



1-1-1969

# Federal Constitutional Court in Germany: Scope of Its Jurisdiction and Procedure

Hans G. Rupp

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

 Part of the [Law Commons](#)

## Recommended Citation

Hans G. Rupp, *Federal Constitutional Court in Germany: Scope of Its Jurisdiction and Procedure*, 44 Notre Dame L. Rev. 548 (1969).  
Available at: <http://scholarship.law.nd.edu/ndlr/vol44/iss4/3>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# THE FEDERAL CONSTITUTIONAL COURT IN GERMANY: SCOPE OF ITS JURISDICTION AND PROCEDURE\*

*Hans G. Rupp\*\**

## I. Introduction

In its Constitution of 1949 the Federal Republic of Germany has chosen to establish a novel type of tribunal for the adjudication of constitutional issues. Previously, similar courts had been established only in Austria (1920) and in Italy (1946). The German Federal Constitutional Court, although not an appellate court, takes precedence over all other courts<sup>1</sup> in the judicial hierarchy. It is the highest tribunal in Germany, being entrusted with the adjudication of all (justiciable) constitutional issues.

The jurisdiction of the Constitutional Court is not limited to judicial review of legislative acts and of executive and judicial actions in the narrow sense. It is also the sole arbiter of disputes between the federal executive and legislative departments concerning their respective powers under the Constitution. Consider Congress having standing in the Supreme Court to institute proceedings against the President of the United States by which that Court could declare that he had encroached on the powers of the legislative branch of the government by his executive order seizing the steel industry.<sup>2</sup> Imagine also the Senate appearing in court and arguing that the President, in violation of the United States Constitution, had not secured the Senate's assent to the removal of a presidential appointee.<sup>3</sup> Moreover, in the German federal state disputes may arise between the federal government and the state governments over the division of powers between them under the German Constitution. Similar disputes may arise between two or more states. All these types of disputes too may be brought before the Federal Constitutional Court.

From these preliminary observations it appears that the scope of the jurisdiction of the Federal Constitutional Court over constitutional issues is larger than that of the Supreme Court of the United States. The United States Supreme Court, for example, would certainly label most disputes between the legislative and executive departments concerning their respective powers as "political questions" and would refuse to assume jurisdiction.

Another difference stems from procedure. In the United States the constitutional question is simply an incidental issue in a criminal case or a civil suit in a court of law. This is so, because the constitutional grant of judicial power

---

\* This article is based on a lecture delivered at the University of Notre Dame on October 16, 1968 under the joint sponsorship of the Law School and the Committee on International Relations.

\*\* Dr. jur., University of Berlin, 1933; Associate Justice, Federal Constitutional Court of the Federal Republic of Germany, 1951; Honorary Professor of Law, University of Tübingen, 1955.

<sup>1</sup> For a brief exposition of the other German courts, both state and federal, see Rupp, *Judicial Review in the Federal Republic of Germany*, 9 AM. J. COMP. L. 29, 29-30 (1960).

<sup>2</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>3</sup> See *Myers v. United States*, 272 U.S. 52 (1926).

limits the jurisdiction of the Supreme Court to "cases" and "controversies";<sup>4</sup> these terms designate claims or contentions of litigants brought before the courts for adjudication by regular proceedings. The Federal Constitutional Court also decides "cases" and "controversies" between "litigants," but in a special proceeding and as a court of first and last resort. The constitutional issue is not an incidental point but the *main* theme. The litigants are state governments, the federal government, the executive and legislative departments in the federal government, or an individual citizen attacking the final judgment of a court of law for violation of basic rights as guaranteed in the German Bill of Rights.

Similar to the United States Supreme Court the Federal Constitutional Court is a constitutional court also in the sense that to abolish it would require constitutional amendment. Furthermore, the Constitution determines the scope of its jurisdiction, which can be extended but not reduced by statute. The Court's interpretation of the Constitution is final and binding on all other courts and on all departments of government.

The Court is organized into two panels — called Senates — of eight judges each, the jurisdiction of each panel (within the scope of the Constitutional grant) being determined by statute. The judges are elected by the legislature. Three judges in each panel are elected for life, while the remaining five are elected for only eight years. Reelection is possible for the latter group. (A bill which is about to be introduced in the federal legislature provides election of all judges for twelve years with possible reelection until retirement age. Compulsory retirement for all judges would be set at age sixty-eight.)

