THE GERMAN CONSTITUTIONAL COURT AND ITS JURISPRUDENCE IN 1996

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I. INTRODUCTION: THE JURISDICTION OF THE CONSTITUTIONAL COURT

The German constitutional system is characterized by its distinctive constitutional jurisdiction. The system is composed of a Constitutional Court for the whole of the federation (*Bundesverfassungsgericht*), which was established in 1951 and regional Constitutional Courts in each of the individual Länder (*Landesverfassungsgerichte*), with the exception of Schleswig-Holstein whose internal constitutional disputes are resolved by the Federal Constitutional Court by virtue of Art. 99 of the German Constitution [*Grundgesetz*].[1]

The Constitutional Court has the most extensive and wide ranging jurisdiction in Europe. The reason for this is that the Bonn Constitution of 1949 sought to prevent through constitutional controls the establishment of another unjust regime comparable to that of the National

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1. Grundgesetz [Constitution] [GG] art. 99 (F.R.G.).

Socialists, and thus included new guarantees regarding human dignity, fundamental rights and the rule of the law in the Constitution.

The following is a summary of the constitutional remedies which can be sought. Art. 93(1) GG together with Art. 100 GG and individual provisions of the Constitutional Court Act (*Bundesverfassungs-gerichtgesetz*) determine most areas of the Court's competence.

Art. 93(1) No. 1 GG embodies the jurisdiction to deal with *disputes between the state institutions*. Such disputes may arise over differences of opinion between the highest federal institutions—i.e. the Federal President, Federal Assembly (called the *Bundestag*, Federal Council, which is the Representative Body for the Länder (*Bundesrat*), and the Federal Government. The Court's jurisdiction also encompasses internal disputes between parts of those institutions, which have legal rights and obligations conferred on them by the Constitution or by the rules of procedure of the individual Houses, e.g. political groupings (*Fraktionen*—unions of MPs of the same political persuasion), investigative committees or individual MPs. It has also been traditional since the time of the Weimar Constitution that parties which are not technically state institutions but are important components of the constitutional system may have recourse to the Constitutional Court in the event of a dispute with the state institutions.

So-called *abstract judicial review* (*abstrakte Normenkontrolle*) is another available remedy,[2] which can be used to review the compatibility of legislation or other legally binding norms with the Constitution. Legislation passed by the Länder can also be subject to review as regards its compatibility with federal law. The institutions which can bring an action of this type are the Federal Government, the Governments of the Länder or one-third of the members of the Bundestag. It is not unusual for the Government of one of the Länder to bring an action challenging legislation which it believes to be unconstitutional.

One recently developed remedy concerns federal legislation, which the Länder Government or Parliament (Bundesrat) believes should not have been passed as federal legislation because the subject matter lies within the legislative competence of the Länder themselves.[3] The Federation can legislate in certain important areas, in which the legislative competence normally rests with the Länder. These are known as concurrent legislative powers (*konkurrierende Gesetzgebungskompe-*

2. *See* GG art. 93(1) No. 2.
3. *Id.* No. 2a.

tenzen). They are listed in Art. 74 GG and may be exercised when, for example, a federal solution is necessary for the legal or economic unity of the Federation as a whole.[4] The Federation has adopted most of the concurrent legislative powers for itself and has legislated in those areas. As a result the legislative sphere is clearly dominated by the Federation at present. Previous jurisprudence of the Constitutional Court made it almost impossible for the Länder to challenge the Federation when it decided to legislate for the legal and economic unity of the Federation. The jurisprudence of the Constitutional Court made it clear that such a challenge would only succeed in those cases where there had been a clear abuse of powers by the Federation. Under such an exacting burden, no challenge was successfully brought. This situation was unacceptable and thus a specific constitutional remedy was introduced for the situation where the Federation has legislated on the basis of these concurrent legislative powers and where federal legislation was not in fact necessary to protect the legal and economic unity of the Federation or to guarantee equal living conditions within the federal territory. This remedy, which was introduced by the Constitutional Amendment Act of October 27, 1994,[5] has not yet been asserted in the Constitutional Court.

A further remedy covers a Federation v. Länder dispute regarding the rights and obligations of the Federation on the one hand and the Länder on the other. If, for example the Federation infringes the constitutional rights of the Länder, e.g. by invading its jurisdiction, a Länder v. Federation action (Bund-Länder-Streit) can be initiated, although this has not occurred very often in the history of the Federal Republic of Germany. This situation is regulated by Art. 93(1) No. 3 GG. In contrast, the constitutional remedy under Art. 93(1) No. 4 GG, which applies in the event of disputes between the Federation and the Länder on public law grounds (as opposed to constitutional law disputes as in No. 3) and other matters, is virtually obsolete.

The most important action in constitutional law in terms of the quantity of actions raised is the individual complaint of unconstitutionality (Verfassungsbeschwerde) in accordance with Art. 93(1) No. 4 a GG. Under this remedy, every natural or legal person in accordance with Art. 19(3) GG can challenge the acts of public authorities, the legislature, the executive and the judiciary on the basis

4. A comparative notion would be the expansive power of the Commerce Clause in U.S. jurisprudence.

5. 42 Änderungsgesetz [42d Constitutional Amendment Act] (ÄndG), 27.10.1994 (BGBl. I, S.3146).

that his fundamental rights as an individual have been directly violated or that other rights as enumerated in Article 93(1) No. 4 GG (in particular his rights to a judicial hearing) have been infringed. The vast majority of such complaints do not succeed and are rejected by a panel of three judges on the grounds that it is not of any direct constitutional relevance or the complainant would not suffer unacceptable hardship if the action were not to proceed.[6] Complainants must also have exhausted other available remedies before seeking a remedy in the Constitutional Court, i.e. the usual actions must be brought in the ordinary administrative courts alleging violation of a fundamental right. An individual complaint of unconstitutionality can usually only be brought in the Constitutional Court as an appeal against a decision of the court of last instance, stating that there has been no violation of the right in question.

