

## The "Karlsruhe Republic – Keynote Address at the State Ceremony Celebrating the 50th Anniversary of the Federal Constitutional Court"

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[Editors' Note -- The *Bundesverfassungsgericht* (Federal Constitutional Court) celebrated its 50th Anniversary in a State Ceremony held in Karlsruhe on September 28, 2001. The following dignitaries addressed the gathering: the President of the Court, Prof. Dr. Dr. h.c. Jutta Limbach; German Federal President, D.Dr. h.c. Johannes Rau; Governor of the Bundesland (Federal State) Baden-Wuerttemberg, Erwin Teufel; and the President of the Austrian Constitutional Court, Prof. D.Dr. Dr. h.c. Ludwig Adomovich. The Keynote Address, reprinted here in English, was delivered by President Emeritus of Stanford University, Prof. Dr. Dr. h.c. Gerhard Casper. *German Law Journal* honored the Constitutional Court with a *Special Edition* on June 1, 2001, which can be found under "Past Issues" at [www.germanlawjournal.com](http://www.germanlawjournal.com).]

[1] Fritz Stern, who was awarded the Peace Prize of the German Booksellers Association in 1999, commenced his speech on that occasion by asking: "Why do German democracies have to be identified, limited as it were, by associating them with the names of cities: Weimar, Bonn, Berlin. All this does is to emphasize unwelcome discontinuity." (1)

[2] The discontinuity that has been created by the designation "Berlin Republic", seems questionable indeed. The continuity of the new Germany that has been developing, by way of an evolutionary revolution, since 1949, would have been underlined by foregoing any city name as an attribute. "Federal Republic" is an apt and useful designation. Alas, that opportunity seems to have passed. "Comrade Trend" seems to insist on the designation "Berlin Republic."

[3] If cities are to define German republics, then please allow me—at least for today and on this occasion—to choose the city of Karlsruhe, where the Federal Constitutional Court is located, as the symbol of German constitutional *continuity*. We owe it to the political situation and the political forces in 1989/90, including the freely elected representatives of the population in the GDR, that the Basic Law has become the constitution for all of Germany, now the "unity and freedom of Germany" (2) have been achieved. This means that the constitutional history of the past fifty years, as it has been shaped by the Federal Constitutional Court, continues as unassailable constitutional tradition.

[4] It is this fact that I first and foremost have in mind when I refer to the "Karlsruhe Republic." The designation does not intend to take up the cliché of "government by judges." The Federal Constitutional Court is of great importance. As far as its institutions are concerned, the creation of the Federal Constitutional Court distinguishes the Federal Republic from its predecessors. This means that, in this respect too, the Federal Republic is the "Karlsruhe Republic." As Alfred Grosser once put it, the Federal Constitutional Court is, among all the institutions of the Federal Republic, "the most original and the most interesting one." (3) Nevertheless, one should be realistic.

[5] In the run-up to United States presidential elections, friends occasionally tell me that they are going to vote in favor of a specific candidate because the President is responsible for appointing the justices of the Supreme Court. It seems to me that such an attitude lends *too* much weight to the judiciary, to its role in daily life, and to its influence. Life in a democratic society is shaped, above all, by the opinions and activities of its citizens and of their representatives, not primarily by an "aristocracy of the robe," even if the latter has the last word on important issues. Following the terror attacks in New York City and in Washington, this simple truth has once again and tragically become obvious.

[6] My field is mainly American constitutional law and American constitutional history. In 1989, in celebration of the bicentennial of the Judiciary Act of 1789 (the statute is still in force), I also gave the keynote speech at the Supreme Court in Washington. (4) On this occasion, someone asked me how I came to focus on American constitutional law. My brief answer was that the American constitution, with its long heritage, and the Supreme Court captured me, as it were, forever when I, as a German student, attended Yale Law School and studied constitutional law there. (5)

[7] In the course of American history, the constitution has continuously served as a point of reference: apart from the Declaration of Independence, it is probably the most important element defining the American polity. Nothing analogous has existed in Germany. I was born shortly before World War II and thus belong to a generation that has had more reason to reflect about constitutional *discontinuities* than about *continuities*.

