

# INDIANA LAW JOURNAL

Volume 32

SPRING 1957

Number 3

## THE GERMAN FEDERAL CONSTITUTIONAL COURT AND THE COMMUNIST PARTY DECISION

EDWARD McWHINNEY†

### I.

The Basic Law (*Grundgesetz*) of the Federal Republic of Germany (The Bonn Constitution of 1949) formally provides for the institution of judicial review. Article 93 of the constitution vests in a Federal Constitutional Court (*Bundesverfassungsgericht*) jurisdiction to decide:

(1) the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal organ or of other parties concerned who have been endowed with independent rights by this Basic Law or by rules of procedure of a supreme federal organ;

(2) differences of opinion or doubts on the formal and material compatibility of federal law or state law with this Basic Law, or on the compatibility of state law with other federal law, at the request of the federal government, of a state government or of one-third of the *Bundestag* members;

(3) differences of opinion on the rights and duties of the Federation and the states, particularly in the execution of federal law by the states and in the exercise of federal supervision;

(4) other disputes of public law between the Federation and the states, between different states or within a state, unless recourse to another court exists.

The German court differs from final appellate tribunals in English-speaking countries in a number of important respects. First, it is a court created specially for the determination of constitutional questions only, with no jurisdiction in private law matters except in so far as they may

---

† LL.M., S.J.D. Barrister-at-Law. Associate Professor of Law, University of Toronto. Author of *JUDICIAL REVIEW IN THE ENGLISH-SPEAKING WORLD* (1956).

give rise also to questions of a constitutional character.<sup>1</sup> As a second point, the court is governed by special rules as to selection and tenure of its members. Article 94 of the constitution provides that half the members of the court are to be elected by the *Bundestag* (lower house of the federal legislature) and half by the members of the *Bundesrat* (upper house). Article 94 has been supplemented by a special federal law of March 12, 1951, contemplated at the time of the adoption of the constitution.<sup>2</sup> This law establishes two senates, each composed of twelve judges. The judges must have completed their 40th year and either be qualified professionally for admission to the bar or for the higher civil service. Four judges in each senate are to be elected from among the judges of the various state (land) supreme courts, and have life tenure on the Federal Constitutional Court. The remaining eight judges in each senate are chosen for an eight-year term, though in respect to the first election to the court it was provided that half of those chosen were to serve for an initial term of four years only.<sup>3</sup> As to the elections, the *Bundesrat* elects the judges directly, a two-thirds majority being required. The *Bundestag* elects, by proportional representation, a committee of twelve which is charged with selecting the judges to be chosen by the *Bundestag*. Such a procedure, in spite of the safeguard in the case of the *Bundestag* of a special nominating committee, might seem to produce inevitably sectionalism and partisanship in the election of members of the court and also a frequent turnover of personnel. In fact, however, a considerable degree of stability and continuity seems to be developing in the membership. At the elections, in late 1956, to replace those elected initially for a four-year term only, all of the retiring judges who indicated themselves available for re-election were elected, though several

---

1. This accords with the dominant emphasis in constitutional drafting in Europe since World War II. See, for example, Constitution of the French Republic, October 27, 1946, tit. XI, Amendments of the Constitution, art. 91-93, though here judicial review is to be exercised by a special Constitutional Committee elected by the members of both Houses of the Legislature and including the presiding officer of each House, rather than a court; Constitution of the Italian Republic, January 1, 1948, tit. VI, Constitutional Guarantees, § I, Constitutional Court, art. 134-37. As to the historical background of the German Federal Constitutional Court, see generally Nagel, *Judicial Review in Germany*, 3 AM. J. COMP. L. 233, 238-41 (1954). For criticism of this current continental tendency to separate constitutional law adjudication from private law adjudication, on the score that it will conduce to abstractness in decision-making, remote from day-by-day litigation, see Freund, *A Supreme Court in a Federation: Some Lessons From Legal History*, 53 COLUM. L. REV. 597, 617-18 (1953).

2. See generally Leibholz, *The Federal Constitutional Court in Germany and the "Southwest Case"*, 46 AM. POL. SCI. REV. 723 (1952); Von Mehren, *Constitutionalism in Germany—The First Decision of the New Constitutional Court*, 1 AM. J. COMP. L. 70, 78-79 (1952).

3. This was to insure that one-third of the positions on the court, that is one-half of the elective posts, which in all comprise two-thirds of the membership of the court, would be available for filling at four-year intervals.

chose to step down under the retirement provisions available. Those elected to the court include several university professors who may continue to hold their teaching posts while members of the court. There is one woman judge and there are several Jewish members of the court, including the president of one of the two senates, who were victims of the Nazi regime and who have returned to Germany since the war.

