Years German Basic Law:
The German Constitution and its Court**

important this restriction of freedom becomes and accordingly the more serious its effect. Since the immediate disadvantages for the general public that result from the practice of an occupation or profession by professionally and morally qualified candidates are also not readily obvious, it is often not possible to clearly demonstrate the existence of a causal relationship between this restriction of the freedom of choice of occupation or profession and the desired effect. The danger that irrelevant motives may become involved is therefore especially great; in particular, it is only natural to suspect that the restriction of access to an occupation or profession is intended to protect those already in practice from competition, could be a motive that is generally felt could never justify encroachment upon the freedom to choose an occupation or profession. Apart from a possible conflict with the principle of equality, it is possible to violate an individual's right to freedom in an especially egregious manner through the choice of this most primitive and most radical means of excluding candidates who are (presumptively) professionally and morally completely suitable. It follows from this that the necessity of such a restriction of freedom must meet especially stringent standards of proof; in general, such encroachment upon the freedom of choice of an occupation or profession is legitimate only if required to avert dangers to a public interest of overriding importance that have been demonstrated to exist or are extremely likely to occur; the desire to promote other public interests or preservation of the social prestige of an occupation or profession through limitation of the number of members does not suffice even if such goals would otherwise justify legislative action.

The legislature must implement regulations permitted under Article 12.1 sentence 2 at the "level" that entails the least encroachment upon the freedom to choose an occupation or profession and may proceed to the next "level" only when it can be proven with a high degree of probability that the feared dangers cannot be effectively combated with (constitutional) means at the preceding lower "level."

4. The Federal Court of Justice and the Federal Administrative Court also want to limit the legislature's freedom to establish objective conditions for admission by statute; however, they infer these limits exclusively from the provision contained in Article 19.2 of the Basic Law although they are not in agreement as regards the interpretation thereof (see Hamel DVBl. 1958 pp. 37 [38] and the documentation cited therein).

Viewed from the position taken here, the questions as to whether the prohibition of infringement of the substantive content of the fundamental rights would result in the imposition of further limits on the regulatory power of the legislature under Article 12.1 sentence 2 and what they might be like in detail can be ignored. For it follows from the above that an interpretation that takes into account the purpose of the fundamental right and its importance in the context of social life leads to an appropriate restriction of the regulatory power of the legislature.

5. The restrictions of regulatory power that follow from consideration of the fundamental right are substantive constitutional commandments that are directed primarily at the legislature itself. However, the Federal Constitutional Court monitors compliance with these commandments. When a restriction of the freedom of choice of occupation or profession at the "last level" (that of objective conditions for admission) is at issue, the Federal Constitutional Court must therefore

**Selected Fundamental Decisions of
the Federal Constitutional Court**

initially determine whether an overriding public interest is threatened and whether the provision of law can even serve to avert this danger in the first place. The Court must, however, also determine whether precisely this specific form of encroachment is compellingly required to protect that interest, in other words, whether the legislature could not have provided this protection through regulation at a preceding level.

It has been objected that review in the latter direction exceeds the authority of a court: it is argued that a court cannot appreciate whether a specific legislative measure is appropriate since it cannot know whether other equally effective means exist and whether they are amenable to implementation by the legislature and that this can be determined only if all life circumstances to be regulated are known, including political possibilities of legislation. This position, which its advocates would primarily for practical considerations use to impose narrow limits on the powers of review of the Federal Constitutional Court, is occasionally supported in theory by asserting that the Court would encroach upon the sphere of the legislature and thereby violate the principle of the separation of powers by claiming such extensive powers of review.

The Federal Constitutional Court cannot concur in this view.

The Court is charged with protecting the fundamental rights against the legislature. When limits upon the legislature follow from the interpretation of a fundamental right, the Court must be able to oversee compliance with such limits; it may not evade this responsibility if it wants to avoid invalidating the fundamental rights to a great extent in practice and depriving the function assigned to it by the Basic Law of its actual purpose.

The requirement that is often set forth in this context to the effect that the legislature must be free to choose from among several equally suitable means would fail to address the specific problem that is at issue here. It refers to the (usual) case of a fundamental right that involves no areas of protection that contain multiple levels (as, for example, in BVerfGE 2, 266). In this case, the legislature may, however, freely choose - within certain limits - among several equally suitable legal measures since they all pertain to the uniform substantive content of the same fundamental right without multiple levels. However, when dealing with a fundamental right that embodies areas of lesser and greater protection of a freedom, it must then in any case be possible for the Federal Constitutional Court to verify whether the prerequisites for a regulatory measure exist at the level at which that freedom enjoys the greatest protection, in other words, it must be possible to establish whether legislative measures at the preceding levels would not have sufficed, i.e., whether the actual encroachment was "compellingly required." If the legislature were to be allowed to freely choose from among "equally suitable means" that belong to different levels, this could in practice have for effect that precisely those forms of encroachment that restrict the fundamental right most severely, which are especially suitable for achieving the desired end due to their drastic effect, would be chosen most frequently and then have to be accepted without review. Effective protection of precisely that area of freedom that Article 12.1 of the Basic Law is intended to protect most sustainably would then no longer be ensured. ...

Since, therefore, the courts have already considered up to now that it is legally required and in fact possible in the interest of protection of the freedom of the citizenry to review laws under certain circumstances to establish whether they are necessary, it is even less possible to remove such powers of review from the purview of the Federal Constitutional Court; for the

**60 Years German Basic Law:
The German Constitution and its Court**

Court is entrusted with the protection of fundamental rights precisely against encroachment by the legislature - in particular through the institution of the constitutional complaint - and is by virtue of its general standing as a constitutional body and court for constitutional issues much less susceptible than other courts to reproach for unjustified encroachment upon the legislative sphere.

(The Federal Constitutional Court applies these standards to Article 3.1 of the Bavarian Pharmacy Act below, assuming that the intent and purpose of the provision is to maintain the health of the pharmacy profession and thereby at the same time serve the health needs of the population. In so doing, the Court then finds that the legislature has not yet availed itself of more lenient possibilities for encroachment at the level of the practice of the profession to protect against the risk that could possibly arise from the manufacture and distribution of pharmaceuticals.

The Court then concludes as follows:

6. The above references to possible legislative measures are not to be construed to mean that the Federal Constitutional Court would like to make general legislative recommendations to the legislature; that is not its responsibility. It was only to do justice to its responsibility to ensure the most effective protection possible for fundamental rights that the Court was compelled to find that restriction to the narrowest area of protection afforded by the fundamental right to freely choose an occupation or profession may be contemplated only when the dangers to be averted cannot be prevented or attenuated by other regulatory measures that might be reasonably considered and do not restrict the fundamental right either at all or to the same extent. This finding would seem all the more necessary since the radical expedient of restrictive admission lies in the German tradition (see on this Urdang-Dieckmann op. cit. pp. 63-64) in the area of law pertaining to pharmacies although, as was shown, it follows from Article 12.1 of the Basic Law that it is first necessary to exhaust other legislative possibilities.

It is of course left to the legislature to decide whether to take the measures alluded to, which of them to choose and in what order to implement them. The Court has limited itself to the mention of such measures as are already under public discussion (at least among experts) and have already to some extent even been implemented or in any case would seem amenable to implementation in consideration of the overall situation.

Since legislative powers in this area reside to some extent with the *Länder* and are to some extent shared by both the Federation and the *Länder*, the Bavarian legislature could of course not, for example, claim that the possibilities alluded to here could provide an effective remedy only if the Federation were to make use of its legislative powers, but that the Land legislature is not obliged to encroach any further upon the area of the fundamental right in the absence of any such initiative on the part of the Federation. Such a suggestion would not be admissible in respect of the fundamental right of occupational freedom. Article 12.1 of the Basic Law makes no distinction between Federal and Land law in respect of statutory regulation of the practice of occupations or professions. The fundamental right under Federal constitutional law is universally

**Selected Fundamental Decisions of
the Federal Constitutional Court**

applicable and as such enjoys equal protection under Federal law and that of the *Länder*. The Federation and the *Länder* may not permit more serious encroachment upon the fundamental right by invoking their lack of legislative authority in respect of any given measure. Instead, in matters involving the protection of the fundamental rights of citizens, who after all are subject to both Federal law as well as Land law, the legislatures of the Federation and the *Länder* must accept treatment as a single entity. ...

b) Non-Smoker Protection, BVerfGE 121, 317

Explanatory Annotation

What has been a reality in many jurisdictions came relatively late to Germany - legislation regulating smoking in pubs, bars and restaurants. At issue in this decision of 2008 was legislation in the states of Baden-Württemberg and Berlin banning smoking in pubs. Exceptions were possible for certain types of establishments and the provision of separate smoking rooms was also possible. However, smoking was completely banned in discotheques because of the increased frequentation by younger people and the physical activities there, which were thought to increase the risk of passive smoking. These provisions were successfully challenged by a small 'one-room' publican who could not offer a separate non-smoking room and by operators of discotheques. The protective purposes of the regulations had to be balanced against the freedom of commercial activity guaranteed under Article 12 of the Basic Law. The Court did not deny that the legislator could indeed act on the increased health risks of passive smoking but saw a violation of the principle of proportionality because the legislation was inconsequential in the Court's view. The health risks involved either call for a total ban on smoking in pubs and restaurants and the legislator would have been free to impose such a complete ban or, if exceptions are provided for as was the case with the provisions at issue, they would have to take into account the special situation of 'one-room' smaller pubs as they are especially affected by the restrictions imposed. Whereas exceptions are not mandated by the Basic Law, once provided for, they must take into account and adequately reflect the protection of all interests involved, including specific commercial interests as brought forward by the applicants.

The Court, in other words, demanded systematic stringency. In this sense, the Court introduced an equal protection requirement into the proportionality test. If the legislator grants an exception for one group but not for another, this can have an effect on the outcome of the proportionality test and render the non-recognition of the interests of the disadvantaged group disproportional.

Translation of the Non-Smoker Protection Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 121, 317*

Headnotes:

1. If due to the scope for assessment, evaluation and action accorded to the legislature it decides in favour of a concept to protect non-smokers in food and drinking establishments seeking to balance health protection against, in particular, the occupational freedom of establishment operators, then exceptions to the ban on smoking must be drafted in such a way that they also cover certain groups of food and drinking establishments - in this case smaller establishments which primarily serve alcoholic beverages - in order to prevent such establishments from being exposed to an especially strong economic burden.
2. It is a violation of the principle of equality if the law allows smoking rooms in food and drinking establishments, but excludes discotheques from this privilege.

Judgment of the First Senate of 30 July 2008 - 1 BvR 3262/07 - / - 1 BvR 402/08 - / - 1 BvR 906/08 -

Facts:

The complainants are operators of food and drinking establishments and a discotheque in Baden-Württemberg and direct their complaints against provisions of Land law on the ban on smoking in food and drinking establishments.

The first and second complainants each operate single-room pubs. They allege that the ban on smoking has resulted in a drop in their turnover.

The first complainant alleges a violation of his fundamental rights under Article 12.1 and Article 14.1 of the Basic Law (Grundgesetz -GG). He alleges that s. 7 of the Non-Smoking Act of the Land Baden-Württemberg (Landesnichtraucherschutzgesetz - LNRSchG) is unconstitutional in that it bans smoking in single-room pubs in which a smokers' room cannot be established.

The second complainant alleges a violation of her fundamental rights under Article 12.1, Article 3.1, Article 2.1, Article 1.1 and Article 14.1 of the Basic Law. S. 2.1 no. 8 in conjunction with s. 4.3, s. 6.2, s. 7.2 of the of the Non-Smoking Act of the Land Berlin (Landesnichtraucherschutzgesetz - LNRSchG) are unconstitutional insofar as a ban on smoking applies to owner-operated single-room pubs, while at the same time smokers may under certain conditions be served food and drink in pubs with two or more rooms.

The third complainant operates a large discotheque. He submits that the challenged provision of Land law violates its fundamental right under Article 12.1 in conjunction with Article 3.1 of the Basic Law. s. 7 of the Non-Smoking Act of the Land BadenWürttemberg is unconstitutional in that it imposes a complete ban on smoking in discotheques.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

Selected Fundamental Decisions of
the Federal Constitutional Court

Extract from the Grounds:

B.

The constitutional complaints are admissible and founded.

I.

1. The ban on smoking in food and drinking establishments in s. 7.1 sentence 1 of the Non-Smoking Act of the Land Baden-Württemberg violates the first complainant's fundamental right to the free pursuit of his occupation (Article 12.1 of the Basic Law). The same applies in the case of the second complainant in view of the ban on smoking pursuant to s. 2.1 no. 8 of the Non-Smoking Act of the Land Berlin. A ban on smoking in food and drinking establishments is to be sure not as such incompatible with the Basic Law. However, a violation of the Basic Law does result from the fact that Land legislatures took no measures in the formulations of the protection of non-smokers they chose that, taken as a whole, also seem reasonable when the special burden upon a specific class of operators of food and drinking establishments are taken into account.

- a) Although the ban on smoking in food and drinking establishments is primarily directed at patrons, it also encroaches on the protected area of freedom of occupation of operators of such establishments. The ban on smoking on the other hand is not to be measured against the standard of the guarantee of property (Article 14.1 of the Basic Law).

...

- aa) The freedom to pursue a profession or occupation enjoys comprehensive protection under Article 12.1 of the Basic Law (see BVerfGE 85, 248 [256]).

This protection also extends to the right of individuals to determine the nature and quality of goods and services they offer on the market (see BVerfGE 106, 275 [299]). and as a result their right to choose freely their target audiences. Under this aspect, the ban on smoking restricts the freedom of operators of food and drinking establishments to pursue their occupation.

The ban on smoking in food and drinking establishments as regulated in the present cases by s. 7.1 sentence 1 of the Non-Smoking Act of the Land Baden-Württemberg and s. 2.1 no. 8 of the Non-Smoking Act of the Land Berlin deprives operators of food and drinking establishments of the possibility of determining themselves whether to allow patrons to smoke in their establishments or to prohibit them from doing so. As a result, operators of food and drinking establishments may decide whether they also want to offer the services and prestations of their establishment to patrons who would like to accept that offer in combination with the possibility of smoking only in exceptional cases provided for by law. It is not only made more difficult for operators of food and drinking establishments to proffer their offerings to smokers, but they are as a rule prevented from performing services, i.e., serving food and drink, for patrons who do not want to abstain from smoking in food and drinking establishments.

**60 Years German Basic Law:
The German Constitution and its Court**

- bb) This restriction on occupational activity is not merely the result of a ban directed at smokers, but represents direct encroachment on the freedom of operators of food and drinking establishments to pursue their occupation. It follows from the logic behind the legal statutes governing the ban on smoking in food and drinking establishments that these provisions also prohibit operators of food and drinking establishments from offering their services and prestations to those of their patrons who smoke, for the non-smoking laws under challenge combine the ban on smoking directed at patrons of food and drinking establishments with a duty on the part of the operators of such establishments to obviate violation of this ban and to prevent further violations (s. 8.2 sentence 1 in conjunction with s. 8.1 sentence 1 and 3 of the Non-Smoking Act of the Land Baden-Württemberg; s. 6.1 no. 2 in conjunction with s. 6.2 of the Non-Smoking Act of the Land Berlin).
- b) In order to be able to withstand scrutiny against the guarantee of the freedom of occupation (Article 12.1 of the Basic Law), any encroachment on the freedom to exercise an occupation or profession must have a legal basis that is sufficiently warranted for reasons of the public good (see BVerfGE 7, 377 [405 and 406]; 94, 372 [390]; 101, 331 [347]).

Restrictions of the freedom of occupation that are unavoidable for reasons of the public good must satisfy the requirement of proportionality (see BVerfGE 19, 330 [336 and 336]; 54, 301 [313]; 104, 357 [364]).

As a result, any encroachments must be suitable for achieving the respective purpose and may not exceed that which is required in the interest of the public good (see BVerfGE 101, 331 [347]; 104, 357 [364]). The means of encroachment may also not be excessively onerous (see BVerfGE 19, 330 [337]) so that the overall balance between the severity of such encroachment and the weight of the reasons for such encroachment still remains within the limits of the reasonable (see BVerfGE 103, 1 [10]; 106, 181 [192]).

The provisions under challenge in respect of the ban on smoking in food and drinking establishments do not satisfy these requirements in every respect. A legal basis is to be sure not lacking (aa); the bans are also based on legitimate purposes (bb); and the provisions are suitable and necessary for achievement of such purposes (cc). In the case of the formulations to be judged here, however, the ban on smoking results in an excessive burden upon a specific class of operators of food and drinking establishments that includes the first and second complainants (dd).

- aa) Only a duly enacted law can satisfy the requirements for a legal basis for encroachment on the freedom of occupation (Article 12.1 sentence 2 of the Basic Law) (see BVerfGE 98, 265 [298]; 102, 197 [213]). There can be no objection to the challenged provisions under this aspect.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- bb) With the ban on smoking in food and drinking establishments, the legislature is pursuing a goal in the public interest that is based upon reasonable considerations and may therefore in principle legitimate restriction of the freedom to exercise an occupation or profession.
- (1) Both laws cite as their purpose protection of the public against the health risks of passive smoking (see s. 1.1 sentence 2 of the Non-Smoking Act of the Land Baden-Württemberg; s. 1 of the Non-Smoking Act of the Land Berlin). Protection of the public against health risks ranks among the public interests of salient importance (see BVerfGE 7, 377 [414]) that can even justify objective prerequisites for admission to the practice of an occupation or profession and therefore all the more so restrictions on the exercise of an occupation or profession. The voluntary nature of the decision of individuals to expose themselves to the burden of tobacco smoke, in particular when visiting food and drinking establishments, does not render the issue of health protection obsolete. In any case as long no adequate possibilities exist for non-smokers to find smoke-free rooms in food and drinking establishments, such a decision will typically not be indicative of acceptance of the health risks of passive smoking, but only *de facto* unavoidable toleration of this risk in order to be able to participate without restriction in society by frequenting the food and drinking establishments of their choice.
- (2) There can be just as little objection on constitutional grounds to the fact that the Land legislatures considered passive smoking, i.e., environmental tobacco smoke (ETS), to constitute a risk to the health of the public and as a result took legislative action.

...

- cc) Laws against smoking in food and drinking establishments are suitable and necessary for protection against the health risks of passive smoking.

...

- (2) Since no other equally effective means is available that would restrict freedom of occupation to a lesser extent, laws against smoking are also necessary (see Drug and Addiction Report of the Commissioner for Narcotics of the Federal Government (*Drogen- und Suchtbericht der Drogenbeauftragten der Bundesregierung*), May 2008, p. 38).

There can in particular be no objections on constitutional grounds to the fact that the legislatures did not consider that obligating operators of food and drinking establishments to choose whether to operate their establishments as smoking or non-smoking establishments would be as equally effective as a law against smoking.

...

- dd) The provisions under challenge are, however, not proportionate in the narrower sense of the term, for they place an unreasonable burden on operators of smaller one-room establishments that serve primarily alcoholic beverages.

**60 Years German Basic Law:
The German Constitution and its Court**

- (1) If the legislature adopts laws that encroach on the freedom to pursue an occupation, the overall balance between the severity of the encroachment and the weight of the reasons for such encroachment must remain within the limits of what is reasonable (see BVerfGE 102, 197 [220]; 112, 255 [267]).
- (a) A ban on smoking in food and drinking establishments represents a serious encroachment on the right of operators of food and drinking establishments to freely pursue their occupation. Since operators of food and drinking establishments may no longer allow smoking on the premises of their establishments, they can reach the smokers among their potential patrons with their offerings, in particular food and drink, only with difficulty or, if the latter in no case want to abstain from smoking in food and drinking establishments, they can no longer reach them at all. Many smokers will, - at least temporarily - frequent food and drinking establishments less often or spend less time in such establishments since their stay will lose considerable appeal because of the ban on smoking. In view of the fact that smokers represent 33.9% of the adult population in Germany (see Drug and Addiction Report of the Commissioner for Narcotics of the Federal Government, May 2008, p. 38), this may, depending upon the orientation of the culinary offering and clientele appealed to by the offering, result in significant revenue shortfalls for the operators of food and drinking establishments. This is confirmed by a study of the Federal Statistical Office (Statistisches Bundesamt) according to which the revenue shortfall of food and drinking establishments - in particular those that concentrate on the sales of alcoholic beverages - was significantly greater in *Länder* with bans on smoking laws than in those *Länder* that still have no bans on smoking in food and drinking establishments (see Press Release of the Federal Statistical Office of 6 June 2008 - 207/08).

Even if reports from countries that have had no-smoking laws in force for a longer period of time to the effect that revenues recover or even improve are correct and this is also found to be the case in Germany, the operators of food and drinking establishments would have to accept lower revenues for a lengthier period of time until this development sets in. This alone can restrict or even make it necessary to shut down a business.

- (b) On the other hand, however, bans on smoking in food and drinking establishments serve public interests of salient importance. This applies first of all to protection of the health of the public, which is accorded considerable importance within the order of values of the Basic Law (see BVerfGE 110, 141 [163]). A duty to provide protection on the part of the state can therefore be inferred from Article 2.2 of the Basic Law, which includes preventive action against health risks (see BVerfGE 56, 54 [78]).

In view of the number of deaths that scientific findings have shown can be attributed to passive smoking, protection of human life is also involved. In that respect, the Basic Law also provides justification for a protective duty that requires that the state protect and foster the life of each individual (see BVerfGE 39, 1 [42]; 46, 160 [164]; 115, 118 [152]).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

There can be no objection on constitutional grounds to the assumption to the effect that a significant threat exists to these legal interests since the Land legislatures can in this respect rely on the prevailing scientific opinion to the effect that tobacco smoke is a health risk even in minimal quantities because of the genotoxic carcinogens it contains (see above B. I. 1. b bb (2) (a))

- (2) It is the affair of the legislature to decide with respect to any given area of life whether, with what level of protection, and in what way to work counter to situations that may in the opinion of the legislature prove harmful (see BVerfGE 110, 141 [159]; see also BVerfGE 111, 10 [38 and 39, 43]). In this context, the legislature enjoys in principle discretionary, evaluative and operating latitude (see BVerfGE 96, 56 [64]).

This also enables the legislature to take into account interests that run counter to the goal it pursues in the interest of the public good when choosing its protective plan and thereby develop a solution by assigning and balancing conflicting legal interests. If in the case of certain exceptions a concrete protective duty cannot be inferred from the Basic Law that makes specific action compulsory, the creation and legislative deployment of a protective duty are left to the legislature as the body of government responsible for this.

- (3) On the basis of the latitude that must be afforded the legislature, it would not be prevented from assigning health protection priority over the freedoms that this would restrict, in particular the freedom of the operators of food and drinking establishments to pursue their chosen occupation and the freedom of smokers to conduct themselves as they see fit, and imposing a strict ban on smoking in food and drinking establishments.
- (a) Since health, and even more so, human life, ranks among the values that are of especially great importance, they may also be protected through the use of means that encroach significantly on freedom of occupation (see BVerfGE 17, 269 [276]; 85, 248 [261]; 107, 186 [196]). The legislature is therefore not bound on constitutional grounds to take into account the freedom of occupation of operators of such establishments by allowing for exceptions to a ban on smoking for food and drinking establishments in buildings and completely enclosed spaces. Indeed, the legislature may opt in favour of a plan for the protection of non-smokers that gives priority to the greatest possible reach and efficiency of protection against the risks of passive smoking, for if exceptions are made to the ban on smoking in food and drinking establishments, in particular for smoking rooms or food and drinking operations in tents, this would represent partial dispensation with the intended goal of health protection. In order to avoid the threat of “significant reduction of protection of non-smokers” that would otherwise result, the federal legislature allowed no exceptions from the ban on smoking in s. 1.3 sentence 2 of the Act on Protection against the Dangers of Passive Smoking (Gesetz zum Schutz vor den Gefahren des Passivrauchens) (of 20 July 2007, Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I p. 1595) for public means of transport, i.e. in particular for trains, trams, busses and aircraft (see Bundestag document 16/5049, p. 9).

**60 Years German Basic Law:
The German Constitution and its Court**

- (b) If the legislature decides in favour of a strict ban on smoking due to the high rank of the interests to be protected, no exception need be made for those establishments that are to be classified as small food and drinking establishments because of their limited seating capacity and whose offering consists primarily of alcoholic beverages (“corner pubs”).

A law restricting freedom of occupation that is as such in compliance with the principle of proportionality is to be sure in violation of Article 12. 1 in conjunction with Article 3.1 of the Basic Law if its provisions fail to take into account differences that typically exist within the occupational class affected. This must be assumed to be the case when the burden imposed upon members of that class is greater than that imposed upon others not only in respect of isolated special constellations that deviate without adequate objective reason from the norm, but also in respect of certain cases that are typical, albeit limited in number (see BVerfGE 25, 236 [251]; 30, 292 [327]; 59, 336 [356]; 68, 155 [173]; 77, 84 [113]).

The legislature may then be bound to take into account the different ramifications of statutory regulations through hardship provisions or by making further distinctions such as exceptions (see BVerfGE 34, 71 [80]).

It need, however, not be decided here whether smaller one-room food and drinking establishments fulfil these conditions for special consideration, for there is sufficient objective reason for justification of the imposition of a greater burden upon this class, including the threat to its economic existence, which is why differentiated regulation is not required (see BVerfGE 34, 71 [79]).

The legislature need not entertain the possibility of making an exception for small food and drinking establishments if it opts for a strict ban on smoking. For this would mean that it would be necessary despite the legislature’s regulatory intent, which is covered by the order of values of the Basic Law, to completely and permanently forego protection of the public against the risks of passive smoking in respect of a not insignificant segment of the hospitality industry. However, the special professional and economic interests of operators of small food and drinking establishments also cannot compel the legislature to completely abandon its decision to strictly pursue public interests of salient importance in an area that presents not insignificant risks.

- (c) A strict ban on smoking in food and drinking establishments is not disproportionate even in view of the interests of those patrons who want to smoke. The ban on smoking does to be sure result in a not insignificant restriction upon smokers since it is made less convenient for them to spend time in food and drinking establishments due to the obligation to abstain from smoking and visits to food and drinking establishments also represent a not insignificant aspect of participation in society. This impairment of the freedom of conduct of smokers (Article 2.1 of the Basic Law) would, however, not seem to be inappropriate due to the salient importance of the purpose of protection pursued with the ban on smoking, especially since it is still possible to leave an establishment temporarily to smoke. Smokers are not disfranchised in an impermissible manner in this case; in particular, they are not compelled to protect themselves against

**Selected Fundamental Decisions of
the Federal Constitutional Court**

risk (see BVerfGE 59, 275 [278 and 279]). The Land no-smoking laws are intended neither to prevent addiction nor to protect individuals against themselves. Instead, their purpose is to protect against the risks of passive smoking (see s. 1.1 sentence 2 of the Non-Smoking Act of the Land Baden-Württemberg; s. 1 of the Non-Smoking Act of the Land Berlin). What is involved is not the protection of the health of smokers but rather the protection of that of other persons in a given situation, who do not themselves smoke.

The non-smokers among the patrons of food and drinking establishments are similarly not forced to accept protection against the risks of passive smoking. The statutory regulation merely takes into account the circumstances that as long as there is not a sufficient number of places in non-smoking public rooms they have no choice other than to accept the health risk due to passive smoking when they frequent a food and drinking establishment (see above B. I. 1. b bb (1)). Non-smokers should be able to participate in this area of society not only at the price of jeopardizing their health.

- (4) However, a proportionality test leads to different results if the decision does not involve a strict ban on smoking, but rather a plan for protection against the risks of passive smoking is chosen - as by the Land legislatures in the present cases - that assigns greater weight to the interests of operators of food and drinking establishments and smokers and, taking this into account, makes protection of health a relative goal, thereby partially abandoning it.
- (a) The legislature could surely, as has been shown (see above B. I. 1. b dd (3)), also have allowed the opposing interests of operators of food and drinking establishments and smokers to be in effect completely ignored. However, in view of the discretionary, evaluative and operating latitude to which the legislature is entitled, it is not prevented from choosing an approach to protection that involves less stringent pursuit of protection of the health of non-smokers when weighed against the freedom of operators of food and drinking establishments and smokers. It cannot be ascertained that the Land legislatures in opting for such an approach incorrectly assessed the interests of the parties affected that were to be reconciled in a manner that is inconsistent with the Basic Law.

The choice of such a protective approach that allows more room for the freedom of operators of food and drinking establishments and smokers does not, however, remain without consequences at the level of the review of the proportionality of the encroachments of fundamental rights that remain nonetheless. The reason for this is that by deciding to adopt a specific approach the Land legislatures assess the advantages and disadvantages for the respective legal interests involved and balance these interests against one another as regards their implications for the various legal interests involved. In that regard, it is the legislature that determines, within the framework of constitutional requirements, the value of the interests of the general public it pursues that are to be weighed in the context of a proportionality test (see BVerfGE 115, 205 [234]).

**60 Years German Basic Law:
The German Constitution and its Court**

- (b) In Baden-Württemberg, the Land legislature first banned smoking in all food and drinking establishments without making any distinctions as regards size, previous use or special characteristics such as, for example, the nature of the regular clientele with s. 7.1 sentence 1 of the Non-Smoking Act. However, exceptions from the ban are then made for food and drinking operations under tents, outdoor venues and itinerant businesses in s. 7.1 sentence 3 of the Non-Smoking Act of the Land Baden-Württemberg. Finally, s. 7.2 of the Non-Smoking Act of the Land Baden-Württemberg makes provision for the possibility of maintaining separate smoking rooms. Comparable provisions are in effect in Berlin. The ban on smoking in food and drinking establishments (s. 2.1 no. 8 of the Non-Smoking Act) does to be sure also apply to food and drinking operations under tents (see s. 2.2 of the Non-Smoking Act), but the creation of smoking rooms is also allowed in Berlin pursuant to s. 4.3 sentence 1 of the Non-Smoking Act. As a result, important exceptions are made in both Länder in practice, and the goal of protection of health is thereby pursued with a lesser degree of intensity.

The compromises in terms of health protection become clear in connection with the creation of smoking rooms. If the legislature allows this exception from the ban on smoking in food and drinking establishments, the possibility cannot be excluded that smoking rooms will also be frequented by non-smoking patrons who follow smokers to such rooms or who retreat to such rooms because all seats are occupied in the non-smoking area. Especially affected are children and youths who are taken along to smoking rooms by the adults accompanying them and - under the no-smoking laws to be judged here - are not prohibited from being there. Although the Land legislatures are also not prevented from protecting the health of the personnel of food and drinking establishments in the interest of the public good (see above B. I. 1. b aa (1)), health risks are accepted in the case of those employees who must enter smoking rooms, in particular to serve patrons. Finally, scientific investigation indicates that the toxic substances in tobacco smoke that permeate smoking rooms cannot be reliably kept away from adjoining non-smoking premises and therefore also represent a burden to those in non-smoking areas (see Blank/Pötschke-Langer, in: *Deutsches Krebsforschungszentrum* (ed.), *Erhöhtes Gesundheitsrisiko für Beschäftigte in der Gastronomie durch Passivrauchen am Arbeitsplatz*, 2007, p. 18).

The situation as regards beer, wine and party tents, which are exempted from the ban on smoking in Baden-Württemberg (s. 7.1 sentence 3 of the Non-Smoking Act of the Land Baden-Württemberg), is in effect no different. Even in the case of temporary venues established for only a limited period of time, for which, however, no provision is made by law in Baden-Württemberg, the general exemption for food and drinking establishments under tents represents a significant limitation of protection of non-smokers since patrons have no possibility at all of escaping the burden of tobacco smoke. In this context, it is not sufficiently certain that tents are consistently or even only as a rule better ventilated than buildings and that the exposure of patrons to tobacco smoke is therefore significantly lower.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- (c) Such exceptions are not required on constitutional grounds (see above B. I. 1. b dd (2)). The Land legislatures allowed them on the basis of their own evaluative and operating decisions, opting thereby in favour of approaches to protection of non-smokers that do not pursue absolute protection, but, taking into account conflicting interests, consider limited protection that makes allowance for various exceptions to be sufficient. Accordingly, the risks of passive smoking are to be sure considered to be significant, but - which is constitutionally defensible - they are not considered to be so serious that health protection should in every respect enjoy priority over the occupational interests of operators of food and drinking establishments and the freedom of conduct of smokers.

The Land legislatures remain bound to their decisions as to the intensity with which they want to pursue the protection of non-smokers in connection with the conflict with the interests of operators of food and drinking establishments and smokers even if - as in the present cases - the reasonableness of the ban on smoking for operators of smaller one-room food and drinking establishments must be assessed. If the legislature has on the basis of the latitude to which it is entitled, decided in favour of a specific assessment of the potential risks, evaluated the interests involved on this basis, and chosen a legislative approach, then it must also consistently follow up on this decision. Assessment of risks is not consistent if the same weight is not assigned to identical risks in the same law (see BVerfGE 107, 186 [197]).

- (d) Accordingly, if the Land legislatures have made the current importance of the legitimate goal of health protection they are pursuing a relative consideration through extensive regulations governing exceptions by allowing in particular the interests of operators of food and drinking establishments to be taken into account, then the specific ramifications of the ban on smoking for smaller establishments that serve primarily alcoholic beverages logically assume greater weight in the context of the overall balance to be struck.

Such establishments are different from other food and drinking establishments not only because they cannot seat as many people and because they serve primarily alcoholic beverages and less food, but also because of the special structure of their clientele. Such food and drinking establishments are frequented for the most part by regular patrons, and of these a relatively large number are smokers. In this regard, the Federal Hotel & Catering Association referred in an additional opinion to investigations according to which the percentage of smokers among the patrons of such food and drinking establishments is at least 50% and in many cases exceeds three-quarters. Since the operators of such food and drinking establishments cannot provide smoking rooms due to the limited availability of space, their establishments become significantly less appealing to the clientele, consisting of smokers that they primarily serve. It can therefore be expected that many smokers will either no longer patronize such food and drinking establishments that do not allow them to smoke while there or spend significantly less time in such establishments.

**60 Years German Basic Law:
The German Constitution and its Court**

That there is at least a tendency towards a concomitant shortfall in revenues is documented by the investigation of the Federal Statistical Office (see above B. I. 1. b dd (1) (a)) that has already been mentioned. According to that investigation, the shortfall in revenues of establishments that serve primarily alcoholic beverages, to which the food and drinking establishments under discussion may be assigned, has been significantly greater in those Bundesländer with bans against smoking in food and drinking establishments than in Länder in which such bans on smoking have not yet gone into effect. For example, the decrease in revenues was 9.8% in the third quarter of 2007 as compared with 6.8%, whereas the decrease was even as high as 14.1% as compared with 8.8% in the fourth quarter of the same year. The investigation shows at the same time the special vulnerability of food and drinking establishments that serve primarily alcoholic beverages, for the same comparison yielded no decrease in revenues for the third quarter for establishments that serve primarily meals and only a slight decrease in the fourth quarter.

It is also logical to assume that allowing separate smoking rooms will mean that patrons who do not want to abstain from smoking will abandon smaller food and drinking establishments that cannot provide such rooms and instead frequent larger establishments with smoking rooms. Not only did the Non-Smoking Action Alliance (Aktionsbündnis Nichtraucher) express in its brief the opinion to the effect that the possibility of a migration from one-room food and drinking establishments to establishments with smoking rooms could not be ruled out; in addressing the question as to the possibility of migration of regular customers from corner pubs to the smoking rooms of larger food and drinking establishments, the German Cancer Research Center (Deutsches Krebsforschungszentrum - DKFZ) also stated that such behaviour on the part of the clientele would be very plausible for economic reasons. A survey conducted by the Baden-Württemberg Hotel & Catering Association on the implications of the ban on smoking from March 2008 also makes reference to such behaviour on the part of patrons. According to this survey, the no-smoking law had a negative effect, with 77.7% of the single-room establishments losing over 20% of their revenues and 61.3% of these establishments even reporting that their further existence was threatened. On the other hand, it was reported that the no-smoking law even had a positive effect on 11.4% of the establishments with several rooms. The above-mentioned survey by the TNS-Emnid Opinion Research Organization confirms that regular customers have migrated from small food and drinking establishments, for it shows that 24% of those surveyed switched from “single-room pubs” to larger food and drinking establishments, and in particular to establishments with separate smoking rooms, because of the ban on smoking.

The revenue shortfall caused by the ban on smoking also has serious repercussions for operators of smaller food and drinking establishments even if they are only temporary. Due to their smaller seating capacity, the operators of such establishments cannot generate high revenues and therefore also cannot build up larger reserves. As a result, revenue shortfalls with no change in overhead costs mean that weaker business phases cannot be bridged for a longer period of time and the operations of such establishments may soon become no longer profitable.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- (e) In terms of the discretionary, evaluative and operating decisions upon which the plans for the protection of non-smokers are based in the present cases, the operators of small establishments that serve primarily alcoholic beverages cannot be reasonably expected to accept these special burdens that the ban on smoking creates for them.

The Land legislatures have allowed exceptions from the ban on smoking in food and drinking establishments for separate enclosed rooms. In the case of larger food and drinking establishments that have or can provide such separate rooms, only a relative ban on smoking applies; the legislature has therefore accommodated their interest in also being able to accommodate smoking patrons. On the other hand, an absolute ban on smoking does exist for smaller food and drinking establishments as long as separate rooms are not available and can also not be created - which will regularly be the case due to the fact that less floor space is available. The goal of protection is strictly pursued only in respect of the operators of such establishments. The health risks associated with passive smoking are therefore weighted differently when balanced against the freedom of occupation of the operators of food and drinking establishments.

Due to this unequal weighting, the ban on smoking results in a significantly greater economic burden for operators of smaller food and drinking establishments than for those of larger establishments. Only the latter can make their offerings more attractive by reserving smoking rooms for smokers. In the case of small food and drinking establishments, on the other hand, the disadvantages associated with the current absolute ban on smoking that affect them in particular may result in the existence-threatening revenue shortfalls described above. This will typically affect small establishments that essentially limit themselves to serving alcoholic beverages. Strict compliance with the ban on smoking is therefore expected of the operators of such establishments even at the price of losing their economic existence although the Land legislatures do not want to pursue the desired protection of health without restriction, but only insofar as the occupational interests of operators of food and drinking establishments are taken into account. However, in view of the retraction of the intended goal of protection, the degree of burden affecting them is no longer reasonable in relation to the benefits to which the Land legislature aspired with the relaxed ban on smoking for the general public.

This applies all the more so since it also would have been only logical to take into account precisely the interests of small establishments that primarily serve alcoholic beverages in the approach chosen for the formulation of protection of non-smokers since the latter are in any case especially disadvantaged by the ban on smoking in food and drinking establishments. In fact, however, as is shown by the legislative materials, no importance worth mentioning was attached to this aspect. To the contrary, the exceptions from the ban on smoking, and in particular the approval of smoking rooms, has created an additional cause of deterioration of the economic situation of these operators of food and drinking establishments. The Land legislatures are to a significant extent responsible for the fact that the economic situation of small food and drinking establishments has deteriorated even more due to their approach to and formulation of protection of non-smokers. Since smoking rooms cannot be made available for these establishments, their operators must not only absorb losses due to the smokers who

**60 Years German Basic Law:
The German Constitution and its Court**

now completely abstain from patronizing their establishments or spend less time there, but they also suffer from the migration of those patrons who now frequent food and drinking establishments with smoking rooms. The legal situation thereby increases the burden on operators of smaller establishments by putting larger establishments that can provide separate smoking rooms at an advantage in terms of their ability to compete for business. Against this background, the various effects of the legal regulations on the different types of establishments cannot be dismissed as the mere manifestation of their respective economic performance and competition.

The Land legislatures must surely, be given credit in the present cases for the fact that the plan they chose to protect non-smokers, proceeds from the logical premise to the effect that a patron should have the possibility of finding a seat in any given food and drinking establishment where he will not be exposed to tobacco smoke. This principle is, however, already compromised by the fact that the loss of the seating capacity required for smokers reduces the capacity available in the non-smoking area, forcing patrons to take recourse to smoking rooms. Moreover, the basic idea of a ban on smoking with an exception for separate rooms in Baden-Württemberg is abandoned for one subclass by completely exempting food and drinking establishments under tents from the ban on smoking. In particular, however, the plan chosen for protection deviates from its own basic approach, which is to achieve a balance of interests, and does not take into account the interests of small food and drinking establishments, which are especially affected by the ban on smoking, but exclusively and one-sidedly the interests of the non-smoking patrons of food and drinking establishments.

However, frequentation of smaller one-room establishments that serve primarily alcoholic beverages is not typically of significant importance in terms of their participation in society, which means only slight improvement can be expected for the protection of non-smokers from current regulations. The number of 60,000 to 80,000 single-room food service establishments cited by the Federal Hotel & Catering Association (*DEHOGA Bundesverband*) as compared with a total of some 243,000 hotel and restaurant operations is in that regard not meaningful. That figure makes no distinction as to whether these single-room establishments serve primarily alcoholic beverages or meals, nor does it contain any indication of room size and as a result information as regards possibilities for providing smoking rooms. Due to the typically small seating capacity, the percentage of all food and drinking operations accounted for by single-room establishments also does not make it possible to infer that their total share of seating accommodations is commensurately large. Instead, the minor importance of smaller single-room food and drinking establishments that serve primarily alcoholic beverages for effective protection of non-smokers is reflected in the exceptionally high percentage of smokers among their patrons. In particular, however, the substantial revenue shortfalls following the entry into force of the bans on smoking show that the operators of such establishments have not been able since then to attract more non-smoking patrons with their hospitality offerings. The *Land* legislatures therefore must have assumed that an exception from the ban on smoking for smaller single-room establishments that serve primarily alcoholic beverages does not seriously detract from adequate protection of non-smokers since sufficient smoke-free seating is available in food and drinking establishments as a whole.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

2. The constitutional complaint of the third complainant, which is directed against s. 7.2 sentence 2 of the Non-Smoking Act of the *Land* Baden-Württemberg, is also founded. Unlike the first and second complainants, the third complainant seeks no additional exception from the ban on smoking in food and drinking establishments, but instead objects to the fact that it was denied the benefit of exemption as already provided for by law. The complainant is successful. It is incompatible with Article 12.1 in conjunction with Article 3.1 of the Basic Law for discotheques that do not admit youths to be excluded from the possibility of providing smoking rooms pursuant to s. 7.2 sentence 1 of the Non-Smoking Act of the Land Baden-Württemberg.

- a) Notwithstanding the requirements that derive directly from Article 12.1 of the Basic Law, provisions of law that govern the exercise of an occupation or profession can be valid only if they are also otherwise in every respect consistent with the Basic Law and in particular in compliance with the general principle of equal treatment under the law pursuant to Article 3.1 of the Basic Law (see BVerfGE 25, 236 [251]).

The general principle of equal treatment under the law pursuant to Article 3.1 of the Basic Law requires that the legislature treat matters that are essentially the same in the same manner and those matters differently that are essentially different (see BVerfGE 1, 14 [52]; 98, 365 [385]; 116 [180]); established case law.

This does not, however, completely prevent the legislature from making distinctions. Indeed, depending on the subject of regulation and the criteria for differentiation involved, the constraints imposed by the general principle of equal treatment under the law vary, ranging from mere prohibition of arbitrariness to strict compliance with the requirements of proportionality (see BVerfGE 110, 274 [291]; 117, 1 [30]); established case law.

Since the principle to the effect that all persons are equal before the law is primarily intended to prevent unwarranted differences in the treatment of individuals, the legislature is regularly bound to strict compliance in the case of matters involving unequal treatment of different classes of persons (see BVerfGE 88, 87 [96]). The fundamental right to equal treatment before the law is therefore violated if in the case of provisions of law that affect different classes of persons the legislature treats one class of persons addressed by a statute differently from any other class despite the fact that no difference exists between the two classes of such nature or weight as to justify such unequal treatment (see BVerfGE 102, 41 [54]; 104, 126 [144 and 145]; 107, 133 [141]; established case law).

However, these principles also apply if unequal treatment in respect of a matter results indirectly in unequal treatment of different classes of persons. For that reason, the more unequal treatment can negatively impact the exercise of freedom that enjoy constitutional protection, in particular the freedom of choice of occupation or profession protected by Article 12.1 of the Basic Law (see BVerfGE 62, 256 [274]), the narrower becomes the operating latitude of the legislature (see BVerfGE 92, 53 [69]; established case law).

**60 Years German Basic Law:
The German Constitution and its Court**

The general principle of equal treatment under the law applies for unequal burden as well as for unequal privileges. Discriminatory exclusion from a privilege is also prohibited if it involves granting a privilege to one class of persons but denying it to another class (see BVerfGE 116, 164 [180] with further references).

b) Measured against this standard, the general exclusion of discotheques from the privilege that is to be seen in the exemption of separate smoking rooms from the ban on smoking pursuant to s. 7.2 sentence 1 of the Non-Smoking Act of the Land Baden-Württemberg is not warranted.

aa) The distinction to be assessed here between eating and drinking establishments in general and those that fall into the special category of “discotheques” (see s. 3.1 of the Licensing Act (Gaststättengesetz - GastG)) involves different treatment of matters. Nevertheless, the review must be based on the assumption to the effect that the legislature is bound to a more stringent standard since the unequal treatment of separate matters entails unequal treatment of classes of persons. The distinctions made in the provisions contained in s. 7.2 sentence 1 and 2 of the Non-Smoking Act of the Land Baden-Württemberg are responsible for the fact that, unlike operators of other food and drinking establishments, operators of discotheques are prevented from providing smoking rooms for their patrons. As a result, operators of discotheques cannot freely pursue their occupation and make the offerings of their food and drinking establishments attractive for smokers. Unequal treatment of the matters at hand therefore has a negative effect on the exercise of freedoms protected by fundamental rights, namely, occupational freedom, which the third complainant may invoke as a limited partnership pursuant to Article 19.3 of the Basic Law (see BVerfGE 105, 252 [265]; established case law)

bb) Sufficient reasons for such unequal treatment are lacking.

(1) According to the grounds provided in the draft of the law of the Land government of Baden-Württemberg, the purpose of the Non-Smoking Act of the Land Baden-Württemberg containing the ban on smoking with no exception for discotheques, is in particular to protect youths against the risks of passive smoking. According to the grounds, the fact that the concentration of harmful substances is especially high in discotheques is taken into account, which in combination with the physical activity of the patrons results in greater inhalation of the inside air containing the harmful substances (see *Landtag* document (*Landtagsdrucksache* - LTDrucks) 14/1359, p. 16).

It is also stated that the absence of an exception to the ban on smoking in discotheques is also necessary since the effects of the pressure to imitate and conform play an important role in the case of youth. Furthermore, it is submitted, if there is a smoking room in a discotheque and the core members of the group spend time there, peer pressure will also cause non-smokers to go there, exposing themselves thereby to passive smoking (See *Landtag* document 14/1359, p. 24).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- (2) These reasons are not of such nature and weight as to justify unequal legal consequences for discotheques on the one hand and other food and drinking establishments on the other hand.
- (a) This applies first of all to the extent that the legislature assumes a greater need for protection of patrons in the case of discotheques. The legislature does surely enjoy a certain latitude as regards its assessment of the risks threatening the general public. There can therefore be no objection on constitutional grounds to the fact that the Land legislature has based its assessment of the situation on the existence of an especially high concentration of harmful substances in discotheques. The legislature may rely in this context on relevant scientific investigations such as, for example, the results of the research project already mentioned that was carried out under the auspices of the Bavarian Land Office for Health and Food Safety (Landesamt für Gesundheit und Lebensmittelsicherheit) (see above B. I. 1. b bb (2) (b)). According to that research, a high level of contamination of the air with toxic and carcinogenic substances from tobacco smoke was ascertained in all food and drinking operations, no matter what the category, the highest level of contamination being found in discotheques. This circumstance does not, however, necessitate the general exclusion of this exception for discotheques if smoking rooms are approved for other food and drinking establishments. If smoking is allowed only in completely separate rooms, the argument to the effect that there is a greater danger of passive smoking in discotheques due to the specific nature of the operation no longer holds. Risks to patrons in non-smoking areas can be prevented through strict compliance with the requirements of s. 7.2 sentence 1 of the Non-Smoking Act of the Land Baden-Württemberg, which must also be observed in the case of smoking rooms in discotheques. According to this legislation, the fact that smoking rooms are provided may not compromise the interests of protection of non-smokers, which means that it is necessary to ensure - if necessary through the use of technical means - that no deterioration in the quality of the air by tobacco smoke can be detected outside the smoking rooms.
- (b) Reference to the considerable importance of effects of pressure to imitate and conform in the case of youths or young adults cannot justify different treatment of discotheques as compared with other types of food and drinking establishments.

Due to the discretionary latitude of the legislature, there can surely be no objection on constitutional grounds to this assessment of the situation as regards the risks for youth. The ban on smoking in discotheques without provision for any exceptions is, however, not necessary in order to prevent youths from following their crowd or individuals to the smoking area. In order to achieve the desired protection of this class of the public, it suffices if - as, for example, stipulated by s. 4.3 sentence 2 of the Non-Smoking Act in the Land of Berlin - the exclusion of smoking rooms is limited to those discotheques that admit persons under the age of 18. The operators of many discotheques - including the third complainant - impose age limits for their clientele and in this manner decide for themselves whether they would prefer to forego providing smoking rooms or restrict admission. Such a regulatory situation that gives operators of discotheques options represents the milder means as compared with the general exclusion of smoking rooms.

**60 Years German Basic Law:
The German Constitution and its Court**

The exclusion of smoking rooms is also not warranted for the purpose of preventing the effects of conformity and peer pressure among the adult clientele of discotheques. By generally allowing smoking rooms in food and drinking establishments, the Land legislature has already accepted the fact that non-smokers will also spend time in such rooms. This is, however, tantamount to acceptance of the effects of peer conformity among adults, which may not be eliminated through unequal treatment only in the case of discotheques. Even the increase in the effect of the pressure to conform that the legislature assumes to exist due to the fact that the patrons of discotheques are for the most part young adults can be counteracted in a less onerous manner by making smoking rooms less attractive. This would include in particular consideration of the possibility of prohibiting the installation of dance floors in smoking rooms. This is achieved by statute in, for example, the Free Hanseatic City of Bremen (s. 3.6 sentence 3 of the Bremen Non-Smoking Act (Bremisches Nichtrauchererschutzgesetz - Brem-NiSchG)) and the Länder Rhineland-Palatinate (s. 7.1 sentence 2 of the Rhineland-Palatinate Non-Smoking Act (Nichtraucherschutzgesetz Rheinland-Pfalz)), Saarland (s. 3.5 sentence 2 of the Act on the Protection against the Risks of Passive Smoking (Nichtraucherschutzgesetz)) and Thuringia (s. 5 sentence 3 of the Thuringia Act on the Protection against the Risks of Passive Smoking (Thüringer Nichtrauchererschutzgesetz-ThürNRSchutzG)).

II.

The fact that the provisions under challenge are in violation of the Basic Law does not make them invalid. Since several possibilities for reform are available to the Land legislatures, it is possible to ascertain only that the current provisions are incompatible with the Basic Law (see BVerfGE 117, 163 [199] with further references).

c) Glycol Wine, BVerfGE 105, 252 (and the Osbo-Sect Judgment, E 105, 279)

Explanatory Annotation

A wine scandal and an Asian sect⁵⁶ do not appear to have anything in common, however, the two decisions rendered by the Constitutional Court on the same day in 2002 dealt with the same legal problem: Can the federal government issue a warning about a perceived danger by way of publishing information or giving certain answers in question-and-answer sessions in the Parliament, holding speeches or issuing reports?⁵⁷

56 Osho was the name given by his followers to the Indian mystic Rajneesh Chandra Mohan. The movement was also known under the names Shree Rajneesh, or Bhagwan.

57 Due to this similarity of the legal issues in both judgments a translation is provided only for the Glycol Wine decision

**Selected Fundamental Decisions of
the Federal Constitutional Court**

In the Glycol case the relevant federal minister had published a list of wines in which the poisonous chemical glycol had been found after testing. The publication made it clear that the results would only apply to the wines tested and that it is well possible that other wines from the same source might not be affected. The effect on the sales figures for wine was catastrophic when this glycol-scandal erupted but those businesses on the warning list were particularly affected, notwithstanding the fact that most of their wines were clean. In the Osho case the sect complained against negative reports, speeches and government answers to questions raised in Parliament on the dangers posed by “psycho-sects”.

Warning implies a danger or risk against which the warning is directed. Risk prevention and damage control is, in addition to the prosecution of criminals, core police work. In Germany the police when exercising its preventive function fall under the exclusive jurisdiction of the *Länder*. The Federal Government has no power to act in this regard. The warnings could therefore have been regarded as unconstitutional for lack of jurisdiction at the federal level. The Court, however, held differently. It differentiated between action through legislation and executive action on the one hand, where the delineation of power between the federal level and the *Länder* must be adhered to and the exercise of mere political leadership (“*Staatsleitung*”) on the other hand, i.e. leadership by communication with other state organs or the interested public. This leadership by communication is an inherent power of any government in general and, in these two cases, the Federal Government in particular. But even this communication effort must measure up to the fundamental rights protected by the Basic Law. In the Osho case this was the freedom of religion guarantee of Article 4 of the Basic Law, which the Court saw violated because of the use of unwarranted derogatory adjectives describing the Osho movement. In the Glycol case it was the freedom of occupation guarantee of Article 12. The Court saw no violation because the information published about the glycol-affected wines had been correct.

Both cases carried case numbers pointing to 1991.⁵⁸ It took the Constitutional Court 11 years to decide those cases. The facts of the two cases go back to 1985 and before. Whereas this is not the norm for the length of proceedings before the Constitutional Court it does illustrate that justice is not always swift when it comes to constitutional justice.

58 1 BvR 558, 1428/91 for the Glycol decision and 1 BvR 670/91 for the Osho decision.

60 Years German Basic Law:
The German Constitution and its Court

**Translation of the Glycol Wine Judgment - Decisions of the Federal Constitutional Court
(Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 105, 252***

Headnotes:

1. Market-related information provided by the government does not restrict the area of the guarantee of the fundamental rights of the affected competitors under Article 12.1 of the Basic Law (Grundgesetz - GG), if the effect on factors that are relevant to the competitive process is consistent with the provisions of law governing the state's information activity and does not distort market conditions. The existence of a governmental responsibility and observance of the division of powers as well as compliance with requirements pertaining to the accuracy and objectivity of the information are the important constitutional aspects involved in this context.
2. The Federal Government may due to its responsibility for the administration of the state engage in information work whenever it bears a responsibility for the state as a whole, that can be discharged with the help of information.

Order of the First Senate of 26 June 2002 - 1 BvR 558, 1428/91 -

Facts:

In the spring of 1985, it became known that wine that had been adulterated with diethylene glycol (DEG) was being sold in Germany in not insignificant quantities. DEG is normally used as an anti-freeze and as a chemical solvent. This resulted in a considerable "media storm," uncertainty on the part of the population and a drastic drop in the consumption of wine.

Against this background, the Federal Ministry of Health (Bundesgesundheitsministerium - BGM) published lists of wines between July and December 1985 that had been found to contain DEG along with the names of the bottlers. The lists also contained mention of the fact it was thoroughly possible that wines from the same bottlers that did not contain DEG could also be on the market.

The complainants are winemakers whose wines appeared in the list. Their wine sales had decreased considerably, and they ultimately petitioned the Court to find the action of the Federal Ministry of Health illegal. The action was unsuccessful in all instances (most recently BVerfGE 87, 37).

The constitutional complaint was dismissed by the Federal Constitutional Court.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

Selected Fundamental Decisions of
the Federal Constitutional Court

Extract from the Grounds:

...

C.

The constitutional complaints are unfounded. Publication of the list of wines containing DEG and the decisions of the court under challenge do not violate the fundamental rights of the complainants under Article 12.1 sentence 1, Article 14.1 sentence 1, Article 3.1 and Article 2.1 of the Basic Law.

I.

The fundamental right of the complainants under Article 12.1 of the Basic Law is not impaired.

1. Freedom of occupation under Article 12.1 of the Basic Law guarantees all Germans the right to freely choose and exercise their occupation or profession. An “occupation or profession” is any activity that is intended to be pursued over a prolonged period of time and serves to establish and maintain a livelihood (see BVerfGE 7, 377 [397 et seq.]; 54, 301 [313]; 68, 272 [281]; 97, 228 [252-253]). According to Article 19.3 of the Basic Law, this fundamental right also applies to artificial persons to the extent that they engage in an activity for commercial purposes that by virtue of its essence and nature is equally accessible to artificial and natural persons (see BVerfGE 50, 290 [363]; established case law).

This applies in the case of the complainants.

2. Under the existing economic order, the freedom pursuant to Article 12.1 of the Basic Law relates in particular to the occupational activity of individual persons or enterprises (see BVerfGE 32, 311 [317]).

This fundamental right does not, however, protect against the dissemination of accurate and objective information in the market that could be of importance in terms of the behaviour of market participants involved in the competitive process even if the content of such information negatively affects the situations of individual competitors. The Federal Government must, however, observe the legal requirements that govern information activity.

- a) Although entrepreneurial occupational or professional activity in the market is governed by the principles of competition, the reach of the protection of the freedom to engage in such activity is also defined by the legal rules that permit and limit the competitive process. In this context, Article 12.1 of the Basic Law safeguards the right to participate in the competitive process under the conditions that govern its operation. Accordingly, the guarantee of the fundamental right does not include protection against effects that operate upon factors that govern the competitive process. In particular, the fundamental right includes no entitlement to success in the competitive process and assurance of the possibility of future earnings (see BVerfGE 24, 236 [251]; 34, 252 [256]).

**60 Years German Basic Law:
The German Constitution and its Court**

Indeed, the situation of a market participant with respect to the competition, and as a result sales and income are subject to the risk of continual change as a function of market conditions.

- b) An enterprise that is active in the market is exposed to communication and therefore also to criticism of the quality of its products or its actions. An enterprise that is so affected can defend itself against negative information through the use of its own information in a manner appropriate to the market, i.e., through its own advertising and emphasis on the quality of its product. For the protection of the freedom to exercise an occupation or profession extends to the projection of a public image, including advertising for the enterprise or for its products, for the purposes of promotion of the professional success of an enterprise (see BVerfGE 85, 97 [104]; 85, 248 [256]; 94, 372 [389]).

The provision containing the fundamental rights does not, however, guarantee an enterprise an exclusive right to its public image and as a result to an unrestricted right to project that image in the marketplace. An enterprise may surely decide itself how it would like to present itself and its products in the context of the competitive process. But Article 12.1 of the Basic Law does not afford enterprises a right to be portrayed by others only the way they would like to be seen or the way they see themselves and their products. Contrary to the opinion of the complainants, such a right cannot also be established by way of analogy with the general right of personality, especially since this right also does not include such an entitlement (see BVerfGE 97, 125 [149]; 97, 391 [403]; 99, 185 [194]; 101, 361 [380]).

- c) Competition functions on the basis of market participants having maximum access to information concerning factors that are relevant to the market. Being informed is what in the first place enables market participants to make decisions aligned with their own interests as regards the conditions for their participation in the market, especially as regards the supply of or demand for goods and services. The availability of such information contributes indirectly to the quality and variety of products available on the market. If, for example, consumers lack information that is relevant for making decisions, they cannot adequately determine whether an offering meets their needs. Informed activity on the part of consumers also has a retroactive effect on providers, who can as a result adapt to the needs of consumers. Accordingly, deficits in the availability of information that is relevant for making decisions threaten the self-regulating power of the market.