## II. Recent Cases Illustrating the Jurisdiction and Procedure of the Federal Constitutional Court

Additional aspects of the jurisdiction and procedure of the Constitutional Court, as well as those mentioned above, may now be illustrated by some cases decided by the Court in recent years. It is hoped that this approach will be more interesting than a mere exposition of rules and requirements. Also, by examining its jurisdiction and procedure through recent cases, the reader can acquire a feel for some of the substantive issues regularly handled by the Constitutional Court.

The so-called *Television Case*,<sup>5</sup> decided in 1961 by the Second Senate, has been much publicized because it checkmated the endeavors of the federal government to gain control over television programs. Before 1933 the technical equipment of radio stations in Germany was provided by the Federal Post Office

<sup>4</sup> U.S. CONST. art. III, § 2 provides in part:

The judicial power shall extend to all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all *Cases* affecting Ambassadors, other public Ministers and Consuls; — to all *Cases* of admiralty and maritime Jurisdiction; — to *Controversies* to which the United States shall be a Party; — to *Controversies* between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens and Subjects. [Emphasis added.]

<sup>5</sup> Judgment of February 28, 1961, 12 BVerfG 205.

Department. The programming itself was in the hands of private corporations, in which the Post Office Department acquired a controlling interest. Nevertheless, government control of radio programs was at that time rather restrained. Between 1933 and 1945, however, radio was 100% government-controlled: After World War II all radio stations were taken over by the occupation powers, who later turned them over to public corporations which were given charters by the legislatures of the German states or by compacts concluded between these states. These corporations had to observe certain regulations laid down by the occupation authorities, which had the purpose of safeguarding the absolute political neutrality of the programs and assuring complete freedom from government influence on program policy, business and organizational affairs. In order to secure strict adherence to these regulations, the governing bodies of the corporations consisted of representatives of all walks of life, including representatives of all political parties, of all sectors of cultural life, of all religious denominations, trade unions, and women's and youth organizations. Nine such public corporations have been established to serve the whole area of the Federal Republic. Since television came to Germany, these corporations have also taken up the transmission of two nationwide daily television programs and several regional shows.

Television is one of the most effective mass media for direct or indirect political propaganda. Therefore, in 1960 the federal government under Chancellor Adenauer tried to lay its hands directly on television inasmuch as the existing radio and television corporations, due to their pledge of political neutrality, seemed inept instruments to carry forward government propaganda. To achieve its aim the federal government created a private corporation called Deutschland-Fernsehen-GmbH, reserving for itself the controlling interest therein and offering the rest of the shares to the eleven German states. To the grief of the Chancellor the states not only refused his offer of shares in the corporation, but several of them brought suit against the federal government in the Constitutional Court, stating that their rights under articles 30 and 5 of the Constitution of the Federal Republic (*Grundgesetz*) had been violated by its establishment.

Article 30 provides that the exercise of governmental powers and the discharge of governmental functions is within the jurisdiction of the states unless the Constitution provides otherwise. Thus article 30 has the same meaning as the tenth amendment of the United States Constitution and embodies the same basic principle for the distribution of powers between state and federal governments. Article 5 is one of the most important provisions of the German Bill of Rights. It guarantees freedom of speech, freedom of the press, freedom of radio and the right of every individual to information from generally accessible sources.

The federal government, in its arguments before the Constitutional Court, contended that the establishment of the corporation was constitutional under article 73 which accords the federation the exclusive power to legislate on postal and telecommunication matters. But the Court decided in favor of the complaining states and against the federal government. It held that the federal government, by establishing the Deutschland-Fernsehen-GmbH, had violated articles 30 and 5 as well as the principle of federal comity. The power to legislate on

postal and telecommunication matters, the Court said, according to the wording, history and purpose of the asserted provision, encompassed only the technical requirements of radio and television stations. Thus, the federal government, acting through the Post Office Department, could only erect transmitters and install the necessary electronic equipment in the stations as it did before, but had to lease those installations to public corporations modeled after the existing ones. It had no power to interfere with the organization of those bodies or influence the programs to be broadcast. Since the latter power had been the only point of interest for the federal government's action, its defeat was complete. As to the violation of article 5, the Court pointed out that in order to safeguard the freedom of these modern instruments for influencing public opinion, control of radio and television must not be relinquished to the government or to one single group in society. The management of radio and television transmission must be organized in such a manner as to provide a voice for all important segments of society; the programs to be transmitted should be unbiased and give due space to a variety of viewpoints. These requirements were fully met by the present setup of the several public corporations in charge of radio and television. Thus federalism, in the European sense, had won a battle before the Constitutional Court for the freedom of radio and television from government interference. The Court's decision has saved the German citizen from the monotonous blare and glare of state controlled television.