Art. 93(1) No. 4b GG provides for an individual complaint of unconstitutionality to be brought by *local authorities*, when a piece of federal or Länder legislation violates their right to self administration, which is guaranteed by Art. 28(2) GG (*Kommunalverfassungs-beschwerde*). In the case of Länder legislation this remedy can be sought in the federal Constitutional Court only if there is no recourse available to the particular Constitutional Court of the Länder in question.

Another important remedy is *concrete judicial review* (*konkrete Normenkontrolle*), as provided for in Art. 100(1) GG. When a court is asked to apply legislation which it considers to be unconstitutional, it must suspend the proceedings and lay the legislation before the Constitutional Court for a decision as to its conformity with the Constitution. Concrete judicial review or judicial-control (*Richtervorlage*) is the second most frequently initiated action in constitutional law. It is second only to individual complaints of unconstitutionality and of great importance in the Federal Republic of Germany.

Concrete review may be combined with grounds of international law in the so-called "norm verification procedure" (*Normenverifi-kationsverfahren*) provided for in Art. 100(2) GG. In this event, the Constitutional Court must first determine whether a particular rule of general public international law exists and, secondly, whether it is an integral part of the domestic law of the Federal Republic of Germany in accordance with Art. 25 GG. The problem in this context is that the

6. For more detail, see Bundesverfassungsgerichtsgesetz [Constitutional Court Act] [BVerfGG] §§ 93a-93d, at 12.03.1951 (BGBl. I S.243), *reprinted in* BGBl. I S.1473.

courts must apply the general rules of public international law in the cases before them but these rules may have an unclear content and effect. The Constitutional Court determines such questions when they are referred to it by the lower courts.

II. ANALYSIS OF THE MOST IMPORTANT DECISIONS OF THE CONSTITUTIONAL COURT IN 1996

A. The Asylum Decisions

Three decisions of particular importance in 1996 concern the law regarding asylum in the Federal Republic of Germany. These rules were amended by Art. 16a GG as a result of the high numbers of applications for asylum in Germany and the minimal number of those applicants who were classed by the German authorities as genuine refugees who had been truly persecuted. The right to asylum was previously regulated in Art. 16 GG, and it constituted an absolute right which could not be restricted. The right to asylum remains a fundamental right, on which persons who have genuinely been the subject of political persecution can rely. This is however restricted in the following ways which the Constitutional Amendment of 1993 introduced.[7]

The new provisions operate on the premise that those who have suffered political persecution should immediately apply for asylum in the country in which the first opportunity arises. Such countries are referred to as "safe countries" by Art. 16a GG. This provision draws a distinction between three types of "safe country": (1) the member states of the EU, which are always considered to be "safe countries"; (2) other European countries which have ratified the Geneva Convention on Refugees and the European Convention on Human Rights and which honor the guarantees contained therein (these countries are listed individually in legislation passed by the Federation); and (3) other countries which are considered to be "safe" in that they appear not to engage in political persecution or in inhumane and degrading punishment or treatment. These countries are also listed individually in federal legislation.

If a refugee arrives from one of the first two types of country he or she cannot apply for asylum in the Federal Republic of Germany. Refugees do not have the right to choose the country in which they would like to apply for asylum, and cannot therefore choose to apply in Germany after having passed in transit through another "safe" country in

7. GG amend. 39, at 28.06.1993 (BGBl. I S.1002).

which they could also have applied for asylum. A period of as little as two hours in another safe country is enough for the purposes of excluding the right to apply for asylum in Germany. In that event the asylum seeker can be sent back to the safe country through which he or she passed.

Where refugees arrive from the third of the three categories of countries it is presumed that they will not face persecution in that country. This presumption can be challenged by the applicant. If a refugee fails to prove the likelihood of persecution the application is classed as "prima facie unfounded" and he or she can be returned to the state in question.

The first decision of the Constitutional Court to be analyzed[8] considered the rules which apply to the second category mentioned above and the constitutional and procedural rules which are connected to them. In its decision, the Constitutional Court dismissed the individual complaint of unconstitutionality brought before the Court by the two refugees.

It should be pointed out at this stage that the amendment of the right to asylum in Art. 16a GG must be subjected to those constitutional provisions which are superior to it within the Constitution, namely Arts. 1 and 20 GG, since the principles of human dignity and the rule of law cannot be set aside in the event of Constitutional reform.[9] The Constitutional Court analyzed the regulatory system behind Art. 16a GG and held that it was constitutional for the legislature to determine "safe" third states by way of listing them in legislation. This determination, the Court maintained, was a "normative assertion." The existence of such legislation establishes that security exists in these states and thus an asylum seeker who arrives via such a third country can be returned there. The Constitution itself provides that this return can be enforced immediately and in cases of Art. 16a(2) GG cannot be postponed by bringing an action for an injunction to suspend the enforcement of the administrative decision to refuse entry. Immediate return comes as a consequence of the fact that the Act has already established the safety of the state in question and the resulting safety of the asylum seeker in that state. This course of action is constitutional as long as the legislature has duly investigated and determined that the conditions laid down in the Constitution are in fact fulfilled. The asylum seeker cannot therefore claim that he will not receive protection in the country in question.

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8. 94 Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 49 (F.R.G. 1996).

9. *See* GG art. 79(3).

The Constitutional Court has however laid down restrictions upon this general rule. There exist certain circumstances which the legislature was not able to take into account when determining whether or not a third country is "safe" in accordance with Art. 16a(2) GG. An example of this is if the death penalty is applied in that state. The possibility of such a penalty is not excluded by Art. 2(1) of the European Convention on Human Rights (ECHR). The legislature must, of course, determine whether the ECHR is given effect in the third state in question but the question whether the death penalty exists and is implemented does not figure in that determination. Where the death penalty does apply, asylum seekers must be allowed to raise this issue as an objection to their being returned to that state.[10] A further example would be to take into account the true circumstances which exist in the particular third state, despite its "safe" status. The conditions may have changed, and it should no longer be termed "safe." The government can as a rule in such a situation remove the state from the list. This procedure is regulated by § 26a(3) of the Asylum Procedure Act. Individual asylum seekers, however, must be allowed to raise this objection in those situations in which the government has not yet acted.[11] Such objections, however, are only sustained in exceptional or extraordinary cases. As a result, strict rules govern the circumstances in which an asylum seeker can raise such objections.