However, the market is not an institution that guarantees the availability of a certain level, and certainly not a high level, of information. The information available in the market is frequently not complete. Information is often selectively disseminated. In addition, not all information available in the marketplace is equally likely to be received and processed in all consequence by those addressed. In such situations, the functionality of the market is enhanced when counterpoints are set in the form of information, including governmental information, or when the superior informational power of individual market participants is counterbalanced.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- d) The goal of the legal system is to make possible a high level of information relevant to the market and thereby make the market transparent. This is achieved, for example, through legal measures to combat unfair competition, establishment of rules for advertising and measures to protect consumers, which is achieved primarily through the availability of information. In particular, s. 1 of the Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb - UWG) protects the operational functionality of competition based on merit against dissemination of information that is in violation of public policy because market participants are deceived. The legal system considers this to be anti-competitive (see in particular ss. 2 et seq. of the Act against Unfair Competition). Accordingly, the principle of truthfulness, which is understood to mean prohibition of deception, is viewed as the prevailing guideline of competition law (see Baumbach/Hefermehl, Wettbewerbsrecht, 22nd ed., 2001, marginal note 5 on s. 1 of the Act against Unfair Competition).

The case law provides a more concrete definition of the standards for protection against deception and therefore also for the accuracy of statements under the Act against Unfair Competition as regards requirements in terms of competitive activity in the area of commercial trade (see Federal Court of Justice, NJW 1987, p. 2930 [2931]; Decisions of the Federal Court of Justice in Civil Matters (*Entscheidungen des Bundesgerichtshofes in Zivilsachen* - BGHZ) 139, 368 [376]).

The goal of ensuring market transparency is, however, also served when information is disseminated by instances other than competitors (Decisions of the Federal Court of Justice in Civil Matters 65, 325 [332 et seq.]).

It also lies in the nature of the overall context of its activities as regards the competitive process that the government disseminates information relevant to competition without itself being a competitor.

- e) Market-related information provided by the government does not restrict the area of the guarantee of the fundamental right of the affected competitors if the effect on factors that are relevant to the competitive process is consistent with the provisions of law governing the state's information activity and does not distort market conditions. The existence of a governmental responsibility and observance of the division of powers (aa) as well as compliance with requirements pertaining to the accuracy and objectivity of the information; (bb) are the important constitutional aspects involved in this context.
- aa) Dissemination of information by the government presupposes responsibility on the part of the acting agency (1) and compliance with limits of authority (2).
- (1) If the responsibilities of the government or the administration can be discharged through public information, the assignment of such responsibilities also includes in principle the power to engage in information activity.

This applies in the case of the administration of the state by the government. This responsibility is intended to achieve the political legitimacy that is important in a democracy and includes involvement in the fulfilment of concrete public duties lying

**60 Years German Basic Law:
The German Constitution and its Court**

outside the sphere of administration activities. Administration of the state is not achieved exclusively through legislative means and influence on the enforcement of legislation through policy, but also through the dissemination of information to the public (see BVerfGE 105, 279 [279] - Osho Judgment).

Governmental participation in public communication has in the course of time undergone a fundamental transformation and continues to change under contemporary conditions. Expansion of the role of the mass media, the prevalence of modern information and communication technologies and the development of new information services also affect the nature of the performance of the duties of government. The official public relations activities of government have traditionally involved in particular the dissemination of information on governmental measures and projects, the presentation and explanation of plans for undertakings to be accomplished in the future and solicitation of support (see BVerfGE 20, 56 [100]; 44, 125 [147]; 63, 230 [241 et seq.]). Contemporary information activity goes much further than such public relations activities (see also Constitutional Court of the Land of North Rhine-Westphalia [*Verfassungsgerichtshof des Landes Nordrhein-Westfalen* - VerfGH NW], North Rhine-Westphalia Law Gazette 1992, p.14 [15-16]).

For example, the responsibility of government in a democracy also includes informing the public of important matters outside of or well in advance of the government's own operational political activity. In a political system that is based on a high degree of personal responsibility on the part of citizens when it comes to solving social problems, the task of government also includes dissemination of information that enables citizens to participate in the management of problems under their own responsibility. Accordingly, citizens expect information from the government that would otherwise not be available for the purposes of forming their own personal opinions and guidance. This can in particular involve areas in which the public's source of knowledge is based on information that is dictated by special interests and entails the risk of being biased and the forces of society are not sufficient to create a satisfactory balance of information.

Administration of the state in this sense includes not only responsibility for facilitating the management of conflicts within the state and society through timely public information, but also for confronting new challenges in this manner, which often arise suddenly, for reacting quickly and expediently to crises as well as for providing citizens with guidance. Current crises in the area of agricultural and food products, for example, have shown how important it is for information that is accompanied by the authority of the government to be available to the public in order to be able to master such tension-ridden situations in an appropriate manner. Were the state to abdicate this responsibility to give the public guidance through education, advice and recommended actions and instead limit itself to legislative initiatives or await administrative measures of other governmental bodies, an important component of crisis management would be lacking that is quick, expeditious and suitable for keeping negative effects on third parties to a minimum. Silence on the part of the government would also be considered failure by many citizens. This can lead to a loss of legitimacy.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- (2) The division of powers must also be respected when it comes to information activity. At the level of the Federation, the division of powers among the Federal Chancellor, the Federal Ministers and the Federal Government as a collegium derives from Article 65 of the Basic Law. In addition, the division of federal powers between the Federation and the *Länder* must be preserved (see BVerfGE 44, 125 [149]).

In this context, decisions as to institutional authority hinge upon whether the responsibility for information activity lies with the Federation or the *Länder* or whether parallel powers exist.

The responsibility for the administration of the state and the information activities of the Federal Government that represent an integral part of this responsibility is a manifestation of the overall responsibility of the state. Unlike in the case of legislative and administrative powers, the Basic Law contains no provisions that explicitly cover the power of the government to administer the state. Such powers are, however, tacitly assumed in the Basic Law, for example, in the provisions on the composition and responsibilities of the Federal Government (Article 62 et seq. of the Basic Law) or on the duty of the Federal Government to inform the Bundestag and its committees; the same applies to the duty of the government and its members to answer to the Bundestag and provide the members of the latter with the information required to discharge their duties (see on the latter BVerfGE 13, 123 [125-126]; 57, 1 [5]; 67, 100 [129]). The Federal Government may engage in information work wherever it bears responsibility for the administration of the state as a whole that can be discharged with the help of information. Indications of the existence of such a responsibility can be inferred from other provisions that govern powers, for example, from those governing legislation, and to be sure also independently of concrete legislative initiatives. The Federation is empowered to assume responsibility for the administration of the state in particular in the case of matters that are of a national nature due to the involvement of a foreign component or their cross-border importance and when such that information work throughout the country on the part of the government contributes to effective resolution of the problem. The Federal Government may in such cases take charge of the respective matter, present the issue and assess it for Parliament and the public and, if it considers it necessary to manage the problem, also issue recommendations or warnings.

In addition to empowering the Federal Government to engage in information activity in this manner, the Basic Law at the same time contains a different provision that concerns the *Länder* under Article 30 of the Basic Law. The provisions of Articles 83 et seq. of the Basic Law are not the standards that determine the power of the Federal Government in the area of information activity. Governmental activity does not include administration within the meaning of these provisions. The Federal Government is not empowered to enforce laws through administrative measures. As a result, the information activity of the Federal Government is unaffected by the provisions of law that empower administrative authorities to inform and warn the public in connection with the enforcement of laws such as s. 8 of the Product Safety Act (Produktsicherheitsgesetz -

**60 Years German Basic Law:
The German Constitution and its Court**

PSG) of 22 April 1997 (Federal Law Gazette I p. 934]), s. 69.4 of the Medicinal Products Act (Arzneimittelgesetz - AMG) in the version promulgated on 11 December 1998 (Federal Law Gazette I p. 3586) or s. 6 of the Equipment Safety Act (Gerätesicherheitsgesetz - GSG) in the version promulgated on 11 May 2001 (Federal Law Gazette I p. 866).

The information power of the Federal Government does not by any means end where action by governmental bodies with other institutional powers could also be considered for the purposes of managing a crisis, for example, that of the Land governments in connection with their own responsibilities for the administration of the state or that of the administration in connection with the prevention of danger through the police. The purpose could be defeated if the information activities of the Federal Government were to be allowed to include all else required to manage crises, but not reference to the danger of specific circumstances. Completeness of information is an important element of credibility. As regards the aspect of the division of powers at the federal level, there can be no objection to dissemination of information by the Federal Government which to an extent commensurates with the problem and if appropriate in a manner that overlaps with the powers of other governmental bodies since such information activity neither excludes that of the Land governments in their own areas of responsibility nor prevents administrative authorities from discharging their duties.

- bb) Article 12.1 of the Basic Law does not protect against the dissemination of information by an agent of governmental power that is substantively accurate and formulated to respect the requirement of objectivity and exercise appropriate restraint.

The substantive accuracy of information is in principle a prerequisite for fostering transparency in the market and as a result its ability to function. An agent of governmental power may, however, under special conditions also be empowered to disseminate information even if the accuracy of such information has not yet been conclusively determined. In such cases, the legitimacy of governmental information activities depends upon whether the facts of matter have been carefully determined possibly prior to dissemination using available sources of information, if appropriate also by hearing those affected, and in an attempt to achieve the reliability possible under the circumstances. If any uncertainty still remains as regards the facts, the state is nevertheless even then not prevented from disseminating the information, in any case not if it is in the public interest that market participants be informed of a circumstance, for example, a danger to consumers, that is important in terms of the course of action they might prefer to take. In such cases, it will be appropriate to inform market participants of any remaining uncertainty as regards the accuracy of the information in order to allow them to make their own decisions as to how to cope with that uncertainty.

Like any governmental activity, information is subject to the requirement of objectivity (see BVerfGE 57, 1 [8]). In the case of information that relates to the market, the requirements to be met also depend on necessities that have to do with the way competition functions. Assessment may not be based on irrelevant

**Selected Fundamental Decisions of
the Federal Constitutional Court**

considerations. Even if information is accurate, it may not be formulated in an unobjective or denigrating form. The dissemination of information must otherwise be restricted to what is necessary to convey the informational content, taking into account possible disadvantageous effects for any competitors affected.

- cc) The area of the fundamental right guaranteed under Article 12.1 of the Basic Law is, however, restricted by activity on the part of the state when such activity is not limited to making available relevant information on the market, which market participants can use as a basis for making independent decisions with respect to their behaviour in the market as a function of their interests. Governmental information activities can constitute restriction of the area of the fundamental right that is guaranteed in particular when their intent and effect serve to replace a governmental measure that would qualify as encroachment upon a fundamental right. The specific constraints of the legal order may not be circumvented by choosing the functional equivalent of such encroachment; on the contrary, the relevant legal requirements pertaining to encroachments on fundamental rights must be fulfilled.

The protected area is also compromised when information proves to be inaccurate in retrospect and is nevertheless disseminated or not corrected despite the fact that it continues to be important in terms of market behaviour. The establishment of an encroachment upon the area of protection in such cases also establishes the existence of an illegal act since there can be no justification for further dissemination of information that is known to be inaccurate.

3. There can be no objection to the challenged publication of the list of wines containing DEG on the basis of these standards. Publication of the list with information on wines containing DEG that was indisputably accurate also did not encroach upon the area covered by the guarantee of the fundamental right of the complainants to exercise an occupation or profession even if it did affect possible sales of wine that did not contain DEG. Publication of the list does not qualify as encroachment. The government respected the legal limits to its information activities.

- a) As a measure taken in the context of administration of the state, publication of the list fell into the area of responsibility of the Federal Government. It was in purpose, substance and effect intended to be different to an administrative act.
- aa) The Federal Minister for Youth, Family and Health (Bundesminister für Jugend, Familie und Gesundheit) exercised a responsibility of the Federal Government for the administration of the state. Its action was intended to manage a crisis that was a cause of concern to the public and a threat to the supraregional wine market by making available information within the limits of governmental responsibility.

The publication contained relevant information on the market concerning the violation of standards of quality in the case of wine from specific areas and bottlers. The information created transparency and put the suppliers and purchasers involved in the wine market in a position to use knowledge that was important to them but would otherwise not have been accessible to make their own decisions

**60 Years German Basic Law:
The German Constitution and its Court**

in the context of the market. The content and format of the publication showed that it also served many other purposes. The Federal Government wanted to accommodate public expectations of effective measures to manage the crisis and stabilize the supraregional wine market, which had largely collapsed. In this context, the government wanted to enable suppliers and purchasers to deal with the undesirable and possibly even dangerous situation in an informed and therefore independent manner. It was intended to enable wine merchants to adapt their offerings and consumers their purchasing behaviour on the basis of the information provided. In particular, the list gave wine merchants the possibility of removing the wines in question from their own selection of wines if appropriate as well as the possibility of advertising to make it clear that the German wine sector was involved only to a limited extent and that German wines were affected only to a limited extent. The dissemination of the information was intended to restore the confidence of the market participants in other wines. As regards wines containing DEG, the content of the list represented a warning to consumers; as regards other wines, it represented an all-clear signal. However, it was left up to the market participants to determine the corresponding consequences; the government limited itself to providing the findings of the investigation.

The list constituted a contribution of information against the background of uncertainty on the part of the public, and the Federal Government was also assigned political responsibility for the alleviation of this uncertainty. Its publication was intended to manage the crisis in a complex manner, in particular through the restoration of confidence in the supraregional wine market. It was not - unlike in the case of administrative measures to protect legal interests through the prevention of dangers - intended to deal with concrete individual cases and eliminate the resultant disadvantages for individual persons or classes of persons. The list was in particular not intended to cause the responsible administrative authorities to waive other measures for avoiding danger - for example, through the introduction and enforcement of a ban on the sale of wines containing DEG. Measures on the part of the Länder to avert danger remained possible, as did information activity by the Land governments.

- bb) The Federal Minister for Youth, Family and Health acted within the limits of the affairs of his department in compliance with Article 65 sentence 2 of the Basic Law. The Federation had the institutional authority to act for the government. The “glycol scandal” had - as the courts also found - attracted the attention of the entire population and called for a supraregional reaction. The events even extended beyond the territory of the Federal Republic to Austria, where the adulteration with DEG was first detected. It was initially necessary to obtain information from that country through diplomatic channels and deal with issues involving regulation of wine imports by customs. In view of the lack of clarity as to the effects of DEG in wine, it was appropriate to involve the Federal Health Office (Bundesgesundheitsamt - BGA). Cross-border coordination that involved the Federation was also appropriate for the management of the crisis situation. A

**Selected Fundamental Decisions of
the Federal Constitutional Court**

reaction was also expected of the Federal Government. This was confirmed by a large number of interpellations in the Bundestag concerning the activities of the government as regards this issue. In addition, the media called for clarification and measures by the Federal Government. The government reacted to this manifestation of supraregional public interest in information. The Federal Government could assume that it would not have been possible to satisfy the need for information through activity on the part of the governments of the Länder alone. For that reason, efficient management of the various aspects of the problem was also a consideration that spoke in favour of the necessity of action on the part of the Federation.

- b) Publication of the list did not violate standards of accuracy and objectivity.

The accuracy of the information contained in the list was beyond dispute. The details provided in the list were limited to information on the DEG content of the examined wines that was legally not allowed, which information was important in terms of market behaviour. It was made clear under the heading “Important Information” that it was possible that wine that was not adulterated with DEG was available on the market from the same bottler with the same designation and presentation. It was further stated that it should not be inferred from the indication of an appellation that all wines from that region could contain DEG, but that this could be deduced only in connection with the name of the bottler and the official number (Amtliche Prüfungsnummer).

The list also cannot be considered inaccurate on the grounds that the question as to the marketability and the health risks of wines with a low DEG content had not been resolved. There was a need for information on the part of broad segments of the uncertain public. The government communicated the information, to which it had access, on wines containing DEG. The accuracy of this information did not depend on whether a danger existed within the meaning of the regulatory requirements. There was also no obligation to maintain secrecy as regards the knowledge acquired through governmental investigation of the wines mentioned. Furthermore, the accuracy and objectivity of the information was not open to question because it was not possible to investigate all wines for reasons having to do with available capacity.

4. Since the fundamental right of the complainants under Article 12.1 of the Basic Law was not restricted by publication of the list of wines containing DEG, the court decisions under challenge also do violate this fundamental right, at least as regards the outcome. It is also not possible to object on constitutional grounds to the fact that the courts assumed that timely rough orientation for the consumers would have been impossible without mentioning the names of the bottlers and that the information would therefore only to a limited extent have been suitable for management of the problem by the individuals affected.

II.

The remaining challenges as regards fundamental rights are also unsuccessful.

1. Article 14.1 of the Basic Law is not violated for the very reason that the area of protection of the constitutional guarantee of property is not affected by the publication of the list.

The guarantee of property is intended to safeguard the freedom with regard to property of a holder of fundamental rights and to thus allow him to arrange his life autonomously. It protects concrete holdings of property against unjustified encroachment by the public powers. A general guarantee for the value of legal interests in property does not follow from Article 14.1 of the Basic Law (see BVerfGE 105, 17 [30]). Article 14.1 of the Basic Law covers only legal interests to which a legal subject is already entitled, but not opportunities and possible earnings in the future (see BVerfGE 68, 193 [222] with further references).

It follows from this that the impairment of possible sales due to the publication of the list advanced by the complainants does not affect any interest that is protected by Article 14.1 of the Basic Law. The property protected under the Basic Law is characterized by the fundamental right afforded the owner to exercise control over that property. This also covers the right of the owner to dispose of property. The right of the complainants to offer their wine on the market was not, however, restricted by the publication of the list. What was restricted according to their submission, was the actual possibility of continuing to sell the products and thereby realize the opportunity to effect the profitable sales inherent in that offer. Whereas the legal right to offer property for sale must be considered part of the estate that is acquired and protected under Article 14.1 of the Basic Law, the actual possibility of a sale has nothing to do with that which has already been acquired, but rather with commercial activity.

A different assessment also does not follow from the aspect of protection of an established and operating commercial enterprise. The Federal Constitutional Court has up to now left open, whether and the extent to which the guarantee of the right of property independently covers an established and operating commercial enterprise as the actual subsumption of the property and rights constituting the assets of a company (see BVerfGE 51, 193 [221-222]; 68, 193 [222-223]).

The constitutional complaints provide no occasion for deciding this question here. Even if mere sales and opportunities for profit or actual circumstances are of considerable importance for the company, they are not assigned to the protected estate of the individual enterprise by the Basic Law as property rights (see BVerfGE 68, 193 [222-223]; 77, 84 [118]; 81, 208 [227-228]).

The situation as regards the damage to the reputation of the company objected to by the complainants is no different. This is in any case not protected by Article 14 of the Basic Law insofar as it involves prospects and favourable opportunities. If the reputation of an enterprise is presented as the result of previous performance, it is also not assigned to the company within the meaning of the property rights protected by Article 14.1 of the Basic Law (see Philipp, *Staatliche Verbraucherinformation im Umwelt and Gesundheitsrecht*, 1989, pp.175 et seq.)

**Selected Fundamental Decisions of
the Federal Constitutional Court**

It is continually redefined in the market through the performance of the company and the image it projects on the one hand and through assessment by market participants on the other hand and is therefore subject to constant change. Article 14 of the Basic Law protects only legal rights assigned by law, but not the result of situational assessment of the market participants, even if this is serious in economic terms.

2. Article 3.1 of the Basic Law is, despite the opinion of the first complainant, not violated because no warnings were issued to the public in the past when monobromacetic acid or homogeneous acetic acid were detected in wine or sparkling wine. A legal measure does not become inequitable because other cases that may have been similar were treated differently. The complainants do not claim arbitrariness in this concrete case, for example, in the form of the use of motives that would have to be disapproved of on objective grounds.

3. Article 2.1 of the Basic Law is excluded as a standard since the questions regarding the protection of competing market participants raised by the constitutional complaints are covered by the objectively more specific fundamental right contained in Article 12.1 of the Basic Law (see BVerfGE 25, 88 [101]; 59, 128 [163]; established case law).

XI. Inviolability of the Home - Article 13 of the Basic Law

a) *Right to Inspect Business Premises, BVerfGE 32, 54*

Explanatory Annotation

Article 13.1 of the Basic Law protects the home from intrusion by the state subject to now very lengthy exceptions (and counter-exceptions) stipulated - or rather narrated - in Sections 13.2 to 13.7. The case concerned the legality of a statutory right of representatives of the Chamber of Trades and Crafts to enter business premises to assess whether such a business could become a member of the Chamber. The two applicants operated a business that was potentially affected by this statutory right of entry and brought constitutional complaints against this new legislative provision. This complaint could only make sense under the assumption that business premises also partake in the protection of Article 13.1 and not only private residences. The Constitutional Court affirmed the broader scope of Article 13.1 to include business premises as well as private residences on the basis of a noteworthy comparative law exercise.

It should be noted that this question arose again years later in the case law of the European Court of Justice in Luxembourg (ECJ), the Court of the European Union, and the European Court of Human Rights (ECtHR) in Strasbourg, the Court of the European Convention of Human Rights (ECHR). In a case concerning cartel investigations by the Commission of the European Community (as it then was), the ECJ had held, that business premises are not protected by the European Union equivalent of Article 13.1, which the ECJ had in principle recognized under its own doctrine of fundamental rights of the European Union as part of the general principles of European Union law.⁵⁹ The ECtHR on the other hand in a later judgment indicated that the protection should be broader and include business premises as well, albeit with the proviso, that the intensity of the protection of business premises is less than that of private residences.⁶⁰ In other words the Strasbourg Court chose the same approach as the German Constitutional Court regarding the scope of the rights and the extent of the exceptions. The ECJ subsequently corrected its position and decided that business premises are protected, as demanded by the Strasbourg Court.⁶¹

59 ECJ, Case 46/87, 21.9.1989, 1989 ECR 2859 - Hoechst AG, para. 17-8,
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61987J0046:EN:HTML>.

60 ECtHR, Appl. No. 13710/88, 16.12.1992, Niemietz/Germany, (available at
<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>).

61 ECJ, Case C-94/00, 22.10.2002, 2002 ECR I-9011, para. 29,
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000J0094:EN:HTML>.

Selected Fundamental Decisions of
the Federal Constitutional Court

Translation of the Right to Inspect Business Premises Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 32, 54*

Headnotes:

1. The term “home” as used in Article 13.1 of the Basic Law (Grundgesetz - GG) must be broadly interpreted; it also encompasses workplaces, business premises and offices.
2. The interpretation of the terms “encroachments and restrictions” in Article 13.3 of the Basic Law must take into account the difference in the need for protection of private dwellings on the one hand and workplaces, business premises and offices on the other hand.

Order of the First Senate of 13 October 1971 - 1 BvR 280/66 -

Facts:

The complainants were proprietors of enterprises engaged in craft-like activities. With their constitutional complaint, they directly challenged the right to enter and inspect premises afforded to the Chamber of Skilled Crafts under s. 17 of the Trade and Crafts Code (Gesetz zur Ordnung des Handwerks - HwO) as it would also apply to them in respect of their business premises and offices. S. 17 of the Trade and Crafts Code reads as follows:

- (1) Craftsmen who are entered in or are to be entered in the Crafts Register must provide the Chamber of Skilled Crafts with the information required for entry in respect of the nature and scope of their enterprise, the number of skilled and unskilled persons employed by the enterprise and craft-related examinations of the proprietor of the enterprise and the manager of the enterprise.
- (2) Agents of the Chamber of Skilled Crafts are empowered to enter the premises and offices of parties required to provide such information and carry out audits and inspections on such premises and in such offices for the purpose specified in paragraph 1. Parties required to provide such information must tolerate such measures. The fundamental right stipulating that the home is inviolable (Article 13 of the Basic Law) is in this regard restricted.
- (3) ...

The constitutional complaint was unsuccessful.

Extract from the Grounds:

(The Court ruled as follows on the admissibility of the constitutional complaint lodged directly against s. 17.2 of the Trade and Crafts Code:)

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**60 Years German Basic Law:
The German Constitution and its Court**

...

2. Insofar as the constitutional complaint challenges s. 20 in conjunction with s. 17.2 of the Trade and Crafts Code, it is - despite the opinion of the Federal Minister of the Economy - to be considered admissible. The obligation of the complainants to tolerate the measures pursuant to s. 17.2 sentence 2 of the Trade and Crafts Code is directly established by force of law. This obligation does surely presuppose an act on the part of the Chamber of Skilled Crafts, namely, an order to enter the premises to carry out the audit or inspection. However, whether and when the Chamber actually exercises this right lies within its discretion. It may also dispatch its agents to the enterprise at any time without observing any formalities. The complainants may not be advised either to contest an impending inspection through the administrative courts beforehand or to initially refuse to allow such inspection, thereby establishing the elements of a regulatory offence (s. 118.1 no. 2 of the Trade and Crafts Code) that may result in regulatory proceedings. Their statutory obligation to tolerate inspections is immediately incumbent upon the complainants.

...

(The Court then proceeds to elaborate on the grounds for the constitutional complaint:)

...

C. II.

The complainants specifically challenge s. 20 of the Trade and Crafts Code insofar as this provision states that s. 17.2 is applicable. They consider that to allow agents of the Chamber of Skilled Crafts the right to enter their “premises and offices” for the purposes of carrying out “audits and inspections” constitutes a violation of their fundamental right to the inviolability of the home.

The wording and obvious intent of these provisions suggest the assumption that they are meant to allow entry of only premises used for commercial purposes, but not the private dwelling of the proprietor of the enterprise. The challenge of the complainants would therefore be without merit if business premises and offices did not even fall under the term “home” within the meaning of Article 13 of the Basic Law. The Federal Constitutional Court cannot, however, concur with this view, which is also held by the Federal Minister of Justice.

1. Article 13.1 of the Basic Law uses a long established formulation to describe the area of this fundamental right it protects. Article 10 of the Belgian constitution of 1831 had already expressed this fundamental right in a brief and memorable phrase: “*Le domicile est inviolable*”. It was taken over without any change in the section on fundamental rights of the Frankfurt Imperial Constitution (Frankfurter Reichsverfassung) of 1848/49 (s. 140) and in Article 6 of the Prussian Constitution of 5 December 1848/31 January 1850. Article 115 of the Weimar Imperial Constitution (Weimarer Reichsverfassung) then provided: Every German’s home is his sanctuary and is inviolable.

Within the jurisdiction of the Prussian Constitution, it was unanimously agreed in case law and the scholarly literature that the term “home” was to be broadly interpreted and also encompassed offices (including those of associations) (see Decisions of the Prussian Higher

**Selected Fundamental Decisions of
the Federal Constitutional Court**

Administrative Court [*Entscheidungen des Preußischen OVG*] in PrOVG 1, 375; 27, 325; 49, 207 and in PrVerwBl. vol. 25 (1903/04), p. 795; also Anschütz, *The Verfassungsurkunde für den Preußischen Staat*, vol. I, 1912, note II 1 on Article 6).

The teachings of constitutional law during the Weimar period overwhelmingly concurred in this opinion (according, for example, to Anschütz, *Die Verfassung des Deutschen Reichs*, 14th ed., 1933, comment 1 on Article 115; Giese, *Die Verfassung des Deutschen Reichs*, 8th ed., 1931, note 1 on Article 115).

During the preliminary work, the Herrenchiemsee draft (Article 5) of the version of Article 115 of the Weimar Imperial Constitution was initially used as the basis for the Basic Law. However, the authors finally reverted to the simple formulation of the Prussian Constitution and the Frankfurt Imperial Constitution. There was no intention to change the previous interpretation of the term “home” (see in particular the statements of the Members of the Bundestag Zinn and v. Mangoldt, *JbÖffR* 1, pp. 139 and 181).

The constitutional literature has consistently adopted this interpretation and includes offices in the area protected by the fundamental right. This serves to emphasize the continuity of the development of the law well as the protective purpose of the provision, which, it was argued, was to safeguard the spatial area for the development of the personality of the individual, including as well, undisturbed occupational activity. Reference is also made to the practical difficulties that would ensue from a narrower interpretation of the term “home” (see in detail the commentaries on the Basic Law: v. Mangoldt-Klein, 2nd ed., vol. I, p. 401; *Bonner Kommentar - Zweitbearbeitung* (Dagtolglou) - marginal note 21 on Article 13; Maunz-Dürig-Herzog, marginal note 1 on Article 13; also, for example, Gentz, *Die Unverletzlichkeit der Wohnung*, 1968, pp. 24 et seq. with further bibliography).

A look at foreign provisions shows that a broad interpretation of the term “home” predominates in the case of identical or substantially identical formulations of legal texts (see, for example, for Switzerland BGE 81 I, pp. 119 et seq.; for Austria the decision of the Constitutional Court [*Verfassungsgerichtshof*] of 22 November 1932 no. 1486, of 14 March 1949 no. 1747, of 2 July 1955 no. 2867 and of 16 December 1965 no. 5182, and Ermacora, *Handbuch der Grundfreiheiten und der Menschenrechte*; for Italy: *Enciclopedia del Diritto* XIII [1964], pp. 859 et seq. and Faso, *La Liberte di Domicilio*, 1968, pp. 34 et seq.; for the USA the dissenting opinion of Justice Frankfurter on *Davis v. United States* of 10 June 1946 - 328 US 582, 596 and 597 and *See v. City of Seattle* of 5 June 1967 - 387 US 541).

2. There is no reason to depart from the broad interpretation of the term “home” even if one takes into account the fact that the earlier provisions described above and to some extent also foreign provisions afford the legislature stronger rights of encroachment than are provided under Article 13 of the Basic Law. Since business premises and offices were already considered to belong to the area of the personal sphere of freedom of the citizenry in times when the protection of fundamental rights was in principle significantly less developed and therefore subject to the specific constitutional and statutory provisions intended to protect against trespass, it would be difficult to understand and run counter to the basic tendency of the framers of the Basic Law of 1949 if such premises were now to be generally excepted from the protection of this fundamental right. The interpretation that has since remained unchanged for more than a century

**60 Years German Basic Law:
The German Constitution and its Court**

has become entrenched as a general legal conviction and lent the fundamental right reach that may be curtailed only if it can be demonstrated that compelling objective reasons require such dilution of substantive content and that the historical development at least does not stand in the way of such dilution. However, as has been shown, the opposite is the case. Not only has the traditional formulation of the fundamental right been taken over without any change, the statements by the authoritative authors that were made to justify this and have remained without contradiction clearly show that the previous interpretation should be retained along with the formulation that has been handed down. There is in no case any reason to suspect that there was any thought of restricting the fundamental right in view of very recent historical experience, which showed the vulnerability of precisely this area of life to encroachment by the public powers. Only a broad interpretation can do justice to the principle according to which in cases of doubt that interpretation is to be chosen that most strongly gives effect to the legal force of the fundamental right (BVerfGE 6, 55 [72]).

It is moreover consistent with the principles that the Federal Constitutional Court has developed for the purposes or interpretation of the fundamental right of occupational freedom. If occupational activity is considered to constitute a significant aspect of the development of an individual's personality and is therefore afforded an especially high level of importance in the context of the conduct of the life of the individual (BVerfGE 7, 377 [397]; 13, 97 [104-105]), it is then only logical to afford the spatial area in which this work takes place commensurately, effective legal protection and in any case refrain in the absence of any compelling necessity from curtailing the constitutional protection of such space already in place. In this context, mention must be made of the fact that only this interpretation also allows legal entities and associations to benefit from the protection of this fundamental right that they have, according to prevailing opinion enjoyed up to now.

The wording of Article 13.1 of the Basic Law can on the other hand not be considered of decisive importance. The linguistic cloak of this fundamental right has been such as to sacrifice legal precision for the solemn pathos of a memorable phrase. "Home" is in this context always to be understood in the sense of the "private spatial sphere."

3. The narrower interpretation of the term "home" advocated by the Federal Minister of Justice is obviously also motivated by a concern that it would not be possible to uphold many customary rights of administrative authorities to enter and inspect premises in connection with business, labour and fiscal oversight if business premises and offices were to be included in the area of protection of Article 13 of the Basic Law since they would no longer be covered by the restrictive provision contained in Article 13.3 of the Basic Law. Even if this were the case, it would seem questionable to define the sphere of operation of the fundamental right on the basis of the restrictive provision and argue, for example, thus: a narrower interpretation must be chosen that would render the restrictions meaningless because a broad interpretation would present practical difficulties. In fact, the substantive content of the fundamental right must be determined first; only then may restrictions on the exercise of the fundamental right that are defensible under the rule of law be defined, taking into account the basic presumption of freedom and the constitutional principles of proportionality and reasonableness. Furthermore, the practical difficulties feared by the Federal Minister of Justice can to a great extent be overcome, as will be shown, through a differentiating interpretation.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

4. a) Inclusion of offices in the area of protection of Article 13 of the Basic Law means first of all that “searches” of such premises may in principle be ordered only by a judge (paragraph 2). The Federal Minister of Justice recognizes that the same need for protection exists in principle as in the case of dwellings, and he is of the opinion that there is no question of any restriction of the basic requirement for a previous judicial order in view of the protection against searches that also applies to commercial and business premises that has long been acknowledged in all constitutional democracies and also in Germany. This end cannot, however, be achieved with sufficient certainty as regards compliance with constitutional law with a narrower interpretation of the term “home.”

It is not necessary to decide in detail here how far the term “search” can be extended under constitutional law (see on this Decisions of the Federal Administrative Court [*Entscheidungen des Bundesverwaltungsgerichts* - BVerwGE] 28, 285); for rights to entry and inspection under legislation governing the exercise of crafts are not searches.

- b) The inviolability of the home in principle is secured in Article 13.3 of the Basic Law by the fact that “encroachments and restrictions,” which are not “searches,” may be carried out only under very specific, precisely described conditions. In the case of homes in the narrower sense, the strict limitation of permissible encroachments reflects the basic requirement of unconditional respect for the private sphere of the citizenry. The Federal Minister of Justice does go too far in assuming that the restrictions in paragraph 3 are “in substance adapted (only) to dwellings;” for entry of business premises and workplaces by the responsible authorities can be expeditious and necessary “to combat the danger of an epidemic” as well as “to protect young persons at risk” (namely, under the aspect of protection of minors in the workplace). However, it may in fact seem that there is some question as to whether a sufficient constitutional basis exists for the right afforded governmental authorities under a series of laws, to enter business premises for control purposes and carry out inspections and audits of various kinds if offices are included within the sphere of operation of Article 13.3 of the Basic Law. In some cases, the purpose, which is “to confront an acute danger to public safety and order,” will surely justify encroachment, especially under the broad interpretation of this clause such as that used as the basis for the decision of the Federal Constitutional Court of 13 February 1964 (BVerfGE 17, 232 [251-252]) that encompasses confrontation of pending danger. However, to the extent that the authorities responsible for the supervision of business, labour and fiscal matters are afforded the right to enter business premises and offices for the purposes of auditing books and records or inspecting merchandise and facilities by virtue of the proprietor’s duty to disclose information, it would be possible to infer a constitutional basis for these measures compatible with customary interpretation only by extending the area of application of paragraph 3 to a degree that can no longer be justified. On the other hand, it is necessary to agree with the Minister in that such rights of entry and inspection often represent an indispensable control instrument for modern oversight of business activities; such rights are even becoming more important for effective and uniform law enforcement as governmental controls make inroads into the management of private companies and business oversight in the broadest sense becomes commensurately more sophisticated and intensive.

**60 Years German Basic Law:
The German Constitution and its Court**

The Federal Minister of Justice assumes that it was not the intention of the Parliamentary Council to eliminate these rights - of which it was aware - of governmental authorities to enter and inspect premises; he is of the opinion that these cases were “obviously not taken into consideration” when Article 13.3 of the Basic Law was formulated. This opinion is also found in the scholarly literature (see, for example, the commentaries of Maunz-Dürig-Herzog, marginal note 22 on Article 13; v. Mangoldt-Klein, 2nd ed., vol. I, pp. 405-406 and Kern in Neumann-Nipperdey-Scheuner, *Die Grundrechte*, vol. II, pp. 105 et seq.).

Accordingly, as the Minister emphasizes, the federal legislature has always assumed since the Basic Law went into force that such rights to enter and inspect premises were not excluded by Article 13.3 of the Basic Law. Of course, the Minister correctly rejects reliance on customary law to justify continuation of this assessment. Very basic reservations speak against the assumption of any restriction of rights of freedom by customary law in view of the fact that the framers of the Basic Law always carefully adapted restrictions as a function of the nature of the individual fundamental rights. Establishment with certainty of a common legal conviction on the part of all parties involved would moreover be hardly possible in this area.

- c) Given this situation, an interpretation would seem appropriate and permissible. One that starts initially with the terms “encroachments and restrictions” and interprets them in a manner that does justice to the protective purpose of the fundamental right, reflects the discernible will of the framers of the Basic Law, but also appropriately takes into account the objective necessities of the administration of the modern state. This interpretation is based on the assumption that - if business premises and offices are also in principle included within the area of protection of Article 13 of the Basic Law - the need for protection of all premises to be assigned to the “private spatial sphere” does in fact vary in degree. Business premises and offices are, because of the nature of their purpose, more amenable to greater openness “to the outside;” they are intended to be used for the purposes of social contact, and the occupant therefore releases them to a certain extent from the private intimate sphere to which the home in the narrower sense of the term belongs. It is in keeping with the greater need to keep disruptions at a distance from private life and the spatial sphere in which it unfolds that the terms “encroachments and restrictions” are more strictly interpreted when they refer to the home in the narrower sense. That means that a right to enter and inspect premises in provisions of the nature at issue here is excluded. For this is where the full effect of the protective purpose of the fundamental right, which is to safeguard the right of the individual “to be left in peace,” (BVerfGE 27, 1 [6]) comes to bear. This also applies when a professional or commercial activity is exercised on these premises at the same time. In the case of premises used exclusively for commercial or business purposes, this need for protection is reduced by the purpose that the occupant himself wants them to fulfil. The activities that the occupant of these premises pursues necessarily have an effect toward the outside and can therefore also affect the interests of others and those of the general public. It is then logical that the authorities charged with the protection of these interests also monitor such activities on site within certain limits and may enter the premises for this purpose. This purposeful process is not actually

**Selected Fundamental Decisions of
the Federal Constitutional Court**

trespassing. The proprietor of the enterprise will accordingly not, as a rule, perceive entry of the premises by agents of the authorities as an encroachment upon his householder's rights. His psychological resistance might be directed against the inspection and audit itself, which he considers unnecessary, burdensome and therefore unreasonable; he will generally not view mere entry of the premises, which he himself has opened to the outside through its dedicated purpose, as a restriction of the sphere protected by his fundamental right.

If one assumes along with the Federal Minister of Justice that because of the inconsistency of the provision that Article 13.3 of the Basic Law was "from the outset" not supposed to apply to customary rights to enter and inspect business premises and offices, the assumption that the Parliamentary Council also proceeded from this "unbiased" perspective would not seem unwarranted. It must be left to the legislature to determine at the appropriate time whether there is occasion for unambiguous expression of this will through reformulation of the text of the Basic Law.

5. If the bounds of the rights to enter and inspect business premises and offices that are accordingly no longer to be qualified as "encroachments and restrictions" are defined objectively, namely, taking into account Article 2.1 of the Basic Law in conjunction with the principles of proportionality and reasonableness, it then follows that in particular the following conditions must be required:

- a) the entry of premises must be authorized by a specific provision of law;
- b) the entry of premises and the conduct of inspections and audits must serve a legitimate purpose and be necessary to achieve this purpose;
- c) the law must make it possible to clearly recognize the purpose of entry, the objective and the scope of the permissible inspection and audit;
- d) the entry of the premises and the conduct of the inspection and audit must be allowed only at times at which the premises are normally available for the respective business or commercial use.

Although entry of business premises and offices by agents of the authorities in connection with their duties is not to be considered a restriction of the right of inviolability of the home under these conditions, it cannot by the nature of things be excluded that the administrative action it serves to implement may as such be objected to under other constitutional aspects.

6. If these standards are applied, there can be no constitutional objections as regards the provisions ss. 20 and 17.2 of the Trade and Crafts Code under challenge here. They serve the legitimate interests of the administration and do not unreasonably burden the proprietor of the enterprise. His private dwelling is not affected.

**60 Years German Basic Law:
The German Constitution and its Court**

b) *Acoustic Surveillance, BVerfGE 109, 279*

Explanatory Annotation

Article 13 of the Basic Law is devoted to the privacy of the home. Originally three short subsections were sufficient to achieve the goal. However, in 1998 four new subsections were inserted and Article 13 inflated to over 340 words. The reason for this amendment of Article 13 was to enable the acoustic surveillance of homes in the context of the prosecution of serious crimes in the context of organized crime and international terrorism.

The Court addressed the ‘eternity clause’ of Article 79.3, which limits the scope of constitutional amendments by safeguarding the principles of Article 1 and 20. As in the case concerning the privacy of mail and other communication, the Court went on to explain that this limitation of the constitutional legislator must be narrowly interpreted and does not preclude amendments to the scope of guarantees. It also does not preclude that the government in the context of the prosecution of serious crimes takes to clandestine measures of which those observed do not know.

However, the Court did define limits. Acoustic surveillance will not be compatible with the human dignity core of the protection of Article 13 if it reaches into the very private sphere of an individual. The Court specifically mentioned sexual relationships as one example and communication with close family members and a spouse as another, albeit even more complicated example, because the conversation with family members could, of course, also yield the very information about the criminal activity, which the observers are after. The surveillance activity must immediately be curtailed when such situations arise or are foreseeable; any information so obtained must be immediately destroyed and cannot be used in court. This obviously complicates matters for the authorities considerably as they will have to carefully tread and instantly decide when to turn the microphone off. The Court also placed time limits on this type of surveillance. Acoustic surveillance around the clock and for a longer time in the private home is not possible. The Court went on to hold that the specific provisions in the Criminal Procedure Code dealing with the acoustic surveillance are not sufficient to secure the limitations spelled out.

Translation of the Acoustic Surveillance Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE), BVerfGE 109, 279*

Headnotes:

1. Article 13.3 of the Basic Law (Grundgesetz - GG) in the version of the Act Amending the Basic Law (Gesetz zur Änderung des Grundgesetzes - GGÄndG) (Article 13) of 26 March 1998 (Federal Law Gazette (Bundesgesetzblatt - BGBl) I, p. 610) is compatible with Article 79.3 of the Basic Law (Grundgesetz).

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

2. The inviolability of human dignity under Article 1.1 of the Basic Law includes recognition of a core area of private conduct of life that is afforded absolute protection. This area may not be encroached upon through acoustic surveillance of private dwellings for the purposes of prosecution of criminal offences (Article 13.3 of the Basic Law). As a result, the inviolability of the home (Article 13.1 in conjunction with Article 1.1 of the Basic Law) and the interest in prosecution of criminal offences may not be balanced against one another according to the principle of proportionality.
3. Not every form of acoustic surveillance of private dwellings constitutes a violation of the substantive content of human dignity under Article 13.1 of the Basic Law.
4. Legal power to permit surveillance of private dwellings must contain safeguards for the inviolability of human dignity and be consistent with the requirements defined in Article 13.3 of the Basic Law as well as the other constitutional requirements.
5. If acoustic surveillance of a private dwelling on the basis of such power does nevertheless result in the collection of information from the protected core area of private conduct of life that is afforded absolute protection, it must be terminated and the recordings deleted; any use of such information is prohibited.
6. The provisions of the Criminal Procedure Code (Strafprozessordnung - StPO) that govern the acoustic surveillance of private dwellings for the purposes of prosecution of criminal offences do not completely satisfy the requirements of the Basic Law in respect of the protection of human dignity (Article 1.1 of the Basic Law), the principle of proportionality embodied in the principle of the rule of law, the guarantee of effective recourse to the courts (Article 19.4 of the Basic Law) and the right to a hearing in accordance with the law (Article 103.1 of the Basic Law).

Judgment of the First Senate of 3 March 2004 - 1 BvR 2378/98 -/- 1 BvR 1084/99 -

Facts:

The constitutional complaints are directed immediately at Articles 13.3 to 13.6 of the Basic Law and the provisions of the Criminal Procedure Code that permit acoustic surveillance of private dwellings for the purposes of prosecution of criminal offences.

The new paragraphs 3-6 were inserted into Article 13 of the Basic Law by constitutional amendment in March 1998. They served as the basis for the inclusion of new provisions governing acoustic surveillance of private dwellings in the Criminal Procedure Code through the Act on the Improvement of the Fight against Organized Crime (Gesetz zur Verbesserung der Bekämpfung der Organisierten Kriminalität - OrgKVerbG) of May 1998.

According to the new s. 100c.1 no. 3 of the Criminal Procedure Code, technical means may be employed to monitor and record the words of a suspect spoken in the privacy of the home if certain facts support the suspicion that he has committed one of the criminal offences specified in the provision, i.e., one of what are referred to as catalogue offences. The catalogue includes in particular offences that are considered typical of the phenomenon of organized crime. Various offences against the security of the state are also included. According to s. 100c.2

**60 Years German Basic Law:
The German Constitution and its Court**

sentence 1 of the Criminal Procedure Code, surveillance activities may be directed only against the actual suspects. However, s. 100c.2 sentence 5 of the Criminal Procedure Code makes it explicitly clear that the private dwellings of other persons may also be monitored if the presence of a suspect in such dwellings can be - with the same degree of suspicion, assumed. Surveillance may pursuant to s. 100d.2 of the Criminal Procedure Code be ordered only by a state security chamber of a Regional Court (Landgericht) or, in the case of imminent danger, by its president. As regards the interception and recording of communication between suspects and persons who enjoy the right to refuse to give testimony, s. 100d.3 of the Criminal Procedure Code makes a distinction between persons afforded the professional privilege mentioned in s. 53 of the Criminal Procedure Code and relatives and care professionals who have a right to confidential communication within the meaning of ss. 52 and 53a of the Criminal Procedure Code. Evidence may not be collected in the case of conversations involving persons who enjoy professional privilege. In the case of relatives and care professionals, on the other hand, the provision prohibits only the use of evidence and is not absolute, but explicitly subject to the application of the principle of proportionality. According to s. 100d.6 of the Criminal Procedure Code, legal remedies are also available after termination of surveillance activities.

SS. 100 et seq. of the Criminal Procedure Code govern the use of the knowledge obtained. Personal information acquired through surveillance under s. 100c.1 no. 3 of the Criminal Procedure Code may in principle be used for the purposes of criminal proceedings. This can also refer to the proceedings in connection with which the measure was ordered or other criminal proceedings (s. 100d.5 sentence 2 of the Criminal Procedure Code) involving a catalogue offence pursuant to s. 100c.1 no. 3 of the Criminal Procedure Code. Paragraph 1 also permits use for preventive police purposes to a limited extent.

The constitutional complaints directed immediately against Articles 13.3 to 13.6 of the Basic Law were dismissed; they were in part successful in respect of the surveillance measures in connection with criminal proceedings.

Extract from the Grounds:

...

C.

The constitutional complaints are, to the extent admissible, in part, founded. The amendment of Article 13.3 of the Basic Law does surely comply with the requirements of Article 79 of the Basic Law. The challenged provisions of the Criminal Procedure Code are on the other hand not entirely consistent with the Basic Law.

I.

Article 13.3 of the Basic Law, which was inserted by constitutional amendment, is in compliance with the Basic Law.

1. Article 13.3 of the Basic Law permits restriction of the fundamental right of inviolability of the home contained in Article 13.1 of the Basic Law. This fundamental right affords the individual a fundamental living space and guarantees the right to be left in peace within this

**Selected Fundamental Decisions of
the Federal Constitutional Court**

space (see BVerfGE 32, 54 [75]; 42, 212 [219]; 51, 97 [110]. Article 13.1 of the Basic Law protects the private spatial sphere in particular in the form of a defensive right (see BVerfGE 7, 230 [238]; 65, 1 [40]).

The provision, which is directed at the holders of public powers, contains a fundamental prohibition not only against entering and remaining in a private dwelling against the will of the occupant (see BVerfGE 76, 83 [89-90]), but also against the installation or use of acoustic surveillance devices (see BVerfGE 65, 1 [40]).

At the time of the creation of the Basic Law, the fundamental right under Article 13.1 thereof served primarily to protect occupants against the undesired physical presence of representatives of governmental power. Since that time, new possibilities for endangering the fundamental right have been added. The current state of technology also makes it possible to intrude upon the spatial sphere in other ways. The protective purpose of the provision containing the fundamental right would be defeated if the protection of private dwellings against surveillance with technical means were not also covered by paragraph 1 even when such means are used outside dwellings. Article 13.3 of the Basic Law therefore creates a constitutive restriction of the fundamental right under Article 13.1 of the Basic Law.

2. The formalities for the proper adoption of Article 13.3 of the Basic Law were complied with.

Article 13.3 of the Basic Law was inserted into the Basic Law by the Act Amending the Basic Law of 26 March 1998, which explicitly supplements the wording of the Basic Law (see Article 79.1 of the Basic Law). The law adopting the constitutional amendment was enacted by a two-thirds majority of the Bundestag and the Bundesrat in compliance with Article 79.2 of the Basic Law.

3. The legislature that adopted the constitutional amendment also respected the substantive limits to constitutional amendment drawn by the Basic Law.

- a) Article 79.3 of the Basic Law prohibits amendments to the Basic Law that affect the principles laid down in Articles 1 and 20 of the Basic Law. These include the principle of respect for and protection of human dignity (Article 1.1 of the Basic Law), but also recognition of inviolable and inalienable human rights as the basis of every community, of peace and of justice (Article 1.2 of the Basic Law). In conjunction with the reference to the following fundamental rights contained in Article 1.3 of the Basic Law, the guarantees of these rights are in principle immune to restriction since they are indispensable to the maintenance of an order in compliance with Articles 1.1 and 1.2 of the Basic Law (see BVerfGE 84, 90 [121]).

The fundamental elements of the principles of the rule of law and the social state expressed in Articles 20.1 and 20.3 of the Basic Law must also be respected.

Article 79.3 of the Basic Law provides for an exception that must be narrowly interpreted; it does not prevent the legislature from adopting amendments to modify those aspects of these principles embodied in positive law for appropriate reasons (see BVerfGE 84, 90 [120-121]; 94, 49 [102-103]).

**60 Years German Basic Law:
The German Constitution and its Court**

The Federal Constitutional Court must respect the right of the legislature to amend, restrict or even suspend individual fundamental rights as long as it does not affect the principles laid down in Articles 1 and 20 of the Basic Law. The legislature is not prohibited from modifying those aspects of these principles that are embodied in positive law for appropriate reasons (see BVerfGE 94, 49 [103-104]). What the substantive guarantee contained in Article 1.1 of the Basic Law encompasses as regards the individual fundamental rights must be established through independent interpretation of each individual provision.

Constitutional amendments are not to be measured against the guarantee of the essence of the fundamental rights contained in Article 19.2 of the Basic Law. This guarantee is binding upon the ordinary legislature, but not upon the legislature with the power to amend the Basic Law. An effect on the essence of a fundamental right within the meaning of Article 19.2 of the Basic Law may surely at the same time restrict the substantive content of human dignity covered by a fundamental right protected by Article 79.3 of the Basic Law in an individual case. The essence of a fundamental right may not, however, be equated with the aspect of human dignity contained in that right. The possibility of congruency in the individual case does not in any way change the fact that the aspect of human dignity contained in a fundamental right, which is protected by Article 79.3 of the Basic Law, is the sole standard for measurement of the restriction of a fundamental right through constitutional amendment.

- b) Article 13.3 of the Basic Law is compatible with the guarantee of human dignity under Article 1.1 of the Basic Law.

A more tangible standard for the measurement of human dignity is obtained through examination of the specific situation in which a conflict may arise. Acoustic surveillance of private dwellings for the purposes of prosecution of criminal offences will generally not violate the aspect of human dignity contained in Article 13.1 of the Basic Law and Article 2.1 in conjunction with Article 1.1 of the Basic Law. However, the nature and manner in which the surveillance of private dwellings is carried out may result in a situation in which human dignity is violated. Article 13.3 of the Basic Law works counter to this possibility through explicit legal precautions; further requirements also exist that can be inferred from interpretation of the Basic Law. The power to authorize acoustic surveillance of private dwellings under Article 13.3 of the Basic Law does not therefore violate Article 79.3 of the Basic Law, for the necessary provision of law can and must ensure that human dignity is not violated in the individual case. The power pursuant to Article 13.3 of the Basic Law covers the enactment of only such provisions as contain such a guarantee.

- aa) Human dignity is a fundamental constitutional principle and a paramount constitutional value (see BVerfGE 6, 32 [36]; 45, 187 [227]; 72, 105 [115]). The substantive content of the guarantee of this term, which implies value judgments, must be concretely defined. This is done by the courts on the basis of the facts involved in the individual case by examining the respective area of life affected by provisions of law and isolating classes of cases and typical examples (see on Article

**Selected Fundamental Decisions of
the Federal Constitutional Court**

100 of the Bavarian Constitution [*Verfassung des Freistaates Bayern - BV*], for example, Bavarian Constitutional Court [*Bayerischer Verfassungsgerichtshof - Bay-VerfGH*], BayVBl 1982, p. 47 [50].

In this context, the term “human dignity” is often described through inference from the act of violation (see BVerfGE 1, 97 [104]; 27, 1 [6]; 30, 1 [25]; 72, 105 [115 et seq.]).

Immediately following the experiences of the period of National Socialism, phenomena such as abuse, persecution and discrimination were initially at the center of consideration. As the Federal Constitutional Court phrased it in one of its first decisions, what was at issue in particular was protection against “humiliation, stigmatization, persecution, ostracism, etc.” (see BVerfGE 1, 97 [104]).

Thereafter, the guarantee of human dignity became the standard of measurement for new threats, for example, the abuse of the collection and use of data in the 1980s (see BVerfGE 65, 1). Violation of principles of humanity, including those involving the collection and dissemination of information, was one of the issues addressed by the courts in their efforts to deal with past injustice in the German Democratic Republic (see BVerfGE 93, 213 [243]).

Currently, the debate over the substantive content of human dignity is conditioned by questions involving the protection of personal identity and psychological and social integrity.

- (1) The Federal Constitutional Court has repeatedly emphasized that it is incompatible with human dignity to make human beings mere objects of governmental power (see BVerfGE 30, 1 [25-26 and 39 et seq.]; 96, 375 [399]). For example, criminals may not be treated in a manner that violates their constitutionally protected right to social esteem and respect and thereby reduced to mere objects of crime prevention and prosecution (see BVerfGE 45, 187 [228]; 72, 105 [116]).

However, limits are also set to the potential of the term “object” (see BVerfGE 30, 1 [25]).

Human beings are not infrequently mere objects, not only of circumstances and social developments, but also of the law that they must obey. Human dignity is not violated merely because a person becomes the object of criminal prosecution measures, but it is when the nature of the measures taken is in principle such as to call into question the quality of the person involved as a subject. This is the case when treatment by the public powers is lacking in respect for the value that every human being represents in his own right. Such measures may also not be taken in the interest of achievement of efficient criminal justice and investigation.

In this context, covert activity on the part of the state does not in itself lead to a violation of the right to respect, which is afforded absolute protection. In the event a person becomes the object of observation, this does not compellingly entail a disregard

**60 Years German Basic Law:
The German Constitution and its Court**

for that person's value as a human being. In the case of such observation, an inviolable core area of private conduct of life must be preserved (see on the guarantee thereof BVerfGE 6, 32 [41]; 27, 1 [6]; 32, 373 [378-379]; 34, 238 [245]; 80, 367 [373]).

Were the state to intrude upon this area, this would infringe the inviolable freedom guaranteed all human beings to personal development as regards strictly personal matters. Even the predominant interests of the general public cannot justify encroachment upon this core area of private conduct of life, which is afforded absolute protection (see BVerfGE 34, 238 [245]).

- (2) The protection of human dignity is also concretely embodied in the fundamental right under Article 13.1 of the Basic Law. The inviolability of the home is intimately related to human dignity and at the same time closely associated with the constitutional requirement of unconditional respect for the individual's exclusively private sphere of - "strictly personal" - development. Individuals are to be afforded the right to be left in peace, especially in their private dwellings (see BVerfGE 75, 318 [328]; see also BVerfGE 51, 97 [110]).

Development of personality in the core area of private conduct of life includes the possibility of expressing internal processes such as emotions and feelings as well as thoughts, opinions and experiences of a strictly personal nature, and to do so without fear of surveillance by governmental agencies. This protection also encompasses emotional expression, expression of unconscious experience and forms of sexual expression. The possibility of such development presupposes that the individual has appropriate free space for such purposes. Confidential communication also requires a spatial substratum, in any case wherever the legal system affords special protection; for the strictly personal conduct of life and citizens rely on such protection. This will regularly be a private dwelling that can be closed to others. If individuals have such space, they can be alone and develop freely in accordance with standards they set for themselves. A private home is an "ultimate refuge" that constitutes a means of safeguarding human dignity. This does not require absolute protection of the premises constituting the private dwelling, but it does require protection of conduct on these premises to the extent that such conduct represents individual development within the core area of private conduct of life.

- (3) This protection may not be relativized by balancing it against the interests of the prosecution of criminal offences on the basis of the principle of proportionality (see BVerfGE 34, 238 [245]; see also BVerfGE 75, 369 [380]; 93, 266 [293]).

There will always be suspicions of especially serious forms of crime and situations involving suspicions of such crimes that will to some seem to make the expediency of criminal justice outweigh the preservation of the human dignity of suspects.

However, Article 1.1 and Article 79.3 of the Basic Law prohibit an evaluation of such kind on the part of the state.

- bb) Acoustic surveillance of private dwellings for the purposes of prosecution of criminal offences violates human dignity when the core area of private conduct of life is not respected.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

Whether the facts of a case warrant assignment to the inviolate core area depends upon whether the substantive content is of a strictly personal nature and therefore also upon the nature and intensity of the effect had upon the sphere of others or the interests of society (see BVerfGE 80, 367 [374]).

The specific circumstances involved in the individual case are what matter (see BVerfGE 34, 238 [248]; 80, 367 [374]).

Of decisive importance in a given situation is whether the inviolable core area of private conduct of life is affected in the individual case as evidenced by concrete indications or typically and without actual evidence to the contrary, for example, in the course of observation of expressions of innermost feelings or forms of sexual expression.

- cc) The power to authorize surveillance of private dwellings by law under Article 13.3 of the Basic Law does not violate Article 79.3 in conjunction with Article 1.1 of the Basic Law since it permits only provisions of law and measures based on such provisions that respect these limits. Limitations to this constitutional power are contained in Article 13.3 of the Basic Law on the one hand, but also follow from other provisions to be taken into consideration in the course of a systematic interpretation of the Basic Law. To the extent that elements of the principle of proportionality are of importance, they do not call into question the absolute nature of the protection of human dignity. Furthermore, the principle of proportionality may be applied as an additional restriction only in cases in which a surveillance measure does not violate human dignity. In this context, commensurate limitations of the power to conduct acoustic surveillance of private dwellings are, however, also intended to exclude the possibility of violation of the substantive content of Article 13.3 as regards human dignity in connection with the execution of the corresponding measures.
- (1) Article 13.3 of the Basic Law governs substantive and procedural prerequisites for legal encroachment.

Acoustic surveillance within the meaning of Article 13.3 sentence 1 of the Basic Law is permissible only to prosecute specific individuals, especially serious criminal offences when suspicion of such offences is supported by certain facts (see Bundestag document 13/8650, pp. 4 et seq.).

The legislature that adopted the constitutional amendment had at the time primarily criminal offences in mind that are typically perpetrated by groups that proceed in an organized manner and in particular by perpetrators involved in what is referred to as organized crime (see Bundestag document 13/8650, p. 4; 13/9660, p. 3). Investigations of such criminal offences will regularly not be limited to the possibility of public indictment, conviction and enforcement of punishment. Although the goal of the legislature that adopted the constitutional amendment that is documented in the legislative materials is achieved, which is to penetrate the core area of organized crime and permit elucidation of its structures, there is a possibility that this may indirectly serve at the same time to prevent further criminal offences.

**60 Years German Basic Law:
The German Constitution and its Court**

Article 13.3 of the Basic Law also requires that alternative methods of investigating the matter be disproportionately difficult or unproductive. As a result, the very wording of the Basic Law makes it clear that acoustic surveillance is a measure that constitutes especially serious encroachment upon the fundamental right to protection of the home and represents the last resort in the context of prosecution of criminal offences. Surveillance of a private dwelling otherwise comes into question only when, and as long as, the suspect is likely to be present in that dwelling.