The so-called *Spiegel* case<sup>6</sup> also deals with the freedom of press and information. It was decided by the First Senate in 1966.

In October, 1962 the news magazine *Der Spiegel* — in importance and circulation comparable to *Time* and *Newsweek* — published an unsigned article, "Bedingt abwehrbereit" ("Limited Preparedness for Defense"). It drew conclusions from the results of the NATO war games, "Fallex 1962," which had taken place some weeks before, and stated that the German Bundeswehr was prepared for effective defense only on a limited scale. The article criticized the equipping of the Bundeswehr with atomic weapons, and disclosed particulars on Operation Fallex and on the military planning within NATO in general. It even published photographs of new weapons.

The chief federal prosecutor subsequently instituted proceedings against the publisher and several editors, seeking to try them for treason before the Federal Court of Criminal Appeals. Section 99, paragraph 2 and section 100, paragraph 1 of the German Criminal Code had at the time provided that whoever intentionally disclosed publicly an official secret and thereby endangered the welfare of the Federal Republic would be punished for treason. The prosecution stated that the military details disclosed in the article were classified material and therefore to be considered official secrets. The prosecutor procured judicial warrants for the search of the *Spiegel* publishing offices at Hamburg, for the seizure of any material connected with the article, and for the arrest of publisher Augstein and editor Ahlers. The search of the publishing offices, which occupied 117 rooms in a seven story building, lasted an entire month and was executed at times by as many as seven federal prosecutors supported by fifty police officers.

---

6 Judgment of August 5, 1966. 20 BVerfG 162.

The first setback for the prosecution came in May, 1965, when the Federal Court of Criminal Appeals threw out the indictment against Augstein and Ahlers for lack of sufficient evidence. The immediate result of the search and seizure action had been an enormous rise in the circulation of *Spiegel* magazine, an event certainly not envisioned and even less cherished by the prosecution. In the meantime, the Spiegel Publishing Company had filed a *constitutional complaint* with the Constitutional Court against the criminal court allowing the search and seizure. The *constitutional complaint* (*Verfassungsbeschwerde*) is a remedy accorded to the *individual* to bring his grievances before the Court. Any person (or private corporation, insofar as the Bill of Rights is applicable to it) may petition the Court directly to declare a federal or state statute unconstitutional and void, to set aside an executive act, or to reverse the decision of any other court on the ground that it violates a right guaranteed to him in the Bill of Rights.<sup>7</sup> Before filing the complaint, however, the complainant must have exhausted other available judicial remedies. The latter requirement was met in the *Spiegel* case after the Federal Court of Criminal Appeals had upheld the warrants. The complaining Spiegel Publishing Company stated that the warrants had violated its right of freedom of the press as guaranteed by article 5 of the Constitution. It further contended that that provision prohibited all actions by the state which had the purpose of obtaining knowledge about the sources of information on which the magazine article was based. The Company argued that the indictment against the publisher and the editor for alleged treason was only a subterfuge to secure the search and seizure warrants, and thus to discover possible leaks in the Defense Ministry through which the information supposedly passed to *Der Spiegel*.

The Constitutional Court dismissed the Spiegel Company's complaint as unfounded. It conceded that search and seizure with the purpose only to detect leads to the persons who had given the editor information for the article would have been illegal, but found that there was insufficient evidence to support such a conclusion. Moreover, the Court felt that the constitutional guaranty of freedom of the press did not include an absolute prohibition of search and seizure of editorial offices. The press could claim no special privilege in criminal proceedings; they had to submit to inquiries just the same as the ordinary citizen who was suspected to have committed a crime. But, the Court said, the constitutional guaranty of freedom of the press made it imperative that both prosecutor and court weigh very carefully the measures intended and avoid any course which would cause unnecessary hardship and restraint on editorial and publishing work. There was, however, again no proof that the authorities in question had overlooked these limitations.