The Constitutional Court also reviews the procedural effects caused by the amendment to Art. 16a GG. According to the Court, these procedural consequences were not unconstitutional. The same applies to the provisions of the Asylum Procedure Act which puts Art. 16a GG into more detailed terms. Moreover, the Court considered whether Austria was to be given "safe" status within the meaning of Art. 16a(2) GG. The case arose before Austria had become a member of the European Union. On its accession Austria automatically gained "safe country" status under the first category of Art. 16a(2) GG. At the time, however, Austria fell within the second category and was included in the legislature's list of "safe" states. After the Constitutional Court examined various provisions of Austrian law, it confirmed Austria's status and rejected the complaint of unconstitutionality.

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10. Ausländergesetz [Foreign Nationals Act] §§ 53(2), 60(5), 61(3) (text of 09.06.1990, BGBl. I, 1354 with further amendments).

11. For further cases, see 94 BVerfGE 49, 99-100 (F.R.G. 1996).

A second decision of the Constitutional Court[12] dealt with the issue raised by Art. 16a(3) GG regarding the third category of "safe" states.[13] This case concerned a national of Ghana who claimed he had been subjected to political persecution and reached Germany on a flight from London. He challenged the "safe country" status given to Ghana under Art. 16a(3) GG in the German legislation as being unconstitutional. The Constitutional Court analyzed the prerequisites for awarding safe status to a third country and for its legislative classification as such. The Court defined the prerequisites more specifically. It stated, for example, that safe status should not be granted to countries in which political persecution is practiced even in certain regions; criminal law regulating the security of the state must conform to the principles of the rule of law; and in those countries which have the death penalty, this should only be applied in cases of very serious wrongdoing and only after a guaranteed fair trial by an impartial organ of justice. Only where these prerequisites are fulfilled can it be guaranteed that neither political persecution nor inhumane and degrading punishment is practiced, which are the conditions for granting safe status under Art. 16a(3) GG.

The Constitutional Court also addressed the question of whether the legislature may statutorily determine the status of countries in this way. The Court confirmed that this conforms to the Constitution and declared that the legislature has the discretion to evaluate this issue. The Court's role is only to question whether the decision reached by the legislature is justifiable. A decision is not justifiable if after considering all points of view, the legislature "was not guided by the intention to base its decision on good reasons."[14] The Constitutional Court thus restricted the Court's own review of these legislative evaluations. In his dissenting opinion Judge Böckenförde rejected this limitation of judicial review as granting too wide a discretion to the legislature.[15]

The Court then addressed the issue of the circumstances under which an asylum seeker can rebut the presumption that political persecution etc. is not practiced in his country of origin. The Court emphasized that the refugee must show that he is under threat of *personal* persecution. The granting of safe status to Ghana was held to conform to the Constitution within the meaning of Art. 16a(3) GG. The provisions of the Asylum Procedure Act were also held to be constitutional.

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12. 94 BVerfGE 115 (F.R.G. 1996).
13. See the explanation above for the cases which are covered by the third category.
14. 94 BVerfGE 115, 144 (F.R.G. 1996).
15. *Id.* at 163.

The President of the Constitutional Court, Judge Limbach, wrote a dissenting opinion on this issue[16] along with Judge Böckenförde and Judge Sommer. Judge Limbach criticized the majority decision that the legislature in granting safe status to other countries within the meaning of Art. 16a(3) GG is not required to "carefully ascertain all the available and important facts and assess them in the light of Art. 16a(1) GG in a reviewable manner."[17] She wished to extend the scope of legislative review beyond the point reached by the majority. She was also of the opinion that Ghana should not have been included in the list of "safe" countries within the meaning of Art. 16a(3) GG because the extent of the legislature's analysis of the prevailing conditions in Ghana did not fulfill constitutional requirements. Judge Sommer concurred with this that the awarding of "safe country" status to Ghana was unconstitutional.[18]

The third important decision in this context dealt with so-called "airport procedure."[19] This case involved a refugee from Togo who arrived in Germany from Nigeria and subsequently applied for asylum. His application was rejected as "prima facie unfounded," and he was refused permission to enter the Federal Republic. He brought an action in the administrative court along with an application for an injunction, which the administrative court rejected. The applicant subsequently brought a claim before the Constitutional Court, which granted him temporary leave to enter the Federal Republic.

The Constitutional Court stated the constitutionality of Art. 16a(4) GG and the applicable provisions of the Asylum Procedure Act. Art. 16a(4) provides that the enforcement of the administrative action to refuse a refugee the right to enter and to remain in the Federal Republic of Germany (i.e. in cases under Art. 16a(3) GG[20]) can only be set aside by the administrative court when "serious doubts" arise as to the legality of that action. It provides that the scope of review by the administrative court may be limited so that, for example, if the asylum seeker subsequently brings new facts to the attention of the Court which he did not previously mention to the authorities these new facts or statements can be regarded as irrelevant if to do otherwise would lead to the duration of the process being too long.

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16. *Id.* at 157-63.
17. *Id.* at 157.
18. *Id.* at 164-66.
19. *Id.* at 166.
20. Where the asylum seeker comes from a "safe" state of origin within the third category. See *supra* for details.

Due to the fact that the applicant arrived in Germany by air, the action was considered to fall within the new provisions on "airport procedure." This means that an asylum seeker who arrives in the transit area of an airport is not deemed to have "entered" the Federal Republic at that point.[21] The immediate refusal to allow him to enter the country from the transit area can therefore only be overturned by the administrative court if serious doubts exist, namely "where significant reasons indicate, that the refusal would probably not stand up to legal challenge."[22]

This provision has been declared constitutional by the Constitutional Court along with the other provisions concerning the asylum procedure in cases of entry by air. The fact that the law provides a specific procedure for such cases does not violate the principle of equality in Art. 3(1) GG. The Constitutional Court has held that it does not constitute arbitrary discrimination to require persons from a safe state of origin, arriving in Germany by air and wishing to apply for asylum, to begin the asylum procedure prior to the decision being taken as to whether they may enter the Federal Republic, provided they can be accommodated on the airport premises while these proceedings take place. The same procedure is applied to foreigners who arrive at immigration control at the airport and are unable to show a valid passport or identity papers.[23] The Constitutional Court has accepted these regulations as being in conformity with the Constitution. It has also held that accommodating foreign nationals in the transit area of an airport does not constitute imprisonment or a restriction of freedom within the meaning of Art. 104 GG together with Art. 2(2) GG. Furthermore, the Constitutional Court has analyzed in detail whether the individual regulations within the "airport procedure" are constitutional and has held that they are. The Court did, however, lay down detailed safeguards to ensure that in carrying out this procedure the principles of the rule of law are complied with.