The legislature that adopted the amendment of the Basic Law ensured compliance with procedural requirements by requiring a judicial order for surveillance measures. In so doing, the legislature provided that the order must be issued in principle by a panel composed of three judges and for a limited period of time.

- (2) Article 13.3 of the Basic Law does not explicitly describe all limits to the use of acoustic surveillance of private dwellings for the purposes of prosecution of criminal offences that derive from the requirement that the inviolable core area of private conduct of life be afforded absolute protection. Further limits follow - as in the case of all provisions relating to fundamental rights - from other provisions of the Basic Law. In the case of modification of provisions relating to fundamental rights, the legislature that adopts a constitutional amendment is also under no obligation to reiterate all relevant constitutional rules that otherwise apply. Review against the standard of Article 79.3 of the Basic Law is therefore subject to Article 13.3 of the Basic Law in conjunction with such other constitutional rules.
- (a) Restrictions of constitutional rights inserted through constitutional amendment must therefore be systematically interpreted against the background of other provisions containing fundamental rights, in particular Article 1.1 of the Basic Law, and construed by applying the principle of proportionality (see BVerfGE 30, 1 [20-21]).

In the case of a provision created through constitutional amendment, the limits to interpretation of constitutional law also lie where a provision with unambiguous wording and intent yields an opposite meaning, the substantive content of the provision to be interpreted is fundamentally redefined or the provision fails in an essential point to achieve its goal (see BVerfGE 11, 77 [84-85]; 33, 52 [69]; 54, 277 [299]; 82, 1 [11 et seq.]).

- (b) There is no reason to assume that these limits have been transgressed in the present case. For Article 13.3 of the Basic Law authorizes only implementation in the form of legislation that adequately takes into account the limits to encroachment imposed by Article 1.1 of the Basic Law. This must also be complemented by reference to the principle of proportionality. Such interpretation is not in contradiction with the will of the legislature that adopted the constitutional amendment.

The deliberations over the constitutional amendment did surely involve significant controversy as regards the legal requirements to be put in place for acoustic surveillance of private dwellings, and efforts to modify the version of Article 13.3 of the Basic Law that was ultimately adopted were not successful. This did not, however, indicate that it was the will of the legislature that adopted the constitutional amendment to

**Selected Fundamental Decisions of
the Federal Constitutional Court**

exclude further concretization through other provisions of the Basic Law. For example, the report of the Committee on Legal Affairs of the Bundestag on the draft of the act to amend Article 13 of the Basic Law explicitly mentions that the possibility of electronic surveillance of private dwellings is excluded from the outset in cases that fall into the inviolable core area of private conduct of life protected by Article 1.1 of the Basic Law. Examples mentioned included priest-penitent communication and strictly personal communication with immediate family members. It was added that the principle of proportionality is applicable only when the core area that is afforded absolute protection is not affected. To take into account such cases, reference was made to the further necessity of ensuring that the more intensive the surveillance becomes, the more stringent become the requirements for permitting encroachment in the individual instance (see Bundestag document 13/9660, p. 4). These considerations show that the legislature that adopted the constitutional amendment also proceeded on the basis of the assumption of the necessity of restrictive interpretation of Article 13.3 of the Basic Law, especially as regards human dignity. The legislature assumed in this context that this requirement is also fulfilled by Article 13.3 of the Basic Law, which is already very detailed, without further explicit precautions.

The rejection of motions to include further restrictions in Article 13.3 of the Basic Law, in particular rights to refuse to give testimony, did not mean that the primacy of the guarantee of human dignity was called into question under the amended provision of the Basic Law. Corresponding statements are also not found in the records of the parliamentary deliberations. Furthermore, the relevance of other provisions of the Basic Law in conjunction with Article 13.3 of the Basic Law was explicitly emphasized, for example by the Member of the Bundestag Schily when he submitted that the fact that Article 1 of the Basic Law must be respected when deciding whether acoustic surveillance may be carried out could lead to a situation in which surveillance would have to be foregone from the outset (see Member of the Bundestag Schily, 214th session of the 13th German *Bundestag* of 16 January 1998, Stenographic Record vol. 191, p. 19549).

The Member of the Bundestag also expressed his opinion to the effect that those constitutional guarantees that apply in any case need not be mentioned in Article 13.3 of the Basic Law (see Member of the Bundestag Schily, 197th session of the 13th German Bundestag of 9 October 1997, Stenographic Record vol. 189, p. 17694).

- (c) Article 13.3 of the Basic Law is to be understood to mean that its statutory embodiment must preclude collection of information through acoustic surveillance of private dwellings whenever investigatory activities would intrude upon the inviolable area of private conduct of life protected by Article 13.1 in conjunction with Article 1.1 and Article 2.1 of the Basic Law.
- dd) Accordingly, this calls for provisions of law that respect the principle of statutory certainty and ensure that acoustic surveillance of private dwellings is by nature and manner such as not to entail any violation of human dignity. It is necessary to refrain from surveillance from the outset in situations in which there are indications to the effect that such activities will result in violation of human dignity. If

**60 Years German Basic Law:
The German Constitution and its Court**

acoustic surveillance of a dwelling otherwise unexpectedly results in the collection of absolutely privileged information, it must be terminated and the recordings deleted; any use of such absolutely privileged data in connection with the prosecution of criminal offences is prohibited.

- (1) Precautions intended to protect human dignity are necessary not only in situations in which an individual is alone, but also when such an individual is engaged in communication with others (see BVerfGE 6, 389 [433]; 35, 202 [220]).

As human beings, individuals are also of necessity involved in social relationships within the core area of personality (see BVerfGE 80, 367 [374]).

A situation cannot therefore be classified as belonging to the inviolable area of private conduct of life or - if that area is not involved - to the social realm, which is under certain conditions exposed to governmental intervention, simply as a function of whether a matter of importance or concern to society is present; what is of decisive importance is in fact the nature and intensity in the concrete case (see BVerfGE 80, 367 [374]).

- (2) The content of communication that contains information on criminal offences that have been committed does not fall into the inviolable core area of private conduct of life (see BVerfGE 80, 367 [375]).

It does not, however, follow from this that just any given link between the suspicion of commission of a criminal offence and the statements of a suspect suffices to confirm the existence of a concern of society. Recordings or statements made in the context of a conversation between two individuals that, for example, convey exclusively personal impressions and feelings and contain no indications of any concrete criminal offence do not take on the nature of a public concern simply because they may reveal the origins or motives for criminal conduct. A concern of society can on the other hand be assumed to exist with sufficient certainty in the case of statements that relate directly to a concrete criminal offence.

- (3) Interception of non-public utterances spoken in private dwellings is prohibited in order to avoid encroachment upon the core area of private conduct of life when an individual is alone in a private dwelling or exclusively with other persons with whom that individual enjoys a special confidential relationship that falls into the core area of protection - for example, with family members or other very close confidants - and no concrete indications exist to the effect that the expected content of the communication will relate directly to a criminal offence. To be sure, not all communication between an individual and very close confidants in a private dwelling falls into the core area of private conduct of life. This is, however, to be assumed in the interest of effective protection of human dignity. Surveillance measures are prohibited when it is probable that absolutely privileged communication will be affected.
- (4) The content of communication constitutes the standard to be applied for the purposes of classification of a situation. It will normally be possible to determine with certainty whether a situation is to be classified as belonging to the area that is strictly personal or to the social realm only after the information has been obtained. In order to safeguard

**Selected Fundamental Decisions of
the Federal Constitutional Court**

the core area of private conduct of life, actual indications must be present that make it possible to infer that the communication is such that it would at least typically not relate to the strictly private area before measures involving acoustic surveillance of private dwellings are undertaken. Investigatory measures are prohibited whenever it is probable that the interception of non-public words spoken in private dwellings will result in violation of the core area of protection.

In assessing a situation prior to the commencement of surveillance measures, prosecuting authorities must take into account possible indications of activities relating to the core area in the private dwelling that will be the object of surveillance. This is also possible in actual practice.

- (a) Initial bases for assessment of the situation can be inferred from the nature of the premises to be subjected to surveillance:
- (i) For example, communication that takes place in commercial and business premises will regularly be of a business nature and therefore typically involve a social relationship (see BVerfGE 34, 238 [248]). Communication in premises that are used exclusively for commercial or business purposes is surely included under the protection provided by Article 13.1 of the Basic Law, but does not in the absence of a link between the concrete communication and the core area of personality involve the substantive content of human dignity embodied in the fundamental right. Business premises are, because of their intended use, by their very nature more open to the outside (see BVerfGE 32, 54 [75]).

They will regularly lack the intimacy and security of a private dwelling. As a result, business premises will in the typical case be justifiably considered to enjoy less protection than private premises. If strictly personal communication does take place in such premises, absolute protection then does, however, apply when this becomes concretely evident.

Premises that are used for both working and residential purposes must be treated differently. In such cases, it is not to be assumed that communication that takes place in working quarters will be of a purely business nature. The same applies in the case of premises that are used for the purposes of exercising occupations or professions that entail special relationships of confidentiality that relate to the strictly personal sphere.

- (ii) Communication is to be assumed to lie in the inviolable core area in the case of premises that typically or in the individual case function as an area of retreat for the purposes of the private conduct of life. It will, however, regularly not be possible to make distinctions as regards the individual rooms within a private dwelling. Strictly personal acts and communication must not be restricted to specific rooms within a private dwelling. Individuals generally consider each of the rooms in their homes to be equally accessible and feel equally unobserved everywhere. The variety of different personal uses of private dwellings defies any typical assignment of activities to specific rooms. The core area of the private spatial sphere cannot therefore be associated with specific areas within a private dwelling.

**60 Years German Basic Law:
The German Constitution and its Court**

- (b) It is also necessary to take into account that the probability of intrusion upon the core area of personality through surveillance measures depends upon who is present in the private dwelling, to be subjected to surveillance.

A weighty indication of the relevance of the content of communication to human dignity is the presence of individuals standing in a strictly personal relationship of confidence. Individuals form their personalities primarily through interaction with others, i.e., through communication. Marriage and the family are therefore specially important in the strictly personal area and in particular in the intimate sphere. For example, communication between spouses, the thematic content of which is especially likely to be unlimited because of the intimate nature of marriage, is predicated on the assumption that outsiders cannot acquire knowledge of such communication. The situation is no different in the case of communication with other close family members, for example, siblings and direct relatives, especially when they live in the same household. In addition to Article 13.1 of the Basic Law, Articles 6.1 and 6.2 of the Basic Law also come to bear in this context.

The protection of the core area of private conduct of life also includes communication with other individuals with whom a special relationship of confidence exists (see BVerfGE 90, 255 [260]).

This class coincides only partially with those parties mentioned in ss. 52 and 53 of the Criminal Procedure Code who have the right to refuse to give testimony. The prohibitions of surveillance that follow from the core area of private conduct of life are not identical with the right to refuse to give testimony in criminal proceedings. For example, s. 52 of the Criminal Procedure Code was not created to protect the relationship of confidence between the relatives mentioned in that section and defendants. It is primarily intended to take into account the predicament of witnesses who are bound to the truth and must fear doing harm to a relative. In addition, the right to refuse to give testimony derives from the formal criterion of kinship and not from a special relationship of confidence such as may also exist in particular with close personal friends.

The basic idea behind s. 53 of the Criminal Procedure Code does surely protect the relationship of confidence between witnesses and the defendant. However, this protection too is not provided because of the human dignity of defendants or their interlocutors in all cases covered by s. 53 of the Criminal Procedure Code. This assumption does, however, apply in the case of priest-penitent communication. For example, the protection of confessions or communication of a confessional nature is covered by the substantive content of the human dignity of the exercise of religion within the meaning of Articles 4.1 and 4.2 of the Basic Law. Communication with defence counsel also has the function of ensuring that defendants do not become mere objects in criminal proceedings, which is important for the preservation of human dignity. Communication with physicians may in the individual case be assigned to the inviolable core area of private conduct of life (see BVerfGE 32, 373 [379]).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

The rights of members of the press and members of Parliament to refuse to give testimony on the other hand, do not relate directly to the core area of private conduct of life. These rights are guaranteed for the sake of the functionality of the respective institutions and not because of the protection of the personality of the defendants.

- (5) Surveillance of private dwellings must even when permissible in principle be restricted to communication situations that are likely to include content that is relevant for the purposes of criminal proceedings. If appropriate, it is necessary to ensure that the acoustic surveillance of private dwellings remains limited to activities that take place within the dwellings that are relevant for the purposes of criminal proceedings, through suitable preliminary investigation that does not encroach upon the protection of the core area of private conduct of life. It is not permissible, for example, to encroach upon the absolute core area of private conduct of life to establish in the first place whether the collection of information relates to this area.

Temporal and spatial “total surveillance” will as a rule not be permissible for the very reason that the probability is great that strictly personal communication will be overheard. Human dignity is also violated in the case of surveillance that is conducted over a lengthier period of time and is so extensive that virtually all movements and expressions of life of the objects of the surveillance are recorded and can be used as the basis for a personality profile (on this risk see BVerfGE 65, 1 [42-43]).

- (6) When the acoustic surveillance of a private dwelling is not prohibited because of the absence of sufficient outward indication of the probability that absolutely privileged communication will be recorded, the communication of a suspect may be monitored for the purposes of establishing whether it contains information suitable for use in criminal proceedings. There are no constitutional grounds under these conditions that militate against initial “screening” of the content of communication that is required for the purposes of assessment with a view to protection of human dignity. Suitable measures must, however, be taken to ensure maximum discretion (see BVerfGE 80, 367 [375, 381]).

For example, the protection afforded by Article 1.1 of the Basic Law may make it necessary to refrain from the use of automatic recording alone, in the case of eavesdropping on a private dwelling in order to be able to interrupt the investigatory activity at any time.

If in the course of the surveillance of a private dwelling a situation arises that must be considered to belong to the core area of private conduct of life, surveillance must be terminated. Recordings made nevertheless must be destroyed. Information so obtained may not be transferred to others or used. Article 13.3 of the Basic Law must be interpreted to mean that there must be regulations in place that prohibit the use of evidence obtained in connection with such recordings (on the constitutional foundation of such requirements see BVerfGE 44, 353 [383-384]; see also BVerfGE 34, 238 [245 et seq.]).

**60 Years German Basic Law:
The German Constitution and its Court**

- c) Article 13.3 of the Basic Law is also not in violation of the principle of the rule of law. It is therefore not necessary to determine the extent to which elements of the principle of the rule of law are declared immune to amendment under Article 79.3 of the Basic Law.

Article 13.3 of the Basic Law does not restrict the principle of proportionality but, to the contrary, also leaves its validity intact as regards the acoustic surveillance of private dwellings and in addition contains concrete clauses that take this principle into account.

The requirement of a fair trial is not compromised by Article 13.3 of the Basic Law. This principle includes the right to freedom of expression and self-determination within the framework of criminal proceedings, which is reflected *inter alia* in ss. 136a and 163a.4 sentence 2 of the Criminal Procedure Code. That means that no one may be compelled to incriminate himself of a criminal offence through his own testimony in the context of criminal proceedings or actively contribute to his conviction (see BVerfGE 56, 37 [49]).

Covert acoustic surveillance of private dwellings entails no such effect on communication.

The secrecy of measures undertaken in connection with the prosecution of criminal offences does not in itself violate the prohibition of deception rooted in the requirement of a fair trial. Covert interception of communication does surely take advantage of a mistaken impression on the part of the object of the surveillance as regards the insulated nature of the home. The utterances of the suspect are, however, based on a voluntary decision. The transfer of knowledge of these utterances to the representatives of governmental power is surely not voluntary. Investigation in secrecy is, however, an essential prerequisite to the success of various measures employed for the purposes of the prosecution of criminal offences, but this alone does not mean that they are in violation of the principle of the rule of law.

II.

The legal power to conduct acoustic surveillance of private dwellings under ss. 100c.1 no. 3, 100c.2 and 100c.3 of the Criminal Procedure Code and regulation of the prohibition of collection and use of evidence under s. 100d.3 of the Criminal Procedure Code do not adequately take into account the requirements that must otherwise be met under Articles 13.1 and 13.3 of the Basic Law and Article 2.1 in conjunction with Article 1.1 of the Basic Law, as regards the protection of the inviolable area of the private conduct of life, the formulation of the catalogue of offences and compliance with the principle of proportionality. They are only partially compatible with the Basic Law.

...

- bb) The legislature also failed to take adequate precautions in s. 100d.3 of the Criminal Procedure Code to ensure that surveillance is terminated if a situation should unexpectedly occur that involves the inviolable core area of private conduct of life. Continuation of surveillance is in such cases illegal.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- cc) Adequate provisions are also lacking to ensure that knowledge will not be used if acquired in connection with violation of the core area of private conduct of life and that information already collected is destroyed in such cases.
- (1) The Basic Law imposes requirements upon the legislature in both regards.
- (a) The Basic Law requires rules to the effect that no use may be made of data that stem from the core area of private conduct of life.

The risk of encroachment upon the core area of private conduct of life associated with the acoustic surveillance of private dwellings is acceptable under the Basic Law only if precautions are taken to ensure that no further implications ensue from violations that have exceptionally occurred. It is necessary to ensure that knowledge acquired through such encroachment is not used in any way in further investigatory proceedings or under other circumstances.

Comprehensive prohibition of the use of such knowledge is required first of all for the eventuality that prosecuting authorities exceed their authority and carry out acoustic surveillance of a private dwelling, for example, despite the existence of the probability that the surveillance will involve absolutely privileged communication. None of the information, no matter what its content, acquired during the period within which the collection of such information is prohibited may be used in criminal proceedings. This applies not only with respect to use as evidence in the main proceedings, but also if this information could be considered for use as the evidentiary basis for investigation in connection with other matters.

The use of such evidence is also prohibited when circumstances do not warrant an assumption that collection is prohibited, but a situation nevertheless develops during acoustic surveillance of a private dwelling that results in interception of communication of a strictly personal nature. There will in practice always be cases in which there are no sufficient outward indications that make it possible to determine whether absolutely privileged communication can or cannot be expected inside a dwelling. It will also not always be possible to confirm beyond all doubt suspicion of involvement in a criminal offence on the part of one of the close family members present in a dwelling. Reliable assessment by prosecuting authorities will be impossible in particular when unambiguous identification is not possible because of the social environment of a suspect despite appropriate effort - for example, through previous observation. It will not always be possible to determine in advance whether communication involves possible perpetrators of a crime. It is for that reason indispensable that prohibition of the collection of evidence be complemented by prohibition of the use of evidence in order to be able to ensure comprehensive protection of the core area. The use of data obtained in connection with activities involving the inviolable area of private conduct of life is absolutely prohibited on constitutional grounds and such data may be used neither in main proceedings nor as the basis for other investigations (see BVerfGE 44, 353 [383-384]).

- (b) When information stemming from the core area of private conduct of life is collected, it must be deleted without delay. This applies notwithstanding the requirement of effective recourse to the courts provided under Article 19.4 of the Basic Law. In that

**60 Years German Basic Law:
The German Constitution and its Court**

respect, it is of decisive importance that further retention of strictly personal data that ought not to have been collected entails a risk of exacerbation of a violation of the right of personality. Subsequent recourse to the courts would also only make it possible to ascertain that the interception and recording of the deleted information were illegal and that the data must be destroyed. However, this purpose is also adequately achieved as far as considerations having to do with constitutional law are concerned through immediate deletion when carried out on the basis of the finding of an authority to the effect that the recording was illegal. However, a possible interest on the part of the parties involved in acquiring complete knowledge as to what communication content was intercepted by the prosecuting authorities remains unsatisfied. This interest cannot, however, justify the risks of further violations of fundamental rights associated with further retention.

Not only the original tape, but also any copies made subsequently, must be deleted. In view of Article 19.4 of the Basic Law, prosecuting authorities must document in writing that the content of absolutely privileged communication was recorded and that the relevant recordings were for that reason completely deleted.

- (2) The legislature has only partially fulfilled its duty to adopt provisions of law that satisfy these constitutional requirements.

...

III.

The legislature failed to limit the formulation of the catalogue of criminal offences, such as offences are, when viewed in the abstract, especially serious within the meaning of Article 13.3 of the Basic Law. Insofar as this was not the case, s. 100c.1 no. 3 of the Criminal Procedure Code does not satisfy Article 13.3 of the Basic Law. As a result, changes in legislation effected after submission of the constitutional complaint are also subject to review pursuant to s. 78 sentence 2 and s. 82.1 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG), which are to be applied accordingly in constitutional complaint proceedings (see BVerfGE 18, 288 [300]).

- (a) The possible range of punishments provided for under the criminal statute indicates whether the legislature has classified a given crime as being especially serious. The catalogue of criminal offences of s. 100c.1 no. 3 of the Criminal Procedure Code includes, in addition to indictable offence, summary offences, including those that do not manifest any above-average degree of unlawfulness. The minimum penalties range from fines to imprisonment for three or for six months to imprisonment of one year or two, three, five or ten years. The maximum penalties also vary from three years to more than five and ten years up to life imprisonment.

The legislature may exercise discretionary judgment when defining the degree of unlawfulness of criminal offences and deciding which offences will warrant acoustic surveillance of private dwellings. According to Article 13.3 of the Basic Law, such offences must be, in the abstract, especially serious. The range of possible penalties

**Selected Fundamental Decisions of
the Federal Constitutional Court**

provides a standard of reference for such purposes. It is possible to assume that a criminal offence is especially serious within the meaning of Article 13.3 of the Basic Law only if the legislature imposes a penalty that in any case exceeds five years of imprisonment. The legal system is such that the maximum penalty of ten or more years of imprisonment is also provided for criminal offences punishable by a term of more than five years. Such penalties are reserved for offences that involve an especially serious unlawful act and therefore clearly depart from the category of crimes of medium seriousness.

- (b) If this standard is applied, the reference of s. 100c.1 no. 3 of the Criminal Procedure Code to such criminal offences is in violation of the Basic Law since this section may be applied at best to the areas of crime of medium seriousness because of the penalty provided for.

...

IV.

The provisions contained in s. 101 of the Criminal Procedure Code on the acoustic surveillance of private dwellings that govern the duty to notify the parties involved is only partially consistent with Article 19.4 and Article 103.1 of the Basic Law.

1. S. 101.1 sentence 1 of the Criminal Procedure Code is incompatible with Article 13.1 and Article 19.4 as well as with Article 2.1 in conjunction with Article 1.1 of the Basic Law insofar it provides for notification of the persons affected by the acoustic surveillance of private dwellings only if this can be accomplished without any threat to the safety of the public or the continued use of an official assigned to an undercover investigation. The court's single opportunity to decide to postpone notification until six months after termination of the measure pursuant to s. 101.1 sentence 2 of the Criminal Procedure Code also fails to adequately ensure compliance of procedural law with the duty to make such notification as required by the Basic Law.

- a) Article 13.1 of the Basic Law in conjunction with the requirement of effective recourse to the courts (Article 19.4 of the Basic Law) provides for holders of fundamental rights to be informed of measures involving the acoustic surveillance measures of private dwellings that affect them.

In the case of covert encroachment, holders of fundamental rights have in principle a right to be informed after the fact of surveillance measures undertaken by the government by reason of the guarantee of effective recourse to the courts (see BVerfGE 100, 313 [361] on Article 10 of the Basic Law).

Without such knowledge, the persons affected can neither assert the illegality of the collection of the information nor any rights they may have to have the recordings deleted. Subsequent notification is also required because no hearing has been held due to the covert nature of the encroachment. The Basic Law does not specify in detail how notification is to be made. Article 13 of the Basic Law requires only that

**60 Years German Basic Law:
The German Constitution and its Court**

notification be made when data are collected covertly, but the right to notification has not been granted or the rights of the persons affected have not been adequately taken into account (see BVerfGE 100, 313 [361] on Article 10 of the Basic Law).

The duty to make subsequent notification that follows from the fundamental right is subject to the same restrictions as the fundamental right itself. When knowledge of an encroachment could defeat its very purpose, there can therefore be no objection on constitutional grounds to commensurate limitation of the extent to which such knowledge is made available.

In addition, the guarantee of recourse to the courts under Article 19.4 of the Basic Law requires notification in principle if this is a prerequisite to the possibility of seeking judicial relief. The possibility of limitation of this right is, however, also not excluded by Article 19.4 of the Basic Law, which is amenable to regulation by law (see BVerfGE 100, 313 [364]).

A right to notification of the fact that surveillance of a private dwelling was ordered and carried out inures to the respective persons affected from Article 13.1 and Article 19.4 of the Basic Law, but only in principle. The limitation of the duty to make notification on the other hand represents encroachment upon fundamental rights under Article 13.1 and Article 19.4 of the Basic Law that requires justification and must therefore also satisfy the requirements of proportionality (see BVerfGE 100, 313 [365, 398-399]). Since postponement of notification delays possibilities for recourse to the courts and the efficacy of judicial relief decreases with temporal distance from the measure ordered, postponement must be restricted to that which is absolutely necessary.

...

V.

The provisions contained in s. 100d.5 sentence 2 and s. 100f.1 of the Criminal Procedure Code on the use of personal information in other proceedings are not compatible with Article 13.1, Article 2.1 and Article 1.1 of the Basic Law, insofar as no duty is prescribed to identify the information that is made available to others for such use.

...

Exclusivity of purpose can be guaranteed only if it also remains obvious after the information is collected; that the data were acquired through acoustic surveillance of a private dwelling. Appropriate identification of data is therefore required by the Basic Law (see BVerfGE 100, 313 [360-361] on Article 10 of the Basic Law). The legislature must impose a duty to identify information not only on the authority that collects the data but also on authorities that receive such data in order to ensure the exclusivity of purpose. Otherwise, data stemming from the acoustic surveillance of private dwellings could be stored and co-mingled with other data in a manner that would make it no longer possible to recognize their origin (see BVerfGE 100, 313 [396-397]). The restrictions on the use of data provided under s. 100f.1 of the Criminal Procedure Code would then be circumvented.

Selected Fundamental Decisions of
the Federal Constitutional Court

VI.

The provisions governing the destruction of data contained in s. 100d.4 sentence 3 and s. 100b.6 of the Criminal Procedure Code, which like the provisions governing the transfer of data to others form a constitutionally relevant regulatory complex with the provisions governing the collection of such data, are in violation of Article 19.4 of the Basic Law.

...

The protection of Article 13.1 of the Basic Law, which also extends to subsequent phases of processing such data, does surely require in principle that legally acquired data be destroyed as soon as they are no longer required for the original purposes (see BVerfGE 100, 313 [362] on Article 10 of the Basic Law). The provisions of law governing the destruction of data must, however, at the same time satisfy the requirement of effective recourse to the courts. As a result, this may result in a specific conflict situation since it is on the one hand consistent with legislation governing data protection to delete data that are no longer needed and on the other hand the deletion of data makes effective recourse to the courts more difficult, if not impossible, because it is possible to review a matter only to a limited extent once records are destroyed (see Constitutional Court of Mecklenburg-West Pomerania [*Verfassungsgerichtshof Mecklenburg-Vorpommern* - MVVerfG], LKV 2000, p. 345 [354]).

Against this background, the duty to destroy data must be balanced with the guarantee of recourse to the courts so that it is not thwarted or frustrated in cases in which the person affected seeks judicial review of governmental acts involving information and the use of data (see BVerfGE 100, 313 [364, 400]).

XII. Protection of Property - Article 14 of the Basic Law

Some General Background

The history of the protection of property in constitutions and international treaties reveals difficulties. Some noteworthy instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) did not contain property protection clauses. In the case of the ECHR such a clause was added to the first Protocol to the Convention⁶², which went into effect in 1954, one year after the original Convention. To this day Switzerland has not ratified this Protocol⁶³. Property protection, as included in the Universal Declaration of Human Rights in Article 17 requires that “[e]veryone has the right to own property alone as well as in association with others” and “[n]o one shall be arbitrarily deprived of his property”.⁶⁴ The reason for these difficulties mainly has to do with the potential impact a property protection clause was perceived to perhaps have on the economic order of a state. There was a certain reluctance to, in essence, set a free market economy as the only possible option for a state by introducing a property protection clause. The alternative, namely to limit property protection to personal property was also not very attractive. A second difficulty lies in the fact that the concept of property itself is an abstract legal concept. The term ‘property’ refers to a legal relationship of one or several - natural or legal - persons to chattel or immovable property, usually to the exclusion of others. Property is therefore the product of a legal order, notwithstanding the fact that core elements of property can be traced to trans-positivist notions of natural law or the like. The Basic Law has incorporated this inherent difficulty by guaranteeing property and the right of inheritance (property succession) in Article 14.1 but at the same time stipulating in Article 14.2 that property has a social function and the owner a social responsibility. Article 14.3 regulates the taking (expropriation) of property. Article 15, which specifically allows for the nationalization of “Land, natural resources and means of production”, the embodiment of the conflict among the drafters of the Basic Law between free marketers on the one side and a more socialistically inclined opposition. Article 15 has never become relevant and probably will not become relevant in the foreseeable future, not only because the communist model for economic organization has not proven to be very successful, but also because Article 15 makes nationalization subject to the payment of compensation and hence prohibitively expensive.

62 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 9, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm>.

63 Neither has Monaco but the Principality only joined the Convention in 2005, see <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=009&CM=8&DF=29/05/2010&CL=ENG>;

64 The Universal Declaration of Human Rights of 10.12.1948, <http://www.un.org/en/documents/udhr/index.shtml>.

Selected Fundamental Decisions of
the Federal Constitutional Court

a) *Groundwater*, BVerfGE 58, 300

Explanatory Annotation

In this case a gravel pit operator sought authorization from the relevant water authorities to continue extracting gravel at sub-ground-water level in a water protection zone. This authorization was denied. The applicant did not seek legal remedies against the denial and instead demanded compensation for what he regarded as a taking of his land because the commercial exploitation of it had been made impossible.

The case is significant because of the Court's attempt to develop a clear structure of the protection in Article 14. The Court distinguished between a legal taking, i.e. a taking of property directly afforded by statute, an administrative taking, i.e. a taking afforded on the basis of an administrative act based on statute on the one hand and a "content definition", i.e. a legal definition of what is to be property - and thus protected - and what isn't. At issue here were several provisions of the Federal Water Act, which made any use of groundwater subject to authorization. The Court regarded these provisions as content definition provisions, i.e. it regarded these provisions as withdrawing the groundwater and its use from the ownership of the land. In other words insofar as the groundwater is concerned, there is no property and hence there cannot be any taking.

A further consequence of the decision was that those affected by such administrative acts do not have a choice to either accept the administrative restriction and demand compensation for it or challenge the administrative act. Either the act in question is an admissible expropriation, in which case the only option is to seek adequate compensation or it is not, in which case the administrative act and the restriction it contains must be challenged.

**Translation of the Groundwater Judgment - Decisions of the Federal Constitutional Court
(Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 58, 300***

Headnotes:

1. a) In the case of a dispute with respect to the legality of an expropriatory action, the administrative courts, which in principle have jurisdiction, must examine all aspects of the legality of the action. This includes determining whether the law on which the interference is based contains a provision governing the nature and extent of compensation to be awarded.
- b) In the case of a dispute with respect to the amount of compensation for expropriation, the ordinary courts are responsible for determining whether the party affected was awarded compensation as called for by (existing) legislation (see BVerfGE 46, 268 [285]).

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**60 Years German Basic Law:
The German Constitution and its Court**

2. If the party affected considers an action directed against him to constitute expropriation, that party may bring an action for compensation only if a legal basis exists for such a claim. In the absence of any such legal basis, the party affected must petition the courts of jurisdiction for reversal of the interventionary action.
3. Civil law and provisions of public law enjoy equal priority for the purposes of the definition of the legal interests of owners of landed property pursuant to Article 14 sentence 2 of the Basic Law (Grundgesetz - GG).
4. The fact that the Federal Water Act (Wasserhaushaltsgesetz - WHG) has subjected the use of subsurface water to regulations of public law that are independent of property in land for the purposes of ensuring viable water management - in particular as regards the public water supply - is consistent with the Basic Law.

Order of the First Senate of 15 July 1981, 1 BvR 77/78

Facts:

The claimant in the initial proceedings had been operating a wet gravel pit on his property in the Münsterland region since 1936. The extraction of gravel from the aquifer was allowed under the Prussian Water Act (Preußisches Wassergesetz) of 1913, which was in force at the time. An application for a permit to continue extraction of gravel filed after the Federal Water Act went into effect was denied by the public authority. The objection of the claimant was unsuccessful; the claimant did not bring any action to compel issuance of the permit applied for. Instead the petition submitted by the claimant for compensation due to an expropriatory action in respect of his established and operational commercial enterprise and his landed property as a result of the denial of the water use permit was dismissed by the Land of North Rhine-Westphalia. The subsequent action before the civil courts seeking appropriate compensation resulted in a stay of the proceedings by the Federal Court of Justice (Bundesgerichtshof). The Federal Court of Justice referred the question as to whether s. 1a.3, s. 2.1 and s. 6 of the Federal Water Act are compatible with Article 14.1 sentence 2 of the Basic Law to the Federal Constitutional Court. The Federal Court of Justice saw a violation of property rights in the fact that the provisions of the Federal Water Act made any use of groundwater that is relevant in terms of water management dependent upon a “loan” to which the property owner has no legal claim.

The Federal Constitutional Court found the provisions of the Federal Water Act on which the Federal Court of Justice based its decision to be consistent with the Basic Law.

Extract from the Grounds:

...

B.

The referral is admissible.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

I.

The purpose of judicial review pursuant to Article 100.1 of the Basic Law is to ensure that decisions made in the case of concrete legal disputes are consistent with the Basic Law. Accordingly, these interlocutory proceedings are required and admissible if the validity of a provision submitted for review is relevant for the purposes of rendering a decision in initial proceedings; the provision must be relevant to the subject matter and outcome of the legal dispute. This will be the case only if the decision would have to be different if the provision is invalid from what it would have to be if the provision is valid (BVerfGE 46, 268 [283]).

The order for reference satisfies these conditions only if the question referred for review (s. 81 of the Federal Constitutional Court Act can be interpreted to be whether the provisions of the Federal Water Act under challenge are incompatible with the Basic Law because they involve expropriatory norms that contain no provision for appropriate compensation as called for by Article 14.3 sentence 2 of the Basic Law.

In addition, constitutional review of the facts underlying the initial legal dispute must also be expanded to cover s. 17 of the Federal Water Act.

1. The order for reference contained mention of the following alternative decisions at the level of the initial proceedings: If the provisions of the Federal Water Act that qualify as laws within the meaning of Article 14.1 sentence 2 of the Basic Law are valid, the action must be dismissed; if they are invalid, the Senate must stay the decision “until the legislature has provided a constitutionally unobjectionable definition of the substantive content of landed property in respect of groundwater.”

This examination does not constitute a ground for considering the provisions under challenge relevant for the purposes of the decision. Proceeding on the basis of the legal opinion of the Court, the action would also have to be dismissed if the cited provisions are incompatible with the Basic Law. The initial proceedings involved a dispute over compensation within the meaning of Article 14.3 sentence 4 of the Basic Law; this provides the basis for the alternative decisions.

- a) The Basic Law assigned adjudicatory authority over decisions regarding the area of law governing expropriation that is limited in terms of function and content to the ordinary courts. According to Article 14.3 sentence 4 of the Basic Law, they must rule if a dispute arises as to the amount of compensation. Since the judicial review proceedings pursuant to Article 100.1 of the Basic Law represent an integral part of the initial legal dispute - even if referred to the Federal Constitutional Court for decision, it follows from the provision of the Basic Law governing legal recourse that only such provisions of law may be referred for constitutional review and only such legal issues referred for decision (s. 81 of the Federal Constitutional Court Act) as are of legal importance in such proceedings. On the other hand, legal issues that arise outside the area of jurisdiction identified by Article 14.3 sentence 4 of the Basic Law may not constitute the subject matter of a reference. Otherwise, proceedings pursuant to Article 100.1 of the Basic Law would result in abstract judicial review pursuant to Article 93.1 no. 2 of the Basic Law, which the courts have no authority to initiate. The Federal Constitutional Court may in connection with concrete abstract judicial review proceedings also rule only on legal issues of importance for decisions in initial proceedings.

**60 Years German Basic Law:
The German Constitution and its Court**

- b) Article 14.3 sentence 4 of the Basic Law is the procedural complement to the principle formulated in Article 14.3 sentence 2 of the Basic Law to the effect that a legal basis for compensation must exist. The content and scope of claims for compensation that may be sought by the party affected must be determined by law (BVerfGE 46, 268 [285]).

The court must rule on whether the expropriated party has been awarded compensation in compliance with the provisions of law. This represents the limit to the jurisdictional competence of the ordinary courts. They may not award compensation for expropriation in the absence of a basis for such claims created by the legislature.

As regards judicial review, what is important is therefore whether the legal dispute is based on an expropriation law that satisfies the requirements of Article 14.3 sentence 2 of the Basic Law. This provision permits expropriation only on the basis of legislation that at the same time regulates the nature and extent of compensation; a law that does not satisfy these requirements is unconstitutional (BVerfGE 24, 367 [418]; 46, 268 [287]).

As a result, two legal questions are at issue in the reference proceedings: first of all, whether the law on which the administrative action is based and on the basis of which compensation is claimed is an expropriation law within the meaning of Article 14.3 sentence 2 of the Basic Law and secondly - if that is the case - whether the law at the same time makes provision for compensation.

In that regard, it must be initially noted that the provisions under challenge specify the conditions under which the use of water may be permitted. However, this is not for the ordinary courts to decide. In addition, the decision of a legal dispute pursuant to Article 14.3 sentence 4 of the Basic Law may not hinge upon whether a law that governs the content and limits of property pursuant to Article 14.1 sentence 2 of the Basic Law is compatible with the Basic Law. Such a question would be of no importance as regards the legality of an expropriation since it can in no case - neither if the provisions are valid, nor if they are invalid - result in confirmation of the existence of an expropriation that entails obligatory compensation. The opinion of the Court of Appeal cited in the order for reference to the effect that going beyond the bounds of "responsibility to society ... gives rise to a right to compensation" is not consistent with the Basic Law. A provision defining substantive content retains its legal character as a norm within the meaning of Article 14.1 sentence 2 of the Basic Law, even if it is in violation of the Basic Law and is not transformed into an expropriation law that is subject to the requirements of Article 14.3 of the Basic Law (BVerfGE 52, 1 [27 and 28]).

A provision of law cannot at one and the same time be both constitutional and unconstitutional. Accordingly, the application of such a provision by public authorities cannot be considered to constitute an instance of administrative expropriation that entails an obligation to provide compensation, but still represents in any case mere enforcement of a law, which, however, may be contested through legal channels. Whether a party affected by an invalid law has any grounds for remedial action may also not be decided in proceedings pursuant to Article 14.3 sentence 4 of the Basic Law.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

2. The admissibility of the order for reference as regards the relevance of the provisions under challenge to the decision can accordingly be confirmed only on the basis of the question presented in respect of the legality of the expropriation. The question at issue is whether the cited provisions of the Federal Water Act involve expropriatory norms that must be complemented by provision for compensation on constitutional grounds.

However, although the Federal Court of Justice also views the provisions under challenge as laws within the meaning of Article 14.1 sentence 2 of the Basic Law, that it considers to be unconstitutional, analysis of the order for reference shows that the Court ultimately proceeds from the expropriatory character of the provisions under challenge, which would be incompatible with the Basic Law due to the absence of a compensation clause.

The fact that the legality of expropriation is at issue in the order for reference is reflected by, among other things, the fact that the Court several times characterizes the loss of the possibility of extracting gravel due to the denial of the water usage permit as encroachment on property rights protected by the Basic Law and deprivation of an ownership interest. The complainant is deprived of his legal interest as defined by ss. 903 and 905 of the Civil Code (Bürgerliches Gesetzbuch - BGB) and the “nature of the matter” by the provisions under challenge. Deprivation of a legal interest guaranteed by Article 14.1 sentence 1 of the Basic Law, which, accordingly, constitutes the substantive content of the provisions under challenge, is, however, the typical characteristic of expropriation (BVerfGE 52, 1 [27]).

The Federal Court of Justice also does not consider the fact that the complainant in the initial proceedings was prevented from carrying out plans to engage in wet extraction of gravel in the immediate vicinity of a water works to be in any way unconstitutional. In fact, it was emphasized, and to be sure repeatedly, that the Basic Law does not allow such measures without compensation.

In the final analysis, the Federal Court of Justice is prevented from deciding in favour of the claimant because the provisions under challenge do not at the same time contain the necessary provisions for compensation required by Article 14.3 sentence 2 of the Basic Law. It is therefore necessary to reinterpret the question posed in the order for reference accordingly in order to determine whether the provisions of the Federal Water Act are unconstitutional under this aspect.

Such reinterpretation is warranted in view of the function of judicial review, which is to create legal clarity in the case of provisions of law whose constitutional validity is disputed. The question as to whether the government is constitutionally required to provide compensation when applying the provisions of the Federal Water Act in cases such as that at hand - as the Federal Court of Justice has assumed in its previous case law - is one of far-reaching legal and economic importance. As is illustrated by the order of the Senate of 7 June 1977 (BVerfGE 45, 63), municipalities, which are primarily affected, have no possibility of clarifying this legal issue through constitutional proceedings. In addition, the Federal Administrative Court (Bundesverwaltungsgericht) takes a position that differs from that of the Federal Court of Justice.

**60 Years German Basic Law:
The German Constitution and its Court**

3. The claimant in the initial proceedings did not contest denial of a water usage permit through an action that was available to him. The question that follows from this as to whether a legal dispute is even possible in respect of the amount of compensation pursuant to Article 14.3 sentence 4 of the Basic Law can be answered in the affirmative only by way of exception in view of the special nature of the facts involved in the matter.

- a) A citizen affected by an expropriatory action has - except in the case of special situations that need not be considered here - pursuant to Article 19.4 sentence 1 of the Basic Law in conjunction with s. 40 of the Code of Administrative Court Procedure (Verwaltungsgericht-sordnung - VwGO) recourse to the administrative courts. The role of these courts is to review all factual and legal aspects of the administrative action to determine its legality (BVerfGE 32, 195 [197] with references).

In this context, their powers of review exceed those of the ordinary courts. Apart from determining whether the action satisfies the constitutionally mandated conditions of Article 14.3 sentence 1 of the Basic Law and the principle of proportionality, (BVerfGE 24, 367 [404 and 405]) they must in particular establish whether the action was taken on a constitutional basis. This also includes a determination of whether the law on which the action is based contains a provision governing the nature and extent of compensation to be provided. Since a law that does not satisfy this requirement is unconstitutional, the administrative courts may not apply such a law; instead, they must obtain a decision as to the validity of the law from the Federal Constitutional Court pursuant to Article 100.1 of the Basic Law (See, for example, BVerfGE 25, 112 [114]; 51, 193 [210 and 211]; 52, 1 [14]).

If the law is declared unconstitutional, the administrative action based on that law must be voided since it violates the fundamental right of the party affected under Article 14.1 sentence 1 of the Basic Law.

The guarantee of property protects concrete holdings in the possession of the individual owner (BVerfGE 24, 367 [400]; 38, 175 [181, 184 and 185]).

He need accept deprivation of his constitutionally protected legal interest only if such action satisfies in every respect the requirements stipulated in Article 14.3 of the Basic Law. In such cases, the guarantee of an existing legal interest is replaced by a guarantee of its value, which is intended to ensure compensation whose details are determined by the legislature (Decisions of the Federal Administrative Court [*Entscheidungen des Bundesverwaltungsgerichts* - BVerwGE] 24, 367 [397]; 46, 268 [285]).

On the other hand, voidance of the interventionary action is the consequence of an unconstitutional "expropriation" provided for by the Basic Law (BVerfGE 56, 249 [266]).

By opening the way to recourse to the administrative courts, the Basic Law has also given parties affected by such actions the possibility of defeating the administrative action themselves if the underlying law is invalid, either because it lacks provision for compensation, or for any other reason [see BVerfGE 45, 297 [342 et seq.]].

**Selected Fundamental Decisions of
the Federal Constitutional Court**

Such parties may as a final resort avail themselves of the possibility of a constitutional complaint if the administrative courts do not agree with their submission to the effect that an unconstitutional expropriation law is involved (See, for example, BVerfGE 45, 297 [346]; 53, 336 [349]).

- b) The following consequences ensue as regards the adjudicatory authority of the ordinary courts over proceedings pursuant to Article 14.3 sentence 4 of the Basic Law: if a citizen considers the action directed against him to constitute expropriation, that citizen may bring an action for compensation only if a legal basis exists for such a claim. In the absence of any such legal basis, the party affected must seek avoidance of the interventionary action through the administrative courts. The party may not, however, forego appeal and claim compensation to which the party is not entitled by law; in the absence of any legal basis, the courts also cannot award any such compensation.

Accordingly, the party affected does not have the option to choose whether to defend himself against an “expropriation” that is illegal because of the lack of legal provision for compensation or to demand compensation without doing so. If that party neglects to contest the interventionary action, the action for compensation must be dismissed. Individuals who fail to avail themselves of the possibilities afforded by the Basic Law to create a situation that is consistent with the Basic Law may not then turn around and demand pecuniary compensation from the government for a loss of legal rights that they themselves brought about.

Referral to the possibility of contesting the administrative action does not represent an unreasonable burden for the party affected. The decision to avail oneself of this legal remedy involves no greater difficulty than the decision to bring an action for compensation. It presupposes only that it be ascertained whether the law makes provision for compensation.

...

II.

The decision to be rendered in the initial proceedings therefore hinges upon whether the fact that the Federal Water Act does not entitle the claimant to compensation because of the denial of a water usage permit is compatible with the Basic Law. The question referred for review (s. 81 of the Federal Constitutional Court Act) is therefore whether Article 14.3 sentence 2 of the Basic Law has been violated.

...

C.

I.

It is not possible to concur with the opinion of the referring court in the assessment of the constitutional issue involved.

...

II.

1. In reviewing the provision against the standard of the Basic Law, it must be assumed that the legislature can enact three different types of laws relating to property rights under Article 14 of the Basic Law.

Taken in the sense of assignment of a legally protected interest to a legal entity, property necessarily requires legal definition in order to be viable in the legal sphere. Accordingly, the Basic Law assigns the legislature responsibility for determining the content and limits of property in Article 14.1 sentence 2. Such norms specify, generally and in the abstract, the rights and obligations of ownership and therefore determine the substantive “content” of property (BVerfGE 52, 1 [27]).

The legislature thereby creates at the legislative level those legal norms that establish and define the legal position of ownership; such norms may be of the nature of private law or public law.

Article 14.3 sentence 2 of the Basic Law also gives the legislature the possibility of depriving an identified or identifiable class of individuals of concrete property rights by law that were legally acquired on the basis of generally applicable laws within the meaning of Article 14.1 sentence 2 of the Basic Law (expropriation by operation of law - BVerfGE 24, 367 [395 and 396]; 45, 297 [325 and 326]; 52, 1 [27]).

Finally, the legislature may - also pursuant to Article 14.3 sentence 2 of the Basic Law - empower the executive to deprive individuals of concrete property. Expropriation on the basis of a law (administrative expropriation) requires an enforcement action by a public authority that - unlike expropriation by operation of law - may be contested through legal channels.

The various provisions of law pertaining to property rights that come into question here are subject to different requirements as regards their admissibility under the Basic Law. This applies not only in respect of the definition of substantive content and expropriation. The two forms of expropriation are not arbitrarily interchangeable as regards the guarantee of comprehensive and effective legal recourse under the Basic Law (BVerfGE 24, 367 [401]; 45, 297 [331, 333]).

In addition, their effects are not identical since the deprivation of rights occurs at different points in time (see BVerfGE 45, 297 [326]).

Contrary to the legal opinion advocated in the order for reference, expropriation by operation of law and administrative expropriation are mutually exclusive: a legal interest that has already been appropriated by the legislature cannot then be set aside again through administrative action. One and the same provision of law cannot effect expropriation by operation of law and at the same time empower the executive to undertake expropriation. That means that if the Federal Water Act appropriated the power inferred by the court from s. 905 of the Civil Code as soon as it went into force, application of s. 6 of the Federal Water Act cannot constitute expropriation of powers invested pursuant to that provision.

Definition of substantive content, expropriation by operation of law and administrative expropriation are all independent legal institutions that the Basic Law clearly distinguishes from one another. That does not, however, exclude the possibility that a new legislative provision within

**Selected Fundamental Decisions of
the Federal Constitutional Court**

the meaning of Article 14.1 sentence 2 of the Basic Law to be applied in the future will at the same time effect expropriation by operation of law because, and to the extent, it appropriates rights that an individual has exercised on the basis of previous law (BVerfGE 45, 297 [332]; 52, 1 [28]).

The provisions under challenge are not expropriation laws in the context of this system; they neither empower the executive to seize the land of the owner who plans to engage in the wet extraction of gravel, nor is expropriation by operation of law involved; instead, they regulate the content of and limits to property within the meaning of Article 14.1 sentence 2 of the Basic Law.

2. In order to determine whether a legal action qualifies as expropriation, it is necessary to establish whether the party affected has a claim to a legal interest amenable to expropriation at the time of the seizure (BVerfGE 25, 112 [121]; 29, 348 [360]).

- a) In that regard, the referring court proceeds on the basis of the following opinion: landed property includes the groundwater, which is considered to belong to that part of the terrestrial body covered by the right of property owners pursuant to s. 905 of the Civil Code. The question as to whether groundwater is a physical object need not be addressed; in any case, the right to dispose of the groundwater found on the land is considered to inure to the landed property. The public law use regulations of the Federal Water Act restrict the “right inherent in landed property” to “free access to groundwater.”

It is not possible to concur with this legal opinion.

...

- b) The order for reference is also based on the legal opinion to the effect that ownership of landed property must be considered a comprehensive right that in principle encompasses any possible and economically reasonable use and is conditioned by civil law and in particular by s. 903 of the Civil Code. This is reflected by, among other things, the fact that the court speaks of property “within the meaning of Article 14.1 sentence 2 of the Basic Law and s. 903 of the Civil Code.”

Proceeding from this basis, the public law regulations of the Federal Water Act that restrict the owner’s enjoyment of property under private law would seem to constitute restriction of his property rights, which are “per se” comprehensive and constitutionally guaranteed. The Federal Water Act leads - according to the order for reference - to an “encroachment upon the sphere of private law” and therefore potentially to expropriation. In that case, the decision as to the expropriatory character would hinge upon the intensity of the encroachment, i.e., upon its “nature and severity.”

It is also not possible to concur with these premises as regards the law governing expropriation.

The legal opinion to the effect that the legal interest of individual property owners described by s. 903 of the Civil Code is restricted by the general provisions of the Federal Water Act in a manner tantamount to expropriation derives from the opinion

**60 Years German Basic Law:
The German Constitution and its Court**

advocated in connection with the Imperial Constitution (Weimarer Reichsverfassung) to the effect that an expropriation can already be ascertained “if the right of the owner to dispose at will of his physical object pursuant to s. 903 of the Civil Code is impaired for the benefit of a third party.” (Decisions of the Imperial Court in Civil Matters [*Reichsgericht in Zivilsachen* - RGZ] 116, 268 [272]; Decisions of the Federal Court of Justice in Civil Matters [*Entscheidungen des Bundesgerichtshofes in Zivilsachen* - BGHZ] 6, 270 [276] - order for reference p. 14).

This legal opinion, which is based on the precedence of the provisions of civil law governing property rights over provisions of public law, is not consistent with the Basic Law.

The definition of property that is guaranteed by the Basic Law must be inferred from the Basic Law itself. The definition of the term property within the meaning of the Basic Law cannot be inferred from provisions of ordinary law, which is inferior to the Basic Law, nor can the scope of the guarantee of concrete property be derived from the legal position under private law.

The Basic Law has charged the legislature with the creation of a system of property rights that does justice to both the private interests of the individual and those of the general public (See BVerfGE 21, 73 [83]; 25, 112 [117 and 118]; 37, 132 [140 and 141]; 50, 290 [340]; 52, 1 [29]).

The legislature has in this regard a twofold task: On the one hand, it must create in the area of private law (BVerfGE 42, 20 [30 et seq.]), the provisions to be applied in connection with legal transactions and legal relationships among citizens (for example, for the transfer or encumbrance of property, law governing relations between neighbours and law governing restitution in the case of impairment of property by third parties); on the other hand, it must take into account the interests of the general public - which especially include every owner of landed property - in the provisions of (for the most part) public law. Although legal relationships under civil law are usually subsumed under the term private rights, both civil law and provisions of public law enjoy equal priority for the purposes of assessing the legal interests of property owners. The system of property rights under civil law does not conclusively regulate the content and limits of property. In the context of Article 14 of the Basic Law, the provisions of private law governing property also do not enjoy precedence over the provisions of public law that govern property rights.

In fact, the concrete rights that a property owner enjoys at a given time follow from the entirety of all provisions governing the ownership interests of property owners that are in force at that time. If it should happen in this connection that a property owner does not have a specific right, this right is then not part of his right of ownership. How the legislature achieves this exclusion is merely a legislative drafting issue. If the legislature initially defines the legal interest in a comprehensive manner only to exclude certain rights of domain in another provision, the party affected is from the outset afforded only a legal interest that is restricted in this manner (See BVerfGE 49, 382 [393]).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

The nature and scope of the protection of an existing legal interest guaranteed by Article 14.1 sentence 1 of the Basic Law follow from the entire body of constitutional law that defines the content of property, and this also holds in the case of deprivation of property rights that entails mandatory compensation.

3. The following ensues from this legal situation:

- a) The provisions under challenge do not empower the executive to deprive owners of landed property of their constitutionally protected rights. Instead, they regulate in a general manner the relationship between landed property and groundwater and define the legal interest of individual owners of landed property within this area of law. According to the provisions of the Federal Water Act, an owner of landed property - apart from exceptions that are not involved here - has no right to affect the groundwater in connection with the use of the property. Such an owner is therefore not deprived of any right through application of the law. The denial of the permit to use the groundwater in connection with the wet extraction of gravel on the basis of s. 6 of the Federal Water Act cannot therefore constitute administrative expropriation. Application of this provision merely concretizes regulations adopted by the legislature pursuant to Article 14.1 sentence 2 of the Basic Law; the provision makes known the limits imposed upon the owner in the exercise of his property rights.

The primary focus of the order for reference on the extraction of gravel, and not on the use of groundwater, does not in any way change this. The Federal Water Act excludes interference with the groundwater from the content of landed property in principle. It makes no difference in this context whether the purpose of such interference is to make use of the groundwater itself or the interference is only an undesirable side effect of measures taken for other purposes. Property in land does not include the right to use the terrestrial body, which is possible only in connection with the use of the groundwater and requires permission. Wet extraction of gravel cannot be broken down into extraction of gravel that is authorized under private law and the use of groundwater, which is pursuant to the Federal Water Act not authorized. To the extent that the gravel lies in the aquifer, the owner has the right to extract it only with permission under legislation governing the use of water. The denial of the permit under legislation governing the use of water therefore also does not represent a deprivation of property in that regard.

- b) As regards its temporal sphere of operation, the public law water use regulations apply to cases involving the use of water that are to occur after the Federal Water Act goes into force. This does not constitute expropriation by operation of law as compared with previous law (e.g., the Prussian Water Act) that afforded owners of landed property the right to use water. The law has merely redefined the content of landed property in respect of groundwater for the future for the entire Federal Republic at the legislative level. Such a change in the law does not result in the deprivation of a concrete legal interest protected by the guarantee of an existing legal interest under Article 14.1 sentence 1 of the Basic Law and therefore does not constitute expropriation.

**60 Years German Basic Law:
The German Constitution and its Court**

The problem of expropriation by operation of law does, however, arise in the case of a change in the law when the right to use groundwater under previous law has already been exercised and the property owner is deprived of this right (see D below). In connection with the legal question this gives rise to (s. 81 of the Federal Constitutional Court Act) as to whether the Federal Water Act constitutes expropriation by operation of law in respect of the “old uses” under discussion here, it is first necessary to address the question as to whether the provisions of law are themselves consistent with the Basic Law (BVerfGE 31, 275 [285]; 51, 193 [207]). If the public law use regulations contained in the provisions cited were to be considered unconstitutional, the transitional law created for such cases would lose its importance.

III.

Further examination shows that the provisions under challenge properly define the content and limits of property in land.

1. In the exercise of its duty to define the content and limits of property imposed by Article 14.1 sentence 2 of the Basic Law, the legislature must respect recognition of private property under constitutional law pursuant to Article 14.1 sentence 1 of the Basic Law as well as the social imperative contained in Article 14.2 of the Basic Law (BVerfGE 37, 132 [140]; 52, 1 [29]).

As the Federal Constitutional Court has repeatedly ruled, certain limits are imposed upon the legislature when it comes to the restriction of rights of ownership. In the present case, at issue is whether the guarantee of property has been violated because the right to use groundwater is in principle divorced from property in land and subjected to regulation under public law.

- a) First of all, it is not possible to infer from Article 14 of the Basic Law that groundwater must in principle be legally assigned to owners of property in land because of the existence of a natural relationship between groundwater and landed property. In creating a system of property rights that is consistent with the Basic Law, the legislature is not bound by a definition of property that derives from the “nature of the matter.” (see BVerfGE 31, 229 [248]).

The guarantee of private property as a legal institution (BVerfGE 20, 351 [355]; 24, 367 [389]), does to be sure prohibit removal of such areas from the system of private law as it belongs to the elementary inventory of activities protected by the Basic Law, within the area of law governing property and consequently also elimination or significant restriction of the area of freedom protected by Article 14 of the Basic Law. It does not, however, follow from this that the Basic Law requires that every legally protected interest be subject to control under private law (BVerfGE 24, 367 [389]).

The guarantee provided by this legal institution is not infringed if interests that are of vital importance to the general public are subsumed not under the system of private law but rather under a system of public law for the purposes of securing interests of overriding importance to the common good and averting danger (BVerfGE 24, 367 [389]).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- b) The provisions to be reviewed are intended to ensure “economical” management of water resources. The water supply itself is, however, a phenomenon (like air) and as such is not amenable to regulation by law. However, human interference with subsurface water may be subjected to regulation by generally binding provisions of law. Such interference may affect the quantity as well as the characteristics of the water. ...

The volumetric demands on the water supply and threats to its biological, physical and chemical characteristics due to human interference have, in addition to other considerations, caused the constituent legislature to place a theretofore unknown area, water management, under the jurisdiction of the federal government (Article 75.1 no. 4 of the Basic Law). In so doing, the legislature indicated that - in addition to existing legislation governing the use of water - it was necessary to enact laws that ensure ordered management of available water resources. When the legislature addressed this constitutional issue by enacting the Federal Water Act, it was faced with the task of creating a system of law for the “economical” use of water to take into account general needs while at the same time protecting the groundwater against harmful effects caused by property owners. The path chosen, which was to subject the use of groundwater to regulation under public law that is divorced from surface ownership, is to a great extent an extension of a legal development that had already been anticipated by the previous law governing water rights. This development was necessary to take into account modern technical and other possibilities that have an effect upon groundwater. The Civil Code, which governs legal relationships in the private sphere, did not address this issue, which arose after its enactment, in its ss. 903 and 905, nor could it have.

- c) Water is one of the most important bases for all human, animal and plant life. It is needed not only for drinking and domestic use, but is also required as a means of production in industry and the trade sector. Due to the disparate and to some extent competing interests in the use of water, the Federal Constitutional Court had already in the past established that ordered water management was of vital importance not only for the population but also for the overall economy (BVerfGE 10, 89 [113]).

...

- d) Since groundwater flows through the earth like a river, the effect of removing water or introducing substances cannot be limited to a specific piece of property. Groundwater that is removed from one piece of property is no longer available to the property downstream. Contamination that occurs on one piece of property can make the water over vast expanses unsuitable for other uses, in particular for use as drinking water. Interference with groundwater also has an intensive effect upon the surrounding areas.

...