[8] In the more than two hundred years during which the United States constitution, only rarely amended in a formal way, has been in existence, Germany has seen the end of the Holy Roman Empire, Napoleon's Rhenish Federation, the German Federation, the Revolution of 1848; later on, the North German Federation, the Bismarck constitution of 1871, the Weimar constitution, the lawlessness and arbitrary rule of the Third Reich, the period of occupation after 1945, two Constitutions of the German Democratic Republic, and the Basic Law. Given these discontinuities it is truly satisfying and liberating that today we may celebrate democratic constitutional continuity under the heading of "The Karlsruhe Republic." This could not have been predicted with any certainty in 1951.

[9] In a rather ambivalent address to students of Hamburg University on the occasion of the entry into force of the Basic Law on 24 May 1949, Rudolf Laun said: "It is true that the new law, in accordance with the will of all those involved, is a provisional arrangement; it is true that it has been created by parliaments and not by the people itself; it is true that it has not been created freely but has come into existence under the pressure of the occupation; it is true that it is not the work of all of Germany but only that of a truncated Germany; but nevertheless, it is the beginning of a new development, whatever course it will take." (6) The fact that the development has taken a good course is, certainly not exclusively, but nevertheless in many ways, attributable to the Federal Constitutional Court, is attributable to "Karlsruhe."

[10] Here in Karlsruhe, the seat of the Federal Constitutional Court and the Federal Court of Justice, the "seat of the law," it is not too far-fetched to mention another continuity that reaches back even further. Karlsruhe, the capital of the former state of Baden, is situated on the French border. In a certain sense, the long German journey westward began here, in 1818, with the enactment of the Constitution of Baden. This constitution was more "Western" than other German constitutions of the period, and remained in force for one hundred years. It contained an impressive catalogue of civil rights, including political rights, and aimed at something that may be called "rule of law." (7) Amendments to the Constitution required a two-thirds majority in each of the two houses of the legislature. (8) "All public servants" were responsible for "exact compliance with the Constitution." (9)

[11] Apart from my emphasis on "satisfying" and "liberating" continuity, the designation "Karlsruhe Republic" is also meant to express the simple fact that the constitutional court has become the symbol of the rule of law in Germany. People "go to Karlsruhe" to enforce their rights. Between September 1951, and 31 December 2000, they did so 132,000 times; in 127,000 cases by way of constitutional complaint. (10) In the first year, in 1951, almost five hundred cases were brought to the Court, fifty years later, it is about ten times as many. (11) In relation to the size of the population, a caseload of about five thousand per year means that more cases are brought before the Federal Constitutional Court than before the Supreme Court of the United States, the caseload of which is about seven thousand. (12)

[12] The acceptance of the Federal Constitutional Court's role among the German population is high. In the west German states, it rose from 55% to 69% between 1975 and 1998. (13) In the new eastern states, the acceptance was already at 61% in 1998, a fact that confirms the continuity of the "Karlsruhe Republic." (14) Controversial decisions have interrupted, but not reversed, this trend. The wording of the statement, for which the Institut für Demoskopie Allensbach ascertained such a high rate of agreement, and which has remained unchanged throughout the years, is: "I think it is a good thing that the Federal Constitutional Court can strike down decisions of the Federal Government and of the *Bundestag* (Federal Parliament) if they are incompatible with the Basic Law. This type of control is essential in a state governed by the rule of law." (15) Only 14% of the interviewees found that these decisions are political ones "that should not be left to a court." (16) In a poll taken by the *Deutsches Jugendinstitut* in 1992, among people between the ages of 16 and 29, the results showed more trust in courts in general, and in the Federal Constitutional Court in particular, than in other governmental institutions. (17)

[13] For an outside observer, a striking feature of the "Karlsruhe Republic" after fifty years is its institutional pragmatism. All in all, there is a more relaxed approach to controversies about "the juridification of politics" and the "politicization of the judiciary" than in the early decades when "Blacks" and "Reds" mounted the Karlsruhe barricades on different occasions and at different points in time. Today, there seems to be a general understanding that, at least as far as the constitution is concerned, the spheres of politics and law are not sharply separated (nor can they be or are they even supposed to be). Under constitutionalism it is important that the obstacles that have been established *ex ante* "to force us to move along certain paths and not others," as Russell Hardin has put it, (18) are continually strengthened by effective institutions and conventions, but are also adapted to new circumstances. This is a delicate policy task, though not a project of partisan politics.