Asylum seekers must be guaranteed effective legal protection by the administrative courts, and that protection must not be reduced by the special circumstances of being accommodated within the transit area of the airport, in particular by isolation within that area, nor by the short time limits for gaining access to the courts, nor by any their lack of understanding of the language, etc. The asylum seeker must be able to

21. Asylverfahrensgesetz text of 27.07.1993, BGBl. I, 1361.
22. 94 BVerfGE 194 (F.R.G. 1996).
23. *Id.* at 197.

understand the content of administrative decisions. He or she must be informed of the grounds on which the authority has granted or rejected the application. If the services of a lawyer are required, the asylum seeker must be guaranteed the right to free advice and the services of an interpreter, should one be required. He or she should be placed in a position personally to determine the chances of the application's success. The legal advice to which he is entitled must be furnished on the day that the administrative process begins and must also be provided on weekends.

These conditions have been established by the Constitutional Court. They are not laid down in any legislation but must always be taken into account as a result of the Court's decision. The asylum seeker must also be given enough time to lodge an application for an interim injunction in the administrative court with submissions as to why it should be granted. Section 18a of the Asylum Procedure Act provides that such an application must be made within three days. The Constitutional Court takes the view that a further four days must be allowed to the applicant in order to permit reasons to be stated as to why an injunction should be granted. Thus from the time of the coming into effect of the administrative decision, the applicant has one week to lodge the application for an injunction, with supporting reasons, thus ensuring effective judicial protection of the rights of the applicant.

The Constitutional Court has also addressed the following problem: Section 18a(4) of the Asylum Procedure Act provides that if the application for an injunction has been filed in time, the refusal of permission to enter cannot be enforced before the administrative court's decision regarding the injunction. The decision of the court is deemed "issued" from the moment when the complete, signed decision is delivered to the administrative office of the Chamber of the administrative court.[24] This means, however, that it is not necessary that the reasons for the decision have already been written. The refusal of entry can be enforced and the asylum seeker returned to the country from which he came before he is aware of the reasons why the decision was made.

The Constitutional Court views this as a very serious matter and has given a detailed response to this situation. The Court emphasized first of all that these rules are characterized by the attempt to provide an expedited procedure in cases in which there is clearly no political

24. *Id.* art. 36(3).

persecution involved. This procedure applies to cases which are clearly "prima facie unfounded." These cases should be distinguished from those applications for asylum which require further investigation of facts and circumstances. In the latter situation the applicant shall be allowed to enter the Federal Republic, thus allowing him to continue with the application procedure.[25] The statistics indicate the serious attitude taken by the responsible authorities toward these cases: in 1994-1995 less than a tenth of the asylum seekers who arrived at Frankfurt airport were denied entry to the Federal Republic under § 18a(3) of the Asylum Procedure Act. As far as cases of denied entry are concerned, the Constitutional Court then examined whether or not it is compatible with the principles of the rule of law, which guarantee a fair and effective judicial process, that in cases which are prima facie unfounded the applicant is forced to leave for another country without knowing the court's reasons for rejecting his application for an injunction. The Constitutional Court held that this process was constitutional.

Certain findings reached by the majority were criticized in the joint dissenting opinion from Judge Limbach, the President of the Court, and Judges Böckenförde and Sommer.[26] First, the dissent was of the opinion that an individual's legal position should receive legal protection up until a decision has been reached by the Constitutional Court on the application for an interim injunction. The majority of the judges, however, were of the opinion that no such protection is afforded if the administrative court has held that the application is manifestly unfounded. Even where an application for an injunction has been filed before the Constitutional Court the asylum seeker can be returned to a third country (potentially to the same country in which he alleges he has been persecuted) before this application or the individual complaint of unconstitutionality has been decided.

Secondly, the three judges dissented from the view that the asylum seeker has no right to be told of the reasons behind the decision of the administrative court to refuse him entry to the Federal Republic and reject his application for an injunction before he has to leave the country. The reasons for the decision allow the court to determine that the decision reached was in fact correct, thus reducing the risk of erroneous decisions being made. For the same reason, the asylum seeker should be told of the reasons for the decision before he is returned to another country.

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25. *Id.* § 18a(6) Nos. 1, 2.

26. Apart from these particular criticisms the decision of the Constitutional Court in this matter was unanimous. *See* 94 BVerfGE 223-40 (F.R.G. 1996).

B. The Expropriation Decision

Another very important decision of the Constitutional Court of the Federal Republic of Germany concerns the issue of the expropriation of property without compensation in the former East Germany during the Soviet occupation of 1945-1949.[27] Former property owners brought constitutional complaints, alleging that after reunification in 1990 their property was not returned to them. The Federal Republic and the German Democratic Republic had agreed before unification that the actions taken by Soviet occupation troops during that period would not be reversed. In the opinion of the government of the Federal Republic at that time this agreement was the only way to obtain the consent of the Soviet Union and the former GDR for unification. Therefore, the nonreturn of the property in question was included as one of the terms of the Treaty of Unification. On the basis of a joint declaration made shortly prior to unification an extra provision was even incorporated into the German Constitution declaring this policy of nonrestitution to be constitutional.[28] Complaints alleging unconstitutionality had already been considered in a previous decision dated April 23, 1991.[29] The Constitutional Court had dismissed the claims as being unfounded. Since then, however, comments made by Gorbatchov and the former Soviet foreign affairs minister Shevardnadse appeared in the German press and cast doubt on the proposition that this agreement was indeed a necessary condition for the consent of the Soviet Union to the unification of Germany.[30] In the constitutional case that followed publication of these statements,[31] the Constitutional Court emphasized that in drawing up the Treaty of Unification the government had very broad political discretion to negotiate the terms of the treaty. The use of that discretion cannot be reviewed by the Constitutional Court. Only when certain limits have been exceeded can the Court take action. These limits are only exceeded when the government has misjudged its negotiating position to such an extent that it can no longer be said to have been acting within its duties. This is only the case where it should have been obvious to the government that it was beginning from the wrong negotiating point. The Court held that this

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27. 94 BVerfGE 12 (F.R.G. 1996).