- e) The importance of groundwater for the general public, in particular for the public water supply, can therefore hardly be overestimated. At the same time, groundwater is especially susceptible to deleterious effects caused by property owners. The considerations presented above show that it would not be reasonable to leave the use of groundwater to the complete discretion of individuals or to limit its use exclusively

**60 Years German Basic Law:
The German Constitution and its Court**

- which would have been sufficient under previous circumstances - on the basis of the legal principle of “general acceptability”. The mastery of such a comprehensive task that serves the common good is typical of the issues addressed by public law that can hardly be accomplished with the means available under private law. There can therefore be no objection on constitutional grounds to the fact that the legislature has placed subsurface water under a system of public law that is divorced from surface ownership in order to ensure viable water management. What is involved here - despite the representations in the order for reference - is not the “unilateral interest of the state” but assertion of the public good by the state.

2. The objections to the legal regulation that have been advanced are based on the erroneous assumption that groundwater must be legally considered part of landed property on constitutional grounds.

a) First of all, the opinion to the effect that the provisions of the Federal Water Act resulted in an “erosion of the substance of landed property” because such property would be subject to “total subordination to the interests of society” is incorrect. Property in land is not deprived of the characteristics of private usufruct rights and the basic power of disposition (BVerfGE 37, 132 [140]; 50, 290 [339]; 52, 1 [31]) merely because the owner may dispose of groundwater only with regulatory approval. The usufruct rights of owners of landed property have always pertained primarily to the surface of the property, whereas the right to access materials lying below the surface has consistently been subject to far-reaching restrictions. Even the power to dispose of and make use of landed property is in many ways subject to constitutional restrictions (see, for example, BVerfGE 21, 73 [83.]; 25, 112 [117]). The possibility of making economically meaningful use of a piece of property does not as a rule hinge upon whether groundwater can be brought to the surface of the property or whether the owner must “resist” the groundwater. A right to precisely those possible uses that promise the owner maximum economic benefit cannot be inferred from the constitutional guarantee of landed property.

...

c) The provisions under challenge also do not violate the principle of proportionality.

The opinion to the effect that instead of a repressive ban with the possibility of exemption, a constitutional regulation must make provision for a procedure for obtaining a permit that gives owners of landed property a legal right for permission to use water if the reasons for denial contained in s. 6 of the Federal Water Act do not apply instead of a discretionary decision overlooks the following:

A procedure for obtaining a permit that involves a legal right to issuance of a permit is constitutionally required if the procedure pertains to the exercise of rights that are guaranteed by the Basic Law. Preventive review with the possibility of a ban serves to determine whether the legal exercise of the fundamental right is intended (BVerfGE 20, 150 [154 and 155]).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

But even these conditions do not exist because the access of owners of landed property to groundwater is in principle excluded by a law that is in compliance with the Basic Law.

Moreover, a preventive procedure for granting permission with the possibility of denial of permission would not suffice to ensure ordered water management. If permission to carry out plans to use water could be denied only when a project is expected to detract from the public good, it would - if all discretion on the part of the public authority were to be excluded - not be possible to achieve optimal use of available water resources. Such a regulatory system would inevitably fail to function, for example, when a concrete project is not in itself expected to detract from the public good but is, however, such as to trigger a development with unforeseeable effects at the level of water management (see Federal Administrative Court (*Bundesverwaltungsgericht* - BVerwG), ZfW, 1965, p. 98 [106]).

The results would be equally unacceptable in cases in which approval of a project would completely exhaust available capacity for the use of water so that no latitude would remain to accommodate any needs that might arise in the future.

These examples suffice to show that a preventive procedure for the issuance of permits with the possibility of denial would provide only minimal protection when the limits to water usage have been reached. It would make future-oriented, ordered management of the use of water impossible. In the case of a scarce resource that is of greater vital importance to the general public than virtually any other, such a system of regulation would be unacceptable.

...

D.

According to the findings in the initial proceedings, the claimant has been extracting gravel without restriction since 1936. The decision in this legal dispute may therefore also hinge upon whether the Federal Water Act was directly responsible for depriving the claimant of a constitutionally protected legal interest that inured to the benefit of the claimant before the Federal Water Act went into force. In that regard, both previous law and the regulatory transition pursuant to s. 17 of the Federal Water Act must be reviewed. ...

The constitutional review must therefore be based on the assumption to the effect that the owner was not prevented from extracting gravel by provisions of law while the Prussian Water Act was in force and that the usage rights afforded owners of landed property under the old law and exercised by the claimant were protected by the guarantee of property. It would be incompatible with the content of this fundamental right for the state to be afforded the power to prohibit, abruptly and without any transition, further use of landed property in cases in which commencement of such use required substantial investment. Such a system of regulation would render valueless the work invested and capital employed from one day to the next. It would undermine confidence in the stability of the legal order, without which it would be impossible for individuals to assume responsibility for their conduct of life in the area governed by property law (see BVerfGE 31, 229 [239]; 50, 290 [339]; 51, 193 [217 and 218]).

**60 Years German Basic Law:
The German Constitution and its Court**

b) *Legal Deposit Copies, BVerfGE 58, 137*

Explanatory Annotation

In 1981, the same year as the groundwater decision, the Constitutional Court further developed the property clause. The case concerned a statutory obligation in the German Land Hesse to submit one copy of every book published there to a designated library without compensation. This statutory obligation was to be applied to several books published by the applicant. These books, however, were special art editions and published in very small editions at relatively high prices. The applicant claimed that this constituted a taking and hence required compensation.

The Constitutional Court did not regard this as an expropriation as it was not directed against a specific object. Rather the Court regarded this as a content definition norm because the whole edition of any book was already reduced by the obligation to submit one copy even before it was printed. Consequently the Court held that property had not been taken and hence there was no basis for the operation of the expropriation compensation norm of Article 14.3 of the Basic Law. However, the Court did not stop there. Whereas it regarded the statutory obligation to submit one copy as constitutional in principle the Court also held that the principle of proportionality demanded to take into account that in untypical cases such as this one - a very expensive but low volume special edition - the obligation to submit without compensation is tantamount to a disproportionate sacrifice of the publisher.

Translation of the Legal Deposit Copies Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 58, 137*

Headnote:

It is inconsistent with the fundamental right to property to require that publishers of printed works furnish specimen copies for deposit even in the case of works that are produced at considerable expense and in small printings (s. 9 of the Hessian Land Press Act (Hessisches Landespressegesetz - Hess. LPrG)).

Order of the First Senate of 14 July 1981 - 1 BvR 24/78 -

Facts:

The matter referred for review concerns the question as to the extent to which the duty of publishers to provide state libraries with specimen copies (legal deposit copies) is compatible with the Basic Law.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

The Land of Hesse has regulated the mandatory submission of legal deposit copies in s. 9 of the Hessian Freedom and Rights of the Press Act (Gesetz über Freiheit und Recht der Presse - LPrG) in the version promulgated on 20 November 1958 (BVerfGE 58, 137 [144], BVerfGE 58, 137 [145]) as well as in the Deposit of Printed Works Regulation of 21 March 1977 (BVerfGE 58, 137 [144], BVerfGE 58, 137 [145]). (Verordnung über die Abgabe von Druckwerken - PflEVO) issued by the Hessian Minister of Culture.

S. 9 of the Freedom and Rights of the Press Act, which had already been included verbatim in the Hessian Press Act of 23 June 1949 (Bavarian Law Gazette [*Bayerisches Gesetz- und Verordnungsblatt* - GVBl.], p. 75), reads as follows:

“The Minister for Culture and Education may by way of executive order require that a specimen copy of every publication appearing within the sphere of operation of this law be deposited with the library designated by the latter free of charge.”

The Deposit of Printed Works Regulation enacted on the basis of this power stipulates in s. 1.1 as follows:

“The publisher of every printed work appearing in the Land of Hesse shall, unless exempted from doing so by s. 3, depending upon the place of publication, provide the following libraries with one copy (legal deposit copy) gratuitously and at his own expense: ...”

The claimant is a publisher in Offenbach. He publishes bibliophile books in small printings as well as original graphics. In the year 1976, he forwarded books identified with the number of copies printed and the sale price to the Hessian Landes- und Hochschulbibliothek in Darmstadt:

Citing s. 9 of the Freedom and Rights of the Press Act and the Deposit of Printed Works Regulation, the library retained possession of the four works sent by the claimant and notified him accordingly. His objection was unsuccessful. The claimant was of the opinion that the books that were retained were not printed works within the meaning of the Press Act. In any case, he argued, a duty to furnish deposit copies without any compensation was in violation of Article 14 of the Basic Law.

The Administrative Court (Verwaltungsgericht) stayed the proceedings pursuant to Article 100.1 of the Basic Law and referred s. 9 of the Freedom and Rights of the Press Act for constitutional review. According to the Court, the provision is not consistent with Article 14 of the Basic Law to the extent that the Hessian Minister of Culture is empowered to require that a specimen copy of each printed work appearing within the sphere of operation of the law be submitted to a designated library for deposit.

Extract from the Grounds:

...

C.

S. 9 of the Freedom and Rights of the Press Act is not entirely consistent with the Basic Law.

**60 Years German Basic Law:
The German Constitution and its Court**

I.

The standard of review for the referred provision is the fundamental right under Article 14.1 sentence 1 of the Basic Law.

The order requiring submission of copies for deposit without compensation pursuant to s. 9 of the Freedom and Rights of the Press Act encumbers the proprietary rights in the printed work produced by the publisher. The provision therefore falls into the area protected by Article 14 of the Basic Law; as regards its content, it permits statutory regulation pursuant to Article 14.1 sentence 2 of the Basic Law.

The duty to submit copies for deposit does to be sure relate to a single specimen copy; nevertheless, it does not involve expropriation within the meaning of Article 14.3 of the Basic Law. The provision does not empower the executive to seize a specific item of property that it requires through an individual action, but establishes, in general and in the abstract, a duty to make payment in kind in the form of a contribution. It affects those who - as a general rule in connection with the exercise of an occupation - market property as publishers and is based on the entirety of the copies constituting a printing that is the property of the publisher and is identified by statute as a printed work. The proprietary rights in a printed work are encumbered by a duty to furnish a copy for deposit upon its appearance. The act of selecting and depositing a random copy of the printed matter from the printing by the publisher constitutes concretization of a general duty of the publisher that already existed beforehand. The regulatory statute governing legal deposit copies is therefore a legal provision that defines in general the substantive content of property (BVerfGE 58, 137 [144], BVerfGE 58, 137 [145]) in a printed work as the entirety of all copies.

Contrary to the opinion of the referring court, this classification also retains its validity if the definition of substantive content - as will be shown - is not consistent with the Basic Law due to the degree of the burden imposed on the owner in certain cases. If the limits that follow from the Basic Law are exceeded when the duties of the owner are defined, the law is unconstitutional; this does not make it an expropriation. (see BVerfGE 52, 1 [27 and 28]).

Definition of substantive content and expropriation are fundamentally different in terms of the conditions and requirements for their substantive construction due to their disparate functions. Their classification and validity must therefore be assessed on the basis of the respective relevant provisions of the Basic Law. The duty that ensues from the regulatory statute governing legal deposit copies therefore falls into the area of Article 14.1 sentence 2 of the Basic Law regardless of the respective degree of burden affecting the publisher.

II.

S. 9 of the Freedom and Rights of the Press Act satisfies the formal requirements for an enabling law that ensue from the reservation of legislative power in Article 14.1 sentence 2 of the Basic Law.

1. The Hessian legislature did not exceed the legislative authority (see BVerfGE 34, 139 [144 et seq.]), to be respected under Article 14.1 sentence 2 of the Basic Law. The regulatory statute governing legal deposit copies does not fall into the category of copyright and publishing law

**Selected Fundamental Decisions of
the Federal Constitutional Court**

(Article 73 no. 9 of the Basic Law), which is exclusively under the jurisdiction of the federal government. s. 4.1 and s. 9 of the Freedom and Rights of the Press Act are to be sure based on the use of the term “printed work,” which derives from copyright and publishing law. The question as to the jurisdiction of the legislature must, however, be decided not on the basis of the point of reference chosen but on the basis of the subject matter of the statute. In that regard, the statute referred for review does not fall into the area governed by copyright and publishing law (BVerfGE 58, 137 [145], BVerfGE 58, 137 [146]). According to s. 9 of the Freedom and Rights of the Press Act, mandatory deposit may be ordered only in the case of a printed work that “appears;” the right of the author to determine whether and how his work is published (s. 12 of the Copyright Act (Urhebergesetz - UrHG)) therefore remains intact. Mandatory submission of deposit copies also does not interfere with legal relationships between publishers and authors, which are regulated by publishing law (s. 1 of the Publishing Act (Verlagsgesetz - VerlG)), since it establishes a duty on the part of the publisher under public law that is independent of such legal relationships. Furthermore, the German Library Act (Deutsche Bibliothek - DBibLG), which was enacted with reference to Article 74 no. 13 of the Basic Law, explicitly does not affect the provisions of Land law governing legal deposit copies (s. 25). Legislation governing legal deposit copies therefore falls under the jurisdiction of the Länder pursuant to Article 70 of the Basic Law.

2. In s. 9 of the Freedom and Rights of the Press Act, the legislature limited itself to enactment of the power to adopt a statutory instrument in a manner to which there can be no objection.

- a) According to Article 14.1 sentence 2 of the Basic Law, the substantive content and limits of property are to be sure defined “by the laws”. Nevertheless, no general duty on the part of the legislature to itself regulate in detail the substantive content of the legal interest of owners of property ensues from this. In view of the elementary importance of Article 14.1 sentence 1 of the Basic Law (see BVerfGE 24, 367 [389]; 50, 290 [339]) for safeguarding freedom, the legislature is, however, bound to establish itself the conditions under which the use of property may be restricted by virtue of powers that are adequately defined in terms of content, purpose and degree.
- b) S. 9 of the Freedom and Rights of the Press Act satisfies the corresponding requirements to be met when such legal powers are delegated:

The content of the powers granted follows directly from the enabling provision itself. The matter to be regulated is the submission of specimen copies of printed works appearing in Hesse for deposit with specific libraries. The Minister of Culture may effect such regulation by virtue of the powers granted him.

The purpose of these powers is to collect the entire body of publications appearing in the Land, to make it available to the public and to preserve it for posterity. This follows from the content of the powers in conjunction with the historical development of legislation governing legal deposit copies. The decisive reason behind the regulatory statute may therefore lie exclusively in the interest of cultural policy intended to offer and make available to all interested parties as complete an overview as possible of intellectual creativity in the Land of Hesse.

**60 Years German Basic Law:
The German Constitution and its Court**

Adequate guidelines as regards the scope of and limits to the regulatory statute to be adopted by the maker of the statutory instrument are also not lacking. It follows from the enabling law that a duty to furnish legal deposit copies may be imposed with respect to publications appearing in Hesse and even in this case only in respect of a single specimen copy of each printed work, which is to be deposited with a library designated by the maker of the statutory instrument.

The powers are also adequately defined as regards the issue of compensation. s. 9 of the Freedom and Rights of the Press Act stipulates that the Minister may order that legal deposit copies be furnished without any reimbursement of costs.

III.

As regards substantive law, s. 9 of the Freedom and Rights of the Press Act is not consistent with Article 14.1 sentence 1 of the Basic Law in that the Minister of Culture is empowered to order that specimen copies be furnished without exception with no reimbursement of costs.

1. The Federal Constitutional Court has in numerous decisions ruled that the legislature must in the case of laws within the meaning of Article 14.1 sentence 2 of the Basic Law take into account in the same manner constitutional recognition of private property by Article 14.1 sentence 1 of the Basic Law as well as the social imperative of Article 14.2 of the Basic Law. In so doing, the legislature must achieve a just balance and equitable relationship between the legitimate interests of the parties involved. The extent and scope of the duty that may be expected of the owner under the Basic Law and effected by the legislature hinge accordingly, essentially upon whether and to what extent the property in question is relevant to society, and has a social function (for example, BVerfGE 37, 132 [140 and 141]; 42, 263 [294]; 50, 290 [340 and 341]; 52, 1 [32]).

This is the case when duties arising from the ownership of property must be consistently reasonable. They may not, in particular as regards the social relevance and social importance of the item of property and in view of the purpose of regulation, give rise to an excessive burden and unreasonably affect the owner's property rights (see BVerfGE 21, 150 [155]; 50, 290 [340 and 341, 351]; 52, 1 [29 and 30, 32]; 53 257 [292]).

In addition, the principle of equal treatment under the law must be respected as a general principle of the rule of law (for example, BVerfGE 52, 1 [29 and 30] with references).

These limits that the legislature must preserve when defining the substantive content of property rights also apply if the formal law permits enactment of statutes that define substantive content. The legislature may in granting powers to issue statutory instruments not extend such regulatory powers pertaining to the guarantee of property as it would be prevented from exercising itself.

2. In view of the standards described above, the duty to submit specimen copies without remuneration constitutes an admissible requirement under Article 14.1 sentence 2 of the Basic Law as long as the resultant financial burden imposed on the publisher does not carry significant weight in the individual case. In that regard, the power to enact such a requirement also presents no cause for concern.

Selected Fundamental Decisions of the Federal Constitutional Court

Every printed work takes on a life of its own as soon as it is published. It does not remain a mere financial asset that results from publishing efforts, but has effects that permeate the life of society. That is what makes it an independent factor that helps to determine the cultural and intellectual activity of its time.⁶⁵ It constitutes, apart from the possibility of disposition under private law, common intellectual and cultural property.

In view of this importance to society, it is legitimate to want to make literary production available as completely as possible to those with an academic or cultural interest in such production and transmit to future generations a comprehensive impression of the intellectual creativity of previous epochs. This cultural need can be taken into account in an appropriate manner by requiring that specimen copies be deposited with public libraries. In assessing the constitutional issue involved, it is not possible to ignore the fact that the general public makes a significant contribution to the achievement of the cultural goal pursued through legal deposit copies by building and maintaining state libraries. The general public for its part takes into account the importance of printed works to and their function within society in an appropriate manner. Under these circumstances, the deposit of a specimen copy of each printed work without remuneration represents a reasonable burden that does not excessively and solely affect the publisher if the concomitant economic disadvantage does not carry significant weight. This can be assumed to be the case of the majority of all periodical and non-periodical publications if they are produced in larger printings.

3. However, the deficiency of the regulatory provision adopted lies in the fact that the general requirement to the effect that specimen copies be furnished for deposit without any reimbursement of costs in all cases also applies to those printed works that are produced at great expense and also only in small printings.

It is obvious that the duty to furnish specimen copies of such printed works at no cost represents a burden that is significant as compared with the case of cut-rate and mass-produced products. Article 14.2 of the Basic Law cannot be used to justify such a burden upon the publisher in the interest of the general public.

The special importance to society that inures to printed works that are of exceptional artistic, scientific or literary value, and therefore regularly very expensive to produce, in view of Article 14.2 of the Basic Law cannot be considered in isolation from their production.

Printed works of this kind will frequently have only a small circle of buyers, which already is reflected in the small printing. The number of potential purchasers is small and sales as a rule by no means certain. Publishers undertake a significantly greater economic risk with the production of such works as compared with that involved in normal publishing activities. Only through private initiative and the willingness to accept risks does it become possible to make exclusive artistic, scientific and literary creativity available to the public, albeit at a high price. To also burden publishers with the cost of the production of legal deposit copies that significantly

⁶⁵ See for parallel in copyright law BVerfGE 31, 229 (242) - Schoolbook Decision.

**60 Years German Basic Law:
The German Constitution and its Court**

exceeds the average, stands in contradiction to the constitutional requirement that the interests of the owner affected, be equitably balanced against those of the general public and one-sided burdens avoided.

It therefore follows from the balance of the degree of burden against the weight of the reasons advanced in justification of that burden that mandatory submission of deposit copies at no charge exceeds the limits of a reasonable and still acceptable definition of the substantive content of the property of publishers in the case of valuable publications with small printings.

The regulatory provision under challenge also conflicts with the principle of equal treatment under the law that must be respected in connection with Article 14.1 sentence 2 of the Basic Law (BVerfGE 52, 1 [29 and 30] with references).

In terms of ramifications in practice, a general obligation to furnish legal deposit copies coupled with a general exclusion of compensation leads, as has been shown, to burdens that vary significantly in degree within the class of publishers. Such unequal effects of a law that is *per se* uniform must also be taken into account in the area governed by Article 14.1 sentence 2 of the Basic Law. The principle of equal treatment under the law requires in this case that the elements of the regulatory provision that defines substantive content be ordered such that the differences in the burden imposed upon owners and as a result the differences in the weight of their interests as compared with the interests of the general public be taken into account with sufficient distinction and unequal burden avoided.

S. 9 of the Freedom and Rights of the Press Act on the other hand grants the power to enact a regulatory statute governing legal deposit copies, the content of which lacks the degree of distinction required in view of the very disparate issues it covers in respect of property rights.

4. In view of the guarantee of property as a fundamental right, the objection to the effect that publishers could also pass the costs incurred due to mandatory submission of deposit copies on to purchasers in the cases under discussion here or offset them with revenues from other publications cannot prevail. In the case of costly printed works with small printings, there is already reason for doubt of a factual nature.

Apart from that, assessment of the constitutionality of regulatory provisions pursuant to Article 14.1 sentence 2 of the Basic Law may not hinge exclusively upon whether the owner can recover expenses imposed upon him elsewhere or in some other manner. The guarantee of property is intended to enable its legal owner to manage his sphere of operation as he sees fit (for example, BVerfGE 24, 367 [389,396]; 50, 290 [339]).

This constitutional function would generally not be achieved if the state could establish duties to be fulfilled by owners of property and legitimize restrictions on the basis of more or less speculative economic considerations. The legitimacy of constitutional restrictions on property and burdens imposed on property is grounded in Article 14.2 of the Basic Law. The Federal Constitutional Court has in this context pointed out several times that the societal function of property and the importance of property to society justify restriction of the legal interests of owners. At the same time, however, the limits to the reasonable burdens that may be imposed by the legislature also follow from this (for example, BVerfGE 58, 137 [151]; BVerfGE 58, 137 [152]; 52, 1 [32]).

Selected Fundamental Decisions of the Federal Constitutional Court

Reference to possible recuperation of losses by owners of property would in cases of the present nature exceed these limits that derive from the constitutional system of property rights and be incompatible with the guarantee of existing legal interests under Article 14.1 sentence 1 of the Basic Law.

IV.

The constitutional considerations presented above cannot suffice to declare the provision objected to by the referring court void either in its entirety or in part. s. 9 of the Freedom and Rights of the Press Act covers the broad class of cases in which a requirement to the effect that legal deposit copies must be provided without remuneration results in only slight burdens on publishers and for that reason gives no cause for concern. To the extent that the enabling powers exceed the bounds of what is constitutionally admissible, the Land legislature has - as follows from the introductory presentation of the regulatory statutes - a series of possibilities for either completely realigning the law governing legal deposit copies or adapting it to the interests involved to take into account hardship cases in light of the guarantee of property. The Federal Constitutional Court must therefore limit itself to ascertainment of a violation of the Basic Law by s. 9 of the Freedom and Rights of the Press Act to the extent described in the operative section.

c) *Monument Protection Act, BVerfGE 100, 226*

Explanatory Annotation

Monument protection law is that area of the law concerned with preserving buildings of historic value. Many of these buildings are held by private owners and statutory protection of these monuments will invariably place substantial restrictions and significant financial obligations on these owners, for example to refrain from tearing the building down, changing its appearance or renovating the building. In this case the Court had to deal with such statutory provisions of one of the German *Länder* regarding monument protection. The Court went on to further develop its jurisprudence of the “library-copy”-decision mentioned above. It construed the monument protection statute as a “content definition norm” for property in concretisation of the social nexus between property and the public good as stipulated in Article 14.2 of the Basic Law. However, even though such norms do not constitute takings requiring compensation in the sense of Article 14.3 of the Basic Law, they can nonetheless go beyond what can be demanded as a reasonable sacrifice of the owner of the property. Whenever this is the case the relevant statutes must take this into account and provide protection in order to be considered proportional and hence in conformity with Article 14.1. However, the Constitutional Court went on to also hold that providing for monetary compensation cannot always provide the necessary level of protection. Property protection must primarily aim at protecting the property as such and monetary compensation can only become relevant when the actual property cannot be adequately protected.

60 Years German Basic Law:
The German Constitution and its Court

Translation of the Monument Protection Act Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 100, 226*

Headnotes:

1. Statutes governing the protection of monuments that define the substantive content and limits of property are incompatible with Article 14.1 of the Basic Law (Grundgesetz - GG) if they do not preclude unreasonable burdens on the owner and contain no provision for measures to avoid such restrictions on property rights.
2. Statutes governing compensation that are intended to preserve the principle of proportionality in cases of unusual hardship are deficient if they are limited to affording the parties affected the right to claim financial compensation. The guarantee of an existing legal interest under Article 14.1 sentence 1 of the Basic Law requires first of all that measures be taken, that in fact avoid any unreasonable burden on the owner and preserve to the greatest extent possible private usufruct of property.
3. Just as the legislature must also regulate the prerequisites for, as well as the nature and scope of compensation for a burden that would otherwise be unreasonable when defining the content and limits of property at the statutory level, administrative authorities must at the same time make decisions, at least in principle, in respect of any compensation that might be required when concretizing restrictions on property rights. The legislature must create the prerequisites for this.
4. S. 13.1, sentence 2 of the Rhineland-Palatinate Monument Protection and Preservation Act (Denkmalschutz- und Pflegegesetz - DSchPflG) is incompatible with the guarantee of property under Article 14.1 of the Basic Law.

Order of the First Senate of 2 March 1999 - 1 BvL 7/91 -

Facts:

The claimant, in the initial proceedings, an industrial enterprise, is the owner of a large mansion property dating from the 19th century that was formally placed under the protection of the Rhineland-Palatinate Monument Protection Act of 1978. According to the provisions of that law, the owner was under an obligation to preserve and maintain the monument and could modify or raze it only with official permission. It was not necessary to take into account the interests of the owner in making decisions as regards such permission.

The claimant was unsuccessful in its application for permission to raze the mansion, on the grounds that there was no commercial use for it and efforts made over the years to find another meaningful use had been unsuccessful.

The appellate court found the statutory regulation unconstitutional and referred it to the Federal Constitutional Court, which declared it incompatible with Article 14.1 of the Basic Law.

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

Selected Fundamental Decisions of
the Federal Constitutional Court

Extract from the Grounds:

...

C.

The statute referred for review is incompatible with Article 14.1 of the Basic Law.

I.

1. S. 13.1 sentence 2 of the Monument Protection and Preservation Act involves a definition of the content and limits of property that must be measured against the standard of Article 14.1 and not Article 14.3 of the Basic Law.

Expropriation constitutes seizure of property of an individual by the state (BVerfGE 100, 226 [239], BVerfGE 100, 226 [240]). It is intended to deprive the owner of concrete legal interests, entirely or in part, that are protected by Article 14.1 sentence 1 of the Basic Law for the purposes of fulfilment of certain public duties (BVerfGE 56, 249 [270 et seq.] - dissenting opinion; 70, 191 [199 and 200] with further references; 71, 137 [143]; 72, 66 [76]).

This is achieved either through a law that deprives a specific class of persons of concrete property rights - expropriation by operation of law - or through an act of enforcement by a public authority on the basis of its legal power to effect such seizure - administrative expropriation (see BVerfGE 52, 1 [27]; 58, 300 [330 and 331]; established case law).

These prerequisites do not obtain here. Neither the statute referred for review on which the obligation to obtain permission to raze protected cultural monuments is based, nor denial of the permit itself, represents an expropriation within the meaning of Article 14.3 of the Basic Law. The statutory regulation does not deprive the owner of any concrete ownership interests for the purposes of fulfilment of specific public duties, but rather restricts, generally and in the abstract, the possible uses of a piece of land with a monument constructed on it; the action of denial concretizes this restriction. s. 13.1 sentence 2 of the Monument Protection and Preservation Act therefore defines the content and limits of property within the meaning of Article 14.1 sentence 2 of the Basic Law. This categorization of the statute is independent of the extent of the burden on the legal owner. It retains its validity even in cases in which the effects of the action approximate or are tantamount to expropriation as far as the party affected is concerned (see BVerfGE 83, 201 [211 et seq.]).

Since the constitutionality of the statutory regulation referred for review is therefore to be measured against the standard of Article 14 1 in conjunction with Article 14.2 of the Basic Law, the requirement contained in Article 14.3 sentence 2 of the Basic Law to the effect that expropriation laws must also regulate the nature and extent of compensation (reciprocity clause) is just as inapplicable as the provision governing legal recourse contained in Article 14.3 sentence 4 of the Basic Law.

**60 Years German Basic Law:
The German Constitution and its Court**

2. In defining the content and limits of property within the meaning of Article 14.1 sentence 2 of the Basic Law, the legislature must achieve a just balance and equitable relationship between the legitimate interests of the owner and the needs of the public good. In so doing, the legislature must remain consistent with all other (BVerfGE 100, 226 [240], BVerfGE) 100, 226 [241]) constitutional norms; in particular, it is bound to the constitutional principle of proportionality and the principle of equal treatment under the law pursuant to Article 3.1 of the Basic Law. The public good is not only the reason for but also the limit to the burden that may be placed upon property. Restrictions on rights of ownership may not exceed that which suffices to achieve the purpose of protection intended by the statutory regulation. This may not be allowed to deplete the core area of the guarantee of property. This includes not only private usufruct, i.e., assignment of property to a legal entity whom it is intended to benefit by serving as the basis for private undertakings, as well as the basic power of disposition over the property (see BVerfGE 70, 191 [200]; 79, 174 [198]; 87, 114 [138 and 139]; 91, 294 [308]).

The regulatory power of the legislature is subject to various restrictions. To the extent that property rights secure the personal freedom of the individual in the area covered by the law governing property, the protection they enjoy is especially pronounced (see BVerfGE 42, 263 [294]; 50, 290 [340]; 70, 191 [201]; 95, 64 [84]).

On the other hand, the greater the importance of an item of property to society, the broader is the operating latitude of the legislature; its nature and function are of decisive importance in this regard (see BVerfGE 53, 257 [292]).

Restriction of rights of ownership must in principle be accepted without compensation in this context as a consequence of the importance of the property to society (Article 14.2 of the Basic Law). If the legislature exceeds the above limits when defining the content and limits of property, the statutory regulation is invalid (BVerfGE 52, 1 [27 and 28]) restrictions or burdens based on any such statute are illegal and may be contested through recourse to the courts of first instance. They do not give rise to a right to compensation on constitutional grounds (see BVerfGE 58, 300 [320]).

II.

Measured against these principles, s. 13.1 sentence 2 of the Monument Protection and Preservation Act is not consistent with Article 14.1 of the Basic Law (see BVerfGE 100, 226 [241], BVerfGE 100, 226 [242]).

1. The statutory regulation that makes no provision for taking into account the interests of owners - unlike the monument protection laws of other Länder - may unreasonably restrict the rights of owners affected by it under certain circumstances.

- a) The protection of cultural monuments is a legitimate concern of the legislature and the maintenance of monuments is a public duty that enjoys high priority; restrictive statutes within the meaning of Article 14.1 sentence 2 of the Basic Law are warranted. Article 40.3 of the Constitution for Rhineland-Palatinate of 18 May 1947 (Ordinance Gazette [*Verordnungblatt* - VOBl] p. 209, most recently amended by the Act of 12 October 1995 [Law Gazette (*Gesetz- und Verordnungsblatt* - GVBl.) p. 405]) also imposes upon the Land the duty to take under its care and maintain monuments of art and history.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- b) The conditions for issuance of a permit set forth in s. 13.1 sentence 2 of the Monument Protection and Preservation Act are appropriate and required to achieve the purpose of the law. Since the razing of a cultural monument may be approved only if other needs of the public good outweigh the interest in protection of that monument and it is necessary to establish whether the overriding needs of the public good cannot be taken into account in some other manner, the preservation of protected cultural monuments is safeguarded in all other cases. It is not possible to discern any other means that is equally effective but would constitute less of an encumbrance upon property rights.
- c) Application of the statute will as a rule also not result in an unreasonable burden upon the owner in the narrower sense. The public interest in the preservation of a protected monument can be taken into account only by imposing a duty upon the owner of the property and building, whose property therefore becomes more subservient to the interests of society. This follows from the situational context, in this case the location and nature of the land (see Decisions of the Federal Administrative Court [*Entscheidungen des Bundeswaltungsgerichts* - BVerwGE] 94, 1 [4]; Decisions of the Federal Court of Justice in Civil Matters [*Entscheidungen des Bundesgerichtshofes in Zivilsachen* - BGHZ] 105, 15 [18], each with further references; Supreme Court of the State of Bavaria (*Bayerisches Oberstes Landesgericht* - BayObLG), BayVBl 1999, p. 251 [252]).

The prohibition against razing an architectural monument does not restrict its current use. In view of the high priority of the protection of monuments and with an eye to Article 14.2 sentence 2 of the Basic Law, the owner must in principle accept that he may possibly be prevented from making more profitable use of the land (see BVerfGE 100, 226 [242], BVerfGE 100, 226 [243]). Article 14.1 of the Basic Law does not protect the most remunerative use of property (see BVerfGE 91, 294 [310]).

- d) The situation is different, however, when a meaningful use for a protected architectural monument no longer exists. This may occur if the original use becomes obsolete due to changes in circumstances and another use that could reasonably be imputed to the owner cannot be realized. When even an owner who is amenable to protection of monuments can make no reasonable use of an architectural monument and for practical purposes cannot dispose of it, the possibility of private usufruct by that owner is virtually completely excluded. If the legal duty to maintain the property is also taken into account, the right becomes a burden that the owner must bear alone in the public interest without being able to enjoy the benefits of private use. The legal position of the party affected therefore comes close to being a situation in which it is no longer deserving of the term “property.” Denial of a demolition permit is then no longer reasonable. If in the opinion of the legislature the public good nonetheless requires that the protected cultural monument be preserved, as is conceivable in the case of structures of great importance in terms of cultural history, this can be achieved only through expropriation (s. 30.1 no. 1 of the Monument Protection and Preservation Act).

The question as to where the limit of reasonableness lies in detail and the extent to which owners are affected to an unacceptable extent by the statute referred for review can be left open. s. 13.1 sentence 2 of the Monument Protection and Preservation

**60 Years German Basic Law:
The German Constitution and its Court**

Act is in violation of the Basic Law, if for no other reason because the norm fails to exclude unreasonable burdens on owners and makes no provision for avoidance of such restrictions on property.

2. The unreasonableness of the prohibition of demolition in certain classes of cases is in no way changed by s. 31.1 sentence 2 of the Monument Protection and Preservation Act. According to this so-called severability clause, the Land must provide appropriate compensation if an action taken under the Monument Protection Act does not affect the previous use (sentence 1), but nevertheless (“otherwise”) has an expropriatory effect. The legislature may to be sure in principle - albeit not to an unlimited extent - preclude unreasonable (see BVerfGE 100, 226 [243], see BVerfGE 100, 226 [244]) effects of a statutory regulation that defines the content of property through compensatory measures (a) s. 31.1 sentence 2 of the Monument Protection and Preservation Act cannot, however, fulfil this function since the requirements to be met (b) by such a provision are not satisfied (c) by the provision.

a) Provisions governing content and limits that would in, and of themselves, be unreasonable, but have been linked with compensatory measures by the legislature may in exceptional cases be consistent with Article 14.1 of the Basic Law.

aa) The legislature is even in cases of hardship not prevented in principle from enforcing measures restricting property rights that it considers warranted in the interest of the public if it avoids imposing burdens that are unreasonable or inequitable upon the owner and takes into account legitimate expectations (see BVerfGE 58, 137 [149 and 150]; 79, 174 [192]; 83, 201 [212 and 213]). Otherwise unreasonable or inequitable provisions that define content and limits within the meaning of Article 14.1 sentence 2 of the Basic Law can be made constitutionally admissible through such compensation in respect of specific classes of cases.

bb) Provisions that call for compensation do of course, not generally constitute a constitutionally acceptable way of achieving consistency of unreasonable restrictions on property with Article 14.1 of the Basic Law. Norms that define the content and limits of property must in principle also preserve the substance of property rights without provision for compensation and comply with the principle of equal treatment under the law (see BVerfGE 79, 174 [198] with further references).

When under exceptional circumstances the application of the law results in an unreasonable burden on the owner, provision for compensation may, however, be considered in order to comply with the principle of proportionality and alleviate especially inequitable hardship.

cc) Finally, compensatory measures do not provide further help in cases in which it is not possible with either technical or administrative or financial means to achieve a balance that is consistent with the principle of proportionality (see BVerfGE 100, 226 [244], BVerfGE 100, 226 [245]) and therefore withstands scrutiny against Article 14.1 of the Basic Law. Such a situation may occur in the area at issue here if, for example, the preservation of a monument in a given situation is of relative little importance and the interests of the owner are especially deserving of

**Selected Fundamental Decisions of
the Federal Constitutional Court**

protection and not of a purely financial nature. In cases of such hardship, the law must allow the demolition of the architectural monument pursuant to a provision for special exceptions in order to achieve complete consistency with the guarantee of property.

- b) Norms that make provision for compensation in the area of application of Article 14.1 sentence 2 of the Basic Law must meet the following requirements:
- aa) They must have a legal basis. It is in principle the affair of the legislature to define the content and limits of property. The legislature must preserve the constitutional limits of laws that define the content and may, if it imposes a mandatory prohibition not rely on the administrative authorities or the courts to avoid any violations of the guarantee of property through compensatory measures or financial payments. To the extent that claims for compensatory restitution are to be justified, this may in any case, even taking into account the budgetary powers of the parliament, be effected only through operation of law.
 - bb) Laws governing compensation that are meant to preserve the principle of proportionality in cases of unusual hardship are inadequate if they only entitle the parties affected to the right to claim financial compensation. The guarantee of an existing legal interest under Article 14.1 sentence 1 of the Basic Law requires first of all that measures be taken, that in fact avoid an unreasonable burden on the owner and preserve to the greatest extent possible the private usufruct of the property. The instruments available to the legislature for this include transitional arrangements, provisions of law governing exceptions and exemption and the use of other administrative and technical measures. If such compensation is impossible or possible only at unreasonable expense in an individual case, financial compensation may be considered in this case or it may be expedient to give the owner the right to have the government acquire the property (see BVerfGE 100, 226 [245], BVerfGE 100, 226 [246]) at market value.

Just as the legislature must also regulate the prerequisites for as well as the nature and scope of compensation for a burden that would otherwise be unreasonable when defining the content and limits of property at the statutory level, administrative authorities must at the same time make decisions in respect of any compensation that might be required at least in principle when concretizing restrictions on property rights (likewise Hermes, NVwZ 1990, pp. 733 and 734).

A property owner who considers an administrative action that infringes his fundamental right under Article 14.1 sentence 1 of the Basic Law to be unreasonable, must contest it through recourse to the administrative courts. If he allows such an action to take effect, he may no longer demand compensation even as provided within the meaning of Article 14.1 sentence 2 of the Basic Law (see BVerfGE 58, 300 [324]). The party affected must therefore decide whether he wants to accept or contest the interventionary action concretizing the restriction on his property rights. He can make a meaningful decision only if he knows whether he is entitled to compensation. The party affected cannot be reasonably

**60 Years German Basic Law:
The German Constitution and its Court**

expected to allow an administrative action that he considers incompatible with the guarantee of property under the Basic Law, to become final in the uncertain expectation of compensation to be awarded retroactively in separate proceedings. The administrative courts must also know whether and in what manner compensation will be provided for an otherwise unreasonable burden in order to be able to assess conclusively the legality of an administrative action that encroaches on property interests.

The legislature must therefore complement its substantive provisions for compensation, with provisions governing administrative procedure that ensure that the administrative actions that concretize restrictions on property are at the same time accompanied by a decision as regards the compensation that could be awarded the owners subjected to the burden; in the case of financial compensation, it is necessary to decide at least whether a claim exists.

- c) The severability clause of s. 31.1 sentence 2 of the Monument Protection and Preservation Act does not satisfy these requirements (BVerfGE 100, 226 [246], BVerfGE 100, 226 [247]). It neither makes provision for avoidance of unconstitutional infringement of property rights, primarily in the form of statutes governing exceptions and exemption as well as other administrative and technical measures, nor does it make provision for administrative proceedings so that the possibility of legal recourse of parties affected is taken into account in the manner described above. For that reason alone, it provides no constitutionally adequate basis for compensation for unreasonable infringement on the basis of s. 13.1 sentence 2 of the Monument Protection and Preservation Act. It is the affair of the courts with jurisdiction to decide whether, in view of its wording, the legal logic behind it and the will of the legislature, any area of application even remains for this provision, which cannot be considered either a basis for compensation for expropriation within the meaning of Article 14.3 sentences 2 and 3 of the Basic Law or as a compensatory provision in connection with the legal definition of the content and limits of property within the meaning of Article 14.1 sentence 2 of the Basic Law.

III.

The incompatibility of s. 13.1 sentence 2 of the Monument Protection and Preservation Act with Article 14.1 of the Basic Law does not render the provision void. The Federal Constitutional Court may refrain from pronouncement of this legal consequence if the legislature has several possibilities for remedying the unconstitutional situation.

That is the case here. ...

XIII. Citizenship and Extradition - Article 16 of the Basic Law

European Arrest Warrant Act, BVerfGE 113, 273

Explanatory Annotation

If an alleged criminal is arrested in one corner of a country there is usually little that bars his transfer to that part of the country where the alleged crime took place or to another location where the rules of jurisdiction provide for a competent criminal court. These jurisdictional rules are very important in order to secure a fair trial and ensure that the executive does not have an opportunity to interfere with the criminal proceedings, e.g. by bringing the case to trial at a favourable location. In federally organized states additional restrictions may apply. However, on the international plane matters become rather complicated. If an alleged criminal is prosecuted by one country but held in another, the only way to conduct criminal proceedings other than in absentia is to engage in extradition proceedings. This usually requires reciprocal extradition treaties between the countries involved and lengthy proceedings through diplomatic channels. When a country's own citizens are to be extradited the legal situation becomes more difficult yet again.

It is these complex complications that the European Arrest Warrant wants to overcome. The European Arrest Warrant is a European Union Framework Decision, i.e. a legislative act requiring legislative implementation in the Member States.⁶⁶ In Germany this was afforded by the European Arrest Warrant Act of 2004.⁶⁷ On the basis of this Act the applicant, a German and Syrian national, was to be transferred to Spain to face criminal charges for membership in and support of a terrorist organization (Al-Qaeda). The charges were based on travel to Spain and meetings and telephone conversations with other persons alleged to have relationships to terrorist organizations. The applicant fought extradition on the grounds that much of the activity took place before the European Arrest Warrant came into force and even before Article 16 of the Basic Law had been amended in 2000 to allow for the extradition of German nationals under certain circumstances.⁶⁸ In addition, the alleged acts were not, at least at the time of the relevant conduct, punishable under German law and the conduct had not exclusively taken place in Spain.

The Constitutional Court ruled in favour of the applicant and quashed the German implementation act. That was delicate in its own right, as a line had to be drawn between the supremacy of European Union law, which is not subject to review by German courts and the

66 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1 (2002), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:HTML>.

67 Of 21 July 2004 (European Arrest Warrant Act, Federal Law Gazette (BGBl.) I p. 1748.

68 The amendment had become necessary to comply with Security Council Resolutions 827 and 955, which established, on an ad hoc basis, the International Criminal Tribunals for the former Yugoslavia and Rwanda in The Hague and Arusha. The Statute of the International Criminal Court also requires that own nationals be extradited to face charges there, albeit only on a subsidiary basis if no adequate charges are to be brought at home. Until the amendment of Article 16 in the year 2000, the extradition of a German national to a foreign country had been absolutely impossible.

**60 Years German Basic Law:
The German Constitution and its Court**

German Implementation Act. The Court stated that the European Framework Decision had left the national legislator with sufficient discretion and that the German legislator had not used the available discretion to implement the Arrest Warrant in line with the Basic Law. This was crucial in avoiding a constitutional showdown with the European Union. The Framework Decision on the Arrest Warrant stands on shaky democratic ground as it was passed under the third pillar of the European Union without participation - other than consultation - of the European Parliament. Without the necessary discretion in the EU Framework Decision and the resulting opportunity by national Parliaments - and Courts - to safeguard fundamental rights and guarantees, the European Union legislation would have been doomed. The Court explained that extraditions under the European Arrest Warrant must take into account the severe impact such extraditions into a foreign country, with a foreign legal order, a different language and a different legal culture will have for affected individuals. Extraditions of German nationals therefore cannot take place when the criminal activity took place in Germany as that will justify a legitimate expectation that the relevant criminal responsibility lies in Germany as well, unlike in situations in which the alleged acts took place mainly within another state and the accused must therefore have been aware of the fact that the legal order of the host country must be obeyed and sanctions be faced if that is not the case. The Court also held that extraditions cannot take place if the conduct, in cases with a substantial nexus to Germany, i.e. where the alleged criminal activity reaches beyond the territory of the state seeking extradition in significant way, is not punishable under German criminal law because the rule of law in a democratic state requires that every person must be in position to know, in an abstract manner, what is allowed and what is not prohibited by criminal law. Finally the Court also held that the implementation act violated Article 19.4 of the Basic Law because it did not provide for adequate access to the courts for independent review of the decision to extradite.

This decision is important because it sheds light on the difficulty of globalization, in this particular case regionalization in the context of the European Union and the interaction between largely national legal systems such as criminal law with these international institutions. In the context of the European Union the additional constitutional aspect of the supremacy of European Union law added to the complexity. These issues arise not only in Europe or in a European context. Legal protection against the acts of the Security Council of the United Nations is also a problem as evidenced for example by the Kadi-decision of the European Court of Justice.⁶⁹ Such actions by the Security Council increasingly affect individuals, for example because of the inclusion in lists with names of people whose assets are to be frozen in the wake of “the war on terror” or they are suffering economic loss through embargo resolutions.

⁶⁹ CJ, Joined Cases C-402/05 P and C-415/05 P, 3.9.2008, 2008 ECR I-6351, Kadi; see also ECtHR, Appl. No. 45036/98, 30.6.2005, Bosphorus,

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=777884&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

Selected Fundamental Decisions of
the Federal Constitutional Court

Translation of the European Arrest Warrant Act Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 113, 273*

Headnotes:

1. With its ban on expatriation and extradition, the fundamental right enshrined in Article 16 of the Basic Law guarantees the citizens' special association to the legal system that is established by them. It is commensurate with the citizen's relation to a free democratic polity that the citizen may, in principle, not be excluded from this association.
2. The cooperation that is put into practice in the "Third Pillar" of the European Union in the shape of limited mutual recognition is a way of preserving national identity and statehood in a single European judicial area, which is considerate in terms of subsidiarity (Article 23.1 of the Basic Law).
3. When adopting the Act implementing the Framework Decision on the European arrest warrant, the legislature was obliged to implement the objective of the Framework Decision in such a way that the restriction of the fundamental right to freedom from extradition is proportionate. In particular, the legislature, apart from respecting the essence of the fundamental right guaranteed by Article 16.2 of the Basic Law, has to see to it that the encroachment upon the scope of protection provided by it is considerate. In doing so, the legislature has to take into account that the ban on extradition is precisely supposed to protect, *inter alia*, the principles of legal certainty and protection of public confidence as regards Germans who are affected by extradition.
4. The confidence of the prosecuted person in his or her own legal system is protected in a particular manner by Article 16.2 of the Basic Law, precisely where the act on which the request for extradition is based shows a significant connecting factor to a foreign country.

Judgment of the Second Senate of 18 July 2005 on the basis of the oral hearing of 13 and 14 April 2005 - 2 BvR 2236/04 -

Facts:

The complainant has German and Syrian citizenship. He is supposed to be extradited to the Kingdom of Spain for prosecution and has been in custody pending extradition since 15 October 2004. A "European arrest warrant" was issued against the complainant by the Central Court of Investigation in Criminal Matters (Juzgado Central de Instrucción) no. 5 of the Audiencia Nacional in Madrid on 16 September 2004. The complainant is charged with participation in a criminal association and with terrorism. He is alleged to have supported the terrorist Al-Qaeda network in financial matters and as concerns the contact between its members as a key figure in the European part of the network. In the European arrest warrant, these

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**60 Years German Basic Law:
The German Constitution and its Court**

charges are based on detailed descriptions of visits to Spain that the complainant had made and of meetings and telephone calls with suspected criminals. On 15 October 2004, the Hamburg Hanseatic Higher Regional Court (Hanseatisches *Oberlandesgericht*) issued an arrest warrant against the complainant and ordered his provisional arrest. The court stated that the complainant was charged of having been active in Spain, Germany and Great Britain since 1997 as one of the key figures of the Al-Qaeda terrorist network in the logistic and financial support of this organisation. The complainant was said to have, *inter alia*, taken part in the purchase of a ship for Osama bin Laden. According to the Court, he had also dealt with the management of the ship, in particular with the transmission of documents and the payment of invoices, and had been bin Laden's permanent interlocutor and assistant in Germany. Apart from this, he was alleged to have travelled to Kosovo at the end of the year 2000 on behalf of the network with the objective of taking an ambulance there to conceal other intentions.

The Higher Regional Court ordered the provisional arrest to continue as arrest, pending extradition.

By order of 23 November 2004, which is challenged here, the Higher Regional Court declared the complainant's extradition admissible.

The judicial authority of the Free and Hanseatic City of Hamburg granted extradition on 24 November 2004. The grant was made contingent on the condition that after the imposition of a final and unappealable prison sentence or other sanction, the complainant would be offered to be returned to Germany for the execution of the sentence.

By his constitutional complaint, the complainant challenges the order of the Higher Regional Court that declared his extradition admissible, and furthermore, the decision of the judicial authority of the Free and Hanseatic City of Hamburg on an application for a grant of extradition. He asserts the violation of his rights under Article 2.1, Article 3.1, Article 16.2 and Article 19.4 of the Basic Law and of Article 103.2 of the Basic Law.

B.

...

The admissible constitutional complaint is well-founded.

The European Arrest Warrant Act infringes fundamental rights and is unconstitutional as concerns substantive law (I.). The Act is void (II.). The legal basis of the challenged decisions is unconstitutional; they are therefore overturned (III.).

I.

The European Arrest Warrant Act infringes Article 16.2 sentence 1 of the Basic Law because the legislature has not complied with the prerequisites of the qualified provision of legality under Article 16.2 sentence 2 of the Basic Law when implementing the Framework Decision on the European arrest warrant. (1.). By excluding recourse to the courts against the grant of extradition to a Member State of the European Union, the European Arrest Warrant Act infringes Article 19.4 of the Basic Law (2.).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

1. German citizens are protected from extradition by the fundamental right under Article 16.2 (a). Pursuant to the second sentence of this provision, the protection can, however, be restricted by law in specific cases (b). As regards the restriction, the legislature is subject to constitutional commitments. These commitments result from the fact that there is a proviso of legality and from the special extent of protection provided by the fundamental right and from the principle of proportionality. When pursuing public interests, the constitution-restricting legislature is obliged to preserve the extent of protection provided by the fundamental right as far as possible; the constitution-restricting legislature may therefore restrict it only in compliance with the principle of proportionality and is to observe other constitutional commitments, such as the guarantee of legal protection under Article 19.4 of the Basic Law (c). The European Arrest Warrant Act does not comply with these constitutional requirements also with a view to the Framework Decision on the European arrest warrant (d).

- a) With the sentence “No German may be extradited to a foreign country” (Article 16.2 sentence 1 of the Basic Law), the Basic Law guaranteed, until its amendment by the Act of 29 November 2000, unrestricted protection for a German citizen from being transferred to a foreign state power. Extradition as a traditional institute of international cooperation of states in criminal matters is characterised as an encroachment upon fundamental rights by the fact that a person is removed by force from the sphere of the domestic jurisdiction and transferred to a foreign jurisdiction (see Decisions of the Federal Constitutional Court [Entscheidungen des Bundesverfassungsgerichts - BVerfGE] 10, 136 [139]) for criminal proceedings that have been instituted there to be brought to a close or a sentence imposed there to be executed (see BVerfGE 29, 183 [192]).

Exactly like the ban on expatriation that is connected with it (Article 16.1 of the Basic Law), the ban on extradition (Article 16.2 sentence 1 of the Basic Law) is not only an expression of the responsibility that the state claims for its own citizens, but both bans are guaranteed as liberty rights. The purpose of the liberty rights to protection from extradition is not to remove the person affected from a just and lawful sentence (BVerfGE 29, 183 [193]). Instead, its purpose is to ensure that citizens are not removed against their will from the legal system with which they are familiar. To the extent that they reside in the state territory, all citizens are supposed to be protected from the insecurities connected with being sentenced in a legal system that is unknown to them under circumstances that are inscrutable to them (see BVerfGE 29, 183 [193]); see also von Martitz, *Internationale Rechtshilfe in Strafsachen*, vol. I p. 1888; Mettgenberg, *Ein Deutscher darf nicht ausgeliefert werden!*, 1925, pp. 6 et seq.; pp. 35 et seq.; Baier, *Die Auslieferung von Bürgern der Europäischen Union an Staaten innerhalb und außerhalb der EU*, *Goltdammer’s Archiv für Strafrecht - GA* 2001, p. 427 [434 et seq.].

With its ban on expatriation and extradition, the fundamental right enshrined in Article 16 of the Basic Law guarantees the citizens’ special association to the legal system that is established by them. The citizenship is the legal prerequisite for an equal civic status, which on the one hand establishes equal duties, but on the other hand, and above all, establishes the rights whose guarantee legitimises public authority in a democracy. The civic rights and duties that are connected with the possession of citizenship for every individual are at the same time constituent bases of the entire polity. It is

**60 Years German Basic Law:
The German Constitution and its Court**

commensurate with the citizen's relation to a free democratic polity that the citizen may, in principle, not be excluded from this association. The citizens' confidence in their secured residence in the territory of the state to which they have a constitutionally guaranteed connection in the shape of the citizenship is also acknowledged by public international law. States are under an obligation under international law to receive their own citizens, i.e. to permit their entry into the state territory and their residence there (see Verdross/Simma, *Universelles Völkerrecht*, 3rd ed., 1984, s. 1202 with further references; detailed account by Hailbronner, in: id./Renner, *Staatsangehörigkeitsrecht*, 3rd ed., 2001, Introduction E, marginal nos. 113 et seq.). The right to enter the state territory correlates to the right of the states to extradite foreigners from their state territory.

The fundamental right that guarantees the citizenship and the right to remain in one's own legal system ranks highly. The manner in which it is drafted is based, *inter alia*, on experience from recent German history in which, immediately after the coup d'état in 1933, the National Socialist dictatorship gradually excluded and expelled, in accordance with the letter of the law, particularly the Germans of Jewish faith or Jewish origin from the protection provided by the German citizenship and by their being part of the German people by devaluing citizenship as an institution and replacing it by a new "national status" for citizens entitled to this status (see s. 2 of the Reich Act on Citizenship (*Reichsbürgergesetz*) of 15 September 1935, *Reich Law Gazette* (*Reichsgesetzblatt - RGBL*) I p. 1146; see Grawert, *Staatsvolk und Staatsangehörigkeit*, in: Isensee/Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. II, 3rd ed., 2004, s. 16.1, marginal no. 44). However, behind the guarantee provided by Article 16 of the Basic Law there is also the conviction, shared all over Europe since the French Revolution, that citizens can enjoy their legal status in politics and under civil law only where their status is secured by law (see Randelzhofer, in: Maunz/Dürig, *Grundgesetz Kommentar*, Article 16.1, marginal no. 2).

To ensure that the ban on extradition does not give a state's own citizens *carte blanche* for criminal action abroad, and to live up to the state's responsibility for their actions which goes with the state's promise to protect them, the Federal Republic of Germany's punitive power extends, in principle, also to offences committed abroad (see ss. 5 et seq. of the Criminal Code and s. 1 of the Code of Crimes against International Law (*Völkerstrafgesetzbuch - VStGB*)), so that, as a general rule, it is possible to prosecute offences committed by Germans abroad.

- b) The encroachment upon the scope of protection of Article 16.2 sentence 1 of the Basic Law is justified exclusively under the prerequisites set out in Article 16.2 sentence 2 of the Basic Law. Since the entry into force of Article 1 of the 47th Act to Amend the Basic Law (47. Gesetz zur Änderung des Grundgesetzes) of 29 November 2000 (*Federal Law Gazette* I p. 1633), the Basic Law permits, under certain conditions, the extradition of a German citizen to a Member State of the European Union or to an international court of justice. To this extent, it also opens the national legal system to European law and to public international law and to international cooperation in the shape of a controlled commitment in order to promote respect of international

**Selected Fundamental Decisions of
the Federal Constitutional Court**

organisations that preserve peace and liberty and respect of public international law, to promote the growing togetherness of the European peoples in a European Union (Article 23.1 of the Basic Law).

- aa) The opening up of such permission to encroach upon the fundamental right to freedom from extradition, which had before been unrestrictedly guaranteed to Germans, has not established unconstitutional constitutional law. An amendment of the Basic Law would be inadmissible if it transgressed the bounds of Article 79.3 of the Basic Law. The extradition of Germans does not infringe the principles laid down in Article 1 und Article 20 of the Basic Law, in any case if the commitments to constitutional law are complied with. An extradition of Germans that abides by the principles of the rule of law neither violates their human dignity nor infringes the principles of state structure laid down in Article 20 of the Basic Law (see already BVerfGE 4, 299 [303-304]; 29, 183 [193]).
- bb) The extradition also of a state's own citizens corresponds to a general development that takes place on the supranational level and in public international law, against which the Basic Law, with its respect for international law, does not establish insurmountable hurdles. As a member of the United Nations, the Federal Republic of Germany is, pursuant to chapter VII of its Charter, in principle obliged to comply with the resolutions of the United Nations Security Council and to implement them (see Frowein/Krisch, in: Simma (ed.), *The Charter of the United Nations*, 2nd ed., 2002, vol. 1, p. 701 [708-709], marginal nos. 21 et seq.). Security Council Resolutions 827 and 955, which established, on an ad hoc basis, the International Criminal Tribunals for the former Yugoslavia and Rwanda in The Hague and Arusha, provide for the extradition of a state's own citizens because as a general rule, only this makes the intended international prosecution of presumed war criminals possible (see the Act on Cooperation with the International Criminal Tribunal for the Former Yugoslavia (*Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof für das ehemalige Jugoslawien*) of 10 April 1995, Federal Law Gazette I p. 485, and the Act on Cooperation with the International Criminal Tribunal for Rwanda (*Gesetz für die Zusammenarbeit mit dem Internationalen Strafgerichtshof für Ruanda*) of 4 May 1998, Federal Law Gazette I p. 843; see in this context Uhle, *Auslieferung und Grundgesetz - Anmerkungen zu Artikel 16 II GG*, *Neue Juristische Wochenschrift - NJW* 2001, p. 1889 [1890]).

The statute of the permanent International Criminal Court in The Hague under the law of international agreements (see Act on the Rome Statute of the International Criminal Court (*Gesetz zum Römischen Statut des Internationalen Strafgerichtshofs*) of 17 July 1998 - ICC Statute Act, Federal Law Gazette 2000 II p. 1393, entered into force on 1 July 2002, in its version promulgated on 28 February 2003, Federal Law Gazette 2003 II p. 293) took recourse to these two models in this respect, with the important proviso, however, that international jurisdiction is only established on a subsidiary basis. The States Parties to the Statute have *ipso jure* the possibility to prevent extradition of their own citizens by adequate national prosecution (as regards the principle of complementary

**60 Years German Basic Law:
The German Constitution and its Court**

jurisdiction, see Article 1 and Article 17 of the Statute and s. 1.1 of the Act of 21 June 2002 on the Implementation of the Rome Statute of the International Criminal Court of 17 July 1998 (Gesetz vom 21. Juni 2002 zur Ausführung des Römischen Statuts des Internationalen Strafgerichtshofs vom 17. Juli 1998), Federal Law Gazette I p. 2144). The responsibility for the punishment of certain offences is thus divided by a coordinated assignment of competences. Aware of its special responsibility, and also of the historical reasons for it, the Federal Republic of Germany, as a member of the international community of states, integrates in the process of evolution of an international system of criminal justice for crimes against humanity, which began with the trials of war criminals before the tribunals of Nuremberg and Tokyo after the Second World War (on the prosecution of genocide, see the Order of the Fourth Chamber of the First Senate of the Federal Constitutional Court of 12 December 2000 - 2 BvR 1290/99 -, *Neue Juristische Wochenschrift* 2001, pp. 1848 et seq.).