The division of the court into the two senates or bancs is a novel feature from the viewpoint of Anglo-American jurisprudence, though such an arrangement is quite commonly found in continental countries allied with provisions for the various bancs sitting together as a *plenum* or full court, most notably, of course, in the case of the French *Cour de Cassation*. The law on the Federal Constitutional Court of March 12th, 1951, gives the first senate of the court exclusive jurisdiction over disputes involving the compatibility of federal and state law with the Basic Law. The second senate has exclusive jurisdiction regarding questions of the interpretation of the Basic Law that arise in disputes between organs of the federal government. Finally, the *plenum* or full court of all twenty-four justices sitting *en banc* may be approached by the President of the Republic or various organs of the federal government for advisory opinions. This provision, while it goes beyond the specific categories of jurisdiction set out in Article 93, does not, however, make clear whether an advisory opinion given by the full court is binding on either of the two senates when considering an identical legal issue raised in a subsequent controversy. The anomalies created by the rather arbitrary division of jurisdiction between the two senates can be seen in the fact that in the summer of 1956 the first senate had 623 current cases on its docket and the second senate only 61. In an effort to speed the disposition of these cases, the court accordingly formulated certain re-organizational measures, inter alia permitting the transfer of part of the case load from the first senate to the second senate, thus distributing the work load more evenly. This measure took effect from the session beginning September 15, 1956.<sup>4</sup>

The confusion that can result from what is, in effect, a tri-partite allocation of constitutional jurisdiction was made clear during the controversy concerning the constitutionality of German participation in the European Defense Community plan involving German ratification of the peace contract and the defense treaty. The jurisdiction of the first senate was invoked (in terms of Article 93(2) of the Basic Law), by one-third of the members of the *Bundestag* (lower federal House) on

---

4. BULLETIN OF THE PRESS AND INFORMATION OFFICE, GERMAN FEDERAL GOVERNMENT, Sept. 27, 1956.

the score that it was a matter involving the compatibility of federal law with the Basic Law. This segment of the *Bundestag* was composed of the Opposition Social Democratic members and they looked to the first senate (popularly known as the "Red" senate, because of its supposed political coloration) for a verdict favorable to their views. The jurisdiction of the second senate (popularly called the "Black" senate) was invoked by the federal government of the Chancellor, Dr. Adenauer, on the score of there being a dispute over constitutional interpretation between the highest federal organs, in this case, questions of the roles of the *Bundestag* and the *Bundesrat* and of the majority necessary for ratification of the defense treaty, the latter question turning on whether or not a constitutional amendment was necessary to effect ratification. Finally, the President of the Republic, Dr. Heuss, requested the *plenum* or full court for an advisory opinion on the question. The court, however, showed an awareness of the dangers of premature raising of issues of constitutional principle before they could be studied in a concrete fact-setting. The first senate ruled that the application before it was premature since ratification of the treaty had not yet occurred. The application to the full court was withdrawn by the President of the Republic at his own instance, and the second senate rejected the petition before it on the score of the petitioners' (here the federal government purporting to act on behalf of the three coalition parties and the "majority of the *Bundestag*") lack of standing to sue. On May 11, 1953, after ratification of the European Defense Community plan by the federal legislature, the Social Democratic members of the *Bundestag* (one-third of the members of the *Bundestag*) again petitioned the court, superseding their petition of the previous year that had been rejected as premature. The court, however, was reluctant to decide the case immediately because federal general elections were pending on September 6, 1953. After the elections and the consequent increased electoral majorities of the Adenauer government, the court discussion became academic for the government was able to secure the necessary two-thirds majorities to effect the passage of ratification as a constitutional amendment.<sup>5</sup>

As a last point, it should be stated that the court, in the full tradition of continental jurisprudence, is an anonymous court, its members generally being unknown to the general public outside professional legal circles. It delivers only a single, per curiam opinion in each case, no indication of the actual voting on the court being given, and no specially

---

5. See generally Loewenstein, *The Bonn Constitution and the European Defense Community Treaties*, 64 *YALE L. J.* 805, 809 (1955).

concurring or dissenting opinions being permitted.<sup>6</sup> As to actual opinion-writing, this is of course in the continental tradition in the sense of being closely reasoned, and formulated in terms of a series of categorical propositions leading to the actual decision. But the opinions of the Constitutional Court do not seem as abstract in form and expression as the opinions of German private law tribunals, or for that matter of continental tribunals generally, and one catches at times some of the conversational unfolding of the opinions of Anglo-American courts. One might comment here, on the occasional extreme length—unusual for a continental court—of the opinions of the Federal Constitutional Court. Its opinion in the Communist Party case released in August, 1956, ran to 425 pages in the first published draft.

## II.

By motion, November 22, 1951, the federal government requested a determination by the Federal Constitutional Court that the West German Communist Party<sup>7</sup> was unconstitutional in terms of Article 21(2) of the Basic Law.<sup>8</sup> This motion reached the court on November 28, 1951, accompanied by an identical motion of the federal government in regard to the Socialist Reich Party (*SRP*), an extreme right-wing, neo-Nazi type political party. Competence in respect to these processes was assumed by the first senate of the court. The court handed down judgment in regard to the *SRP* on October 23, 1952, ruling it to be unconstitutional in terms of article 21(2). The court did not, however, formally announce its decision in relation to the *KPD* until August 17, 1956.

