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THE CONSTITUTIONS OF WEST GERMANY AND THE UNITED STATES: A COMPARATIVE STUDY†

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THE Basic Law for the Federal Republic of Germany (hereinafter referred to as the Basic Law)¹ invites attention and study for several reasons. Constitution-making has been a significant political development on the world scale since World War II.

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† The subject is treated under the following principal headings beginning at the pages indicated.

- I. Basic Principles, p. 1094.
- II. Political Freedom, p. 1097.
- III. Basic Rights, p. 1102.
- IV. The Federal Principle, p. 1138.
- V. Separation of Powers, p. 1157.
- VI. The Federal Constitutional Court, p. 1162.
- VII. The Amending Process, p. 1182.

¹ Use of the English term "Basic Law" in reference to the Constitution of West Germany is derived directly from the official German term *Grundgesetz*. This term is used rather than the term *Verfassung* (Constitution), since the *Grundgesetz* is viewed as a fundamental statute designed to establish the order of the political life during the transitional period pending reunification of Germany and the adoption at that time of a permanent constitution for the German people. See the Preamble to the Basic Law.

For the German text of the Basic Law, see *GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND* included in *FORSTHOFF, ÖFFENTLICHES RECHT—SAMMLUNG STAATS- UND VERWALTUNGSRECHTLICHER GESETZE* 1 et seq. (1956). The author when quoting the Basic Law in this article relies on the approved English translation of the text as effective on March 15, 1955, entitled "Basic Law for the Federal Republic of Germany." This English version, published by the Deutscher Bundestag, was edited by the Linguistics Section of the Foreign Office of the Federal Republic of Germany on the basis of a translation made by the Legal Staffs of the Allied High Commission. Because of reliance on this 1955 text, later amendments of the Basic Law, except those amending Part X, dealing with questions of finance, will be disregarded.

For the texts of the constitutions of some of the *Länder* (states), in parallel English and German versions, see *CONSTITUTIONS OF THE GERMAN LÄNDER*, prepared by Civil Administrative Division, Office of Military Government (U.S.) (1947).

For extended commentaries on the Basic Law, see *KOMMENTAR ZUM BONNER GRUNDGESETZ (BONNER KOMMENTAR)*, ed. by Dennewitz and Wernicke (1949); *HAMANN, DAS GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND* v. 23.5.1949 (1956); *VON MANGOLDT AND KLEIN, DAS BONNER GRUNDGESETZ*, 2d ed. (1955); *MAUNZ AND DÜRIG, GRUNDGESETZ* (1959). A briefer treatment is found in *MAUNZ, DEUTSCHES STAATSRRECHT*, 8th ed. (1958).

For an analysis of the Basic Law at the time it was adopted, see Friedrich, "Rebuilding the German Constitution," 43 *AM. POL. SCI. REV.* 704 (1949) (Part II); Lenhoff, "The German (Bonn) Constitution with Comparative Glances at the French and Italian Constitutions," 24 *TULANE L. REV.* 1 (1949).

Perhaps at no one time has so much energy been expended on the preparation of new written constitutions, with emphasis on judicial review and the protection of basic rights as means of furthering the aims of a democratic society.² West Germany's Basic Law acquires added interest in the light of its antecedents,³ the manipulation of the constitutional structure during the Hitler regime, and the attempt in the new Basic Law to raise to its highest and most secure level the familiar conception of the *Rechtsstaat*, i.e., the conception of the state permeated and governed by the rule of law. Finally, for Americans the Basic Law has added interest, not only because American influence played some part in the shaping of the Basic Law but also because of the comparisons and contrasts it suggests with the Constitution of the United States.⁴ It is evident that the two constitutions share many points in common: both have a democratic foundation in the institutions of free suffrage and representative government, both establish a federal structure, both articulate the principle of separation of powers, both define basic rights of the individual, and, finally, but by no means least, both commit the final interpretation of the written document, viewed as a limitation on the authority of all branches of government, to the judiciary in the exercise of the power of judicial review. However, even though these two constitutional systems rest on a common basis of fundamental principles, a comparison of the institutional framework designed for the implementation of these principles, particularly in regard to such matters as the structure of federalism and the instrumentalities and methods of judicial review, reveals conspicuous differences. The purpose of this article is to present a descriptive overall picture of the fundamental

² See Dietze, "Judicial Review in Europe," 55 MICH. L. REV. 539 (1957); Dietze, "America and Europe—Decline and Emergence of Judicial Review," 44 VA. L. REV. 1233 (1958). See also ZURCHER, CONSTITUTIONS AND CONSTITUTIONAL TRENDS SINCE WORLD WAR II, 2d ed. (1955); BOWIE AND FRIEDRICH, STUDIES IN FEDERALISM (1954).

³ Although no attempt will be made in this article to relate the features of the Basic Law to their antecedents in German constitutional history, it should be emphasized that a number of fundamental principles and institutions incorporated in the Basic Law are derived from the earlier constitutional tradition.

For the historical background of the Basic Law and the developments leading to its drafting and adoption, see Friedrich, "Rebuilding the German Constitution," 43 AM. POL. SCI. REV. 461 (1949).

For useful brief treatments of judicial review under the Weimar Constitution, see von Mehren, "Constitutionalism in Germany—the First Decision of the New Constitutional Court," 1 AM. J. COMP. L. 70 at 71-74 (1952); Nagel, "Judicial Review in Germany," 3 AM. J. COMP. L. 233 (1954).

⁴ Except where the use of the longer term seems necessary to avoid confusion, the author uses the term "Constitution" in the text to refer to the Constitution of the United States.

features of the system established by the Basic Law and at the same time point up significant comparisons and contrasts by reference to the Constitution. Eleven years have now elapsed since the Basic Law went into effect, and significant decisions of the Federal Constitutional Court (*Bundesverfassungsgericht*),⁵ noted at the appropriate points, serve to illuminate the working of the system established by it.

It may be observed at the outset that the Basic Law is a more thorough and extensive document than the United States Constitution. It consists of eleven parts, including the final part with its detailed transitional and concluding provisions. Substantially longer than the Constitution as amended, it elaborates in greater detail the treatment of certain corresponding items and deals at length with subjects not embraced by the Constitution. Thus the basic substantive rights of the individual set forth in Part I are more comprehensively stated than in the first eight amendments to the Constitution and in corresponding provisions of state constitutions. The distribution of authority between the federal government (Federation) and the ten states (*Länder*), made explicit in a detailed recital of exclusive and concurrent powers and in the formulation of the role of the *Länder* in the enforcement of the Federation's laws, receives more detailed treatment than that accorded by the Constitution, although it should be observed that the concept of federalism embodied in some of these features differs materially from the American pattern. Finally, the Basic Law treats in detail some matters which under the Constitution are left to be worked out by Congress in the exercise of its discretion. Attention is called, for instance, to those features of Part X of the Basic Law that are concerned with budgetary matters. Whereas the drafters of the Constitution limited themselves to constitutional essentials and often employed general phrases capable of wide and varied interpretation that left much to legislative discretion and judicial interpretation, the drafters of the Basic Law evidenced by their product a determined effort to deal more thoroughly and explicitly with the matters coming within the range of the constitution, and in achieving this result they framed a relatively less

⁵ Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts*) are reported in bound volumes. The abbreviation "*BVerfGE*" is used in referring to these reports.

No attempt is made within the bounds of this article to deal with the numerous decisions by the other federal courts and by the courts of the *Länder* on constitutional questions.

elastic document. Indeed, the Basic Law, taking account of the range of matters and the detail included in it, is in many respects reminiscent of the lengthier American state constitutions.

I. BASIC PRINCIPLES

Turning to the substance of the Basic Law, attention is called at the outset to the statements of basic principles that serve as foundations to define the nature and objectives of the politically organized society governed by it. The key provisions are stated in Article 20 as follows:

“(1) The Federal Republic of Germany is a democratic and social federal state.

“(2) All state authority emanates from the people. It is exercised by the people by means of elections and voting and by separate legislative, executive and judicial organs.

“(3) Legislation is subject to the constitutional order; the executive and the judiciary are bound by the law.”

The foregoing provisions are supplemented by the statement in the first paragraph of Article 28 that the “constitutional order in the *Länder* must conform to the principles of republican, democratic and social government based on the rule of law, within the meaning of this Basic Law.” Reference should also be made at this point to the provisions of Article 1:

“(1) The dignity of man is inviolable. To respect and protect it is the duty of all state authority.

“(2) The German people therefore acknowledges inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

“(3) The following basic rights bind the legislature, the executive and the judiciary as directly enforceable law.”

Taken together, these provisions state the basic premises of the German constitutional system. It establishes a democratic state that rests on the authority of the people. The form of government is republican in that the people's authority is made effective by means of elections, voting, and the institutions of representative government. It is a federal state that recognizes a distribution of authority between the Federation and the *Länder*. It is a social state in that it recognizes the positive function and authority of the government to promote the common weal, as well as its duty to respect and protect the dignity of man which becomes the ultimate value and furnishes the foundation of the acknowledged

"inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world." Finally, this constitutional order rests on "the rule of law," whereby all governmental authority, operating within the framework of the separation of powers, is subject to legal restraints and obligations in order to achieve the fundamental objectives of the constitutional order.⁶ The object to be achieved then is a constitutional democracy capable of serving the needs of the modern welfare state. Although resting on the will of the people made manifest by the election of representatives to a parliamentary law-making body, it is not an unlimited democracy since the Basic Law as a limitation on the legislative as well as the executive and judicial powers, and the source of directly enforceable rights, all ultimately vindicated by an independent judiciary exercising the power of judicial review, serves to limit the majority will. The subjection of all authority to the rule of law, with the important position thereby accorded to the judiciary as a means of nullifying unauthorized governmental action as well as action violating basic rights and other specific limitations, elevates the idea of the *Rechtsstaat* to its highest level. Indeed, in view of the authority that may be exercised by the judiciary, and notably by the Federal Constitutional Court, as pointed out later, the fear has been expressed that the new German constitutional order may be transformed from a *Rechtsstaat* (one governed by the rule of law) to a *Justizstaat* (one governed by the judiciary).⁷

In adopting, on the one hand, the conception of the dignity of man and his right to the free development of his personality, made

⁶ Decisions of the Federal Constitutional Court emphasize the importance of these general principles as bases for constitutional interpretation. See, e.g., the opinion in the famous "Southwest" case, 1 *BVerfGE* 14 (1951), where the Court held invalid the federal statute which extended the terms of two state legislatures (*Landtage*) until the completion of territorial reorganization was effected, on the ground that this intervention in the legislative process of the *Länder* violated basic concepts of democracy and federalism. See von Mehren, "Constitutionalism in Germany—the First Decision of the New Constitutional Court," 1 *AM. J. COMP. L.* 70 (1952); Leibholz, "The Federal Constitutional Court in Germany and the 'Southwest' Case," 46 *AM. POL. SCI. REV.* 723 (1952).

See also the decision in 9 *BVerfGE* 268 (1959), where the Court relied on the rule of law idea in holding invalid in its application to permanent civil service officers (*Beamte*), that part of a *Land* law which provided that in the case of a dispute between the administration and these officers concerning appointment, promotion, and other personal matters, the final decision would be made by an independent commission instead of by the administration. The Court thought that it was incompatible with the rule of law to have these questions affecting civil service personnel of this class decided by a commission that was not responsible to the administration.

⁷ See Rupp, "Government Under Law in Germany," 9 *ANNALES DE LA FACULTÉ DE DROIT D'ISTANBUL* 101 at 111 (1959). This paper by Judge Hans Rupp of the Federal Constitutional Court was originally presented by him before the Colloquium on "The Rule of Law in the West," held at Chicago in September 1957.

concrete by the detailed catalogue of basic rights, and, on the other hand, the conception of the social state with its responsibility for promoting the common weal, the Basic Law attempts a synthesis of the individual freedom that serves as a restraint on power and the individual's claim upon the state to advance and promote his well being.⁸

The political order established by the Constitution of the United States also rests on the will of the people made manifest in the right to elect representatives under a republican form of government. The founding fathers were not interested in establishing a democratic order in the sense of uncontrolled popular will, and indeed, the word "democracy" does not appear in the Constitution. But with the growth of democratic ideas and institutions, the political order is recognized as a constitutional democracy, although it is a limited democracy in that the judiciary may intervene to invalidate unauthorized or prohibited legislative acts and to protect constitutionally-recognized rights. The term "rule of law" (as equivalent to *Rechtsstaat*) does not appear in the Constitution and indeed is not generally as well favored in American usage as "government under law" or "supremacy of law." But the idea is implicit in the fundamental structure and operation of our system.

To some it may appear that a fundamental difference in basic orientation between the United States Constitution and the Basic Law is that the Constitution was formulated with an eye principally to limitations on power in the interests of human freedom. The structure of the federal system, with its delegation of limited power to the federal government, the separation of powers within the federal government, and the prohibitions on power together with the recognition of basic rights, all evidence a mistrust of power and the attempt to keep it within limits. In short, this view accepts the idea of a government of limited and divided functions, epitomized in Jefferson's famous statement that that government governs best which governs least, and emphasizes the negative aspects of the Constitution as a restraint on power in the interests of

⁸ Judge Rupp in his article, *id.* at 102-103, after referring to the opinion expressed by some German writers that the concept of a social welfare state subject to the rule of law (*sozialer Rechtsstaat*) is a contradiction in terms, goes on to say, "But the Federal Constitutional Court in several decisions has taken the view that a '*sozialer Rechtsstaat*' is not a contradiction in itself, but that the '*Sozialstaatsprinzip*' carries an obligation to the legislator and at the same time should guide the executive and the judiciary to such an interpretation of individual liberty which aims at the common good of all." Judge Rupp here cites the decisions in 3 *BVerfGE* 377, 381 (1954); 4 *BVerfGE* 96, 102 (1954); 5 *BVerfGE* 85, 198 (1956).

freedom. By comparison the Basic Law in establishing a democratic and social order places more emphasis on the positive function of government in promoting the purposes of the social welfare state. There is merit in this comparison, but it is easily overemphasized. The Preamble to the Constitution states great and positive purposes of the government created by it—"to establish a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty. . . ." Certainly it is true that with the growing demands upon the government to promote the well-being of its citizens, the constitutional order, given an assist by flexible judicial interpretation responsive to the felt needs of the times, has been accommodated to the increased functions of the welfare state, notwithstanding the distribution and dispersal of power and the system of checks and balances established by the fundamental law. Indeed, the Supreme Court⁹ has been concerned with a re-appraisal of constitutional values in terms of their relevancy to contemporary understanding of the nature and purpose of a democratic society.¹⁰

Attention will now be given to specific features of the Basic Law designed to implement the concept of a democratic, social order operating within the framework of the rule of law.

II. POLITICAL FREEDOM

The Basic Law, recognizing that all state authority emanates from the people, by means of elections,¹¹ establishes the *Bundestag* as the primary law-making authority of the Federation. It consists of representatives elected in "universal, direct, free, equal and secret elections."¹² The Basic Law incorporates the same provision respecting the representative bodies that govern the *Länder*, the counties and communes.¹³ Anyone who has attained the age of twenty-one years is entitled to vote for representatives in the

⁹ The term "Supreme Court" will be used in the text to refer to the Supreme Court of the United States.

¹⁰ In recent years the Supreme Court has accorded less judicial protection to economic liberty and property rights but, on the other hand, has used its power of judicial review more vigorously to protect freedom of expression, the procedural rights of the accused, and freedom from racial discrimination. This shift in emphasis finds its explanation in judicial accommodation of constitutional interpretation to the Court's understanding of the values basic to a democratic society. See KAUPER, *FRONTIERS OF CONSTITUTIONAL LIBERTY* 18-54 (1956).

¹¹ Art. 20, §(2).

¹² Art. 38, §(1).

¹³ Art. 28, §(1).

Bundestag and anyone who has attained the age of twenty-five is eligible for election.¹⁴ Qualifications for voting for representatives in the legislatures of the *Länder* are determined by the laws of the respective *Länder*. This pattern for the determination of voting rights and qualifications differs in some respects from that followed in the American system. The Constitution creates the right to vote for congressional representatives and senators.¹⁵ On the other hand, the right to vote in state and local matters is derived from the respective state constitutions. The Constitution without defining qualifications states that persons qualified by state law to vote for the most numerous branch of the state legislature are thereby qualified to vote for representatives and senators.¹⁶ Thus qualification under state law becomes the standard for voting for both federal and state legislative officers. However, the express prohibitions of the Fifteenth and Nineteenth Amendments which deny the power to define voting qualifications by reference to race, color, or sex, in addition to the general prohibition against discrimination stated in the equal protection clause of the Fourteenth Amendment, restrict the states in defining qualifications.¹⁷

The Basic Law recognizes that political parties are indispensable to the functioning of a democratic society resting on the will of the people.¹⁸ Indeed, they are considered quasi-organs of the state.¹⁹ Article 21 states that political parties may be freely formed, that their internal organization must conform to democratic principles, and that they must publicly account for the sources of their funds.²⁰

¹⁴ Art. 38, §(2).

¹⁵ See *United States v. Classic*, 313 U.S. 299 (1941).

¹⁶ Art. I, §2, ¶ 1. (representatives); Amendment XVII (senators).

¹⁷ Consistent with these limitations, the states are free to determine age limits for voting and may further define voting qualifications by reference to such factors as citizenship, literacy, and the payment of poll taxes. See *Breedlove v. Suttles*, 302 U.S. 277 (1937) (payment of poll tax requirement); *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959) (literacy test).

Although the Constitution prohibits racial discrimination in the enjoyment of the voting right, some of the states by various devices have effectively denied Negroes the right to vote. Congress, which has the power to enforce the provisions of the Fourteenth and Fifteenth Amendments, has recently enacted the Civil Rights Act of 1960, which includes new remedial provisions designed to secure the right to vote free from racial discrimination.

¹⁸ Art. 21, §(1).

¹⁹ Thus under Art. 93, §(1), No. 1 of the Basic Law, dealing with the jurisdiction of the Federal Constitutional Court in cases brought before it and between organs of the state (*Organstreit*), a political party has standing to contest the validity of an election law alleged to violate its constitutional rights. 1 *BVerfGE* 208 (1952); 4 *BVerfGE* 27 (1954); 6 *BVerfGE* 84 (1957).

²⁰ See the discussion in the text, pp. 1124-1125 *infra*, of Art. 21, §(2), of the Basic Law which provides that parties which, by reason of their aims or the behavior of their

The concept of political parties playing a vital role in the election of federal officers was unknown to the Fathers who drafted the Constitution of the United States. The electoral college system for the election of President was premised on a theory of election that did not take political parties into account.²¹ The system of political parties has grown up as an extra-constitutional institution. Freedom of political association and activity is recognized as implicit in the freedoms guaranteed in the First Amendment and is thereby accorded judicial protection.²² Organized under state law, political parties are subject to state regulation in a number of matters and also to federal regulation in respect to accounting for funds, expenditures, etc.²³ As a practical matter, therefore, political parties have come to assume vital political and legal significance under the American system even though they do not have the constitutional status accorded to parties under the Basic Law.

The Basic Law states that the deputies to the German *Bundestag* "are representatives of the whole people, are not bound by orders and instructions and are subject only to their own con-

adherents, seek to impair or destroy the free democratic order or to endanger the existence of the Federal Republic of Germany are unconstitutional, and that the question of a party's unconstitutionality shall be decided by the Federal Constitutional Court.

²¹ Art. II, §1 of the Constitution, as amended by the Twelfth Amendment, provides that each state shall appoint electors in a number equal to the state's total number of senators and representatives in Congress who shall then cast the state's votes for President and Vice-President. The theory here was that the electors would exercise their judgment in voting for the men best qualified for these offices. With the rise of political parties, a basic theory of the electoral college was abandoned, and under today's practice, the electors, chosen by their respective parties, serve the mechanical function of casting the state's vote in the electoral college in support of the Presidential and Vice-Presidential candidates who received the highest vote in the state's popular election. The electoral college system is still important in that it results in the casting of the state's vote as a unit, regardless of the size of the vote of the defeated party. On the status of electors, see *Ray v. Blair*, 343 U.S. 214 (1952).

²² See the discussion in *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947).

²³ Congress has acted to outlaw the Communist Party by means of the Communist Control Act of 1954. 68 Stat. 775 (1954), 50 U.S.C. (1958) §§841-888. See comment, 53 MICH. L. REV. 1153 (1955). Moreover, conspiracy to organize a party in order to advocate overthrow of the government by force is punishable under federal legislation. See *Dennis v. United States*, 341 U.S. 494 (1951). Prior to the enactment of the Communist Control Act of 1954, some states by legislation had denied the Communist Party a place on the ballot. See *Gerende v. Board of Supervisors of Elections of Baltimore*, 341 U.S. 56 (1951); comment, 34 VA. L. REV. 450 (1948).

This legislative treatment of the Communist Party under American law may be compared with the express provision of the Basic Law [Art. 21, §(2)], which states that political parties which seek to impair or destroy the free democratic order or that endanger the existence of the Federal Republic are unconstitutional. See note 20 *supra*, and the discussion in the text, pp. 1124-1125 *infra*.

science.”²⁴ The representative character of the law-making organ and its freedom from popular pressure in discharging its functions in an area of exclusive federal competence were emphasized by the decision of the Federal Constitutional Court²⁵ holding invalid the laws of two *Länder* which had authorized popular advisory referenda to be held on the question of arming the military forces with atomic weapons after the *Bundestag* had voted favorably on this proposal. The federal government had brought the suit before the Federal Constitutional Court to enjoin the *Länder* from proceeding to hold these referenda. In upholding the federal government’s action and granting the requested relief, the Federal Constitutional Court held that the purpose of the proposed referenda in voicing popular opinion on the subject would be to subject the *Bundestag* and the federal government to unauthorized pressures in discharging their responsibilities in an area of exclusive federal responsibility. By undertaking these referenda on their own responsibility, the *Länder* were attempting to replace the collective will of the Federation by the wills of the separate *Länder*. The *Länder* had made the argument that in any event it was proper for a *Land* to conduct a referendum as a means of advising the *Land’s* representatives in the *Bundesrat*²⁶ on the position to take on this question. The Court’s answer to this was that under the Basic Law the members of the *Bundesrat* represented the administrations of their respective *Länder*, and it was therefore the function of these administrations and not of the people of the *Länder* to advise their representatives on how to vote on a given issue.

The requirement of Article 38 of the Basic Law that deputies be elected in “equal” elections has raised problems with respect to attempts to limit the rights of small splinter parties. Although West Germany uses an electoral system which relies in part on the

²⁴ Art. 38, § (1).

²⁵ 8 *BVerfGE* 104 (1958). See also 8 *BVerfGE* 122 (1958), where the Court directed the administration of a *Land* to take appropriate steps to prevent a municipality from conducting a local advisory referendum on this same question. The proceeding and relief took this form since the Federal Constitutional Court has no direct jurisdiction over municipalities. See note 197 *infra*.

²⁶ The *Bundesrat* is the organ that gives the *Länder* a special representation and voice in the legislation and administration of the Federation. See the discussion in the text, pp 1153-1156 *infra*. It should not be confused with the *Bundestag* which is the primary legislative body of the Federation.

proportional representation principle,²⁷ it has attempted by legislation to prevent too great a diffusion of parties by requiring that a party display a minimum voting strength at an election in order to share in the proportionate distribution of seats. In dealing with this question the Federal Constitutional Court, apparently mindful of the practical considerations involved, has upheld the power of the federal, state and local legislative bodies to impose a limitation of this kind, thereby denying the absoluteness of the constitutional restriction and subjecting it to the general standard of reasonableness.²⁸ Laws requiring such a minimum voting strength generally fix the standard at five percent, and the Court's opinions indicate that it would probably view as unreasonable any attempt to set the minimum at a higher level. It should be emphasized, moreover, that the question before the Federal Constitutional Court related to the proportional distribution of seats after an election, and that the complete exclusion of a party from a ballot because of failure to display minimum voting strength at a prior election was not at issue.²⁹

Although the system of proportional representation is not followed in the United States except in a few instances of municipal elections, some related questions respecting equality of parties and equality of voting rights have been raised before the Supreme Court under the equal protection clause of the Fourteenth Amendment. Thus it was argued that a state law requiring a certain number of signatures on a petition before a party could be placed on the ballot and further requiring that the signatures be distributed throughout the state, including areas where signatures

²⁷ The electoral system of West Germany combines the principle of the single-member district, followed in the United States in the election of representatives to the lower house of Congress, with a system of proportional representation. Each voter casts two votes in the elections for representatives in the *Bundestag*: one for the candidate whom he favors in his local constituency, the other for the party of his choice at the national level. The second vote determines the basis for the proportionate representation of the parties with respect to one-half of the membership of the *Bundestag*. Under this unusual system political development in the post-war period reveals a trend toward a two-party system. See Dietze, "The Federal Republic of Germany: An Evaluation After Ten Years," 22 J. POL. 112 at 115-118 (1960).

²⁸ See 1 *BVerfGE* 208 (1952) (*Land* elections); 6 *BVerfGE* 84 (1957); 6 *BVerfGE* 99 (1957) (federal elections); 6 *BVerfGE* 104 (1957) (municipal elections). In justifying this kind of limitation, the Court emphasized the problems presented by splinter parties in jeopardizing the effective functioning of a legislative body as well as the establishment and work of the executive department under a parliamentary system of government. Professor Cole states that these decisions involve a considerable amount of "judicial free-wheeling" on the part of the Court. See his article, "The West German Federal Constitutional Court: An Evaluation After Six Years," 20 J. POL. 278 at 294 (1958).

²⁹ See notes 20 and 23 *supra*.

for this party were difficult to procure, denied equality in voting right. The Supreme Court refused to intervene in this case on the ground apparently that this was a "political question" and not to be resolved by judicial decision.³⁰ It is fair to suppose that if in a given case the Supreme Court does assume to pass on the validity of legislation that denies a given party a place on the ballot because of its limited size, it too will approach the question in terms of the reasonableness and fairness of the classification.

Equality of the voting privilege under the Basic Law received emphasis in another interesting decision of the Federal Constitutional Court holding invalid the provision of the federal income tax law which authorized a deduction for contributions to political parties.³¹ In its thinking the Court gave weight to the consideration that a given political party may represent in a special way the interests of the wealthier classes, and that to allow the supporters of this party to deduct their political contributions gives an unequal advantage to these persons and to their party. In reliance on the type of formal logic often employed by courts in dealing with problems of equality under the law, the Court might have said that the law dealt equally with all taxpayers in permitting each to take deductions for political contributions. The Court's reliance instead on functional considerations drawn from the realities of political life lends particular interests to this decision.