[14] My teacher at the University of Freiburg, Konrad Hesse, who was a member of the First Senate of the Federal Constitutional Court from 1975 to 1987, described the required dialectical approach in his inaugural lecture on "The Normative Power of Constitutions" in 1958 as follows (I was present in the lecture hall):

*The most important . . . prerequisite for the normative power of a constitution is, therefore, that the constitution not only responds to social, political and economic laws, but, above all, to the intellectual situation of its time; that it be*

*accepted and supported, in the general consciousness, as an appropriate and just order.*

*It is, however, scarcely less important that a constitution is able to adapt itself to changed circumstances. Apart from purely organisational and technical provisions, it must, if possible, restrict itself to a few basic principles, whose implications . . . can be developed anew in each individual case, but with regard to these essential principles. . . .* (19)

[15] This process, the continual definition of the polity with reference to essential constitutional principles, has been performed by the Federal Constitutional Court in a manner that has earned it attention and respect world-wide. The Federal Constitutional Court has dealt with changes in society; in doing so, the Federal Constitutional Court itself has changed, as has been shown, *inter alia*, by Gary Schaal and his co-authors in a publication whose title also refers to the "Karlsruhe Republic." (20)

[16] The Federal Constitutional Court has contributed to an increase in the number of courts specialising in constitutional review throughout the world. Its success and its importance have encouraged, in particular, new democracies in Central and Eastern Europe to adopt many aspects of the institution. (21) Its influence, however, can also be found in Western Europe and beyond, perhaps most impressively in South Africa. (22)

[17] One of the reasons why the Federal Constitutional Court carries weight as an example in a world that continues to undergo democratization is that, twice in its history, Karlsruhe had to participate in regime transformation. The main task in this context was, of course, the new beginning, marked by the Basic Law in 1949, after the end of *the* German state that had legalized injustice and organized genocide. The second transformation was the legal treatment of the consequences of German reunification after 1990. The issues in this context ranged from the question to what extent former GDR officials can be made responsible, under criminal law, for their actions, to questions concerning civil service law, pension regulations and acts of expropriation under Soviet occupation. The care with which the Federal Constitutional Court dealt with these difficult problems, although not always beyond criticism, was a contribution to reunification in its own right.

[18] I return to the beginning fifty years ago. If I were to travel to that island where one is allowed to take only one book, one piece of music, one picture and one important decision of the Federal Constitutional Court, I would choose the 1958 *Lüth Case*, not because its reasoning is unfailingly persuasive, but because of its significance for the Karlsruhe Republic. (23) Its theme, which is contained in the first sentence of the headnotes, was: "The basic rights are primarily rights of the citizen against the State (negative rights); the basic rights of the Basic Law, however, also embody an objective system of values, to be taken as the basic constitutional determination for all areas of law." (24)

[19] In 1951, the Hamburg Regional Court, relying on the German Civil Code's provisions about torts, had enjoined Erich Lüth from calling for the boycott of a new film, the scriptwriter and director of which was the former Nazi filmmaker Veit Harlan.

[20] In itself, the case was simple. A court, *i.e.*, an arm of state authority, had prohibited speech that calling for boycott of a film by Harlan on the basis of a legislative provision that had been formulated as a "general clause." Lüth invoked his "negative right" under Article 5 of the Basic Law. (25) The Federal Constitutional Court had to decide whether the complaint was justified.

[21] Lüth's constitutional complaint was indeed regarded as well-founded. The Court's decision, however, went much further, even if Theodor Ritterspach, the judge of the First Senate who served as reporter, said shortly before his death that he had not anticipated the developments that would result from this case. The decision, so to speak, treated the name of the Bonn constitution, *Grundgesetz* (Basic Law), literally. The constitution became the law of laws, a *Grundnorm* (Fundamental Principle) in more than the formal sense. I quote:

*It is equally true, however, that the Basic Law, which is not neutral as to values . . . , has, in its section on basic rights, also set up an objective value system and thus strengthened the normative power of those basic rights. . . . This value system focuses on human dignity and the freely developing human personality and must be regarded as the basic constitutional standard for all spheres of law. Legislation, administration and judiciary must be guided and inspired by it. Accordingly, it also influences the private law; no provision of private law may contradict it; each must be interpreted in its spirit.* (26)

[22] This statement was to carry far, and it has had far-ranging consequences indeed, including the creation of governmental duties to protect those whom the Court regards as needing protection. The statement makes not only government, but also society the "object of constitutional regulation," I am using Dieter Grimm's phrase. (27) It told the citizens of the republic that a new age had begun. It told the judges and other representatives of public authority that law enacted before the ratification of the Basic Law could not be used, simply to perpetuate old solutions. As far as the *Lüth Case* was concerned, the Federal Constitutional Court concluded (I shall return to this) that the "general

laws," that are mentioned in Article 5 of the Basic Law as limits of the freedom of speech, may not be used to undermine the "particular value" of this fundamental right. (28)

[23] Four decades later, the theme is dealt with somewhat differently. "Principles" are mentioned more often than "values." The system of values has, as it were, become less systematic, and more open, more problematic instead. Today, it is expected that the weighing of interests will establish a "practical concordance" among legal interests. The approach is fairly expansive. Indeed, the Federal Constitutional Court regards the "negative" aspect of basic rights as only *one* of their functions.