28. *See* GG art. 143(3).

29. 84 BVerfGE 90 (F.R.G. 1991).

30. *See Moskau hat die Enteignung in der Sowjetzone nicht für unantastbar erklärt*, FRANKFURTER ALLGEMEINE ZEITUNG, Aug. 27, 1994, at 1-2; *Soviel Kleinkram*, DER SPIEGEL, Sept. 5, 1994, at 27, 31; *Schewardnadse: Es gab keine Vorbedingungen*, DIE WELT, Sept. 5, 1994, at 2.

31. *See* 94 BVerfGE 12, 18-20 (F.R.G. 1996) (relevant texts reprinted).

limit was not exceeded by the government of the Federal Republic.[32] The Court analyzed in detail what was negotiated with both the GDR and the Soviet Union and came to the conclusion that no significant new facts had come to light since the 1991 decision. Thus, the Government's evaluation of its negotiating position did not constitute an infringement of its duties. The Court also declined to depart from its 1991 decision regarding other issues raised by the complainants.[33]

C. Decision on Basic Human Rights

In a very important decision of October 24, 1996,[34] the Constitutional Court addressed the issue of the criminal responsibility of members of the National Security Council of the GDR and of border troops who had killed people trying to flee from East Germany into West Germany. The complainants[35] who were tried and convicted of manslaughter held important positions within the party and the state institutions of the GDR, including membership on the National Security Council until 1989; one complainant was the defense minister of the GDR and another was his deputy. Another individual complaint[36] was lodged by an officer formerly in charge of a stretch of the border who, together with one of the border troops, shot a swimmer trying to cross the river Spree into the West. The Court rejected the contention of these parties that holding them criminally responsible and convicting them of manslaughter was unconstitutional. The victims were citizens of the GDR trying to escape from the former East Germany. All orders concerning the use of guns at the border were given by the National Security Council, which according to the Constitution of the GDR was a subsidiary body assisting the State Council in the defense of the country. The National Security Council was in fact one of the highest military institutions within the GDR. The border troops were under the command of the leader of the National Security Council, who along with the other members was himself a leading member of the Socialist Unity Party (SED). Thus, the decisions of the SED were followed and enforced by the National Security Council. The permission granted to the border troops to use guns was provided for in legislation and was extended by

32. *Id.* at 35, 40-44.

33. For more details, see *id.* at 44-49.

34. 2 BvR 1851, 1853, 1875, 1852/94, as yet unpublished in Constitutional Court Reports. The author is grateful to the Office of the Constitutional Court for having delivered a copy of the decision prior to its official publication.

35. *Id.*

36. 2 BvR 1852/94.

orders and guidelines of service which were determined by the Minister for National Security on the basis of the decisions of the National Security Council concerning the defense of the border. Border troops were to provide this defense by laying mines and spring-loaded guns and by firing their weapons. The specific legislation in question was the Citizens Police Act (*Volkspolizeigesetz*) and the National Boundaries of the GDR Act of 1982.

In rejecting these complaints, the Constitutional Court made the following findings: Those who held high office or who were members of one of the constitutional institutions in the GDR were relying on their immunity from prosecution under the general rules of public international law. This claim was rejected, however, because such immunity does not exist as a general rule of public international law outside of Anglo-Saxon legal systems, and furthermore any immunity which may have existed in the former GDR ceased to exist with the collapse of the GDR.

The complainants also sought to rely on Art. 103(2) GG which embodies the principle *nulla poena sine lege*. The complainants submitted that the criminal courts which convicted them failed to take into consideration that their actions were based on legislative provisions justified in the GDR at that time, and that preventing citizens from escaping to the West was regarded as sufficient reason to shoot them. Their convictions as indirect perpetrators were obtained under the laws of the Federal Republic of Germany, though at the time of committing the crime they were subject to the law of the GDR. The Constitutional Court rejected these submissions on the grounds that the prohibition on retrospective criminal legislation embodied in Art. 103(2) GG "is based on a foundation of trust which the criminal law enjoys as a result of being passed by a democratic legislature in the light of the fundamental rights contained in the Constitution."[37] This foundation of trust however ceases to exist when the state generally treats serious crime like killing a criminal offense but then excludes this responsibility for particular circumstances and actually invites people to commit a wrong. In the case of the killing of persons fleeing from the country, the state thus shows a serious disregard for basic human rights, and the responsible authorities commit a "serious injustice on behalf of the state."[38] In these circumstances the requirement of substantive justice that embodies the respect for human rights as recognized in public international law does

37. *Id.* text of the decision, at C II 1b/bb.
38. *Id.* at C II 1b/bb and C II 2.

not allow recognition of this defense. The normally strict protection of this foundation of trust embodied in Art. 103(2) GG cannot be accorded for; otherwise the enforcement of the criminal law in Germany would conflict with the requirements of the rule of law. The Constitutional Court referred to a decision of the High Court in the British zone of occupation which the Federal High Court of Justice[39] (*Bundesgerichtshof*) followed, holding no legal effect be given to norms which "violate those legal principles which are valid regardless of their recognition by the state."[40] Anyone who follows such laws should be held criminally responsible for his actions.[41] Those committing the crimes would know at the time of the "substantial and, for the purposes of human co-existence, essential principles which are part of the inviolable nucleus of the law."[42] This was in line with judgments concerning injustice under the National Socialist regime. The Constitutional Court also referred to Gustav Radbruch, the famous legal philosopher and Minister of Justice in the Weimar Republic, who stated that in the event of an "intolerable conflict between positive law and the principles of justice," the principle of substantive justice should be preferred to that of the certainty of the law.[43] Positive law should then be considered invalid and obedience to this law should be abandoned.