III. BASIC RIGHTS

A. *Underlying Values and Principles*

The foundation for the specific rights catalogued in Part I of the Basic Law is found in the first two sections of Article 1 which state that the dignity of man is inviolable, that it is the duty of all state authority to respect and protect it, and that the "German people, therefore, acknowledges inviolable and inalienable human rights as a basis of every community, of peace and of justice in the world." The reference here to inviolable and inalienable human rights suggests the language of the American Declaration of Independence,³² and suggests also the theory of "fundamental rights"

³⁰ *MacDougall v. Green*, 335 U.S. 281 (1948). It should be noted, however, that some language used in the per curiam opinion in this case suggests that the Court disposed of the case on the merits on the theory that it was not arbitrary for the legislature to promote a balance of voting strength as between urban and rural areas.

³¹ 8 *BVerfGE* 51 (1958).

³² "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are

which the Supreme Court has relied upon in the interpretation of the due process clause.³³ The word "acknowledges" as it appears in the Basic Law deserves emphasis. The Basic Law does not create these inviolable and inalienable rights. Rather it declares and recognizes the natural rights of the person and furnishes positive sanction for them. The assumptions underlying Article 1 of the Basic Law assume further significance in the light of the idea expressed by German courts that there are some conceptions of right and justice which transcend the Basic Law and are superior to it and that, therefore, specific provisions of the Basic Law may be found to violate these supra-constitutional norms.³⁴

B. Rights as Restraints Upon Both the Federal and State Governments

The specific rights which are stated in the Basic Law and which bind the legislature, the executive, and the judiciary, serve as limitations not only on the Federation but operate as restraints also upon the exercise of governmental power by the *Länder*. This is an important facet of federalism under the Basic Law that distinguishes it from the federal structure under the Constitution. The Bill of Rights limits only the federal government. To be sure, the body of the Constitution states some limitations on the states as well as on the federal government³⁵ and, more importantly, the broad construction of the due process clause of the Fourteenth Amendment has served as an effective vehicle whereby the Supreme Court has protected the so-called "fundamental rights" against state violation.³⁶ But there is no complete correlation between the rights specified in the Bill of Rights as limitations on the federal government and those derived

Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."

³³ See the opinions in *Palko v. Connecticut*, 302 U.S. 319 (1937); *Adamson v. California*, 332 U.S. 46 (1947). See also Corwin, "The 'Higher Law' Background of American Constitutional Law," 42 HARV. L. REV. 149, 365 (1928-1929).

³⁴ See the discussion in the text, pp. 1178-1180 *infra*.

³⁵ See Art. I, §§9 and 10.

³⁶ For discussions of the fundamental rights theory, see Justice Cardozo's opinion in *Palko v. Connecticut*, 302 U.S. 319 (1937), and the several opinions in *Adamson v. California*, 332 U.S. 46 (1947). See also Corwin, "The 'Higher Law' Background of American Constitutional Law," 42 HARV. L. REV. 149, 365 (1928-1929). For an interpretation by a foreign observer and student of the historical development of the due process clause in American constitutional history and its present meaning, see DEPPELER, *DUE PROCESS OF LAW — EIN KAPITEL AMERIKANISCHER VERFASSUNGSGESCHICHTE* (1957).

by implication from the Fourteenth Amendment as limitations on the states.³⁷

In this connection it may be noted that rights in addition to those protected under the Basic Law are guaranteed to persons as a matter of *Land* law under the separate constitutions of the several *Länder*, just as residents of each of the American states may claim rights as a matter of state law under state constitutions apart from the rights protected on the national level under the Constitution.

C. *Rights as Restraints Upon Governmental Action*

The third section of Article 1 of the Basic Law states that the specific rights thereafter enumerated bind the legislature, the executive and the judiciary as directly enforceable law. This language suggests the interesting and important question whether the specific rights enumerated in Part I are—to use familiar American legal vocabulary—protected rights, i.e., rights which are constitutionally protected only against action of the three branches of the government, or whether they are absolute or sumptuary rights in the sense that all persons are required to respect them. Under the Constitution of the United States the rights stated in the body of the Constitution, in the Bill of Rights, and the Fourteenth Amendment are rights protected against governmental interference. The Supreme Court has made clear that the rights here recognized do not limit freedom of private action.³⁸ The duties that one individual owes another are governed by statutory and common law.

Although the language of the third section of Article 1 of the Basic Law suggests that the basic rights thereafter enumerated are limitations only on governmental action, some of the specific

³⁷ Thus the following procedural guarantees included in the Bill of Rights as restrictions on the federal government are not included in the due process concept: grand jury indictment, *Hurtado v. California*, 110 U.S. 516 (1884); trial by jury, *Maxwell v. Dow*, 176 U.S. 581 (1900); freedom from double jeopardy, *Palko v. Connecticut*, 302 U.S. 319 (1937); the privilege against self-incrimination, *Adamson v. California*, 332 U.S. 46 (1947). On the other hand, the following substantive freedoms, expressly protected against congressional abridgement under the First Amendment, are recognized as fundamental liberties under the due process clause of the Fourteenth Amendment: freedom of speech, *Gitlow v. New York*, 268 U.S. 652 (1925); freedom of press, *Near v. Minnesota*, 283 U.S. 697 (1931); freedom of assembly, *De Jonge v. Oregon*, 299 U.S. 353 (1937); freedom of religion, *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

³⁸ See the Civil Rights Cases, 109 U.S. 3 (1883), holding that since the equal protection clause of the Fourteenth Amendment is a restriction only on the states, Congress in the exercise of its power to enforce this limitation could not constitutionally prohibit discrimination by private persons. See also *Shelley v. Kraemer*, 334 U.S. 1 (1948).

rights are stated in a way which makes clear that they are absolute or universal in the sense that third persons must respect them too, with the result that these rights become part of the body of private law. The provisions that men and women have equal rights,³⁹ that everyone has "the right freely to express and to disseminate his opinion by speech, writing and pictures . . .,"⁴⁰ and the provision guaranteeing the right to form associations to safeguard and improve working and economic conditions,⁴¹ may be cited as illustrations. On the other hand, some of the specific rights assume significance only as restraints on governmental action. The provisions that no one may be compelled against his conscience to render war service as an armed combatant,⁴² that there shall be no censorship,⁴³ and that all Germans have the right to assemble peacefully without prior notification or permission,⁴⁴ fall into this category.

The case is not so clear, however, with respect to some of the other rights specified in the Basic Law. Attention is called particularly to the provision of Article 3, section (1), that "[a]ll persons are equal before the law." While this language suggests a limitation only on the action of the three branches of the government, the thought has been expressed by some German writers that the right here formulated is effective against third persons as well as against all forms of governmental action.⁴⁵ This view, however, does not appear to have gained general acceptance.

In any event it is clear that the question whether the basic rights are absorbed into the private law as a matter of constitutional imperative cannot be resolved on the basis of any broad generalities. Attention must be paid to the wording used in defining a specific right and the context in which it appears.

But even in the case where constitutionally-sanctioned rights are limitations only upon governmental action, questions may still be raised with respect to the impact of these rights upon private action. In the first place, the very fact that the constitution recognizes and protects these rights may prove to be an influential policy factor in the shaping of the private law, so that

³⁹ Art. 3, § (2).

⁴⁰ Art. 5, § (1).

⁴¹ Art. 9, § (3).

⁴² Art. 4, § (3).

⁴³ Art. 5, § (1).

⁴⁴ Art. 8, § (1).

⁴⁵ See ENNECCERUS-NIPPERDEY, *ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS*, 15th ed., 93 et seq. (1959).

these rights may be enforced against private persons even though this result is not directly required by the constitution. Secondly, the enforcement of private rights by branches of the government may so identify the government with private action that the constitutional restriction for the protection of right becomes directly applicable. The Basic Law states that the basic rights enumerated therein bind the legislature, the executive and the judiciary. Similarly, the equal protection clause of the Fourteenth Amendment operates as a restraint upon all three branches of the government. The application of this limitation to legislative and executive action raises no special problems. But when are rights violated by judicial action? The question has become acute in the United States with respect to the judicial enforcement of private contract and property rights. Starting from the premise that courts are agents of the state, the Supreme Court has held that although private contracts raise no question of violation of constitutional rights, their enforcement by judicial order identifies the state with the policy underlying the contract and hence presents the requisite "state action" element.⁴⁶ The full implications of this decision still remain to be explored.⁴⁷

The statement in the Basic Law that the specific rights bind the judiciary as directly enforceable law raises the corresponding question whether judicial enforcement of private rights may result in unlawful impairment of basic rights. Clearly this is the case where judicial enforcement of private right conflicts with an opposing right specifically protected by the Basic Law. Thus the Federal Constitutional Court declared invalid a judicial decree enjoining utterances that invited the boycott of a movie, where the decree was based on protection of the property owners' interests, since the freedom of expression was protected under the Basic Law's free speech guarantee.⁴⁸ In short, a court may not act to protect a private right at the expense of a competing constitutionally-recognized right. But this is not the same as saying that all judicial enforcement of private rights so identifies the state with the policy underlying the assertion of private right as to make it the equivalent of governmental action. If, for instance, it is assumed that the provision of the Basic Law that all men are

⁴⁶ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁴⁷ Cf. with the *Shelley* case the decision in *Black v. Cutter Laboratories*, 351 U.S. 292 (1956), holding that no constitutional issue was raised by a state supreme court's interpretation of a private contract where it was alleged that the contract as sanctioned by the court's interpretation resulted in impairment of First Amendment freedoms.

⁴⁸ 7 *BVerfGE* 198 (1958).

equal before the law is a limitation only on the three branches of the government, does it follow that a court in protecting the private rights of a proprietor who discriminates on the basis of race, religion or ancestry, is thereby denying equality before the law? Or is the court in a case like this doing no more than enforcing private property rights in an equal way? It remains to be seen whether the Federal Constitutional Court will in a case of this kind take the approach followed by the United States Supreme Court in the restrictive covenant case.⁴⁹

D. *Citizenship and the Rights Peculiar to It*

The Basic Law does not define the basis of German citizenship. By contrast the Fourteenth Amendment to the Constitution provides that everyone born or naturalized in the United States and subject to the jurisdiction thereof is a citizen of the United States and of the state wherein he resides. The Basic Law does deal with the loss of citizenship. It states that no one may be deprived of his German citizenship. But it also recognizes that loss of citizenship may arise pursuant to a law, subject, however, to the limitation that involuntary expatriation may arise only if the person does not thereby become stateless.⁵⁰ The absolute prohibition upon deprivation of citizenship is aimed against expatriation by means of direct legislative act, administrative decree or judicial decision. The fundamental idea here, having in mind the experience during the Hitler regime, is that expatriation shall not be used deliberately as a punitive device for imposing sanctions or disabilities upon persons or classes of persons. On the other hand, a citizen's own actions may automatically result in expatriation pursuant to a law which defines the conditions giving rise to loss of citizenship, but even here the law may not force an involuntary expatriation if the result is that the person thereby becomes stateless. Thus, to take an example from American law, voting in a foreign election could not be made the basis of an involuntary expatriation since no new citizenship is acquired thereby. But it is permissible to provide by law that a German woman shall lose her citizenship if she marries a foreign national and by virtue of the marriage acquires her husband's nationality.⁵¹

⁴⁹ See the Court's discussion of the general problem in 7 *BVerfGE* 198 (1958).

⁵⁰ Art. 16, § (1).

⁵¹ For discussion, see HAMANN, *DAS GRUNDGESETZ* 160 (1956).

The Constitution does not expressly deal with the subject of expatriation. The power of Congress to enact legislation stating conditions resulting in the loss of citizenship, on other than a strictly voluntary basis, has been the subject of recent important decisions by the Supreme Court. These decisions, it may be noted parenthetically, have left a number of questions unanswered.

By divided vote the Court has held that Congress may exercise a power of expatriation, even though it results in statelessness, as an implied means of effectuating other substantive powers. More specifically, the Court has held that Congress, in the exercise of its powers over foreign affairs, may attach loss of citizenship as a consequence of a citizen's voting in an election in a foreign country.⁵² On the other hand, loss of citizenship may not be used as a punitive device where under the circumstances it appears to be cruel and unusual punishment.⁵³

Although most of the specific rights enumerated in the Basic Law are rights enjoyed by all within the jurisdiction of the country, certain ones are specified to be rights peculiar to German citizens. Thus the right to assemble peacefully and unarmed without prior notification or permission,⁵⁴ the right to form associations and societies,⁵⁵ and the right freely to choose a trade or profession,⁵⁶ are defined as rights peculiar to German citizens. Likewise all Germans enjoy freedom of movement throughout the federal territory,⁵⁷ and no German may be extradited to a foreign country.⁵⁸ Aliens, therefore, cannot claim these privileges as a matter of constitutional right.

Under the United States Constitution the basic rights protected against governmental invasion may be asserted by both citizens and aliens. The protections of the Bill of Rights and of the due process and equal protection clauses of the Fourteenth Amendment extend to all persons. The distinctive privileges of citizenship are those peculiar to the relationship between the citizen and the government and arising from the nature of the

⁵² *Perez v. Brownell*, 356 U.S. 44 (1958). Earlier the Court had upheld legislation which provided for suspension of an American woman's citizenship while she remained married to a foreign national, where as the result of the marriage she had acquired the husband's nationality. *Mackenzie v. Hare*, 239 U.S. 299 (1915).

⁵³ *Trop v. Dulles*, 356 U.S. 86 (1958).

⁵⁴ Art. 8, § (1).

⁵⁵ Art. 9, § (1).

⁵⁶ Art. 12, § (1).

⁵⁷ Art. 11, § (1).

⁵⁸ Art. 16, § (2).

federal system.⁵⁹ These include the right to vote for federal officers and to run for federal office,⁶⁰ to assemble for the purpose of discussing matters within the domain of federal authority and petitioning the federal government for redress of grievances,⁶¹ and the right to travel freely throughout the United States.⁶²

Although, as stated above, aliens may claim the protection of the Bill of Rights and of the Fourteenth Amendment under the Constitution of the United States, their status as aliens does subject them to some disabilities to which citizens are not subject. Congress, which has paramount control over aliens, may impose some special restrictions upon them,⁶³ and even though aliens come within the reach of the equal protection clause the states may within narrow limits discriminate against aliens in the enjoyment of some privileges, where the classification by reference to alienage is deemed reasonable and appropriate.⁶⁴

⁵⁹ *Crandall v. Nevada*, 6 Wall. (73 U.S.) 35 (1868); *Slaughterhouse Cases*, 16 Wall. (83 U.S.) 36 (1873). See also Justice Stone's dissenting opinion in *Colgate v. Harvey*, 296 U.S. 404 at 436 (1935), and his concurring opinion in *Hague v. CIO*, 307 U.S. 496 at 518 (1939).

⁶⁰ *United States v. Classic*, 313 U.S. 299 (1941).

⁶¹ *United States v. Cruikshank*, 92 U.S. 542 (1876).

⁶² *Crandall v. Nevada*, 6 Wall. (73 U.S.) 35 (1868); *Edwards v. California*, 314 U.S. 160 (1941). In the *Edwards* case the Court held invalid a California statute designed to keep indigent persons from establishing residence in the state. A part of the Court found the statute invalid on the theory that it was an unwarranted restraint on the freedom of interstate commerce, but other members of the Court premised the holding on the ground that the statute resulted in abridgment of the citizen's right to travel. The Basic Law recognizes that the German citizen's right to travel may be restricted by law in order to deal with the situation where communities may be subjected to special burdens in supporting persons without means of support, to protect youth against neglect, to combat the danger of epidemics or to prevent crime. Art. 11, § (2).

The right to travel suggests the further question whether a citizen has a right to travel abroad. This question becomes pertinent in connection with administrative limitations on the issuance of passports to citizens. The Supreme Court has held that a citizen's right to travel abroad is a liberty protected under the due process clause and that it cannot be abridged except pursuant to statutory authorization. See *Kent and Briehl v. Dulles*, 357 U.S. 116 (1958); *Dayton v. Dulles*, 357 U.S. 144 (1958). Cf. the holding of the Federal Constitutional Court that the administrative denial of a passport to a German citizen on the ground that he would make use of it to the detriment of the Federal Republic did not violate the freedom to travel throughout the federal territory as guaranteed by Article 11, 6 *BVerfGE* 32 (1957).

⁶³ See the discussion in *Hariades v. Shaughnessy*, 342 U.S. 580 (1952), where the Court upheld the validity of legislation requiring the deportation of aliens who were members of an organization advocating overthrow of the government by force.

⁶⁴ Thus a state may provide that contractors engaged in public works shall employ only citizens, *Heim v. McCall*, 239 U.S. 175 (1915), and it may deny aliens the right to engage in certain occupations with harmful tendencies, *Clarke v. Deckebach*, 274 U.S. 392 (1927). But in general the states may not discriminate against aliens in the licensing of legitimate occupations, nor may they require private employers to discriminate against aliens. See *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948); *Truax v. Raich*, 239 U.S. 33 (1915).

The status of aliens suggests the further question as to the status of corporations in the enjoyment of basic constitutional rights. The Basic Law states the general rule that the basic rights enumerated by it apply also to domestic juristic persons to the extent that the nature of such rights permits.⁶⁵ This position of corporations finds a parallel under the United States Constitution. Thus, despite some controversy over the subject, corporations are recognized as persons within the meaning of the due process and equal protection clauses of the Fourteenth Amendment.⁶⁶ Likewise they may claim the protection of provisions of the Bill of Rights, although some of the rights enumerated there, like some of the fundamental rights protected under the Fourteenth Amendment, are by their nature relevant only to natural persons.⁶⁷

E. Limitations on Basic Rights

Some of the basic rights set forth in Articles 2 to 18 of the Basic Law are stated in an absolute form. For instance, Article 4 states that freedom of faith and of conscience, and freedom of religious or ideological beliefs are inviolable. Others are stated to be subject to the provisions of general laws. Thus the rights associated with freedom of expression under Article 5 are "limited by the provisions of the general laws, the provisions of law for the protection of youth and by the right to inviolability of personal honor." But Article 19 provides that insofar as under the Basic Law a basic right may be restricted by or pursuant to a law, the law must apply generally and not solely to an individual case. Furthermore, the law must name the basic right, indicating the article, and in no case may a basic right be infringed upon in its essential content.

By comparison it may be pointed out that in general it is recognized under the Constitution of the United States that the substantive freedoms protected against the federal and state governments are not absolute in character and that they may be limited by appropriate exercises of the legislative power in the public interest. The principle that the fundamental rights protected under the

⁶⁵ Art. 19, § (3).

⁶⁶ See Justice Jackson's separate opinion on this question in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 at 574 (1949). See also comment, 48 MICH. L. REV. 983 (1950).

⁶⁷ Despite earlier suggestions that corporations could not claim the benefit of the "liberty" clause of the Fourteenth Amendment, later cases accept by implication the standing of a corporation to assert freedom of the press as a fundamental right protected under this amendment. See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

due process clause are subject to a reasonable exercise of the police power on behalf of the public health, safety, morals and general welfare is a familiar one.⁶⁸ But the Supreme Court reserves the final authority to determine the reasonableness of the legislation, and in exercising this power it resorts to the pragmatic process of balancing the respective public and private interests at stake.⁶⁹ Even in the interpretation of the First Amendment with its categorical prohibition on the power of Congress to pass laws abridging freedom of expression, the Supreme Court, notwithstanding strong dissent on this question, has continued to hold that these rights may be restricted by Congress by legislation appropriate to its delegated powers,⁷⁰ although the nature of this freedom leads the Court in these cases to make more searching scrutiny into the legislative justification for the abridgment of the right than it does in the cases dealing with the implied funda-

⁶⁸ See, for instance, *Nebbia v. New York*, 291 U.S. 502 (1934), holding valid a state law regulating milk prices as against the contention that it violated the economic liberty secured by the due process clause of the Fourteenth Amendment; *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), upholding a state law fixing minimum wages for women and minors as against the same contention; *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), holding that a municipal zoning law did not result in an unconstitutional deprivation of property rights; *Beauharnais v. Illinois*, 343 U.S. 250 (1952), holding that a state race libel law did not unconstitutionally impair the freedom of the press protected under the Fourteenth Amendment; *Roth v. United States*, *Alberts v. California*, 354 U.S. 476 (1957), holding that the federal and state governments may punish the transportation and sale of obscene literature.

⁶⁹ For a recent illustrative case, see *Bates v. Little Rock*, 361 U.S. 516 (1960), holding that a municipality had not proved an adequate public interest that warranted a requirement that a non-profit organization disclose its membership list at the expense of the fundamental right of freedom of association.

⁷⁰ See *American Communications Assn., CIO v. Douds*, 339 U.S. 382 (1950), upholding congressional legislation requiring officers of labor unions to file non-Communist affidavits as a condition to the unions' continued enjoyment of privileges under national labor legislation; *Dennis v. United States*, 341 U.S. 494 (1951), holding valid federal legislation punishing conspiracy to advocate overthrow of government by force or to organize a party advocating the same; *Barenblatt v. United States*, 360 U.S. 109 (1959), holding that Congress may lawfully authorize a committee investigation of Communist activities and that a witness may not claim the privilege by virtue of the First Amendment to refuse to answer questions relating to Communist Party affiliation.

Justices Black and Douglas have taken the position that in view of the wording and policy of the First Amendment, any law which is found to abridge freedom of speech, press, assembly or religion is unconstitutional, and that it is improper for the Court to balance allegedly public interests against these freedoms in upholding restrictive legislation. See their dissenting opinions in the cases cited in the preceding paragraph. They take the position also that the First Amendment, interpreted to prohibit all laws abridging freedom of expression in its various forms, is made applicable to the states by the Fourteenth Amendment, and so they reject the balancing process also in dealing with state and local laws that restrict these freedoms. See their dissenting opinions in *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Roth v. United States*, *Alberts v. California*, 354 U.S. 476 (1957).

mental rights under the due process clause.⁷¹ The approach made by the Supreme Court in determining the reasonableness of legislation impinging upon private right by weighing and balancing the competing interests at stake may be useful to the Federal Constitutional Court in deciding when a law which restricts one of the basic rights, which is recognized under the Basic Law to be subject to restriction by or pursuant to a law, goes too far in that it infringes upon the essential content of this right.

F. *General Right: Free Development of Personality*

A broad underlying type of right is recognized in section (1), Article 2, of the Basic Law which states that everyone has the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code. Here is a general provision which admits of wide and elastic interpretation. The central emphasis here is upon the individual's freedom of self-expression in the full development of his faculties. It derives its inspiration from the concept of the dignity of man as a supreme value in a democratic society. The purpose of the social order is to promote his well-being. But this same section of the Basic Law recognizes also that man is a social creature, that individual freedom is meaningful only in the context of a social order that maintains the conditions of liberty, and that the freedom of the individual is not to be identified with unrestrained license. The individual's basic freedom to express himself by word and conduct in furtherance of the development of his personality is therefore subject to the stated conditions that he not violate the rights of others or offend against the constitutional order or offend the moral code. The content of any specific liberties derived by interpretation from this basic freedom must therefore be determined in the light

⁷¹ The Court has frequently stated that the First Amendment freedoms are "preferred freedoms," since they are indispensable to the functioning of a democratic society and should, therefore, receive added judicial protection. Note the following statement taken from Justice Rutledge's opinion in *Thomas v. Collins*, 323 U.S. 516 at 529-530 (1945):

"The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the *preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment*. . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions." Emphasis added.

For discussion of the "preferred freedoms" concept and its practical implications in terms of judicial techniques in dealing with legislation restricting freedom of expression, see McKay, "The Preference for Freedom," 34 N.Y. UNIV. L. REV. 1182 (1959). See also KAUPER, *FRONTIERS OF CONSTITUTIONAL LIBERTY* 55-99 (1956).

of these limitations. But these are the only limitations that govern in this situation since the right to the free development of personality is not made subject to restriction by law. The interpretation of this section requires a judicial balancing of this basic freedom and the rights derived from it against the social interests stated as limitations.

The concept of the right to the free development of personality suggests by way of parallel the broad interpretation that has been given by the United States Supreme Court to the due process clause as a vehicle for the protection of the so-called fundamental rights, and which has served as a powerful vehicle for judicial review of legislative, as well as executive and judicial, activities.⁷² Thus the Court said some years ago that "the liberty" mentioned in the due process clause of the Fourteenth Amendment "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."⁷³

Although the "free development of personality" concept stated in the Basic Law suggests a possible breadth of interpretation that may parallel the Supreme Court's construction of the due process clause, an important consideration militates against this result. A number of specific rights which are essential to the individual's development of his faculties are dealt with separately in the Basic Law. For instance, freedom of speech, freedom of assembly, freedom to form associations and societies, freedom of movement, and freedom to choose a trade or profession, to mention some of the specific rights which have been characterized as "concretizations of" the basic right to the free development of personality,⁷⁴ are given express recognition in the Basic Law. Hence, the content of these rights and any limitations that may be imposed upon them are governed not by the first section of Article 2 but by the articles that apply specifically to them.

⁷² For discussions of the "fundamental rights" interpretation of the due process clause, see *Palko v. Connecticut*, 302 U.S. 319 (1937), and the several opinions in *Adamson v. California*, 332 U.S. 46 (1947).

⁷³ *Allgeyer v. Louisiana*, 165 U.S. 578 at 589 (1897).

⁷⁴ See 1 *BVerfGE* 264 at 274 (1952); 4 *BVerfGE* 52 at 57 (1954).

Even though its reach and usefulness is limited by the separate enumeration of a number of specific rights in the Basic Law, the "free development of personality" section still admits of elastic interpretation as a source of specific liberties not otherwise detailed in the Basic Law, and it is not surprising that this section has been invoked in many cases. Although the Federal Constitutional Court has not yet squarely held a statute invalid as violating this section,⁷⁵ the lower courts have given it frequent application. Phases of economic liberty have been held to be protected by it, including freedom of contract, freedom of competition and freedom of advertising.⁷⁶ This emphasis on facets of economic liberty as derivations from the broad right to the free development of personality presents an interesting contrast to the reduced emphasis by the United States Supreme Court in recent years on economic liberty as a fundamental right protected under the due process clause.⁷⁷

G. *Specific Rights*

Attention will now be given to specific rights protected under the Basic Law.⁷⁸

The Right to Life and Inviolability of the Person; Freedom of the Individual. The second section of Article 2 of the Basic Law declares that everyone has the right to life and to inviolability of his person and that the freedom of the individual is inviolable. These rights may only be encroached upon pursuant to a law. Although it may appear inaccurate to speak of these rights as specific rights in view of their general nature, it seems clear that the purpose is not to duplicate the "free development of personality" idea set forth in the first section of this article but rather to stress the elementary idea, paralleled by the basic procedural significance of the due process clause in the United States Con-

⁷⁵ See the discussion in 4 *BVerfGE* 7 at 15 (1954).