As a Member State of the European Union, Germany has entered into further obligations. By ratifying the treaties of Amsterdam and of Nice, the Federal Republic of Germany has undertaken to take part in establishing and developing the “area of freedom, security and justice”. The Member States’ cooperation takes place within the - intergovernmental - “Third Pillar” of the law of the European Union. In this context, Article 31.1 letter b of the Treaty on European Union also provides to facilitate extradition between Member States. In doing so, the European Union pursues the objective to combine the process of growing together and of opening the borders for persons, goods, services and capital with better cooperation of law enforcement services. This is supposed to be ensured by a further judicialisation of the relations between the Member States, i.e., *inter alia*, by the Member State governments’ waiver of their political discretion that is customary in the states’ conventional legal relations, which exists in particular in the law on extradition - in Germany, precisely in the context of the decision on the application on a grant of extradition.

- cc) The possibility of restricting the ban on the extradition of Germans, whose validity had been absolute to date, also does not result in the legal system that is established by the Basic Law losing the core elements of statehood (Entstaatlichung), a development that, due to the inalienable principles of Article 20 of the Basic Law, would be removed from the constitution amending legislature’s freedom of disposition (see BVerfGE 89, 155 [182 et seq.]). In particular, the institute of citizenship is neither abandoned nor substantially devalued or replaced by citizenship of the European Union so that its importance for the principle of democracy does not have to be discussed here. Notwithstanding its importance in other respects (see BVerfGE 89, 155 [184]), the citizenship of the Union is a derived status which complements national citizenship (Article 17.1 sentence 2 of the Treaty establishing the European Community); this is upheld also in Article I-10.1 sentence 2 of the Treaty establishing a Constitution for Europe where it lays down that citizenship of the Union shall be additional to national citizenship and shall not replace it. Correspondingly, the ban under European

Selected Fundamental Decisions of the Federal Constitutional Court

Community law on discrimination on grounds of citizenship is not laid down comprehensively but, in line with the principle of conferral, only for the objectives set out in the Treaty, in particular in the context of the fundamental liberties. This at the same time contributes to the Member States being able to preserve their own national identities (Article 6.3 of the Treaty on European Union), which find their expression in their respective fundamental political and constitutional structures (see Hilf/Schorkopf, in: Grabitz/Hilf (eds.), *Recht der Europäischen Union*, Article 6 EU, marginal nos. 78 et seq. and Article I-5.1 of the Treaty establishing a Constitution for Europe).

Due to the area-specific restriction of the European ban on discrimination on grounds of Member State citizenship, a loss of the core elements of statehood, which would be inadmissible pursuant to the regulations of the Basic Law, cannot be established in this context as concerns the extradition of German citizens to other Member States. Not only do tasks of substantial importance remain with the state; the restriction of the ban on extradition is also not tantamount to the waiver of a state task that is essential in its own right.

In particular with a view to the principle of subsidiarity, (Article 23.1 of the Basic Law), the cooperation that is put into practice in the “Third Pillar” of the European Union in the shape of limited mutual recognition, which does not provide for a general harmonisation of the Member States’ systems of criminal law, is a way of preserving national identity and statehood in a single European judicial area.

- c) The legislature cannot unrestrictedly depart from the ban on the extradition of Germans.
 - aa) As a qualified proviso of legality, Article 16.2 sentence 2 of the Basic Law permits the extradition of Germans only “as long as the rule of law is upheld”. Such prerequisite for an extradition not merely repeats the validity of the principle of the rule of law, which is not open to restrictions of fundamental rights anyhow, and in particular of the principle of proportionality. It rather constitutes an expectation referring to the requesting Member State and to the international court in terms of structural correspondence, as has also been set out in Article 23.1 of the Basic Law. When permitting the extradition of Germans, the legislature must examine in this context whether the prerequisites of the rule of law are complied with by the requesting authorities.

In this context, the legislature must verify when restricting fundamental rights that the observance of rule-of-law principles by the authority that claims punitive power over a German is guaranteed. Here, it will have to be taken into account that every Member State of the European Union is to observe the principles set out in Article 6.1 of the Treaty on European Union, and thus also the principle of proportionality and that therefore, a basis for mutual confidence exists. This, however, does not release the legislature from reacting, in cases in which such confidence in the general conditions of procedure in a Member State has been profoundly shaken, and from doing so irrespective of proceedings pursuant to 7 of the Treaty on European Union.

**60 Years German Basic Law:
The German Constitution and its Court**

The particular bar mentioned in Article 16.2 sentence 2 of the Basic Law does not, however, replace the limits of the constitution that exist for every law that restricts fundamental rights. In turn, the law that restricts fundamental rights must comply with all commitments to constitutional law, may not tolerate conflicts with other provisions of the constitution and must implement the encroachment in a considerate manner, complying with the precept of proportionality.

- bb) The legislature was obliged in any case to use the latitude as concerns incorporation into national law that the Framework Decision leaves the Member States in a manner that is considerate with the fundamental rights. The fact that the responsibility for ensuring that incorporation is in conformity with the constitution is particularly high in comparison with the incorporation of European Community directives into national law also results from the circumstance that the measures in question are from the European Union's "Third Pillar". The Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States is an act of secondary Union legislation that legally implements the objective established by the Treaty on European Union. Pursuant to Article 34.2 letter b, the Treaty on European Union is binding as regards the "result to be achieved". It is true that as concerns its concept, the approach to action under European Union law is modelled after the directive under supranational Community law; in several aspects, however, it differs from this source of secondary law. A Framework Decision does not entail direct effect (Article 34.1 letter b of the Treaty on European Union); its national validity still depends on its being incorporated into national law by the Member States. By incorporating the exclusion of direct applicability into the Treaty on European Union, the Member States wanted to prevent in particular that the case-law of the Court of Justice of the European Communities on the direct applicability of directives is interpreted in such a way that it also covers Framework Decisions (on the so-called "vertical direct effect" of directives see Court of Justice of the European Communities, Joint Cases C-6/90 and C-9/90, European Court Reports 1991 page I-5357 marginal no. 11 - Francovich and others; Case C-62/00, European Court Reports 2002, I-6325 marginal no. 25 - Marks & Spencer; summary in Borchardt, *Die rechtlichen Grundlagen der Europäischen Union*, 2nd ed., 2002, marginal nos. 341 et seq.).

As a form of action of European Union law, the Framework Decision is situated outside the supranational decision-making structure of Community law (on the difference on European Union law and Community law, see BVerfGE 89, 155 [196]). In spite of the advanced state of integration, European Union law is still a partial legal system that is deliberately assigned to public international law. This means that a Framework Decision must be adopted unanimously by the Council, it requires incorporation into national law by the Member States, and incorporation is not enforceable before a court. The European Parliament, autonomous source of legitimisation of European law, is merely consulted during the lawmaking process (see Article 39.1 of the Treaty on European Union), which, in the area of the

**Selected Fundamental Decisions of
the Federal Constitutional Court**

“Third Pillar”, meets the requirements of the principle of democracy because the Member States’ legislative bodies retain the political power of drafting in the context of implementation, if necessary also by denying implementation.

- cc) Pursuant to Article 4 no. 7 letters (a) and (b) of the Framework Decision on the European arrest warrant, the execution of the European arrest warrant can be refused where it relates to offences that are regarded by the law of the executing Member State as having been committed in whole or in part on the territory of the executing Member State or in a place treated as such or which have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

These provisions reveal a need for a restriction of extradition by national law. When adopting the Act implementing the Framework Decision on the European arrest warrant, the legislature was obliged to implement the objective of the Framework Decision in such a way that the restriction of the fundamental rights to freedom from extradition is proportionate. In particular, the legislature, apart from respecting the essence of the fundamental right guaranteed by Article 16.2 of the Basic Law, has to see to it that the encroachment upon the scope of protection provided by it is considerate. In doing so, the legislature has to take into account that the ban on extradition is precisely supposed to protect, *inter alia*, the principles of legal certainty and protection of public confidence as regards German citizens who are affected by extradition. The reliability of the legal system is an essential prerequisite for freedom, i.e. for a person’s self-determination over his or her own concept of life and its implementation. In this respect, already the principle of the rule of law requires that persons who are entitled to enjoy the fundamental right in question must be in a position to rely on their behaviour not being subsequently qualified as illegal where it complies with the law in force at the respective point in time (on the time aspect of the application of legal provisions, see BVerfGE 45, 142 [167-168]; 63, 343 [357]).

The prosecuted person’s confidence in his or her own legal system is especially protected by Article 16.2 of the Basic Law in conjunction with the principle of the rule of law where the act on which the request for extradition is based has been committed in whole or in part on German territory, aboard German vessels or aircraft or in places that are under German sovereign power. Charges of criminal acts with such a significant domestic connecting factor are, in principle, to be investigated in the domestic territory by German investigation authorities if those suspected of the criminal act are German citizens.

A significant domestic connecting factor exists in any case if essential parts of the place where the criminal act was committed and of the place where the result of the act occurred are located on German state territory. In such a combination of circumstances, the state’s responsibility for the integrity of its legal system and the prosecuted person’s fundamental-rights claims come together in such a way that as a general rule, the result is a bar on extradition. Whoever, as a German, commits

**60 Years German Basic Law:
The German Constitution and its Court**

a criminal offence in his or her own judicial area need, in principle, not fear extradition to another state power. If this were different, such a restriction of the protection from extradition would already come close to affecting the essence of the fundamental right. For the prosecuted person, transfer to another Member State's legal system, even though it has been brought closer by European integration, not only means discrimination under procedural law, which can consist in language obstacles, cultural differences and different procedural law and possibilities of defence. Such transfer ultimately ties the prosecuted person to a substantive criminal law in respect of which no democratic means had existed for him or her to participate in its creation, which he or she - unlike German criminal law - does not need to know and which in many cases due to a lack of familiarity with the respective national context, does not permit him or her as a layperson a sufficiently secure comparative evaluation.

The result of the assessment is different where a significant connecting factor to a foreign country exists as regards the alleged offence. Whoever acts within another legal system must reckon with his or her being held responsible there as well. As a general rule, this will be the case if the act constituting the offence has been committed entirely or in essential parts, in the territory of another European Union Member State and if the result has occurred there. The fact that after committing an offence, the prosecuted person will possibly succeed in fleeing to his or her home state is not of decisive importance in this context. A significant connecting factor to a foreign country must also, and especially, be assumed in cases where the offence has a typical cross-border dimension from the outset and shows a corresponding gravity, as is the case with international terrorism or organised trafficking in drugs or human beings; all those who become part of such criminal structures cannot fully rely on their citizenship providing them protection from extradition.

Whereas in cases such as the ones outlined here, the result of the examination of proportionality is as a general rule predictable, specific weighing of the individual case is required if the act has been committed entirely or partly in Germany but the result has occurred abroad. What must be weighed and correlated in such cases are the gravity of the alleged offence and the possibilities of effective prosecution on the one hand and the prosecuted person's interests that are protected by fundamental rights on the other hand, taking into account the objectives connected with the creation of a single European judicial area.

To the extent that the legislature does not make use of the latitude provided to it by Article 4 no. 7 letter (a) of the Framework Decision on the European arrest warrant by specifying constituent elements of offences, it has to ensure through its programme of legal examination that the authorities that implement the Act will engage in a specific weighing of the conflicting legal positions. The requirements placed on the constitution amending legislature by Article 20 and Article 1 of the Basic Law are not met already by Article 16.2 sentence 2 of the Basic Law demanding, in an abstract and general manner, that the requesting state's legal system adhere to the principles of the rule of law, and by the German

Selected Fundamental Decisions of the Federal Constitutional Court

implementing act establishing a corresponding concordance of minimum rule-of-law standards. As regards the extradition of persons, in particular of a state's own citizens, the Basic Law demands in each individual case a specific examination of whether the prosecuted person's corresponding rights are guaranteed. Such examination is necessary precisely because other states' sovereign punitive power is not, in principle, bound by the principle of territoriality and, pursuant to classical concepts under international law, is limited, apart from the requirement of a minimum connection of the alleged offence to the punishing state, by the fact that it is left to all other states' discretion whether they provide judicial assistance in criminal matters (see Maierhöfer, *Weltrechtsprinzip und Immunität: das Völkerstrafrecht vor den Haager Richtern: Besprechung des Urteils des IGH vom 14. Februar 2002 (Demokratische Republik Kongo gegen Belgien)*, *Europäische Grundrechte-Zeitschrift - EuGRZ* 2003, pp. 545 et seq.). In this respect, the Framework Decision has merely shifted the pattern of a political decision, which is not subject to judicial review, towards a judicial weighing-in where due account is to be taken of the Framework Decision's objectives of simplification.

- d) The European Arrest Warrant Act does not meet these constitutional requirements. The manner of achieving the Framework Decision's objectives that the law has chosen encroaches upon the freedom from extradition under Article 16.2 of the Basic Law in a disproportionate manner.
- aa) When implementing the Framework Decision, the legislature has failed to take sufficient account of the specially protected interests of German citizens. In this respect, s. 80 of the Law on International Judicial Assistance in Criminal Matters distinguishes between Germans who are supposed to be extradited to a Member State of the European Union and non-Germans only by making use of the possibility, provided in Article 5.3 of the Framework Decision on the European arrest warrant, of making extradition of a state's own citizens subject to conditions regarding the persons being returned to serve the sentence passed against them. Pursuant to s. 80 of the Law on International Judicial Assistance in Criminal Matters, extradition of a German for prosecution is only admissible where the requesting Member State offers to return the German after the imposition of the unappealable custodial sentence or other sanction at the person's request to the area of applicability of the Law on International Judicial Assistance in Criminal Matters.

Beyond this, protection from extradition is only granted to the extent that is applicable also to foreigners. Consequently, extradition is inadmissible in particular where serious grounds exist to suspect that in case of their extradition, the prosecuted persons will be persecuted or punished on account of their race, their religion, their citizenship, their forming part of a specific social group or their political creeds or that their situation would be rendered more difficult for one of these reasons, (s. 6.2 of the Law on International Judicial Assistance in Criminal Matters). This protective provision also applies in case of extradition on account of a European arrest warrant (s. 82 of the Law on International Judicial Assistance in Criminal Matters).

**60 Years German Basic Law:
The German Constitution and its Court**

Moreover, s. 9 no. 1 of the Law on International Judicial Assistance in Criminal Matters prohibits extradition on account of offences for which German jurisdiction has been established if a court or a public authority in the area of application of this Act has, on account of the offence, passed a judgment or a decision against the prosecuted person or refuses to open main proceedings (s. 204 of the German Code of Criminal Procedure (Strafprozessordnung - StPO)), has dismissed an application to prefer public charges (s. 174 of the Code of Criminal Procedure), has halted proceedings upon the imposition of conditions and instructions (s. 153.a of the Code of Criminal Procedure) or, finally, has halted proceedings pursuant to s. 45, s. 47 of the Juvenile Court Act (Jugendgerichtsgesetz - JGG). As a result of this provision, the ban on double punishment, which, in principle, only applies in the domestic territory, also covers extradition for the purpose of further prosecution. At the same time, however, protection from extradition, which is prescribed by the constitution, is complied with for those cases in which a German had been answerable before a German court, with corresponding decisions that concluded the proceedings, already before the decision on extradition. Where, however, the request for extradition is made before such conclusion of proceedings, or where no corresponding proceedings are instituted in Germany at all, there is, pursuant to the Law on International Judicial Assistance in Criminal Matters, valid in the version of the European Arrest Warrant Act, nothing that stands in the way of extraditing a German who is charged with an offence that has a significant domestic connecting factor. From the perspective of persons entitled to enjoy the fundamental right in question, there is a gap in legal protection in this context.

- bb) A particular effect of encroachment upon fundamental rights is created where the citizens are supposed to be held responsible by other Member States for remote effects of their action in Germany that they could not easily have expected, or where they are confronted with prosecution claims by individual Member States that are extensive both as concerns their subject matter and the prosecuted persons themselves. Such effect of encroachment is even increased where the act alleged by the state requesting extradition is not punishable pursuant to German law.

The legislature could have chosen an implementation that shows a higher consideration in respect of the fundamental right concerned without infringing the binding objectives of the Framework Decision because the Framework Decision contains possibilities for exceptions that permit the Federal Republic of Germany to take account of the fundamental rights requirements that follow from Article 16.2 of the Basic Law. Article 4 no. 7 of the Framework Decision on the European arrest warrant permits the executing judicial authorities of the Member States to refuse to execute the European arrest warrant where it relates, on the one hand, to offences which are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such (Article 4 no. 7 letter (a) of the Framework Decision on the European arrest warrant) or where, on the other hand, the arrest warrant relates to offences that have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its

**Selected Fundamental Decisions of
the Federal Constitutional Court**

territory (Article 4 no. 7 letter (b) of the Framework Decision on the European arrest warrant). In any case as regards offences with a significant domestic connecting factor within the meaning that has been set out, the legislature had to create the possibility, as regards the constituent elements of offences, and the legal obligation of refusing the extradition of Germans.

Moreover, the legislature was called upon to decide upon enhancing the legal position of Germans over and above the regulations in s. 9 of the Law on International Judicial Assistance in Criminal Matters. The Framework Decision permits to refuse extradition where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based (Article 4 no. 2 of the Framework Decision on the European arrest warrant) or where the judicial authorities have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings (Article 4 no. 3 of the Framework Decision on the European arrest warrant). In this respect, the preliminary investigation by the public prosecutor has an additional function, namely that of protecting individual rights, which would have had to be taken into account when the Framework Decision was incorporated into national law. In this context, the legislature should have examined the provisions of the Code of Criminal Procedure to verify whether decisions by the Public Prosecutor's Office to refrain from criminal prosecution must be subject to judicial review regarding a possible extradition. Also by doing so, it can be ensured already before a decision on extradition is issued that a German who has not left the territory of the Federal Republic of Germany and who, according to German law, has not committed a criminal offence is not extradited.

- c) The European Arrest Warrant Act's infringement of the fundamental right to protection from extradition and of the principles of the rule of law that are applicable in this context would have been avoided by exhausting the margins afforded by the framework legislation when incorporating it into national law. The legislature was not entitled to refrain in this context from exhausting the latitude afforded to it, not even taking into account the legislature's freedom of drafting. The legislature not correctly performed the weighing, which it is called upon to conduct by Article 16.2 of the Basic Law in connection with the principle of the rule of law, between the European interest in cross-border prosecution and the claim to protection that follows from the rights that stem from a person's status as a German. The legislature has already failed to see the mandate for weighing that follows from the special proviso of legality of Article 16.2 of the Basic Law; in any case, it factually has not carried it out by providing a sufficient extent of protection from extradition.

If the German legislature wants to restrict the protection of Germans from extradition in a constitutional manner on the basis of Article 16.2 sentence 2 of the Basic Law, it must, by providing constituent elements of offences that are determined in accordance with the rule of law, put the executing authority at least in a position to weigh the citizen's confidence in the German legal system, which

**60 Years German Basic Law:
The German Constitution and its Court**

is protected in this respect, in the individual case according to these constitutional principles. The judge's general commitment to fundamental rights in conjunction with the principle of proportionality (Article 1.3 of the Basic Law) does not come up to these requirements placed on a law that restricts fundamental rights.

- dd) If the distinction between an alleged offence with a domestic connecting factor and one with a significant connecting factor to a foreign country, which is necessary under constitutional law, were upheld, a conflict with the special ban on retroactivity pursuant to Article 103.2 of the Basic Law would be ruled out from the outset so that the importance of this Article to combinations of circumstances such as the one that exists here need not be finally determined. The principle according to which an offence may only be punished if punishability was legally determined before the offence was committed is a special guarantee under the rule of law of the confidence in the reliability of the legal system, which is to provide clear orientation on what is punishable and what is not. Without such reliable orientation, individual freedom cannot develop: Whoever must expect an unpredictable retroactive amendment of criminal law provisions will no longer be able to exercise his or her freedom of action with the necessary security and will lose his or her position as an autonomous individual in one of the areas that are most sensitive as concerns fundamental rights. Admittedly, the ban on retroactivity only applies to amendments of substantive criminal law and not to those of procedural law, of which the law on extradition is also regarded as a part (see Higher Regional Court (Oberlandesgericht) Braunschweig, Order of 3 November 2004 - Ausl. 5/04 -, *Neue Zeitschrift für Strafrecht, Rechtsprechungs-Report - NStZ-RR* 2005, p. 18 [19]; BVerfGE 109, 13 [37]). If however a German, who up to now enjoyed absolute protection from extradition, is answerable in a Member State of the European Union for acts that do not show a significant connecting factor to a foreign country and were not punishable in Germany when they were committed, this could be tantamount to a retroactive amendment of substantive law.
- ee) The deficiencies of the legal regulation that have been shown are also not sufficiently compensated by the fact that pursuant to s. 80.1 of the Law on International Judicial Assistance in Criminal Matters, extradition of a German citizen for prosecution is only admissible when it is ensured that the Member State requesting extradition will offer to return the prosecuted person at his or her request to Germany for execution after the imposition of an unappealable custodial sentence or other sanction. It is true that the execution of a sentence in the domestic territory is, in principle, a protective measure for a state's own citizens, but it only concerns execution and not prosecution.

Apart from this, the legislature will have to examine whether the bar on admissibility that is constituted by the lack of a guarantee by the state requesting extradition to offer the requested state the prosecuted person's return for execution is an adequate measure. According to the legislature's intention, the requirement of the prosecuted person's return is supposed to comply with the principle of rehabilitation. The legislature, however, has admitted already in the legislative

**Selected Fundamental Decisions of
the Federal Constitutional Court**

process that there could be individual cases in which the return of a person to be extradited could fail due to a lack of criminal liability on the part of the prosecuted person in Germany (see Bundestag document [Bundestagsdrucksache - BTDrucks] 15/1718, p. 16). The mere promise of return is inadequate in this context because it does not tell anything about whether the possibility of serving the custodial sentence in Germany exists.

2. The lack of voidability of the decision on the application for a grant of extradition in proceedings concerning extradition to a Member State of the European Union pursuant to the eighth part of the Law on International Judicial Assistance in Criminal Matters (see ss. 78 et seq. of the Law on International Judicial Assistance in Criminal Matters) infringes Article 19.4 of the Basic Law. Admittedly, legal practice and legal literature have up to now rejected the possibility of recourse to the courts to void the decision on the application for a grant of extradition in extradition proceedings because its foreign-policy and general-policy aspects belong to the core area of executive power. This can, however, no longer apply if the decision on the application for a grant of extradition puts the legal restriction of a fundamental right in concrete terms.

a) Article 19.4 of the Basic Law guarantees a fundamental right to effective legal protection provided by the courts from acts of public authority (aa) to the extent that they encroach upon the rights of the person affected (bb).

aa) Article 19.4 of the Basic Law contains a fundamental right to effective judicial protection from acts of public authority that is as complete as possible (see BVerfGE 8, 274 [326]; 67, 43 [58]; 96, 27 [39]; 104, 220 [231]; established case-law). The guarantee provided by the Basic Law comprises access to the courts, the examination of the relief sought in formal proceedings and the binding decision of the court (see BVerfGE 107, 395 [401]). The citizen has a substantial claim to judicial review that is as effective as possible (see BVerfGE 40, 272 [275]; 93, 1 [13]; established case-law).

An integral part of the guarantee of effective legal protection is above all that the judge has sufficient authority to review as concerns the factual and legal aspects of a dispute so that he or she can remedy a violation of the law. The precept of effective legal protection does, however, not exclude that, depending on the type of measure that is to be examined, the concession of scope for drafting, discretion and assessment can result in differences regarding the completeness of judicial review (see BVerfGE 61, 82 [111]; 84, 34 [53 et seq.]).

bb) The prerequisite of the guarantee of recourse to the courts is that the person affected is entitled to a legal position; the violation of mere interests is not sufficient (see BVerfGE 31, 33 [39 et seq.]; 83, 182 [194]). Such legal position can be established by another fundamental right or from a guarantee that is equivalent to a fundamental right, but also by law, with the legislature determining the conditions under which a citizen is entitled to a right and the content that the right has (see BVerfGE 78, 214 [226]; 83, 182 [195]).

**60 Years German Basic Law:
The German Constitution and its Court**

These principles also apply where an Act leaves a measure to the competent authority's discretion. Where the Act's regulations on decision-making enjoin the authority to take into account also legally protected interests of the person affected when exercising its discretion, the guarantee of legal protection under Article 19.4 of the Basic Law applies. Where, on the contrary, the legal provision does not protect any legal interests of the person affected, the discretionary decision need not be voidable by him or her in court proceedings; in the intermediate zone, an interpretation that gives prevalence to the fundamental rights merits preference (see BVerfGE 96, 100 [114-115] with further references).

As concerns the grant of extradition in the classical extradition proceedings, the Federal Constitutional Court has so far left it open in its case law whether the decision on the application for a grant of extradition can be challenged by a constitutional complaint; it has however, assumed that there is, in any case, only a limited possibility of review (see BVerfGE 63, 215 [226]; Order of the Second Senate of the Federal Constitutional Court (Preliminary Review Committee - Vorprüfungsausschuss) of 16 March 1983 - 2 BvR 429/83 -, *Europäische GrundrechteZeitschrift* 1983, pp. 262263; from the nonconstitutional courts' more recent case-law, see Berlin Higher Administrative Court (Oberverwaltungsgericht - OVG), Order of 26 March 2001 - 2 S 2/01 -, *Decisions of the Higher Administrative Court (Entscheidungen des Oberverwaltungsgerichts - OVGE)* 23, 232 - *Neue Zeitschrift für Verwaltungsrecht - NVwZ* 2002, p. 114 on the one hand and the Order of the Berlin Administrative Court (Verwaltungsgericht - VG) of 12 April 2005 - VG 34 A 98.04 - on the other hand). In a decision on the parallel problem of the transfer of prisoners, the Second Senate of the Federal Constitutional Court has regarded the non-voidability of the executive power's decision as compatible with Article 19.4 of the Basic Law because the decision had not affected legal interests of the person affected (see BVerfGE 96, 100 et seq.).

- cc) The grant of extradition is the executive power's decision of granting a foreign state's request to extradite a wanted person. In the Federal Republic of Germany, the competence for granting extradition lies with the Federal Government and is exercised by the Federal Ministry of Justice in agreement with the German Foreign Office. The Federation has partly delegated the exercise of its competences regarding the decision on incoming requests to the Länder (states) on the basis of s. 74.2 of the Law on International Judicial Assistance in Criminal Matters; the Länder, in turn, can delegate their competences to the subordinate authorities (see the agreement of 28 April 2004, which entered into force on 1 May 2004, between the Federal Government and the Länder governments on the competences in the relations of mutual judicial assistance in criminal matters, *Federal Bulletin (Bundesanzeiger)* 2004, p. 1, 1494). This regulation expresses that extraditions are to be classified as part of relations with foreign states, for which the Federation has exclusive competence pursuant to Article 32.1 of the Basic Law (see BVerfGE 96, 100 [117]).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

The division of German extradition proceedings into proceedings that review the admissibility of extradition and proceedings on the grant of extradition, which has historical reasons, has up to now resulted in a distinction concerning the functions of the two stages of proceedings and the prosecuted person's possibilities of legal protection that are connected with them. Under the conventional divided system, the admissibility proceedings have served, and still serve, the prosecuted person's preventive legal protection whereas the proceedings on the grant of extradition are intended to make it possible to take foreign-policy and general-policy aspects into account. In practice, it was therefore not possible to challenge the decision on the application on a grant of extradition before a court; moreover, this possibility was rejected in most of the legal literature (see Vogler, *Auslieferungsrecht und Grundgesetz*, 1970, pp. 306 et seq. with further references; id., in: Grützner/Pötz, *Internationaler Rechtshilfeverkehr in Strafsachen*, 2nd ed. 2004, s. 12, marginal nos. 20 et seq.; moreover BVerfGE 63, 215 [226]).

- b) The European Arrest Warrant Act has extended the proceedings on the grant of extradition in case of extraditions to Member States of the European Union by elements of discretion, (refer (aa)), which serve the protection of the prosecuted person and which are therefore subject to the guarantee of legal protection refer (bb). Effective legal protection mandatorily requires that the extradition documents that are presented are complete (refer (cc)).

aa)

...

The European Arrest Warrant Act tries to take account of the citizen's interests that are protected by fundamental rights by partly incorporating the grounds for which the execution of the European arrest warrant may be refused that are provided in the Framework Decision (see Article 4 of the Framework Decision on the European arrest warrant). Here, the Framework Decision has afforded the Member States of the European Union a margin for incorporating the grounds for non-execution that are listed in Article 4 of the Framework Decision into national law as mandatory or optional bars to extradition and for putting them into concrete terms there.

...

- bb) What the fact that the procedure for granting extradition is complemented by specified grounds for refusing the grant gives rise to is that, in the case of extraditions to a Member State of the European Union, the authority responsible for granting extradition no longer merely decides on unspecified foreign-policy and general-policy aspects of the request for extradition but has to enter into a process of weighing the subject of which is in particular criminal prosecution of the person affected in his or her home state. Consequently, the competent German authorities are, on the one hand, afforded a margin of assessment and discretion while, on the other hand, there is also an obligation, which is based on constitutional law, to protect German citizens.

**60 Years German Basic Law:
The German Constitution and its Court**

...

The obligation to give reasons for the decision (see s. 79 sentence 2 of the Law on International Judicial Assistance in Criminal Matters) shows that the legislature has also recognised the importance of the decision on the application for the grant of extradition as regards the individual rights of the person affected. This provision, which had not been contained in the Law on International Judicial Assistance in Criminal Matters before the entry into force of the European Arrest Warrant Act, has only been drafted in the course of the legislative procedure in such a way that not only the requesting state - as had been originally intended - but also the prosecuted person is provided with a reasoning. The provision contains an obligation to notify the prosecuted person of the reasoned decision on the application for a grant of extradition, so that other criteria are fulfilled according to which the grant can be classified as a classical administrative act (see s. 41.1 of the Administrative Procedure Act (Verwaltungsverfahrensgesetz - VwVfG)), which is subject to review by the judiciary.

- cc) Part of the required efficiency of legal protection is also that the extradition documents or a European arrest warrant, which is equivalent to these documents, permit judicial review that is appropriate for the fundamental rights affected. It is incompatible with this requirement that s. 83.a of the Law on International Judicial Assistance in Criminal Matters makes reference to the extradition documents and specifies minimum information that must be provided in the European arrest warrant but - unlike s. 10 of the Law on International Judicial Assistance in Criminal Matters with regard to the conventional extradition proceedings - does not make the completeness of such information a *conditio sine qua non* for the decision on the admissibility of the application for the grant of extradition. Already in the short period of time after the entry into force of the European Arrest Warrant Act, the result of the fact that s. 83.a.1 of the Law on International Judicial Assistance in Criminal Matters was drafted as a directory provision (Soll-Vorschrift) has been that in concrete extradition proceedings, the completeness of the extradition documents has been regarded as dispensable for the admissibility of a request, with reference being made to the wording of the Act (see Stuttgart Higher Regional Court, Order of 7 September 2004 - 3 Ausl. 80/04 -, Neue Juristische Wochenschrift 2004, p. 3437 [3438]; see also Seitz, loc. cit., p. 546 [548]). The deviation from the mandatory wording of s. 10 of the Law on International Judicial Assistance in Criminal Matters can also not be justified by arguing that the term *sollen* (should) as a general rule generates a legal commitment but does permit to deviate from such commitment under special circumstances. For an effective protection of the fundamental right enshrined in Article 16.2 of the Basic Law, the legislature would have to clarify in this case when such circumstances exist.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

II.

The European Arrest Warrant Act is void (s. 95.3 sentence 2 of the Federal Constitutional Court Act); an interpretation in conformity with the constitution or a ruling that establishes the Act's partial voidness are excluded because the German legislature must be in a position to decide again, in normative freedom and taking into account the constitutional standards, about the exercise of the qualified legal proviso in Article 16.2 sentence 2 of the Basic Law (1.). As long as the legislature does not adopt a new Act implementing Article 16.2 sentence 2 of the Basic Law, the extradition of a German citizen to a Member State of the European Union is inadmissible (2.).

1. The constitutional prerequisites placed on the extradition of German citizens and the principles of legal clarity and legal certainty require that the Act implementing Article 16.2 sentence 2 of the Basic Law is understandable by itself and that it sufficiently predetermines the decisions on applications for the grant of extradition. The expression in concrete terms, which is called for by the constitution, must manifest itself in the text of the statute; this cannot be achieved by interpreting the European Arrest Warrant Act in conformity with the constitution or by establishing its partial voidness.

...

2. As long as the legislature does not adopt a new Act implementing Article 16.2 sentence 2 of the Basic Law, the extradition of a German citizen to a Member State of the European Union is not possible. Extraditions can, however, be performed on the basis of the Law on International Judicial Assistance in Criminal Matters in the version that was valid before the entry into force of the European Arrest Warrant Act.

III.

The order of the Higher Regional Court (1.) and the Free and Hanseatic City of Hamburg's decision on the application of a grant of extradition (2.) are based on an unconstitutional law and are therefore overturned (s. 95.3 sentence 2 of the Federal Constitutional Court Act).

1. The order of the Hanseatic Higher Regional Court of 23 November 2004 has been issued on the basis of an unconstitutional law and cannot be upheld for this reason alone.

2. Also the decision on the application of a grant of extradition is based on unconstitutional law and is overturned already for this reason.

Apart from this, the authority that granted extradition has exercised the discretion to which it is entitled in an erroneous manner. It has failed to recognise that a grant of extradition of a German citizen is subject to special constitutional standards that must be part of the process of weighing when the bars on extradition pursuant to s. 83.b of the Law on International Judicial Assistance in Criminal Matters and the question of return pursuant to s. 80.1 of the Law on International Judicial Assistance in Criminal Matters are examined. It has, admittedly, made the grant contingent on the condition that the Spanish authorities will offer the return of the person affected after the imposition of a sentence, it has, however, not dealt with the question whether such an aid to execution is admissible under German law at all. Apart from this, the grant states that the Public Prosecutor General has no objections against the complainant's extradition in view

**60 Years German Basic Law:
The German Constitution and its Court**

of the German preliminary investigation by the public prosecutor. In his letter, the Public Prosecutor General merely summarised the state of the investigations against the complainant and pointed out that the investigations pursuant to s. 129.a of the Criminal Code had not been brought to a close yet.

The protection of German citizens requires that when a decision on the grant of an application for extradition is made, the fact that a national preliminary investigation by the public prosecutor has been instituted is taken into account in any case. Here, criminal investigations in Germany with a corresponding domestic connecting factor of the alleged act constituting the offence will as a general rule result in the existence of a bar to extradition; in this respect, the granting authority's discretion is significantly limited, and detailed reasons stating why a request for extradition is granted after all are required. The mere possibility of extradition to a Member State of the European Union is not an option of legal policy, the decision about which may only follow considerations of expediency or effectiveness of the administration of criminal justice.

C. ...

Extracts from the dissenting opinion of Judge Broß:

I am only able to agree with the decision of the Senate majority to the extent that the European Arrest Warrant Act is declared void, but not as regards essential parts of the grounds, and above all, not in view of the fact that it regards extradition of German citizens as admissible, without any substantive restriction, in case of offences with a significant connecting factor to a foreign country.

The European Arrest Warrant Act is not only unconstitutional on account of the legislature's failure when incorporating the Framework Decision into national law; it is void already because it violates the limits on integration that are set out in Article 23.1 sentence 1 of the Basic Law. This is because the Basic Law opens up the national legal system to European Community law and European Union law only to the extent that the prerequisites established by Article 23.1 sentence 1 of the Basic Law, namely those of the principle of subsidiarity, have been complied with. The legislature must take this into account when incorporating the Framework Decision into national law. Already this is not the case.

1. ...

2. The principle of subsidiarity, which is laid down as a rule in Article 23.1 sentence 1 of the Basic Law, directs the allocation of competences and tasks, with a principal preference for the lower level. The smaller social unit, which as such is closer to the citizens, is supposed to take precedence (see, as a fundamental source, Isensee, *Subsidiaritätsprinzip und Verfassungsrecht*, 2nd ed., 2001, pp. 223 et seq.; Rojahn, in: von Münch/Kunig [eds.], loc. cit., Article 23, marginal no. 30). The larger unit takes over only where the smaller one, which is closer to the citizens, is not, or less effectively, able to perform the respective task (see Pernice, in: Dreier (ed.), loc. cit., Article 23, marginal no. 71; Rojahn, in: von Münch/Kunig [eds.], loc. cit., Article 23, marginal no. 30).

...

**Selected Fundamental Decisions of
the Federal Constitutional Court**

3. On this basis, the extradition of German citizens for prosecution can actually only be a possibility where a realisation of the state's claim to prosecution fails for factual reasons that are plausible on the merits and that, apart from this, have been sufficiently substantiated in the particular case. Only to this extent may the legislature transform the Framework Decision on the European arrest warrant into national law.

...

6. The Federal Constitutional Court must examine already *ex officio* violations of the principle of subsidiarity by nonconstitutional law under the aspect of the infringement of higher ranking law (Article 20.3 of the Basic Law). Notwithstanding this, the principle of subsidiarity applies not only to laws but also to individual rights. In this context, the close factual connection with Article 38 of the Basic Law must be seen. This provision excludes for the area of application of Article 23 of the Basic Law that the legitimisation of public authority and the influence on the exercise of public authority that have been effected by elections are devalued or factually bound and predetermined, by shifting the tasks and competences of the German Bundestag in such a way that the principle of democracy is violated (see BVerfGE 89, 155 [172]).

...

7. At the same time, the principle of subsidiarity (Article 23.1 sentence 1 of the Basic Law) results in the legislature's obligation, which has however hardly been taken notice of so far, to plausibly substantiate a legislative project's "integration value added" in the area of the "Third Pillar" of the European Union. What requires justification is above all the following: the fact that, and if necessary to what extent, a task that has been made the subject of regulation - here, the extradition of Germans for prosecution to Member States of the European Union - exceeds the capability of the Federal and the Länder judiciary and can only be effectively dealt with on the level of the European Union - by means of extradition - (on this, see Pernice, in: Dreier [ed.], loc. cit., Article 23, marginal no. 73; Rojahn, in: von Münch/Kunig [eds.], loc. cit., Article 23, marginal no. 33).

...

8. By such an implementation of the Framework Decision, which takes the principle of subsidiarity into account, the legislature does not contradict requirements under European law. Article 4 nos. 2 and 3 of the Framework Decision explicitly permit to refuse extradition where prosecution by the "executing Member State" takes place for the same act on which the European arrest warrant is based (Article 4 no. 2 of the Framework Decision on the European arrest warrant) or where the investigating authorities have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings (Article 4 no. 3 of the Framework Decision on the European arrest warrant). This has also been established by the Senate majority (see B.I.1.d) bb)). Apart from this, it has rightly stressed the authorisation of the legislative bodies of the Member States to also refuse the incorporation of the Framework Decision into national law if necessary (see B.I.1.c) bb)).

9. It is all the more surprising that the Senate majority considers it admissible to provide, in case of offences with a significant connecting factor to a foreign country, in spite of the duties to protect that have been stipulated with reference to citizenship, and misjudging the meaning

**60 Years German Basic Law:
The German Constitution and its Court**

and scope not only of the principle of subsidiarity (Article 23.1 sentence 1 of the Basic Law) but also of the principle of proportionality (Article 20.3 of the Basic Law), the possibility of extraditing German citizens without any substantive restriction. Such a procedure, which counteracts the presumption of innocence and, with that, a mainstay of the principle of the rule of law (Article 20.3 of the Basic Law), remains incomprehensible.

Nevertheless, the legislature is not prevented from not making use of the legal opinion criticised here and to use the room for manoeuvre that is at its disposal, in the interest of the citizens who are entrusted to it and who are to be deemed innocent, and with that, unrestrictedly worthy of protection, by the legislature unless the contrary is proved.

Extracts from the dissenting opinion of Judge Lübke-Wolff:

I share the Senate majority's opinion that when enacting the European Arrest Warrant Act, the German legislature has not taken sufficient account of the fundamental rights of persons potentially affected by it, but I cannot agree with large parts of the grounds (1.5.) and with the dictum on the legal consequences (6.). The European Arrest Warrant Act's deficiencies under constitutional law do not justify the nullification of the entire Act.

1. The basis of the - restricted - ban on the extradition of Germans is Article 16.2 sentence 1 of the Basic Law. The attempt to anchor it in higher spheres (of natural law, as it were), deeper (historical) ones and broader ones (under natural law), leads astray.

- a) The principle that a state does not extradite its own citizens can neither be derived from the nature of "the citizen's relation to a free democratic polity", nor is there a "conviction, shared all over Europe since the French Revolution" that supports it. This principle does not apply, *inter alia*, in states of the Anglo-Saxon legal sphere to which we owe freedom and democracy (on this, see BVerfGE 4, 299 [303-304]; for further comparative-law information see Masing, in: Dreier, GG, vol. 1, 2nd ed., 2004, marginal no. 37 on Article 16 of the Basic Law). Unlike the ban on the deprivation of German citizenship (Article 16.1 sentence 1 of the Basic Law), the principle of the non-extradition of Germans, which is enshrined in Article 16.2 of the Basic Law, is not based on the experience of National Socialist injustice. It can already be found in the Weimar Constitution (Article 112.3 of the Weimar Constitution (Weimarer Reichsverfassung - WRV)) and can be traced back to a tradition that is considerably older (see Masing, *ibid.*, marginal no. 8, with further references). Finally, it also cannot be maintained that the citizens' confidence in their secured residence in their home state is protected by international law, in the respect that is of interest here. The states' obligation under international law to receive their own citizens to which the Senate references, does not have a trace of a content that would ban or restrict the extradition of a state's own citizens.

...

- b) If one refrains from loading the ban on the extradition of a state's own citizens with a significance that is not stipulated in the constitution, the thought that the incorporation of Article 16.2 sentence 2 into the Basic Law could have exceeded the limits of a possible constitutional amendment that are embodied in Article 79.3 of the Basic Law

**Selected Fundamental Decisions of
the Federal Constitutional Court**

is remote. If one intends to seriously ascertain in this context whether the constitution amending legislature brings about “the legal system that is established by the Basic Law losing the core elements of statehood” or has created an inadmissible cause for that, such a statement can, in any case, not be substantiated by explanations about the significance of the citizenship of the Union and about the scope of the ban on discrimination on grounds of citizenship under Community law (Article 12.1 of the Treaty establishing the European Community).

...

2. The statement that “in particular with a view to the principle of subsidiarity (Article 23.1 of the Basic Law)”, the “cooperation” that is put into practice in the “Third Pillar” of the European Union “in the shape of limited mutual recognition, which does not provide for a general harmonisation of the Member States’ systems of criminal law, is a way of preserving national identity and statehood in a single European judicial area”, is also a vague signal. To the extent that this signal intends to object a general harmonisation of the Member States’ systems of criminal justice, it is superfluous if only because no one intends a general harmonisation of the Member States’ systems of criminal justice; under applicable law, it is ruled out not only for reasons of subsidiarity but already because the Treaty on European Union (Articles 29, 34 of the Treaty on European Union) does not provide a basis of competence for that.

...

3. I cannot go along with part of the course and of the results of the examination of proportionality that the Senate has performed.

- a) Whether the provisions of the European Arrest Warrant Act take sufficient account of the principle of proportionality as regards Article 16.2 of the Basic Law and other fundamental rights that are potentially affected in the case of extraditions is a constitutional question; the standard for the answer to this question is not provided by the Framework Decision on the European arrest warrant but by the Basic Law. The answer therefore does not depend on the latitude for refusing extraditions that the Framework Decision on the European arrest warrant leaves to the German legislature. Correspondingly, the German legislature is also not obliged to make use of the grounds for optional refusal to execute the European arrest warrant provided in the Framework Decision solely because encroachments upon fundamental rights that are caused by extradition can be avoided in this way. What is decisive instead is a weighing of the interests of effective prosecution, which are pursued by the Framework Decision and its incorporation into national law on the one hand and of the interests of possible witnesses and victims on the other hand.

...

- b) I regard as incorrect the view that apart from this, the European Arrest Warrant Act shows a constitutionally problematic gap in protection also as regards the possibility of refusing extradition where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based (Article 4 no. 2 of the Framework Decision on

**60 Years German Basic Law:
The German Constitution and its Court**

the European arrest warrant) or where the judicial authorities have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings (Article 4 no. 3 of the Framework Decision on the European arrest warrant). ...

The Senate does not substantiate, however, why, apart from the legislative implementation of the grounds for refusal under Article 4 no. 7 of the Framework Decision on the European arrest warrant, which is unanimously regarded as necessary including the corresponding legal protection, separate claims to the use of the grounds for refusal under s. 83.b nos. 1 and 2 of the Law on International Judicial Assistance in Criminal Matters, which also enjoy legal protection, are supposed to be necessary at all in order to ensure the proportionality of extradition. ...

- c) The statement that the question of the return of the person affected for the execution of a possible custodial sentence “must be part of the process of weighing” and that the legislature is to examine whether “the bar on admissibility that is constituted by the lack of a guarantee by the state requesting extradition to offer the requested state the prosecuted person’s return for execution is an adequate measure”, the Senate evades answering the decisive constitutional question.

What is the issue here is the proportionality of the encroachment upon a fundamental right that extradition constitutes.

...

With regard to the groups of persons who enjoy particular protection (see 1.) it must thus be deemed a compulsory prerequisite of extradition that the possibility of the person’s return for execution exists and that it will also be made use of later on.

...

4. The Senate regards the proviso of the rule of law being upheld (Article 16.2 sentence 2 of the Basic Law) as an assignment of tasks to the legislature in the sense that it is directly incumbent on the legislature itself to establish “that the observance of rule-of-law principles by the authority that claims punitive power over a German is guaranteed”.

To the extent that thus, the legislature is supposed to be authorised to make general declarations, which are binding to public authorities and nonconstitutional courts when assessing individual cases, as concerns the question whether rule-of-law principles are upheld in the EC Member State, objection must be made. Pursuant to the principle of the separation of powers (Article 20.3 of the Basic Law), the binding subsumption of facts under legal concepts is, in principle, not incumbent upon the legislature but upon the executive and the legislative powers.

...

5. The complainant has argued that the legal basis of his extradition showed an unconstitutional democratic deficit. His fundamental rights could only be encroached upon on the basis of an Act adopted by Parliament. The German Parliament had not been in a position to freely decide

**Selected Fundamental Decisions of
the Federal Constitutional Court**

on the provisions of the European Arrest Warrant Act, which set out that extradition is possible irrespective of double criminality because it had been bound by the Framework Decision on the European arrest warrant, which had been enacted by government representatives alone.

As regards this argument, the Senate states that the fact that the European Parliament is merely consulted when European Framework Decisions are adopted is commensurate with the requirements of the principle of democracy because the Member States' legislative bodies retain the political power of drafting in the context of implementation, if necessary also by denying implementation. This is not an answer to the complainant's objection but a description of the problem, with the only particular feature that the problem is not regarded as being one. Where the belief is held that democratic legitimisation must be sought in the freedom of Parliament to infringe European Union law, something is going a bad way.

...

6. I cannot discern a justification for the declaration of nullity of the European Arrest Warrant Act. The Act is unconstitutional to the extent that it does not contain regulations that make it possible to safeguard the proportionality of extradition and to guarantee such safeguard through sufficient legal protection as regards special groups of persons and the groups of cases that concern them. In order to rule out infringements of the constitution that are based on such unconstitutionality, it is sufficient to state that until the entry into force of a regulation that is in conformity with the constitution, Germans, and non-Germans who are worthy of protection (see 1.), may not be extradited to the extent that the offences in question are among those with regard to which extradition can be refused pursuant to Article 4 no. 7.a or no. 7.b of the Framework Decision on the European arrest warrant (see 3.a) and to the extent that a return in order to serve a possible sentence fails under applicable law for lack of mutual criminality (see 3.c).

...

In contrast to this, the declaration of nullity of the European Arrest Warrant Act also eliminates the nonconstitutional bases of extradition on account of European arrest warrants also to the extent that they concern cases with regard to which the Senate itself has not in any way criticised the law as being constitutionally problematic.

...

Extracts from the dissenting opinion of Judge Gerhardt:

I cannot agree with the judgment. The constitutional complaint would have had to be rejected as unfounded. The declaration of nullity of the European Arrest Warrant Act is not in harmony with the precept under constitutional and European Union law of avoiding violations of the Treaty on European Union wherever possible. The Senate contradicts the case law of the Court of Justice of the European Communities.

I.

The ban on extradition, which is laid down in Article 16.2 of the Basic Law, is, on the one hand, supposed to prevent German public authority from enforcing other states' claims to punishment that do not have an equivalent in the valuations of the German legal system (1.).

**60 Years German Basic Law:
The German Constitution and its Court**

On the other hand, the prosecuted person is supposed to be spared the added, possibly serious, difficulties that are connected with proceedings abroad (2.). Both objectives of protection are achieved by interpreting and applying the European Arrest Warrant Act in conformity with the constitution, with account being taken of European Union law. The same applies *mutatis mutandis* to compliance with the guarantee of legal protection (3.).

1. ...

I very much regret that the Senate refuses to make a positive contribution to European solutions in this respect. In particular by alleging an intrinsic connection of the ban on extradition and citizenship as a status, and by using the topos of the confidence in the reliability of one's own legal system, which has remained undefined, it one-sidedly emphasises the national perspective instead of achieving a balance between the bonds of national law and that of European law. The fact that it deals with the Pupino judgment of the Court of Justice of the European Communities neither as far as concepts are concerned nor by discussing possible consequences, does not further the law.

2. The European Arrest Warrant Act provides sufficient possibilities of refusing surrender to the requesting state in cases in which the burden resulting from criminal proceedings abroad for the prosecuted person is out of all proportion to the advantages that can be put forward in favour of prosecution in the requesting state.

...

The instruction to the legislature to enact a new regulation is not only superfluous, incompatible with the principles of good lawmaking and an unnecessary burden on the legislative bodies. The declaration of nullity of the European Arrest Warrant Act also infringes the precept under European Union law to attain the objectives pursued by the Framework Decision as far as possible (ECJ, Judgment of 16 June 2005, loc. cit., marginal nos. 43, 47). This precept, however, manifests itself here as a precept of maintaining the statutory provision that runs parallel to the Federal Constitutional Court's domestic task of preserving the legislature's intent as far as possible in case of constitutional deficiencies.

3. Article 19.4 of the Basic Law requires that before extradition, a court examines compliance with the principle of proportionality. In the context of their decision on the admissibility of extradition, the Higher Regional Courts are obliged to do so. There is no gap in legal protection.

II.

Also from its own perspective, the Senate would not have been allowed to declare the European Arrest Warrant Act void in its entirety. It already does not ask itself the question to what extent it is at all justified to declare an Act that regulates government encroachment upon fundamental rights void in its entirety, following a constitutional complaint, due to the lack of certain regulations instead of merely stating its inapplicability under specific circumstances. If this question had been answered in the affirmative, the further question should have been asked, whether this also applies where it can be foreseen with certainty that the provisions which are regarded as missing will ultimately not play a role in the original case. If, apart from this, the Senate is of the opinion that partial voidness is out of the question it should have upheld the

Selected Fundamental Decisions of the Federal Constitutional Court

European Arrest Warrant Act by means of a transitory regulation with provisos for its application in conformity with the constitution until the adoption of a new Act. The Federal Republic of Germany has undertaken to incorporate the Framework Decision on the European arrest warrant, which was adopted unanimously in the Council and which is binding as regards the objective to be attained, into national law until the end of the year 2003. Notwithstanding the fact that the Treaty on European Union does not provide infringement proceedings in this respect, continued non-incorporation infringes the obligations of the Federal Republic of Germany to the Union and the requirement of consideration and solidarity in its relation to the other Member States. This infringement is all the more serious because pursuant to national constitutional law, the unconstitutionality of an Act indeed does not forcibly result in its being declared void. The Basic Law's commitment to Germany's integration into a unified Europe, which the Senate has strongly emphasised several times recently, and the obligation under European Union law to interpret Framework Decisions in conformity with European Community law (ECJ, Judgment of 16 June 2005, *loc. cit.*, marginal no. 43) compel to create at least a legal situation that is as close as possible to European Union law by means of the continued application, albeit reduced factually and modified in conformity with the constitution for a transitional period.

III.

When drafting the new regulation, the legislature will have to consider whether, in view of the fact that the participation of the Federal Republic of Germany in the Framework Decision on the European arrest warrant is constitutionally based on Article 23 of the Basic Law and that this Article has largely divested extradition proceedings within the European Union of their international law and foreign-policy elements, it is (still) justified in this context to assign the Federation administrative competence on the basis of Article 32 of the Basic Law (s. 74 of the Law on International Judicial Assistance in Criminal Matters). Here, the question at issue is not whether the European Arrest Warrant Act required approval by the Bundesrat but whether it is possible at all to deviate from Articles 83 et seq. of the Basic Law when drafting the executive competence. In the present proceedings, the question - which had not been discussed with the parties - does also in my view not require decision because an unconstitutionality of the European Arrest Warrant Act which would possibly have resulted from it would not have called its continued application for a transitional period into question.

XIV. Political Prosecution and Asylum - Article 16a of the Basic Law

Some General Background

The fundamental right to asylum was originally contained in Article 16 and was “moved” to the new Article 16a in 1993.⁷⁰ That explains why the first decision (BVerfGE 80, 315) of 1989 refers to Article 16 and not Article 16a. The right to asylum as part of the Basic Law’s fundamental rights is one example of the Basic Law’s reaction to the horror of the Nazi terror when so many in Germany (and elsewhere), especially Jewish Germans and other persecuted groups had to flee from Germany and seek refuge elsewhere.

The new Article 16a restricted the right to asylum considerably. Article 16a sentence 2 states that no asylum will be granted for those entering Germany from a secure third country.⁷¹ Since Germany is surrounded by nine secure countries and the North Sea that leaves only air travel for potential asylum seekers⁷², notwithstanding Article 16a.5, which prescribes a prevalence of international treaties and European Union legislation dealing with refugee matters. A respective European Union legislative act regulates which state has - exclusive - jurisdiction to deal with the asylum application.⁷³ According to Article 16a.3, federal legislation can determine other states where *prima facie* persecution does not take place, which effectively puts the onus of rebuttal on the refugee who must present evidence that the legislated list is wrong with regard to his or her claims on which country has been responsible for the persecution.

a) *Tamils*, BVerfGE 80, 315

Explanatory Annotation

The Constitutional Court interpreted the concept of political persecution, which is the prerequisite for the right to asylum. The Court made it clear that such persecution is not to be understood narrowly to only encompass political activism as such. Rather it extends to persecution for any characteristic, which objectively sets the applicant apart and makes him or her subject to persecution. Such criteria could be political beliefs, ethnicity or race, religion, nationality or sexual orientation, if these characteristics lead to persecution; mere discrimination is not sufficient.

70 The new Article 16a is an impressive example for excessive verbosity. The original asylum right consisted of four words. Whereas that may have been just a bit short, the new Article 16a contains 5 subsections and a total of 286 words in the German version and many of those words have no place in a constitution and should have been left to a concretizing statute.

71 European Union members states and member states which have ratified both the 1951 Convention Relating to the Status of Refugees, <http://www.unhcr.org/3b66c2aa10.html>, and the European Convention on Human Rights and where observance of these legal instruments is ascertained.

72 Cf. BVerfGE 94, 49 (94-5).

73 See Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L50/1 (2003), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:050:0001:0010:EN:PDF>.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

The Constitutional Court also emphasized that safe refuge in another part of the refugee's home country also preempts the right to asylum. Asylum is not the only way for refugees to remain in Germany because of the recognition of "*de-facto*"-refugees from civil wars and other such catastrophes and because of Articles 14.1, 33 of the Refugee Convention and Article 3 of the European Convention on Human Rights, which prohibit the sending back of persons to their home state in case of danger for life, freedom or inhumane treatment.

**Translation of the Tamils Judgment - Decisions of the Federal Constitutional Court
(Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 80, 315***

Headnotes:

1. Political persecution within the meaning of Article 16.2 sentence 2 of the Basic Law (Grundgesetz - GG) is in principle, governmental persecution.
2. Persecution is political when it deliberately violates the legal rights of an individual on the basis of his political convictions, fundamental choice of religion or characteristics beyond his control that account for his being different, such that the individual is excluded from the overarching peaceful order of the governmental entity due to the intensity of such violation.
3. Governmental prosecution of acts that in and of themselves represent a manifestation of political conviction may in principle also constitute political persecution and even if the state acts thereby in defence of the legitimate interest of its own existence or political identity. Special justification is required to exclude such prosecution from the area of political persecution.
4. Effective territorial control by the state in the sense of effective sovereign superiority is a prerequisite for persecution by or attributable to a state. The possibility of political persecution therefore does not exist as long as the state assumes only the role of a party that is engaged militarily in an ongoing civil war in a disputed territory but no longer exists as the overarching effective peacekeeping power. The same applies in certain crisis situations involving guerilla warfare.

In all of these cases, political persecution is, however, involved if governmental forces wage combat in a manner deliberately intended to achieve physical annihilation of persons on the opposing side or attributed to that side who are selected on the basis of criteria that are relevant for the purposes of asylum although such persons no longer want to or cannot offer resistance or no longer want to participate in military activities, especially if their acts mutate into deliberate physical annihilation or destruction of the ethnic, cultural or religious identity of a portion of the population selected on the basis of criteria that are relevant for the purposes of asylum.

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**60 Years German Basic Law:
The German Constitution and its Court**

5. a) A person who is affected only by regional political persecution is not to be considered a political persecutee within the meaning of Article 16.2 sentence 2 of the Basic Law, unless such regional persecution puts him in a hopeless situation throughout the country. This is the case if that person cannot find reasonable refuge in other parts of his home country (alternative domestic refuge).
- b) Alternative domestic refuge presupposes that the asylum seeker is sufficiently safe from political persecution in the areas that come into question and is in any case not threatened by any other disadvantages and dangers that are equivalent in terms of intensity and severity, to the impairment of legal rights for political reasons that is relevant for the purposes of asylum, if such existential endangerment did not exist at the place of origin.

Order of the Second Senate of 10 July 1989 - 2 BvR 502, 100, 961/86 -

Facts:

The complainants were Sri Lankan citizens of ethnic Ceylonese-Tamil origin. They directed their constitutional complaints against judgments of the administrative courts that denied their applications for asylum.

The constitutional complaints were successful since, among other things, the administrative courts did not in view of the civil war situation prevailing in Sri Lanka at the time in question consider the actions of the Sri Lankan security forces that were objected to as political persecution because of the motive of preservation of the state behind these actions; they therefore arrived at the assumption that the complainants were not threatened with persecution when they entered the country.

Extract from the Grounds:

...

B.

The admissible constitutional complaints are founded. The challenged judgments violate the fundamental right of the complainants under Article 16.2 sentence 2 of the Basic Law.

I.

1. a) According to Article 16.2 sentence 2 of the Basic Law, political persecutees have the right to asylum. The meaning of the term “political persecutee” cannot be narrowed down solely on the basis of the succinct wording of this provision. Instead, it is necessary to determine what was and is meant to be the overall intent and purpose of the legal definition that is expressed in the given formulation, taking into account in particular legislative tradition and the historical development of the fundamental right (see BVerfGE 74, 51 [57]).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

In general, the fundamental right to asylum is based on a conviction predicated on respect for the inviolability of human dignity to the effect that no state has the right to threaten or violate the body, life or personal freedom of individuals for reasons that lie exclusively in their political convictions, fundamental choice of religion or characteristics beyond their control that account for their being different (criteria relevant for the purposes of asylum); the constitutional right to asylum is essentially defined by this legal doctrine (see BVerfGE 76, 143 [157 and 158]).