---

6. During the drafting of the statute (*Gerichtsverfassungsgesetz*) setting up the Constitutional Court, a proposal was made to give judges in the minority the right to indicate the fact and the reasons for their dissent, but the proposal was rejected on the score that it would lead to "Byzantinism" and to the seeking of publicity. Von Mehren, *The Judicial Process: A comparative Analysis*, 5 *AM. J. COMP. L.* 197, 208-09 (1956). In one decision of the *plenum* of the Constitutional Court given on December 12, 1952, it was indicated that two judges had dissented. This was an advisory opinion rendered by the *plenum* of the court, and the departure from accepted practice has been explained on that score. The highest German appellate tribunal in private law matters, the *Bundesgerichtshof*, now permits any dissenting judge to "set out his position and file same with the court's record." *Ibid.*

7. *Die Kommunistische Partei Deutschlands*, hereafter referred to by its common form of abbreviation in Germany, *KPD*.

8. "Article 21:

(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 behaviour 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 Federal Constitutional Court decides on the question of unconstitutionality.

(3) Details will be regulated by federal legislation."

The difference in timing is partly to be explained by the extent and depth of the oral argument by the parties in the *KPD* case. Even up to the time of the final release of the court judgment in August, 1956, the *KPD*'s counsel expressed themselves as anxious to continue oral argument, a position that brought forth some comments from the court in its judgment as to dilatory tactics of the defense. Substantially, though, it seems clear that the court's delay was designed to make an ally of time in the solution of a problem whose undertones were as much political as legal. This is a familiar enough approach with courts exercising the role of judicial review of a constitution. The noticeable marking-time for a number of years by the United States Supreme Court in the recent school-segregation cases,<sup>9</sup> apparently until such time as the attitude of the national government, (the main agency concerned, in the last analysis, with any physical enforcement of a court decision ending segregation), had been made clearer by the Presidential elections of 1952 and the subsequent attempts at translation of campaign platforms into concrete executive programs, is the best example of this in recent years. Conversely, the Steel Seizure decision of 1952 has been censured as a situation where a court rushed in too quickly and has suffered for its pains.<sup>10</sup> The only question in relation to the West German Supreme Court, assuming that a "premature" court decision on the same lines as its *SRP* decision might exacerbate Russo-German relations and so delay ultimate German reunification, would be why, after waiting five years, a decision must then be given in August, 1956, when the announcement of a ban must surely be less opportune than ever.<sup>11</sup> The answer is, apparently, that with some of the elective members of the first senate of the court coming to the end of their terms, and the possibility in the future, with fresh elections to the court, of some changes in the personnel of the first senate, it was felt that a decision had to be given at long last, lest a re-constituted first senate be unable properly to decide a case whose oral argument might not have been heard by some of its members. As to the validity of this argument, Anglo-American experience is only of partial help. We tend to place more stress than does continental jurisprudence on argument by counsel, but on the other hand

---

9. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

10. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), criticized by PRITCHETT, *CIVIL LIBERTIES AND THE VINSON COURT* 249 (1954). See also Freund, *Book Review*, 29 N.Y.U.L. REV. 1164 (1954); Freund, *The Year of the Steel Case*, 66 HARV. L. REV. 89 (1952).

11. The West German Government and the Soviet Union finally exchanged Ambassadors in 1955, following Chancellor Adenauer's visit to Moscow. The Soviet Ambassador to Bonn was suddenly recalled in mid-1956 and had not been replaced by the time the court released its *KPD* decision, the recall being accepted in Bonn governmental circles as indicating a hardening of Russian attitudes towards West Germany.

we are more likely to emphasize, even with the more prominent personal role taken by our own judges, the fact of continuity in a court, that a court is a going concern distinct from changes in its members. In this regard, death of Chief Justice Vinson of the United States Supreme Court after some three years of court handling of the school segregation cases in which his own role had been dominant, did not prevent his successor, Chief Justice Warren, from taking part in the continuing court deliberations on the issue from the moment of his appointment, and ultimately from writing the official opinion.

The issue of timing of release of the court decision, of course, shades off into the questions of the political merits of the decision as such, particularly in its effects on German reunification. The latter issue to some extent of course had been resolved for the Federal Constitutional Court by the federal government. It was on the federal government's motion that the process came before the court. The process was never withdrawn and officially, at least, up to the time of the actual release of the judgment the federal government was pressing for a decision. If the court itself had concluded that a decision dissolving the *KPD* was unwise, it had thus only two courses open to it. It could make an ally of time and keep on delaying judgment (apparently the course it actually followed until the imminent expiry of the terms of some of its elected members presented it with a dilemma it did not feel able to solve), or else refuse the motion of the federal government on the merits, something that would have involved (substantially, though not formally, since there is no official doctrine of precedent in Germany any more than elsewhere on the continent) a distinguishing of the court's *SRP* decision of 1952. The latter course might both have embedded the court in questions of political philosophy of extreme complexity and also left it open to the unpleasant charge that it applied a double standard of legal interpretation and political morality—one standard for the anti-parliamentary forces of the Right and quite another standard for the anti-parliamentary forces of the Left.