⁷⁶ See HAMANN, *DAS GRUNDGESETZ* 81 (1956).

⁷⁷ See *Nebbia v. New York*, 291 U.S. 502 (1934), upholding legislation regulating the price of milk; *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), upholding legislation fixing minimum wages for women and children. For a significant statement on the decline of economic liberty as a substantive right protected under the due process clause, see Justice Black's opinion in *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949). See also on the subject, KAUPER, *FRONTIERS OF CONSTITUTIONAL LIBERTY* 33-54 (1956).

⁷⁸ The restrictions on deprivation and loss of citizenship under Art. 16 of the Basic Law have already been discussed, p. 1107 *supra*, and the freedom of movement, guaranteed under Art. 11, is referred to in note 62 *supra*. Consideration of these matters is, therefore, excluded from the discussion that follows in the text.

stitution, namely, that no person shall be deprived of life or liberty except pursuant to law and in accordance with the procedures established by law. Articles 101, 103 and 104 of the Basic Law detailing protections for persons charged with crime and placing limitations on the actions of the police serve in a practical way to implement the freedoms specified in the second section of Article 2.⁷⁹

Although the provisions of Article 2, section (2), are directed primarily against illegal deprivations of life or liberty, i.e., deprivations not authorized by a law, the freedoms here mentioned appear to be the source of substantive rights as well in the sense that no law encroaching upon them may infringe upon their essential content as stated in Article 19. Indeed, the right to life acquires added significance from the Basic Law itself since it expressly abolishes capital punishment.⁸⁰ The individual's right to inviolability of his person suggests important substantive rights with respect to freedom from impairment of physical faculties. The Supreme Court of the United States, for instance, has faced the question whether legislation directing sexual sterilization of persons in certain categories violates the fundamental liberty of the person protected under the due process clause. Although the Court has sustained legislation authorizing the sterilization of mental defectives where the record in the specific case before the Court clearly showed hereditary weakness,⁸¹ it has also indicated that it will closely scrutinize any extension of the sterilization treatment to other classes of persons.⁸²

Equal Protection of the Laws. Article 3 of the Basic Law states, first of all, the general proposition that all persons are equal before the law. This parallels the Fourteenth Amendment's provision that no state shall deny to any person the equal protection of the laws, a limitation which the Supreme Court has said is also implicit in the notion of due process of law in the Fifth Amendment as a restriction on the federal government.⁸³ The general

⁷⁹ See the discussion in the text, pp. 1134-1136 *infra*.

⁸⁰ Art. 102. The Constitution of the United States does not prohibit capital punishment, although the Eighth Amendment does prohibit "cruel and unusual punishment." Capital punishment has been abolished in a number of states either by statute or by constitutional amendment.

⁸¹ *Buck v. Bell*, 274 U.S. 200 (1927).

⁸² See *Skinner v. Oklahoma*, 316 U.S. 535 (1942), where the Court held invalid a state statute requiring the sterilization of certain classes of habitual criminals.

⁸³ See *Bolling v. Sharpe*, 347 U.S. 497 (1954), holding that legislation which required racial segregation in the public schools of the District of Columbia, an area under federal control, was invalid under the Fifth Amendment.

equality section has already been frequently invoked before the Federal Constitutional Court, just as in American constitutional litigation it is a frequently-invoked article in connection with a claim that a statute is preferential or discriminatory in its treatment of persons or classes. The Supreme Court in the interpretation of the equal protection clause has taken the general position that this limitation does not prohibit legislation that establishes classifications so long as they are reasonable.⁸⁴ Likewise, the Federal Constitutional Court has said that the matter of classification is a legislative matter and that it will not be disturbed as a denial of equality unless it is arbitrary or capricious in the sense that there is no rational ground for classification.⁸⁵ As a result the general

⁸⁴ The following oft-quoted statement, taken from the opinion in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 at 78-79 (1911), characterizes the Supreme Court's general approach to equal protection problems:

"The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. . . ."

As a result of this judicial tolerance of legislative classification, the Supreme Court, despite the frequent claims made upon the basis of the equal protection clause, is not likely to invalidate classifications established by tax laws and by laws regulating business enterprise and economic and proprietary matters, as distinguished from classifications that discriminate on the basis of race, color or religion. In one of the few exceptional cases arising in recent years, the Supreme Court invalidated a statute which subjected companies issuing travelers' checks to a system of regulation but expressly exempted the American Express Co. This was found to be a conspicuous case of unlawful preference. *Morey v. Doud*, 354 U.S. 457 (1957). For cases illustrating the Court's readiness to rationalize and justify legislative classification, see *Goesaert v. Cleary*, 335 U.S. 464 (1948), sustaining a state statute requiring the licensing of bartenders but prohibiting the licensing of a female unless she was the wife or daughter of the male owner of a licensed liquor establishment.

⁸⁵ In his paper entitled "The Role of Supreme Courts in Insuring Equality Under the Law," delivered before the Annual Meeting of the American Political Science Association, Washington, D.C., September 10, 1959, Judge Hans Kutscher of the Federal Constitutional Court, after stating that the Court had adopted the views expressed by Professor Gerhard Leibholz (now a judge of the Federal Constitutional Court) in his book [*DIE GLEICHHEIT VOR DEM GESETZ* (1st ed., 1925; 2d ed., 1959)], continued as follows:

"... According to the Federal Constitutional Court the principle of equality prohibits arbitrary action by the legislature, that is, it prohibits arbitrary differential treatment of that which is essentially equal. It is up to the legislature to decide what factual situations shall be considered essentially equal or unequal. It is not up to the Federal Constitutional Court to decide whether a statute provides the most effective or the most reasonable or the most equitable or the wisest solution of a problem. The court can declare a statute unconstitutional only if the legislature exceeds the limits of its discretionary power, that is if no plausible reason for differential treatment can be found in

equality provision of Article 3 has not resulted in invalidation of any major legislation.⁸⁶

More effective as limitations on the legislative power are the specific provisions of Article 3. Section (2) states that men and women have equal rights. The importance of this provision, which may be attributed at least in large part to the economic contributions made by women during and immediately after World War II and their increased participation in all phases of national life, is attested by the recent decision of the Federal Constitutional Court which held invalid the provision of the federal family law which gave the husband-father the ultimate power of decision in matters concerning control of children. The Court held that pursuant to several provisions of the Basic Law, including section (2) of Article 3, the wife was entitled to an equal voice in these matters.⁸⁷ The full implications of this decision in terms of control of the family remain to be developed.

The specific assurance of equal rights for women found in the Basic Law has no parallel in the United States Constitution. At most the equal protection clause serves as a vehicle for determining the validity of legislation that discriminates between the sexes, and early decisions of the Supreme Court do not support the idea that the equal protection clause requires equal legal

which case the statute must be considered arbitrary. You will realize that the court has followed more or less the same trend as the United States Supreme Court."

For cases, see 1 *BVerfGE* 208 (1952); 2 *BVerfGE* 266 (1953); 3 *BVerfGE* 162 (1953); 4 *BVerfGE* 144 (1955); 7 *BVerfGE* 305 (1958).

⁸⁶ In his paper referred to in the preceding footnote, Judge Kutscher states that despite the frequency with which the general equality clause has been invoked before it, the Federal Constitutional Court has invalidated provisions of only three or four relatively unimportant statutes on the basis of this limitation.

⁸⁷ 10 *BVerfGE* 59 (1959). The Court rested its decision on §§(1) and (2) of Article 6, which state that marriage and family enjoy the special protection of the state and that the care and upbringing of children are the natural right of the parents, in conjunction with §(2) of Art. 3, stating that men and women have equal rights, and §(3) of Art. 3 which provides, inter alia, that no one may be prejudiced or favored because of his sex.

Attention may also be called in this connection to the Court's earlier decision holding invalid the provision of the federal income tax law requiring husbands and wives to pool their incomes in determining the applicable tax rate. 6 *BVerfGE* 55 (1957). Although one of the arguments before the Court was that this provision violated the equal rights of women and was, therefore, invalid under Art. 3, the Court's decision rested on the ground that the statute by subjecting married persons to a tax disadvantage violated the provision of Art. 6, §(1), that marriage and family enjoy the special protection of the state. This decision may be compared with the United States Supreme Court's decision in *Hooper v. Tax Commission*, 284 U.S. 206 (1931), holding invalid under the due process clause of the Fourteenth Amendment the provision of a state income tax law which required the family to be treated as a unit in determining taxable income and the applicable rate.

rights between the sexes.⁸⁸ Indeed, it required an amendment to the Constitution to assure equal voting rights for women.⁸⁹ It is probably true, however, that with the growing recognition of the equal status of women as a matter of political, social and economic development, a development mirrored also in the trends evident in statutory and case law,⁹⁰ the Supreme Court is likely at present to scrutinize more closely legal restrictions discriminating against women.⁹¹

The third section of Article 3 of the Basic Law states another rule of equal protection in that no one may be prejudiced or favored because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political inclinations. In short, the Basic Law in this section declares these factors irrational per se as a basis for classification. Except for the Fifteenth Amendment which expressly prohibits discrimination in voting rights because of race, color, or previous condition of servitude, the Constitution does not explicitly invalidate discrimination based on the factors mentioned in Article 3 of the Basic Law, and any comparable results must be based on the equal protection clause. The whole recent development in interpretation of the equal protection clause to prohibit discrimination against Negroes,⁹² including prohibitions on legislation which requires racial segregation,⁹³ makes clear that freedom from classification based on race or color is a fundamental right under the equal protection clause.⁹⁴ Again, it may be said that the effect of the decisions is to

⁸⁸ See *Minor v. Happersett*, 21 Wall. (88 U.S.) 162 (1875), holding that a state law which limited the right to vote to males was not unconstitutional.

⁸⁹ The Nineteenth Amendment adopted in 1920.

⁹⁰ See the Supreme Court's review in *Hoeper v. Tax Commission*, 284 U.S. 206 (1931), of the changes in the law of Wisconsin that had led to the "emancipation" of women and decline of the unitary theory in respect to the husband-wife relationship.

⁹¹ See, for instance, the dissenting opinion in *Goesaert v. Cleary*, 335 U.S. 464 at 467 (1948), where the majority sustained a statute requiring the licensing of all bartenders but prohibiting the issuance of a license to a female unless she was the wife or daughter of the male owner of a licensed liquor establishment.

⁹² See, e.g., *Smith v. Allwright*, 321 U.S. 649 (1944), holding that Negroes cannot be excluded from party primary elections; *Shelley v. Kraemer*, 334 U.S. 1 (1948), holding that covenants designed to exclude Negroes from use of residential property may not be enforced. Also in a series of decisions the Court has invalidated discrimination in fact against Negroes in the choice of persons for jury service. See, e.g., *Cassell v. Texas*, 339 U.S. 282 (1950).

⁹³ *Brown v. Board of Education*, 347 U.S. 483 (1954), holding invalid legislation requiring racial segregation in public schools. The Court here rejected and overruled the "equal but separate" doctrine first enunciated in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁹⁴ The Court has also in recent years invalidated state legislation discriminating against persons of Japanese ancestry. See *Oyama v. California*, 332 U.S. 633 (1948); *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948). On discrimination against aliens, see the discussion in the text, pp. 1108-1109 *supra*, and the sources cited in notes 63 and 64.

recognize that classification by race is inherently irrational and arbitrary. It seems clear also that any discrimination based on religious or political grounds would also be regarded as unconstitutional, in view of the express recognition of religious freedom and in view of the recognition given to political opinions as a phase of the free expression of ideas protected under the First Amendment.⁹⁵

Freedom of Belief and Religion. Article 4 of the Basic Law declares that freedom of faith and of conscience and of religious and ideological creeds is inviolable. Moreover, the undisturbed practice of religion is guaranteed. Finally, this article states that no one may be compelled against his conscience to render war service as an armed combatant. These provisions, at least in part, suggest for comparison the general idea of freedom of thought implied in the First Amendment to the Constitution and also regarded as a fundamental right protected under the Fourteenth Amendment,⁹⁶ as well as the First Amendment's guarantee of the free exercise of religion, also a right recognized as fundamental under the due process clause.⁹⁷ The Basic Law in its language transcends the language of our First Amendment with respect to religious freedom by placing all forms of ideological belief in this category, although again this is not a substantial distinction.⁹⁸ What is significant about Article 4, by way of contrast with our system, is that it rests on a constitutional footing the right of a conscientious objector not to be compelled to render war service as an armed combatant. The Supreme Court's decisions indicate that no one may invoke freedom of conscience or freedom of religion as a basis for refusal to render military service.⁹⁹ It may be mentioned, however, that the right of a conscientious objector to refuse to serve as an armed combatant or even to serve in the army on a non-combatant basis is now recognized by federal legislation.

⁹⁵ But the Communist Party and its members may be subjected to discriminatory treatment in view of the factors which distinguish this party from other political associations. See *American Communications Assn., CIO v. Douds*, 339 U.S. 382 (1950); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Barenblatt v. United States*, 360 U.S. 109 (1959).

⁹⁶ In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), where the Court held that a school board could not constitutionally impose penalties on a parent and child because of the child's refusal, based on religious grounds, to take part in a flag salute exercise, Justice Jackson, who wrote the majority opinion, said (at 642): "... If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

⁹⁷ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

⁹⁸ See *West Virginia State Board of Education v. Barnette*, referred to in note 96 supra.

⁹⁹ *Selective Draft Law Cases*, 245 U.S. 366 (1918).

Although the Basic Law assures freedom of religion, nothing contained in Article 4 specifically recognizes the general principle of separation of church and state.¹⁰⁰ The Supreme Court has held that the provisions of the First Amendment to the Constitution of the United States, stating that Congress shall pass no law respecting an establishment of religion or prohibiting the free exercise thereof, in effect prescribe a general principle of separation of church and state, and that this means, in addition to requiring that the free practice of religion be undisturbed, that the state cannot prefer one religion over another or, indeed, give any aid to religion even on a non-preferential basis.¹⁰¹

Not only does the Basic Law not require separation of church and state as known in American constitutional law, but German practices repudiate the notion that the state cannot use its power and facilities to aid religion. Thus in the German *Länder* a special church tax is collected by the government and distributed to the churches for their financial support.¹⁰² Such a practice in the United States would be a clear violation of the constitutional conception of church-state relations.¹⁰³

Freedom of Expression, Assembly, Petition and Association. Article 5 of the Basic Law which deals more generally with the freedoms of expression secures to everyone the right freely to ex-

¹⁰⁰ The relations between church and state are stated more definitively in the constitutions of some of the *Länder*. Note, for instance, the following statement found in Art. 29 of the Constitution for Württemberg-Baden:

"The importance of the churches and of the recognized religious and ideological societies in the safeguarding and strengthening of the religious and moral foundations of human life is recognized. They organize and administer their affairs independently within the law which is binding upon all and may, in so doing, develop freely. They fill their offices without the concurrence of the state or *Gemeinde*. The institutions and activities of the churches and societies recognized under this Article of the Constitution may not be misused for purposes of party politics. The civic rights and religious and moral duties of those in the service of the churches and religious societies in public life remain unaffected hereby.

"Requirements for the recognition of a religious or ideological society are prescribed by law."

¹⁰¹ *Everson v. Board of Education*, 330 U.S. 1 (1947). On the general subject, see PFEFFER, *CHURCH, STATE AND FREEDOM* (1953); KAUPER, *FRONTIERS OF CONSTITUTIONAL LIBERTY* 100-144 (1956). On the question of religious instruction in the public schools, see the discussion in the text, pp. 1126-1127 *infra*, and the cases cited in note 129.

¹⁰² In theory the tax is levied by the churches, and the government's function is to serve as an agency in collecting and distributing the tax. See in this connection Art. 31 of the Constitution for Württemberg-Baden which states that those recognized religious societies which are public law corporations have the right to levy taxes on the basis of the official tax lists. The church tax is voluntary in the sense that a taxpayer by terminating his church membership thereby relieves himself from payment of the tax.

¹⁰³ "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson v. Board of Education*, 330 U.S. 1 at 16 (1947).

press and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press, and freedom of reporting by radio and motion pictures, are expressly guaranteed, and censorship is prohibited. The First Amendment to the Constitution by way of comparison states that Congress shall make no law abridging freedom of speech or of the press. Moreover, these First Amendment freedoms which the Supreme Court has characterized as "preferred freedoms"¹⁰⁴ are also given protection as fundamental liberties under the due process clause of the Fourteenth Amendment.¹⁰⁵ However, the express recognition in the Basic Law that everyone has the right freely to inform himself from generally accessible sources as an important conception underlying freedom of expression does not find explicit expression in the First Amendment, which is directed to the right of the person to express himself. But an appreciation of the function of free speech as an indispensable institution for influencing people's minds in the vital areas of public concern is implicit in the high value the Supreme Court has placed on the First Amendment freedoms even though the Court has not formally distilled the right of the people to hear, learn and know as a right implicit in the free speech guarantee.¹⁰⁶ The freedom of reporting by motion pictures, expressly guaranteed by the Basic Law, comes within the free press guarantee of the First Amendment.¹⁰⁷ The express prohibition of censorship under the Basic Law finds its parallel in the Supreme Court's decisions holding that prior restraint is a particularly objectionable restriction on freedom of the press.¹⁰⁸

¹⁰⁴ See note 71 *supra*.

¹⁰⁵ *Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech); *Near v. Minnesota*, 283 U.S. 697 (1931) (freedom of press).

¹⁰⁶ See MEIKLEJOHN, *POLITICAL FREEDOM* (1960) for stress on the thesis that free speech is important because it is relevant to the right of citizens in a democratic society to be able to inform themselves and make decisions on matters of public concern.

¹⁰⁷ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

¹⁰⁸ *Near v. Minnesota*, 283 U.S. 697 (1931). The emphasis upon freedom from prior restraint has led the Court to invalidate laws which prohibit the distribution of handbills, religious literature, etc., without the prior approval of a governmental authority vested with discretionary power in the matter. See, e.g., *Lovell v. Griffin*, 303 U.S. 444 (1938).

Although the Supreme Court has not squarely held that all censorship of movies is invalid, it has in a series of decisions invalidated censorship orders prohibiting the showing of specific films where it appeared that the standard stated in the statute vested the board with discretionary authority that was too broad or too vague, or that the ground for decision by the censorship board did not serve as a valid ground for limiting freedom of the press. Some members of the Court have made clear that they regard all movie censorship as an invalid form of prior restraint. See Justice Douglas' opinion in *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U.S. 684 (1959).

The Basic Law declares that art and science, and research and teaching are free, although freedom of teaching does not absolve from loyalty to the Constitution.¹⁰⁹ In so far as these freedoms are recognized under the Constitution it is either because they are regarded as facets of freedom of speech and press, or are otherwise viewed as fundamental liberties. Thus the Supreme Court has recognized academic freedom as a fundamental right protected under the due process clause of the Fourteenth Amendment.¹¹⁰

Under Article 8 of the Basic Law all Germans have the right to assemble peaceably and unarmed without prior notification or permission. In regard to open-air meetings, however, this right may be restricted by or pursuant to a law. The right of peaceable assembly should be coupled with the provision of Article 17 stating that everyone has the right individually or jointly with others to address written requests or complaints to the competent authorities and to the representative assemblies. These provisions are matched by the specific clauses of the First Amendment securing the right of the people peaceably to assemble and to petition the government for redress of grievances, a right recognized as fundamental also under the due process clause of the Fourteenth Amendment.¹¹¹ In a series of decisions interpreting the due process clause, the Supreme Court has recognized that religious as well as non-religious groups have a right to use public places such as parks and streets to conduct their services and hold meetings, and that any requirement of prior approval by way of a license is invalid if it vests discretionary power in the licensing authority,¹¹² although a regulation requiring prior notification or permission is valid if it is designed to do nothing more than regulate the orderly scheduling of meetings and is not used as a vehicle for censoring unpopular causes.¹¹³

The right of all Germans to form associations and societies is expressly recognized under Article 9 of the Basic Law. While this general right is not expressly formulated in the Constitution, the Supreme Court has recognized that the right to form associations directed to the expression of ideas or to improvement of the status

¹⁰⁹ Art. 5, §(3).

¹¹⁰ *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

¹¹¹ *De Jonge v. Oregon*, 299 U.S. 353 (1937).

¹¹² See, e.g., *Hague v. CIO*, 307 U.S. 496 (1939); *Kunz v. New York*, 340 U.S. 290 (1951); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

¹¹³ *Poulos v. New Hampshire*, 345 U.S. 395 (1953).

of the group's members is a fundamental facet of liberty protected under the due process clause.¹¹⁴

Mention may be made at this point of the distinction drawn in the Basic Law between those phases of freedom of expression which are stated in absolute terms and those with built-in limitations in the sense that they are stated to be subject to restriction by law. Thus the freedom of faith and conscience and the right to undisturbed practice of religion under Article 4 of the Basic Law are put in absolute terms. The same is true of the right of Germans under Article 8 to assemble peacefully and unarmed without prior notification or permission. Similarly the right of Germans under Article 9 to form associations and societies appears unlimited except for a restriction dealt with below. Also the freedom of art and science, research and teaching appears to be absolute, except for the qualification that freedom of teaching does not absolve from loyalty to the constitution. On the other hand, the general freedoms of speech and press, enumerated in the first section of Article 5, are limited under the second section by "the provisions of the general laws, the provisions of law for the protection of youth and by the right to inviolability of personal honor." Likewise, under Article 8, the right to assemble peacefully may be restricted by or pursuant to a law in so far as this right extends to open-air meetings.

The Basic Law thus recognizes that certain of these freedoms are subject to restrictions imposed by general laws, protecting appropriate public interests which in the familiar American thinking and terminology come within the range of the legislative police power. Article 5 recognizes, for instance, the power to enact legislation punishing the publication of obscene or libelous matters. As previously pointed out,¹¹⁵ Article 19 states that in so far as the Basic Law recognizes that a right may be restricted by or pursuant to a law, the law must apply generally, must name the basic right, indicating the article, and may not infringe upon the right in its essential content.

By comparison, the freedoms of expression categorized in the First Amendment and protected also under the Fourteenth Amendment against state violation are recognized to be subject to

¹¹⁴ NAACP v. Alabama, 357 U.S. 449 (1958).

¹¹⁵ See the discussion, pp. 1110-1112 *supra*.

limitations appropriately enacted in the public interest,¹¹⁶ although the Supreme Court has characterized these freedoms as preferred freedoms and for this reason subjects restraints on them to a closer scrutiny and employs various techniques that emphasize the Court's conception of its vital role in protecting the freedoms it regards as indispensable to the functioning of a democratic society.¹¹⁷ Indeed, so far as freedom of religion is concerned, the Court's numerous decisions in favor of this freedom suggest that not only is it regarded as a preferred freedom, but that it stands at the pinnacle of the preferred freedoms and is virtually absolute in character.¹¹⁸

Apart from the provisions specifying that certain basic rights may be restricted pursuant to general law, the Basic Law incorporates other features designed to prevent abuse of rights at the expense of the free democratic basic order. Although Article 9 guarantees to all Germans the right to form associations and societies, it directly prohibits associations, the objects or activities of which conflict with the criminal laws or which are directed against the constitutional order or the concept of international understanding. Moreover, Article 18 declares that whoever abuses freedom of expression of opinion, and in particular freedom of the press, freedom of teaching, freedom of assembly, freedom of association, secrecy of mail, post, and telecommunications, property, or the right of asylum in order to attack the free democratic basic order forfeits these basic rights. The forfeiture and its extent are pronounced by the Federal Constitutional Court. Finally, although the right to form political parties is recognized under

¹¹⁶ Thus Congress may make it a criminal offense to advocate overthrow of the government by force or to conspire to do so [*Dennis v. United States*, 342 U.S. 494 (1951)], require the deportation of aliens who belong to an organization advocating violent overthrow [*Harisiades v. Shaughnessy*, 342 U.S. 580 (1952)], require disclosure by witnesses of Communist Party affiliation in connection with committee investigation of subversive activities [*Barenblatt v. United States*, 360 U.S. 109 (1959)], and require union officers to file non-Communist affidavits as a condition to the union's continued enjoyment of privileges under the national labor legislation [*American Communications Assn., CIO v. Douds*, 339 U.S. 382 (1950)].

Similarly both the federal government and the states may punish the circulation, distribution and sale of obscene matters [*Roth v. United States*, *Alberts v. California*, 354 U.S. 476 (1957)], and the states may punish the publication of libelous matters, including so-called group libels that incite to racial or religious hatred [*Beauharnais v. Illinois*, 343 U.S. 250 (1952)].

¹¹⁷ See note 71 *supra*.

¹¹⁸ But overt conduct, even though sanctioned by religious belief, may be prohibited by legislation that embodies accepted notions of public morality. See *Reynolds v. United States*, 98 U.S. 145 (1879), upholding a federal statute prohibiting bigamy in federal territories as applied to persons who practiced polygamy as a matter of religious conviction.

Article 21, section (2) of this same article declares unconstitutional all parties which, by reason of their aims or the behavior of their adherents, seek to impair or destroy the free democratic basic order or to endanger the existence of the Federal Republic. The Federal Constitutional Court decides on the question of unconstitutionality. Pursuant to this provision the Federal Constitutional Court handed down its important decision finding that the Communist Party existed in order to attack the free democratic basic order and was for this reason unconstitutional.¹¹⁹ This decision may be compared with the decisions of the United States Supreme Court upholding congressional legislation imposing disabilities on persons by reference to Communist Party membership, upholding the constitutionality of the Smith Act in its application to Communists charged with conspiracy to advocate overthrow of government by force and to organize a party engaged in such advocacy, and upholding provisions of federal legislation requiring the deportation of Communists.¹²⁰ The important difference between the two constitutional systems in dealing with Communism as a subversive movement is that whereas under the Basic Law the Federal Constitutional Court is directly charged with responsibility for dealing with the problem, any restrictions under American law originate with Congress or the state legislative bodies. It is the Supreme Court's function to decide whether the statutory restriction either on its face or in its application violates the First Amendment freedoms, and the Court's decisions have made clear that these freedoms may be abridged pursuant to legislation designed to protect vital interests.