The *Spiegel* decision is not only important for the discussion and solution of the conflict between the constitutional concept of freedom of the press and the necessity to protect the state against treasonable activities, but also for the fact that in handing down the decision the Court was evenly divided, and for the first time since the Court was established, the division was disclosed. Al-

---

<sup>7</sup> GRUNDGESETZ arts. 1-17. Hereinafter the Grundgesetz, the German Federal Constitution, is cited as GG.

though the Court did not announce the names of the four judges on either side, each group was allowed to give its reasons within the framework of the Court's opinion.<sup>8</sup> This event may be considered as the first step towards a published dissenting opinion, which today is not in practice in Germany. After this case, however, the Second Senate of the Constitutional Court took a further step by announcing the votes in every case but without giving the names of the judges of the majority and minority.

Although the complaint was dismissed and the government had won its case, the news about the reason for its success — the equality of votes — came as a profound but healthy shock. The criminal proceeding against *Der Spiegel* had, from the outset, raised misgivings and discussion in the press and among the general public. Now the government noticed with horror that it had had only a very narrow escape in the Constitutional Court.

A second result of the decision was that the equal division of votes dramatized the inadequacy of the provisions of the German Criminal Code on treason, in that they failed to sufficiently distinguish between the felon who committed treason by disclosing military secrets directly to foreign military intelligence for financial gain and the responsible editor who did it in order to inform the general public of his country of weak spots in the defense setup. This gap was closed in June, 1968, when the treason provisions of the Criminal Code were amended. Section 94 (replacing former sections 99, paragraph 2 and 100, paragraph 1) now provides that whoever causes an official secret to be delivered to an unauthorized person or makes such a secret public *with the intent* to injure the Federal Republic or to aid and abet a foreign country, and who thereby brings about the danger of gross detriment to the external security of the Republic, shall be punished for treason. As may be easily perceived, the new wording makes a difference between the felon and the publisher or editor. In most cases it will be impossible to prove that a responsible editor had disclosed official secrets with the intent to injure the Federal Republic or to aid and abet a foreign country.

Under another procedural device, *abstrakte Normenkontrolle*, the federal government, a state government, or one-third of the membership of the Bundestag may petition the Constitutional Court to declare a federal or state statute unconstitutional or void. Obviously unlike anything in United States constitutional law procedure,<sup>9</sup> this *entree* into the Court is illustrated by recent attempts to have the federal government subsidize political parties.

Political parties play a very important part in a democratic state, especially with regard to elections. The Federal Republic of Germany is the only nation

8 The reason why the complaint, with four judges in its favor and four against it, had to be dismissed is found in section 15, paragraph 2 of the statute governing the procedure of the Constitutional Court. This section restrains the Court from holding that the Constitution has been violated in a specific case if the number of votes for and against are equal.

9 In the United States the federal courts cannot decide constitutional questions in the abstract.

. . . [T]he limitation to "case or controversy" is intimately related to the doctrine of judicial review. In *Marbury v. Madison* it was central to Marshall's argument that a court has power to declare a statute unconstitutional only as a consequence of the power of the court to decide cases properly before it. Unconstitutional statutes there may be, but unless they are involved in a case properly susceptible of judicial determination, the courts have no power to pronounce that they are unconstitutional. [Footnote omitted.] C. WRIGHT, *FEDERAL COURTS* 32-33 (1963).

that expressly mentions, in a special article of the Constitution, the role of political parties:

- (1) The political parties participate in the forming of the political will of the people. They may be freely formed. Their internal organization must conform to democratic principles. They must publicly account for the sources of their funds.
- (2) 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 of Germany are unconstitutional. The Constitutional Court decides on the question of unconstitutionality.
- (3) Details will be regulated by federal legislation.<sup>10</sup>

It is common knowledge among members of political parties in all democratic countries that the daily upkeep of a party organization, and even more so an election campaign, cost money — lots of money. The usual way to get it is to solicit pledges of financial support from party members, individual voters, business corporations or professional organizations such as labor unions, Chambers of Commerce and the like. This method of financing political parties has two flaws. First, it makes the parties dependent upon their financial sponsors. Second, the flow of money is restrained by the fact that in most countries the sponsor has to pay income tax on his gift. What, then, is more natural for the parties than trying to change income tax legislation in their favor?