Even so, the court found it difficult, in view of the nature of the *KPD* case, to avoid questions of political philosophy because the principal argument by counsel for both sides, understandably, centered around the interpretation of article 21(2). The court recognized that article 21(2) attempted a synthesis between the principle of tolerance in the face of all political views and the avowal of fixed, inviolable, basic values of the State order.<sup>12</sup> Put in terms with which American lawyers, arguing the

---

12. "Das Grundgesetz hat in Art 21 Abs 2 bewusst den Versuch einer Synthese zwischen dem Prinzip der Toleranz gegenüber allen politischen Auffassungen und

first amendment cases in the United States during the Cold War crisis, have become familiar, though the constitution recognized the interests in free speech and association, these were not to be regarded as absolute, but must be balanced against countervailing interests in national security and order. The real problem, therefore, in a German as well as a North American context, would be as to questions of *degree*, how far and in what way the interests in speech and association could be limited by the state. The latter aspect of the problem was substantially foreclosed for the court by the fact that it was now asked to rule that the constitution per se, without any implementing legislation by the federal legislature, struck down the KPD. Consideration of questions of techniques, means actually used by governmental authority to implement the interests in security, was thus, as the court saw it, effectively taken out of its purview.<sup>13</sup>

The first aspect of the problem, how far the interests in speech and association could be limited by the state, remained, however. The court here recognized that the Bonn constitution-makers in contrast to those in the era, after 1918, of the Weimar Republic, had profited by historical experience and had resolved to defer no more to the principle of the absolute neutrality of the state in the face of political parties, of whatever nature, and of whatever objectives. The Bonn constitution-makers had here avowed the creation of a "valiant democracy."<sup>14</sup>

---

*dem Bekenntnis zu gewissen unantastbaren Grundwerten der Staatsordnung unternommen."* KPD Prozess. Sonderdruck des Urteils vom 17. August, 1956.

13. The KPD had argued that art. 21(2) of the Basic Law was not immediately applicable law, and could not be applied and enforced by the court without implementing legislation in terms of art. 21(3). The court, however, rejected this argument, as it had done also in the SRP case in 1952, on the score that the concepts set forth in art. 21, for example, "free democratic basic order," were sufficiently determinate to render their judicial application possible. The court went on to note that art. 21(2) did not distinguish between the parties, and that even "classical democratic parties" were not absolutely protected against a proceeding under the article, this flowing from the fact that the goals and character of a political party need not necessarily always remain the same. The originally democratic attribute of a party could never be a license for the future; likewise, of course, it could always remain open in theory whether the KPD would be acknowledged in the future to be, as it asserted it now was, a "classical democratic party."

14. "*Er ist Ausdruck des bewussten verfassungspolitischen Willens zur Lösung eines Grenzproblems der freiheitlichen demokratischen Staatsordnung, Niederschlag der Erfahrungen eines Verfassungsgebers, der in einer bestimmten historischen Situation das Prinzip der Neutralität des Staates gegenüber den politischen Parteien nicht mehr rein verwirklichen zu dürfen glaubte, Bekenntnis zu einer—in diesem Sinne—streitbaren Demokratie.*" KPD Prozess, Sonderdruck des Urteils vom 17. August, 1956.

Compare the remarks of MIRKINE-GUETZÉVITCH, LES CONSTITUTIONS EUROPÉENNES, vol. I, 146 (1951). "*Un grand espoir s'est levé sur l'Europe le jour de l'insurrection de Paris. La Naissance, sur les barricades parisiennes, de la IV<sup>e</sup> République, symbolisait pour l'Europe entière l'apparition d'une démocratie renouée. Mais la révolution résistante n'a pas réussi. Mais la démocratie des résistants a cédé le pouvoir aux démocraties anémiques.*"



As to the principles to be adverted to in the interpretation of article 21(2), the court laid down a number of important propositions. First, it held, a political party is not to be adjudged as constitution-adverse if the sole objection is that it does not affirmatively acknowledge first principles of the free democratic basic order. To be constitution-adverse, a party must go beyond that and develop an active, combatant, aggressive attitude against the standing order, and plainly prejudice the functioning of that order. Hence, the court said, article 21(2) demands that the political party in question positively aim to prejudice or set aside the free democratic basic order. The court, however, expressly denied the *KPD's* argument that inchoate intentions were not enough for purposes of article 21(2), and that overt acts (for example, active preparation of a high-treason undertaking), were necessary before there could be any ruling of constitution-adversity in terms of article 21(2). The court affirmed that the political course of a party can be determined through an intention, the intention to combat the free democratic basic order, for it is the goal of article 21(2) to prevent the rise of parties with anti-democratic objects in view. As to the concrete application of these propositions to the *KPD*, the court received a considerable amount of oral and written evidence as to the nature of the *KPD* and proceeded to record its findings of fact in its judgment. Starting with the origins of modern socialism in Germany, the court looked at the teachings of Marx and Engels which, in the court's view, over and above day-by-day political demands, sought to determine the position of the working-class, the proletariat, in the bourgeois-capitalist economy and social order. According to these teachings, the court found, the presently existing class-state of the capitalist-bourgeoisie is to be followed first of all by the class-state of the proletariat; and out of this latter is to develop finally communism itself in which there are to be no more class-differences. The public authority is to lose its political character and the state itself to disappear or wither away. This "scientific socialism," viewed by its founders as different from other socialist systems, especially *Utopian* socialism which is sometimes called communism, is developed from Marx. As a teaching it summons the proletariat to class-consciousness and also to political action on an international basis.