Marriage, Family, and the Rights of Parents and Children. The Basic Law states that marriage and family enjoy the special protection of the state, declares that the care and upbringing of children are the natural rights of the parents and a duty primarily incumbent upon them but that the state watches over the performance of this duty, and provides that children may be separated from the family against the will of the persons entitled to bring them up only pursuant to a law, if those so entitled fail in their duty or if the children are otherwise threatened with neglect.¹²¹

¹¹⁹ 5 BVerfGE 85 (1956). For comment on this decision, see McWhinney, "The German Federal Constitutional Court and the Communist Party Decision," 32 IND. L.J. 295 (1957). In an earlier decision the Court had similarly held the neo-fascist Socialist Reich Party unconstitutional, 2 BVerfGE 1 (1952).

¹²⁰ See the cases cited in note 116 supra.

¹²¹ Art. 6, §§ (1)-(3).

The importance of these provisions is highlighted by the decisions of the Federal Constitutional Court holding unconstitutional the provision of the family law giving the husband-father the power of decision over matters concerning the control and education of the children¹²² and the provision of the income tax law requiring the pooling of the separate incomes of husband and wife in determining the applicable tax rate.¹²³ The law giving the father the controlling voice over the children was found to violate the wife's equal right to participate in these matters, and the income tax provision was held to discriminate against the family relationship.

Although the United States Constitution does not deal expressly with family matters, it should be noted that the Supreme Court has recognized the natural right of parents with respect to the care and education of their children as a fundamental right protected under the due process clause of the Fourteenth Amendment.¹²⁴

Article 6 of the Basic Law further asserts the rights of mothers to the protection and care of the community and the duty of the legislature to provide illegitimate children with the same opportunities for their physical and spiritual development and their position in society as are enjoyed by legitimate children. Provisions of this type, oriented toward a program of social welfare legislation, are not generally found in American constitutions which are concerned with political and personal freedoms and are instead regarded as a matter appropriate for the usual law-making processes.

Education and Religious Instruction. The Basic Law deals at length with the important matter of education. Article 7 states at the outset that the entire educational system is under the supervision of the state. The persons entitled to bring up a child have the right to decide whether it shall receive religious instruction which forms part of the ordinary curriculum in the state and municipal schools except in secular schools. Without prejudice to the state's right of supervision, religious instruction is given in accordance with the tenets of the religious communities, but no teacher may be obliged against his will to give religious instruction. Although the right to establish private schools is guaranteed,

¹²² 10 BVerfGE 59 (1959). See note 87 supra for a statement of the several grounds on which the Court rested its decision and also the discussion in the text at that point.

¹²³ 6 BVerfGE 55 (1957). See the prior reference to this case in note 87 supra.

¹²⁴ See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), holding invalid a state statute which required all children to attend public schools on the ground that this interfered with the liberty of parents and guardians to direct the education of children under their control.

these schools when serving as a substitute for state and municipal schools require the approval of the state and are subject to the laws of the *Länder*, but this approval must be given if certain conditions stated in the Constitution are satisfied. These provisions suggest interesting points of comparison and contrast with constitutional aspects of education in the United States. The Supreme Court has recognized that a parent has a right to determine whether his child shall receive religious instruction. Indeed, the Court has held that the right to send children to a parochial school is fundamental and that state legislation that forces all children to attend public schools is unconstitutional as an interference with the freedom of the parents.¹²⁵ Perhaps the most interesting point of contrast here is the recognition under the Basic Law that religious instruction forms part of the ordinary curriculum in state and municipal schools (although a child's attendance at this instruction is subject to the decision of the parents), and that this religious instruction is given in accordance with the tenets of religious communities.¹²⁶ As pointed out earlier,¹²⁷ the Supreme Court has interpreted the First Amendment to require separation of church and state and to forbid all forms of state aid to religion. Pursuant to this interpretation, the Court has made clear that religious instruction and practices may not be included as part of the public school program.¹²⁸ Indeed, the release of children from their public school classes for one hour during the week to receive religious instruction from teachers supplied by the churches is unconstitutional if the instruction takes place on the school premises.¹²⁹ It must be remembered, however, in this connection that there is no general provision in the Basic Law which requires separation of church and state or which otherwise prohibits the government from giving aid to religion.¹³⁰ The Basic Law, therefore, is much more flexible in regard to these matters, although it does explicitly recognize religious and intellectual freedom.

Privacy of Home. Article 13 of the Basic Law states that the home is inviolable and that searches may be ordered only by a

¹²⁵ Ibid.

¹²⁶ Art 7, §(3).

¹²⁷ See the discussion in the text, p. 1120 supra.

¹²⁸ *Everson v. Board of Education*, 330 U.S. 1 (1947).

¹²⁹ *McCollum v. Board of Education*, 333 U.S. 203 (1948). But a released time program is valid if conducted off the school premises. *Zorach v. Clauson*, 343 U.S. 306 (1952).

¹³⁰ See note 100 supra.

judge or, in the event of danger in delay, by other organs as provided by law and may be carried out only in the form prescribed by law. Otherwise, this immunity may be encroached upon or restricted only to avert a common danger or a mortal danger to individuals, or, pursuant to a law, to prevent imminent danger to public security and order, especially to alleviate the housing shortage, to combat the danger of epidemics or to protect endangered juveniles. In general, this presents a counterpart of the Fourth Amendment of the Constitution of the United States which states a freedom from unreasonable search and seizure, a freedom which has also been recognized as fundamental under the due process clause of the Fourteenth Amendment.¹³¹ The provision in Article 13, authorizing searches in certain situations without regard to the usual formal authorization, suggests the problem recently before the Supreme Court in the case¹³² where it held that a municipal ordinance could impose a fine upon a person for refusing to open his home for inspection by a health officer when the officer had reason to suspect a condition that was dangerous to public health.

Freedom To Choose and Pursue Occupation. The Basic Law secures to all Germans the right freely to choose their trade or profession, their place of work and their place of training.¹³³ In turn it provides that the practice of trades and professions may be regulated by law. The Basic Law here recognizes both the specific right to choose one's trade or profession and the specific right to practice or pursue the same. These rights fall in the category of emanations of the right to the free development of personality and but for their special treatment would be protected under and governed by section (1) of Article 2. Under Article 12, section (1), a distinction is drawn between the right to choose one's trade or profession which appears to be absolute in character, and the right to practice one's trade or profession which is subject to

¹³¹ Wolf v. Colorado, 338 U.S. 25 (1949).

Wire-tapping is not considered a form of search and seizure that comes under the Fourth Amendment's restrictions. See *Olmstead v. United States*, 277 U.S. 438 (1928). Similarly it does not appear that wire-tapping comes within the search provisions of Article 13 of the Basic Law. Article 10 of the Basic Law, however, states that secrecy of the mail and secrecy of posts and telecommunications are inviolable and that restrictions may be ordered only pursuant to a law. In the United States these matters are dealt with by federal legislation in the absence of corresponding constitutional limitations. See Dobry, "Wire-tapping and Eavesdropping: A Comparative Survey," 1 J. INTL. COMM. JUR. 319 (1957).

¹³² Frank v. Maryland, 359 U.S. 360 (1959).

¹³³ Art. 12, § (1).

the reservation that it may be regulated by law. Because of the close interrelationship, however, between the choice and practice of a trade or profession, the Federal Constitutional Court has recognized that the choice of trade or profession may be restricted by law but only if the public interests served by the restriction cannot be achieved by regulations governing the practice. The right to choose and enter a trade or profession stands on the higher level.

Three interesting cases decided by the Court give a good picture of the practical significance of these rights and the theory followed in interpreting and applying them. In the well-known *Apotheke* case¹³⁴ the Court had before it a Bavarian statute which provided for the licensing of apothecaries and which empowered the licensing authority to take into account as a condition of granting the license the question whether there were not already enough apothecaries serving the area so that further competition, therefore, was undesirable, both from the viewpoint of protecting those already in the business and protecting the applicant from embarking upon a losing venture. In this case the applicant had been denied a license by reference to these economic considerations. The Court held that the part of the statute authorizing denial of a license on this ground was unconstitutional under section (1) of Article 12. This clearly was a restriction on the right to choose a profession. Recognizing that some restrictions could be imposed on this right, the Court distinguished between subjective and objective qualifications. The legislature may properly impose subjective qualifications, relating to such matters as professional competence, training, character and fitness, since the applicant has a chance to meet these qualifications and thereby help determine the result. But objective qualifications or conditions which are beyond the applicant's power to influence, such as the economic considerations relied upon in denying the license in this case, cannot be sustained, consistent with a person's constitutional right to choose a profession, unless justified by weighty and compelling public considerations and unless the possibility of achieving the desired results by means of subjective qualifications are first exhausted. In the case before it the Court found no justification for denial of the license.

¹³⁴ 7 BVerfGE 377 (1958). See Hamann, "Die Freiheit der Berufswahl," 11 NEUE JURISTISCHE WOCHENSCHRIFT 1801 (1958).

Thereafter the Court held invalid the provision of a milk control law which authorized the licensing authority to refuse to license a person who would not daily market a prescribed minimum amount of milk.¹³⁵ Again this was held to be an unlawful restriction on the right to choose a trade. The Court rejected the argument that this was a health measure on the theory that smaller establishments would be less likely to observe hygienic standards and that a large number of small establishments selling milk would make inspection more difficult. Health and inspection measures could properly be enforced in regulating the business, but establishing a daily minimum quota of milk to be sold was not essential to achieve these purposes.

Notwithstanding its decisions in the two cases discussed above, the Federal Constitutional Court sustained the law which gives a monopoly to the apothecaries or pharmacists in respect to the sale of most ready-packaged, non-prescriptive drugs.¹³⁶ Although it was argued that this created a monopolistic privilege at the expense of other businesses which claimed the constitutional right, pursuant to Article 12, to sell these drugs, the Court in advancing grounds to sustain this legislation emphasized not only the importance of having drugs dispensed by those who have special technical knowledge but laid stress also on the interesting argument that as an economic matter pharmacists could not afford to carry on their important function of filling prescriptions unless they could count on the profits from the sale of ready-packaged non-prescriptive drugs.¹³⁷ The Court's reliance on functional economic considerations to justify this legislation is noteworthy in view of its rejection in the earlier *Apotheke* case of the economic arguments advanced in support of the regulation there declared invalid.

The role assumed by the Court, as evidenced in all three cases, in determining the criteria to be employed in passing on the validity of legislation impinging upon the freedom to choose and pursue a trade or profession and in effect deciding whether the restrictions were reasonably required, furnishes an interesting commentary on the functioning of judicial review in the protection of these phases of economic liberty.

¹³⁵ 9 BVerfGE 39 (1958).

¹³⁶ 9 BVerfGE 73 (1959).

¹³⁷ The Court treated the regulation in this case as a regulation of the practice of their professions by both the apothecaries and the operators of other types of stores that were excluded from the sale of ready-packaged non-prescriptive drugs. Hence, the legislation was not seen as imposing a restriction on the freedom to choose a profession.

Although important phases of economic liberty are protected both under the specific provisions of Article 12 and by derivation from the general right to the free development of personality under Article 2, neither the Basic Law nor the decisions interpreting it furnish a basis for postulating a general concept of freedom of private enterprise. In short the Basic Law does not provide a constitutional sanction for a laissez-faire theory of economics. Indeed, the Federal Constitutional Court has said that the Basic Law is neutral on this matter, and that the legislature is free to develop its own conception of the proper type of economic order provided that its legislation does not violate rights protected by the Basic Law.¹³⁸

By way of comparison, it may be noted that although the Supreme Court at one time interpreted the due process clause to incorporate a broad concept of economic liberty, consistent with the ideas of free enterprise and a laissez-faire economics, this interpretation has been substantially devitalized in recent years by decisions upholding legislation imposing various types of economic controls, with the result that while economic liberty still has recognition as a fundamental right, it is subject to a broad exercise of the police power limited only by a loose standard of reasonableness.¹³⁹ The individual's right to choose and pursue his trade or occupation continues, however, to be regarded as an important liberty, and arbitrary exclusion of an individual from a profession is subject to attack as a denial of due process of law.¹⁴⁰

In connection with the right to choose and practice one's trade or profession, and as a phase of the broader concept of economic liberty, mention may be made also at this point of the express recognition in the Basic Law of the right to form labor unions.¹⁴¹ Agreements which seek to hinder this right are null and void. In the United States the right of collective bargaining and the duty of employers not to discriminate against employees because of union affiliation is recognized by the national labor

¹³⁸ See the opinion in 7 *BVerfGE* 377 (1958).

¹³⁹ See the references cited in note 77 *supra*.

¹⁴⁰ See *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957), holding that the refusal of bar examiners to certify an applicant for admission to the bar was a denial of due process of law since the record did not support a finding that the applicant had failed to establish his good moral character or had failed to show that he did not advocate overthrow of the government by force. See also *Greene v. McElroy*, 360 U.S. 474 (1959), where the Court stated (p. 492) that the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the due process clause.

¹⁴¹ Art. 9, §(3).

legislation. In upholding this legislation the Supreme Court stated that the right of collective bargaining must now be recognized as a fundamental right.¹⁴²

Freedom From Involuntary Servitude. Article 12 of the Basic Law which states that no one may be compelled to perform a particular work, except within the framework of a traditional compulsory public service which applies generally and equally to all, and that forced labor may be imposed only in the event that a person is deprived of his freedom by the sentence of a court, parallels the Thirteenth Amendment, which, while prohibiting involuntary servitude, expressly recognizes that forced labor may be permitted as punishment for crime and which has been construed to permit types of compulsory public service needed in the public interest.¹⁴³

Property Rights. The Basic Law guarantees property and the rights of inheritance, and states that their contents and limits are determined by the laws.¹⁴⁴ This article further declares that property imposes duties and that its use should also serve the public weal. Expropriation is permitted only in the public weal, and the compensation in case of expropriation shall be determined upon just consideration of the public interest and of the interests of the persons affected.¹⁴⁵ In case of dispute regarding the amount of compensation, recourse may be had to the ordinary courts.

The results reached under the United States Constitution in respect to property rights bear close resemblance to the express provisions of the Basic Law. The right to own, possess and enjoy the use of property is recognized as a fundamental right in the interpretation of the due process clause.¹⁴⁶ Private property may be taken by the government for a public use but only upon the

¹⁴² *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 at 33 (1937).

¹⁴³ See *Butler v. Perry*, 240 U.S. 328 (1916). Likewise, legislation prohibiting strikes under circumstances where vital public interests would be affected does not violate the involuntary servitude prohibition. See *International Union, UAW-AFL, Local 232 v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949).

¹⁴⁴ Art. 14, § (1).

¹⁴⁵ Art. 14, § (3). This section requires that a statute which authorizes a taking of property provide the means of compensation. If it fails to do so, it is unconstitutional. It is not the function of the judiciary to order a means of compensation in such a case. See *4 BVerfGE* 219 (1955). On the general subject, see Schubert, "Compensation Under New German Legislation on Expropriation," 9 *Am. J. Comp. L.* 84 (1960).

¹⁴⁶ See, e.g., *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). But the right of an owner to dispose of his property by will has not been regarded as a fundamental or natural right. *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283 (1898).

payment of just compensation.¹⁴⁷ Whether property is taken, whether it is taken for a public use, and what constitutes just compensation are questions for judicial interpretation.¹⁴⁸ But property rights are not absolute, and the use of property may be subjected to reasonable restrictions imposed by the legislature in the public interest in the exercise of the police power.¹⁴⁹ The line between permissible restrictions on the use of property and restrictions which are invalid either because they are arbitrary or because they amount to an attempt to take property without payment of compensation is not easily drawn, and any court forced into a decision on a question of this kind is inevitably required to employ an empiric process that weighs and balances such factors as the degree of impairment of private right, the breadth and nature of the public interest served, and the reciprocity of benefits accruing to private owners.¹⁵⁰

Article 15 of the Basic Law states that land, natural resources and means of production may, for the purpose of socialization, be transferred to public ownership or other forms of publicly controlled economy by a law which provides for the kind and extent of the compensation. This programmatic provision makes clear that a socialization program would not be incompatible with the con-

¹⁴⁷ This restriction is expressly stated in the Fifth Amendment as a limitation on the federal government. The due process clause of the Fourteenth Amendment has been interpreted to impose the same restriction upon the states. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

Attention should also be called to the provision of Art. I, §10 of the Constitution, prohibiting the states from passing laws impairing the obligation of contracts. This serves as an added protection against retrospective legislative impairment of one class of vested rights. No corresponding provision appears in the Basic Law.

¹⁴⁸ On the "taking" question, see *United States v. Causby*, 328 U.S. 256 (1946), holding that the flight of government aircraft over a private farm in such a manner as to interfere with the owner's effective use of his land constituted a compensable taking.

The term "public use" as a limitation on the eminent domain power is no longer strictly construed by the Supreme Court. Property is taken for a public use if it is taken for a use that serves the public interest and general welfare. See *Berman v. Parker*, 348 U. S. 26 (1954), upholding the use of the eminent domain power in connection with a project for the redevelopment of a part of the District of Columbia. The Court further indicated in this case that the question whether a public purpose would be served by the exercise of the eminent domain power was a matter primarily for determination by Congress and that the Court had a very narrow function to perform in review of this question.

On the judicial function in determining "just compensation," see *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

¹⁴⁹ See, e.g., *Hadacheck v. Sebastian*, 239 U. S. 394 (1915) (the use of property in a manner injurious to the health and safety of the public may be prohibited); *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926) (use of land may be limited by comprehensive zoning laws that define permissible use classifications).

¹⁵⁰ Helpful discussions are found in the opinions in the *Village of Euclid* case, note 149 *supra*, and the *Pennsylvania Coal Co. case*, note 146 *supra*.

stitutional order established by the Basic Law and further supports the idea that the Basic Law is neutral in respect to the nature of the economic system within the constitutional order. At an earlier period in American constitutional history the Supreme Court employed the due process clause as a means of protecting the private enterprise system, and as part of this conception placed limitations on the use of public funds to engage in proprietary enterprise by finding that the due process clause prohibited the use of public funds for other than a public purpose, which was defined to exclude enterprises normally conducted by private persons and corporations.¹⁵¹ These interpretations of the due process clause appear to have little or no vitality at present,¹⁵² although limitations found in state constitutions continue to serve as restrictions on the powers of state legislatures to embark upon programs of proprietary enterprise.¹⁵³ So far as Congress is concerned, taking into account its broad power to regulate and promote commerce¹⁵⁴ and its equally broad power to spend for the general welfare,¹⁵⁵ it is doubtful whether the Constitution imposes any substantial barriers to a program of governmental socialization of industries basic to the national economy, provided, of course, that compensation is paid in the case of expropriation of private property for this purpose.

Limitations on Criminal Liability. Before concluding this review of rights protected under the Basic Law, reference may be made to the rights of those charged with crime. These rights occupy an important position in the United States Constitution,¹⁵⁶

¹⁵¹ See *Citizen's Savings & Loan Assn. v. Topeka*, 20 Wall. (87 U.S.) 655 (1875).

¹⁵² See *Green v. Frazier*, 253 U. S. 233 (1920), where the Court upheld the power of a state to operate a bank, warehouse, grain elevator, flour mill and home building project.

¹⁵³ State constitutions commonly provide that public funds may be expended only for "a public purpose," and it is the function of the state courts in interpretation of this limitation to determine what is properly a "public purpose."

¹⁵⁴ U.S. CONST., Art. I, §8, ¶ 3. Thus, incident to its power to regulate commerce, Congress may authorize federal proprietary enterprise at the expense of private enterprise, as in the case of federal hydroelectric projects on navigable waters. The Tennessee Valley Authority program is a prime example. See *Ashwander v. TVA*, 297 U.S. 288 (1936); *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1939).

¹⁵⁵ U.S. CONST., Art. I, §8, ¶ 1. See *United States v. Butler*, 297 U.S. 1 (1936); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937). The breadth and general character of the federal spending power scarcely admit of limitation by judicial interpretation.

¹⁵⁶ The Fifth and Sixth Amendments to the Constitution detail a number of procedural limitations applicable in the case of federal prosecutions: indictment by grand jury, the right to a speedy and public trial by an impartial jury, freedom from double jeopardy, the privilege against self-incrimination, the right of the accused to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. The Fourth

as well as in the various state constitutions, and bulk large in the Supreme Court's interpretation of the due process clause of the Fourteenth Amendment.¹⁵⁷ Although some rights of this kind are recognized under the Basic Law, they are included in Articles 101, 103 and 104 in Part IX, dealing with the administration of justice and are not categorized as basic rights under Part I.

In brief these provisions prohibit extraordinary courts, prohibit a person's removal from the jurisdiction of his lawful judge, secure the accused's right to a hearing in accordance with the law, prohibit *ex post facto* laws and double jeopardy, place restraints on police action in restricting the individual's freedom by requiring the restriction to be based on law and with due regard to the forms prescribed therein, prohibit the mental and physical ill-treatment of detained persons, strictly limit the period in which police may hold a person in custody before bringing him before a judge for a preliminary hearing, and require prompt notice to be given to a relative of the person detained, or a person enjoying his confidence, of any judicial decision ordering or extending a deprivation of liberty. Many of these restrictions have their parallels in American constitutional limitations,¹⁵⁸ although some

Amendment, previously discussed in the text, protects against unreasonable search and seizure, and the Eighth Amendment prohibits excessive bail, excessive fines and cruel and unusual punishment.

Article I, §§ 9 and 10, prohibits both the federal government and the states from passing bills of attainder and *ex post facto* laws.

¹⁵⁷ Since the express provisions of the Bill of Rights, referred to in note 156 *supra*, apply only to federal prosecutions, the limitations derived from the Constitution on state criminal procedure, except in respect to the bill of attainder and *ex post facto* prohibitions, result from the Supreme Court's interpretation of the due process clause which has been construed to protect those rights which are basic according to the Court's conception of fundamental fairness and justice. Not all the procedural rights specifically catalogued in the Bill of Rights as limitations on the federal government are regarded as fundamental. See the cases cited in note 37 *supra*.

¹⁵⁸ The right to hearing in accordance with the law accords with the central idea of the due process clause, namely, that a person shall not be deprived of life, liberty or property without due process of law, which reduced to its essentials means that a person may not be punished except after notice and a fair hearing in accordance with the procedures established by law. See *Hurtado v. California*, 110 U.S. 516 (1884).

The body of the Constitution expressly prohibits both the federal government and the states from passing *ex post facto* laws. Art. I, §§ 9 and 10.

The Sixth Amendment, applicable to the federal government, states that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. This provision is commonly found in state constitutions as well. But the due process clause of the Fourteenth Amendment, as a federal restriction on the states, does not require the states to observe the double jeopardy limitation in the same sense in which it applies to the federal government. *Palko v. Connecticut*, 302 U. S. 319 (1937).

The federal statute requiring persons arrested by federal officers to be brought promptly before a federal magistrate has recently received a strict construction from the Supreme Court which has declared the rule that confessions obtained during a period of

of the details are not governed by constitutional provisions but instead are spelled out in the federal and state laws defining criminal procedure.¹⁵⁹ The common American constitutional provisions are more concerned with protections of the accused in the course of the trial, such as the right to jury trial, the right to counsel, the privilege against self-incrimination, the right to confront witnesses, and the accused's rights to have compulsory process for obtaining witnesses in his favor. On the other hand, while restraints on police conduct assume a major significance in the Basic Law, the important protections for the accused in the course of the trial are left for legislative treatment in the Code of Criminal Procedure. In this connection it should also be noted that any comparison of American and German criminal trial procedures must take into account the basic consideration that trial by jury and grand jury indictment are not a part of the German legal system.

H. *Conclusions*

The recognition of fundamental rights under the Constitution rests on the classic assumption of constitutional liberalism that the freedom of the individual must be protected against the power of the state. The Basic Law, true to its general character as a document which fuses the traditional concept of democratic liberalism with the evolving concept of the modern public service state, postulates some social rights that depend for their fulfillment upon positive action by the state. The provisions respecting the family and education may be cited in this connection. But most of the rights guaranteed under the Basic Law are concerned with constitutional freedom of the individual in the classic sense. Comparison with the Constitution reveals recognition of a common

illegal detention are inadmissible at the trial later. See *Mallory v. United States*, 354 U. S. 449 (1957).

The Supreme Court employs the due process clause as a means of curbing lawless actions of state police in subjecting prisoners to abusive practices by holding inadmissible at the trial confessions secured by the police under circumstances which are basically unfair to the prisoner and which impair the voluntary character of the confession. See, e.g., *Fikes v. Alabama*, 352 U. S. 191 (1957); *Spano v. New York*, 360 U. S. 315 (1959).

¹⁵⁹ Thus the period of time within which police must present an arrested person for arraignment before a magistrate is often detailed by statute. The federal statute provides that this shall be done "without unnecessary delay." In *Mallory v. United States*, 354 U. S. 449 (1957), this requirement was held violated where the police had the opportunity to present the prisoner before a magistrate immediately after arrest but waited until the next morning to do so.

core of basic rights. Freedom of religion, speech, press and assembly, the right to equal protection of the laws, the right to compensation in the case of expropriation of property for a public use, the right to a fair trial and other protections for the accused are guaranteed under both constitutions. The Basic Law is much more comprehensive, however, and also more precise in its statement of basic rights. It recognizes some rights which are left to implication under the Constitution either in the interpretation of rights specifically enumerated or in the interpretation of the fundamental rights protected under the due process clause. The freedom of art, science, research and teaching, the equal rights of men and women, the right of parents in regard to the care and upbringing of children, the right to form associations and societies, the freedom of movement, the right to choose a trade or profession, and the rights of property and inheritance all fall into this category. On the other hand, some of the specific rights catalogued in the Basic Law, such as the rights of conscientious objectors, are not recognized either expressly or by implication under the Constitution.

An important difference between the Basic Law and the Constitution relates to church-state matters. Although it guarantees complete freedom of religious and ideological views and the right to the undisturbed practice of religion, the Basic Law does not state a general theory of separation of church and state. The express provision of the Basic Law authorizing religious instruction in the public schools furnishes an interesting contrast to American practice as limited by the separation concept.