Based on these considerations the Constitutional Court came to the conclusion that there could be no justification for the intentional killing of unarmed persons who were merely trying to cross the inner German border and who did not pose a threat to any generally recognized goal of the legal order. It constituted a "clear and intolerable violation of the elementary requirements of justice and human rights as recognized in public international law"[44] for which there was no justification. It was such a serious infringement that it violated the legal conventions common to all peoples regarding the value and dignity of man. In such

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39. 2 Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen [OGHbr] [Decisions of the Court of Appeals for the British Zone in Criminal Matters] 231(1949); 1 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] [Decisions of the Federal High Court of Justice in Criminal Matters] 391, 399 (1951).

40. 2 BvR 1852/94, C II 1b/cc(1).

41. For further decisions of the BGHSt, see 2 BGHSt 173, 177 (1952); 2 BGHSt 234, 239 (1952); 3 BGHSt 110, 128 (1953); 3 BGHSt 357, 362-63 (1953).

42. 2 BvR 1852/94, at C II 1b/cc(1).

43. *Id.* at C II 1b/cc(2).

44. *Id.* at C II 2a (formulation of the Federal High Court of Justice, 40 Entscheidungen des Bundesgerichtshofes in Strafsachen (BGHSt) 218, 232 and *id.* 241, 244 (1994). *See also* 39 BGHSt 1, 14 (1992) and *id.* 168, 183-84 (1993). This formulation was confirmed by the Constitutional Court in the above decision).

circumstances justice takes priority over positive law. The criminal courts were correct in not accepting the justifications put forward by the complainants for the killing of persons trying to cross the border. In the eyes of the Court, even the fact that the complainants were perpetrators of indirect manslaughter under the criminal law applicable in the Federal Republic was not questionable on constitutional law grounds.

The Constitutional Court also rejected the other submissions of the complainants, in particular the claim that the criminal courts had disregarded the principle of no conviction without proof of fault which is embodied in the Constitution. There were also no constitutional problems posed by the severity of the sentence imposed by the criminal courts. The decision of the Constitutional Court (Second Chamber) was unanimous.

D. The Married Officials Decision

Another important decision of the Constitutional Court[45] concerned the issue of local government law, which is within the jurisdiction of the individual Länder in Germany. It was concerned specifically with a provision in the local government code in Baden-Württemberg, whereby two spouses could not be members of the local council at the same time. The prohibition extended to divorced couples. The Constitutional Court analyzed this case on the basis of Art. 28(1) GG, which provides that the people should have local representation elected by general, equal, direct, free and secret ballot. The Court found that the local government provision violated the principle of equality which is inherent in the ballot and applies to active as well as to passive voting. The equality principle applies not only to the election procedure itself but also to the exercise of the functions of an elected person. If it is not possible to ensure equality of electability, then there must be compelling grounds for limiting this important principle. In the instant case, the Court held there were no compelling reasons for abandoning the principle. The provision aimed to prevent power being accumulated in the local council so that the joint interests of the spouses themselves or of third parties could not be given precedence over that of the public welfare. Such an accumulation of power could also affect the trust placed by the electorate in the local council, which gives effect to democracy at a lower level. In the case of divorced couple, however, there is unlikely to be any such accumulation of interest and unlikely that they would indulge

45. 93 BVerfGE 373 (F.R.G. 1996).

in collaboration on certain matters. Thus there was no compelling ground for the restriction of the principle of equal ballot.

E. Decision on Freedom of Speech

Another important decision of the Constitutional Court dealt with the old problem of the extent to which the Constitutional Court can review the decisions of lower courts. The Constitutional Court is not a "Supreme Court of Appeal" which can correct the decisions of courts of last instance. The Constitutional Court may only look at the question whether the court of last instance has applied constitutional law correctly. It cannot review the way in which legislation is applied or interpreted by the ordinary courts, as that lies within their sole jurisdiction. The standards applied by the Constitutional Court are those contained in the Basic Law and not in legislation. In its decision of February 13, 1996,[46] the Court addressed this issue in the context of freedom of expression as embodied in Art. 5 GG. At an international Schopenhauer conference leaflets were circulated which were critical of the German Organization for the Right to a Humane Death. The latter is an organization that represents persons suffering from incurable illness and promotes the right of suicide. The person responsible for circulating the leaflet was of the opinion that members of the organization had encouraged people who were close to committing suicide, but who still might have changed their minds to take this action. The leaflet also claimed that the organization described these individuals in the press as being utterly convinced of their will to die when in fact they were often people who were hesitating to commit suicide. Thus, it was contended, the situation of these individuals was being "unscrupulously falsified" by the organization. The person responsible for circulating the leaflet was ordered by a court to stop all distribution. He unsuccessfully lodged an individual complaint of unconstitutionality with the Constitutional Court. The Court emphasized that it only had the power to decide whether the ordinary courts had given the correct emphasis to the right of free speech. It must decide if the courts properly classified the statements as statements of opinion (i.e. value judgments), or as statements of fact, with the different consequences each of these entails. Of course, the courts must not attach meaning to statements which they cannot objectively bear. If statements are capable of several meanings, then the courts must assess the possible alternatives and then give reasons for evaluating them in the way that

46. 94 BVerfGE 1 (F.R.G. 1996).

they did. The Constitutional Court does not have jurisdiction to decide this issue for itself or to replace the decision of the ordinary courts with its own opinion. The Constitutional Court can only verify that the ordinary court has applied the constitutional provisions correctly.[47] In the case in question the *Landesgericht* (Regional Court) viewed the statements as statements of opinion whereas the *Oberlandesgericht* (Regional Court of Appeal) treated them as statements of fact. The two courts had different understandings of the textual content of the leaflets. In constitutional law statements can either be statements of opinion or statements of fact but not both. The wording of the statements meant that both interpretations were objectively justifiable. The *Oberlandesgericht*, in deciding that the statements were indeed statements of fact, did not infringe the constitutional right to free speech of the distributor of the leaflets.[48] The Constitutional Court had to accept as a consequence of this interpretation that the distributor of the leaflets could not thereafter republish his allegations as they were not capable of substantiation. This would not have been the case had the court found the statements to be mere opinions.