The ultimate goal of the *KPD*, the court declared, is the establishment of the socialist-communist social order, through the proletarian revolution and the dictatorship of the proletariat. The proletarian revolution and the dictatorship of the proletariat, the court declared, are incompatible with the free democratic basic order, for the two systems, dictatorship of the proletariat and the free democratic basic order, are

mutually exclusive. In the court's view, the kernel and essence of the present West German Basic Law (dignity, freedom, and equality of the person) could not survive in a state order in which the principles of the dictatorship of the proletariat alone had value. Social democracy based on the rule of law, the multi-party system and right of opposition, spiritual freedom and tolerance, patient reform-work and incessant coming to terms with rival political principles as convictions equally entitled to be respected, stood in incompatible contrast to the dictatorship of the proletariat.<sup>15</sup> In fact, the court noted, the representatives of the *KPD* themselves had in the oral argument affirmed the incompatibility of both state-orders. Certainly, proletarian revolution and the dictatorship of the proletariat were not the immediately realizable, short-range goals of the *KPD*, but the manner and way in which the *KPD* systematically made the proletarian revolution and the dictatorship of the proletariat the long-range object of their party-political schooling, propaganda, and agitation in political struggle within the West German republic made it clear that the party already aimed at the undermining of the free democratic order established under the Basic Law.

On the basis of these findings of fact as to the nature of the party, the court applied the principles of article 21(2) to decree as follows:

- (1) that the *KPD* was constitution-adverse;
- (2) that the *KPD* was dissolved forthwith;
- (3) that the creation of "front" or substitute organizations for the *KPD*, or the continuation of existing organizations as "fronts," was prohibited;<sup>16</sup>

---

15. "Es ist nicht denkbar, den Wesenkern des Grundgesetzes (*Würde, Freiheit, and Gleichheit der Person*) aufrechtzuerhalten, wenn eine Staatsordnung errichtet würde, bei der die Prinzipien der Diktatur des Proletariats allein Geltung haben. Soziale rechtsstaatliche Demokratie, Mehrparteiensystem und Recht auf Opposition, geistige Freiheit und Toleranz, geduldige Reformarbeit und fortwährende Auseinandersetzung mit anderen grundsätzlich als gleichberechtigt angesehenen Überzeugungen steht in unvereinbarem Gegensatz zur Diktatur des Proletariats." *KPD Prozess, Sonderdruck des Urteils vom. 17. August, 1956.*

16. One of the further consequences of the establishment of the constitution-adversity of the *KPD*, as the court expressly noted, was that representatives of the *KPD* in the federal and state lawmaking bodies would lose their mandates. This ruling did not directly affect the federal legislature since it had no Communist members. In the elections to the first *Bundestag* (lower house of the federal legislature) in 1949, the *KPD* had gained 15 seats out of a total of 402, securing 1,361,700 votes in a total poll of nearly 24,000,000. In the elections to the second *Bundestag* in 1953, the *KPD* vote fell to 607,800 out of a total of 27,500,000 and it failed to win any seats. MERKATZ AND METZNER, *GERMANY TODAY* 30-31 (1954). The only state legislatures affected were the Bremen City Senate with four Communist members who thereby forfeited their seats, and the Niedersachsen legislature with two Communist members who were, however, expected to be permitted to continue their mandates though only as non-party members. Actual card-carrying membership of the *KPD* in West Germany at the time of the court ban in

(4) that the property and wealth of the *KPD* was declared confiscated in favor of the federal republic and was to be devoted to community-useful goals.<sup>17</sup>

The court provided for the implementation of its decision by charging the Ministers of the Interior in the various member-states of the West German federation and also the federal Minister of the Interior with the execution of the various parts of the decision. It gave immediate authorization to all police organs to act so far as this might be incumbent upon them and stipulated that actions intentionally committed against the decision or against its implementation would be treated as contempt of court and subject the actor to imprisonment of not less than six months.

### III.

The individual arguments advanced by the *KPD* and the response by the court are interesting in so far as they bear on the court's conception of its own scope and functions. The court had little difficulty in rejecting the argument, directed to the enforcement of its decision, that the actual dissolution of the party by the court was an executive-type measure and, as such, offended a separation of powers doctrine that must be regarded as bound up in any constitutional system embodying the rule of law. Surely, the court said, once a party is established as constitution-adverse, it is only logical that the normal legal consequences—dissolution—should follow.