A notable feature of the Basic Law is that unlike the Constitution it defines more precisely the scope of the various rights guaranteed by it. Some of the rights may be asserted only by citizens. Moreover, some rights are recognized to be absolute in character whereas others are subject to restriction by law, but in the latter case the law must be general in character, must name the basic right it is restricting, and in no case may it infringe upon the right in its basic content. Such built-in limitations are not found in the Constitution. It is the responsibility of the Supreme Court to determine the scope of the rights expressly or impliedly protected under the Constitution, and in general it has followed the theory that these rights may be limited in the reasonable exercise of the legislative power to protect appropriate public interests.

IV. THE FEDERAL PRINCIPLE

The Basic Law provides that the federal territory shall be reorganized by federal law with due regard to regional ties, historical and cultural connections, economic expediency and social structure, and that such reorganization should create *Länder* (states) which, by their size and capacity, are able effectively to fulfill the function incumbent upon them.¹⁶⁰ Further provisions deal with the procedure to be followed by means of popular initiative and referendum respecting changes regarding the *Land* boundaries established by the reorganization of the *Länder* after May 8, 1945.¹⁶¹ The procedure regarding any other changes in the territory of the *Länder* is to be established by a federal law which requires the consent of the *Bundesrat* and of the majority of the members of the *Bundestag*. But the basic principle that the Federation shall be divided into *Länder* cannot be changed by an amendment of the Basic Law.¹⁶² Thus, while the boundaries and the number of the *Länder* may be changed, it is not possible, consistent with the Basic Law, to eliminate the *Länder* altogether in order to achieve a unitary state. The insistence upon this principle must be understood in light of the experience under the Hitler regime when the states as political entities were abolished and the federal principle as established under the Weimar Constitution was discarded. The important role of the *Länder* in the post-war

¹⁶⁰ Art. 29, § (1).

¹⁶¹ Article 118, included in the transitional and concluding provisions of the Basic Law, dealing specially with the reorganization of the territory comprising the *Länder* Baden, Wuertemberg-Baden and Wuertemberg-Hohenzollern, in the southwestern part of Germany, authorized reorganization by agreement between the *Länder* concerned and provided that if no agreement was reached, the reorganization was to be regulated by a federal law which had to provide for a referendum. The federal statutes enacted to deal with this matter gave rise to the first major case (the "Southwest Case") before the Federal Constitutional Court and the first decision holding federal legislation unconstitutional. 1 *BVerfGE* 14 (1951). See von Mehren, "Constitutionalism in Germany—the First Decision of the New Constitutional Court," 1 *AM. J. COMP. L.* 70 (1952); Leibholz, "The Federal Constitutional Court in Germany and the 'Southwest Case,'" 46 *AM. POL. SCI. REV.* 723 (1952); Klein, "Bundesverfassungsgericht und Südweststaatsfrage," 77 (Vol. 38, New Series) *ARCHIV DES ÖFFENTLICHEN RECHTS* 452 (1951-1952). See also note 6 *supra*.

Actually the decision in the Southwest Case, while holding parts of the federal legislation unconstitutional, sustained its essential features with the result that the referendum as authorized by the reorganization statute was held on December 9, 1951. The proposed reorganization of the three *Länder* into a single new *Land* known as Baden-Wuerttemberg was approved by the necessary majority votes. The Saar was added as a new *Land* on January 1, 1957. At present the Federation consists of the following ten *Länder* (exclusive of West Berlin which has a special status): Baden-Wuerttemberg, Bavaria, Bremen, Hamburg, Hesse, Lower Saxony, North Rhine-Westphalia, Rhineland Palatinate, Saarland, and Schleswig-Holstein.

¹⁶² Art. 79, § (3).

constitutional development is reflected in the key role played by the *Länder's* representatives in the drafting and ratification of the Basic Law.^{162a}

A. *Distribution of Legislative Power*

Article 70 of the Basic Law defines the basic theory respecting the division of legislative authority as between the Federation and the *Länder*. The *Länder* have the power to legislate in so far as the Basic Law does not confer legislative power on the Federation. This finds a parallel in the Tenth Amendment to the Constitution of the United States which reserves to the states or to the people the powers not delegated to the United States.

The division of authority between the Federation and the *Länder* is determined by the provisions of the Basic Law concerning exclusive and concurrent legislative powers. Article 73 lists eleven categories of exclusive legislative powers of the Federation¹⁶³ and with respect to these the Basic Law provides that the *Länder* shall have authority to legislate only if, and to the extent that, a federal law explicitly so authorizes them.¹⁶⁴ Article 74 lists twenty-three categories of concurrent legislative powers,¹⁶⁵ and

^{162a} The Basic Law was prepared and drafted by the Parliamentary Council which consisted of delegates elected by the *Landtage* (legislatures) of the several *Länder* (eleven at that time). By its terms (Art. 144), the Basic Law became effective for all the *Länder* following ratification by the *Landtage* of the two-thirds of the *Länder*. Ten of the eleven *Landtage* voted to ratify. Although the Bavarian *Landtag* voted to reject the Basic Law, it nevertheless voted in support of a declaration that Bavaria was a part of the Federal Republic of Germany.

¹⁶³ The Federation's exclusive legislative powers extend under Art. 73 to (1) foreign affairs as well as defense, including both military service for males from their completed age of 18 years and the protection of the civilian population, (2) citizenship in the Federation, (3) freedom of movement, passports, immigration and emigration, and extradition, (4) currency, money and coinage, weights and measures, as well as computation of time, (5) the unity of the customs and commercial territory, commercial and navigation agreements, the freedom of movement of goods, and the exchanges of goods, and payments with foreign countries including customs and frontier protection, (6) federal railroads and air traffic, (7) postal and telecommunication services, (8) the legal status of the persons employed by the Federation and by federal bodies-corporate under public law, (9) industrial property rights, copyrights and publication rights, (10) cooperation of the Federation and the *Länder* in matters of criminal police and of protection of the Constitution, establishment of a federal office of the criminal police, as well as international control of crime, and (11) statistics for federal purposes.

¹⁶⁴ Art. 71.

¹⁶⁵ The concurrent legislative powers extend to the following matters:

- "1. civil law, criminal law and execution of sentences, the system of judicature, the procedure of the courts, the legal profession, notaries and legal advice (*Rechtsberatung*);
2. registration of births, deaths, and marriages;
3. the law of association and assembly;
4. the law relating to residence and establishment of aliens;
5. the protection of German cultural treasures against removal abroad;

with respect to these the *Länder* have authority to legislate as long as, and to the extent that, the Federation does not use its legislative power.¹⁶⁶

In the sphere of concurrent legislative powers, the Federation has the right to legislate only to the extent that a need for a federal rule exists because (1) a matter cannot be effectively dealt with by the legislation of individual *Länder*; or (2) dealing with the matter by a *Land* law might prejudice the interests of other *Länder* or of the entire community; or (3) the maintenance of legal or economic unity, especially the maintenance of uniformity of living conditions beyond the territory of a *Land*, necessitates it.¹⁶⁷

The statement in Article 70 that the *Länder* have the power to legislate in so far as the Basic Law does not confer legislative powers on the Federation does not tell the whole story, since the *Länder* may legislate by express authority of the Federation in the

6. the affairs of refugees and expellees;
7. public welfare;
8. citizenship in the *Länder*;
9. war damage and reparation;
10. benefits to war-disabled persons and to dependents of those killed in the war, assistance to former prisoners of war, and care of war graves;
11. the law relating to economic matters (mining, industry, supply of power, crafts, trades, commerce, banking and stock exchanges, private insurance);
12. labor law, including the legal organization of enterprises; protection of workers, employment exchanges and agencies, as well as social insurance, including unemployment insurance;
13. the promotion of scientific research;
14. the law regarding expropriation to the extent that matters enumerated in Articles 73 and 74 are concerned;
15. transfer of land, natural resources and means of production into public ownership or other forms of publicly controlled economy;
16. prevention of the abuse of economic power;
17. promotion of agricultural and forest production, safeguarding of the supply of food, the import and export of agricultural and forest products, deep sea and coastal fishing, and preservation of the coasts;
18. dealings in real estate, land law and matters concerning agricultural leases, housing, settlements and homesteads;
19. measures against epidemic and infectious diseases of humans and animals, admission to medical and other professions and practices in the field of healing, traffic in drugs, medicines, narcotics, and poisons;
20. protection with regard to traffic in food and stimulants as well as in necessities of life, in fodder, in agricultural and forest seeds and seedlings, and protection of trees and plants against diseases and pests;
21. ocean and coastal shipping as well as aids to navigation, inland shipping, meteorological services, sea waterways and inland waterways used for general traffic;
22. road traffic, motor transport, and construction and maintenance of long distance highways;
23. railroads other than federal railroads, except mountain railroads."

¹⁶⁶ Art. 72, § (1).

¹⁶⁷ Art. 72, § (2).

areas of the Federation's exclusive legislative powers, and may exercise concurrent legislative powers as long as the Federation does not occupy the field by its own laws. What is really meant by Article 70 is that the *Länder* have exclusive powers to legislate in areas not embraced by the Federation's powers. It is a point worth emphasis that the *Länder* derive their authority from a constitutional distribution of power, that they do not owe their existence and powers to the Federation, and that within the sphere of their exclusive jurisdiction they exercise autonomous sovereign authority.

The Federation's exclusive legislative powers parallel in important respects the expressly granted power of Congress under the Constitution.¹⁶⁸ When account is taken, however, of the concurrent powers also, it is clear that the Federation's powers extend to many matters not coming within the powers of Congress, although it should be noted that some of the concurrent powers, such as those relating to regulation of economic matters, including commerce, labor law, and promotion of agriculture, parallel the reach of congressional power either as expressly or impliedly granted.¹⁶⁹ Perhaps one way to look at the concurrent powers under Article 74 is that they deal, at least in large part, with matters which in the United States fall within the implied powers of Congress. On the other hand, it is also evident that the Federation, in view of its concurrent authority to deal with civil law, criminal law, and dealings in real estate and land law, has a much broader authority than our Congress does, since the matters of strictly private law do not generally come within the express or

¹⁶⁸ Apart from the tax powers discussed later, the important powers expressly granted to Congress under Article I of the Constitution include the power to regulate foreign and interstate commerce, establish uniform rules of naturalization and bankruptcy, coin money and regulate the value thereof, fix the standards of weights and measures, establish post offices and post roads, enact laws relating to patents and copyrights, declare war, and provide for the armed forces. The primary power to regulate foreign affairs is vested in the President under Art. II. See *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936). However, Congress has power to legislate in respect to foreign affairs both because of the reach of its express powers in regard to such matters as regulation of foreign commerce, and because this power inheres in the national government. See *Perez v. Brownell*, 356 U. S. 44 (1958).

¹⁶⁹ Under the power to regulate commerce among the several states, Congress has the authority to regulate labor-management relations in industries affecting commerce [*NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)], fix labor standards for employees engaged in commerce or in production for commerce [*United States v. Darby Lumber Co.*, 312 U. S. 100 (1941)], and regulate agricultural production [*Wickard v. Filburn*, 317 U. S. 111 (1942)].

implied powers of the national government.¹⁷⁰ Indeed, it is fair to say that the combination of exclusive and concurrent powers under the Basic Law gives to the Federation a totality of legislative power considerably in excess of that granted to Congress, with the result that the areas that are exclusively left to the *Länder* under the Basic Law are very limited in scope. It appears that education and culture, along with matters relating to local administration, are the only major areas over which the *Länder* have an exclusive legislative authority.

The Basic Law recognizes a third category of legislative powers of the Federation, apart from the categories of exclusive and concurrent powers. Article 75 authorizes the Federation to enact what for lack of a better term we may call general framework laws (*Rahmenvorschriften*). These have to do with (1) the legal status of persons in the public service of the *Länder*, communes and other bodies-corporate of public law; (2) the general rules of law concerning the status of the press and motion pictures; (3) hunting, protection of nature and care of the countryside; (4) land distribution, regional planning, and water conservation; (5) matters relating to registration and identity cards. Here the legislative power of the Federation extends to the enactment of general rules as distinguished from complete treatment of the subject. The *Länder*, in turn, have the authority to implement the general rules by detailed regulations of their own. In short, this category embodies the idea that these matters have a national aspect and yet admit of diversity of treatment in their particularized application.

According to the classic interpretation of the United States Constitution, originating with Chief Justice Marshall's opinion in *McCulloch v. Maryland*,¹⁷¹ the Congress may exercise not only the powers expressly enumerated in Article I of the Constitution but also the powers implied from those granted. The implied power doctrine, coupled with the general theory of liberal construction propounded in the *McCulloch* case, has contributed in an extraordinary way to extension of congressional legislative power. This principle of construction has its roots in the con-

¹⁷⁰ Congress has the implied power to enact criminal laws with respect to matters coming within its legislative jurisdiction, but it lacks jurisdiction to enact general criminal laws.

Not only does the federal government not have legislative authority over matters of private law, i.e., contracts, torts, and property law, but federal courts in dealing with questions of private law coming before them must follow the law of the state, whether statutory or case law, where the federal court sits. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

¹⁷¹ 4 Wheat. (17 U.S.) 316 (1819).

stitutional language which authorizes Congress to make all laws which shall be "necessary and proper" for executing its enumerated powers and all other powers vested by the Constitution in the federal government.¹⁷² The Basic Law contains no "necessary and proper" clause. In view of the range of the powers delegated to the Federation, it is understandable that such a clause was not included. However, despite the absence of a clause of this kind, the Federal Constitutional Court, without formulating a broad or liberal theory of implied powers, has accepted two ideas that contribute to a limited implied power doctrine.

The Federation is said to have powers not expressly granted which relate to functions which by their nature (*Natur der Sache*) inhere in the very creation and constitutional organization of the Federation.¹⁷³ But the consideration that with respect to a given subject matter it would be expedient to have a uniform federal law instead of a diversity of laws of the several *Länder* is not in itself enough to show that the subject matter involves functions that by their nature fall within the competence of the Federation. In accordance with this principle the Federal Constitutional Court expressed the opinion that while land planning on a national level was a function which by its nature gave rise to a legislative power in the Federation to deal with the subject, the same could not be said with respect to building law taken as a whole (*Baurecht als Gesamtmaterie*) even though specific phases of building law came within the express delegations of authority to the Federation.¹⁷⁴

A second principle of construction that suggests a limited doctrine of implied powers is that an express grant of power to the Federation to deal with a specific subject matter carries with it the implied authority to enact regulations which are indispensable to the full exercise of the express power (*Sachzusammenhang*), even though the Federation may thereby extend its authority into fields of regulation not specifically embraced within its express powers. This comes the closest to the American "necessary and proper" idea, but any such analogy should be viewed with caution, since the emphasis given by the Federal Constitutional Court appears to stress what is *strictly* necessary to the implementation of the express power.¹⁷⁵

¹⁷² Art. I, §8.

¹⁷³ See the discussion in the advisory opinion reported in 3 *BVerfGE* 407 (1954).

¹⁷⁴ 3 *BVerfGE* 407 (1954).

¹⁷⁵ For discussion, see the advisory opinion in 3 *BVerfGE* 407 (1954). Here the Court concluded that the power to enact a building law was not necessary to the implementation of the Federation's legislative powers. See also the opinion in 8 *BVerfGE* 143, where the

A further comparison may be made at this point between the distribution of power under the Basic Law and under the United States Constitution. The Constitution in delegating power to Congress does not explicitly define these powers as either exclusive or concurrent and does not state any general rule respecting the continuing power of the states in these areas. Any powers given to Congress may be deemed exclusive by virtue of the provisions of the Constitution only to the extent that there are express prohibitions on the power of the states to legislate or to deal with certain areas, such as the express prohibition on the power of the states to make treaties or to enter into alliances or confederations, coin money, emit bills of credit, or make anything but silver and gold coin a legal tender in payment of debts.¹⁷⁶ Likewise, no state may, without the consent of Congress, lay imposts or duties on imports or exports, lay any duty or tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign nation, or engage in a war unless actually invaded or in such imminent danger as will not admit of delay.¹⁷⁷ The federal power to deal with these matters is not in every case strictly exclusive, since it is recognized that the states may exercise authority in some of these areas with the consent of Congress. This does suggest a parallel with the Basic Law since even the so-called exclusive powers of the Federation are exclusive only in the sense that the *Länder* may not exercise legislative power in these areas without the express approval of the Federation.

Apart, however, from the express denials of certain powers to the states, whether the denial is absolute or conditioned on approval by Congress, the Constitution states no general rules for determining whether or not powers granted to Congress are exclusive or whether they admit of a subordinate concurrent power on the part of the states. These problems have been worked out by the Supreme Court in its role as umpire of the federal system. They have arisen most frequently in respect to the regulation of commerce. The Constitution grants to Congress the power to

Court develops the idea that a legislative power granted the Federation implies a police power incident to the execution of the power.

For extended and critical discussion of the subject of implied powers, see Küchenhoff, "Ausdrückliches, stillschweigendes und ungeschriebenes Recht in der bundesstaatlichen Kompetenzverteilung," 82 (Vol. 43, New Series) ARCHIV DES ÖFFENTLICHEN RECHTS 413 (1957).

¹⁷⁶ Art. I, §10, ¶1.

¹⁷⁷ Art. I, §10, ¶2.

regulate commerce among the several states. In the absence of an indication of congressional policy respecting the power of the states to make their laws applicable to commerce, the Supreme Court has provided solutions by employing various theories which in the end permit states at least a limited authority to extend their police regulations and tax laws to commerce within the limits of their territorial jurisdiction. In the end it does not make much difference whether the Court says that the power to regulate commerce is exclusive but the states may exercise their police power to affect commerce,¹⁷⁸ or whether it says that the states have a subordinate concurrent power to regulate the local phases of commerce,¹⁷⁹ or that the states may regulate commerce as long as there is a valid local interest that outweighs the national interests in the freedom of commerce.¹⁸⁰ Whatever the theory, a substantial amount of state regulation and taxation is permitted, consistent with the basic freedom to do business on the interstate market. In this sense, therefore, it can be said that the states do have a concurrent power to regulate commerce subject to the paramount power of Congress and its expressed or implied policy respecting a given phase of regulation. On the other hand, some phases of regulation of commerce have been denied to the states absent authorization from Congress.¹⁸¹ To this extent it may be said that the power of Congress over the subject is exclusive in the sense that this term is used in the Basic Law. What emerges as the central principle is that Congress has the superior power over the subject and that by its legislation it may expressly or impliedly deny to the states the power to deal with the subject¹⁸² or expressly authorize

¹⁷⁸ *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1 (1824).

¹⁷⁹ *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. (53 U.S.) 299 (1851).

¹⁸⁰ *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). The opinion in this case contains an excellent discussion of the subject, and the approach here taken appears to represent the Court's current position on this problem.

¹⁸¹ Thus the states may not regulate the degree of competition in interstate commerce [*Buck v. Kuykendall*, 267 U.S. 307 (1925), *H. P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949)], subject commerce to conflicting requirements [*Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959)], discriminate against interstate commerce [*Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951)], or tax the privilege of doing interstate business [*Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951)].

¹⁸² Legislation having this effect may assume either of two forms. Congress by its own substantive legislation in the exercise of the commerce power may occupy or preempt the field and thereby impliedly displace state power, or the statute may by its express terms indicate the extent to which state power is displaced. The problem of displacement by implication has arisen most frequently in recent years in regard to the power of states to deal with labor matters in view of federal legislation in this area. See, e.g., *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957). For an extended discussion and application of the pre-emption doctrine in its relevancy to internal security legislation, see *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). Congress, without enacting its own

the states to extend their authority over a given subject in interstate commerce.¹⁸³

The express authority of the Federation under the Basic Law to enact general standard or framework laws with details to be supplied by the *Länder*¹⁸⁴ has no parallel under the Constitution, although it does suggest a familiar pattern with respect to the relationship of state and municipal authority under the several state constitutions. Congress may adopt local laws in some instances,¹⁸⁵ may permit details in some statutes to be determined by reference to local law,¹⁸⁶ and may condition the exercise of a federal right by the observance of state law,¹⁸⁷ but at most these patterns suggest only imperfect analogies to the idea of a general framework statute as authorized by the Basic Law.

B. Tax Powers

The distribution of taxing authority is dealt with specially in Part X of the Basic Law as amended December 23, 1955. The Federation has exclusive power to legislate on customs and fiscal monopolies,¹⁸⁸ and a concurrent power to legislate on excise and transaction taxes, taxes on income, property, inheritances and gifts, and taxes on real estates and businesses.¹⁸⁹ But while the Federation occupies the dominant position in respect to these major tax powers, so far as the enactment of tax legislation is concerned, the Basic Law stipulates that the receipts from certain taxes accrue to the benefit of the *Länder* whereas others are earmarked

substantive legislation, may expressly deny a state the power to subject commerce to specific burdens or restraints. Thus in 1959 it enacted the Interstate Commerce Tax Act, expressly providing that no state may levy an income tax on a foreign corporation doing solely interstate business within the state. 73 Stat. 555 (1959), 15 U.S.C. (Supp. 1959) §§381-384.

¹⁸³ Thus Congress has expressly provided that the insurance business shall be subject to state regulatory and tax laws. See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

¹⁸⁴ Art. 75.

¹⁸⁵ Thus Congress in the Assimilative Crimes Act has adopted state criminal legislation in defining criminal liability in areas under exclusive federal jurisdiction. This statute was upheld in *United States v. Sharpnack*, 355 U.S. 286 (1958).

¹⁸⁶ Under the federal bankruptcy act certain property exemptions are governed by state law. 11 U.S.C. (1958) §24. On the validity of this provision, see *Hanover Nat. Bank v. Moyses*, 186 U.S. 181 (1902).

¹⁸⁷ Thus Congress in the Webb-Kenyon Act prohibited interstate shipments of liquor intended for use or possession in violation of the laws of the state of destination. This statute was upheld in *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311 (1917), as a proper exercise of the congressional power to regulate interstate commerce. See KALLENBACH, *FEDERAL COOPERATION WITH THE STATES UNDER THE COMMERCE CLAUSE* (1942).

¹⁸⁸ Art. 105, § (1).

¹⁸⁹ Art. 105, § (2).

for the Federation's benefit.¹⁹⁰ The receipts from federal income and corporation taxes are apportioned on a percentage basis with about two-thirds going to the *Länder*.¹⁹¹ In order to equalize financial capacity of the *Länder*, taking into account differences in tax revenues and differences in burdens of expenditures, the Federation may grant special subsidies to some *Länder* at the expense of the share of resources that would normally be distributed to other *Länder*.¹⁹²

In summary, the tax provisions of the Basic Law contemplate a centralization of the important tax powers in the Federation, but with earmarking of a part of the receipts for *Länder* purposes. By contrast, under the United States Constitution, the national government and the states have independent taxing powers.¹⁹³ Both Congress and the state legislatures may, for instance, levy income taxes, death taxes, and numerous forms of excises. As a practical matter pre-emption may occur if federal tax rates are so high as to discourage the states from levying a similar type of tax. Custom and experience have also indicated a line of division in tax matters. For instance, the federal government does not levy property taxes,¹⁹⁴ and in turn this is a principal source of revenue to the states and their political subdivisions. Moreover, in determining the total fiscal picture account must be taken of the broad spending power of the federal government, which may use its spending power as a means of redistributing back to the states moneys collected through federal taxes, and in doing so it may act

¹⁹⁰ Art. 106, §§ (1) and (2).

¹⁹¹ Art. 106, § (3).

¹⁹² Art. 107, § (2).

¹⁹³ Under Art. I, § 8 of the Constitution, Congress has the power to lay and collect taxes, duties, imposts and excises. Duties, imposts and excises are required to be uniform throughout the United States. Direct taxes are required to be apportioned among the states on the basis of population. Art. I, § 9. Under the Sixteenth Amendment (1913) Congress is expressly authorized to lay and collect taxes on income. The income tax is now the major source of federal revenues.

The power of the states to levy taxes is derived from their own constitutions. Apart from limitations imposed by their respective constitutions, the states in exercising their taxing powers are subject to some limitations derived from the Constitution. The states may not levy taxes on imports and exports without the consent of Congress, Art. I, § 10. Because of the grant of power to Congress to regulate commerce, the states may not levy taxes on the privilege of doing interstate business. See *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951). Likewise, according to the doctrine of implied intergovernmental immunities, the states may not levy taxes directly on the federal government or its instrumentalities except as the immunity is waived by Congress. See *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819); *United States v. Detroit*, 355 U.S. 466 (1958).

¹⁹⁴ Any federal property tax would have to be apportioned to the states on the basis of population. See note 193 *supra*.

to correct inequalities between the states so far as their own resources are concerned.¹⁹⁵

C. *Federal Supremacy*

Article VI of the United States Constitution reads in part as follows: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ." States may not exercise authority in conflict with the supreme law of the land as thus defined. By comparison, a limited form of the supremacy clause is found in Article 31 of the Basic Law which reads as follows: "Federal law overrides *Land* law." Implicit here in the reference to federal law is that it is law compatible with the Basic Law. Article 31 can be translated to mean that all federal law, in so far as it is compatible with the Basic Law, is the supreme law of the land, notwithstanding any law of the *Länder* to the contrary. One difference between Article 31 of the Basic Law and Article VI of the Constitution is the failure in Article 31 to include a reference to the supremacy of treaties made under the authority of the Federation. It is true that Article 25 provides that the general rules of public international law form part of the federal law, take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory. But the phrase "general rules of public international law" appears to refer only to the commonly accepted principles and usages of international law and does not include within its reach the provisions of special international agreements as distinguished from multilateral conventions that are the source of commonly accepted rules. More in point is Article 59 of the Basic Law which provides that treaties which regulate the political relations of the Federation or relate to matters of federal legislation require the consent or participation, in the form of a federal law, of the bodies competent in any specific case for such federal legislation. Under this provision it follows that if the *Bundestag* by law consents to or participates in a treaty that relates to a matter of its legislative competence, this law, pursuant to Article 31, overrides any *Land* law to the contrary.

¹⁹⁵ Under Art. I, §8 of the Constitution, Congress has an independent substantive power to spend for the general welfare. *United States v. Butler*, 297 U.S. 1 (1936); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

For discussion of the financial aspects of American federalism and of the system of federal grants-in-aid to the states, see United States Commission on Intergovernmental Relations, *A REPORT TO THE PRESIDENT FOR TRANSMITTAL TO CONGRESS* (1955).