- b) The descriptor “political” used in Article 16.2 sentence 2 of the Basic Law does not mean an objectively demarcated area of politics, but identifies a characteristic or quality that measures and can at any time assume in any area under certain circumstances (see BVerfGE 76, 143 [157]).

A necessary prerequisite for persecution to manifest itself as political is that it be related to disputes over the organization and nature of the general order of coexistence of people and groups of people, which is to say that - unlike, for example, private persecution - it must be of a public nature and proceed from a wielder of superior, as a rule sovereign, power to which the victim is subservient.

Political persecution is therefore in principle governmental persecution (established case law; see BVerfGE 9, 174 [180]; 54, 341 [356 and 357, 358]; 76, 143 [157 and 158, 169]).

This follows from the historical development and intent of the fundamental right. The historical development documents the fact that the Parliamentary Council (Parlamentarischer Rat) assumed that it was self-evident that asylum was to be granted from governmental persecution (see Parliamentary Council, Delegates Wagner and Renner at the 44th session of the Main Committee, 19 January 1949, Stenographic Record p. 581, 582).

International law also proceeded at the time without further question on the basis of countries as subjects under international law; international law governing refugees dealt and deals with special situations involved in the relationship between states and their respective citizens. The authors of the Basic Law found that this concept already existed; they incorporated it into German constitutional law (see Reichel, *Das staatliche Asylrecht “im Rahmen des Völkerrechts,”* 1987, pp. 87 et seq.).

If political persecution is therefore in principle governmental persecution, this is not in contradiction with the fact that the case law of the administrative courts equates such state-like organizations with the state as having ousted the respective state or to whom the latter has abandoned the field and which in fact replaced it (see Federal Administrative Court, Judgment of 3 December 1985, Buchholz 402.25 s. 1 of the Asylum Procedure Act [*Asylverfahrensgesetz* - AsyVfG] no. 43).

- c) States represent internally pacified entities that relativize all differences, conflicts and disputes internally through an overarching order in such a manner that they remain below the threshold of violence and do not call into question the possible existence of the individual, which is to say that they do not therefore suspend the peaceful order

**60 Years German Basic Law:
The German Constitution and its Court**

(see BVerfGE 76, 143 [159 and 160]). Governmental power serves this purpose. The power to protect includes, however, the power to persecute. As a result, the logic behind the guarantee of asylum in the Basic Law proceeds entirely from those dangers that issue from a specific type of use of persecutorial governmental power (see BVerfGE 9, 174 [180]).

- d) Accordingly, persecution is political if it deliberately violates the rights of an individual on the basis of characteristics that are relevant for the purposes of asylum such that the individual is excluded from the peaceful order of the overarching governmental entity due to the intensity of such violation.
- aa) The measure in question must deliberately violate the legal rights of the party affected. This is absent in the case of disadvantages that an individual must suffer due to general circumstances in his home country such as hunger and natural disasters but also in the case of the general ramifications of civil disorder, revolution and war. For example, the Federal Constitutional Court made it clear that the right to asylum is not intended to give everyone who must live in material need in his home country the possibility of leaving his home country to improve his situation in life in the Federal Republic of Germany (BVerfGE 54, 341 [357]).
- bb) Not every deliberate violation of rights that is inadmissible, for example, under the constitutional order of the Federal Republic of Germany, constitutes political prosecution for the purposes of asylum. The measure must be intended to affect the party affected precisely on the basis of characteristics that are relevant for the purposes of asylum. Whether such a specific intent is present and the persecution therefore takes place “due to” an asylum criterion must be determined as a function of the recognizable thrust of the measure itself on the basis of its substantive character, not on the basis of subjective reasons or motives that guide the persecutor (see BVerfGE 76, 143 [157, 166 and 167]).
- cc) Finally, a violation of rights that is deliberately inflicted in the present sense must be of an intensity that represents not only an impairment but - ostracizing - persecution. The degree of intensity is not prescribed in the abstract. Its must be deduced from the humanitarian intent that the right to asylum serves, which is to afford those who find themselves in a hopeless situation refuge and protection (see BVerfGE 74, 51 [64] and in general BVerfGE 54, 341 [357]; 76, 143 [158 et seq., 163 and 164]).

2. According to the case law of the Federal Constitutional Court, acts of persecution committed by third parties may also be considered political persecution within the meaning of Article 16.2 sentence 2 of the Basic Law. However, this presupposes that they can be attributed to the respective government (see BVerfGE 54, 341 [358]; 76, 143 [169]).

This depends upon whether the state affords the party affected protection with the means actually available to the state (see BVerfGE 74, 41 [43]).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

Grounds for attributing acts of persecution to the state exist if the state is either not prepared or does not see itself in a position to afford protection by making (sufficient) use of available means in the concrete case to confront acts of persecution on the part of certain third parties, in particular, for example, on the part of the state clergy or the state party (see BVerfGE 54, 341 [358]).

The situation is different if affording protection would exceed the ability of a specific state; its responsibility for the purposes of law governing asylum does not extend beyond the means actually at its disposal. The basis for attribution of acts of persecution by third parties for the purposes of the law governing asylum does not lie solely in the mere claim of a state to a monopoly on the legitimate use of force but only in its - fundamental - realization. If the guarantee of asylum is to offer protection against a specific type of use of persecutorial governmental power, (see BVerfGE 9, 174 [180] and 1.c above) this contains the converse conclusion to the effect that protection against the results of anarchic circumstances or the dissolution of government power is not promised by Article 16.2 sentence 2 of the Basic Law.

3. a) Acts of governmental self-defence may also provide grounds for a right to asylum. It is not compatible with the guarantee of asylum of the Basic Law to generally deny asylum to a person who has been involved in political activity against his state and is for that reason persecuted by that state. If the area protected by the fundamental right to asylum is defined with reference to the characteristics of refugees of the Geneva Convention, the characteristic “due to their political conviction” encompasses not only political views as such and the manifestation thereof but in principle also the corresponding activity.

This follows from the legislative tradition of the right to asylum and the historical development of Article 16.2 sentence 2 of the Basic Law. Prohibitions of extradition have traditionally constituted the core of the right to asylum; but since the 19th century they have also applied in favour of “political criminals,” i.e., in favour of foreigners who have engaged in activities based on their oppositional political convictions and in so doing violated criminal laws used by their home government to defend its fundamental political order and territorial integrity. According to the German Extradition Act (Deutsches Auslieferungsgesetz - DAG) of 23 December 1929, foreigners who are to be prosecuted for a political crime may not be extradited, except in cases where they were guilty of a premeditated crime against life that did not take place in open combat (s. 3 of the German Extradition Act [*Deutsches Auslieferungsgesetz* - DAG], Reich Law Gazette [*Reichsgesetzblatt* - RGBl.] 1929 I p. 239; see s. 6 Act on International Judicial Assistance in Criminal Matters [*Gesetz über die internationale Rechtshilfe in Strafsachen* - öö] of 23 December 1982, Federal Law Gazette [*Bundesgesetzblatt* - BGBl.] I p. 2071).

The Parliamentary Council discussed the fundamental right to asylum against the background of this prohibition of extradition, which reflected practice with respect to asylum as generally exercised since the 19th century. In this context, the Parliamentary Council of course assumed that political criminals also had in principle a right to asylum to the extent that they were to be afforded protection against extradition (JöR 1, 1951, pp.165 et seq.; Parliamentary Council, 18th and 44th sessions of the Main Committee, Stenographic Record pp. 217 and 218, 582 et seq).

**60 Years German Basic Law:
The German Constitution and its Court**

The traditional prohibition of extradition of political criminals may differ in principle today from asylum for political persecutees in terms of purpose, prerequisites and legal consequences (see BVerfGE 60, 348 [359]; 64, 46 [62 and 63]), but the substantive connection between the right to asylum and non-extradition of political criminals remains intact.

- b) If therefore political conviction manifested in the form of action lies within the area of protection of the fundamental right to asylum, governmental prosecution of acts that in and of themselves represent a manifestation of political conviction - in particular separatist and revolutionary political activities - may in principle constitute political persecution and to be sure even if the state acts thereby in defense of the legally protected interest of its own existence or political identity. Special justification based on specific criteria for demarcation is required to exclude such prosecution from the area of political persecution.

Protection of legal interests is initially such a criterion. Political persecution is accordingly not present in principle when a state prosecutes criminal offences - even if they are also politically motivated especially those that are directed against the legal interests of its citizens: the prosecution of criminal offences is in that sense not "political" persecution.

All further objective circumstances must also be considered. Thus the prosecution of acts that are directed against political legal interests nevertheless does not represent political persecution if it is possible to conclude from such circumstances that such prosecution is not aimed at the political conviction manifested by the offence as such, but at an additional criminal component that is expressed in such acts as is commonly punishable in governmental practice. This is the case, for example, when criminal offences are prosecuted in an especially critical state of tension that goes beyond a threat to the entity of the state or the existing political order and immediately threatens the security of the populace in order to protect - in an objectively comprehensible manner - the private legal interests of the citizenry, but not, however, to punish the expression or manifestation of a political conviction. This can be the case if the expression or manifestation of a political conviction occurs in a situation of extreme uncertainty due to terrorist activities in such a demonstrative manner - which is to say without appropriate clear and credible dissociation from such activities - that they must be understood by the public precisely to constitute support for terrorism. Accordingly, the expression or manifestation of critical - and subversive - political convictions as such remains within the area of protection of the right to asylum.

However, the prosecution of criminal offences that does not represent political persecution according to the above may mutate into political persecution, namely, if objective circumstances make it possible to conclude that the party affected is nevertheless being persecuted because of a characteristic that is relevant for the purposes of asylum. This is to be suspected in particular if he suffers from treatment that is harsher than is usual in the case of prosecution of similar - non-political - criminal offences of comparable severity in the prosecuting state.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- c) There is another limit to the prospects of asylum for political criminals whenever - notwithstanding the neutrality of the right to asylum as regards political convictions - the actions of an asylum seeker are in principle disapproved of by the Federal Republic of Germany in agreement with the international legal order it supports. The Parliamentary Council had already agreed that certain severe breaches of the public peace are also not to be tolerated under the law governing the right to asylum; reference was made in this context to the "assassination clause" of established extradition law and s. 3.3 of the German Extradition Act of 1929 (see Parliamentary Council, Delegate Dr. Schmid at the 4th session of the meeting of the Committee on Basic Issues of 23 September 1948, Stenographic Record p. 37).

The above limit is exceeded if in manifesting his political convictions an asylum seeker has made use of terrorist means, in particular therefore if the asylum seeker has made use of weapons that constitute a danger to the public or made attacks on the life of innocent parties. Persecution of political enemies is a ground for asylum, but not a defense against terrorism. Repressive or preventive measures that the state takes to defend against terrorism do not constitute political persecution for the purposes of legislation governing asylum if they are directed against active terrorists, accessories within the meaning of criminal law or those who involve themselves in preparations for terrorist activities beforehand without themselves participating in such activities. If, however, other circumstances - such as, for example, the special intensity of the acts of prosecution - make it possible to conclude that the party affected is nevertheless being persecuted because of a characteristic that is relevant for the purposes of asylum or if the measures taken by the state extend beyond the designated class of persons who, for example, advocate separatist or other political goals but do not, or only under coercion, support terrorist activities, political persecution that is relevant for the purposes of asylum when measured against the standards elaborated above (under b) may be present. This applies in particular for actions taken in connection with mere counter-terrorism that may to be sure be meant to combat terrorism and the environment actively supporting it but are intended - in response to the acts of terrorism - to subject the civilian population that is not immediately involved in the ongoing conflict to the pressure of brute force.

4. a) If effective territorial control by the state in the sense of effective sovereign superiority is a prerequisite for persecution by or attributable to a state, the possibility of political persecution does not exist as long as the state assumes only the role of a party that is engaged militarily in an ongoing civil war in a disputed territory but no longer exists as an effective overarching peacekeeping power. Measures taken in that territory by a state that has become a party to a civil war do not therefore constitute political persecution for the purposes of the law governing asylum if and to the extent that they exhibit a typically military character and serve to regain territory over which, although to be sure *de jure* (still) part of that state's national territory, territorial control has been *de facto* lost to the other forces against which combat is waged. In such situations, combat against the opposing side in a civil war by governmental forces does not generally appear to constitute political persecution. The situation is of course different if the governmental forces wage combat in a manner intended to achieve physical annihilation

**60 Years German Basic Law:
The German Constitution and its Court**

of persons on the opposing side or attributed to that side and selected on the basis of criteria relevant for the purposes of asylum although such persons no longer want to or cannot offer resistance or do not or no longer want to participate in military activities, especially if the acts of the governmental forces mutate into deliberate physical annihilation or destruction of the ethnic, cultural or religious identity of the entire insurgent portion of the population.

If, on the other hand, the state can assert its basic territorial control or - despite an ongoing civil war - regain it in specific areas, the possibility of political persecution for the purposes of asylum continues to obtain or occurs anew due to its position of superiority.

- b) In addition to what is referred to as a situation of open civil war, guerilla warfare has become more common in recent decades. Its peculiarity lies in its asymmetry, in that insurgents remain in hiding in order to offer no exposure to attack but gradually erode the state's monopoly on the use of force. If this results in a sustained and not merely temporary challenge to the state's territorial control, an intermediate situation occurs in which the state's powers of protection and persecution remain to be sure partially intact, but have to compete with stronger or superior opposing forces. The state's peaceful order is thereby in principle suspended. Such a situation exists when terrorist attacks spread and are repeatedly directed against state security forces and, to compel support, against the perpetrators' own population group and these attacks overburden the state in such a manner that the conventional means of defense of police and criminal law no longer suffice such that the state must indeed react with military and martial means and will as a result not be able to provide reliable protection for the life, freedom and property of its citizens in the foreseeable future.

When such a crisis situation occurs, the state finds itself in a situation comparable to that of open civil war as long as such circumstances prevail: it increasingly loses the initiative as the overarching and effective peacekeeping power. Its actions therefore lose in that regard the character of persecution in terms of their relevance under legislation pertaining to asylum even if they are - which is not seldomly the case - in violation of international law and in particular contravene the Geneva Red Cross Conventions of 1949 and the Additional Protocols of 1977.

However, political persecution is also present in such special situations if the actions of state security forces in the sense indicated above (4.a) go beyond measures to combat the opposing side in the civil war for the purposes of restoring the peaceful order of the state.

5. A person who is affected only by regional political persecution is not to be considered to be persecuted for political reasons within the meaning of Article 16.2 sentence 2 of the Basic Law unless such regional persecution puts him in a hopeless situation throughout the country. This is the case if he cannot find reasonable refuge in other parts of his home country (domestic refuge alternative).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- a) As has been shown, the right to asylum is based on the relationship between the persecutee and the state of which he is a citizen. Only this state can in principle come into question as the agent of persecution (see 1.b above). The home country of the persecutee is also decisive in terms of regional considerations: Only those who are defenceless throughout their home country as a result of political persecution and must therefore seek protection in another country have a right to asylum within the meaning of Article 16.2 sentence 2 of the Basic Law (see BVerwG, JZ 1984, p. 294; BVerwG, Buchholz 402.25 s. 1 of the Asylum Procedure Act no. 72).

It may, when considering states of European or North American character, the entire territory of which is subject to a single cultural and legal order, surely be difficult to imagine that the same state that is itself actively involved in persecution in one part of the country would not only not disturb those affected in another part of the country but would even protect them against persecution by others in that part of the country. In more than a few countries, the state presents two or multiple sides; it pursues different goals for different regions and establishes or tolerates various cultural or legal orders. This can be seen in the case of the present proceedings. When governmental leadership is of the opinion that its likely to be possible to successfully repel a separatist movement in one part of the country only through the use of means that can be considered to constitute political persecution, the use of these means is then naturally not required in other parts of the country in which such aspirations do not exist.

As regards the right to asylum, it follows from this phenomenon of the state with multiple facets that not necessarily everyone who is exposed, directly or indirectly, to prosecution by a state in one part of the country will require protection in another country and is therefore in a situation of need that would justify the granting of asylum. Those individuals can under such circumstances be referred to those parts of their country in which persecution is absent. However, it is necessary to take into account in this case that this state with multiple facets is also one and the same state. In examining the question as to whether a person can move to parts of the country in which persecution is absent, this circumstance may not be ignored.

- b) The subsidiarity of asylum in another country to the guarantee of protection by one's own state is also reflected in international refugee law. According to Article 1.A no. 2 of the Geneva Refugee Convention, only persons who are unable to avail themselves of the protection of the country of their nationality or who because of a well-founded fear of prosecution are unwilling to avail themselves of that protection, are refugees. Persecutees must therefore first turn to the country of their nationality before seeking protection in another country (see Nehemiah Robinson, *Convention Relating to the Status of Refugees - Its History, Contents and Interpretation*, 1953, p. 46).

This idea is pursued in various bodies of international law: Article 1 no. 2 of the Convention of the Organisation for African Unity (OAU) establishes as a prerequisite for recognition of refugee status in the case of prosecution that is only regional, that such persecution be the compelling reason for leaving one's own country to seek refuge

**60 Years German Basic Law:
The German Constitution and its Court**

in another country (Association for the Study of the World Refugee Problem Bulletin, 1970, p. 86 [87]; see Goodwin-Gill, *The Refugee in International Law*, 1983, pp. 26 et seq., 42).

The institution of granting asylum under international law also had no other content when the Basic Law came into being. If it is assumed, however, that Article 16.2 sentence 2 of the Basic Law was intended to elevate that which at the time was understood as asylum or the granting of asylum to a legal right, (see BVerfGE 74, 51 [57, 63]; 76, 143 [156 and 157]) the fundamental right to granting asylum under the Basic Law is not in any case, in the absence of special reasons for so doing, to be construed more generously than international refugee law under the Geneva Convention.

- c) An alternative possibility within the country is considered to exist in other parts of a country if the party affected would not put himself in a hopeless situation there. This presupposes that asylum seekers are sufficiently safe from political persecution in the areas that come into question and are in any case not threatened by any disadvantages and dangers that are equivalent in terms of degree and severity to the impairment of legal rights for political reasons that is relevant for the purposes of asylum (see BVerfGE 54, 341 [357]) if such existential endangerment did not exist at the place of origin.

6. The right to asylum under Article 16.2 sentence 2 of the Basic Law is based, as the Senate emphasized, on the idea of refuge, that is to say on the causal relationship between persecution, flight and asylum (see BVerfGE 74, 51 [60]).

On the basis of the fundamental right's underlying legislative concept in which this is reflected, a person who due to political persecution is compelled to leave his country and seek protection and refuge in another country and for that reason comes to the Federal Republic of Germany will typically have the right to asylum. The case of persons who enter the country without being persecuted and nevertheless desire asylum here and justify this on the basis of circumstances that develop while in this country or the future development of which that person fears is atypical, albeit frequent (on what are referred to as circumstances occurring after flight, see *op. cit.*, pp. 64 et seq.).

According to this legislative concept for the fundamental right to asylum, different standards apply for the purposes of assessment of whether an asylum seeker is a political persecutee within the meaning of Article 16.2 sentence 2 of the Basic Law, depending upon whether that person has left his home country to flee the actual occurrence or the immediate threat of political persecution or has come to the Federal Republic of Germany without being persecuted.

- a) In the event retrospective examination shows that the asylum seeker fled country wide political persecution, recognition of the right to asylum will regularly come into consideration. In the event that the danger of persecution is found to be only regional, it will also be necessary to establish that the asylum seeker would have been in a hopeless situation throughout the entire country (see 5.c above). This is the case, as has been shown, if the asylum seeker would not have been sufficiently safe from political persecution in other parts of the country or would have been faced with the threat of finding himself in a hopeless situation for reasons other than those relevant

**Selected Fundamental Decisions of
the Federal Constitutional Court**

for the purposes of asylum by moving there. As regards safety from political persecution in other parts of the country, the “reduced” standard of probability is therefore to be applied - if one proceeds on the basis of the two standards of probability that have been established in practice by the administrative courts - for the purposes of retrospective evaluation. This also takes into account the considerations presented above (5.a) with respect to states presenting multiple facets. Relative improvement also as regards disadvantages and dangers that have nothing to do with persecution and would possibly have been associated with a move within the home country is not required. The party affected is accordingly considered to have left the country without being persecuted (see b below) if it can be established that he would have been safe from political persecution in other parts of the country and it cannot be established that he would have been threatened with the disadvantages and dangers mentioned in those parts of the country.

If, on the other hand, it is certain that the asylum seeker has left the country due to the occurrence or immediate threat of political persecution and that he cannot be reasonably expected to have moved within his home country as described above, he has a right to asylum pursuant to Article 16.2 sentence 2 of the Basic Law, unless he can again find protection in his own country. An application for asylum must therefore be successful if the circumstances that caused him to flee at the time of his decision persist without any significant change. If the danger of persecution has ceased to exist in the meantime, what is important is whether it can be expected to recur; recognition of the right to asylum is not required pursuant to Article 16.2 sentence 2 of the Basic Law if the asylum seeker can be sufficiently safe from recurrent persecution (see BVerfGE 54, 341 [360]). The same applies if - in the case of persistent, regionally limited political persecution - a reasonable domestic alternative possibility for the refuge presents itself after arrival in the sphere of operation of the Basic Law. This presupposes that the person having fled prosecution in these parts of the country is sufficiently safe not only from political persecution but also from those disadvantages and dangers that made it unreasonable to expect that person to change his location when he fled and that person is also not threatened by any other disadvantages and dangers that would put him in a hopeless situation.

- b) However, if the asylum seeker has left his home country without being persecuted, his application for asylum pursuant to Article 16.2 sentence 2 of the Basic Law can be successful only if he is threatened with political persecution due to circumstances occurring after his flight that are, when measured against the standards of the decision of 26 November 1986 (BVerfGE 74, 51 [64 et seq.]), considerable. If this danger poses a threat in only part of the home country, the party affected may be referred to areas in which he would be sufficiently safe from political persecution unless there is a threat of other disadvantages and dangers that must be considered unreasonable on the basis of the principles presented in 5.c) above.

7. If a persecutee cannot claim asylum pursuant to Article 16.2 sentence 2 of the Basic Law, he need not be without protection. The Federal Republic of Germany, like other countries in Western Europe, allows refugees who are forced to flee because of civil war or severe domestic disorder to remain in the country (referred to as “*de-facto* refugees”) for humanitarian reasons

**60 Years German Basic Law:
The German Constitution and its Court**

although the conditions for recognition as political refugees are not present. In addition, s. 14.1 of the Aliens Act (Ausländergesetz - AuslG), Article 33 of the Geneva Refugee Convention and Article 3 of the European Human Rights Convention guarantee protection against expulsion and deportation if the life or freedom of a person is threatened due to characteristics that make that person different from others or if a concrete danger of inhuman treatment exists.

This humanitarian protection may be regulated through contractual agreements between host countries, including in particular those lying in the vicinity of the respective home countries; in this case, uniform use of the capacity for accommodation of all countries offering protection may be agreed. In addition, the Federal Republic of Germany may work to achieve desistance from acts that are in violation of human rights and inhumane in a foreign state and may adopt measures for the protection of human rights in connection with the human rights pacts of the United Nations and the European Convention on Human Rights.

II.

The judgments under challenge do not satisfy the requirements of Article 16.2 sentence 2 of the Basic Law on the basis of the standards presented.

...

b) Asylum (Third Country Rule), BVerfGE 94, 49

Explanatory Annotation

In this decision the Constitutional Court had to deal with amendments to Article 16a.2, the so-called 'secure third country'-provisions. Amended provisions of the Basic Law are, obviously, also part of the constitutional law. However, because of the somewhat peculiar provision of Article 79.3, which limits constitutional amendments and requires that any such amendment must adhere to the principles contained in Article 1 and 20 of the Basic Law, the German Constitutional Court is in effect in a position to test the constitutionality even of (amendments of) constitutional law. Article 1 contains a strong emphasis on the importance of human dignity and all the subsequent fundamental rights, which in essence means that at least the core of these rights is not amendable. However, that does not necessarily mean that the right to asylum could not be touched or even that it must remain constitutionally protected. It could only mean that the core of the right must remain. The new provisions in Article 16a of the Basic Law, with their reliance on safe third countries in conjunction with the European asylum framework⁷⁴, might be less favourable, especially procedurally, but still sufficiently guarantees safe refuge from persecution at home.

⁷⁴ See supra footnote 72.

Selected Fundamental Decisions of
the Federal Constitutional Court

Translation of the Asylum - Third-Country Rule Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 94, 49*

Headnotes:

1. a) With the Act Amending the Basic Law (Gesetz zur Änderung des Grundgesetzes - GGÄndG) of 28 June 1993, the amending legislature created a basis for the achievement of an overall European system for the protection of the rights of refugees that would distribute the burden among the states participating in such a system.
b) The amending legislature is also subject to no legal constraints as regards the formulation and modification of fundamental rights as long as the limits of Article 79.3 of the Basic Law are not infringed and prescribes the standard for the Federal Constitutional Court. The fundamental right to asylum is not included in the substantive content of the guarantee provided in Article 1.1 of the Basic Law (Grundgesetz - GG). What the substantive content of that guarantee is and the consequences to be drawn from that content as regards the powers of the German state must be determined independently.
2. Article 16a.2 of the Basic Law restricts the sphere of operation of the fundamental right to asylum, which is still guaranteed under Article 16a.1 of the Basic Law. A person arriving from a safe third country within the meaning of Article 16a.2 sentence 1 of the Basic Law is not in need of the protection of the fundamental right guaranteed under paragraph 1 in the Federal Republic of Germany since that person could have found protection from political persecution in that third country.
3. The respective Member States of the European Communities are by virtue of the Basic Law automatically considered safe third countries.
4. a) Guaranteed application of the Geneva Refugee Convention (GRC) and the European Convention on Human Rights (ECHR), which is required by law (Article 16a.2 sentence 2 of the Basic Law) for designation as a safe third country, presupposes in particular that the state has become a party to the two conventions and that its legal system does not permit deportation of foreigners to states that allegedly practice persecution without first establishing whether such persons are faced with the threat of persecution within the meaning of Article 33 of the GRC or torture or inhuman or degrading punishment within the meaning of Article 3 of the European Human Rights Convention in that country.
b) The legislature has a certain latitude in the choice of the investigative means it employs to obtain a factual basis for the purposes of designating countries as safe third countries. The assessment of the legislature must be reasonable.

...

* Translation by Donna Elliott; © Konrad-Adenauer-Stiftung.

**60 Years German Basic Law:
The German Constitution and its Court**

Judgment of the Second Senate of 14 May 1996 on the basis of the oral hearing of 21, 22 and 23 November and 5 December 1995 - 2 BvR 1938, 2315/93 -

Facts:

The constitutional complaints concern exclusion of the possibility of invoking the fundamental right under Article 16a.1 of the Basic Law upon entry from a safe third country, which is governed by Article 16a.2 sentences 1 and 2 of the Basic Law and s. 26a.1 of the Asylum Procedure Act (*Asylverfahrensgesetz* - *AsyVfG*) in the version promulgated on 27 July 1993 (Federal Law Gazette [*Bundesgesetzblatt* - *BGBL.*] I p. 1361, and in that connection also the provision governing immediate enforcement of measures to terminate the stay in the country (Article 16a.2 sentence 3 of the Basic Law and s. 34a of the Asylum Procedure Act).

In response to the constitutional complaints of two persons whose applications for asylum were unsuccessful on the basis of these revisions of what is referred to as the “asylum compromise”, the Federal Constitutional Court declared the provisions of the Basic Law and the Asylum Procedure Act cited above incompatible with the Basic Law.

Extract from the Grounds:

...

C.

The constitutional complaints are unfounded. s. 26a of the Asylum Procedure Act in conjunction with s. 18.2 no. 1, s. 31.4, s. 34a.1 and s. 34a.2 of the Asylum Procedure Act and the inclusion of Austria in Appendix I to s. 26a of the Asylum Procedure Act are compatible with the Basic Law. The decisions of the Federal Office (*Bundesamt*) and Border Protection Office (*Grenzschutzamt*) under challenge as well as the orders of the administrative courts ultimately provide no reason for objection on constitutional grounds.

I.

With the Act Amending the Basic Law of 28 June 1993, the amending legislature revised the fundamental right to asylum. This revision is, also to the extent that it is more restrictive as compared with the previous character of the fundamental right, to be viewed as a whole and to be taken as such as the basis for the construction and application of the details of the constitutional provision. The Basic Law also affords the amending legislature broad latitude as regards its power and responsibility in connection with the formulation and modification of fundamental rights. The legislature is also subject to no legal constraints as long as the limits of Article 79.3 of the Basic Law are not infringed and prescribes the standard for the Federal Constitutional Court.

With the reform of legislation governing asylum, the amending legislature created a basis for the achievement of an overall European agreement to guarantee refugees protection through an agreement under international law governing jurisdiction for examination of applications for asylum and mutual recognition of decisions regarding asylum in order to distribute the burden

**Selected Fundamental Decisions of
the Federal Constitutional Court**

among the states participating in such a system (Article 16a.5 of the Basic Law). Notwithstanding such regulations at the level of international law, the legislature has taken into account the situation resulting from flows of refugees and migrants throughout the world in Article 16a.2 of the Basic Law and as a result departed from the previous approach to solving the problems associated with the accommodation of political refugees exclusively through regulation by national law. The legislature continues to assume that there is a need to afford protection against political persecution, but refers foreigners desiring asylum to the protection they can receive elsewhere in a safe third country.

1. Accordingly, a person arriving from a Member State of the European Communities or another third country in which application of the Convention relating to the Status of Refugees, - GRC - of 28 July 1951 (BGBl. 1953 II p. 560) and the Convention for the Protection of Human Rights and Fundamental Freedoms - ECHR - of 4 November 1950 (BGBl. 1952 II p.953) is ensured, may not pursuant to Article 16a.2 sentence 1 of the Basic Law invoke the fundamental right to asylum guaranteed in paragraph 1 thereof. Third countries outside the European Communities are identified by federal law (Article 16a.2 sentence 2 of the Basic Law).

This clause is, where applicable, subordinate to agreements under international law within the meaning of Article 16a.5 of the Basic Law. ...

2. The concept of safe third countries adopted by the amending legislature restricts the sphere of operation of the fundamental right to asylum, which is still guaranteed under Article 16a.1 of the Basic Law. This approach involves drawing conclusions as regards a foreigner's need for protection from his itinerary: A person arriving from a safe third country within the meaning of Article 16a.2 sentence 1 of the Basic Law is not in need of the protection of the fundamental right guaranteed under paragraph 1 in the Federal Republic of Germany since that person could have found protection from political persecution in that third country. Exclusion from the fundamental right to asylum is not dependent upon whether the foreigner can or should be returned to the third country. No asylum proceedings have taken place. The right to temporary residency granted in anticipation of protection under the fundamental right also does not apply. According to Article 16a.2 sentence 3 of the Basic Law, measures to terminate residency may, by way of inference, be enforced independently of any legal remedy pursued against such measures in the cases covered by sentence 1.

3. The amending legislature considers that protection against political persecution (Article 16a.1 of the Basic Law) is ensured by the provision contained in Article 16a.2 sentence 1 of the Basic Law, if a foreigner desiring protection can find refuge in another country in which the Geneva Refugee Convention is applied and in particular the prohibition of refoulement contained in Article 33 of the GRC is observed. In addition, the European Convention on Human Rights, and in particular its Article 3, must also be applicable in that third country; the Basic Law thereby takes into account the fluid transitions between acts of persecution that are of relevance to the right to asylum and inhuman or degrading punishment or treatment when referring refugees to the possibilities of protection in other countries (see also Article 16a.3 sentence 1 of the Basic Law as well as today's judgment in the proceedings 2 BvR 1507 and 1508/93).

**60 Years German Basic Law:
The German Constitution and its Court**

a) The amending legislature has itself defined the Member States of the European Communities as safe third countries in Article 16a.2 sentence 1 of the Basic Law. It follows from the historical development of the legislation as well as from the goal that the amending legislature pursued with the third-country rule that the Member States are automatically safe countries by virtue of the Basic Law.

...

b) Article 16a.2 sentence 2 of the Basic Law empowers the legislature to designate other countries that fulfil the conditions of sentence 1 by a federal law that requires ratification by the Bundesrat. Such designation presupposes that application of the Convention Relating to the Status of Refugees and the Convention for the Protection of Human Rights and Fundamental Freedoms is ensured in such states.

aa) This can be the case only if the states have become party to the two conventions. Since pursuant to its Article 1 A.2 the Geneva Refugee Convention was originally applicable only to refugees from events occurring before 1 January 1951 and the provision containing this time limit was in effect upon entry into force of Article I.2 of the Protocol Relating to the Status of Refugees of 31 January 1967 (BGBl. 1969 II p. 1294), the states must also have become party to this protocol. Such states must also have accepted the control procedures that are provided for by the conventions and intended to ensure fulfilment of the obligations undertaken upon ratification of the conventions. This applies on the one hand in respect of the duty to cooperate with the Office of the United Nations High Commissioner for Refugees of the United Nations in Article 35 of the GRC. On the other hand, according to Article 25 of the European Human Rights Convention, anyone may address a petition regarding violation of the rights set forth in this convention to the European Commission of Human Rights.

bb) In addition, the institutions of the states must also be bound under the legal orders of such states to apply the conventions. This presupposes that the state may not under its legal system deport a foreigner to a state that allegedly practices persecution without establishing beforehand whether that foreigner is threatened with persecution within the meaning of Article 33 of the GRC or torture or inhuman or degrading punishment or treatment within the meaning of Article 3 of the European Human Rights Convention.

(1) In the context of substantive verification of refugee status, the states must be guided by the requirements of the prohibition of refoulement pursuant to Article 33 of the GFC in conjunction with the definition of the term refugee contained in Article 1 A.2 of the GFC. It is as a rule no longer possible to speak in terms of guaranteed application if groups of individuals are from the very outset not considered refugees on the basis of national law or on the basis of political orders, either because the Geneva Refugee Convention was signed only subject to regional qualification (see Article 1 B GRC and Article I.3 of the Protocol) or because - due to reasons of foreign policy deference, for example - refugees from certain countries are generally not granted refuge.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- (2) Exclusion from the fundamental right to asylum that accompanies designation as a safe third country pursuant to Article 16a.2 of the Basic Law does not require that foreigners have access to a review procedure in that third country that essentially corresponds to the German asylum procedure. The legal and actual conditions in the third country must, however, be such that it is actually possible for foreigners seeking protection to petition for protection and thereby initiate an obligation on the part of a competent authority to make a decision in this regard after prior review (see also on this ss. 2.c) and d) of the Resolution of the Ministers of the Member States of the European Communities responsible for immigration on a harmonized approach to questions concerning host third countries of 30 November/1 December 1992, reprinted in ZDWF-Schriftenreihe no. 53 “Article 16a GG und seine Folgen,” February 1993, pp. 152 and 153).

The Geneva Refugee Convention does not, however, prescribe a specific procedure for determining refugee status. It is also not possible to ascertain that a specific governmental practice has evolved in that regard that would have to be considered binding pursuant to Article 31.3.b of the Vienna Convention on the Law of Treaties of 23 May 1969 (BGBI. 1985 II p. 926).

For example, the minimum standards for the procedure to determine refugee status adopted in the year 1977 by the Executive Committee of the UNHCR in Conclusion No. 8 (XXVIII) did not become binding under international law. However, the parties to an agreement under international law must generally act in good faith to achieve the purpose of the agreement. They may therefore not evade their duties under the Geneva Refugee Convention through de facto omission of a procedure to verify refugee status, especially since it is possible to determine whether deportation infringes the prohibition of refoulement contained in Article 33 of the GRC only through a procedure that has been in some manner formalized (see Goodwin-Gill, *The Refugee in International Law*, 1984, p.165 and 166 and 167; *Ibid.*, in: *Yearbook of the International Institutions of Humanitarian Law*, 1985, 56 [60]; Hannum, *Guide to International Human Rights Practice*, second edition 1992, p. 221 and 222; see also BVerwGE 7, 333 [334]).

The existence of deadlines for application that deny foreigners access to the procedure if not met do not as such stand in the way of designation of a state as a safe third country. When deadlines for recognition of refugee status have not been met, a duty must in any case exist to determine whether the prohibition of refoulement contained in Article 33 of the GRC precludes such a measure in the specific case prior to deportation, directly or indirectly, to a state that allegedly practices persecution. The same applies if foreigners will no longer have access to a formal procedure in the third country after being returned to that country - for example, in view of the fact that no petition for protection was submitted during the initial stay in the third country and the deadline for submitting the application for that purpose has for that reason elapsed. The purpose of the third-country rule is to refer the parties affected to states that offer protection (see Bundestag document [*Drucksache des Deutschen Bundestages - BTDrucks*] 12/4450, p. 20).

**60 Years German Basic Law:
The German Constitution and its Court**

- cc) A state that makes provision for a third-country rule (see on this Article 29.2 sentence 2 of the Schengen Implementation Agreement; Article 3.5 of the Dublin Agreement) may also be designated as a safe third country pursuant to Article 16a.2 sentence 2 of the Basic Law. However, the state's legal system must not empower that state to deport foreigners to a country in which they would face the threat of further deportation to the country that allegedly practices persecution without determination of whether the prerequisites pursuant to Article 33 of the GRC and Article 3 of the European Human Rights Convention obtain or corresponding protection is actually guaranteed in that country (i.e., in the "fourth country") by means of a formal procedure. If a state (third country) considers that it has the right to deport refugees to yet another country although these prerequisites are not satisfied in that country, the application of the Geneva Refugee Convention is then not ensured in that third country. Pursuant to Article 33.1 of the GRC, refugees may not be expelled or returned "in any manner whatsoever" across the borders of territories in which they are faced with the threat of persecution. The prohibition of refoulement therefore precludes not only transfer directly to a state that practices persecution but also deportation or return to any country in which a threat exists of further deportation to the state that practices persecution. The expert Kälin explicitly confirmed this at the oral hearing (see also Zimmermann, *Das neue Grundrecht auf Asyl* [1994], p.171 and 172 with further references).
- dd) The legislature is given independent responsibility for designating states as safe third countries through legislation that lends content to the fundamental right in accordance with the criteria set forth for this purpose in Article 16a.2 sentence 1 of the Basic Law. As regards the actual determinations of fact required to answer the question as to whether the application of the two conventions is ensured, the legislature may regularly assume, in the case of a state that because of its legal system and general practice guarantees in principle compliance of its administration with the rule of law, that the institutions of that state will respect existing law and therefore also the two conventions. This is not the case only if regular failure to respect the two conventions - either in general or with respect to refugees from certain countries - must be obvious to the legislature.

The legislature is afforded a certain latitude in the choice of the investigative means it employs as regards its observations and closer investigation occasioned by justified reservations. The legislature remains within these bounds when it makes its decision on the basis of official information from national and - to the extent accessible - international institutions and takes into account investigative means otherwise at its disposal.

The legislature enjoys discretionary and decision-making latitude when evaluating the factual basis obtained in this manner against the standard presented immediately above for ensuring the application of the two conventions. The decision of the legislature must be reasonable.

...

**Selected Fundamental Decisions of
the Federal Constitutional Court**

5. Persons who enter the country from a safe third country within the meaning of Article 16a.2 of the Basic Law may not invoke paragraph 1 thereof. Such foreigners are therefore excluded from the sphere of operation of the fundamental right to asylum (see 2. above).

Article 16a.2 sentence 1 of the Basic Law excludes, by virtue of its wording, invocation of the fundamental right to asylum under Article 16a.1 of the Basic Law. If a foreigner is to be sent back or returned to a safe third country, the substantive rights upon which a foreigner can otherwise rely to contest deportation (in particular ss. 51.1 and 53 of the Aliens Act (Ausländergesetz - AuslG)) do not come into consideration for that person due to the substantive reach of Article 16a.2 of the Basic Law unless the concrete situations of danger described below (see e below) exist in the third country. On the other hand, the humanitarian and personal reasons that speak against enforcement of a deportation order and may lead to issuance of a toleration permit pursuant to s. 55 of the Aliens Act, are not affected.

- a) The legislative content of Article 16a.2 of the Basic Law derives from the notion of legislative confirmation of safety in the third country that is intended by this provision of the Basic Law. The Member States of the European Communities are considered safe by virtue of the decision embodied in the Basic Law. Other countries may be designated as safe third countries by the legislature (Article 16a.2 sentence 2 of the Basic Law) on the basis of findings to the effect that application of the Geneva Refugee Convention and the European Convention on Human Rights is ensured.

...

II.

The revision of the fundamental right to asylum in Article 16a of the Basic Law does not violate the limits of Article 79.3 of the Basic Law. The amending legislature has also complied with the requirements of Article 79.1 sentence 1 of the Basic Law.

1. a) Article 79.3 of the Basic Law prohibits amendments to the Basic Law that affect the principles laid down in Articles 1 and 20 of the Basic Law. This includes not only the principle of respect for and protection of human dignity anchored in Article 1.1 of the Basic Law. The acknowledgement of inviolable and inalienable human rights as the basis of the human community, peace and justice contained in Article 1.2 of the Basic Law also becomes important in that regard; in conjunction with the reference to the following fundamental rights contained in Article 1.3 of the Basic Law, the guarantees of these rights are in principle immune to restriction since they are indispensable to the maintenance of an order in compliance with Articles 1.1 and 1.2 of the Basic Law. The fundamental elements of the principles of the rule of law and the social state expressed in Articles 20.1 and 20.3 of the Basic Law must also be respected. For all that, Article 79.3 of the Basic Law requires, however, only that the principles mentioned not be affected. It does not, on the other hand, prevent the legislature from adopting amendments to modify those aspects of these principles embodied in positive law for appropriate reasons (see BVerfGE 84, 90 [120 and 121]).

**60 Years German Basic Law:
The German Constitution and its Court**

- b) Like every provision of the Basic Law, the fundamental right to asylum lies in principle at the disposal of the legislature, which may amend the Basic Law (Article 79.1 sentence 1 and 79.2 of the Basic Law). The limit imposed upon the amending legislature by Article 79.3 of the Basic Law, according to which amendment of the principles laid down in Articles 1 and 20 of the Basic Law is inadmissible, is not violated by the fact that foreigners are not afforded protection against political persecution by a guarantee in the form of a fundamental right. The Federal Constitutional Court, has, however, stated in connection with the definition of the term “persons persecuted on political grounds” in Article 16.2 sentence 2 of the Basic Law (old version) that the fundamental right to asylum is based on the conviction, defined by respect for the inviolability of human dignity, to the effect that no state has the right to threaten or violate the body, life or personal freedom of an individual for reasons that lie exclusively in that individual’s political convictions, fundamental choice of religion or characteristics beyond that individual’s control (see BVerfGE 80, 315 [333]; see also BVerfGE 54, 341 [357]; 76, 143 [157 and 158]).

It cannot, however, be inferred from this that the fundamental right to asylum is included in the substantive content of the guarantee of Article 1.1 of the Basic Law. What the substantive content of that guarantee is and the consequences to be drawn from its content for the powers of the German state must be determined independently.

If therefore the amending legislature is not prevented from suspending the fundamental right to asylum as such, it follows implicitly that Article 16a.2 of the Basic Law, sentences 1 and 2 which retracts the sphere of operation of the fundamental right from the level of the individual, paragraph 3 which restricts the substantive content of the guarantee in respect of procedure, paragraph 2 sentence 3 and paragraph 4 which reformulates the guarantee of legal recourse of Article 19.4 of the Basic Law and finally paragraph 5 which creates a basis for pan-European regulation of protection of refugees through agreements under international law, remain within the limits of a permissible constitutional amendment.

- c) Article 16a.2 sentence 3 of the Basic Law contains a special clause pertaining to the procedure for termination of the stay in the country in cases of entry from a safe third country. This clause modifies Article 19.4 of the Basic Law. The question as to whether the principles set forth in Article 20 of the Basic Law make the principle of personal recourse to the courts under the rule of law, which is concretely formulated in Article 19.4 of the Basic Law, inviolate (see BVerfGE 30, 1 [157 et seq.]) and can remain open. Article 16a.2 sentence 3 of the Basic Law does not in any case infringe such a principle. This applies in particular since foreigners are to be sure returned immediately to the safe third country without prior review by a further controlling instance, but this measure is preceded by legal confirmation of the guarantee of application of the Geneva Refugee Convention and the European Convention on Human Rights in the third country.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

2. The requirement of Article 79.1 sentence 1 of the Basic Law to the effect that a constitutional amendment - in this case modification of Article 19.4 of the Basic Law by Article 16a.2 sentence 3 of the Basic Law - must be reflected in the text of the Basic Law itself, is satisfied through insertion of Article 16a.2 sentence 3 of the Basic Law into the text of the Basic Law.

...

XV. Fundamental Rights Protection by the Federal Republic of Germany and the European Union

Solange I (As-long-as I) - BVerfGE 37, 271 and Solange II (As-long-as II) - BVerfGE 73, 339, Maastricht - BVerfGE 89, 155; Banana Market Organization - BVerfGE 102, 147 and Lisbon Treaty - BVerfGE 123, 267

Explanatory Annotation

Fundamental rights protection in federal systems can be a complicated matter and the European Union (EU) has developed in many ways into a federal system even if it cannot be qualified as a federal state.⁷⁵ One way to conceive fundamental rights protection in a multi-level system of government is to segregate the various levels and ensure rights protection separately within the various levels of government. The consequence would be rights' protection on the federal level with regard to the exercise of federal authority and rights protection on the lower (regional, state or member state) level against government action attributable to authorities of this level. Such a system of "dual federalism" would ideally require a separation of jurisdiction and powers in such a way that all potential governmental action is attributable to one or the other level in order to indicate which rights' protection regime is applicable.⁷⁶

This is in principle the approach to fundamental rights protection in the USA. Governmental action by state authorities, e.g. the police in California or the school administration in Kansas, is attributable to that state only and fundamental rights issues that might arise can in principle only arise under the respective bill of rights of California or Kansas. However, the US example also reveals the difficulties of this approach. If the respective state constitution or other legal order allows for egregious human rights violations it is very unsatisfactory if there are no remedies available at the federal level. In the USA this has led to important amendments to the US constitution.⁷⁷ The 13th amendment prohibits slavery in section 1 and extends that prohibition to "any place subject to the jurisdiction" of the United States. The 14th amendment to the Constitution expressly requires that the various states must not "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."⁷⁸

75 For a recent study on European Union federalism see Schütze, Robert, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, 2009; see also Ward/Ward (eds.), *The Ashgate research Companion to Federalism*, Part 4, p. 279 et seq. containing a number of contributions on European Union federalism.

76 For this notion respective separate but equal spheres of power in a federal system see Corwin, Edward S., *The Passing of Dual Federalism*, 36 *Virginia Law Review* (1950) 1.

77 Text of the US-Constitution available from the National Archives at <http://www.archives.gov/exhibits/charters/constitution.html>.

78 Hence the debate whether "dual federalism" is at all possible and a good case can be made that it is not, at least not without modification. One can even make a good case that even the relationship between states and their law on the one hand and international law on the other, even if structured dualistically by the national constitution, is difficult to maintain in its pure form in today's complex, intertwined and globalized world. In the context of this study the term is only used to describe a possible principle approach.

Selected Fundamental Decisions of the Federal Constitutional Court

The other approach is more integrative and would extend the scope of the federal fundamental rights beyond just the actions of federal organs to cover the federal entity as a whole, i.e. the central level and the sub-entities. That is, for example, the approach taken in Germany under the Basic Law. Article 31 of the Basic Law states in simple words that federal law breaches the law of the *Länder*, i.e. the law of the lower entities. This means that whenever there is a conflict between federal law and the law of a lower entity, a *Land*, federal law will not only prevail but the legal provision of the respective *Land* will be null and void.⁷⁹ Any and all legal provisions of the *Länder* must consequently be in conformity with the Basic Law in general and the fundamental rights provisions in particular.

The European Union, on the other hand, is not a federal state and whereas its law is also supreme and prevails over the law of its member states in case of conflict, the prevalence of the Union is only one of application and not one of validity. This means that when a member legal provision law, if applied in a given situation, would lead to an infringement of European Union law, Union law must prevail and the member state norm must not be applied. It would, however, remain valid for all other - purely domestic - situations, where a conflict between the two norm sets would not arise. In the area of fundamental rights such conflicts of norms are easily perceivable. European Union legislation could, for example, on the national level be perceived to be in violation of domestic fundamental rights. Under the doctrine of the supremacy of European Union Law this would not matter because Union law would have to prevail against all national law. However, this notion almost inherently requires that some form of fundamental rights protection exists on the European Union level so that Union action can at least be vetted accordingly on that level.

The problem was that the European Union, i.e. the European Economic Community as it was called from 1957 to 1993 or the European Community as it was called from 1993 to 2009, did not have a catalogue of fundamental rights as part of its founding treaties. That is largely due to the fact that the member states when founding the European Economic Community in 1957 could simply not imagine that the process of integration would be so dynamic that the notion of the Community violating fundamental rights might actually arise.

However, the issue of the protection of fundamental rights arose nonetheless. It began with the question whether a person had to disclose his identity when intending to buy subsidized butter made available for the poor⁸⁰, and has since touched upon many fundamental rights ranging from human dignity to free speech and property rights.⁸¹ In the light of the complete lack of

79 This prevalence of federal law is so entrenched that despite a number of amendments the state constitution of the Land Hesse of 1946 (preceding the Basic Law by three years) in Article 21 still provides for the possibility of sentencing someone to death for especially heinous crimes and nobody takes it seriously enough to engage in a revision because Article 102 of the Basic Law provides for the absolute abolishment of capital punishment and Article 21 is therefore null and void - as if it were not on the books at all.

80 ECJ, Case 29/69, 12.11.1969, ECR 1969, 419, Stauder,
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61969J0029:EN:HTML>.

81 It is beyond this study to trace the development of fundamental rights protection in the European Union in details. For more details see Ehlers, Dirk, *Europäische Grundrechte und Grundfreiheiten*, 2009 and Ehlers, Dirk (ed.), *European Fundamental Rights and Freedoms*, 2007. In the Ehlers collection see Walter, Christian, *History and Development of European Fundamental Rights and Fundamental Freedoms*, p. 1 et seq. for an account of the historical development.

**60 Years German Basic Law:
The German Constitution and its Court**

fundamental rights in the founding treaties the European Court of Justice could only achieve the requisite protection by adapting the international law doctrine of the so-called general principles of law. General principles of international law are those inherent in all legal orders of the states comprising the international community and which can therefore be presumed to be relevant in interstate relationships as well. General principles of European Union law are those inherent in the legal orders of all member states of the European Union, which can therefore be presumed to be part of the European Union legal order as well. As all member states of the European Union protect fundamental rights in their domestic legal order, and are also member states of the European Convention on Human Rights, the European Court of Justice held that this creates an abstract catalogue of fundamental rights that is relevant as primary European Union law, i.e. on the same level as treaty law. The fundamental rights so found then needed to be developed in the case law of the Court much in the same fashion as written rights gain their concrete scope and significance not so much by the language in which they were drafted but by the interpretation of the courts applying them over the years.

This development at the European Union level came in conjunction with increasing pressure at the national level demanding fundamental rights protection at the European Union level as a prerequisite for acknowledging the supremacy of European Union law. The European Court of Justice had dogmatically construed the supremacy and prevalence of European Union law as independent from any domestic law, including constitutionally protected fundamental rights, but the German Constitutional Court had rather practically responded by maintaining that they will exercise jurisdiction of last resort to protect their fundamental rights standard should it become necessary.

This was the content of the famous “As long As” decision of the Constitutional Court. At issue in this case was a provision in a Regulation of European Community law, which constitutes a directly applicable legislative act. The Constitutional Court had already made it clear that constitutional complaints can only be lodged against acts of the German state and not acts of the European Community. However, the implementation or execution of such acts of the European Community by German officials, as was the case here with regard to the Regulation in question, constitutes such a national act. The Constitutional Court held that it would continue to exercise its power to assess such national acts in the light of the fundamental rights of the Basic Law. The consequence of such an assessment could, of course, be that the execution of the European Community’s legal obligation is unconstitutional because the underlying European Community legal act is unconstitutional. In the case at issue the Constitutional Court found this not to be the case and hence the ultimate conflict between European Community law and the German Basic Law was avoided.

12 years later, the Court revisited the question again in the context of European Community regulations. In the meantime the European Court of Justice had time to develop its approach to fundamental rights as part of the Community’s general principles of law. The Court consequently held that it would no longer regard as admissible proceedings brought before it challenging the application of European Community law in Germany. However, this “moratorium” was to apply only “as long as” the European Court of Justice provided effective fundamental rights protection on a quality level comparable to that of the Basic Law. This was obviously a recognition of the European Court of Justice’s work in the area of fundamental rights protection

Selected Fundamental Decisions of the Federal Constitutional Court

but it still fell short of unequivocally accepting the supremacy of European Union law reserving the right to “step in” if the Court ever came to the conclusion that the European Union level of fundamental rights protection was inadequate.

In the decision concerning the constitutionality of the Maastricht Treaty the Court by and large confirmed this approach. However, it no longer restricted its approach to just supervise the acts of German authorities and stipulated that it continues to assert the power to protect fundamental rights in Germany against any act of supranational organizations regardless of whether such acts require implementation or execution. However, the Court also said that it would exercise fundamental rights protection cooperatively with the European Court of Justice and that could only mean that the principal relationship between the two legal orders has remained unchanged and that the Court continues to assert the right of last control in the fundamental rights area.⁸²

In a later decision concerning the European Union’s banana market and a new regulation concerning import quotas for so-called dollar-bananas from mainly Central American countries the Constitutional Court specified the requirements for exercising this reserved right.⁸³ Any applicant would have to show “in detail that the protection of fundamental rights required unconditionally by the Basic Law is not generally assured in the respective case. This requires a comparison of the protection of fundamental rights on the national and on the Community level [...]”.⁸⁴ It is evident that it will be almost impossible for any applicant or submitting regular court to make such a claim as long as the European Court of Justice remains a credible and functioning judicial body.

The Treaty of Lisbon, which entered into force on 1 December 2009, impacted fundamental rights protection in the European Union by making the Charter of Fundamental Rights of the European Union part of the Union’s primary body of law by way of referring to it in Article 6 of the new European Union Treaty. Article 6.3 makes it clear that the general principles of European Union law as developed by the European Court of Justice retain their relevance so that a continuation of the European Court’s jurisprudence can be expected, probably with an increasing shift away from the general principles to the provisions of the Charter. The new Treaty also empowered the European Union in Article 6.2 to accede to the European Convention on Human Rights and the coming into force of the 14th Protocol to the European Convention of Human Rights on 1 June 2010⁸⁵ has opened up the possibility of accession from the Convention’s side as well. The complainants in the Lisbon case alleged, *inter alia*, violations of several fundamental rights. However the Court disagreed and confirmed its position as

82 The Court also added a second potential challenge to the supremacy of constitutional law in this Maastricht decision by stating that it will not recognize European Union *ultra vires* acts, i.e. European Union legal acts passed in excess of the powers transferred to the Union by way of the founding treaties even if the European Court of Justice should have determined that the alleged *ultra vires* act is soundly based on a relevant treaty norm. So far the Court has refrained from declaring any European Union act to be *ultra vires*.

83 Decision available in English at http://www.bverfg.de/entscheidungen/ls20000607_2bvl000197en.html.

84 See http://www.bverfg.de/entscheidungen/ls20000607_2bvl000197en.html at para. 39.

85 <http://conventions.coe.int/Treaty/EN/Treaties/Html/194.htm>.

**60 Years German Basic Law:
The German Constitution and its Court**

summarized in the Banana market regulation case.⁸⁶ The German Court continues to assert the power of last resort but will not exercise this power as long as the European Court of Justice will effectively guarantee fundamental rights against European Union acts on a comparable level of quality.

a) Translation of the Solange I Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 37, 271*

Headnotes:

As long as the integration process has not progressed so far that Community law receives a catalogue of fundamental rights decided on by a Parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference by a court of the Federal Republic of Germany to the Federal Constitutional Court in judicial review proceedings, following the obtaining of a ruling of the European Court under Article 177 of the Treaty, is admissible and necessary if the German court regards the rule of Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far as it conflicts with one of the fundamental rights of the Basic Law.

Order of the Second Senate of 29 May 1974 - 2 BvL 52/71 -

Facts:

A German import/export undertaking is making an application to the Administrative Court (Verwaltungsgericht) of Frankfurt/Main for annulment of a decision of the Einfuhr- und Vorratsstelle für Getreide und Futtermittel (EVSt), in which an export deposit of DM 17,026.47 was declared to be forfeited after the firm had only partially used an export licence granted to it for 20,000 tons of ground maize.

The decision is based on Article 12.1 of EEC Council Regulation 120/67, of 13 June 1967, and on Article 9 of EEC Commission Regulation 473/67, of 21 August 1967.

Article 12.1 of EEC Regulation 120/67 reads:

‘1. Imports into the Community or exports therefrom of any of the products listed in Article 1 shall be subject to the submission of an import or export licence which may be issued by member states to any applicant irrespective of the place of his establishment in the Community....

⁸⁶ BVerfG, 2 BvE 2/08 of 30.6.2009, para. 189, http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html.

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**Selected Fundamental Decisions of
the Federal Constitutional Court**

The issue of such licences shall be conditional on the lodging of a deposit guaranteeing that importation or exportation is effected during the period of validity of the licence; the deposit shall be forfeited in whole or in part if the transaction is not effected, or is only partially effected, within that period.'

Article 8 (2) of EEC Regulation 473/67 reads:

'(2) Subject to Article 9 hereof, if the obligation to import or export has not been fulfilled during the period of validity of the licence, the deposit is forfeited ...'

Article 9 of EEC Regulation 473/67 reads:

'(1) If the import or export is prevented within the period of validity of the licence by a circumstance which is to be regarded as force majeure, and if application is made for these circumstances to be taken into account, then: (a) in the cases listed in paragraph (2) (a)-(d) hereof, the obligation to import or export is extinguished, and the deposit is not forfeited.

...

(b) in the cases listed in paragraph (2) (e)-(h) hereof, the period of validity of the licence is extended by the period of time which the competent authority deems necessary in consequence of this circumstance. On application, however, the competent authority may order that the obligation to import or export be extinguished and that the deposit be not forfeited.

2. The Administrative Court first obtained a preliminary ruling from the European Court of Justice under Article 177 of the Treaty establishing the European Economic Community (hereinafter referred to for short as 'the Treaty') as to whether the rules cited from these regulations are lawful under the law of the European Economic Community. In the judgment of the European Court dated 17 December 1970 -- in Case 11/70 -- the legality of the disputed regulations is confirmed (likewise in the judgment of 10 March 1971 in Case 37/70).

The Administrative Court then stayed the proceedings by a decision of 24 November 1971 and requested the ruling of the Federal Constitutional Court under Article 100.1 of the Basic Law as to whether the obligation to export existing under European Community law and the associated duty to make an export deposit are compatible with the Basic Law and, if so, whether the rule that the deposit is to be released only in a case of *force majeure* is compatible with the Basic Law.

**60 Years German Basic Law:
The German Constitution and its Court**

Extract from the Grounds:

...

B. I.

The reference is admissible

1. An essential preliminary for this ruling is the closer, though not yet conclusive, determination of the relationship between the constitutional law of the Federal Republic of Germany and European Community law, which has come into being on the basis of the Treaty establishing the European Economic Community (hereinafter referred to as Community law). The present case demands only the clarification of the relationship between the guarantees of fundamental rights in the Basic Law and the rules of secondary Community law of the EEC, the execution of which is in the hands of administrative authorities in the Federal Republic of Germany. There is at the moment nothing to support the view that rules of the Treaty establishing the EEC that is, primary Community law, could be in conflict with provisions of the Basic Law of the Federal Republic of Germany. It can equally remain open whether the same considerations apply to the relationship between the law of the Basic Law outside its catalogue of fundamental rights and Community law as applied according to the following reasoning, to the relationship between the guarantees of fundamental rights in the Basic Law and secondary Community law.