Of more importance was the *KPD* argument that the theories of Marx and Lenin could not properly be judged under article 21(2) because they were a "scientific doctrine, more than 100 years old and propagated over the whole World, and on whose principles today the social organization of already over a third of the World rests." The argument was that a legal norm, such as that set out in article 21(2), could provide no adequate scale for the measurement and judgment of a scientific view of life, that, regardless, article 5(3) of the Basic Law specifically protected freedom of scientific investigation and teaching,<sup>18</sup> and that on this basis the process against the party would be a "witch-

---

1956 was estimated at 70,000. BULLETIN OF THE PRESS AND INFORMATION OFFICE, GERMAN FEDERAL GOVERNMENT, Aug. 23, 1956.

17. The court, in its judgment, seems to have left open for the future, "for clarification by the competent organs," the question of what measures should be taken in regard to the property and wealth of the *KPD* if the constitutional ban on that party should ever be lifted.

18. "Article 5(3) :

Art and science, research and teaching are free. Freedom of teaching does not absolve from loyalty to the constitution."

process," or "Inquisition-process." But, the court said, so far as scientific teaching, or doctrine building, the development of state, society, and economy was concerned, this would clearly still be free, even after any banning of the *KPD*. Teaching of this type could still be carried forward, and become discussed and combated. Scientific teaching, as such, was not the object of the process. The decisive matters for the court to consider were the political objectives of the party and the role in the state that it had set for itself. The unequivocal and clearly-definable boundary between scientific theory and political goal lay there.

The most substantial of the arguments of the *KPD* concerned the Potsdam Agreement of 1945 between the four Allied powers and the further question of German re-unification. As to the Potsdam Agreement, the party contended that in so far as, under the agreement, it had been licensed by the four occupation powers, article 21(2) could not apply to it. It argued that article 21(2) could not apply to "democratic parties" previously licensed as such by the occupation powers in terms of the agreement. The court answered this contention in detail. First, it pointed out that Germany had not been a party to the Potsdam Agreement. In the court's view, it was doubtful in international law doctrine whether a nation-state, here, West Germany, which did not take part in a treaty-settlement, could acquire binding duties thereunder. Even if it could, there was the wider question as to the scope and extent of the actual agreement, whether the occupation powers had altogether intended the German people and their future governmental organs to be bound in this way. The parties to the Potsdam Agreement had agreed over the content and meaning of the concept "Democracy" only to the extent that it constituted a *negative* or veto against Nazism. The constitution of West Germany had subsequently taken up the allied intention, and over and beyond that *negative* it had sought to fill the concept "Democracy" with *positive* content. Within the framework of the "free democratic basic order" established under the constitution of West Germany, the state could at least be defended against political parties, quite apart from the Nazi party, which conformed also to the *negative* definition of "Democracy" established by the Potsdam Agreement. As to the *KPD* argument, then, that it was licensed under the Potsdam Agreement in the West Zone of Germany (the present West German Republic) and therefore not opposed to article 21(2), the Allied licenses to the extent of article 21(2) had become superfluous.

The other substantial argument of the party rested on what it categorized as the pre-eminent constitutional principle for West Germany, the obligation as to the re-unification of Germany which is to be spelled

out from the preamble<sup>19</sup> and also article 146.<sup>20</sup> That the restoration of the state unity of Germany was an urgent national goal the court for its part regarded as both self-evident and also following from the legal view that the German Reich, through the collapse of 1945, had not perished as a municipal and international law subject. As the court noted, the preamble and article 146 showed the re-unification of Germany to be in the foreground as a political goal for West Germany. The legal obligation existed for all political and state organs of the federal republic to strive for the unity of Germany with all their strength, to exercise their official functions with a view to this goal, and to keep in mind ultimate bearing on the question of re-unification of the appropriateness of their political actions. But, said the court, and here it approached very closely the American doctrine of judicial restraint, it must be left open to the political organs of the federal republic to decide in what ways to bring about re-unification. Judges should only reject a measure of the political organ as constitution-adverse on the ground of its impeding re-unification when the injury is evident and the measure from no viewpoint may be justified. The *KPD* argued that its outlawry and dissolution in practice would hinder the re-unification. But whether this would be so must above all always remain a question of political discretion and judgment pertaining to the political and not the judicial arm of government.

As the court further noted on this point, the re-unification of Germany was not only a municipal law question, but also an international question. Presumably, it could not be achieved without an international law agreement between the four occupation powers. Measure-taking for the preparation of re-unification would involve the allowance and execution of an election law for all-German elections to an all-German constitution-organ. The judicial establishment of the constitution-adversity of the *KPD* would not oppose this for a judgment of the present Federal Constitutional Court could only have efficacy for the state and area controlled by the present constitution of West Germany and not efficacy in regard to all-German elections established as an act of constituent power of the whole of the German people.