F. The Separation of Powers Decision

In another decision the Constitutional Court[49] was required to rule upon the constitutionality of legislation concerning the construction of the "Stendal Bypass," which formed part of a high-speed rail link between Hannover and Berlin. Due to deterioration of the transport network in former East Germany, existing facilities had to be reconstructed and upgraded quickly for various reasons, including the need to encourage investment in the area. The legislation under review was passed in order to carry out the project as soon as possible. If the normal procedure were followed, namely the execution of a public works planning procedure, then the project would have taken up to a year longer to get underway. The legislation gave the project the go ahead and provided for the compulsory purchase of land by the railway network. The legislation thus replaced the usual planning procedure by which such issues are normally determined. Thus an essentially administrative decision was transferred to the competence of the legislature. At the

47. *Id.* at 9.

48. *Id.* at 10.

49. Decision of 17.07.1996, 2 BvF 2/93, as yet unpublished in the Constitutional Court Reports. Once again the author is grateful to the Office of the Constitutional Court for the delivery of this decision prior to its official publication.

same time the usual legal recourse against such administrative planning decisions was set aside because the validity of legislation can only be tested on constitutional grounds, and such actions are scarcely possible for individuals to bring successfully. The Government of Hessen brought an action of "abstract" judicial review before the Constitutional Court on the dual grounds that this course of action infringed the principle of the separation of powers embodied in Art. 20(2) GG, and the principle of efficient judicial protection laid down in Art. 19(4) GG. The Constitutional Court dismissed the claim as unfounded. The main findings of the Court are as follows: The Court gave a very detailed ruling on the question of whether the legislation constituted an infringement of the principle of the separation of powers.[50] Rejecting this contention, the Court declared that there are many limits placed on the principle of the separation of powers, but the only important restriction is that one power should not become superior to another in any case in which the Constitution does not provide for it.[51] The nucleus of each individual power must remain unaltered. As far as planning powers are concerned, these lie neither solely within the competence of the executive nor solely within the competence of the legislature. The Constitution does not prohibit planning decisions being made by legislation. Planning decisions are normally reached by the executive, but there is no rule of law to prevent the legislature from exercising this competence in cases where there are good reasons for doing so. The speedy realization of a planning project was for the benefit of the community as a whole, and the development of the transport network in former East Germany was a proper reason for legislative action. Also, the Federation has authority over the administration of the railway network by virtue of Art. 87e GG.[52] The plans drawn up by the federal government were laid before Parliament, and subjected to objections and inquiry in much the same way as they would have been had they been drawn up by the executive. The Constitutional Court also accepted the fact that expropriation was to occur under the legislation. This was held to be a special case of so-called "legal expropriation" which is only permitted by the Constitution in very limited circumstances. Due to the fact that the plans and the expropriation associated with it would be subject to long delays if carried out by the executive, the expropriation

50. *See* GG art. 20(2).

51. Decision of 17.07.1996, 2 BvF 2/93, II 1 a.

52. This was introduced by the Amendment to the Constitution of 20.12.1993 (BGBl. I S.2089).

was held to be permissible under constitutional law. The actual planning decision itself, as reached by the legislature, is subject to limited review by the Constitutional Court. The Court can only review whether the legislature has made a bona fide effort to take into account the relevant factors and has weighed the different factors in a reasonable and comprehensive manner. In reaching decision on the matter, the individuals and local communities affected must also be allowed to make representations and have these taken into account. The Constitutional Court may only interfere where there has been a clear error on the part of the legislature: namely where the weight attached to the relevant considerations is obviously erroneous or the decision violates constitutional principles.[53] The Court's detailed reasoning showed that no conflict with the Constitution was established. The Constitutional Court also rejected claims that the principle of equality[54] and the right to self-administration of the municipalities[55] had been infringed, for in fact when the planning decision was made, the legislature gave full consideration to the impact upon the municipalities.

G. Decisions on Professional Advertising

The Constitutional Court also rendered an important decision dealing with the question whether pharmacists can advertise their services.[56] Certain pharmacists advertised their services and were fined by the specialist court responsible for regulating the profession. These individuals brought three complaints of unconstitutionality. The Constitutional Court held that Art. 12(1) GG which guarantees the right to freely exercise a profession encompasses the right to advertise.[57] The restrictions on advertising introduced by the professional bodies were restrictions of this right. Restrictions which limit the right to exercise a profession are permitted only in situations where they are proportional and in the public interest. They must be necessary and tolerable for the professionals concerned. The purpose of limiting the right of professionals to advertise is to ensure that they acquire a heightened sense of responsibility to the profession itself and fulfill their obligations properly. Professionals generally should not be driven by the desire to make profits, but by a desire to serve the profession by providing

53. Decision of 17.07.1996, 2 BvF 2/93, III 1 c.
54. *See* GG art. 3(1).
55. *See* GG art. 28(2).
56. Decision of 22.05.1996-1 BvR 744/88, 60/89, 94 BVerfGE 372 (F.R.G. 1996).
57. *Id.* at 389.

pharmaceutical products to the public. Advertising restrictions may help control the misuse of prescribed drugs, and strengthen public faith in pharmacists and their professional integrity.