Exactly this was done by the German Bundestag in 1954, when, with the votes of the Christian Democratic Union and the Free Democratic Party, it passed an amendment to the income tax laws providing that individual taxpayers could deduct up to ten percent and corporations up to five percent from their taxable income if they gave such money to a political party. In 1957 the socialist state government of Hesse filed a petition in the Constitutional Court to have the statute declared unconstitutional on the ground that it transgressed the constitutional mandate that all parties must have an equal chance in an election. The statutory provision allowing the taxpayer to deduct gifts to political parties from his taxable income, though applicable to gifts to the Social Democratic Party as well as to the Christian Democratic Union and Free Democratic Party, actually favored — so the government of Hesse said — gifts to the latter two, because individuals and corporations with big incomes would hardly subsidize a socialist party but would rather give their money to a party representing their own interests such as the Christian Democratic Union and Free Democratic Party. The Court followed the reasoning of petitioner and declared the statute void.<sup>11</sup> The procedural avenue followed by Hesse in this case was *abstrakte Normenkontrolle*.

This decision, of course, came as a severe blow to the treasurers of the political parties. They had, therefore, to try some other device to replenish their empty coffers. Beginning with the Appropriation Act of 1959, the Bundestag provided an appropriation of five million DM a year for the parties

---

<sup>10</sup> GG art. 21.

<sup>11</sup> Judgment of June 24, 1958, 8 BVerfG 51.

represented in the Bundestag. This sum was to be distributed in proportion to the number of their seats in the Bundestag. In 1962, the appropriation was raised to twenty million and in 1964 to thirty-eight million DM. Again, in 1965, the government of Hesse petitioned the Court to declare unconstitutional and void the provisions of the Appropriation Act of 1965 which also allotted thirty-eight million DM to the parties represented in the Bundestag. Hesse argued that subsidies paid out of the federal treasury to political parties made them dependent on the federal government, which was under no legal obligation to distribute the appropriated funds, but which rather had authority to do so subject to its own discretion. More specifically, the parties were dependent on the actual majority in the Bundestag, which might slash the appropriation in any forthcoming fiscal year. This, the government of Hesse argued, was contrary to article 21 of the Constitution of the Federal Republic, which required political parties to remain completely free from government influence.

The Court handed down its decision in July, 1966,<sup>12</sup> declaring the contested provisions of the Appropriation Act of 1965 unconstitutional and void. It acceded to the arguments of Hesse to the extent that it held that political parties, which had to participate in the free and open process of the formation of the will of the people, must not be influenced in this activity by state organs which themselves were created by the will of the people in elections. Therefore, an appropriation for the purpose of covering running expenses of the party organization was unconstitutional. But, the Court continued, since in a democracy the state organs were created by general elections which could not be held without the cooperation of the political parties in proposing candidates for elective offices, it was constitutional if a statute provided that the parties should be reimbursed out of the federal treasury for their financial outlay on election campaigns. The Court made this reimbursement subject to several conditions:

- (1) Only such costs may be reimbursed which are actual and direct campaign costs.
- (2) The outlay must have been necessary to carry on an adequate and fair campaign.
- (3) The constitutional principle of equal chances requires that all parties which participated in the elections get their share — not only those represented in the Bundestag — notwithstanding that small splinter groups could be excluded from reimbursement.<sup>13</sup>

A year later the Bundestag passed the Political Parties Act (*Parteiengesetz*), enabled by article 21, in order to define which associations were to be given the status of a political party, how they should be organized, and how they should publicly account for the sources of their funds. This statute had long been overdue, especially since some parties had shied away from making any move in the direction of public accounting and disclosure of their sponsors. Now that the Bundestag was going to pass a statute on this subject the eagerness

12 Judgment of July 19, 1966, 20 BVerfG 56.

13 *Id.* at 112-19.

to reimburse their respective parties for election expenses obviously had given wings to the legislators.

The Political Parties Act of 1967 provides that the government provide a lump sum of 2.5 DM for every citizen authorized to vote (but not necessarily actually voting), to be distributed among all parties which have participated in an election according to the number of votes cast for them, provided that they have received at least two and one-half percent of the total vote.