That was not to deny that the party, if prohibited now, would find itself in an unfavorable position in the preparation of future all-German

---

19. "Preamble:

. . . the entire German people is called on to achieve by free self-determination the unity and freedom of Germany."

20. "Article 146:

This Basic Law shall cease to be in force on the day on which a constitution adopted by a free decision of the German people comes into force."

elections. But this inequality of political chances in any future all-German elections would be true only in respect to the area comprising the present federal republic of West Germany. Balancing this, it might be noted that non-communist political parties in the present Soviet zone of Germany, East Germany, in view of the prevailing political system in that zone would likewise have no real equality of political chances with the Soviet zone Communist Party in any future all-German elections. On the merits, therefore, the court was unable to find that a ban on the *KPD*, legally or actually, would hinder the execution of free all-German elections and thus close the way to re-unification.

#### IV.

The Basic Law of the Federal Republic of Germany, the Bonn Constitution of 1949, represents a very deliberate and considered design on the part of its drafters to depart from both the letter and the substance of the Weimar Constitution, the constitution of the between-the-world-wars period, which is generally regarded as having left the democratic parties impotent before the authoritarian forces of the Right and of the Left. Laski's "rules of the game" thesis has been written into the Bonn Constitution to the extent that those who do not accept certain minimum fundamentals of political association are not to be entitled to its privileges and protections. The problem of how, from the viewpoint of political theory, to justify such controls in a society that desires still to conform to the description of a "Rule-of-Law" state, the traditional German public law concept of "*Rechtsstaat*," is ameliorated, though not, it must be conceded, finally solved, by vesting a monopoly of the constitutional power to adjudge a political party as constitution-adverse and therefore as dissolved in a judicial agency, the special Federal Constitutional Court.

By its particular handling of the *KPD* process, as demonstrated and justified in its lengthy opinion, the German constitutional court has made it clear that in seeking to establish a "valiant democracy" in place of the "anaemic" polity of the Weimar era, the classical antinomy,<sup>21</sup> the Bonn Constitution-makers have not gone to the other extreme of enshrining any particular orthodoxy as absolute in the area of political opinion. The court's opinion in the *KPD* case demonstrates that the constitution is not to be regarded as establishing philosophic absolutes, but standards capable of varying application in varying societal conditions, thus opening the way to a pragmatic, balancing-of-interests approach that is quite novel to German public law jurisprudence and clearly owes much to the influence of American legal ideas and technique during the Allied occupation

---

21. See note 14 *supra*.

period.<sup>22</sup> Even if the balancing-of-interests approach, in its concrete application in the *KPD* case, may seem to have involved the balance's tilting decisively in favor of the interest in national security and order, this is not different from the ultimate resolution of the free speech-national security conflict made by the United States Supreme Court in the *Dennis* case.<sup>23</sup> Both the relative risks in each country of internal subversion during the current Cold War crisis and also the past sorry history of political defenselessness against such dangers in Germany, might seem to justify the German court's solution of the interests-problem as readily as that of the American court. In any case, the German court was at some pains in its decision to note that under changed conditions the balance might be tilted the other way in the case of either the *KPD*, or, for that matter, in the case of parties presently considered as constitutional.

The German court, in Brandeis fashion,<sup>24</sup> necessarily recognized here that underlying questions of fact—political, social and economic—do condition questions of constitutionality; whether in relation to legislation, administrative action, or conduct of private individuals and group associations. Though the line is often hard to draw in practice, it is suggested that the German court properly refused to regard the question of the potential effects of any judicial ban on the *KPD* on German re-unification as being ultimately within its special competence. Control of the *KPD* suit at all times belonged to the Bonn government which could at any stage have withdrawn the process if it had felt that a ban on the party would delay or prevent re-unification. It would surely be right under these circumstances, that the Bonn government and not the court should assume full political responsibility for any consequences of the decision in this context. With this major exception, the German court showed itself ready to enter into strictly "non-legal" questions, those of political philosophy and day-by-day party programs. Without such an examination, of course, any court decision in the *KPD* case would have been an exercise in logic and not in life. But the extreme facility of this, the newest of the national courts of the Western countries, exercising the power of judicial review, in the handling of such questions of fact contrasts sharply to the difficulties of the much older supreme courts of the

---

22. The German school of *Interessenjurisprudenz*, which partly anticipated Roscoe Pound's main ideas, had of course made its influence felt in the area of private law much earlier than this.

23. *Dennis v. United States*, 341 U.S. 494 (1951).

24. See Brandeis' opinion in *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*, 282 U. S. 251 (1931).

Commonwealth countries<sup>25</sup> which still do not accept the Brandeis Brief as an aid to the adjudication of public law issues, and which must, perforce, attempt to decide such problems in the confines of a mechanically positivist, "black-letter" jurisprudence.