But suppose a treaty relates to a matter over which the Federation does not have legislative competence? This question came before the Federal Constitutional Court in the well-known case involving the Concordat which Hitler had entered into with the Vatican, pursuant to which Catholic children were entitled to special privileges in regard to religious education in the German schools. The question presented before the Court was whether a post-war law of one of the *Länder* which did not recognize these special privileges was invalid as being inconsistent with obligations under a valid treaty. In a long opinion, the Court, after establishing at great length that the Concordat, although often breached by Hitler, had not been renounced, that it had continued to have validity as an international obligation, and was, therefore, still an obligation of the Federation,¹⁹⁶ held that the treaty, nevertheless, imposed no obligation upon the *Länder*, since under the Basic Law the control of education is reserved to the *Länder*.¹⁹⁷ Consequently they may or may not, at their option, elect to comply with the provisions of the Concordat.

The Concordat decision presents an interesting contrast to the famous decision of the United States Supreme Court in *Missouri v.*

¹⁹⁶ The second section of Art. 23 of the Basic Law, included in the part which contains transitory and concluding provisions, is specifically directed to the question whether treaties entered into by the former Reich continue in force after the establishment of the Federal Republic of Germany. It reads as follows:

"Subject to all rights and objections of the interested parties, the state treaties concluded by the German Reich concerning matters for which, under this Basic Law, Land legislation is competent, remain in force, if they are and continue to be valid in accordance with general principles of law, until new state treaties are concluded by the agencies competent under this Basic Law, or until they are in any other way terminated pursuant to their provisions."

It will be noted that while this ambiguous article contemplates the continued validity of treaties entered into by the former Reich concerning matters for which, under the Basic Law, Land law is competent, it provides no express answer to the question whether the *Länder* are required to conform to such treaties.

¹⁹⁷ 6 *BVerfGE* 309 (1957). In its opinion the Federal Constitutional Court considered the question whether the *Bundestreue* principle required the *Länder* to respect and carry into effect treaties that were binding on the Federation. The Court has declared that this principle, which means in effect that each of the *Länder* must view itself as an interdependent part of an organic whole and must, therefore, act in a way consistent with the interests of Federation and of the other *Länder*, is implied from the nature of the federal structure as established by the Basic Law. Thus the Court, in reliance on this principle, has held that a Land was under a duty to take appropriate steps to prevent a municipality from conducting an advisory referendum on the question whether the army should be equipped with atomic weapons. (The Court was without jurisdiction to deal directly with municipal corporations.) 8 *BVerfGE* 122 at 137-141 (1958). See note 25 *supra*, and the discussion in the text at this point. In the Concordat case, however, the Court declared that the *Bundestreue* principle did not require a Land to give effect to a federal treaty dealing with a matter over which the *Länder* had exclusive legislative jurisdiction. 6 *BVerfGE* 309 at 361-362 (1957).

Holland,¹⁹⁸ which held that when the federal government entered into a treaty dealing with an appropriate matter of international concern, Congress had the implied power to legislate in implementation of the treaty and that its legislation overrode state law, even though Congress had no independent legislative power to deal with the subject. The Tenth Amendment was not deemed to be a bar to this conclusion, since it reserves to the states only the powers that are not delegated to the federal government, and Congress under the necessary and proper clause may enact legislation appropriate to the implementation of a valid treaty.

The problem presented in the Concordat case and in *Missouri v. Holland* is identical and arises in any federal system. Whether there are such fundamental differences between the Basic Law and the Constitution of the United States as to require a difference in result in the treatment of this problem is debatable. Justification for the Federal Constitutional Court's decision in the Concordat case must be found in the Court's conviction that according to the superior will of the constitution makers control of education is a matter reserved to the *Länder* and that the treaty power cannot be used as a means of impairing the *Länder's* freedom of action in this area. Under the Constitution it cannot be said that the states possess any exclusive powers since they retain only the powers not granted to the federal government, and the powers of the federal government are capable of progressively-widened interpretation. The Federal Constitutional Court's solicitude for state autonomy in the field of education is understandable, since this is one of the few important areas reserved to the legislative authority of the *Länder*. It should be noted, however, that the decision in the Concordat case has not gone unchallenged and has been criticized with respect to its impact on international law and the ability of the Federation to carry out its treaties.¹⁹⁹

D. *Role of States in Administration of Federal Law*

Any discussion of the general features of federalism under the Basic Law would be incomplete without reference to the provisions found in Part VIII of the Basic Law relating to the execution and administration of federal laws. Without any attempt at detailed analysis, it is sufficient to note that the *Länder* execute the federal

¹⁹⁸ 252 U.S. 416 (1920).

¹⁹⁹ See Kaiser, "Die Erfüllung der völkerrechtlichen Verträge des Bundes durch die Länder," 18 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 526 (1957-1958).

laws as a matter of their own concern to the extent that the Basic Law does not otherwise provide or permit.²⁰⁰ Likewise they may execute federal laws as agents of the Federation.²⁰¹ Whether acting as agents of the Federation or acting on their own concern, it is the business and duty of the *Länder* to enforce federal laws. The important difference between acting as agents of the Federation and acting on their own concern is that when acting as agents they may expect to be compensated by the Federation for supplying this service. As it works out in practice, the federal laws are for the most part administered by officers and employees of the *Länder* with the result that the citizen actually has very little contact with federal authorities. The *Länder* in executing the federal laws as a matter of their own concern provide for the establishment of authorities and the regulation of administrative procedures in so far as federal laws do not otherwise provide.²⁰² The federal government may issue general administrative rules and exercise its supervision to ensure that the *Länder* execute the federal laws in accordance with applicable law.²⁰³ When the *Land* authorities are executing federal laws as agents of the Federation, they are in addition subject to the instructions of the appropriate highest federal authorities.²⁰⁴

Although in conformity with these provisions a large share of the administration of federal law is conducted by officers and employees of the *Länder*, the Basic Law requires that the foreign service, the federal finance administration, the federal railroads, the federal postal service and the administration of the federal waterways and of shipping be conducted as matters of federal administration with their own subordinate administrative structure.²⁰⁵

This interesting aspect of federalism under the Basic Law, which points to integration of federal and state administration in the enforcement of federal laws²⁰⁶ presents a striking contrast to the duality of administration that is a characteristic feature of federalism under the Constitution of the United States. As a

²⁰⁰ Art. 83.

²⁰¹ Art. 85, § (1).

²⁰² Art. 84, § (1).

²⁰³ Art. 84.

²⁰⁴ Art. 85, § (3). Where the *Länder* execute federal laws as a matter of their own concern, the federal government may issue individual instructions for particular cases but only if authorized by a federal law requiring the consent of the *Bundesrat*. Art. 84, § (5).

²⁰⁵ Art. 87, § (1).

²⁰⁶ For discussion, see Merkl, "Executive-Legislative Federalism in West Germany," 53 AM. POL. SCI. REV. 732 (1959).

general proposition, federal laws are administered by federal authority, and state administrative machinery is not utilized in carrying federal laws into effect. Certainly there is no duty on the part of the states to administer federal laws. It is true that a high degree of cooperation between federal and state administrative and enforcement authorities is found in some situations. Thus in the enforcement of their respective criminal laws, federal and state officers often work closely together in the detection of crime that raises questions of violation of both federal and state laws. Likewise, there is a substantial amount of exchange of information of common concern to federal and state agencies. Joint inspection by federal and state officers occurs in some areas, and state officers may occasionally be vested with authority to serve as federal inspectors or otherwise to help administer federal laws.²⁰⁷ But these situations by no means represent the usual rule or practice, and certainly within the limits of the constitutional system patterns of cooperative relations can be more fully explored and developed than they are at present.²⁰⁸

E. *The Judicial System*

The integration of federal and *Länder* authority in the administration of federal laws, representing a much more highly developed "cooperative federalism" than exists in the United States, is paralleled also by the integrated judicial system, established under Part IX of the Basic Law. The total judicial authority of the Federal Republic is vested in the judges and is exercised by the Federal Constitutional Court, by the higher federal courts provided for in the Basic Law and by the courts of the *Länder*.²⁰⁹ Higher federal courts are required to be and have been established in the fields of ordinary, administrative, finance, labor and social jurisdiction.²¹⁰ It should be emphasized that the

²⁰⁷ See Kauper, "Utilization of State Commissioners in the Administration of the Federal Motor Carrier Act," 34 MICH. L. REV. 37 (1935); Koenig, "Federal and State Cooperation Under the Constitution," 36 MICH. L. REV. 752 (1938).

²⁰⁸ The Commission on Intergovernmental Relations appointed by President Eisenhower has urged greater attention to the potentialities of cooperative relationships and recommends an enlarged use of state personnel and machinery in the administration and enforcement of federal laws. See chapter 3, "National Responsibilities and Cooperative Relations," of its REPORT TO THE PRESIDENT FOR TRANSMITTAL TO CONGRESS 59-89 (1955).

²⁰⁹ Art. 92. The Federal Constitutional Court is discussed pp. 1162-1181 *infra*. Provision is also made in Art. 92 for the Supreme Federal Court whose function according to Art. 95 will be to decide cases in which the decision is of fundamental importance for the uniformity in administration of justice by the higher federal courts, but this court has not yet been established.

²¹⁰ Art. 96, § (1).

only federal courts, apart from the Federal Constitutional Court, are the so-called "higher federal courts," and these, within their respective jurisdictions in areas of federal law, are really the high courts of the judicial system. These courts operating on the highest level rest on a foundation of lower courts that are courts of the *Länder* but which administer federal law as well as the local law of their respective jurisdictions. These lower court judges are appointed for life by the *Länder* authorities and their status is regulated by special laws of the *Länder* subject to general rules enacted by the Federation.²¹¹ Within the spheres of their jurisdiction, the lower *Länder* courts operate as arms of the unitary judicial system. In short, there is no system of dual courts of the Federation and of the *Länder*. Just as administrative authorities of the *Länder* are used to enforce federal law, so the *Länder* courts constitute the lower level of the judicial system in the interpretation, application and enforcement of federal law. The lower courts have jurisdiction also over matters arising distinctively under the laws of their respective *Länder*. This unified German court system is radically different from the American pattern which features sharply differentiated federal and state judicial systems, each with its own complete layers of trial and appellate courts, and with the United States Supreme Court having jurisdiction over the highest courts of the states only with respect to decisions on questions arising under the Constitution, laws and treaties of the United States.²¹²

F. *The Role of the Bundesrat in Representing the Länder*

A distinctive feature of federalism under the Basic Law is the institutional role of the *Bundesrat*,²¹³ designed to serve as an

²¹¹ Art. 98, §§ (3) and (4).

²¹² Under Art. III of the Constitution the federal judicial power extends to cases arising under the Constitution, treaties and laws of the United States, as well as to certain categories of cases depending on the nature of the parties, including cases between citizens of different states. The jurisdiction of state courts is derived from their respective state constitutions and most of the cases coming before them deal with matters arising under state law. But the two judicial systems are not mutually exclusive in terms of jurisdiction. Thus state courts in dealing with cases before them must often deal with questions of federal law arising under the Constitution, treaties and laws of the United States. Indeed, Congress may vest state courts with authority to entertain civil causes of action arising under federal statutes. See *Mondau v. N.Y., N.H. & H. Ry. Co.*, 223 U.S. 1 (1912). On the other hand federal courts in exercising their jurisdiction in cases turning on the nature of the parties are required to give effect to state law in the determination of these cases. See *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

²¹³ The provisions establishing the *Bundesrat* and determining its composition and organization are found in Articles 50-53 of the Basic Law (Part IV).

agency for giving the *Länder* a special voice in the determination of the affairs of the Federation and thereby serving to protect the place of the *Länder* in the federal order.

Article 50 states that the *Länder* participate through the *Bundesrat* in the legislation and administration of the Federation. The *Bundesrat* consists of members of the *Länder* governments which appoint and recall them.²¹⁴ The reference here to the *Länder* governments means the administrative authorities of the *Länder*.²¹⁵ Each *Land* has at least three votes in the *Bundesrat* and those with larger populations have more.²¹⁶ The votes of each *Land* may be cast only as a block vote by members present or their substitutes.²¹⁷

Without detailing the procedures followed by the *Bundesrat* it is sufficient here to note that although the primary legislative authority of the Federation is vested in the *Bundestag*, the *Bundesrat* plays an important part in the total legislative process in two different ways. First of all, it must be consulted on all legislative matters, and, depending on its action or inaction, the *Bundesrat* may exercise a limited veto power on the action of the *Bundestag* by forcing the latter to reconsider and re-enact a law to which the *Bundesrat* objects. If the *Bundesrat* rejects the law by a simple majority vote, the *Bundestag* may re-enact it by a simple majority vote; if the *Bundesrat* rejects it by a two-thirds vote, the *Bundestag* may then re-enact it only by a two-thirds majority vote.²¹⁸

In respect to a number of specified matters coming within the legislative competence of the *Bundestag* but which are of special concern to the *Länder*, the *Bundesrat's* consent is required in order for the law to become effective.²¹⁹ Also, in those spheres of administration where the *Länder* authorities administer federal laws, the power of the Federation to prescribe rules governing the

²¹⁴ Art. 51, § (1).

²¹⁵ The accountability of the *Bundesrat* representatives to the governments of the *Länder* was emphasized by the Federal Constitutional Court in its decision holding unconstitutional the advisory referenda proposed to be held by several *Länder* on the question of arming the military forces with atomic weapons. 8 *BVerfGE* 104 (1958). In answer to the argument that the advisory expression of opinion would be helpful to the *Land's* representatives in the *Bundesrat*, the Court stated that these representatives were to be guided by instructions from the government of the *Land*. See the discussion in the text, p. 1100 *supra*.

²¹⁶ Art. 51, § (2).

²¹⁷ Art. 51, § (3).

²¹⁸ The procedures are spelled out in Art. 77.

²¹⁹ See, e.g., the provisions of Arts. 105-107 relating to tax matters.

same is subject to approval by the *Bundesrat*.²²⁰ Moreover, a two-thirds concurrence by the *Bundesrat* is required in case of amendment of the Basic Law.

The formal provisions of the Basic Law respecting the functions of the *Bundesrat* do not tell the whole story. Actually the *Bundesrat* is emerging as a stronger and more influential political body than was perhaps contemplated by its establishment.²²¹ A steadily increasing number of federal legislative enactments have been interpreted to require the consent of the *Bundesrat* with the result that the *Bundesrat* is on its way to becoming an important second chamber of the legislative branch of the federal government.²²²

The *Bundesrat* suggests some comparison with the Senate of the United States but the comparison should not be pushed too far. Like the Senate the *Bundesrat* may be characterized as a second house of the national legislature. But there is a wide difference in that whereas the Senate has an equal voice with the House of Representatives in the enactment of federal legislation, i.e., affirmative votes are required by both the Senate and House for the enactment of laws, the *Bundesrat's* affirmative participation is required only in respect to legislation affecting the special interests of the *Länder*, and with respect to other legislation it has a consultative voice and may even assert what amounts to a veto power. In a sense, then, the *Bundesrat* exercises in part functions performed by the United States Senate and in part a function served by the President so far as his formal participation in the legislative process by means of the veto power is concerned. Within the limits of the functions assigned to it, and, as pointed out above, with its role in the legislative process gradually becoming more prominent, the *Bundesrat* represents in a special way the interests of the *Länder* and thus is an institution designed to help preserve the integrity of the federal system. A further comparison may be made with the Senate of the United States on this point. It is a matter of history that the provisions of the Constitution creating the Senate and determining its composition represented a

²²⁰ See Arts. 84 and 85.

²²¹ See Neunreither, "Politics and Bureaucracy in the West German Bundesrat," 53 AM. POL. SCI. REV. 713 (1959); Katzenstein, "Rechtliche Erscheinungsformen der Machtverschiebung zwischen Bund und Ländern seit 1949," 11 DIE ÖFFENTLICHE VERWALTUNG 593 (1958).

²²² Up to April 1958, no less than 50% of all enacted federal laws had been recognized to fall in the category of laws requiring the consent of the *Bundesrat*. NEUNREITHER, id. at 718.

compromise between the big and small states entering the Union. In order to offset the preponderant influence the larger states would have had by determining representation solely on the basis of population—the standard used for determining the House of Representatives—equality of representation and vote in the Senate was seen as a compensating feature to protect the interests of the smaller states. It is, therefore, accurate to say that the Senate of the United States was designed, like the *Bundesrat*, to serve particularly as the branch of the national legislature which represented the states' interests in a special way. This was emphasized by the provision that the senators would be elected by the legislatures of their respective states. This feature, however, was abandoned with the adoption in 1913 of the Seventeenth Amendment which authorizes popular elections of senators. Thus the combination of a number of factors, including the accountability of senators to the electors instead of the state legislature or administration, the Senate's general participation in the federal legislative process, and the increased concern in American political life with matters of national interest, has served over the years to alter the role of the Senate as the body peculiarly designed to represent state interests in the federal legislative process, and sharply differentiates it from the *Bundesrat*.²²³

G. Conclusions

The Basic Law creates a federal system and distributes power between the Federation and the *Länder*. It states a theory similar to a basic idea of American federalism in that it recognizes that the *Länder* have the power to legislate in so far as the Basic Law does not confer power on the Federation, although the practical significance of this should not be overestimated in view of the large and important areas in which the Federation may exercise legislative powers and the correspondingly limited areas of *Länder* autonomy. Federal law within the sphere of its competence is supreme as recognized in Article 31 which provides that federal law overrides *Land* law, and which in some respects resembles the supremacy clause of Article VI of the United States Constitution. The features of the Basic Law that authorize the Federation to enact general laws with power in states to implement them with details and, more strikingly, the employment of state officers and agencies

²²³ It should be stressed that a *Land's* representatives in the *Bundesrat* are appointed by the *Land's* administration and are accountable to it.

to administer federal laws in many areas and the integration of the entire judicial system under the Basic Law all mark considerable departures from American federalism. Indeed, these various features suggest that German federalism, when compared with the American pattern, is a substantially diluted form of federalism, and that the *Länder* occupy a significantly less important role in the Federation than do the states of the American Union. Certainly there is a much greater centralization of legislative authority, and the use of the administrative and judicial authority of the *Länder* to enforce federal laws, suggests either that the position of the *Länder* may be described in terms of constitutional home rule or that the general federal structure under the Basic Law may be characterized in terms of centralized power and decentralized administration. But this would be a superficial conclusion. The retention of legislative power in some significant areas, the use of state administrative personnel to enforce federal laws, the control by the *Länder* of the integrated judiciary at the subordinate levels, and the distinctive and significant role of the *Bundesrat* in representing the *Länder's* interest in the federal legislative and administrative processes, as well as in the important process of constitutional amendment, are all institutional arrangements that strengthen the position of the *Länder* and contribute to a genuine federalism.^{223a} Perhaps the net conclusion to be drawn is that it is a less rigid and more economical type of federalism than its American counterpart and certainly one that more fully utilizes the principle of cooperative federalism. The federal principle admits of many diverse applications that take account of historical, political and geographical factors. To mention only the geographical factor, one must expect substantial differences between a federal structure accommodated to West Germany's limited and compact territory and the federal structure designed for the government of the vastly larger domain of the United States.

V. SEPARATION OF POWERS

The separation of powers theory is postulated as a fundamental feature of the constitutional system established by the Basic Law. "All state authority emanates from the people. It is exercised by

^{223a} See Mason, "Federalism — The Bonn Model," in ZURCHER, CONSTITUTIONS AND CONSTITUTIONAL TRENDS SINCE WORLD WAR II, 2d ed., 134-153 (1955), for an analysis and appraisal of what the author describes as the federal and non-federal features of the system established by the Basic Law.

the people by means of elections and voting and by separate legislative, executive and judicial organs."²²⁴ This principle is implemented by the provisions establishing the organs of government and defining their authority.²²⁵ The *Bundestag* exercises the primary legislative function of the Federation.²²⁶ The *Bundesrat* as pointed out earlier in the discussion of federalism is a special organ whereby the *Länder* have a voice in the legislative and administrative processes of the Federation. The Federal President who is the titular head of state has limited but important executive functions.²²⁷ His office, however, is not to be compared to that of the President of the United States who is the nation's chief executive officer.²²⁸ Under the parliamentary-cabinet system of government prescribed by the Basic Law, the Federal Chancellor and the Federal Ministers constitute the "Federal Government" as this term is used in the Basic Law.²²⁹ (To use the familiar American terminology, the Federal Chancellor and the Federal Ministers constitute the "federal administration.") It is the Chancellor who is the important executive head of the govern-

²²⁴ Art. 20, § (2).

²²⁵ See the earlier discussion of the judicial system, pp. 1152-1153 *supra*, as part of the analysis of federalism under the Basic Law.

²²⁶ See Basic Law, Part III (Articles 38-49).

²²⁷ The Federal President is elected for a term of five years without debate by the Federal Convention which consists of the members of the *Bundestag* and an equal number of members elected by the representative assemblies of the *Länder*, Art. 54. He represents the Federation in its international relations, concludes treaties with foreign states on behalf of the Federation, and accredits and receives envoys. Art. 59, § (1). He proposes the Federal Chancellor for election by the *Bundestag*, Art. 63, § (1), dismisses the Chancellor and appoints a successor as provided in Art. 67, dissolves the *Bundestag* under the conditions specified in Art. 63, § (4), appoints and dismisses Federal Ministers upon the proposal of the Federal Chancellor, Art. 64, § (1), appoints and dismisses the federal judges and the federal civil servants unless otherwise provided for by law, Art. 60, § (1), and exercises the power of pardon in individual cases on behalf of the Federation, Art. 60, § (2). Laws duly passed and countersigned become effective after they are signed by the President and promulgated in the Federal Gazette. Art. 82.

The President's authority to represent the Federation in its international relations appears to be chiefly ceremonial in character, while the substantive power of determining foreign policy resides in the Chancellor and the cabinet. This question received extended discussion in 1959 when Chancellor Adenauer announced his intention (later revoked) of running for the Presidency. See Dietze, "The Federal Republic of Germany: An Evaluation After Ten Years," 22 J. POL. 112 at 113 (1960).

²²⁸ Art. II of the Constitution vests the executive authority in the President and also names him as commander-in-chief of the Army and Navy. He negotiates and concludes treaties with the advice and consent of two-thirds of the Senate, appoints ambassadors and other public ministers and consuls, heads of departments and other officers, and federal judges with the advice and consent of the Senate, receives ambassadors and other public ministers, exercises the pardoning power, proposes legislation, has the power to veto legislation which can thereafter be re-enacted by the Congress only by a two-thirds vote, has the authority to convene special sessions of Congress, and is vested with the general duty to take care that the laws be faithfully executed.

²²⁹ See Basic Law, Part VI (Articles 62-69).

ment and who also because of his political position plays the leading role in the determination of legislative and foreign policy.

The Basic Law makes clear in numerous ways that the administration is not to encroach on the legislative power. Restriction on basic rights, if permitted, may be accomplished only by and subject to law. Thus the fundamental rights of freedom of expression may be limited only by the provisions of the general laws.²³⁰ Although the President represents the Federation in its international relations, concludes treaties with foreign states on behalf of the Federation, and accredits and receives envoys, all treaties which regulate the political relations of the Federation or relate to matters of federal legislation require the consent or participation, in the form of a federal law, of the bodies competent in any specific case for such federal legislation.²³¹ This may be contrasted with the situation in the United States where a treaty, pursuant to Article VI, is the supreme law of the land and may, depending on its nature, become the source of domestic law without the necessity of implementing or ratifying legislation by Congress.²³²

Only in one situation does the Basic Law recognize a power in the administration to make a law effective without the enactment by the *Bundestag*.²³³ If the Federal Chancellor fails to secure a vote of confidence on motion put by him and the President fails to dissolve the *Bundestag*, the President may, at the request of the administration and with the consent of the *Bundesrat*, declare a state of legislative emergency with respect to a bill if the *Bundestag* rejects the bill even though the administration has declared it to be urgent. Following this declaration, the bill is deemed to have been passed if the *Bundesrat* assents to it even though the *Bundestag* again rejects the bill or adopts it in a version declared to be unacceptable to the administration. But the state of legislative emergency may not continue for more than six months during the Chancellor's term of office.²³⁴

²³⁰ Art. 5, § (2).

²³¹ Art. 59, § (2).

²³² For an illustrative case, see *Hauenstein v. Lynham*, 100 U.S. 483 (1880). See also the opinion in *Edye v. Robertson*, 112 U.S. 580 at 598 (1884).

²³³ See Art. 81.

²³⁴ On the question whether the President of the United States has power to deal with internal emergencies on the basis of his own executive prerogative, see the several opinions in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), where the majority of the Court held invalid the President's seizure of the steel mills as a means of averting a strike. Although two of the justices comprising the majority rested their decision on the theory that the President had attempted to exercise a legislative power

Although the Constitution is silent on the subject, the Supreme Court has declared the general principle that Congress may not delegate its legislative power to the executive or to administrative agencies.²³⁵ This result is based both on the general principle of separation of powers and on the theory that delegated power cannot be redelegated. To be sure the principle has been greatly diluted by the judicial recognition that liberal grants of the rule-making power and of discretionary authority to administrative agencies is necessary in the structure of modern government,²³⁶ although even here the Court has insisted that Congress define the general policy of the legislation and employ standards or norms that will serve to limit administrative discretion. Carte blanche delegations of authority without reference to policy objectives or definable standards have been held unconstitutional.²³⁷

The Basic Law is explicit on this point.²³⁸ While recognizing that the administration, a federal minister or the governments of the *Länder* may be authorized by law to issue ordinances having the force of law (*Rechtsverordnungen*), it provides that the content, purpose and scope of the powers conferred must be set forth in the law. The legal basis must be stated in the ordinance. Furthermore, if a law provides that a power may be further delegated, an ordinance having the force of law is necessary in order to delegate the power. Thus the Basic Law, while permitting a delegation of a subordinate law-making power, states restrictions designed to avoid carte blanche delegations.²³⁹

without authorization from Congress, the other four justices included in the majority group based their decision on the narrower ground that whatever prerogative authority the President could claim to deal with an internal emergency, it could not be exercised in a way that conflicted with the declared policy of Congress within the sphere of its legislative competence.

²³⁵ See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

²³⁶ See Justice Jackson's opinion in *Fahey v. Mallonee*, 332 U.S. 245 (1947).

²³⁷ See the cases cited in 235 supra.

²³⁸ Art. 80, § (1).