2. This Court in this respect in agreement with the law developed by the European Court of Justice adheres to its settled view that Community law is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source (BVerfGE 22, 293 [296]; 31, 145 [173 seq.]); for the Community is not a state, in particular not a federal state, but 'a sui generis community in the process of progressive integration', an 'interstate institution' within the meaning of Article 24 (1) of the Basic Law.

It follows from this that, in principle, the two legal spheres stand independent of and side by side one another in their validity, and that, in particular, the competent Community organs, including the European Court of Justice, have to rule on the binding force, construction and observance of Community law, and the competent national organs on the binding force, construction and observance of the constitutional law of the Federal Republic of Germany. The European Court of Justice cannot with binding effect rule on whether a rule of Community law is compatible with the Basic Law, nor can the Federal Constitutional Court rule on whether, and with what implications, a rule of secondary Community law is compatible with primary Community law. This does not lead to any difficulties as long as the two systems of law do not come into conflict with one another in their substance. Therefore there grows forth from the special relationship which has arisen between the Community and its members by the establishment of the Community, first and foremost, the duty for the competent organs, in particular for the two courts charged with reviewing law the European Court of Justice and the Federal Constitutional Court to concern themselves in their decisions with the concordance of the two systems of law. Only in so far as this is unsuccessful can there arise the conflict which demands the drawing of conclusions from the relationship of principle between the two legal spheres set out above.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

For, in this case, it is not enough simply to speak of the 'precedence' of Community law over national constitutional law in order to justify the conclusion that Community law must always prevail over national constitutional law because, otherwise, the Community would be put in question. Community law is just as little put in question when, exceptionally, Community law is not permitted to prevail over cogent (zwingendes) constitutional law, as international law is put in question by Article 25 of the Basic Law when it provides that the general rules of international law only take precedence over simple federal law, and as another (foreign) system of law is put in question when it is ousted by the public policy of the Federal Republic of Germany. The binding of the Federal Republic of Germany (and of all member states) by the Treaty is not, according to the meaning and spirit of the Treaties, one-sided, but also binds the Community which they establish to carry out its part in order to resolve the conflict here assumed, that is, to seek a system which is compatible with an entrenched precept of the constitutional law of the Federal Republic of Germany. Invoking such a conflict is, therefore, not in itself a violation of the Treaty, but sets in motion inside the European organs the Treaty mechanism which resolves the conflict on a political level.

3. Article 24 of the Basic Law deals with the transfer of sovereign rights to interstate institutions. This cannot be taken literally. Like every constitutional provision of a similar fundamental nature, Article 24 of the Basic Law must be understood and construed in the overall context of the whole Basic Law. That is, it does not open the way to amending the basic structure of the Basic Law, which forms the basis of its identity, without a formal amendment to the Basic Law, that is it does not open any such way through the legislation of the interstate institution. Certainly, the competent Community organs can make law which the competent German constitutional organs could not make under the law of the Basic Law and which is nonetheless valid and is to be applied directly in the Federal Republic of Germany.

4. The part of the Basic Law dealing with fundamental rights is an inalienable, essential feature of the valid Basic Law of the Federal Republic of Germany and one which forms part of the constitutional structure of the Basic Law. Article 24 of the Basic Law does not, without reservation, allow it to be subjected to qualifications. In this, the present state of integration of the Community is of crucial importance. The Community still lacks a democratically legitimate Parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level; it still lacks, in particular, a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Basic Law and therefore allows a comparison and a decision as to whether, at the time in question, the Community law standard with regard to fundamental rights generally binding in the Community is adequate in the long-term, measured by the standard of the Basic Law with regard to fundamental rights (without prejudice to possible amendments) in such a way that there is no exceeding the limitation indicated, set by Article 24 of the Basic Law. As long as this legal certainty, which is not guaranteed merely by the decisions of the European Court of Justice, favourable though these have been to fundamental rights, is not achieved in the course of the further integration of the Community, the reservation derived from Article 24 of the Basic Law applies. What is involved is, therefore, a legal difficulty arising exclusively from the Community's continuing integration process, which is still in flux and which will end with the present transitional phase.

**60 Years German Basic Law:
The German Constitution and its Court**

Provisionally, therefore, in the hypothetical case of a conflict between Community law and a part of national constitutional law or, more precisely, of the guarantees of fundamental rights in the Basic Law, there arises the question of which system of law takes precedence, that is, ousts the other. In this conflict of norms, the guarantee of fundamental rights in the Basic Law prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism.

5. From the relationship between Basic Law and Community law outlined above, the following conclusions emerge with regard to the jurisdiction of the European Court of Justice and of the Federal Constitutional Court.

- a) In accordance with the Treaty rules on jurisdiction, the European Court of Justice has jurisdiction to rule on the legal validity of the norms of Community law (including the unwritten norms of Community law which it considers exist) and on their construction. It does not, however, decide incidental questions of national law of the Federal Republic of Germany (or in any other member state) with binding force for this State. Statements in the reasoning of its judgments that a particular aspect of a Community norm accords or is compatible in its substance with a constitutional rule of national law at this place, with a guarantee of fundamental rights in the Basic Law constitute non-binding *obiter dicta*.

In the framework of this jurisdiction, the European Court determines the content of Community law with binding effect for all the member states. Accordingly, under the terms of Article 177 of the Treaty, the courts of the Federal Republic of Germany have to obtain the ruling of the European Court before they raise the question of the compatibility of the norm of Community law which is relevant to their decision with guarantees of fundamental rights in the Basic Law.

- b) As emerges from the foregoing outline, the Federal Constitutional Court never rules on the validity or invalidity of a rule of Community law. At most, it can come to the conclusion that such a rule cannot be applied by the authorities or courts of the Federal Republic of Germany in so far as it conflicts with a rule of the Basic Law relating to fundamental rights. It can (just like, vice versa, the European Court) itself decide incidental questions of Community law in so far as the requirements of Article 177 of the Treaty, which are also binding on the Federal Constitutional Court, are not present or a ruling of the European Court, binding under Community law on the Federal Constitutional Court, does not supervene.

6. Fundamental rights can be guaranteed by law in numerous ways and may accordingly enjoy numerous types of judicial protection. As its previous decisions show, the European Court also considers that it has jurisdiction by its decisions to protect fundamental rights in accordance with Community law. On the other hand, only the Federal Constitutional Court is entitled, within the framework of the powers granted to it in the Basic Law, to protect the fundamental rights guaranteed in the Basic Law. No other court can deprive it of this duty imposed by constitutional law. Thus, accordingly, in so far as citizens of the Federal Republic of Germany have a claim to judicial protection of their fundamental rights guaranteed in the Basic Law, their status cannot suffer any impairment merely because they are directly affected by legal acts of authorities or

**Selected Fundamental Decisions of
the Federal Constitutional Court**

courts of the Federal Republic of Germany which are based on Community law. Otherwise, a perceptible gap in judicial protection might arise precisely for the most elementary status rights of the citizen. Moreover, no different considerations apply to the constitution of a community of states with a constitution based on freedom and democracy which is called into question than apply to a federal state with a constitution based on freedom and democracy: it does not harm the Community and its constitution based on freedom (and democracy), if and in so far as its members in their constitutions give stronger guarantees of the liberties of their citizens than does the Community.

7. In detail, judicial protection by the Federal Constitutional Court is measured exclusively according to the constitutional law of the Federal Republic of Germany and according to the more precise rules laid down in the Federal Constitutional Court Act.

- a) In proceedings for judicial review on a reference by a court, it is always a question of examining a provision of a statute. Since the traditional distinction in national law between provisions of a formal statute and provisions of a regulation based on a formal statute is unknown to Community law, every provision of a Community regulation is a provision of a statute within the meaning of the rules of procedure for the Federal Constitutional Court.
- b) An initial barrier to the jurisdiction of the Federal Constitutional Court emerges from the fact that it can only make the subject of its review acts of German State power, that is, decisions of the courts, administrative acts of the authorities and measures of the constitutional organs of the Federal Republic of Germany. For this reason, the Federal Constitutional Court regards as inadmissible a constitutional complaint by a citizen of the Federal Republic of Germany directly against a Community regulation (BVerfGE 22, 293 [297]).
- c) If a Community regulation is implemented by an administrative authority of the Federal Republic of Germany or dealt with by a court in the Federal Republic of Germany, this is an exercise of German State power; and, in this process, the administrative authority and the courts are also bound to the constitutional law of the Federal Republic of Germany. According to the procedural law of the Federal Constitutional Court, if one disregards the constitutional complaint, which is only admissible after all other legal remedies are exhausted, the exception in s. 90.2 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG) hardly comes into consideration in a case involving the challenging of an administrative act based on a rule of Community law, the protection of fundamental rights is carried out by way of reference by the court concerned in so-called proceedings for judicial review of constitutionality before the Federal Constitutional Court. In view of the special features, outlined above, of the relationship between national constitutional law and Community law, these proceedings require some modifications, of the kind that have also been considered necessary in the past by the Federal Constitutional Court in other decided cases. Thus, for example, it has held in the framework of judicial review proceedings, that the existing legal position with regard to a constitutional application is not in keeping with the Basic Law; it has contented itself with holding that a particular set of regulations is incompatible with the provision on equality, without declaring the regulations void; it

**60 Years German Basic Law:
The German Constitution and its Court**

has declared a set of regulations brought into being by the Occupying Powers to be in conflict with the Basic Law and put the Federal Government under an obligation to make efforts to have them brought by the German legislator into harmony with the Basic Law; it has developed preventive judicial review in respect of ratification statutes. It lies in the nature of these previous decisions for the Federal Constitutional Court to restrict itself in cases like the present one to determining the inapplicability of a rule of Community law by the administrative authorities or courts of the Federal Republic of Germany in so far as it conflicts with a guarantee of fundamental rights in the Basic Law.

The concentration of this power of decision in the hands of the Federal Constitutional Court is not only necessary, from the point of view of constitutional law, for the same reason which has led to the Court's so called monopoly of rejection, but is also in the interests of the Community and of Community law. According to the underlying idea of Article 100.1 of the Basic Law, the Federal Constitutional Court's task is to prevent any German court from disregarding the intention of the legislature by failing to apply the statutes decided on by the legislature on the grounds that the court considers they violate the Basic Law (BVerfGE 1, 184 (197); 2, 124 [129]). National statutory law thereby received protection of its validity *vis-a-vis* courts which would deny it validity on constitutional grounds. The position is similar with the rule contained in Article 100.2 of the Basic Law, under which the advice of the Federal Constitutional Court must be sought in cases of doubt as to whether a general rule of international law creates rights and duties for the individual. Therefore the underlying idea of Article 100 requires that the validity of Community law should be protected from impairment in the Federal Republic of Germany in the same way as that of national law.

The result is: as long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a Parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference by a court in the Federal Republic of Germany to the Federal Constitutional Court in judicial review proceedings, following the obtaining of a ruling of the European Court under Article 177 of the Treaty, is admissible and necessary if the German court regards the rule of Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far as it conflicts with one of the fundamental rights in the Basic Law.

II.

The First Senate has previously held that a measure taken by a foreign state is not subject to review by the Federal Constitutional Court, and that even a measure based on a military government statute and issued by a German authority 'by order of the military government' is not a measure taken by German public power and is therefore likewise removed from the jurisdiction of the Federal Constitutional Court (BVerfGE 1, 10). For the same reason, it has held inadmissible a constitutional action aimed directly or indirectly at decisions of a supreme appellate court (BVerfGE 6, 15; 22, 91), and rejected as inadmissible, a constitutional action

Selected Fundamental Decisions of the Federal Constitutional Court

against a purely internal ecclesiastical measure (BVerfGE 18, 385). It has, moreover, held that the Federal Constitutional Court has no jurisdiction to examine German law (namely, an implementation statute in connection with the Kontrollratsgesetz (Control Council Act) for its compatibility with occupation law (BVerfGE 3, 368). Its judgment on this matter reads literally: 'The Basic Law and the Gesetz über das Federal Constitutional Court (Federal Constitutional Court Act) contain no general constitutional clause dealing with the jurisdiction of the Federal Constitutional Court. ... No particular jurisdiction to examine German law for its compatibility with occupation law is assigned to the Federal Constitutional Court. Federal constitutional law and the federal law applying in the framework of the Basic Law are the Federal Constitutional Court's only criteria for its examination. Its jurisdiction cannot be extended beyond the positive rules on its jurisdiction for reasons of legal policy' (BVerfGE 3, 368 [376]). In judicial review proceedings which concerned a provision of the 42nd Implementation Regulation to the Umstellungsgesetz (Currency Changeover Act), the First Senate has further held that the provision challenged is occupation law and occupation law cannot be examined for its compatibility with the Basic Law (BVerfGE 4, 45). This decision, however, is followed, after the coming into force of the Paris Treaty system, by the decisions in which occupational law is examined for its compatibility with the Basic Law, and the competent constitutional organs of the Federal Republic of Germany are charged with the duty of harmonising the content of the statute with the Basic Law after appropriate consultation with the Three Powers (BVerfGE 15, 337; 36, 146 (14 November 1973 1 BvR 719/69 Ehegesetz). Finally, in the decision of 18 October 1967 (BVerfGE 22, 293), as already mentioned, a constitutional action brought directly against regulations of the Council or Commission of the EEC is rejected as inadmissible because it is not directed against an act of the German public power bound by the Basic Law. In this context, it is stated: jurisdiction cannot be founded by the consideration that there is an urgent need for legal protection by a constitutional court because the possibilities offered in Community law are insufficient to guarantee adequate protection of the basic rights of the nationals of member states. Nor can the jurisdiction of the Federal Constitutional Court be extended, it says, by a necessity of legal policy, however urgent. After this follows the sentence: 'This is not a conclusive decision as to whether and to what extent the Federal Constitutional Court can measure Community law against the norms on fundamental rights in the Basic Law in the framework of proceedings admissibly brought to its cognizance. ...' This, it says, depends *inter alia* on 'whether and to what extent the Federal Republic of Germany was capable, in transferring sovereign rights under Article 24.1) of the Basic Law, of exempting the Community organs from being so bound (by fundamental rights)'.

III.

The challenged rule of Community law in the interpretation given by the European Court of Justice does not conflict with a guarantee of fundamental rights in the Basic Law, neither with Article 12 nor with Article 2.1 of the Basic Law.

1. It must right away be observed that the forfeiture of the export deposit provided for in the system of licensing, coupled with security deposits for export and import of certain products and goods, cannot be regarded as an evil imposed by order of the state for reprehensible unlawful conduct, akin to a penalty or fine. Rather, this system has built into it a legal device known to the system of private law, which makes allowance for the character of risk transactions

**60 Years German Basic Law:
The German Constitution and its Court**

(e.g., forward transactions, instalment transactions, transactions for recurrent delivery of goods, etc.). The making of an export deposit and the forfeiture of the security under the conditions agreed upon in the contract is not alien to such transactions. Even in the case of import and export of goods which fall under the system set up by the challenged rules, the businessman concerned knows what risk he is taking and is free to decide whether he wishes to enter into the contract or not on the terms in this case not agreed, but laid down by statute. All misgivings derived from the comparison with a sanction of criminal law or a sanction akin to one of criminal law therefore fail from the outset (see BVerfGE 9, 137 [144]).

2. The system contained in the challenged rules is not only appropriate in the present stage of development of the European Community, in which economic relations cannot function without planning and effective control, but is (still) indispensable and not replaceable by a different, similarly effective and simple and, on the other hand, market geared system.

3. So far as the basic freedom of trade and occupation (Article 12 of the Basic Law) is concerned, the principles developed in the judgment of 11 June 1958 (BVerfGE 7, 377 [397]) are also crucial here. The system of licensing of export and import transactions coupled with security deposits and forfeiture of the deposit affects the exercise of occupation, the limitation of which can be provided for by the legislator. But the legislator does not have a free hand to do this. What the legislator has introduced in this case is a 'pure system of rules on exercise of occupation or trade, which does not affect the freedom of choice of trade or occupation, but rather only determines in what manner members of a trade or occupation must in detail carry out their occupational activities'. Here, to a large extent, viewpoints of expediency can assert themselves; and it is to be assessed according to these viewpoints what impositions must be placed on the members of the trade or occupation in order to avert disadvantages and dangers for the general republic. In this respect, the protection of basic rights is restricted to averting statutory impositions which are in themselves unconstitutional because they are excessively burdensome and not exactable; apart from these exceptions, the impairment of occupational freedom in question does not affect the person entitled to the fundamental right too perceptibly since he is already engaged in the trade or occupation and his authorization to practise it is not affected' (BVerfGE 7, 377 [405 seq.]).

When this criterion is applied, the challenged system of rules does not conflict with Article 12 of the Basic Law. For, as the European Court of Justice has already stated in its decisions, there are carefully considered reasons in favour of this system, with a view to averting perceptible disadvantages for the EEC. In this case, what is involved is just as little an 'imposition in itself unconstitutional because it is excessively burdensome and not exactable' as in the - on this point comparable - case which was decided with the so called penalty payments judgment of 3 February 1959 (BVerfGE 9, 137); in that judgment, the Court did not even consider the question that Article 12 of the Basic Law might be violated (BVerfGE 9, 137 [146]).

4. In so far as making allowance for the principle of proportionality is required in the use of the formulations 'excessively burdensome' and not exactable, the following is to be noted in the case of the rules on the conditions for a forfeiture of the deposit: it is in keeping with the purpose of a security deposit that it is forfeited if the obligations laid down by the contract or by statute are not fulfilled, regardless of whether this is culpable or not culpable. The non-

**Selected Fundamental Decisions of
the Federal Constitutional Court**

forfeiture of a security bond must accordingly remain an exception which does not cover all cases in which the person making the security deposit has acted without culpability, that is, has acted with the due caution of a businessman. The challenged rules classify the exception under the legal concept of *force majeure*, and the European Court has interpreted this concept, with binding effect, as meaning that, apart from the cases expressly referred to in the rules, it must be taken to include not only all cases of absolute impossibility of import or export, but also cases in which the import or export did not take place because of circumstances beyond the control of the importer or exporter, the consequences of which would, despite all reasonable precautions, only be avoidable at the cost of disproportionate losses. In particular, since the European Court adds that the elements of the concept formulated as ‘precautions which would have had to be taken’ and ‘heaviness of the loss which ... he would have had to take on himself’ are flexible, all this is another way of expressing the legal notion current in German law and contained within the constitutional principle of proportionality, that the person subjected to the obligation in cases of this kind can free himself from his obligation where there is a ‘burden over and above the obligation entered into’.

5. Accordingly, Article 12 of the Basic Law does not pose any obstacle to the application of the challenged rules by the German authorities and courts in the present case. Apart from Article 12 of the Basic Law, Article 2.1 of the Basic Law does not, according to the settled case law of the Federal Constitutional Court, enter into consideration as a further independent criterion for examination (BVerfGE 9, 63 [73]; 9, 73 [77]; 9, 338 [343]; 10, 185 [199]; 21, 227 [234]; 23, 50 [55seq.]).

b) Translation of the Solange II Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 73, 339*

Headnotes:

1. a) The European Court of Justice is a ‘statutory court’ within the meaning of Article 101.1 of the Basic Law. It is a sovereign organ of judicature established by the Community Treaties, which, on the basis of and within the framework of a legally established jurisdiction and procedures, in principle, makes final decisions in a state of judicial independence on legal questions in accordance with legal rules and legal standards.
- b) The procedural law of the Federal Supreme Court meets the legal requirement of a free hearing, a procedure that affords an appropriate means of defence and a right to counsel of choice.
2. As long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they

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**60 Years German Basic Law:
The German Constitution and its Court**

generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law; references to the Court under Article 100.1 of the Basic Law for those purpose are therefore inadmissible.

Order of the Second Senate of 22 October 1986 - 2 BvR 197/83 -

Facts:

The appellant's business includes the importing of preserved mushrooms from non-European Community States into the Federal Republic; such imports are subject to Community regulations.

It applied in writing to the competent Federal Office for Food and Licence to import 1,000 tons of preserved mushrooms from Taiwan. The application was refused with reference to the provisions of Regulation 2107/74.

After unsuccessful review proceedings the appellant brought an action before the Frankfurt Administrative Court (Verwaltungsgericht) arguing that the continuation in force of Regulation 2107/74 beyond 1 July 1976, was not justified.

By its judgment of 25 July 1978, the Frankfurt Administrative Court dismissed the application as unfounded on the ground that the refusal of the licence had not been unlawful. In the court's view Regulation 2107/74 corresponded to the objectives specified in Article 39 of the EEC Treaty.

The appellant entered an interlocutory appeal against that judgment. In its decision of 25 March 1981 the Federal Supreme Administrative Court (Bundesverwaltungsgericht) in response to the appellant's application suspended the proceedings and referred the question to the European Court whether Regulation 2107/74 of the Commission of 8 August 1974, laying down protective measures applicable to imports of preserved mushrooms, infringes the combined provisions of Article 7.1 of Regulation 1927/75 of the Council of 22 July 1975 concerning the system of trade with third countries in the market in products processed from fruit and vegetables and Article 2.2 of Council Regulation 1928/75 of 22 July 1975, laying down detailed rules for applying measures in the market in products processed from fruit and vegetables in so far as it was retained in force after 30 June 1976.

In answer to the question the Court ruled that: consideration of Commission Regulations Nos 1412/76 of 18 June 1976 and 2284/76 of 21 September 1976 has disclosed nothing which affects their validity.

...

- d) In further proceedings before the Supreme Administrative Court, the appellant objected that there had been a breach of various constitutional rules and requested that the proceedings be suspended and that either the question whether Regulations 1412/76 and 2284/76 as interpreted by the European Court in its judgment of 6 May 1982 in Case

**Selected Fundamental Decisions of
the Federal Constitutional Court**

126/81 could be applied in the Federal Republic should be referred to the Federal Constitutional Court under Article 100.1 of the Basic Law or whether a fresh reference should be made to the European Court under Article 177.3 EEC.

In its judgment of 1 December 1982 (7 C 87.78), the Federal Supreme Administrative Court dismissed the appeal as unfounded. In its appeal on constitutional grounds the appellant claims that the judgment of the Federal Supreme Administrative Court disregarded its procedural and substantial rights under the Basic Law.

...

Extract from the Grounds:

B.

The appeal on constitutional grounds is admissible but is not well founded.

I.

1. A finding of a breach of Article 100.1 sentence 2 of the Basic Law in conjunction with Article 177.3 EEC by the judgment at issue, presupposes that the Federal Administrative Court was obliged to make a fresh reference to the European Court in spite of the latter Court's preliminary ruling of 6 May 1982 made as a result of the order for a reference by the former court. The refusal of a reference based on such an obligation would conflict with Article 101.1 sentence 2 of the Basic Law if the European Court was a statutory court within the limits of that provision and the refusal was based on arbitrary considerations.

- a) The European Court is a statutory court in the meaning of Article 101.1 sentence 2 of the Basic Law; this question, not hitherto decided by the Federal Constitutional Court (see BVerfGE 29, 198 [207]) must be answered in the affirmative.
 - aa) In view of the extensive institutional guarantees which are present (see Articles 165, 168 and 188 EEC, Articles 2 et seq. and 17 et seq. of the Protocol on the Statute of the Court of Justice of the European Economic Community of 17 April 1957 [II BGBl.1146] and the Rules of Procedure of the Court of Justice of the European Communities of 4 December 1974 in the codified version of 15 February [1982] O.J. C 39/91), there can be no doubt of the European Court's character as a court within the meaning of Article 101.1 sentence 2 of the Basic Law. The Court is a sovereign organ of judicature established by the Community Treaties which, on the basis and within the framework of a legally established jurisdiction and procedures, in principle, makes final decisions in a state of judicial independence on legal questions in accordance with legal rules and legal standards. Its members are subject to obligations of independence and impartiality; their legal status is so constituted by law as to offer guarantee of personal independence. The Court's procedural rules satisfy the due process requirement of a state subject to the rule of law; in particular they guarantee the right to be heard, opportunities for initiating and defending litigation which are appropriate to the subject matter of the proceedings, and freely chosen expert assistance (see also BVerfGE 59,63 [91 et seq.]).

**60 Years German Basic Law:
The German Constitution and its Court**

- bb) The European Court is not an institution of the Federal Republic of Germany but a common institution of the European Communities. The functional interlocking of the jurisdiction of the European Communities with those of the member states, together with the fact that the Community Treaties, by virtue of the instructions on the application of law given by the ratification legislation under Articles 24.1 and 59.2 sentence 1 of the Basic Law, and the subordinate law passed on the basis of the Treaties are part of the legal order which applies in the Federal Republic and have to be adhered to, interpreted and applied by its courts, give the European Court the character of a statutory court within the meaning of Article 101.1 sentence 2 of the Basic Law, in so far as the legislation ratifying the Community Treaties confers on the Court judicial functions contained therein. Those functions include in particular the Court's jurisdiction to give preliminary rulings under Article 177 ECC.

Article 177 ECC accords the Court of Justice the conclusive authority in relation to the courts of member states to make decisions on the interpretation of the Treaty and on the validity and interpretation of instruments of Community law derived therefrom, (BVerfGE 52, 187 [200]). That judicial monopoly for the European Court as regards the treaty (embodied for the purposes of Community law in Article 177 ECC) gives it the character, to the extent, of a statutory court within the limits of Article 101.1 sentence 2 of the Basic Law.

This partly functional incorporation of the European Court into the jurisdictions of member states expresses the fact that the legal orders of member states and the legal order of the Community are not abruptly juxtaposed in a state of mutual insulation but are in numerous ways related to each other, interconnected and open to reciprocal effects (see e.g. Article 215.2 ECC and the reference therein to 'general principles common to the laws of the member states'). This becomes particularly clear in the allocation of jurisdiction under Article 177 oriented towards cooperation between the courts of member states and the European Court. In the interests of the Treaty objectives of integration, legal security and uniformity of application, it serves to bring about the most uniformly possible interpretation and application of Community law by all courts within the sphere of application of the ECC Treaty (see the European Court judgments in *Hoffmann La Roche AG v. Centrafarm* [107/76]).

- cc) This conclusion is in harmony with the international law obligation on the Federal Republic of Germany arising under Article 5.1 EEC to take all appropriate measures to fulfil the obligations arising out of the EEC Treaty: in so far as they follow from Article 177 they are to be implemented by the courts and it is for the member states themselves to guarantee adherence to them. This objective is served in an especially apt way by the inclusion of the European Court, within the framework of its jurisdiction under Article 177 EEC, in the sphere of application of Article 101.1 sentence 2 of the Basic Law.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- dd) Classification of the European Court as a statutory court according to Article 101.1 sentence 2 of the Basic Law in the matter of preliminary rulings under Article 177 EEC is not prevented by the fact that a reference under Article 177 constitutes an objective interim procedure in which the parties to the main action have no right of application of their own and which primarily serves the purpose of interpreting, implementing and reviewing the validity of Community law. An application to the European Court under Article 177 for a ruling forms part of uniform legal dispute, for the outcome of which the answering of the question referred to (in so far as relevant) is decisive. The right of an individual involved in the main action to demand implementation of the guarantees contained in Article 101.1 sentence 2 of the Basic Law also extends to the observation of the duty, established by Article 177 EEC, to institute proceedings for a ruling regardless of the legal nature of the proceedings and the rules which constitute its substance.
- b) The Federal Administrative Court did not act arbitrarily in refusing in this case to make a fresh reference to the European Court.
- aa) The European Court had already given a preliminary ruling in the same originating action following a reference by the Federal Administrative Court. The subject matter of its decision concerned the same legal issues, namely the validity of Commission Regulations 1412/76 of 18 June 1976 and 2284/76 of 21 September 1976, in respect of which the appellant demanded a fresh reference. The Federal Administrative Court was not obliged to refer the question a second time. Judgments made by the European Court in accordance with Article 177 EEC are binding on all courts of member states dealing with the same main action (European Court judgment in *Milch, Fett und Eierkontor v. Hauptzollamt Saarbrücken* [29/68]); in so far as they are relevant to the decisions of those courts they are to be used as a basis for deciding the main action. That follows from the meaning and purpose of Article 177 and 164 EEC (see BVerfGE 45, 142 [162]; 52, 187 [201]).
- bb) There is an exception to such a binding effect according to the above mentioned judgment of the European Court in cases where its judgment lacks clarity. With regard to the European Court's preliminary ruling in the present action the Federal Supreme Administrative Court considered whether it was dealing with such a case. It answered the question in the negative. The view it took is in no way arbitrary.
- cc) We are not concerned with deciding in the present case whether the basic binding effect of preliminary rulings of the European Court also ceases to apply if, after the ruling is given, new facts become known which might possibly lead to a different decision by the Court, or whether only the procedure for reapplication under Article 41 of the Statute of the Court would be relevant; the appellant has not alleged any such facts.
- dd) It is not necessary for present purposes to decide whether under the provisions of Community law the possibility was open to the Supreme Administrative Court, having regard to any possible failure on the part of the European Court to take

**60 Years German Basic Law:
The German Constitution and its Court**

account of or adequately to appraise the submissions of the appellant in the Article 177 proceedings, to commence fresh reference proceedings from the viewpoint of the right to a legal hearing. In the judgment of the Supreme Administrative Court, which was in no way arbitrary, there were no factors which could give rise to the supposition that the European Court failed to direct its attention to the appellant's submission or to give it due consideration. The requisite conditions therefore do not exist for a fresh reference under Article 177, the refusal of which, in so far as it was permissible, or possibly even required, under the provisions of Community law, could constitute a breach of Article 101.1 sentence 2 of the Basic Law.

- c) On those grounds, at any rate, there is no question in the present proceedings, which involve an appeal on constitutional grounds, of a reference of the questions by the Federal Supreme Administrative Court to the European Court.
 - d) Furthermore, the Supreme Administrative Court did not contravene Article 101.1 sentence 2 of the Basic Law, by reason of its refusal to make a reference to the Constitutional Court under that Article in order to occasion the European Court to change its preliminary ruling by way of a reference by the Constitutional Court under Article 177. A reference to the Constitutional Court with that end in mind would have been inadmissible; the subject matter of proceedings under Article 100.1 of the Basic Law is the constitutionality of legislation and not of court judgments.
2. There was no contravention of Article 103.1 of the Basic Law.
- a) The appellant's objection, that the European Court denied it the right to a legal hearing in the proceedings for a preliminary ruling and that for constitutional reasons it therefore could not bind the Supreme Administrative Court by its ruling, is inadmissible. The appellant is not alleging circumstances which would show that in its method of procedure in giving the preliminary ruling under Article 177 EEC, the European Court refused in general to accord the parties to the original proceedings a measure of legal hearing sufficient to satisfy the minimum rule of law requirements of due legal process and that it simply and generally disregarded or failed to take into account the guarantees in its statute and rules of procedure corresponding to those requirements. The infringement alleged by the appellant in this case, even if it should be true, does not allow that general conclusion to be drawn.

Only if there were that sort of general denial of a legal hearing on the part of the European Court could consideration be given, in view of the requirements of principle imposed by the Basic Law as a condition for the transfer of sovereign rights under Article 24.1 of the Basic Law (see BVerfGE 37, 271 [296]; 58, 1[28, 40]), to questioning the continued validity under the Basic Law of the Acts of Accession to the Community Treaties, and therefore the binding effect of preliminary rulings of the European Court, from the standpoint of infringement of the right to a legal hearing (see also II. 1 and 2 below).

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- b) The Supreme Administrative Court itself clearly took notice of the appellant's submissions and took them into account in reaching its decision; there is therefore no question of a contravention of Article 103.1 of the Basic Law. Nor was the court obliged for constitutional reasons, as explained, to provide the appellant with the legal hearing before the European Court which it was allegedly denied by making a fresh reference to the Court.

3. Article 19.4 of the Basic Law was not infringed by the judgment of the Federal Supreme Administrative Court:

- a) Instruments incorporating judicial decisions of the kind here at issue do not fall within the term 'public powers' for the purposes of that Article (see BVerfGE 49, 329 [340 et seq.]).
- b) Nor is the appeal on constitutional grounds well founded if it is understood in the sense that the appellant regards it as an infringement of Article 19.4 sentence 1 of the Basic Law, that remedies are not available from the German courts against judgments of the European Court in proceedings for a preliminary ruling under Article 177.

This Court has already held on several occasions that Article 19.4 of the Basic Law does not confer subsidiary jurisdiction on German courts or give them international competence to intervene against decisions of international courts (BVerfGE 58, 1 [28 et seq.] with further references); the same applies to decisions of the European Court.

- c) Nor was there a breach of Article 19.4 sentence 1 of the Basic Law by reason of the Supreme Administrative Court considering itself bound by the preliminary ruling of the European Court.
 - aa) It is true that Article 19.4 sentence 1 of the Basic Law requires the provision of a legal system of recourse to the courts, which guarantees a comprehensive consideration of the factual and legal aspects of the subject matter of the proceedings, as well as a form of decision and means of implementing it appropriate to the particular demand for protection of rights, by an independent and impartial organ of judicature (BVerfGE 60, 253 [296 seq.]); disregarding possible circumstantial effects and the scope for appraisal, formulation or discretion on the part of the legislative or executive authority, this in principle, excludes any binding obligation on courts to adhere to factual or legal judgments of a particular case by other bodies. But this does not exclude an obligation provided for by legal rules to adhere to the decisions of other courts (see BVerfGE 65, 132 [137 et seq.]); because of its functional jurisdiction under Article 177 EEC, in respect of which there are no constitutional doubts, the same also applies to the binding effect of preliminary rulings of the European Court.
 - bb) The question whether there is sufficient provision for the protection of legal rights before the European Court could only be significant in relation to a possible infringement of Article 24.1 of the Basic Law by the Act of Accession to the EEC

**60 Years German Basic Law:
The German Constitution and its Court**

Treaty if the constitutional principle of the rule of law, which has to be respected in the event of transfer of sovereign rights under Article 24.1, required a right of appeal to be given against preliminary rulings of the European Court.

This Court has consistently held that neither Article 19.4 nor Article 103.1 of the Basic Law nor the general principle of the rule of law requires there to be an additional recourse to domestic (German) courts of further instance (see BVerfGE 34, 1 [6]; 42, 243 [248]; 42, 252 [254]; 49, 329[343]; 54, 277 [291]). From that viewpoint the present organization of the procedure for a preliminary ruling from the European Court does not fail to adhere to the restrictions laid down in the Basic Law on the transfer of sovereign rights.

II.

It cannot be held that the judgment of the Federal Administrative Court at issue infringed the appellant's fundamental rights under Articles 12.1 and 2.1 in conjunction with Article 20.3 of the Basic Law (principles of proportionality and legal certainty).

1. The appellant's complaints, that the European Court's ruling and Commission Regulations 1412/76 and 2284/76 as interpreted by that Court infringed the fundamental rights under the Basic Law and therefore ought not to have been applied by German authorities or courts during the period in question within the sphere to which the Basic Law applies, are inadmissible; a reference of the regulations to this Court by the Supreme Administrative Court under Article 100.1 of the Basic Law would have been inadmissible.

- a) Article 24.1 of the Basic Law makes it possible to open up the legal system of the Federal Republic of Germany in such a way that the Federal Republic's exclusive claim to control in its sphere of sovereignty can be withdrawn and room can be given for the direct validity and application of a law from another source within that sphere of the sovereignty (see BVerfGE 37, 271 [280]; 58, 1 [28]; 59, 63 [90]). It is true that Article 24.1 of the Basic Law does not itself provide for the direct validity and application of the law established by the international institution, nor does it directly regulate the relationship between such law and domestic law (for example, the question of the priority of their respective application). Internal validity and application, as well as the possible internal priority of validity or application of international treaties (including those of the sort at issue here), do not follow directly from general international law. Current international law does not contain any general rule arising out of the agreed practice of states or undoubted legal acceptance to the effect that states are obliged to incorporate their treaties into their domestic law and to accord them thereunder priority of validity or application as against the national law. Internal priority of validity or application only arises by virtue of an application of law instruction to that effect under the national law, and that applies, too in the case of treaties, the content of which obliges the parties to provide for internal priority of validity or application. Article 24.1, however, makes it possible constitutionally for treaties which transfer sovereign rights to international institutions and the law established by such institutions to be accorded priority of validity and application as against the national law of the Federal Republic by the appropriate internal application of law instruction.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

That is what took place in the case of the European Community Treaties and the law established on their basis by the Community organs by the passing of the Acts of Accession to the Treaties under Articles 24.1 and 59.2 sentence 1 of the Basic Law. From the application of law instruction of the Act of Accession to the EEC Treaty, which extends to Article 189.2 EEC, arises the immediate validity of the regulations of the Community for the Federal Republic and the precedence of their application over national law.

- b) The power conferred by Article 24.1 of the Basic Law, however, is not without limits under constitutional law. The provision does not confer a power to surrender by way of ceding sovereign rights to international institutions the identity of the prevailing constitutional order of the Federal Republic by breaking into its basic framework, that is, into its very structure. That applies in particular to legislative instruments of the international institution which, perhaps as a result of a corresponding interpretation or development of the underlying treaty law, would undermine essential, structural parts of the Basic Law. An essential part which cannot be dispensed with and belongs to the basic framework of the constitutional order in force is constituted in any event by the legal principles underlying the provisions of the Basic Law on fundamental rights (see BVerfGE 37, 271 [279]; 58, 1 [30 seq.]). Article 24.1 of the Basic Law, subject to conditions, allows these legal principles to be treated according to context. In so far as sovereign power is accorded to an international institution within the meaning of Article 24.1 which is in a position within the sovereign sphere of the Federal Republic to encroach on the essential content of the fundamental rights recognized by the Basic Law, it is necessary, if that entails the removal of legal protection existing under the terms of the Basic Law, that instead, there should be a guarantee of the application of fundamental rights which in substance and effectiveness is essentially similar to the protection of fundamental rights required unconditionally by the Basic Law. As a general rule this will require a system of protection of individual rights by independent courts which are given adequate jurisdiction and, in particular, power to review and decide on factual and legal questions appropriate to the relevant claim to protection of rights, and by courts which reach their decisions on the basis of a proper procedure allowing the right to a legal hearing and providing for means of attack or defence appropriate to the subject matter of the dispute and for the availability of freely chosen expert assistance, and the decisions of which, if necessary, contain adequate and effective sanctions for the infringement of a fundamental right.
- c) This Court explained in its judgment of 29 May 1974 (see BVerfGE 37, 271 [280 et seq.]) that, having regard to the state of integration which had been reached at that time, the standard of fundamental rights under Community law, generally binding within the European Communities, did not yet show the level of legal certainty for the Court to conclude that standard would permanently satisfy the fundamental rights standards of the Basic Law, without prejudice to possible modifications, in such a way that the limits imposed by Article 24.1 of the Basic Law on the application of derived Community law within the sovereign area of the Federal Republic would not be transgressed. It said that the Community still lacked a Parliament legitimized by direct democratic means and established by general suffrage, which possessed legislative powers

**60 Years German Basic Law:
The German Constitution and its Court**

and to which the Community institutions competent to issue legislation were politically fully responsible; in particular, the Community still lacked a codified catalogue of fundamental rights; European Court case law, as it then stood, did not by itself guarantee necessary legal certainty. So far as that legal certainty remained unachieved in the course of subsequent integration, the reservation derived from Article 24 remained in force. This Court accordingly held in the above mentioned judgment: as long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference by a court in the Federal Republic of Germany to the Federal Constitutional Court in judicial review proceedings after obtaining a ruling of the European Court under Article 177 of the Treaty is admissible and necessary if the German court regards that rule of Community law which is relevant to its decision in the interpretation given by the European Court to be inapplicable in the interpretation given by the European Court because and in so far as it conflicts with one of the fundamental rights in the Basic Law (BVerfGE 37, 271 [285]). In the case in question it held the reference under Article 100.1 of the Basic Law to be admissible but, in the circumstances, not to be well founded.

In its decision of 25 July 1979 (BVerfGE 52, 187 [202 seq.]), this Chamber expressly left open the question whether, or to what extent (having regard to political and legal developments which might take place in the meantime in European Community matters), the principles laid down in the judgment of 29 May 1974 could continue to claim unrestricted validity in relation to future reference of rules of derived Community law.

- d) In the judgment of this Chamber a measure of protection of fundamental rights has been established in the meantime within the sovereign jurisdiction of the European Communities which in its conception, substance and manner of implementation is essentially comparable with the standards of fundamental rights provided for in the Basic Law. All the main institutions of the Community have since acknowledged in a legally significant manner that in the exercise of their powers and the pursuit of the objectives of the Community they will be guided as a legal duty by respect for fundamental rights, in particular as established by the constitutions of member states and by the European Convention on Human Rights. There are no decisive factors to lead one to conclude that the standard of fundamental rights which has been achieved under Community law is not adequately consolidated and is only of a transitory nature.
- aa) This standard of fundamental rights has in the meantime, particularly through the decisions of the European Court, been formulated in content, consolidated and adequately guaranteed.

In the early years the European Court refused to investigate accusations by parties that decisions of the High Authority had infringed principles of German constitutional law and, in particular, Articles 2 and 12 of the Basic Law (Stork v. High Authority [1/58]); it stated that it had no authority to ensure respect for rules of domestic law in force in one or other member state, even if they involved

**Selected Fundamental Decisions of
the Federal Constitutional Court**

principles of constitutional law, and explained that ‘Community law as it arises under the European Coal and Steel Community Treaty does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights (President etc. v. High Authority [36-38/59 and 40/59]). In the following period the European Court made it clear that the general principles of Community law, the maintenance of which it was bound to protect, included the fundamental rights of the individual (see *Stauder v. City of Ulm* [29/69]). It is true that in the *Internationale Handelsgesellschaft* case (*Internationale Handelsgesellschaft* [11/70]) it held that the validity of a Community measure or its effect within a particular member state could not be affected by an allegation that it ran counter to fundamental rights as formulated by the constitution of the member state or to the principles of its constitutional structure; it would still have to consider, however, whether an analogous guarantee under Community law had been disregarded, for the safeguarding of fundamental rights formed part of the general principles of law which the Court had to protect. Whilst the protection of such rights must be supported by the constitutional traditions of the member states, they must also operate within the structure and objectives of the Community.

The European Court took the essential step (from the viewpoint of the Basic Law) in its judgment in the *Nold* case (*J. Nold KG v. E.C. Commission* [4/73]), where it stated that in relation to the safeguarding of fundamental rights it had to start from the common constitutional tradition of the member states: ‘it cannot therefore allow measures which are incompatible with fundamental rights recognized and guaranteed by the constitutions of those states’.

On the legal basis of the general principles of Community law thus defined and given that content, the European Court in the period that followed cited fundamental rights, as recognised in the constitutions of member states, as obligatory standards for reviewing measures of Community organs taken within their spheres of jurisdiction. Side by side with the express guarantees of liberties contained in the Community Treaties themselves (see e.g. Articles 7, 48 et seq., 59 et seq. and 67 et seq. EEC) the foreground was occupied naturally by the fundamental rights and freedom relating to economic activities, such as the right to property and freedom to pursue economic activities (see *Nold* [above]; *Hauer v. Land Rheinland-Pfalz* [44/79]). In addition to that it cited other basic rights, such as freedom of association, the general principle of equal treatment and the prohibition of arbitrary acts, religious freedom or the protection of the family, as standards of assessment (see *Union Sydicale v. E.C. Council* [175/73]; *Ruckdeschel* [117/76 and 16/77]).

The European Court has generally recognized and consistently applied in its decisions the principles, which follow from the rule of law, of the prohibition of excessive action and of proportionality as general legal principles in reaching a balance between the common interest objectives of the Community legal system and the safeguarding of the essential content of fundamental rights (More recent examples are the judgments in: *Internationale Handelsgesellschaft* [above]; *Hauer*

**60 Years German Basic Law:
The German Constitution and its Court**

[above]; *Testa v. Bundesanstalt für Arbeit* [41, 121 and 796/79]; *Heijn* [94/83]; *Fearon v. Irish Land Commission* [182/83]; *Altale* [240/83]; compare *M. Hilf* in *EuGRZ* 1985, 647 at 649). It has recognized the prohibition of retrospection as an emanation of the basic principle of legal certainty and has recognized the rule against double penalties (see *Racke* [98/78]; *Regina v. Kent Kirk* [63/83]; *Boehringer* [7/72]) and likewise the obligation under the rule of law to state reasons for individual decisions (see *Intermills v. E:C: Commission* [323/82]; *Netherlands v. E:C: Commission* [296 and 318/82]; *M. Hilf*, loc. cit on p. 650). In *Johnston v. The Chief Constable of the Royalulster Constabulary* (Case 222/84) the Court, having recourse to the constitutional traditions common to all member states and to Article 13 of the European Human Rights Convention, categorized the claim to effective judicial protection for the safeguarding of personal rights as a constituent part of the guarantees for fundamental rights under Community law. It regarded the duty to grant a legal hearing as an essential requirement of a fair procedural system (see *Pecastaing v. Belgian State* [98/79]).

For the purposes of defining under Community law the content and extent of fundamental rights, the Court has also referred to the European Human Rights Convention and its additional protocol (see *Rutili* (36/75)).

- bb) The European Parliament, the Council and the Commission of the Community adopted the following joint declaration on 5 April 1977 (O.J. 1977, C 103/1):

The European Parliament, the Council and the Commission, Whereas the Treaties establishing the European Communities are based on the principle of respect for the law;

Whereas, as the Court of Justice has recognized, that law comprises, over and above the rules embodied in the Treaties and secondary Community legislation, the general principles of law and in particular the fundamental rights, principles and rights on which the constitutional law of the member states is based; Whereas, in particular, all the member states are Contracting Parties to the European Convention for the protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, have adopted the following declaration:

1. The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the member states and the European Convention for the Protection of Human Rights and Fundamental Freedoms.
2. In the exercise of their powers and in pursuance of the aims of the European Communities, they respect and will continue to respect these rights. The European council adopted a declaration on democracy on 7/8 April 1978; it reads as follows:

The election of the Members of the Assembly by direct universal suffrage is an event of out-standing importance for the future of the European Communities and a vivid demonstration of the ideals of democracy shared by the people within them.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

The creation of the Communities, which is the foundation of ever closer union among the peoples of Europe called for in the Treaty of Rome, marked the determination of their founders to strengthen the protection of peace and freedom.

The Heads of State and of Government confirm their will, as expressed in the Copenhagen Declaration the European identity, to ensure that the cherished values of their legal, political and moral order are respected and to safeguard the principles of representative democracy, of the rule of law, of social justice and of respect for human rights.

The application of these principles implies a political system of pluralist democracy which guarantees both free expression of opinions within the constitutional organization of powers and the procedures necessary for the protection of human rights.

The Heads of State and of Government associate themselves with the Joint Declaration by the Assembly, the Council and the Commission whereby these institutions expressed their determination to respect fundamental rights in pursuing the aims of the Communities.

They solemnly declare that respect for and maintenance of representative democracy and human rights in each member state are essential elements of membership of the European Communities.

- e) Compared with the standard of fundamental rights under the Basic Law it may be that the guarantees for the protection of such rights established thus far by the decisions of the European Court, since they have naturally been developed case by case, still contain gaps in so far as specific legal principles recognized by the Basic Law or the nature, content or extent of a fundamental right have not individually been the object of a judgment delivered by the Court. What is decisive, nevertheless, is the attitude of principle which the Court maintains at this stage towards the Community's obligations in respect of fundamental rights, to the incorporation of fundamental rights in Community law under legal rules and the legal connection of that law (to that extent) with the constitutions of member states and with the European Human Rights Convention, as is also the practical significance which has been achieved by the protection of fundamental rights in the meantime in the Court's application of Community law. Although the above mentioned declarations of the institutions of the European Community and of the European Council may lack the formal character of Treaty law and though the Community as such is not a party to the European Human Rights Convention, those instruments are both internal to the Community and of legal significance as regards the relationship of the Community with its member states: they testify formally to the agreed legal view of the states party to the Treaty and of the Community institutions with regard to the Community's obligation to guarantee fundamental rights as they result from the constitutions of the member states and, by virtue of being general legal principles, attain validity as primary Community law; by their unanimous testimony to an intention as regards the application of the Community

**60 Years German Basic Law:
The German Constitution and its Court**

Treaties in practice, they are also of legal significance under international law for the definition of the content of the Treaties. The declarations also reinforce the European Court's jurisdiction and obligation to ensure the protection under Community law of these fundamental rights and the legal principles which they entail in accordance with its rules of procedure. Those rules of procedure, in relation to access to the Court, the given types of procedures, the powers of the Court to review and make decisions, the procedural principles and the effect of its decisions, are organized in a way which, in general, guarantees effective protection of fundamental rights which is to be regarded as substantially similar to the unconditional protection of fundamental rights under the Basic Law.

By virtue of the connection, through legal rules as explained above of the guarantees of fundamental rights contained in the constitutions of member states and in the European Human Rights Convention, with the general principles of Community law, the requirement of a catalogue of fundamental rights decreed by a Parliament, which was regarded as necessary by this Chamber in its judgment of 29 May, has also been satisfied in all, the circumstances. In the first place, since 1974 all the original member states of the Community (like those which acceded later) have acceded to the European Human Rights Convention, and their respective parliaments have approved their accession; in the second place, the common declaration of 5 April 1977, which was also adopted by the European Parliament, can be judged from the viewpoint of the requirement to be a sufficient parliamentary recognition of a formulated catalogue of effectively operating fundamental rights. Whilst this Chamber in its judgment of 29 May 1974, observed that the Community lacked a parliament legitimized by direct and democratic means and established by general suffrage which possessed legislative powers and to which the institutions competent to issue legislation were politically fully responsible, that was an element in the description of the state of integration as it appeared at that time; the basis for that finding was clearly the consideration that protection of fundamental rights has to begin as early as the stage of lawmaking and parliamentary responsibility provides a suitable protective arrangement for that purpose. There was no intention, however, of laying down a constitutional requirement that such a position must have prevailed before there could be any possibility of the withdrawal of the Federal Constitutional Court's jurisdiction over derived Community law in proceedings by way of review of legislation under Article 100.1 of the Basic Law.

Nor is it to be expected in view of the state of European Court case law achieved at the present stage that a decline in the standards of fundamental rights under Community law might result through the legal connection of Community law with the constitutions of member states to an extent that makes it impossible on constitutional grounds to regard a reasonable protection of fundamental rights as being generally available. In the first place, the Court is not obliged to determine the general principles of Community law according to the lowest common denominator derived from a comparison of the constitutions of member states, even if such deep differences between their Basic Laws exist at all or do arise in the future. It is to be expected rather that the European Court will strive to ensure the best possible development of any particular principle of fundamental rights in Community law. In the second place,

**Selected Fundamental Decisions of
the Federal Constitutional Court**

the taking into account for legal purposes of the European Human Rights Convention, together with the now extensive case law of the European Court in favour of human rights, guarantees a minimum standard of substantive protection of fundamental rights which, in principle, satisfies the legal requirements of the Basic Law as such. That position is not altered by the fact that the Community as such is not a party to the European Human Rights Convention.

The fact that at Community level questions of a different nature arise in certain circumstances in connection with the regulation of fundamental rights or the practical definition of the extent to which they are protected does not, in general, impair the adequacy of the protection of fundamental rights provided by Community law from the point of view of the Basic Law. In regard especially to the objectives laid down in the Community treaties, which for their part are compatible with the Basic Law, questions of balance will arise in this connection involving Treaty and common interest objectives of the Community which will not arise, at least directly, in the same way at member state level. Furthermore, the fundamental rights safeguarded by the Basic Law take their place in a constitutional framework as a body of rules representing a unified purpose and are accordingly to be interpreted and applied in harmony and coordination with other legal interests conferred or recognized thereby. They include the belief, expressed in the preamble forms, of supranational cooperation made possible under Article 24.1. Under the Basic Law, therefore it is also possible to have legal provisions at Community level which protect fundamental rights in accordance with the objectives and special structures of the Community; the substantive content of the fundamental rights and, indeed, of human rights on the other hand is unconditional and must continue in existence in face of the sovereign powers of the Community as well. This Chamber holds that requirement to be adequately guaranteed in general at the present stage at Community level.

- f) In view of those developments it must be held that, so long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law; references to the Court under Article 100.1 for that purpose are therefore inadmissible.
- g) The question must, therefore, remain unanswered whether the appellant is correct in its accusation that the disputed Commission regulations in the interpretation given by the European Court infringe its fundamental rights as recognized in Articles 12.1 and 2.1 in conjunction with Article 20.3 of the Basic Law. It does not appear either from the appellant's submissions or from the preliminary ruling of the European Court that

**60 Years German Basic Law:
The German Constitution and its Court**

the Court under its interpretation of the law is in general simply not prepared or not in a position to recognize or protect the fundamental rights claimed by the appellant and that, therefore, the degree of protection of such rights required by the Basic Law has in general clearly not been reached at the level of Community law. For those reasons the present case does not give any occasion to consider a review of the disputed Commission regulations in respect of their compatibility with fundamental rights under the Basic Law. A reference of the Commission regulations under Article 100.1 by the Federal Supreme Administrative Court in the main action would, therefore, have been inadmissible.

2. The appellant has not alleged, nor is there any evidence of any independent contravention by the judgment of the Federal Supreme Administrative Court of the constitutional rights which it claims would not be covered by the binding effects on that court of the European Court's preliminary ruling.

c) Part Translation of the Maastricht Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 89, 155*

Headnotes:

...

7. Sovereign acts of the European Communities also affect the holders of fundamental rights in Germany, and thereby touch on the guarantees of the Constitution and the role of the Federal Constitutional Court, which is responsible for the protection of fundamental rights in Germany, not only against German state organs (contrary to BVerfGE 58, 1 [27]). Nevertheless the Federal Constitutional Court exercises its jurisdiction over the applicability of secondary Community Law in Germany in a "relationship of cooperation" with the European Court of Justice.

...

Judgment of the Second Senate of 12 October 1993 - 2 BvR 2134/92 and 2159/92 -

...

Facts:

The recourse to the Federal Constitutional Court opposes Parliament's approval of the Treaty of Maastricht and the constitutional amendment to legalize Germany's membership in the European Union (Article 23 of the Basic Law) as well as to install a European Monetary Union

* Translation by Miriam Söhne; © Konrad-Adenauer-Stiftung.

**Selected Fundamental Decisions of
the Federal Constitutional Court**

(Article 88 of the Basic Law). The main interrelated but distinct issues of the claim are the expansion of the European Union competences and the potential existence of “absolute” limits to European integration.

German members of the European Parliament, belonging to the political party “Die Grünen” (The Green Party), and Manfred Brunner, a former high ranking official of the European Commission, lodged complaints of unconstitutionality with the Federal Constitutional Court.

The complainants claim that the amendments to the Basic Law and the law transforming the Treaty of Maastricht into national law violated the following: (1) the right to human dignity; (2) the right to free development of personality; (3) the right to form associations and societies; (4) the right to freely establish political parties; (5) the right to freely choose a trade, occupation or profession; (6) the right to property; (7) the right to elect deputies of the German Bundestag; (8) the right to constrain any person seeking to abolish the constitutional order of Germany.

...

Extract from the Grounds:

...

B. I.

2. b) The complainant argues that his fundamental rights were infringed because they are no longer guaranteed for Germany alone and by German state organs and therefore changed their content as they became European fundamental rights. This complaint is inadmissible, too. The openness of the Basic Law towards European Integration, which is already established in the preamble of the Basic Law and further regulated in Articles 23 and 24 of the Basic Law, has an impact on the possibility of encroachments upon fundamental rights. Those encroachments upon fundamental rights can also result from measures taken by the European organs. Thus, the protection of fundamental rights must be guaranteed throughout the territory where these measures apply; this especially widens the territorial scope of application of the fundamental liberties and the comparative perspective as regards the application of the rule of equality.

This does not result in a substantial decrease in the standard of fundamental rights protection. The Federal Constitutional Court by its jurisdiction (see BVerfGE 37, 271 [280 seq.]; 73, 339 [376 seq.]) generally guarantees an effective protection of basic rights for the inhabitants of Germany, also against the sovereign powers of the Communities. It guarantees that this protection of basic rights will be accorded the same respect as the protection of indispensable basic right guarantees under the constitution. In particular the court provides a general safeguard of the essential content of the basic rights. The court thus guarantees this essential content as against the sovereign powers of the Community as well (see BVerfGE 73, 339 [386]).

**60 Years German Basic Law:
The German Constitution and its Court**

Sovereign acts of the European Communities also affect the holders of fundamental rights in Germany, and thereby touch on the guarantees of the Constitution and the role of the Federal Constitutional Court, which is responsible for the protection of fundamental rights in Germany, not only against German state organs (contrary to BVerfGE 58, 1 [27]). Nevertheless the Federal Constitutional Court exercises its jurisdiction over the applicability of secondary Community Law in Germany in a “relationship of cooperation” with the European Court of Justice. In this relationship, the European Court of Justice guarantees the fundamental rights protection in each individual case for the whole area of the European Community, and the Federal Constitutional Court can therefore limit itself to the general guarantee of the indispensable fundamental rights standard (see BVerfGE 73, 339 [387]).

...

d) Translation of the Banana Market Organization Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 102, 147*

Headnotes:

1. Constitutional complaints and submissions by courts which assert that fundamental rights guaranteed in the Basic Law have been infringed by secondary European Community Law are inadmissible from the outset if their grounds do not state that the evolution of European law, including the rulings of the Court of Justice of the European Communities, has declined below the standard of fundamental rights required after the “Solange II” decision (BVerfGE 73, 339 [378 - 381]).
2. Therefore, the grounds for a submission or a constitutional complaint must state in detail that the protection of the fundamental rights unconditionally required by the Basic Law is not generally ensured in the respective case. This requires a comparison of the protection of fundamental rights on the national and on the Community level similar to the one made by the Federal Constitutional Court in the “Solange II” decision (BVerfGE 73, 339 [378 - 381]).

Order of the Second Senate of 7 June 2000 - 2 BvL 1/97 -

Facts:

The judicial referral concerns the question whether the application of the common organisation of the market in bananas of the European Community in the Federal Republic of Germany is constitutional. On 1 July 1993, the common organisation of the market in bananas (hereinafter: banana market organisation) entered into force pursuant to Article 33, sentence 2

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**Selected Fundamental Decisions of
the Federal Constitutional Court**

of Council Regulation (EEC) No 404/93 of 13 February 1993 (OJ L 47, 25/02/1993, p. 1 - 11; hereinafter: Regulation 404/93), which, *inter alia*, discontinued the tariff quota granted in the Banana Protocol (Regulation 404/93, Article 21 [2]).

The regulation differentiates bananas according to their origin: First, “Community bananas” are produced within the European Community. Second, “ACP bananas” come from certain African, Caribbean and Pacific countries, which, as the so-called ACP countries, have for a long time been linked to the European Community by special multilateral agreements. In this context, a quota of bananas of a total weight of up to 857,000 tonnes is referred to as “traditional” ACP bananas (cf. Annex of Regulation 404/93), this quantity corresponding to the customary import quantity from ACP countries. Imports that exceed this quantity are referred to as “non-traditional” ACP bananas. Finally, “third country bananas” are neither from the Community nor from ACP countries. As regards price and quality, neither Community bananas nor ACP bananas can compete with third country bananas. The aim of the banana market organisation is to support the banana production within the Community and to ensure the duty-free sale of traditional ACP bananas without hindering the import of third country bananas and non-traditional ACP bananas (Regulation 404/93, recitals 2 et seq.).

To achieve this, compensatory aid arrangements for Community bananas were created (Regulation 404/93, Art 10 et seq.). Traditional ACP bananas - as all bananas produced outside the European Community - require an import licence (Regulation 404/93, Article 17), but are duty-free (Regulation 404/93, recital 12). Non-traditional ACP bananas and third country bananas may be imported, in the framework of a specified tariff quota, at low customs duty rates or duty-free. Beyond this quota, however, they are subject to high levies.