[24] Let me quote, as an example, from a decision involving an agreement to guarantee or secure a loan, the *Bürgerschafts Case*. (29) In this 1993 case, the Federal Constitutional Court, contrary to the Federal Court of Justice, denied the binding effect of a suretyship contract entered into between a 21-year old daughter, in favor of her father, and a savings bank. The court invoked the inequality in the parties' negotiating power. It meant that the Court regarded the freedom of contract as limited by the *Constitution*, not only by legal provisions subordinate to the Constitution.

*The obligation to establish and detail a system of private law presents the Parliament with a problem of practical concordance. Legal relations in private law are entered into by holders of fundamental rights who are of equal standing, who pursue different interests and, in many cases, contrary aims. Because all parties involved in private law transactions enjoy the protection provided by Article 2.1 of the Basic Law [the basic right to the free development of one's personality], and because all can equally invoke the constitutional guarantee of their personal autonomy, it must not be that the stronger party prevails simply on account of its strength. The reciprocity of the conflicting fundamental rights must be discerned, and their positions must be delimited in such a way that they become effective for all parties involved to the greatest extent possible.* (30)

[25] In the fifty years of its existence, the Federal Constitutional Court has stressed time and again that there are limits to its review of legislative balancing and also to its review of the other branches of the judiciary. The Federal Constitutional Court must not, and should not, assume the tasks of the other branches (including other courts). Its jurisdiction is strictly *constitutional review*. (31)

[26] If, however, constitutional review extends to ascertaining whether government has duly performed possibly existing duties to protect, the boundaries between the branches, and indeed the various courts, become very uncertain indeed. What is assigned to the constitution is mostly denied the other branches. As Wiltraud Rupp-v. Brünneck and Helmut Simon, Judges of the Federal Constitutional Court, emphasized in their dissent in the 1975 *Abortion Case*: "As negative rights the basic rights have a relatively clear, recognizable content. . . . On the other hand, it is ordinarily a most complex question, how values are to be implemented through affirmative measures of the legislature. . . . That decision, which frequently presupposes compromises and takes place by means of trial and error, according to the principles of the separation of powers and democracy, is the responsibility of the legislature. The legislature receives its legitimacy directly from the people." (32)

[27] In the long run, the price to be paid for this kind of constitutional development can be a weakening of the legislature, especially if the legislature begins to rely on the fact that its word is not the last word, and if it therefore considers itself to be excused from the duty to make hard decisions. Jutta Limbach has described the risk with a metaphor that recalls Jonathan Swift's *Gulliver*: "[T]he closer-meshed the court's net of constitutional restrictions becomes, the tighter it lashes the legislature's freedom to choose, the more it paralyses parliament's political imagination." (33)

[28] The price to be paid also consists in an overuse of the constitution in political discourse; *any* claim can be dressed up in a constitutional cloak. All-too-easy allegations of constitutional violations hinder any cost-benefit analysis. As the cases show that range from the legalization of abortion or the question whether private schools are entitled to state subsidies, to interventions in the welfare state, this line of argument can be equally adopted by "conservatives" and "liberals" and, indeed, all colors of the political rainbow.

[29] All in all, the Federal Constitutional Court has been cautious as concerns "positive rights." Nevertheless, from the vantage point of an outside observer, it seems that the "Karlsruhe Republic" is characterized by fine tuning that makes the court appear as a court of appeals in individual cases and as the guardian not only of the constitution but of an appropriate and just order as such.