²³⁹ Some delegations of power have been held invalid by the Federal Constitutional Court on the ground that they violated the limitations set forth in the Basic Law. See, e.g., 1 *BVerfGE* 14 (1951), holding invalid the broad delegation of authority to the Federal Minister of the Interior "to issue such decrees having the force of law as are required" to implement the provisions of the law providing for reorganization of the *Länder* in the Southwest territory; 9 *BVerfGE* 83 (1959), holding invalid a decree of the Defense Council authorizing the Minister of Interior to make rules respecting the packaging and sale of ready-packaged drugs, subject to exceptions granted by him. Cf. the decision in 8 *BVerfGE* 274 (1958), holding valid the delegation of power to the Federal Minister of Economics and to the *Länder* governments to fix prices for goods and services except wages by executive order.

Transcending the specific provisions of the Basic Law is the underlying conception of the *Rechtsstaat* with its emphasis on legality and the subjection of administrative action to judicial review to determine its lawfulness.²⁴⁰ This is accented by the establishment of separate courts, as authorized by the Basic Law, with jurisdiction over administrative, tax, labor and social matters.²⁴¹ Indeed, it appears that the German system for judicial review to determine questions of law and legality in spheres of public administration is more extensive and penetrating than review by United States courts of the determinations and acts of federal executive and administrative agencies. It must be remembered in this connection that in the American system the regular courts have jurisdiction over all legal questions in the spheres of both private and public law, as contrasted to the continental system which establishes special courts for review of matters in the area of public administration.

Whether the law-making power may be exercised only by the enactment of laws of general application, as distinguished from special laws dealing with specific situations, is a question that becomes pertinent in any discussion of the rule of law. The Basic Law does not state such a general principle, but it does require the observance of this idea in one situation. Article 19 provides that when under the Basic Law a basic right may be restricted by or pursuant to a law, the law must apply generally and not solely to an individual case. Furthermore, the law must in this instance name the basic right, indicating the article. Special laws aimed at depriving certain persons of their rights are thereby prohibited. German writers have advanced the argument that the idea that laws must have a general application is implicit in the concept of the law-making power and the rule of law,²⁴² but whether the Federal Constitutional Court will give this argument constitutional sanction remains to be seen.²⁴³

²⁴⁰ See Art. 20, § (3), stating that the executive and the judiciary are bound by the law, the provision of Art. 28, § (1), that the constitutional order in the *Länder* must conform to the principles of republican, democratic and social government based on the rule of law, and the important provision of Art. 19, § (4), that if any person's right is violated by public authority, recourse to the court shall be open to him, and if no other court has jurisdiction, recourse shall be to the ordinary courts.

²⁴¹ Art. 96, § (1). See also Art. 19, § (4), referred to in note 240 *supra*.

²⁴² See HAMANN, DAS GRUNDGESETZ 49 (1956) with further citations.

²⁴³ The decision of the Federal Constitutional Court in sustaining the validity of a special assessment levied by the *Bundestag* on German business enterprise (*gewerbliche Wirtschaft*) in order to provide funds to aid basic industries, while relevant to the question under discussion, offers no basis for any broad generalizations on the subject. See 4 *BVerfGE* 7 (1954).

The Constitution does not expressly limit the Congress to the enactment of general laws within the spheres of its legislative competence,²⁴⁴ although a number of state constitutions prohibit the enactment either of all special laws or special laws dealing with specified subjects. Congress usually enacts many special laws at each session. These special laws generally confer benefits on the persons involved. But special laws passed by Congress imposing burdens or disabilities or depriving persons of constitutional rights can be attacked either as bills of attainder,²⁴⁵ or as a form of discriminatory legislation that violates the due process clause of the Fifth Amendment. It is conceivable also that certain types of special acts aimed at specific purposes could be regarded as an unlawful attempt to interfere with the executive function or to invade the sphere of judicial authority.²⁴⁶

VI. THE FEDERAL CONSTITUTIONAL COURT

A. *Authority and Jurisdiction*

The Basic Law not only recognizes the principle of judicial review but also establishes a special tribunal, the Federal Constitutional Court, to pass on constitutional questions. Indeed, the Federal Constitutional Court may properly be characterized as the most important development in post-war German constitutionalism.²⁴⁷ As a special tribunal charged with the important

²⁴⁴ Under Art. I, §8, Congress is authorized to establish a uniform rule of naturalization and uniform laws on the subject of bankruptcies. Similarly, all duties, imposts and excises are required to be uniform. This has been held to refer to geographical uniformity and to mean that taxes falling in these categories must apply to all parts of the country alike. *Knowlton v. Moore*, 178 U.S. 41 (1900). So far as the naturalization power is concerned, it has not been supposed that Congress is limited in the exercise of this power to the enactment of general laws. Congress has in numerous cases conferred citizenship in specific cases by special laws.

²⁴⁵ Art. I, §9, prohibits bills of attainder by Congress. A bill of attainder is defined as a legislative act prescribing punishment. See *United States v. Lovett*, 328 U.S. 303 (1946), holding invalid as a bill of attainder a provision of a federal appropriations act which declared that certain named persons, then employed by the federal government, would be ineligible to receive salary payments out of federal appropriations. Congress was attempting by this means to compel the dismissal of these employees.

²⁴⁶ Thus in *United States v. Lovett*, 328 U.S. 303 (1946), referred to in note 245 *supra*, the Court's decision might well have been based on the ground that Congress was attempting thereby to assert executive authority over the dismissal of federal employees.

²⁴⁷ For excellent discussions of the Federal Constitutional Court, see Cole, "The West German Federal Constitutional Court: An Evaluation After Six Years," 20 J. POL. 278 (1958); Rupp, "Judicial Review in the Federal Republic of Germany," 9 AM. J. COMP. L. 29 (1960). See also von Mehren, "Constitutionalism in Germany—The First Decision of the New Constitutional Court," 1 AM. J. COMP. L. 70 (1952); Nagel, "Judicial Review in Germany," 3 AM. J. COMP. L. 233 (1954); Dietze, "Judicial Review in Europe," 55 MICH.

task and responsibility of authoritative interpretation of the Basic Law, it occupies a unique place in the constitutional structure. The Federal Constitutional Court has been described as standing at the apex of the judicial pyramid²⁴⁸ and, in distinction from the other courts, it is recognized by statute as a constitutional organ.²⁴⁹

The Court's jurisdiction is defined by Article 93 of the Basic Law as follows:

“(1) The Federal Constitutional Court decides:—

1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal organ or of other parties concerned who have been endowed with independent rights by this Basic Law or by Rules of Procedure of a supreme federal organ;
2. in case of differences of opinion or doubts on the formal and material compatibility of federal or *Land* law with this Basic Law, or on the compatibility of *Land* law with other federal law, at the request of the Federal Government, of a *Land* Government or of one-third of the *Bundestag* members;
3. in case of differences of opinion on the rights and duties of the Federation and the *Länder*, particularly in the execution of federal law by the *Länder* and in the exercise of federal supervision;
4. on other disputes of public law between the Federation and the *Länder*, between different *Länder* or within a *Land*, unless recourse to another court exists;
5. in the other cases provided for in this Basic Law.

“(2) The Federal Constitutional Court shall also act in such cases as are otherwise assigned to it by federal law.”

The Court's jurisdiction as thus defined is very broad and encompasses authority to deal with all problems that raise questions of interpretation of the Basic Law. Moreover, this grant of jurisdiction also defines who are proper parties to raise certain kinds of constitutional questions. Finally, it should be emphasized that the effect of these provisions is to vest the Court with original jurisdiction in dealing with the specific categories of disputes and cases here enumerated.

L. REV. 539 (1957). See also Cole, “Three Constitutional Courts: A Comparison,” 53 AM. POL. SCI. REV. 963 (1959).

For an excellent German text on the Federal Constitutional Court, see GEIGER, GESETZ ÜBER DAS BUNDESVERFASSUNGSGERICHT (1952).

²⁴⁸ Rupp, “Government Under Law in Germany,” 9 ANNALES DE LA FACULTÉ DE DROIT D'ISTANBUL 101 at 110 (1959).

²⁴⁹ Statute on the Federal Constitutional Court, §1 (1).

The constitutional provisions respecting the Court's jurisdiction have been implemented by the Statute on the Federal Constitutional Court, (*Bundesverfassungsgerichtsgesetz*)²⁵⁰ which defines the organization of the Court, the methods of raising questions before it, and the procedure to be followed by it.

Pursuant to the Basic Law and the statute, constitutional issues, depending on the nature of the question and the parties raising the question, may come before the Court in the following principal ways:²⁵¹

1. By a proceeding initiated directly before the Court by a supreme federal organ, such as the *Bundestag*, the *Bundesrat*, the President, the Federal Government, or a political party, to secure an interpretation of the Basic Law in the event of a dispute concerning the rights and duties of the parties concerned (*Organstreit*).²⁵² In other words the Court has jurisdiction to determine disputes between the executive and legislative departments.²⁵³

2. By a proceeding initiated directly before the Court by the Federal Government, a *Land* Government or one-third of the *Bundestag* members to determine the validity of Federal or *Land* laws (*abstrakte Normenkontrolle*).²⁵⁴

²⁵⁰ For the text of the statute, see FORSTHOFF, *ÖFFENTLICHES RECHT — SAMMLUNG STAATS- UND VERWALTUNGSRECHTLICHER GESETZE* 195 et seq. (1956).

²⁵¹ For an excellent discussion of these various procedures, see Rupp, "Judicial Review in the Federal Republic of Germany," 9 AM. J. COMP. L. 29 (1960).

Apart from the general types of proceedings enumerated in the text, the Federal Constitutional Court is also vested with authority to deal with specific matters in special types of proceedings. Mention may be made, for instance, of its jurisdiction to decide on the constitutionality of parties under Art. 21 of the Basic Law and its disciplinary authority over federal judges under Art. 98.

²⁵² For the purpose of this jurisdiction, a faction of the *Bundestag*, indeed, even an individual member of the *Bundestag*, is recognized to have standing to raise the kind of questions contemplated by Art. 93, §(1) ¶1. See 1 *BVerfGE* 351 and 372 (1952); 4 *BVerfGE* 144 (1955). See also Rupp, "Judicial Review in the Federal Republic of Germany," 9 AM. J. COMP. L. 29 at 43 (1960).

²⁵³ See Rupp, "Judicial Review in the Federal Republic of Germany," 9 AM. J. COMP. L. 29 at 42 (1960).

²⁵⁴ The phrase "*abstrakte Normenkontrolle*" does not admit of any adequate English translation. This proceeding is designed to furnish a speedy method for securing an adjudication by the Court in case of differences of opinions or doubts as to the validity of federal or *Land* law. No dispute or controversy is required. On the other hand, the Court's opinion in a case coming before it in this way should not be confused with an advisory opinion. The question respecting validity of a statute can be raised before the Court only after the statute has been enacted. And, more importantly, §31 of the Statute on the Federal Constitutional Court gives the force of law to the Court's opinion in a proceeding of this character and makes it binding on all organs of government.

At an earlier time the Federal Constitutional Court was authorized to render advisory opinions, but this authority was repealed in 1956 by amendment of the Statute on the Federal Constitutional Court.

Relatively few cases have come before the Court in the exercise of its *abstrakte Normenkontrolle* jurisdiction. Judge Rupp states that as of June 30, 1959, only eight out

3. By a proceeding initiated directly before the Courts by the Federation or by a *Land* or *Länder* in case of disputes of public law between the Federation and the *Länder*, or between different *Länder*, or within a *Land*.

4. By a complaint proceeding initiated directly before the Court by an individual who claims that one of his constitutional rights has been violated by the exercise of governmental authority. (*Verfassungsbeschwerde*).²⁵⁵

5. By a proceeding originating in another court, if this court considers unconstitutional a law, the validity of which is relevant to its decision, where the matter concerns a violation of the Basic Law, including a violation of the Basic Law by *Land* law or the incompatibility of a *Land* law with a federal law.²⁵⁶

Before proceeding further with respect to the Constitutional Court, a comparison may be made at this point between the basic jurisdiction of the Federal Constitutional Court and of the Supreme Court of the United States. The Supreme Court's jurisdiction is limited by the definition of judicial power under Article III which provides that the federal judicial power extends to cases arising under the Constitution, treaties and laws of the United States (federal question jurisdiction) and to cases turning on the nature of the parties, such as suits between states, cases to which the United States is party, suits between citizens of different states, and cases affecting ambassadors, other public ministers and consuls.

of a total of 4,203 cases were in this category, but they all related to very important issues. See his article, "Judicial Review in the Federal Republic of Germany," 9 AM. J. COMP. L. 29 at 36, n. 26 (1960).

²⁵⁵ This complaint proceeding, known as *Verfassungsbeschwerde*, is not directly provided for under Art. 93, § (1). It is authorized by §90 of the Statute on the Federal Constitutional Court in accordance with the provision of Art. 93, § (2) of the Basic Law. A thorough treatment is found in PFEIFFER, DIE VERFASSUNGSBESCHWERDE IN DER PRAXIS (1959). For an excellent English discussion of this complaint procedure, see Barnett, "Protection of Constitutional Rights in Germany," 45 VA. L. REV. 1139 (1959). Professor Barnett states that of the thousands of petitions considered since 1951 only a small number have resulted in decisions favorable to the complainant. In the five-year period from 1951-1956, only seven complaints were held to be both admissible on jurisdictional grounds and justifiable on the merits. *Id.* at 1157. Many of the complaints filed have been frivolous in character. Moreover, a large number have been dismissed on the ground that the complainant had not previously exhausted other remedies available to him, as required in the usual case by §90, ¶2 of the Statute on the Federal Constitutional Court.

See also on this matter, Cole, "The West German Federal Constitutional Court: An Evaluation After Six Years," 20 J. POL. 278 at 287-289 (1958).

²⁵⁶ This procedure is directly authorized by Art. 100 of the Basic Law. For a helpful discussion of the mechanics of this procedure, see Rupp, "Judicial Review in the Federal Republic of Germany," 9 AM. J. COMP. L. 29 at 32-35 (1960).

The Supreme Court as the highest court in the federal system in turn possesses original jurisdiction in only a limited category of cases, namely, cases to which a state is a party and cases affecting public ambassadors, other public ministers and consuls. In all other cases it has appellate jurisdiction subject to such exceptions as Congress shall make.²⁵⁷ In view of this limitation, the major part of the Supreme Court's jurisdiction is appellate in character, i.e., it reviews cases arising in the lower federal or in the state courts dealing with federal questions or other types of cases coming within the scope of the federal judicial power and turning on the nature of the parties. Moreover, most of the Supreme Court's appellate jurisdiction is discretionary in the sense that it is free to decide which cases to review on a writ of certiorari.

This brief description points up at once several basic differences between the jurisdiction of the Federal Constitutional Court and that of the United States Supreme Court. First, whereas the Supreme Court's jurisdiction is principally appellate in character, the Federal Constitutional Court's jurisdiction has been described as being entirely original.²⁵⁸ Secondly, whereas the Federal Constitutional Court is limited in its jurisdiction to dealing with constitutional questions (including the compatibility of laws of a *Land* with federal laws), the United States Supreme Court in the exercise of its appellate jurisdiction may review all cases arising in either the federal or state courts dealing with federal questions, i.e., questions arising under the Constitution, treaties or laws of the United States as well as cases arising in the lower courts where jurisdiction is founded on the nature of the parties. Thus all questions dealing with the interpretation of federal statutes come within the court's appellate jurisdiction. In short it has a much wider jurisdiction and is not simply a special tribunal to pass on constitutional questions. On the other hand, the Supreme Court has a wide discretion in determining which cases to review whereas the Federal Constitutional Court is required to hear and determine all cases coming within its jurisdiction.²⁵⁹

²⁵⁷ U.S. CONST., Art. III, §2, ¶2.

²⁵⁸ See Rupp, "Judicial Review in the Federal Republic of Germany," 9 AM. J. COMP. L. 29 at 30 (1960). The first four classes of cases listed above in the text clearly fall into this category. It is more questionable whether the fifth type of proceeding, involving a referral to the Federal Constitutional Court of a constitutional issue decided by another court, should be classified as original jurisdiction. American lawyers would probably regard this as an exercise of appellate jurisdiction.

²⁵⁹ Although the Federal Constitutional Court has no choice in determining which cases to hear, it must necessarily devote a substantial effort to the preliminary tasks of determining whether in a proceeding initiated before it the formal and jurisdictional

It should be emphasized also that the United States Supreme Court, like the lower federal courts, may deal with questions only in the contest of adversary proceedings, i.e., in cases or controversies representing parties with adverse legal interests.²⁶⁰ It must be remembered that the power of judicial review is not expressly authorized under the Constitution of the United States, that it is derived by implication from the grant of judicial power in a setting of separation of powers under a document viewed as fundamental law,²⁶¹ and that according to the classical American theory courts do not deal with constitutional issues in the abstract but only as they are relevant to the disposition of controversies that come before them.²⁶² Thus whether a given constitutional issue ever reaches the Supreme Court depends on the uncertain and haphazard process of litigation. The case or controversy limitation, coupled with the requirement that a person have the proper legal standing or interest²⁶³ to raise a constitutional issue, limits much more closely the opportunity to raise constitutional issues under this system than that afforded under the Basic Law.

It is true that when the Federal Constitutional Court hears a complaint from an aggrieved party that a constitutional right has been violated or deals with a constitutional issue extracted from an adversary proceeding before another court, the constitutional review process operates within the framework of an adversary proceeding. Likewise cases coming before the Court involving disputes between organs of the government (*Organstreit*) are adversary proceedings in the sense that there is a concrete controversy between opposing parties. This is not the case, however, with respect to the proceedings that come before the Federal Constitutional Court in the exercise of its *abstrakte Normenkontrolle* jurisdiction. Thus upon request of a *Land* government, it has jurisdiction to pass on the question of compatibility of a federal law with the Basic Law, and upon the request of the Federal Government or of one-third of the *Bundestag* to pass on the compatibility of a *Land* law with the Basic Law or with a federal law. It seems

requirements are satisfied and whether substantial issues are raised. See Cole, "The West German Federal Constitutional Court: An Evaluation after Six Years," 20 J. POL. 278 at 288-289 (1958).

²⁶⁰ Art. III, §2 of the Constitution limits the federal judicial power to "cases" or "controversies" involving federal questions or turning on the nature of the parties.

²⁶¹ *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803).

²⁶² See *Muskrat v. United States*, 219 U.S. 346 (1911).

²⁶³ See *Massachusetts v. Mellon*, 262 U.S. 447 (1923); *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1939).

clear that no corresponding suits would be entertained in our federal courts. In the first place, this type of proceeding does not satisfy the "case or controversy" requirement, since no dispute between adversary parties is required. It is sufficient that there is difference of opinion or doubt as to the validity of a federal or *Land* law. Secondly, the parties competent to request the Court to decide the question would not be recognized by American conceptions to have standing as proper parties in interest to raise the question. Thus a state has no standing to raise a question about the validity of a federal statute unless the state shows damage to its own legal interests,²⁶⁴ and in turn neither Congress nor the President have standing to question the validity of a state statute. Whether the problem is stated in terms of the case or controversy limitation or of the party-in-interest limitation, the same result would follow.²⁶⁵

A similar party-in-interest problem would be raised under American law with respect to the Federal Constitutional Court's authority to decide disputes between organs of government. The Court may at the instance of the *Bundestag* consider the validity of an act of the Federal Government. But a controversy between Congress and the President would not give rise to a justiciable dispute between these two parties in the federal courts. Thus the validity of President Truman's seizure of the steel mills, even though it turned on questions of the separation of powers between the President and the Congress, was decided in a case initiated by the steel companies who were the proper parties in interest since their property rights were affected by the seizure.²⁶⁶

In all cases decided by it dealing with the validity of legislation the Federal Constitutional Court declares the statute valid or void. (The term statute as used in this context includes the *Rechtsverordnungen*, i.e., administrative ordinances having the force of law.) Its decisions arising in the course of certain types of proceedings are declared by statute to have the force of law and must be published in the Federal Gazette.²⁶⁷ The Court annuls any statute which it finds invalid, and in this case the statute is

²⁶⁴ See, e.g., *Massachusetts v. Mellon*, 262 U.S. 447 (1923), holding that a state could not challenge the validity of a federal statute on the ground that Congress had authorized the expenditure of federal funds for a purpose not within the constitutional competence of the federal government.

²⁶⁵ On the question whether the Federal Constitutional Court's opinion in this type of proceeding should be characterized as an advisory opinion, see note 254 *supra*.

²⁶⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

²⁶⁷ Statute on the Federal Constitutional Court, §31 (2).

treated as void *ab initio*.²⁶⁸ But to avoid the difficulties and confusion that would arise from re-examination of past acts and determinations founded on the void statute, the statute provides that such past acts shall stand but are unenforceable. Thus in a case where a tax statute is declared invalid, the government is not required to make refunds of taxes already paid, but on the other hand unpaid tax liability may not be enforced. In the case, however, of a person convicted of crime under a statute declared invalid, he may on application secure a new trial.²⁶⁹

According to the classic theory of American constitutional law, a court in finding a statute invalid does not repeal or annul the statute but simply refuses to take the statute into account as an element of the case.²⁷⁰ The statute remains on the books and may in effect be revived later if the decision finding it invalid is later overruled or if other elements enter later to validate the statute. Moreover, since the court is deciding a case or controversy before it, the decision that the statute is invalid has a formal relevancy only with respect to the parties before the court, although as a practical matter the statute becomes unenforceable on the assumption that the court will reach a like result in other cases coming before it. So far as the effect of adjudication is concerned, the Supreme Court has said that an unconstitutional statute gives rise to no rights or obligations and is the same as a statute never passed.²⁷¹ But this theoretical view does not govern in practice. Thus the doctrine of *res judicata* may be applied to prevent the re-examination in a collateral proceeding of a prior determination based on the statute later declared invalid.²⁷² On the other hand, it is clear that a person held in prison under authority of a statute later held invalid may secure his release in a proper proceeding.²⁷³ In terms of the concrete problems presented by the question of retroactive application of a finding of unconstitutionality it may be doubted whether the overall results are much different under the American system of judicial review from that of the German system, despite the radically different conception under the German system that the Court operates directly on a statute much like a legislative body as contrasted to the American view that the Court acts only to decide the case before it.

²⁶⁸ 8 *BVerfGE* 51 (1958).

²⁶⁹ Statute on the Federal Constitutional Court, §79.

²⁷⁰ See *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803).

²⁷¹ See the statement in *Norton v. Shelby County*, 118 U.S. 425 at 442 (1886).

²⁷² *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940).

²⁷³ *Ex parte Siebold*, 100 U.S. 371 (1880).

B. *Composition and Organization*

The Basic Law provides that the Federal Constitutional Court consists of federal judges and other members, and that half of the members of the Court are elected by the *Bundestag* and half by the *Bundesrat*.²⁷⁴ The Basic Law does not, however, define the size or otherwise determine the composition of the Court. These matters are governed by the Statute on the Federal Constitutional Court²⁷⁵ which was enacted under the authority of Article 94 of the Basic Law which provides that the Court's constitution and procedure will be regulated by a federal law. Pursuant to this statute the Court consists of two divisions (*Senat*). Although each *Senat* originally consisted of twelve members, this was later reduced to ten members each. The Statute on the Federal Constitutional Court now definitively provides that each *Senat* consists of eight members,²⁷⁶ but the reduction from ten to eight will not become effective until September 1, 1963.²⁷⁷ Three members of each *Senat* are chosen from practicing judges of the higher federal courts.²⁷⁸

The *Bundestag*, in making its elections, acts through a twelve-man electoral committee on which the several political parties are represented according to their voting strength in the *Bundestag*. The *Bundesrat* in electing members of the Court acts as a plenary body. In both cases a two-thirds majority vote is required.²⁷⁹

The judges from the higher federal courts appointed to the Federal Constitutional Court are automatically appointed for life since this is a continuation of their status as federal judges. By statute the other members of the Court are appointed for eight-year terms.²⁸⁰ The Basic Law recognizes that the judges appointed for life are subject to age retirement requirements as fixed by law.²⁸¹

The Basic Law states that the judges are independent and subject only to the law.²⁸² If a federal judge, in his official capacity or unofficially, infringes upon the principles of the Basic Law or

²⁷⁴ Art. 94, § (1).

²⁷⁵ See note 250 *supra*.

²⁷⁶ Sec. 2 (2).

²⁷⁷ Art. 2, § (1) of the GESETZ ZUR ÄNDERUNG DES BUNDESVERFASSUNGSGERICHTSGESETZES, SAMMLUNG DES BUNDESRECHTS, Part III, p. 123 (1959).

²⁷⁸ Statute on the Federal Constitutional Court, §4 (1).

²⁷⁹ *Id.*, §§6 and 7.

²⁸⁰ *Id.*, §4 (2).

²⁸¹ Art. 97, § (2).

²⁸² Art. 97, § (1).

the constitutional order of a *Land*, the Federal Constitutional Court may decide by a two-thirds majority, upon the request of the *Bundestag*, that the judge be transferred to another office or placed on the retired list, and in case of an intentional infringement, his dismissal may be ordered.²⁸³

Under the United States Constitution the composition of the Supreme Court is left to Congress. Although the number of justices on the Supreme Court has varied, for many years now it has been fixed by statute at nine. Congress has never authorized or directed the Supreme Court to sit in divisions, and the Court has never operated in this way. It deals in plenum with all the cases before it. Indeed, a question may be raised whether the Constitution does not contemplate that the Court sit and hear cases as a plenary body.

The justices of the Supreme Court are appointed by the President with the advice and consent of the Senate,²⁸⁴ and in this respect no distinction is observed between Supreme Court justices and other federal judges. Unlike the Basic Law, which requires that a part of the Federal Constitutional Court consist of persons drawn from the higher federal courts, the Constitution does not recognize any special qualifications for those appointed to the Supreme Court. In the past the appointment as Supreme Court justices of persons with prior judicial experience, whether on federal or state courts, has been the exception rather than the general rule. The recognition of the Court's role in dealing with questions of broad political significance has led to the appointment in most cases of men who have been prominent in public life.²⁸⁵ In view of the place of the Federal Constitutional Court in the constitutional system, its close identification with political disputes because of the wide scope of its review power and the easy access to the Court for the judicial solution of disputes, it is understandable that the persons appointed to the Court, except those drawn from the federal judiciary, have been prominent in German political life as well as persons who have been distinguished in the academic world.²⁸⁶

²⁸³ Art. 98, § (2).

²⁸⁴ U.S. CONST., Art. III, §2.

²⁸⁵ President Eisenhower in his recent appointments has followed his announced policy of appointing to the Supreme Court persons with prior judicial experience, but it is not to be supposed that this will fix a permanent policy in this matter.