The Court, however, did not accept that all restrictions on the right to advertise were constitutional. For example, the Professional Code of 1970 of Baden-Württemberg bans advertising by circulars and leaflets that are distributed off the site of the pharmacy. The Constitutional Court found this to be disproportional because restrictions should merely prevent obtrusive and unreasonable advertising and not exclude advertising altogether because of the nature of the medium. It depends very much on the content of the advertisement and the manner and the frequency with which it is carried out. As long as it is not obtrusive and ostentatious, nor constitutes a neglect of a professional obligation, advertising must be permitted. The Court found the provisions in question to be partially unconstitutional because they constituted unreasonable limits on the freedom to exercise a profession.[58]

The second complaint concerned the provisions of the Professional Code in Westphalia. The Constitutional Court upheld their constitutionality because they only restricted obtrusive advertising. In the third decision, the Court held that the Bavarian Professional Code of 1983 conformed to the Constitution because it too only restricted unreasonable advertising.[59] The Constitutional Court, of course, does not always hold the application and interpretation of these Codes to be constitutional. In reviewing decisions of specialist courts, the Constitutional Court can only investigate whether the court has given sufficient weight to the relevant provisions of the Constitution. In the first of the three complaints, the Constitutional Court criticized the specialist court for finding that an advertisement of more than forty cm^2 in an association journal was ostentatious publicity. The specialist court had not taken all of the relevant factors into account, e.g. format, circulation, presentation, and readership, in reaching its decision. The judgment by the specialist court against the second complainant was also criticized. The court had not given comprehensive reasons to justify the conclusion that two to three newspaper ads per month for pharmaceutical products like medicinal herbs, natural products etc., would greatly influence the public. In terms of normal advertising practice, this constitutes limited publicity, and therefore the judgment against

58. *Id.* at 392.
59. *Id.* at 394.

complainant was not justified. In the case of the third complainant the Constitutional Court held that to censure erecting advertising signs in front of a pharmacy constituted a violation of the pharmacist's right to exercise a profession. The specialist court had not advanced convincing reasons as to why these signs would conflict with the legitimate objectives of the Professional Code. The Constitutional Court could find no evidence of obtrusive advertising that might be legitimately prohibited.

H. The Decision on Unlawfully Confiscated Property

The decision of the First Senate of the Constitutional Court of October 8, 1996,[60] concerned the practice in the former GDR of requiring persons who wished to emigrate to the West to sell or give away any land that they owned and forfeit their possessions before their exit visas would be granted. Special legislation that governs unresolved property right issues confers a right to recover assets which have been confiscated by state authorities upon showing abuse of power, corruption, duress or fraud. Thus it could be submitted that emigrants who divested themselves of their property in order to receive an exit visa would have a right to recover their property because they acted under duress. The legislation provides, however, that such a right of recovery ceases to exist where third parties acting in good faith have subsequently acquired property rights or the right to possess the assets in question. In these circumstances the legislation provides for financial compensation or alternatively the award of another piece of land or property of the same value. In a specific case on this issue, the complainant brought an action in the ordinary courts on grounds of duress, challenging the legality of the forfeiture of his property to the GDR authorities. The *Bundesgerichtshof* (Federal High Court of Justice) dismissed the action on the procedural basis that it should have been brought pursuant to the special legislation in the administrative court, rather than the ordinary courts. A private law challenge alleging duress under private law was therefore incompetent. The complainant submitted to the Constitutional Court that the *Bundesgerichtshof* had not properly interpreted the legislation in question and thus had violated his right to property as embodied in Art. 14 GG. The Constitutional Court dismissed the case as unfounded. The main reason for the dismissal was that the property guarantee that is applicable

60. 1 BvR 875/92, as yet unpublished in the Constitutional Court Reports. Once again the author is grateful to the Office of the Constitutional Court for the delivery of this decision prior to its official publication.

to questions of recovery is not violated by virtue of the fact that the legislation allows for such matters to be governed exclusively by public law or restricts the remedy where there has been bona fide acquisition of the property in question by a third party. Such restrictions protect the social equilibrium and do not therefore constitute a violation of the right to property. The complainant has a right to compensation in the event that recovery is no longer possible and thus there is no violation of Art. 14 GG.

I. The Parliamentary Investigation Case

Last but not least is the decision of the Constitutional Court in an action brought by Gregor Gysi, a member of the Democratic Socialist Party (PDS).[61] Gysi was the leader of the PDS which is the successor to the Socialist Unity Party of the former GDR. He is now a member of the German Parliament. The Federal parliament decided to investigate Gysi, to ascertain whether he had been an active member of the Stasi (the East German national security organization). Section 44 b II of the Members of Parliament Act[62] provides for such an investigation. If a MP were found to have played an active role in the Stasi, it would not have automatically resulted in the MP losing his or her mandate, but Parliament would have questioned whether the mandate could be regarded as legitimate. The Constitutional Court held that on being elected to Parliament the MP gains the status of representative. The Parliament must honor that status and as a rule it is prohibited from carrying out such an investigation unless the question of whether the candidate met the minimum eligibility requirements is an issue. Investigations like this one into former Stasi activities must remain exceptional, and are only admissible where they are required in the public interest. The Court affirmed their constitutionality because the Stasi played an integral role in the totalitarian regime of the GDR. However, it pointed out that safeguards to protect the status of MP must also be provided within the procedure. In particular the person subject to investigation must be allowed to participate in the inquiry itself as well as in the collection of evidence. He or she must also be given adequate opportunity to defend. The Constitutional Court held that § 44b of the

61. Decision of 21.05.1996, 2 BvE 1/95, 94 BVerfGE 351 (F.R.G. 1996).

62. Abgeordnetengesetz (AbgG), text of 18.02.1977, BGBl. I, 297 as amended by the Act of 20.01.1992, BGBl. I, 67.

legislation in question and the directives which supplement that legislation provide these safeguards.[63]

III. CONCLUSION

In conclusion, it can be stated on the basis of the jurisprudence of 1996 that the Federal Constitutional Court continues to maintain a high level of protection for fundamental rights. Nevertheless, it manages to reconcile these rights with public interest requirements. A considerable number of decisions needed to resolve constitutional issues arising from the former GDR situation. In resolving these issues the Court can apply the well-developed norms of the German Constitution, the interpretation of which has been the task of the Court for more than forty-five years. As a whole, the jurisprudence of 1996 makes an efficient contribution to the recognition of the Constitution as the highest norm within the legal order and to the stabilizing societal effect of the rule of law.

63. 94 BVerfGE 351, 369-71 (F.R.G. 1996).