Shortly after the Political Parties Act had come into force, several small parties which had not gained the required two and one-half percent of the total vote in the last election attacked the new statute as unconstitutional, particularly on the ground that the requirement of at least two and one-half percent of the total vote violated the principle of equal chances.<sup>14</sup> The Court, in an opinion handed down on December 3, 1968, declared that requiring at least two and one-half percent of the total vote as a condition for the plaintiffs to have their election costs reimbursed indeed violated their right of equal chances in an election; however, it held that a requirement of one-half percent of the total vote would still be tolerable under the constitution.<sup>15</sup>

From the cases mentioned above, one might gain the impression that the Federal Constitutional Court is preoccupied with cases concerning the conduct of public affairs and having far-reaching political implications, and that it has no time and no heart for the daily grievances of the man in the street. Nothing could be farther from the truth. As a matter of fact, the Court's daily fare consists of the troubles of the man in the street and they, too, arrive by way of various procedural avenues.

One of the basic provisions in our Bill of Rights is the right of individual liberty and the right to the inviolability of the person.<sup>16</sup> A man was tried for a minor fraud in municipal court.<sup>17</sup> Before witnesses were called, his counsel moved that he should be medically examined to determine whether he was fully responsible for his actions. A medical expert, upon examination of the defendant, said that without electroencephalography and pneumoencephalography (pumping air into the cerebral ventricle) it was impossible to decide whether he was fully responsible or not, because a brain injury sustained earlier could be a decisive factor. Thereupon the court ordered the defendant to be examined in a hospital and gave permission to subject him, even against his will, to pneumoencephalography and electroencephalography. On appeal, the order was upheld. Subsequently, the defendant, through counsel, filed a constitutional complaint with the Constitutional Court asking a reversal of the order because it infringed upon his fundamental right to the inviolability of his person.

The Constitutional Court reversed the order insofar as it had permitted pneumoencephalography. This, the Court held, would be a considerable encroachment on the defendant's right to the inviolability of his person inasmuch

---

14 Political parties have standing to bring suit in the Federal Constitutional Court to protect their constitutional rights, since they have been officially recognized by the Constitution as participating in the formation of the political will of the people. GG art. 21, § 1; cf. Judgment of July 20, 1954, 4 BVerfG 27. See also Rupp, *supra* note 1, at 43.

15 This opinion will be published in volume 24 of the BVerfG.

16 GG art. 2, § 2.

17 Judgment of July 25, 1963, 17 BVerfG 108.

as such an operation might result in great pain and eventually in a dangerous infection. Such an invasion into the protected personal sphere should be commensurate to the criminal act which the defendant was suspected to have committed. The case against this defendant was based on very shaky evidence. In these circumstances, pneumoencephalography could not be justified as a means to determine whether the defendant was fully responsible.<sup>18</sup>

Another case concerning the fundamental right of personal liberty arose in connection with sections 72, 73 and 74 of the Federal Social Welfare Act (*Bundessozialhilfegesetz*) of 1962 which provided that even a financially self-supporting person could, by court order, be detained in an adequate institution if he

- (1) had an extremely weak willpower or could not restrain his carnal instincts, *and*
- (2) was unkempt or depraved, *and*
- (3) could be reformed only in a closed institution.

The purpose of the detention as expressed in the statute was to bring the individual back into the social fold and get him accustomed to regular work.

The question of whether these rather ambiguously worded provisions violated individual liberty came before the Constitutional Court in a proceeding *abstrakte Normenkontrolle* instituted by the state government of Hesse.<sup>19</sup> The Court declared the provisions, which according to their wording were applicable to prostitutes as well as they would have been to famous poets or painters of the past like Heinrich Heine and Toulouse-Lautrec, unconstitutional and void. The purpose of the provisions, the Court said, was neither to protect the community nor the individual in question himself, because the persons contemplated by the statute were neither criminal nor insane. The provisions of the statute were designed rather to "reform" people who had committed no wrong more serious than dressing sloppily, smelling badly, being dirty and living an eccentric life. The Court held that it was not the state's business to "reform" its citizens and that article 2 protected them against such endeavors.<sup>20</sup>

The Constitution of 1949 has left unimpaired the power of the courts to review statutes, a power which they had usurped in the days of the Weimar Republic after World War I.<sup>21</sup> But it allows them to render judgment forthwith only if they conclude that the statute to be applied in the case at bar is constitutional. Only then do they exercise the "case or controversy" type of incidental judicial review of legislation evident in the American pattern.<sup>22</sup> By express constitutional command, however, every German court, high or low, is required to stay proceedings and to refer the question of the constitutionality of the statute to the Constitutional Court if it deems the statute repugnant to the Constitution.<sup>23</sup>

18 *Id.*

19 Judgment of July 18, 1967, 22 BVerfG 180.

20 *Id.*

21 Rupp, *supra* note 1, at 31-32.

22 *See* note 9 *supra*.