For discussion of the subject, see Frankfurter, "The Supreme Court in the Mirror of Justices," 105 UNIV. PA. L. REV. 781 (1957).

²⁸⁶ See Cole, "The West German Federal Constitutional Court: An Evaluation After Six Years," 20 J. POL. 278 at 286 (1958).

All of the federal judges in the United States, by virtue of explicit constitutional provision, are appointed for life and are subject to removal only by impeachment proceedings before the Senate of the United States.²⁸⁷ Because of this provision Congress may not even require the retirement of federal judges at a specified age, although, of course, it may authorize voluntary retirement.

Finally, it may be noted that whereas the Supreme Court determines its procedure by its own rule-making power, the procedure of the Federal Constitutional Court has been spelled out in detail by legislation as authorized by the Basic Law.

Judged by formal requirements, it appears that on the whole the United States Supreme Court occupies a somewhat more independent position than the Federal Constitutional Court. Congress has no voice in the appointments except as the Senate's approval of the President's appointments is required, the justices are appointed for life, subject only to impeachment by the Senate, and the Court has control of the procedures under which it operates. Both courts are vulnerable to legislative manipulation in the sense that the size of the tribunal is dependent on the legislature. In one respect the Supreme Court is more vulnerable because of the control Congress has over its appellate jurisdiction as compared with the direct grant of jurisdiction to the Federal Constitutional Court under the Basic Law. Actually, however, in only one conspicuous instance has this control been exercised in order to keep the Court from passing on an important constitutional issue.²⁸⁸ Similarly, it should be noted that although the fixed term of office of most of the Federal Constitutional Court members suggests the possibility of replacement of judges in order to secure men more in sympathy with legislative objectives, experience to date has demonstrated substantial stability in the composition of the Federal Constitutional Court as the result of a general practice of re-electing men whose terms have expired.²⁸⁹

C. *Operation of the Federal Constitutional Court*

A few general observations may be noted with respect to the way in which the Federal Constitutional Court has carried on its

²⁸⁷ U.S. CONST., Art. III, §1. This section further provides that the salaries of judges may not be reduced during their term of office.

²⁸⁸ See *Ex parte McCordle*, 7 Wall. (74 U.S.) 506 (1869).

²⁸⁹ Cole, "The West German Federal Constitutional Court: An Evaluation After Six Years," 20 J. POL. 278 at 285-286 (1958).

work, although a thorough examination of the subject is not feasible within the limitations of this article.

In the presentation of important cases before the Court, stress is placed on oral argument of counsel, although written briefs are also submitted. No time limits are placed on the oral arguments, and in some of the important cases decided by the Court the arguments have extended over several days. This practice is reminiscent of the practice in the early days of the Supreme Court of the United States and contrasts with the Court's present practice which places fairly strict limits on the time allowed for oral presentation, with the result that correspondingly greater importance attaches to the written briefs.

In accordance with the usual German practice, a decision of the Federal Constitutional Court is a corporate decision. The opinion is the opinion of the Court and no individual judge's name appears as the author of the opinion, unlike an opinion of the United States Supreme Court which is the opinion of the justice who was assigned the task of stating the Court's judgment and delivering an opinion on behalf of the Court. Since the decisions of the Federal Constitutional Court are corporate opinions, dissenting and separate concurring views are not published, although a judge may privately record a dissent as part of the Court's own records.²⁹⁰ This is in striking contrast to the freedom of the justices of the United States Supreme Court to express individual views in dissenting or individual concurring opinions, a freedom reflected in the multiplicity of opinions in recent years. The German practice has the advantage of stressing the Federal Constitutional Court's function as an impersonal collegiate body, and the rendering of a single opinion adds greater weight and authority to the Court's judgment. On the other hand, the American practice has much in its favor, despite any impairment of the Court's prestige that may result from the publicly-recorded expression of division within the Supreme Court, since the expression of divergent views, as demonstrated by American constitutional history, often points the way to the future development of the law. In support of the Federal Constitutional Court's practice of rendering the single corporate judgment and opinion, it should be emphasized that the Court is a very young institution and has faced the task at the outset of gaining public respect and

²⁹⁰ See Nadelmann, "The Judicial Dissent: Publication v. Secrecy," 8 AM. J. COMP. L. 415 (1959).

confidence. It may well be that once the Federal Constitutional Court feels it has securely established itself in its important role as defender of the Basic Law, it will find it desirable to permit the expression of divergent views.

The Supreme Court of the United States, sensitive to the significance of judicial review in a democratic system that accords a central place to the legislative process, has developed a series of self-restraints designed to minimize the area in which its important review power is effective. Thus it has formulated and applied the category of "political questions" in which it refuses to intervene,²⁹¹ has insisted that parties raising constitutional questions have proper standing to do so, has refused to pass on constitutional questions unless necessary to the disposition of the case before it, interprets statutes if possible to avoid constitutional questions, asserts respect for the legislative determination, and presumes the constitutionality of legislation.²⁹² In mentioning these self-imposed restraints it is well to note that there is nothing to force the Court to keep within these bounds, that the application of these ideas is not always clear, and that the Court's members frequently disagree on whether these restraints have been observed.

In view of the power expressly granted it and the scope of its jurisdiction as constitutionally defined, the Federal Constitutional Court is not in a position to develop similar self-restraints in the same measure. The Court's express authority and duty to decide controversies between supreme federal organs with respect to their competence and rights and duties forces the Court to deal with some problems which would be recognized as political questions by our Court.²⁹³ Again, in dealing with the party-in-interest problem, the Court is required to recognize standing of parties

²⁹¹ See *Coleman v. Miller*, 307 U.S. 433 (1939).

²⁹² See Justice Brandeis' concurring opinion in *Ashwander v. TVA*, 297 U.S. 288 at 345-348 (1936), and Justice Rutledge's opinion in *Rescue Army v. Municipal Court of City of Los Angeles*, 331 U.S. 549 (1947). On the presumption of constitutionality, see Justice Brandeis' opinion in *O'Gorman and Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251 at 257 (1931). On the respect to be accorded the legislative determination, see Justice Stone's dissenting opinion in *United States v. Butler*, 291 U.S. 1 at 78 (1936); Justice Frankfurter's concurring opinion in *Dennis v. United States*, 339 U.S. 162 (1950).

²⁹³ Mention may be made, for instance, of the questions raised in respect to the reorganization of the southwest territory, 1 *BVerfGE* 14 (1951), the validity of *Länder*-sponsored referenda on the question of equipping the armed forces with atomic weapons, 8 *BVerfGE* 104 (1958), the declaration that the Communist Party was unconstitutional, 5 *BVerfGE* 85 (1956), and the questions relating to the Federation's participation in the European Defense Community Treaties, 1 *BVerfGE* 396 (1952). For comment on the last cited case which was dismissed by the Court on procedural grounds, see Loewenstein, "The Bonn Constitution and the European Defense Community Treaties: A Study in Judicial Frustration," 64 *YALE L. J.* 805 (1955).

to raise a question in cases where clearly our Court would reject the suit for lack of requisite interest. But other facets of the self-restraint concept are manifest in the Court's action. It will not deal with a constitutional question unless it becomes necessary to do so. Thus where questions have been referred to it by other courts that have found statutes invalid, the Court has avoided the constitutional issue by finding that the statute could be interpreted to preclude the constitutional question.²⁹⁴ It has declared as a general principle that statutes are to be presumed valid and, where legislative authority to deal with a problem rests on the determination of certain conditions and findings, the Court has stated that a determination of this kind is a legislative matter which the Court cannot disturb.²⁹⁵ To put the matter summarily, it seems fair to say that in the interpretation of the general legislative powers of the Federation as enumerated in the Basic Law, the Federal Constitutional Court, like the United States Supreme Court, is likely to resolve the doubts in favor of the validity of the legislation.

A feature of the opinions of the Federal Constitutional Court that may strike the American observer is the Court's tendency to discuss at length issues and questions presented as part of a case properly before it but which in view of the decision reached by the Court are not relevant to the final disposition of the case. The United States Supreme Court has repeatedly said that it will avoid expressing opinion respecting matters on which decision is not required.²⁹⁶ By contrast, and to illustrate a tendency of the Federal Constitutional Court to go beyond the issues strictly necessary to the disposition of the case, attention is again called to the Court's important decision in the Concordat case²⁹⁷ dealing with the question whether the *Länder* in regulating instruction in the public schools were required to respect the provisions of the Concordat between Hitler and the Vatican respecting religious instruction for Catholic children. In the end the Court held that since under the Basic Law education was a matter reserved for control by the *Länder*, they were not bound by this treaty. In view of this disposition of the case, it was unnecessary for the Court to consider at length as it did the questions relating to the

²⁹⁴ See, e.g., 2 *BVerfGE* 181 (1953).

²⁹⁵ See Rupp, "Judicial Review in the Federal Republic of Germany," 9 *AM. J. COMP. L.* 29 at 38 (1960).

²⁹⁶ See, e.g., *Peters v. Hobby*, 349 U.S. 331 (1955); *Kent and Briehl v. Dulles*, 357 U.S. 116 (1958).

²⁹⁷ 6 *BVerfGE* 309 (1957).

continued validity of the Concordat as an international agreement which the Federation was required to respect in its capacity as successor to the Hitler regime.

Dealing with issues not essential to the disposition of the case may result in future difficulties and embarrassment for a court, and a good case may be made for the United States Supreme Court's practice of refusing to deal with questions not necessary to the decision. But it must be kept in mind in this connection that the Federal Constitutional Court is operating under a new constitution and that perhaps the gratuitous assertion of some ideas and principles is inevitable in the formative stage of interpretation. The United States Supreme Court in its earlier days did not follow a rigorous policy of self-restraint in refusing to pass on questions unnecessary to the decision of the case. We recall important opinions by Chief Justice Marshall in some leading cases where he went beyond the problems of the case to state basic views which would serve as guides to future interpretation and development.²⁹⁸

Since the Federal Constitutional Court does not operate within the framework of a legal system that places emphasis upon concrete holdings as the source of law, the principle of *stare decisis* assumes no formal doctrinal significance. The Court does make frequent references to its prior opinions but for the purpose primarily of extracting general propositions rather than for comparing or distinguishing the facts or holdings in the earlier cases.²⁹⁹ Although freedom from any formal doctrine in respect to adherence to precedent gives the Court a flexibility in its interpretation and further emphasizes its reliance upon propositional law, the assertion may be hazarded that the Court's practice of writing opinions dealing at length with the issues before it, coupled with the desired objective of stability—an objective reflected in the Basic Law itself, will over the long run give its decisions an authority not lightly to be disregarded. Certainly the Court by

²⁹⁸ See, e.g., *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819), where the Chief Justice developed a broad doctrine of federal immunity to state taxation even though the case might have rested on the narrower ground that the Maryland tax was discriminatory; *Brown v. Maryland*, 12 Wheat. (28 U.S.) 419 (1827), where he laid the foundation for the doctrine that the states may not tax commerce even though it would have been sufficient to rest the decision on the ground that the Maryland tax was invalid under the imports-exports clause.

²⁹⁹ The Federal Constitutional Court has not shown any tendency to cite constitutional decisions arising under other constitutional systems in which judicial review plays a prominent role and which raise common or related problems of interpretation. Frequent references to the United States Supreme Court's decisions are found in the opinions of the Australian, Canadian and Indian courts. See Tripathi, "Foreign Precedents and Constitutional Law," 57 *Col. L. Rev.* 319 (1957).

its decisions and opinions is building up a body of law which in time will become the authoritative gloss on the written text. Again the differences in this respect between the Federal Constitutional Court and the Supreme Court are probably more formal than real. The Supreme Court has stated, and certainly its practices in recent years confirm this, that in the field of constitutional adjudication the principle of stare decisis has much less validity than in other areas and that the Court should consider itself relatively free to overrule earlier decisions when it is perceived that these decisions rested on an erroneous basis or that new circumstances require fresh consideration of the problem.³⁰⁰

The Federal Constitutional Court's opinions are thoroughly and carefully written, and in general reveal a judicial process which relies upon formal conceptual analysis and the formulation of propositional law. By comparison we may point to the pragmatism evident in the contemporary work of the United States Supreme Court with its conscious explication and appraisal of basic constitutional values, absorption with the policy and functional aspects of the problem before it, the employment of the balancing process in the weighing of competing interests, and reliance on the empirical approach, inherent in the judicial method of the common law, as a basis for constructing a body of general principles. Indeed, in some important areas of constitutional law of current importance, the Supreme Court's ad hoc method of decision has invited the criticism that the Court has lost sight of its responsibility for formulating meaningful and coherent general principles of interpretation.³⁰¹

In comparing the judicial methods of the two courts, it should not be forgotten that a major part of the Supreme Court's decisions arise under broad language like that of the commerce and due process clauses which afford wide opportunities for judicial maneuvering and furnish a natural setting for judicial subjectivity in the identification, appraisal and weighing of relevant interests. The more precisely drafted Basic Law does not leave as much room for free play in the judicial process. Moreover, the type of proceeding whereby an important part of the Federal Constitutional Court's cases come before it, namely, on certification of a

³⁰⁰ See Justice Brandeis' opinion in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 at 405-411 (1932); Justice Reed's opinion in *Smith v. Allwright*, 321 U.S. 649 at 665 (1944); Douglas, "Stare Decisis," 49 *COL. L. REV.* 735 (1949).

³⁰¹ See Wechsler, "Toward Neutral Principles of Constitutional Law," 73 *HARV. L. REV.* 1 (1959).

question of constitutional law extracted from a case before another court, necessarily forces the Court to formulate objective principles of interpretation rather than deal empirically with a total case before it.

But it is easy to overstate formalism and conceptualism in the decisional processes of the Federal Constitutional Court. Whatever the formal reasoning process may be, and no matter how precisely the fundamental law is drafted, policy considerations cannot be ignored in the process of constitutional adjudication. To mention only a single instance, one cannot escape the conviction that important policy considerations entered into the Federal Constitutional Court's decision holding invalid *Länder* statutes directing the holding of advisory public referenda on the question of arming the military forces with atomic weapons.³⁰² Likewise it should be noted that the Court in dealing with statutes regulating business activities has not hesitated to employ economic data and fall back upon empirical considerations and data in attempting to give a meaningful interpretation of constitutional limitations.³⁰³ Similarly in the Communist Party case the Court had to draw upon underlying factual considerations of a political, social and economic nature in arriving at its characterization of the Party's nature and objectives.³⁰⁴ Finally, it is fair to say, in view of the express enumeration of basic rights and the Court's duty to protect these rights, coupled with the express recognition that many of these rights are subject to legislative restriction, the Court cannot avoid the subjectivity implicit in the pragmatic process of balancing the right against the asserted claim of a competing public interest. As evidenced by the Court's decisions dealing with a person's right to choose and pursue his calling,³⁰⁵ a consideration of the validity of legislation impinging upon this right entails a large measure of subjective judgment.

Probably the most interesting feature of the Federal Constitutional Court's assertion of its function in protecting basic rights

³⁰² 8 BVerfGE 104 (1958).

³⁰³ See 9 BVerfGE 39 (1958), 73 (1959). See also the discussion in the text, p. 1130 *supra*.

³⁰⁴ Professor McWhinney writes that the Court's opinion in this case "demonstrates that the constitution is not to be regarded as establishing philosophic absolutes, but standards capable of varying application in varying societal conditions, thus opening the way to a pragmatic, balancing-of-interests approach that is quite novel to German public law jurisprudence and clearly owes much to the influence of American legal ideas and techniques during the Allied occupation period." See his article, "The German Federal Constitutional Court and the Communist Party Decision," 32 IND. L. J. 295 at 308 (1957).

³⁰⁵ See the discussion in the text, pp. 1128-1131 *supra*.

and one which refutes a strictly objective and positivistic interpretation of a written text has been the suggestion that the Basic Law itself is subject to extra-constitutional norms, derived from natural law considerations, and by reference to which express constitutional provisions may be held unconstitutional.³⁰⁶ Such a view rests on the assumption that certain human rights are superior to and precede the written constitution, and that no positive law, not even a constitution, can be permitted to violate them. The Federal Constitutional Court has not had frequent occasion to express this idea, and in no case has it rested a decision squarely on this kind of reasoning.³⁰⁷ The notion that the constitution itself is subject to a transcendent natural justice had its inspiration in the post-war German legal and juridical thinking that reacted strongly against the philosophy of legal positivism identifiable with the concept of "legality" which furnished a cloak for legitimizing the outrageous invasion of personal rights during the Hitler regime.³⁰⁸ A decline in natural justice thinking has become apparent by this time, however, and it may be doubted whether it will have substantial significance as a factor in future constitutional interpretation. But the recognition of the idea by the Federal Constitutional Court is in itself significant. Recourse to natural justice and natural rights thinking by the United States Supreme Court in the interpretation of the Constitution and particularly in the formulation of the "fundamental rights" interpretation of the due process clause of the Fourteenth Amendment has been a familiar feature of American constitutional history.³⁰⁹ It is not surprising to Americans, therefore, to find an expression of this thinking also in the thinking of the Federal Constitutional Court in view of the important role committed to it. But the use of the natural law concept to question the validity of an express constitutional provision goes beyond reliance upon natural rights thinking by the United States Supreme Court in the process of constitutional interpretation. Certainly it would be regarded as extraordinary and unprecedented if the Supreme Court were ever to say that a provision of the Constitution, whether included in the

³⁰⁶ See the Court's opinion in 3 *BVerfGE* 225 (1953).

³⁰⁷ See Dietze, "Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany," 42 *VA. L. REV.* 1 (1956).

³⁰⁸ See Bodenheimer, "Significant Developments in German Legal Philosophy Since 1945," 3 *AM. J. COMP. L.* 379 (1954).

³⁰⁹ See Corwin, "The 'Higher Law' Background of American Constitutional Law," 42 *HARV. L. REV.* 149, 365 (1928, 1929).

body of this document or added by amendment, was itself unconstitutional by reference to extra-constitutional norms.

D. *Conclusions*

In view of its broad jurisdiction, derived directly from the Basic Law, which places upon it the responsibility for umpiring the federal system, protecting basic rights, and resolving conflicts between the various organs of state, the Federal Constitutional Court occupies a pivotal role in preserving the integrity of the constitutional order. Like the Supreme Court of the United States, it is in a strategic position to make a genuine and creative contribution to the furtherance of a democratic society resting on the rule of law.

The exercise of a broad power of judicial review that includes an authority to declare legislation invalid and to resolve disputes between political organs of the state poses delicate and difficult tasks for a judicial tribunal operating within the framework of a society dedicated to democratic principles. The Federal Constitutional Court, still an infant institution concerned with establishing itself in public confidence and respect, faces the task of discharging its duties in a responsible way while at the same time avoiding the excesses of judicial power that lead to government by the judiciary at the expense of the governmental organs charged with the making of laws and the determination of political issues.

The power to review legislation necessarily vests any tribunal with an authority that transcends the ordinary limits of judicial power. The Federal Constitutional Court's task in attempting to pursue a path free from entanglement with political questions and encroachment upon the proper sphere of legislative discretion in the determination of basic policy is a formidable one. The United States Supreme Court, by comparison, is in a much more enviable position in this respect. Since the Court itself has postulated its power of review as a power implied in the constitutional structure, it is free to develop its own self-imposed limitations on the exercise of this power. Moreover, the requirements that constitutional questions come before it in the context of genuine adversary proceedings and that only persons with proper standing or interest be allowed to raise constitutional questions, and the further considerations that the important constitutional issues come before the Court in the exercise of its appellate jurisdiction and that with respect to the major part of its appellate jurisdiction the

Court is free to decide what cases to hear and decide, all combine to insulate the Court in a substantial way from the political overtones of the issues that come before it. The Federal Constitutional Court, on the other hand, is under obligation to pass on types of political questions that would not reach the United States Supreme Court, and because of its original jurisdiction and duty to take the case its decision in point of time is less readily dissociated from the political overtones of the controversy. Much more so than in the case of the United States Supreme Court, the Federal Constitutional Court, by virtue of the role expressly thrust upon it, may be characterized as a super political-judicial tribunal.³¹⁰

It is fair to say, however, that in the discharge of its constitutional obligations, the Federal Constitutional Court has to date pursued a creditable course. Although it has resolutely discharged its task of interpreting and defending the Basic Law as evidenced in part by its decisions holding federal and *Länder* statutes invalid,³¹¹ its work reflects no tendency toward aggrandizement or abuse of its important powers. It has rendered decisions which by reference to American concepts would be characterized as political decisions, but the Basic Law leaves the Court no choice except to hear and decide these cases. This is the Court's business. If any major criticism may be expressed in regard to the Court's work, it is that the Court invites unnecessary difficulty by not confining itself to issues strictly necessary to the determination of cases before it.

One further comment may be ventured in this connection. The Federal Constitutional Court's role and the relative ease of access to it by organs of the government for the determination of constitutional issues makes it readily possible to shift to the Court the responsibility for decisions on important political matters. The Federal Constitutional Court is vulnerable to the "passing of the buck." Its position and reputation as a disinterested judicial tribunal will, therefore, depend not only upon the Court's self-imposed limitations but also in substantial part upon the sense of self-restraint cultivated by the other organs of government in respect to the demands made upon the Court.

³¹⁰ On the comparable function and role of the Italian Constitutional Court, see Treves, "Judicial Review of Legislation in Italy," 7 J. PUB. L. 345 (1958); Cassandro, "The Constitutional Court of Italy," 8 AM. J. COMP. L. 1 at 10-12 (1959).

³¹¹ Until Sept. 1, 1959, the Federal Constitutional Court had declared 16 federal and 18 state statutes unconstitutional. Rupp, "Judicial Review in the Federal Republic of Germany," 9 AM. J. COMP. L. 29 at 37, n. 31 (1960).

VII. THE AMENDING PROCESS

The significance of judicial review under a written constitution is vitally affected by the relative ease or difficulty with which the constitution is amended. Substantial hurdles are placed in the path of amending the Constitution of the United States. A two-thirds vote of both Houses of Congress is required to propose an amendment, and the vote of three-fourths of the state is necessary to ratification.³¹² But except for the provision that no state may be deprived of its representation in the Senate there appears to be no limit to what the amending process may achieve by way of alteration of basic policies or rights under the Constitution. The Basic Law states both formal and substantive limitations on the amending process. In the first place it can be amended only by a law which expressly amends or supplements the text thereof.³¹³ This provision becomes meaningful in light of the practice during the period of the Weimar Constitution of enacting laws by the majority required for constitutional amendment and which were considered as amendments to the extent they were inconsistent with the constitution.³¹⁴ A law to amend the Basic Law requires the affirmative vote of two-thirds of the members of the *Bundestag* and two-thirds of the votes of the *Bundesrat*.³¹⁵ In terms, then, of the formal limitations, the Basic Law can be amended more easily than the Constitution of the United States. More interesting are the substantive limitations. Article 79 declares inadmissible any amendment of the Basic Law affecting the division of the Federation into *Länder*, the participation in principle of the *Länder* in legislation, or the basic principles laid down in Articles 1 and 20.³¹⁶ These limitations sharply distinguish the amending process under the United States Constitution. Any comparison on this score should, however, take account of the consideration that amendment of the Basic Law is a legislative act, whereas amendment of the American Constitution is based upon the will of the people as reflected in the action taken by the states in voting whether to approve or reject a proposed amendment.

³¹² U.S. CONST., Art. V.

³¹³ Art. 79, §1.

³¹⁴ See von Mehren, "Constitutionalism in Germany—The First Decision of the New Constitutional Court," 1 AM. J. COMP. L. 70 at 73 (1952).

³¹⁵ Art. 79, § (2).

³¹⁶ See the text of Articles 1 and 20 quoted in the text, p. 1094 supra.

A CONCLUDING WORD

The descriptive survey undertaken in this article documents the assertion made at the outset that while basic principles and institutions are shared in common under the Basic Law of Germany and the Constitution of the United States, notable differences are evident particularly in the application of the federal principle and in the institutional apparatus for exercise of the power of judicial review. But no mention has been made of what is the greatest practical difference, and that is that the Basic Law has been in operation only eleven years whereas the Constitution has functioned over a period of one hundred and seventy-three years. The Constitution, as Chief Justice Marshall said, was "intended to endure for ages to come, and, consequently, to be adapted to the various crises in human affairs."³¹⁷ With credit due to the way in which it was drafted and the flexibility of interpretation in response to new conditions, the time-honored Constitution, heavily crusted with a large body of interpretation, has weathered a number of crises, has served its purpose remarkably well and continues to serve as an effective instrument of government, despite the difficulties of the amending process and the relatively small number of amendments that have been adopted.³¹⁸ The fledgling Basic Law of the Federal Republic of Germany, it must be remembered, was intended as a transitory constitution for West Germany pending reunification of Germany and the adoption at the time of reunion of a permanent constitution. It is for this reason that it is characterized as a *Grundgesetz* (Basic Law) and not as a *Verfassung* (Constitution). Whether and when reunification will take place are questions for which the future holds the answers. In the meantime government has functioned effectively under the Basic Law.³¹⁹ Over the long run it may become apparent that the Basic Law is too rigid a document, that the demands made upon the Federal Constitutional Court are too great and that some modification of its jurisdiction will be required, and

³¹⁷ *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316 at 415-416 (1819).

³¹⁸ Twenty-two to date. The first twelve amendments were adopted within sixteen years after the Constitution went into effect. The following ten amendments were adopted over an eighty-nine year period, beginning with the Thirteenth Amendment in 1865 and concluding with the Twenty-Second Amendment in 1951.

The Basic Law has been amended nine times since it went into effect in 1949.

³¹⁹ See Dietze, "The Federal Republic of Germany: An Evaluation After Ten Years," 22 J. Pol. 112 (1960).

that other changes will be necessary. More important, however, is the question, not yet put to the test, whether the constitutional order established by the Basic Law will prove adequate in time of crisis. To date it has faced no such critical test, thanks to the prosperous economic conditions and the political stability West Germany has enjoyed in the post-war period. Any crisis that may arise to test the strength of the constitutional order under the Basic Law will even more significantly test the question whether the constitutional system reflects the political understanding and habits of the people and commands their loyalty. The Basic Law provides on the whole a good skeleton structure for the functioning of a democratic society. But the flesh and blood required to make it a living organism and to endue it with the toughness that withstands stress and strain must be supplied at the grass-roots level by citizens devoted to the basic values that give meaning to a constitutional democracy and disciplined to the demands that a self-governing society makes upon them.