The plaintiffs of both original proceedings are 19 companies of the so-called Atlanta group. As banana importers, they engage in all steps of transport, ripening and marketing. 30 per cent of their sales are obtained from the marketing of bananas. After the entry into force of the banana market organisation, the plaintiffs were allotted a provisional quota quantity for the third quarter of 1993. Objections raised against the limitation this allotment placed on the quantities of imports were dismissed. In the legal action they brought against this limitation, the plaintiffs put forward, at first, that Regulation 404/93 infringes Community law. The Administrative Court submitted the question to the Court of Justice of the European Communities. At the same time, it granted the plaintiffs, by means of temporary relief, further import licences for the months of November and December 1993, at a customs duty rate of 100 ECU per tonne, which were, in case of the plaintiffs losing the case on the merits, to be offset against the reference quantities to which the plaintiffs were entitled according to Community law.

The submission is inadmissible.

60 Years German Basic Law:
The German Constitution and its Court

Extract from the Grounds:

...

B.

...

II.

In its decision of 29 May 1974 - 2 BvL 52/71 (BVerfGE 37, 271 - "As long as ... Decision" [*Solange I*]), the competent Senate of the Federal Constitutional Court had, with reference to actual jurisdiction, come to the result that the integration process of the Community had not progressed so far that Community law also contained a codified catalogue of fundamental rights decided on by a Parliament and of settled validity, which was adequate in comparison with the catalogue of fundamental rights contained in the Basic Law. For this reason, the Senate regarded the reference by a court of the Federal Republic of Germany to the Federal Constitutional Court in constitutional review proceedings, following the obtaining of a ruling of the Court of Justice of the European Communities under Article 177 of the EEC Treaty, which was required at that time, as admissible and necessary if the German court regards the rule of Community law that is relevant to its decision as inapplicable in the interpretation given by the Court of Justice of the European Communities because and in so far as it conflicts with one of the fundamental rights of the Basic Law (BVerfGE 37, 271 [285]).

...

- 2 a) In its decision of 22 October 1986 - 2 BvR 197/83 (BVerfGE 73, 339 - [*Solange II*]), the Senate holds that a measure of protection of fundamental rights has been established in the meantime within the sovereign jurisdiction of the European Community which in its conception, substance and manner of implementation is essentially comparable with the standards of fundamental rights provided in the Basic Law, and that there are no decisive factors to lead one to conclude that the standard of fundamental rights which has been achieved under Community law is not adequately consolidated and only of a transitory nature (BVerfGE 73, 339 [378]).

On the basis of individual decisions of the Court of Justice of the European Communities, the Senate made statements concerning the standard of fundamental rights, and holds that this standard, particularly through the decisions of the Court of Justice of the European Communities, has been formulated in content, consolidated and adequately guaranteed (BVerfGE 73, 339 [378 - 381]). In this context, the Senate commented on the decisions of the Court of Justice of the European Communities concerning the fundamental rights and freedoms relating to economic activities, such as the right to property and the freedom to pursue economic activities (above, p. 380), but also on the freedom of association, on the general principle of equal treatment and the prohibition of arbitrary acts, religious freedom and the protection of the family, as well as on the principles, which follow from the rule of law, of the prohibition of

**Selected Fundamental Decisions of
the Federal Constitutional Court**

excessive action and of proportionality as general legal principles in achieving a balance between the common interest objectives of the Community legal system, and on the safeguarding of the essential content of fundamental rights (above, p. 380).

In summary, the Senate made the following statement: As long as the European Communities, in particular European case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of fundamental rights contained in the Basic Law. References (of rules of secondary Community law to the Federal Constitutional Court) under Article 100.1 of the Basic Law are therefore inadmissible (BVerfGE 73, 339 [387]).

- b) In its Maastricht Decision (BVerfGE 89, 155), the Senate maintained this view. In this decision, the Senate stressed that the Federal Constitutional Court, through its jurisdiction, guarantees, in cooperation with the Court of Justice of the European Communities, that effective protection of fundamental rights for the residents of Germany will also be secured against the sovereign powers of the Communities and is generally to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and that in particular the Court provides a general safeguard of the essential contents of the fundamental rights. The Federal Constitutional Court thus guarantees this essential content against the sovereign powers of the Community as well (BVerfGE 89, 155 [174 - 175], with reference to BVerfGE 37, 271 [280 et seq.] and 73, 339 [376 - 377, 386]). Under the preconditions the Senate has formulated in BVerfGE 73, 339 - “Solange II” -, the Court of Justice of the European Communities is also competent for the protection of the fundamental rights of the citizens of the Federal Republic of Germany against acts done by the national (German) public authority on account of secondary Community law. The Federal Constitutional Court will only become active again in the framework of its jurisdiction should the Court of Justice of the European Communities depart from the standard of fundamental rights stated by the Senate in BVerfGE 73, 339 (378 - 381).
- c) Article 23.1 sentence 1 of the Basic Law (inserted pursuant to the Law amending the Basic Law of 21 December 1992 - BGBl I, p. 2086 -) confirms this ruling. Pursuant to this law, the Federal Republic of Germany shall participate, with a view to establishing a united Europe, in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of fundamental rights essentially comparable to that afforded by the Basic Law. An identical protection in the different areas of fundamental rights afforded by European Community law and by the rulings of the Court of Justice of the European Communities, which are based on Community law, is not called for. The constitutional requirements are satisfied in

**60 Years German Basic Law:
The German Constitution and its Court**

accordance with the preconditions mentioned in BVerfGE 73, 339 (340, 387) if the rulings of the Court of Justice of the European Communities generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights.

- d) Thus, constitutional complaints and submissions by courts are, also pursuant to the Senate decision in BVerfG 89, 155, inadmissible from the outset if their grounds do not state that the evolution of European law, including the rulings of the Court of Justice of the European Communities, has resulted in a decline below the required standard of fundamental rights after the “Solange II” decision (BVerfGE 73, 339 [378 - 381]). Therefore, the grounds for a submission by a national court of justice or of a constitutional complaint which puts forward an infringement by secondary European Community Law of the fundamental rights guaranteed in the Basic Law must state in detail that the protection of fundamental rights required unconditionally by the Basic Law is not generally assured in the respective case. This requires a comparison of the protection of fundamental rights on the national and on the Community level similar to the one made by the Federal Constitutional Court in BVerfGE 73, 339 (378 - 381).

...

e) Translation of the Lisbon Treaty Judgment - Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 123, 267*

Headnotes:

1. With its Article 23, the Basic Law grants powers to participate and develop a European Union which is designed as an association of sovereign national states (Staatenverbund). The concept of *Verbund* covers a close long-term association of states which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order, however, is subject to the disposal of the Member States alone and in which the peoples of their Member States, i.e. the citizens of the states, remain the subjects of democratic legitimisation.
2. a) To the extent that the Member States elaborate the law laid down in the Treaties in such a way that, with the principle of conferral fundamentally continuing to apply, an amendment of the law laid down in the Treaties can be brought about without a ratification procedure, a special responsibility is incumbent on the legislative bodies, apart from the Federal Government, as regards participation; in Germany, participation must,

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**Selected Fundamental Decisions of
the Federal Constitutional Court**

on the national level, comply with the requirements under Article 23.1 of the Basic Law (responsibility for integration) and can, if necessary, be asserted in proceedings before the Federal Constitutional Court.

- b) A law within the meaning of Article 23.1 sentence 2 of the Basic Law is not required to the extent that special bridging clauses are restricted to areas which are already sufficiently determined by the Treaty of Lisbon. Also in these cases, however, it is incumbent on the *Bundestag* and - to the extent that the legislative competences of the *Länder* are affected, on the *Bundesrat* - to comply with its responsibility for integration in another suitable manner.
3. European unification on the basis of a union of sovereign states under the Treaties may not be realised in such a way that the Member States do not retain sufficient room for the political formation of the economic, cultural and social circumstances of life. This applies in particular to areas which shape the citizens' circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language and which unfold in discourses in the space of a political public that is organised by party politics and Parliament.
4. The Federal Constitutional Court reviews whether legal instruments of the European institutions and bodies, adhering to the principle of subsidiarity under Community and Union law (Article 5.2 ECT; Article 5.1 sentence 2 and 5.3 of the Treaty on European Union in the version of the Treaty of Lisbon <TEU Lisbon>), keep within the boundaries of the sovereign powers accorded to them by way of conferred power (see BVerfGE 58, 1 [30-31]; 75, 223 [235, 242]; 89, 155 [188]; see the latter concerning legal instruments transgressing the limits). Furthermore, the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 sentence 3 in conjunction with Article 79.3 of the Basic Law is respected (see BVerfGE 113, 273 [296]). The exercise of this competence of review, which is rooted in constitutional law, follows the principle of the Basic Law's openness towards European Law (*Europarechtsfreundlichkeit*), and it therefore also does not contradict the principle of loyal cooperation (Article 4.3 TEU Lisbon); with progressing integration, the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4.2 sentence 1 TEU Lisbon, cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and the one under Union law go hand in hand in the European legal area.

Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 -

Facts:

The subject matter of the *Organstreit* proceedings and constitutional complaints, which have been consolidated for joint adjudication, is the ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ no. C 306/1). The proceedings relate to the German Act

**60 Years German Basic Law:
The German Constitution and its Court**

Approving the Treaty of Lisbon and - partly - the accompanying laws to the Act Approving the Treaty of Lisbon: The Act Amending the Basic Law (Articles 23, 45 and 93), which has already been promulgated, but not yet entered into force, and the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters, which has been adopted, but not yet signed and promulgated.

...

The complainants in the constitutional complaint proceedings challenge the Act Approving the Treaty of Lisbon. Apart from this, the constitutional complaints of the complainants re III. and VI. concern the Act Amending the Basic Law (Articles 23, 45 and 93) as well as the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters.

...

The complainants concur in submitting that their right under Article 38 of the Basic Law is violated. They argue as follows: Article 38 of the Basic Law grants them, as Germans entitled to vote, the individually assertable right to participate in the election to the German *Bundestag*, to thereby take part in the legitimisation of state authority on the federal level and to influence its exercise. The transfer of sovereign powers to the European Union that is effected in the Act Approving the Treaty of Lisbon encroaches upon this right because the legitimisation and the exercise of state authority is withdrawn from their influence. The encroachment transgresses the boundaries of the powers granted with a view to European integration pursuant to Article 23.1 sentence 3 in conjunction with Article 79.3 of the Basic Law and is therefore not justified. To the extent that it is inviolable pursuant to Article 79.3 of the Basic Law in conjunction with Article 20.1 and 20.2 of the Basic Law, the principle of democracy is infringed in two different respects: by the competences of the German *Bundestag* being undermined on the one hand and by a lack of democratic legitimisation of the European Union on the other hand.

Extract from the Grounds:

...

B.

The constitutional complaints lodged against the Act Approving the Treaty of Lisbon are admissible to the extent that they challenge, on the basis of Article 38.1 sentence 1 of the Basic Law, a violation of the principle of democracy, the loss of statehood of the Federal Republic of Germany and a violation of the principle of the social state. The constitutional complaints of the complainants re (III) and (VI), lodged against the accompanying laws are admissible to the extent that they are based on Article 38.1 sentence 1 of the Basic Law (I.). The application made in the *Organstreit* proceedings re (II) is admissible to the extent that the applicant asserts a violation of the competences of the German *Bundestag* to decide on the deployment of the German armed forces (II.). In other respects, the constitutional complaints and the applications made in *Organstreit* proceedings are inadmissible.

...

**Selected Fundamental Decisions of
the Federal Constitutional Court**

- cc) To the extent that the complainants re III. and IV. allege the loss of statehood of the Federal Republic of Germany by the Act Approving the Treaty of Lisbon, their entitlement to lodge a constitutional complaint also results from Article 38.1 sentence 1 of the Basic Law.

According to the Basic Law, those entitled to vote have the right to decide “by a free decision” on the change of identity of the Federal Republic of Germany that would be effected by its becoming a constituent state of a European federal state, and the replacement of the Basic Law which would go with it. Like Article 38.1 sentence 1 of the Basic Law, Article 146 of the Basic Law creates a right of participation of the citizen entitled to vote. Article 146 of the Basic Law confirms the pre-constitutional right to give oneself a constitution from which the state authority founded on the constitution emerges and by which such authority is bound. Article 38.1 sentence 1 of the Basic Law guarantees the right to take part in the legitimisation of the state authority founded on the constitution and to influence its exercise. Article 146 of the Basic Law sets out, in addition to the substantive requirements laid down in Article 23.1 sentence 1 of the Basic Law, the ultimate limit of the participation of the Federal Republic of Germany in European integration. It is the constituent power alone, and not the state authority founded on the constitution, which is entitled to release the state that is founded on the Basic Law as its constitution.

The fact that Article 146 of the Basic Law does not establish an individual right that can be challenged individually, and can thus be asserted by a constitutional complaint within the meaning of Article 93.1 no. 4a of the Basic Law (see BVerfGE 89, 155 [180]), is not contrary to the possibility of lodging a constitutional complaint against the “loss of statehood”. For this does not rule out that a violation may be challenged of Article 146 of the Basic Law in conjunction with the fundamental rights, and rights equivalent to fundamental rights, mentioned in Article 93.1 no. 4a of the Basic Law, - here Article 38.1 sentence 1 of the Basic Law. The submissions of the complainants re III. and IV. is also not directly aimed at for instance holding a referendum. The submissions of the complainants re III. and IV. are rather directed against the alleged loss of statehood of the Federal Republic of Germany by the Act Approving the Treaty of Lisbon and thus also against the tacit replacement of the Basic Law.

...

- bb) Apart from this, the complainants re III. and V. are not entitled to lodge a constitutional complaint as regards other fundamental rights and rights equivalent to fundamental rights by the Act Approving the Treaty of Lisbon.
- (1) In their allegation that the Charter of Fundamental Rights, which is legally binding pursuant to Article 6.1 sentence 1 TEU Lisbon, makes human dignity a legal interest that may be weighed against other legal interests, the complainants re III. and V. do not state in a sufficiently substantiated manner that a violation of their fundamental right under Article 1.1 of the Basic Law is possible.

**60 Years German Basic Law:
The German Constitution and its Court**

The general provision concerning limitations under Article 52.1 of the Charter can at most restrict the human dignity guaranteed in Article 1 of the Charter, but not Article 1.1 of the Basic Law. For the European and the national levels of fundamental rights must be distinguished. The complainants do not even make submissions that sufficiently differentiate the levels of fundamental rights. What is more, Article 52.1 of the Charter might be, if at all, relevant to the national level of fundamental rights only to the extent that due to it, a level of protection of fundamental rights on the European level that is essentially comparable to that afforded by the Basic Law within the meaning of Article 23.1 sentence 1 of the Basic Law would no longer be guaranteed. Such shortcomings cannot be inferred from the complainants' submissions. The general curtailment of human dignity that is alleged by them does not follow without further ado from the Charter of Fundamental Rights or from the case-law of the Court of Justice of the European Communities that is cited by them. It will be for future proceedings to clarify whether and to what extent a decline of the protection of fundamental rights by changes in primary law can at all be admissibly challenged on the basis of Article 1.1 of the Basic Law and what requirements as to substantiation may be placed on such a challenge (see on the violation of fundamental rights of the Basic Law by secondary Union law BVerfGE 102, 147 [164]).

- (2) To the extent that the complainant re (III) moreover asserts that in the area of application of the Charter of Fundamental Rights, which is legally binding pursuant to Article 6.1 sentence 1 TEU Lisbon, the German state bodies are largely exempted from their obligation to respect the fundamental rights of the Basic Law, he also does not state in a sufficiently determined manner that a violation of his fundamental rights and rights equivalent to fundamental rights is possible.

Regardless of the range of the area of application of the Charter of Fundamental Rights pursuant to Article 51 of the Charter, the fundamental rights of the Basic Law are part of the core contents of the constitution that restrict the transfer of sovereign powers to the European Union pursuant to Article 23.1 sentence 2 of the Basic Law (see BVerfGE 37, 271 [279-280]; 73, 339 [376]). The Federal Constitutional Court no longer exercises its jurisdiction to decide on the applicability of secondary Union law and other acts of the European Union cited as the legal basis for any acts of German courts or authorities within the sovereign sphere of the Federal Republic of Germany, merely as long as the European Union guarantees an application of fundamental rights which in substance and effectiveness is essentially similar to the protection of fundamental rights required unconditionally by the Basic Law (see BVerfGE 73, 339 [376, 387]; 102, 147 [164]).

...

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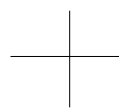
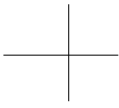
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INDEX

Abortion Cases (see also interruption of pregnancy) **180-221**

Abortion I 182-203

Abortion II 203-222

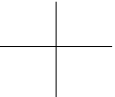

acoustic surveillance **652-671**

- and human dignity 652-653, 655-659, 661-665
- deletion of data that are absolutely protected 671
- information which is unconditionally protected 661
- prohibition of processing data that are absolutely protected 671

action, general freedom of 131, 132, 136-137, 140, 143, 223-224, 265

- constitutional requirement of a specific enactment 110, 119, 296, 331, 336-337, 344, 346, 348
- Elfes 130-131, 135, 143-144
- limits 131, 134, 147, 151, 165, 169, 184, 188, 209, 212, 232, 249, 251
- principle of proportionality 131, 137, 140, 144, 149-150, 154, 158, 167, 170, 175, 177, 191
- Riding in Forests 135-136, 140, 142-143
- the constitutional order (as a limit to the general freedom of action) 102, 126, 130-131, 133-134, 137, 147, 188, 268, 280, 311, 359, 361, 409, 440, 449, 472, 480, 499, 546, 549, 560-562, 564-565, 736, 775, 783

aliens law 241, 520, 744, 751

- deportation 744-745, 749, 750-751
 - exceptional leave to remain 733, 743
- 
- 

Index

Anachronistic Procession **475-482**

anchor provision 264, 274, 390-391, 500, 726, 751

animals 141, 276-286

- killing to be performed as gentle as possible 281-283
- protection based on ethical principles 280, 282-284
- ritual slaughter 276-282, 284-286
- slaughter of warm-blooded animals without previously stunning them 276-284

art, freedom of 469-473, 475

- definition of art 478-479
- limits 472, 474
- scope of protection 110, 137-138, 160-161, 164, 367-368, 402, 404, 408, 410, 412, 490, 570, 705, 708, 713

assembly 148, 272, 362, 367, 369-371, 523-532, 534-545

- demonstrations 131, 403, 526, 529, 530-531, 534-536, 538-545
- freedom of 367, 369-370, 525, 527-528, 530-532, 534-545
- limits 151, 165, 169, 184, 188, 209, 212, 232, 249, 251-253, 258, 262, 266, 269, 297, 308, 312, 316, 320-322, 325, 330-331, 335, 345, 347, 355-357, 390, 393, 417, 420-421, 452, 456, 460-461, 464, 467, 472, 474, 477, 480, 487, 494, 505, 513, 515, 537, 540, 542
- mass demonstrations 530-531, 539, 541-545
- obligatory registration 524, 531-532, 537-539, 543
- peacefulness 523, 525, 531-532, 537, 541-545
- proportionality 370, 525, 529, 540
- special importance 141, 209, 213, 362, 411, 421, 470, 561, 563, 693

Index

- assembly law 367, 369-370, 524-531, 534, 537-539, 541, 543-545
- association 121-122, 237, 246, 258-261, 281, 343, 363, 384, 393, 535-536, 540, 543, 546-548, 550, 553-554, 623, 705, 742, 777, 786, 788
- autonomy of 547-551, 553-554
 - freedom of 546-548, 550, 554, 777, 786
 - negative right of 287, 293, 295-296, 298, 301, 314, 323, 325-326, 331, 342-343, 346
 - religious freedom of 258, 277, 306, 308-310, 313-314, 319, 377, 386
 - relevance 467, 588, 595, 661, 664, 677, 692, 740, 747, 757
- asylum, basic right to 241, 270, 732-739, 741-747, 749, 751-752
- asylum law 735, 737-741, 746
 - asylum procedure 735, 741, 746, 749
 - European Convention of Human Rights (ECHR) 365, 509-513, 515-522, 644, 672, 745, 747
 - Geneva Convention on Refugees 737, 741-742, 744-745, 747-752
 - international agreements 432, 514-515, 709
 - member states of the European Union 365, 509, 703, 710-712, 721, 725, 727
 - right to guarantee of justice 102, 420, 422, 565, 567, 612, 655, 682, 751, 779
 - Third Country Rule 744-745
- Auschwitz Lie **365-372**
- Aviation Security Act **107-129**
- ban on extradition 705, 707-708, 711, 713, 729-730
- definition 371, 377, 382, 412, 457, 471, 478-479
 - responsibility for citizens 148, 269, 274, 323, 338-339, 361, 364, 392, 468, 534-535, 546, 562, 565, 602, 636, 682, 705, 707-708, 715-716, 726, 740, 762-763, 787

Index

- rule of law standards 100, 104, 106, 134, 137, 144, 149, 165, 217, 399, 421, 510, 512, 517, 566, 590, 648, 704, 717-718, 750, 769, 786-787

Banana Market Organization Decision **784-792**

Basic Law 99, 130, 222, 257, 350, 483, 523, 546, 557, 599, 644, 672, 703, 732

- as an objective value system 189, 296, 345, 417, 470, 500
- as a system bound by values 343
- openness towards European integration 514, 714, 753, 790-791
- openness towards international law 509, 513-514, 518, 520-521, 575, 708-709, 712, 726, 731, 735, 741, 746, 749, 752, 756, 761, 770, 780

basic legal order, free democratic 132, 148, 329, 352, 377, 394-395, 418, 535, 563, 566, 596

basic rights 101, 103, 204, 218-219, 352, 354-357, 377-378, 388, 443, 472-474, 765-766, 777, 783

- as constitutional guarantee 361, 363, 449, 471-472, 478, 494, 512, 521, 642, 661, 686
- as defensive rights 534, 655
- as objective norms 188, 354
- as objective principles 125, 140, 142, 227, 229, 239, 254, 311, 342, 350-352, 363, 389, 399, 417, 343, 487, 573, 581, 586, 594, 599, 600-601, 603, 609-611, 643, 650, 711, 770, 787
- as objective value system 189, 296, 345, 417, 470, 500
- concordance 277, 293-294, 309, 335, 715, 760
- conflicting basic rights 474
- effects between private parties 153, 198, 234, 260, 289, 317, 360, 368, 471, 517, 528, 547-549, 553, 701, 749
- encroachment upon 126-128, 133, 282, 333, 335-336, 343, 348, 360, 372, 395, 398, 415, 420, 516, 533-534, 558-559, 562-564, 573-574, 577-578, 586, 590-591, 594, 596, 601, 605, 608, 610, 612-613, 639, 651, 658, 660, 662, 667, 670, 681, 705, 707-708, 713, 716, 728, 730

Index

- institutional guarantee 485, 487, 488, 769
- interpretation 101, 112, 114, 130, 132, 134-135, 138, 145, 186, 202, 217, 240, 258-260, 262, 274-276, 284-286, 326-327, 350, 370, 377-378, 382, 409-410, 430-431, 469, 478, 510, 517, 537, 543, 558, 560, 564-566, 588, 600, 605, 611, 645, 647-648, 650, 720, 723, 758, 765, 770, 775, 781
- limits 101, 122, 131, 134, 147, 151, 165, 169, 184, 188, 209, 212, 232, 249, 251-253, 258, 262, 266, 269, 297, 308, 312, 316, 320-322, 325, 330-331, 335, 345, 347, 355-357, 390, 393, 417, 420-421, 452, 456, 460-461, 464, 467, 472, 474, 477, 480, 487, 494, 505, 513, 515, 537, 540, 542, 548, 549, 560, 562-563, 601, 604, 607, 610-611, 616, 618, 629, 635, 639, 640, 650, 652, 655, 657, 659-660, 676, 680-684, 687, 690-692, 694-698, 700-702, 712, 724, 726, 744-746, 751-752, 769-770, 775, 783, 789
- participatory rights 547, 551, 555
- principle of proportionality 101, 106, 126, 128, 130-131, 137, 140, 144, 149-150, 154, 158, 167, 170, 175, 177, 191, 280, 351, 370, 395, 397, 494, 499, 523, 525, 529, 531, 537, 540-541, 550, 558-559, 562-563, 565, 569-570, 572, 579, 581, 591, 601, 609, 613, 620, 648, 651, 653-654, 658-661, 666, 678, 686, 688, 696, 698, 700-701, 707, 711, 718, 726-727, 730, 766-767, 774
- protection of basic rights 766, 783
- protection of basic rights by procedure 774-775, 779-780
- scope of protection 110, 137-138, 160-161, 164, 367-368, 402, 404, 408, 410, 412, 490, 570, 705, 708, 713
- social rights 247
- the state's duty to protect 124-125, 167, 181-182, 204-205, 213, 215, 217-219, 221

Broadcasting Decisions **423-468**

- and freedom of opinion 350, 356, 375-379, 381-386, 389-390
- and opinion-forming 411
- Broadcasting I 425-452
- Broadcasting II 452-468

Index

- broadcasting under public law 354, 434, 437, 439-441, 450
- dual system 455-456, 458-459
- fees 432, 438, 455, 457
- freedom of broadcasting 428-429, 443, 449-451, 453, 460, 465-466
- legislative competence 425, 428-431, 436-438, 443-444, 446
- monopoly 427-428, 437-439, 444, 450
- private broadcasting 424, 452-455, 458-464

Brokdorf **530-545**

Caroline of Monaco II **401-415**

Catholic Church 258-259, 261

Catholic Rural Youth Movement of Germany (Katholische Landjugendbewegung Deutschlands)
259

census 143-146, 151-152, 155, 572

Census Act Case **143-155**

child as a cause of damage 205

Christianity 291-294, 306-307, 309, 312, 315

church 211, 323-324, 424, 543

- protection of status and freedom of the churches in their material basis 324, 543
- church collects 211
- church self-determination 211, 323-324

church's overall mandate 211, 426

civil servants 321, 329, 333-341, 349

Index

- duty of neutrality 330, 332, 337-339
- exercise of fundamental rights in office 321
- official duties 321-323, 333-340, 342, 344, 346, 348

clarity 155, 158, 165-166, 174, 176, 202, 457, 478, 491, 573, 579, 588, 594, 640, 677, 723, 771

Classroom Crucifix **301-318**

collective action 549

compensation 169, 206, 213, 229, 231, 234-235, 293, 401, 416, 419-420, 422, 516-517, 555, 672-679, 683, 688-690, 692, 694-698, 700-702

concordance 293-294, 309, 335, 715, 760

- practical concordance 277, 335
- principle of 296, 310, 317, 338, 715, 766

confession 262, 305-306, 312-313, 467, 664

conscience, freedom of 194, 258, 260, 269

- as a basic right 204, 215, 218-219, 308
- examination of conscience 267, 270

conscientious objection 265-275

- Act on the Reform of the Right to Conscientious Objection and Civilian Service 267, 272-273, 275

constitution 102-103, 110-112, 115-116, 118-119, 124-125, 131, 133, 156-157, 165-171, 173-175, 177-178, 182, 186, 188-192, 195, 197, 202-203, 208, 212, 215, 217, 219-221, 225, 266, 274, 296, 299, 308-310, 312, 315, 322-323, 331-332, 334-338, 340, 346, 354, 356, 417, 419, 486, 490, 498, 500, 507, 514, 539, 550, 561, 562, 589, 595, 710, 712, 715-716, 723, 726-727, 729-731, 754, 763, 777, 783, 791

constitutional amendment 249-250, 272, 557, 559-561, 564-565, 596, 652-656, 659-661, 726, 744, 752-753, 782

Index

- limits 249, 251-253, 258, 262, 266, 269, 297, 308, 312, 316, 320-322, 325, 330, 331, 335, 345, 347, 355-357, 390, 393, 417, 420-421, 452, 456, 460-461, 464, 467, 472, 474, 477, 480, 487, 494, 505, 513, 515, 537, 540, 542, 548-549, 560, 562-563, 601, 604, 607, 610-611, 616, 618, 629, 635, 639-640, 650, 652, 655, 657, 659-660, 676, 680-684, 687, 690-692, 694-702, 712, 724, 726, 744-746, 751-752, 769-770, 775
- constitutional complaint 107-109, 131-132, 134, 136-137, 139, 145-147, 149, 157, 223-224, 229-230, 233, 240, 248-249, 259, 277, 279, 288-290, 296, 300, 302-303, 310-311, 316-317, 320, 323, 332, 336, 354, 359, 374-375, 387-388, 392, 402-403, 415-416, 476-477, 497-498, 511, 513, 522, 524, 532-534, 547-548, 558, 560, 571, 586-587, 602, 612, 615, 627, 632-633, 642-646, 653-654, 668, 679, 706, 720, 729-730, 734, 746, 756, 763, 784, 788-790
 - admissibility 146, 149, 302-303, 313, 316, 533, 539, 559, 567, 645, 677, 680, 718, 721-722, 728, 730
 - scope of review 135, 236, 242, 322, 556
 - specific constitutional law 388
 - subsidiarity 146, 302, 705, 711, 724-727, 741, 787, 789
- constitutional requirement of the specific enactment of a statute 110, 119, 296, 331, 336-337, 344, 346, 348-349
- control over one's own image 404-405
- cooperation, relationship of 782, 784
- core foundational norms 99, 156, 262, 274, 309, 412, 417, 422, 501, 557, 652, 672, 744
- creed 257, 291, 294, 298, 715
- criminal law 102-103, 123, 180-187, 189-191, 193, 198, 200, 204, 208, 212, 357, 359, 360-361, 364-365, 370-371, 376, 380, 391, 394-397, 476-477, 481-482, 519, 523, 527, 545, 704, 711, 714, 718, 727, 739-740, 766
- criminal sanctions 190, 365
- cross 301-302, 304, 306-310, 312-315, 326, 343, 347, 374, 468
- Crucifix 301, 317, 343
- data collection **156-179**

Index

- protection of personal data 144-145, 147-148, 151-152, 163, 570, 589
 - statistic purposes 145, 149-155
- democracy, principle of 332, 338, 361, 363, 710, 713, 725, 729, 790
- Deutschland-Fernsehen-GmbH 426-427, 440, 442-444, 446, 451
- dietary laws, religiously motivated, observance of 262, 284, 340
- dignity 99-101, 103, 119, 121, 123, 125, 130, 134, 147, 187, 202, 268, 311, 324, 343-345, 370, 469, 473, 500, 566, 603
- discretion 135, 141-142, 193, 280, 290, 293-294, 300, 312, 316-317, 319, 321-322, 341, 360, 395-396, 462, 508, 540, 589, 604-605, 607, 646, 665, 685, 687, 704, 710, 715, 719-721, 723-724, 773
- discrimination, prohibition of 155, 223, 226, 247, 249, 251-252, 255, 492
- dissenting opinion 135, 203, 218, 220, 310, 316, 319, 333, 347, 387, 466, 490, 647, 697, 724, 726, 729
- domestic sphere 402, 406-407, 416, 518
- Eavesdropping **557-569**
- education, right of for the parents 323-326, 330-331, 334, 340, 342-343
- educational mandate (of the state) 290, 292, 308, 311
- effect between private parties (of the basic rights) 153, 198, 234, 260, 289, 317, 360, 368, 471, 517, 528, 547-549, 553, 701, 749
- election, right to stand for 536, 778, 790
- Elves **130-134**
- Employment Promotion Act 247-248, 551, 553-554
- equality, general principle of 102, 224, 226, 232, 242, 245-246, 249, 256, 286, 324, 347, 462, 492, 494, 556, 610, 614
- and legislative discretion 321, 589, 604, 607

Index

- and protection of the family 777, 786
 - arbitrariness 242, 256, 337, 359, 421, 467, 556, 566, 627, 643
 - equal access to public office in the civil service 320-321, 337
- eternity clause (Article 79.3 of the Basic Law) 652
- European Convention on Human Rights 397, 512-513, 515-520, 522, 672, 733, 744-745, 747, 751-752, 756-757, 776
- ranking in the hierarchy of norms 513
 - interpretation of German basic rights according to the convention 101, 204, 218, 352, 377, 388, 765, 777
- European Court of Human Rights 318, 331, 365, 402, 509-511, 513, 521, 575, 644
- binding effects of the decisions of the European Court of Human Rights 402, 509-511, 513, 521, 575
 - duty of the German courts to take the decisions into consideration 402, 509, 511, 575, 644
- Europe 365, 509, 515-516, 704, 708, 710-711, 726, 743, 779, 787
- European Arrest Warrant **703-731**
- European Court of Justice (ECJ) 644, 704, 756-762, 765-767, 782, 784
- binding effect 704, 757-762, 766
 - final decisions 756-758, 761, 767
 - guarantee of judicial relief 756, 758, 761-762, 767, 784
 - lawful judge 760
 - relation to the Federal Constitutional Court 759-760, 762, 782, 784
- European Union 108, 281, 424, 644, 703-706, 708-712, 714-715, 718-719, 724-725, 727, 729, 731-732, 754-758, 782-783, 787-790, 792
- European Union Law 509, 644, 703, 712, 721, 723-724, 729-731, 755-757

Index

- admissibility 302, 645, 718, 721, 728, 730
- constitutional complaint 302, 645, 706, 720, 729, 734, 756, 763, 784, 788-791
- “implied powers” 728, 754, 761-762, 767, 775-776, 778-780, 788-789
- principle of conferred powers 775, 789
- principle of proportionality 707, 711, 718, 726-727, 730, 766-767, 774
- principle of subsidiary 709, 773
- primacy in application 194, 519, 661
- primarily ruling 771

Evangelical Land church 295

expropriation 672-684, 688, 690, 697, 699, 702

- and definition of content 673, 675, 680, 688, 690, 694-695, 697, 702
- as a restriction of the right to property 681, 684, 686, 694-696, 698, 700-702
- by administrative measures 673, 676, 678-680, 700-702
- by legislative measures 680, 690
- compensation 672-679, 683, 688-690, 692, 694-698, 700-702
- guarantee of an existing legal interest 678, 683, 695-696, 701
- guarantee of its value 678
- principle of proportionality 678, 686, 688, 696, 698, 700-701
- protection of vested rights 677, 679, 682-683, 687, 690, 698

faction 186, 194, 206, 559

faith 257, 260-262, 282, 284-285, 289-293, 296, 298, 304-310, 315, 318, 320, 322-326, 328-332, 338, 708, 749

- right to undisturbed practice of religion 259-262, 264, 290, 294, 298, 322



Index

- freedom of conscience 258, 260
 - freedom of faith 257, 260-261, 290, 298, 320, 322, 323-326, 328, 330-332, 338
 - freedom to profess a faith 260
 - freedom to worship, proselytize and propagate 260
 - guaranteed unconditionally 322-323
 - harbour a faith in secret, right to 260
 - individual 257, 259, 262, 297-300, 304-306, 314-315, 322-323, 325-327, 332, 346, 733, 752
 - inner freedom 322
 - negative freedom of faith 287, 293, 295-296, 298, 301, 323, 325-326, 331, 342-343, 346
 - outer freedom 322
 - positive freedom of faith 287, 293, 296, 301, 325
 - profess a faith 257, 260, 287, 289, 293, 295-296
 - restrictions 308, 322-323, 330
 - right to undisturbed practice of religion 259-262, 290, 294, 298, 314, 322
- family 222, 228, 231-235, 240, 260, 308, 366, 408, 483, 485, 488, 490-491, 494, 496, 499, 501, 503, 516, 520, 522, 652, 662, 664, 667, 777, 786
- adoption 485, 509, 511
 - community of mutual assistance 483, 495
 - definition 487
- Federal Constitutional Court 99-100, 108, 131, 135, 144, 156, 182, 203, 222, 229, 241, 247, 259, 266, 277, 287, 301, 319, 352, 358, 366, 374, 391, 402, 416, 425, 452, 470, 476, 484, 497, 510, 524, 531, 547, 558, 570, 606, 614, 632, 645, 652, 673, 688, 696, 705, 733, 745, 758, 782, 784, 788
- relation to the European Court of Justice 644, 712, 756-762, 766-767, 782, 784

Index

- scope of review 100, 103
- separation of powers 611

Federal Intelligence Service **569-598**

federalism 754

free movement, right to 100-103, 107-110, 119, 123, 126-128, 223-224, 227, 241, 243, 246, 259-260, 274, 282, 287, 289-290, 293-296, 305, 308, 310, 324-325, 334, 340, 345, 350, 352-353, 355, 357, 361-364, 367, 371, 375, 387, 389-391, 415-420, 433-434, 460, 466, 478, 485, 493, 498-500, 502-505, 507-508, 523, 525, 527-528, 531, 534, 537, 543, 547-548, 554, 568, 577-578, 585, 588, 602, 608, 610, 612, 615, 627, 633, 653-654, 657-658, 660, 664, 666, 670, 684, 686, 705, 708, 719, 732-739, 741-747, 751-752, 767, 769, 772, 775, 777, 783

foundation norm 102, 306, 355, 443, 470-471, 509, 631, 676, 762

fundamental core principles of the Basic Law 102, 110, 119, 223, 227, 251, 254, 256, 259-261, 263, 268-270, 276, 279-280, 284-286, 295-296, 300, 304, 310, 313, 320-321, 326, 328-329, 351, 395, 417, 454, 477, 497-498, 503, 508-510, 513, 521, 524, 548, 562, 575-577, 590, 607, 612, 614, 633, 639, 645, 655-656, 678, 707, 719, 742, 745-746, 751-752, 756, 791

Geneva Convention on Refugees 737, 741-742, 744-745, 747-752

Glycol Wine **630-643**

Görgülü **509-522**

Groundwater **673-687**

guarantee of justice, right to 102, 104, 141, 182, 338, 346, 349, 420, 567, 607, 655, 710, 751, 779

headscarf 318-319

- expression of cultural separation 318, 320
- expression of religious conviction 324-326, 328, 332, 342-343
- headscarf 318-320, 323, 325-329, 336, 340-347
- political symbol of Islamic fundamentalism 318, 320, 323, 326, 329, 342, 344-345

Index

- religious symbol 318, 320, 325-326, 342, 344, 347
- requirement to wear 318-320, 323, 325, 327-328, 331, 341-343
- symbol of the social repression of women 327
- wearing of 318-320, 323, 325-329, 331-332, 340, 343-347

Hijab (Schächten) **276-286**

home 228, 260, 323, 401, 406-407, 414-415, 557, 644-654, 658, 660, 666, 714, 726, 733, 744

- business premises 257, 644-651, 663
- interpretation 645, 647-650, 656, 659, 660-661

human dignity **99-129**

- after death 119
- and right to personality 102, 104, 149, 204, 209, 219, 415-420
- and child as a cause of damage 205, 213, 217, 220
- and fundamental right to asylum 732-739, 741-747, 749, 751-752
- as the basic fundamental right 107, 110, 128
- content 125
- for the unborn human life 203-205, 207, 209-211, 213-218, 220
- guarantee of identity 147, 262, 327, 345, 577, 583, 657, 733, 738, 740
- human dignity 100-105, 107-108, 119-120, 123, 125, 144-145, 161, 180, 187-189, 203-204, 219, 263, 296, 324, 327, 354, 371, 377-378, 385, 389-390, 417, 470, 473, 500, 557, 559, 565, 566, 652, 653, 655-659, 661-665, 709, 735, 744, 751-752, 755, 783, 791-792
- life imprisonment 99-101, 103-106, 668
- object formula 421
- protection of 99, 102

Index

- scope of protection 110
 - unconditional protection of 780
- immigration law 749
- information, freedom of 350, 357-361, 363-364, 475
- as a human right 354-355, 357, 361, 377, 384, 417, 473
 - as an individual right 351, 471
 - in relation to the freedom of press and to the freedom of opinion 350, 356, 362, 375-379, 381-386, 389-390, 412
 - source of information 358, 362-363, 396
- inherent constitutional limitations 132-133, 251, 319, 361, 469, 472, 475, 605, 659
- inspect business premises, right to 644-645, 651
- insult 366, 368, 370-375, 377-378, 380-383, 386-387, 475
- integration, European 514-515, 712, 714, 724-725, 731, 755, 758, 760-761, 764, 770, 775-776, 783, 786, 790-791
- international law 351, 373, 509, 511, 513-514, 517-518, 520-521, 575, 708-709, 712, 715, 726, 731, 735, 740-741, 746-747, 749, 752, 756, 760-761, 764, 770, 774, 780
- customary international law 514
 - International Treaties 446, 509, 672, 732, 774
- interruption of pregnancy 180-190, 192-201, 203, 205-207, 209, 212-214, 217, 219-221
- inviolability of the home **644-658**
- and human dignity 102, 107, 119, 123, 371, 417
 - encroachments upon 651, 658
 - inspection 645-646, 649, 651
 - limits 650, 652, 655, 657



Index

- scope of protection 161, 402
- Islam 247, 276, 279, 282-285, 341, 344-345
- judicial relief, guarantee of 248, 533-534
- judicial relief, right to 248, 533-534
- judicial self restraint 329, 331, 339, 638
- law and constitution, binding of all public power to 761
- Legal Deposit Copies **688-695**
- legal person 500
- legislator 101, 203-204, 207-210, 215-216, 218-220
 - discretion 135, 141-142, 193
 - margin of appreciation 546
 - omission 348-349, 468, 566-567, 749
 - political responsibility 342, 350-551, 640
- Leipzig People's Daily **357-364**
- liberty of the person 109, 130, 257, 334-337, 558, 707, 754
 - admissibility of restrictions 149, 533, 539, 559, 567
 - formal guarantee 254, 303, 779
 - life imprisonment **99-106**
 - principle of proportionality 101, 106
 - substantive guarantee 656
- life imprisonment 99-101, 103-106, 668
- life, right to 100, 107-110, 119, 123, 126-128, 180-181, 185-189, 191-193, 203-204, 210, 217

Index

- unborn human life 203-205, 207, 209-211, 213-218, 220
- duty to protect 103-104, 125, 167, 181-182, 190, 192, 203-205, 207, 209, 211-221, 478, 490

Life Partnership Act **483-496**

- and Art. 6.1 of the Basic Law 486
- and inheritance law 494
- and the general principle of equality 492, 494
- and the law on revenue tax 257, 462, 618
- and the prohibition of discrimination 492

Lisbon Treaty **788-792**

loyalty 334-335, 337, 341

- to the law 338
- to the state 337-338

Lüth **350-356**

Lumber Room **258-264**

Maastricht **782-784**

market-related information by the government 632, 635

marriage **483-508**

- and life partnerships act 483-485

marriage and family, protection of **483-508**

Mephisto **469-474**

minorities, protection 301, 310, 458, 534, 536, 544

Index

Monument Protection Act **695-702**

- protection of monuments 696, 699
- property 672-678, 680-688, 690-702

Muslim butcher 276-277, 280, 282-284, 286

- fundamental right to occupational freedom 279, 282

Muslim pupils, integration 301, 327, 330-331

Muslima 318, 326-327

Non-Smoker Protection **613-630**

occupation, freedom of 599, 609, 615-617, 620, 625, 631, 633

- free choice 599
- one basic right 100-101, 105, 133, 353-354, 377-379, 387, 434, 474
- market-related information provided by the government 632, 635
- encroachment upon 601, 605, 608, 610, 612-613, 639
- scope of protection 110, 132, 138, 160-161, 164, 367-368, 402, 404, 408, 410, 412, 490, 576, 705, 708, 713

opinion, freedom of 350, 356, 362, 376-379, 381-386, 389-390, 412

- and defamation 360, 366, 370-371, 378, 383-386, 389-390, 476, 480-481
- and freedom of expression 350, 352, 354-362, 364, 367-370, 372, 382, 393, 433-434, 441, 472, 527, 534-535, 537, 666
- and freedom of information 350, 357-364, 475
- and human dignity 371, 417
- and right of assembly 523-524
- and right to personality 149, 209, 219, 243, 246, 415-420

Index

- collective defamation 383-384, 386, 389
- formal insult or abuse 368, 372, 378, 383-385, 536, 559, 566
- freedom to express one's opinion 322, 360-361, 454, 536
- freedom to form one's opinion 409
- limits 355-357, 390, 393
- relevance 467, 588, 595, 661, 664, 677, 692, 740, 747, 757
- scope of protection 367-368, 402, 404, 408, 410, 412

Parental Duty of Contact **496-508**

parents 210-211, 225, 228, 232-233, 246-248, 251, 253-254, 287, 290, 305, 408, 493-494, 496-497, 500-503, 505, 509, 511

- denominational parental right 493-494, 496, 500-505
- right to bring up their children 290, 302

in religious and ideological respects 192, 211, 259-263, 278-279, 290-291, 293-295, 298, 322-326, 329, 336, 339-342, 344-345, 347

parliament 102, 108, 131, 144, 203, 272, 280-283, 285, 332-334, 338, 346-347, 349, 392, 412, 424, 466, 509, 514, 547, 557, 570, 572, 574, 576, 579, 580-581, 584-585, 587-598, 630-631, 637, 665, 701, 704, 728-729, 758, 761, 764, 775-776, 780, 786, 789

- parliamentary approval 331, 782

personal determination in religious matters 297

personal honour, protection of 375-377, 381, 383-384, 390

personality, general right to 376, 387, 402-405, 408-410, 412-413, 482

- as protection of human dignity 377-378, 385, 389-390, 417, 470, 473
- as right to informational self-determination 144-145, 148-154, 156, 158, 162-164, 176-177, 571-572, 585



Index

- person upon which the public focuses 390, 399, 400-407, 412-415, 418
- privacy 402, 404-408, 414-416
- protection against defamation 360, 370-371, 378, 383-386, 389-390, 480
- scope of protection 110, 137-138, 160-161, 164, 367-368, 402, 404, 408, 410, 412, 490, 570, 705, 708, 713

Pharmacy **599-613**

pluralistic society 262, 299, 309

press 350, 358-361, 364, 391-402, 409-414, 418-420, 423, 430-431, 433, 449, 450, 453, 472, 475

- entertaining publications 402
- function 372, 392-393, 395
- legal status 393
- relevance 467

press, freedom of 358-361, 364, 391, 393-402, 409-412, 414, 418-420, 449-450, 472, 535, 577-578, 588-589, 594

- and secrecy of telecommunications 394
- as an individual basic right 377, 449
- institutional guarantee 393, 401-402, 410-411, 449-450
- limits 390, 393, 417
- scope of protection 367-368, 402, 404, 408, 410, 412

principle of certainty 464

principle of conferred powers 775, 789

principle of subsidiarity 146, 302, 705, 711, 724-727, 787, 789

privacy 162-163, 170, 181, 401-402, 405-408, 414-416, 499, 502, 559, 560-564, 576, 570-583, 585-591, 652-653

Index

- and persons upon which the public focuses 390, 399, 400-407, 412-418
- absolute protection 136
- limits 101
- relative protection 110
- domestic sphere 402, 406-407, 416, 518

privacy of correspondence, posts and telecommunications 559

- limits 560
- processing of personal data 572, 588
- scope of protection 570

procession 261

profess a belief 287, 289, 293, 295-296, 298

- freedom to 287
- fundamental right to 259-260, 287, 295, 310
- negative freedom to 289, 295-296, 298
- positive freedom to 293, 296, 298

Prohibition of Nocturnal Employment **222-227**

property 672-678, 680-702

- in civil law 674, 681-682
- in public law 674, 680-686, 691

property, right to 688

- compensation 672-679, 683, 688-690, 692, 694-698, 700-702
- constitutional protection of property 672, 683, 695-700, 702



Index

- definition of substantive content and limits 690, 694, 697, 702
 - expropriation 672-684, 688, 690, 697, 699, 702
 - individual right to property 678-683, 685, 687, 692, 697-698, 701
 - institutional guarantee 672, 677-687, 680-684, 686-687, 692, 694-696, 698, 701-702
 - legislator's discretion 686-687
 - no protection of assets 695
 - proportionality 678, 686, 688, 696, 698, 700-701
 - provision governing the nature and extent of compensation to be awarded 673, 676, 678, 697
 - relevance to society 672
 - scope of protection 683
 - social function of 672, 692
 - use of groundwater 683, 685
- proportionality, principle 101-102, 106, 126, 128
- and shooting down of an aircraft 107, 120-121, 123, 127-128
 - basis 123
 - in civil law 109, 111-112
 - in criminal law 100, 102-103, 123
 - in European Union law 108
 - judicial review 101, 103, 105
 - life imprisonment 99-101, 103-106
 - necessity (principle of least impact) 103

Index

- reasonableness (principle of reasonableness or proportionality in the narrow sense) 122, 127-128
 - suitability (principle of utility or effectiveness) 112-115, 118, 122, 125, 127
- protection for reliance on existing law 650, 744
- proviso of legality 707, 711, 717
- public office, access to 333, 337
- and equality 262, 268-269, 286, 318, 324, 335-336, 344-345, 347
 - prohibition of discrimination for religious reasons 286, 297, 299, 318
- public policy 259, 264, 635, 761
- public utility 582
- punishment 101-103, 105-106, 182-183, 190-197, 201-204, 207, 212, 216, 218, 220, 371, 375-376, 378, 380-381, 383, 527, 659, 668, 710, 716, 729, 745, 747, 748
- religion 257-262, 264, 276, 279, 282, 285-287, 290, 293-294, 296, 298-299, 304-307, 314, 319-320, 322-326, 329-332, 336, 338-339, 341-342, 345-346
- freedom of 257-260, 262-263, 279-280, 287, 301, 304-305, 318, 333, 336, 342-343, 346, 348
 - fundamental right to undisturbed practice 259-260
 - negative freedom 287, 293, 295-296, 298, 301, 323, 325-326, 331, 342-343, 346
 - reserve benefiting conscience and decisions based on belief 257-258, 260-261, 265-271, 273-274, 286, 313, 322
- religions and groups that share other beliefs 259, 261
- religious acts 294-296, 298
- religious affirmation 291, 307, 309, 312
- religious associations 260-261, 343

Index

- religious belief, freedom to profess 260, 318, 322-324
- religious communities 262, 305-306, 313
- corporate bodies 312
 - interpretation of the concept 285
- religious conviction 263, 277-278, 284-285, 293, 304-308, 310-311, 313-315, 322, 324-326, 328, 330-332, 341-343
- religious exercises 315, 325
- religious freedom 258, 277, 306, 308-310, 313-314, 319
- religious instruction 285, 287-295, 299, 309-310
- bound to a religious denomination 287-295, 301, 307-315, 330
 - content and objectives 290, 306, 309, 312-313, 315, 324, 344
 - participation in religious instruction of another religious denomination 260, 287-294, 299
- religious neutrality 323, 326, 330, 344
- religious or ideological activity 290-296, 298, 322-326, 329-330, 332, 336, 339-342, 344-345, 347
- religious orders 261, 291
- religious service 262
- religious society 324, 326, 345
- right of self-determination 324, 326
- religious symbols 305-306, 314, 320, 325-327, 341, 346-347, 349
- at school 306-308, 312, 314, 316-318, 327
 - potential for influence and conflict 332
- research and teaching, freedom of 350, 469

Index

Right of Assembly **523-530**

Right to Inspect Business Premises 644-645

right to life and physical integrity 192, 204

- the state's duty to protect 217

Riding in Forests **135-142**

Rubble Women **228-239**

- statutory pension insurance 229-231, 234-237

rule of law 100, 102, 134, 144, 149, 217, 268, 382, 399-400, 420-421, 464, 472, 566, 590, 648, 655, 704, 709, 714, 718, 728, 750-752, 769, 772, 777-779, 786-787

- guarantee of justice 268, 784
- principle 101, 104, 106, 137, 165, 510, 512, 517, 519, 521, 562-563, 565, 567-568, 635, 666, 692, 711, 713, 717, 726, 774
- principle of legal certainty 778
- principle of proportionality 101-102, 106, 126, 128
- procedural law 170, 522, 669, 714, 718, 763, 767
- retroactive effects of a statute 718
- prohibition of retroactive laws 718

school 257, 287-299, 301, 303-304, 306-316, 318-333, 336, 339-347, 349

- inclusive education 292, 296, 302, 309, 334
- neutrality of the state as regards religious matters 305, 308, 313, 318, 320, 323-326, 329-330, 332-333

School Prayer **287-300**

separation of powers 333, 420, 431, 514, 517, 526, 557-559, 565-567, 611

Index

Shiite Islam 276

Short-Work Benefits **546-556**

social state, principle of the 102-103, 150, 655, 751, 790

social welfare 134, 227, 231

Solange Decisions 754-782

- Solange I **754-767**

- Solange II **767-782**

Soldiers - Murderers **373-390**

Soraya **416-422**

speech, freedom of 351, 356, 365, 368, 373, 378, 383, 475

Spiegel **391-400**

state 101, 104-105, 109, 120-121, 123-125, 128, 131-132, 149, 154, 157, 159, 164, 167-170, 174, 181-182, 185, 188-190, 193, 197, 201-205, 211, 217-219, 221, 225, 227, 231, 250-252, 257, 261-263, 268-269, 274, 278, 286, 292-293, 301, 312, 333-337, 341, 348, 352, 355, 376, 381, 384, 390, 393-394, 397-400, 421, 424, 447, 450, 478, 491, 500-502, 511, 536, 557, 561-562, 566, 570, 572-573, 575-576, 600, 603, 636-637, 639, 644, 650, 653, 672, 687, 694, 697, 704, 708-709, 711, 715, 718, 726, 732-734, 736, 739, 741, 744-745, 748-750, 754

state religion 261-262, 286-287, 304, 318, 323-327, 329-331

statutes, general 101, 195, 334, 358, 375, 378, 391, 616, 696, 702, 764

- as a limit for basic rights 351-352, 354-358, 363, 370, 375, 377-378, 472
- constitutional requirement of a specific enactment (if constitutional rights are to be restricted by statute) 110, 119, 296, 331, 336-337, 344, 346, 348-349
- definition 336, 377, 382
- interpretation 335, 358, 377

Sunnite Islam 276, 278-279, 284-285

Index

Tamils 732-744

teacher 253-254, 287-289, 292-293, 297-300, 302, 312, 319-320, 322-323, 325-334, 336-337, 339-347, 349

- influence 260-261, 264, 290, 292, 305, 313, 315, 317, 324-326, 328, 332, 339-340, 343

- lack of aptitude for the office 320-321, 326-328, 330, 340

- official duties 321-323, 333-340, 342, 344, 346, 348

television 405, 423-424, 426-427, 429, 440-441, 443, 445, 448, 451

tolerance 262, 287-288, 291, 296-299, 309, 314-315, 324-325, 330, 345

trade unions 424, 546, 548, 550-551, 556

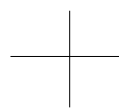
Transsexuals 240-245

unborn child 203-204, 207, 209-211, 213, 215, 217-218

Weimar Constitution 257-339

- guarantees of 331

- incorporation into the Basic Law 335



EXPLANATION OF ABBREVIATIONS

AFG	Arbeitsförderungsgesetz - Employment Promotion Act
AöR	Archiv des öffentlichen Rechts - Public Law Archive
AsylVfG/AsylVG	Gesetz über das Asylverfahren (Asylverfahrensgesetz - Asylum Procedure Act)
AuslG	Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet (Ausländergesetz) - Aliens Act
AZO	Arbeitszeitordnung - Working Time Ordinance
BAG	Bundesarbeitsgericht - Federal Labour Court
Bay VfGH	Bayerischer Verfassungsgerichtshof - Bavarian Constitutional Court
BayApothekenG	Bayerisches Apothekengesetz - Bavarian Pharmacy Act
BayObLG	Bayerisches Oberstes Landesgericht - Bavarian Higher Regional Court
BGB	Bürgerliches Gesetzbuch - German Civil Code
BGBI.	Bundesgesetzblätter - Federal Law Gazette
BGH	Bundesgerichtshof - Federal Court of Justice
BGH NJW	Case Law of the Federal Court of Justice published in NJW
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen - Decisions of the Federal Court of Justice in Criminal Matters
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen - Decisions of the Federal Court of Justice in Civil Matters
BNatSchG	Gesetz über Naturschutz und Landschaftspflege (Bundesnaturschutzgesetz) - Federal Nature Conservation Act

Explanation of Abbreviations

BRDrucks.	Bundesratdrucksachen - Bundesrat Printed Papers
BstatG	Gesetz über die Statistik für Bundeszwecke (Bundesstatistikgesetz) - Federal Statistics Act
BTDrucks.	Bundestagsdrucksachen - Bundestag Printed Papers
BVerfG	Bundesverfassungsgericht - Federal Constitutional Court
BVerfGE	Entscheidungen des Bundesverfassungsgerichts - Decisions of the Federal Constitutional Court
BVerwG	Bundesverwaltungsgericht - Federal Administrative Court
BVerwGE	Entscheidungen des Bundesverwaltungsgerichts - Decisions of the Federal Administrative Court
BWaldG	Bundeswaldgesetz - Federal Forests Act
CDU	Christlich Demokratische Union - Christian Democratic Union
cf.	confer
CSU	Christlich Soziale Union - Christian Social Union
DSchPflG	Denkmalschutzpflegegesetz - Monument Protection Act
DVBl.	Deutsches Verwaltungsblatt - German Administrative Paper
e.V.	eingetragener Verein - Incorporated Society
ECHR	European Convention on Human Rights
EMRK	Europäische Menschenrechtskonvention - European Convention on Human Rights (ECHR)
EStG	Einkommensteuergesetz - Income Tax Act
FDP	Freie Demokratische Partei - Free Democratic Party
G 10	Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses

Explanation of Abbreviations

GDR	Deutsche Demokratische Republik (DDR) - German Democratic Republic
GFK	Genfer Flüchtlingskonvention - Geneva Convention on Refugees
GG	Grundgesetz - German Basic Law
GVBl	Gesetz- und Verordnungsblatt - Law and Ordinance Gazette
GVG	Gerichtsverfassungsgesetz - Judicature Act
IRG	Gesetz über internationale Rechtshilfe in Strafsachen - Law on International Judicial Assistance in Criminal Matters
JöR	Jahrbuch des öffentlichen Rechts der Gegenwart - Yearbook of the Present Public Law
JZ	Juristenzeitung - Journal for Lawyers
KDVNG	Gesetz zur Neuordnung des Rechts der Kriegsdienstverweigerung und des Zivildienstes - Act on the Reform of the Right to Conscientious Objection and Civil Service
LPartDisBGGesetz	zur Beendigung der Diskriminierung gleichgeschlechtlicher Lebenspartnerschaften - Act to End Discrimination Against Same-Sex Life Partnerships
LRG NW	Rundfunkgesetz für das Land Nordrhein Westfalen - Broadcasting Act for the Land of North Rhine Westfalia
LTDrucks.	Drucksachen des Landtages - Land parliament documents
MVVerfG	Verfassungsgerichtshof Mecklenburg-Vorpommern - Constitutional Court of Mecklenburg-West Pomerania
NJW	Neue Juristische Wochenschrift - New Legal Weekly Journal
NStZ	Neue Zeitschrift für Strafrecht - New Journal for Criminal Law
NVwZ	Neue Zeitschrift für Verwaltungsrecht - New Journal for Administrative Law
op. cit.	opera citato

Explanation of Abbreviations

OVG	Oberverwaltungsgericht - Higher Administrative Court
p.	page
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen - Decisions of the High Court of the German Empire in Civil Matters
RVO	Rechtsverordnung - Executive Order Law
SPD	Sozialdemokratische Partei Deutschlands - Social Democratic Party of Germany
StGB	Strafgesetzbuch - German Criminal Code
StPO	Strafprozessordnung - Code of Criminal Procedure
StVG	Straßenverkehrsgesetz - Road Traffic Act
StVollZG	Strafvollzugsgesetz - Penal Law
UrhG	Gesetz über Urheberrecht und verwandte Schutzrechte - Law on Copyright and Related Rights
VersammlG	Versammlungsgesetz - Assembly Act
VersR	Versicherungsrecht - Insurance Law
VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechts-lehrer - Publications of the Association of German Public Law Teachers
VwGO	Verwaltungsgerichtsordnung - Administrative Court Procedures Code
WHG	Wasserhaushaltsgesetz - Water Resources Act
ZPO	Zivilprozessordnung - Code of Civil Procedure
ZRP	Zeitschrift für Rechtspolitik - Journal on Legal Policy