23 GG art. 100, § 1.

The Constitutional Court receives the whole record, but does not review the case on its merits. It does not decide whether John Doe may recover in tort from Richard Roe or whether a defendant is guilty of a crime. It decides only whether the statute which the lower court deems invalid is constitutional or not. After the decision of the Constitutional Court (which is final and binding on all courts and government agencies) has been handed down, the court which had certified the question to the Constitutional Court, and before which the case is pending, resumes proceedings and renders judgment (*konkrete Normenkontrolle*).<sup>24</sup>

One recent case illustrating this type of proceeding concerned the constitutionality of certain provisions in the law of adoption, and was decided by the First Senate on July 29, 1968.<sup>25</sup> Section 1747 of the German Civil Code, as amended, provides that the consent of the parents (or, if the child is illegitimate, of the mother) to the adoption of a child under twenty-one years of age may be replaced by a decree of the Juvenile (Orphans) Court if the parents have continually and gravely neglected their duties to the child, if withholding consent is deemed to be malicious, and if the child would be seriously handicapped should the adoption not take place. Similar provisions can be found in the law of Anglo-American countries. On the other hand, according to article 6 of the Constitution, marriage and family enjoy the special protection of the state. The care and upbringing of children are at once both the natural right of the parents and a duty primarily incumbent on them. The state watches over the performance of this duty. Separation of children from the family against the will of the persons entitled to bring them up may take place only pursuant to law, if those so entitled fail in their duty or if the children are otherwise threatened with neglect.

Several courts that had to pass upon petitions for decrees to replace the maliciously withheld parental consent to adoption had come to the conclusion that the above mentioned section of the Civil Code violated the constitutional principles which recognized the natural right of parents to care for and bring up their children. This natural right, in the opinion of those courts, was infringed upon in its essential content if the child, without parental consent, could be irrevocably transferred to another family. The Constitutional Court nevertheless declared section 1747 constitutional because it enabled the state to fulfill its constitutional duty to watch over the performance of the parents in caring for their children. If the natural parents neglected their duty, the state, for the sake of the welfare of the child, could step in and, by judicial decree, replace the consent withheld by the parents.<sup>26</sup>

### III. Conclusion

It has been stated quite recently that the Supreme Court of the United States is both a judicial tribunal and a political organ of state.<sup>27</sup> The same holds

<sup>24</sup> Rupp, *supra* note 1, at 32.

<sup>25</sup> Judgment of July 29, 1968, 24 BVerfG 119.

<sup>26</sup> *Id.*

<sup>27</sup> Kauper, *The Supreme Court: Hybrid Organ of State*, 21 Sw. L.J. 573, 578 (1967).

true for the German Constitutional Court, because it, too, performs a function which transcends that of the ordinary judicial tribunals. It deals with matters of large political significance — political both in the sense that the Court's work requires it to pass judgment on the other organs of Government, and in the sense that policy considerations necessarily play a large part in the process of constitutional interpretation.

In order to remain "the least dangerous branch" of government, such a court must adhere to two principles. The one is judicial self-restraint. The other, occasioned by the far-reaching binding force of its decisions which compels obedience by the other departments of government, the other courts, and the individual citizen, is a certain continuity in its interpretation of the Constitution and an absence of vacillation in its adjudications. On the other hand, the Constitutional Court must also be aware that almost all issues it is called upon to decide have some political coloring and, in a broad sense, concern "political questions." One of the purposes of the Constitutional Court is to insure that the business of government is conducted with due respect for the law. If it shrinks from this responsibility because a case is politically controversial, it will lose an opportunity to demonstrate to the people and the other governmental departments that ours is an ordered government of law.<sup>28</sup>

---

28 Rupp, *Some Remarks on Judicial Self Restraint*, 21 ОЖЮ St. L.J. 503, 515 (1960).