[30] Such fine tuning can affect the main task of a constitutional court, *i.e.*, the resolution of doubtful cases concerning the interpretation and the development of the constitution, especially if the caseload is as substantial as that of the Federal Constitutional Court. The fact that the acceptance of constitutional complaints for decision is, at least *de jure*, not within the discretion of the court, should also be considered in this context. Granting the court discretion in this

respect would reduce the pressure of having to take a stand too early, and on too many issues; it would facilitate judicial restraint. (34)

[31] The emphasis on individual recourse to the Federal Constitutional Court is understandable, all the more so in light of the fact that the rule of law was non-existent in the Nazi regime. Seen from the outside, it seems, nevertheless, too formalistic an approach to reject the Court's discretion in the matter of accepting constitutional complaints for reasons having to do with the rule of law. After all, the rule of law is the business of all courts. From the citizen's point of view, what matters is that the Federal Constitutional Court itself, and no other institution, decides whether to decide his or her case and that he or she can indeed "go to Karlsruhe."

[32] Discretion of the highest court as to case selection is indeed compatible with the right of recourse, as the example of the United States Supreme Court has shown for decades. Twenty-five years ago, Richard Posner and I undertook an empirical study of the Supreme Court's caseload and decision-making. (35) The results of this study convinced us that the United States Supreme Court does not avoid cases that, in the terms of the statute governing the Federal Constitutional Court, have "fundamental constitutional significance" or in which the acceptance is indeed advisable for the enforcement of rights. (36)

[33] I now return to the *Lüth Case*. The immediate significance of this decision is to be found in its statements concerning the fundamental importance of the freedom of expression for a democracy. I quote:

*The basic right to freely express one's opinion is, as the most direct expression of an individual's personality in society, one of the foremost human rights (un des droits les plus précieux de l'homme, according to Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen). For a free and democratic government, it is simply constitutive, for it is only through it that the constant intellectual debate, the clash of opinions, that is its vital element, is made possible. . . . It is, in a certain sense, the basis of every freedom, whatever, "the matrix, the indispensable condition of nearly every other form of freedom" (Cardozo). (37)*

[34] By characterizing the freedom of speech as "constitutive," the Federal Constitutional Court linked, as it were, the basic right in Article 5 of the Basic Law to the organizational parts of the constitution: The freedom of speech makes it possible for the citizen to assume his or her role as a part of the sovereign.

[35] Wilhelm Hennis has argued that the German notion of constitutionalism, which has evolved from constitutional monarchy, is different from the notion of other Western democracies that emanates from the concept of popular sovereignty. The German notion understands the constitution primarily as "an instrument for constitutionalizing social forces that are admitted to participate in decision-making." (38) In the first decades of the Federal Constitutional Court's existence, this understanding more than occasionally seemed to characterize the court's position as well. The effort of heeding the lessons from the destruction of the Weimar Republic, and "militant democracy," (rather too militant at times) relegated the constitutive aspect of the freedom of speech to the background. (39)

[36] All in all, the Federal Constitutional Court has, however, fortunately remained faithful to the value it had attached to the freedom of speech in the *Lüth Case*. The Court has optimized the freedom of speech, even though occasionally criticism of its decisions, the last time a few years ago, has been harsh, (40) and even though politicians, administrators, and citizens, in this country as well as elsewhere, sometimes forget how complicated and difficult a task democracy in a pluralistic society is. A unanimous decision of the Second Senate that was issued late last year was very refreshing with regard to this. This decision granted Jehovah's Witnesses the right not to have to consider themselves "agents of the State" when claiming the status of a "corporation under public law." (41) The Court held, concisely and to the point: "Whether a religious community that applies for the status of a 'corporation under public law' is to be denied such status, is not determined by its beliefs but by its behavior." (42) All democracies need to take this distinction between beliefs and behavior seriously if and when reactions to acts of terrorism increase the pressure to judge people primarily on account of their beliefs and opinions, on the color of their skin or their ethnicity.

[37] In the 1990s, the subject of democracy primarily occupied the Federal Constitutional Court in the context of European integration. I should like to turn to this matter for the remainder of my remarks. It is, so to speak, the third regime transformation that the Federal Constitutional Court has had to address.

[38] The concept of popular sovereignty has not, and Hennis is certainly right in this respect, played the same role in German history as it did, e.g., in America at the time of the American Revolution or in France during the French Revolution. In 1918, the sovereignty of the people did assert itself in Germany; in 1949, the sovereignty of the people was more of a fiction; in 1989, it was visible: "We are the people," "We are *one* people." Nowhere does judicial review aim at implementing the will of the people in any straightforward sense; this is especially the case in Germany when one considers German history and the ban on "unconstitutional constitutional amendments" in article 79 of the Basic Law. It rather works the other way round: Judicial review is, above all, meant to protect the individual and minorities

from the majority. All in all, popular sovereignty is a difficult, fairly rhetorical concept.