*Addendum*

*Court Jurisdiction in Germany and the Otto John Case Decision*

The recent decision in the *Otto John* case, the record of which has now become available, emphasizes the special jurisdictional features of German appellate court structure (referred to above), distinguishing the German legal system from that of the English-speaking countries in general. The decision in the *John* case was given by the Supreme Federal Court (*Bundesgerichtshof*), the final appellate tribunal for the Federal Republic of Germany in private law matters, and counterpart, therefore, on the private law side, of the Federal Constitutional Court (*Bundesverfassungsgericht*).

The *John* case concerned the prosecution, under sections 100(a) and 100(d) of the German Criminal Code (*Strafgesetzbuch*), of the former head of the internal security service who had fled to the Soviet Zone of Germany on July 20, 1954, and remained there until December, 1955, when he had returned voluntarily to the West. The charges against John, made under the special High Treason (*Landesverrat*) chapter inserted in the Criminal Code in 1951 at the height of the Korean War security emphasis, were on two counts—treasonable conspiracy against the State (*Landesverräterische Konspiration*) and the treasonable giving away of false State secrets (*Verrat falscher Staatsgeheimnisse*). The second count is rather an odd one, viewed in terms of the general doctrinal development of German criminal law. The prosecution sought to prove, under this count, that John had said falsely that there was a secret protocol to the European Defense Community Treaty; and that the West German intelligence organization had stepped up its activities in France; and that Chancellor Adenauer had ordered security surveillance of one of his cabinet ministers. The significance of a charge of treasonably giving away false State secrets rested on the notion that even though false, these "secrets" had constituted very effective Communist propaganda against the West, in view of John's high status in the West Ger-

---

25. See, e.g., *Australian Communist Party v. Commonwealth* [1951] 83 C.L.R. 1 (High Court of Australia), a decision invalidating legislation passed by the federal government of Australia dissolving the Communist Party in Australia. For a criticism of the abstract, conceptualist basis of the reasoning employed by the Australian court in reaching its decision in this case, see McWHINNEY, *JUDICIAL REVIEW IN THE ENGLISH-SPEAKING WORLD* 81 (1956).



man government service.

John's conviction by the Supreme Federal Court (*Bundesgerichtshof*), announced on December 22, 1956, followed a stormy six-week trial. The court sentenced him to four years imprisonment at hard labor, rejecting a prosecution recommendation of a two year penalty only, and at the same time ordered John to pay the costs of the trial, estimated at over 100,000 Deutsche Mark. No appeals lies from the decision, either as to facts or law, or as to severity of sentence.

Certain questions as to jurisdiction and court hierarchy will occur to Anglo-American lawyers studying the record in the *John* case. As already noted, the Supreme Federal Court (*Bundesgerichtshof*) is the final appellate federal tribunal for private law matters, while the Federal Constitutional Court (*Bundesverfassungsgericht*) is the final appellate tribunal in constitutional law cases. Granted the merits of a system of thus dividing appellate court jurisdiction, according to subject matter, especially in view of the opportunities it allows of building up specialist-type expertise among the members of the judiciary, the question remains as to why, when the major policy issues involved in the *John* case are so close to those canvassed in the *KPD* case, the former must be allocated to the private law tribunal and the latter to the constitutional law tribunal. The answer is that the sections under which John was prosecuted form part of a chapter (High Treason [*Landesverrat*] chapter) of the German Criminal Code, and that, classified as criminal law, the *John* case must necessarily belong on the private law side. One may wonder, however, whether a more substantial test of court jurisdiction looking to the issues of high governmental policy bound up in the John prosecution, might not have sent it, instead, to the constitutional law side, and whether in such case the Federal Constitutional Court (*Bundesverfassungsgericht*), with its demonstrated special competence and readiness in examining the shifting boundary lines between public law and policy, might not have taken a somewhat different, more flexible approach than its more technically-based private law counterpart.

As a second point, it is a little surprising to see a final appellate tribunal prepared to exercise original jurisdiction, especially where it is a matter of jurisdiction in a criminal trial and a trial as long drawn out and as controversial as the *John* case turned out to be. Considerations of pressure of court time and business, and also the desirability of keeping a final appellate tribunal as far as possible free from direct contact with political *causes célèbres*, would seem to indicate the merits of confining the Supreme Federal Court's role, in such situations as the *John* case, to appellate review only. The obvious solution, in this regard, would be an

amendment of the jurisdictional rules of the German private law court hierarchy conferring original jurisdiction in such matters as the High Treason chapter of the Criminal Code on courts of intermediate or primary jurisdiction, with only appeal lying to the Supreme Federal Court.

As noted, the decision actually given by the Supreme Federal Court in the *John* case is final and not subject to appeal, the only remedy being a possible petition for executive clemency. This particular aspect of the Supreme Federal Court's decision, its finality, though given in the exercise of original jurisdiction, has been the subject of criticism in West Germany, together with criticism of the vagueness and rubberiness (*Kautschuk-Begriff*) of the actual counts used against John. Looking only to the jurisdictional rules and practice revealed by the *John* case, the outside observer may well feel that notwithstanding the many advantages, especially as to specialization, presented by the German system of court jurisdiction, some modifications may be warranted in the interests of more efficient conduct of court business and even of justice in the individual case.