[39] In his book *Liberalism, Constitutionalism and Democracy*, Russell Hardin, discussing popular sovereignty, refers to the problem of the aggregation of political preferences, a problem that is well understood today. He continues by arguing that government must act through institutions to be effective. In his opinion, the structure and, ultimately, also the decisions of institutions are, essentially, unintended consequences that result from growth, "and not the outcome of popular choice or even any systematic choice at all . . ." (43) This is the dilemma that the Federal Constitutional Court dealt with in its 1993 *Maastricht* decision. (44)

[40] The constitutional complaints concerned the creation of the European Union and the question whether European integration and the European institutions still comply with the minimum requirements of democratic legitimacy. Following its decisions about basic rights in the European Communities, the Federal Constitutional Court addressed the most political of all questions: What does democratic legitimacy mean in the context of the European Union?

[41] How does Karlsruhe see European democracy? I quote from the *Maastricht Case*:

*Democracy, if it is not to remain a merely formal principle of attribution, is dependent on the existence of certain pre-legal conditions, such as a continuous free debate between opposing social forces, interests, and ideas, in which political goals become clarified and also change . . . .*

*What is decisive is that the democratic bases of the European Union are built up in step with integration, and that as integration proceeds, thriving democracy is also maintained in the Member States . . . .*

*These states need sufficiently important areas of responsibility of their own in which each people can, by means of legitimate political processes that result in law, develop and articulate what binds them—a relatively homogeneous group—intellectually, socially and politically together . . . . It thus follows that functions and powers of substantial weight must be retained by the German Bundestag. (45)*

[42] As far as the reference to the "relative homogeneity" of the peoples of the member states is concerned, the emphasis most likely is on the attribute "relative." The court placed the accent, at least this is how I understand the court's reasoning, on "a thriving democracy," on the "continuous free debate between opposing social forces, interests, and ideas," on what was called "the most direct expression of an individual's personality" in the *Lüth Case*. If one can speak of a *Leitkultur*, or defining culture, in the Karlsruhe Republic, it is certainly the culture that understands itself as democratic, and in which everyone, including the foreigner, is entitled to almost all basic rights, a principle that also and most recently has been confirmed by the European Union's Charter of Basic Rights. (46)

[43] In its *Maastricht* decision and in accordance with Article 23 of the Basic Law, the Federal Constitutional Court imposes two requirements on the European Union: (1) the further development of its democratic foundations, and (2) that the "confederation" strictly limit itself to the exercise of the powers that are granted to it in the Treaties and that may only be exercised in accordance with the so-called subsidiarity principle, *i.e.*, only if the aims of contemplated measures cannot be achieved on a national level.

[44] An outside observer who analyzes this position in terms of the constitutional dimensions of American federalism will not come to expect much from the second requirement. The American constitution restricts the authority of Congress, a body that does enjoy direct democratic legitimacy, to a limited catalogue of powers. (47) From a historical vantage point, the most important of these are the power to regulate commerce among the states and with foreign nations and the power to tax and to spend money. (48) Since the 1930s at the latest, the Supreme Court, in the interest of enabling the welfare state, has turned these powers into a comprehensive power to regulate the economy as such, and therefore, almost all other spheres of life as well.

[45] As the example of the United States shows, not only is it the case that nearly anything can be connected with and justified by the aim of promoting material welfare, but a "compelling" reason why there should be one rule for all can also always be found. Furthermore, these questions are not truly justiciable, not even in the European Court of Justice in Luxembourg. Most controversies about European democracy are equally nonjusticiable.

[46] European democracy is, above all, the responsibility of citizens and of politics in the member states. Apart from certain professionals, businesses and interest groups, most citizens and voters do not constitute a "European public." It is difficult to imagine that this will change in the foreseeable future, in particular in light of the coming enlargements of the Union. Without a Europe-wide public, however, even a further strengthening of the European Parliament would, as far as democracy is concerned, not achieve much more than "merely formal attribution."

[47] Characterization of the European Union's democracy dilemma as a "deficit" suggests as a solution the

strengthening of the European Parliament in order to reduce the deficit. It seems to me less formalistic, however, to assure that, in years to come, European problems and questions are, continually and in a transparent manner, brought before and placed on the agenda of public discourse and parliaments in the member states in order to achieve the necessary "feedback" between representative bodies in the member states and European politics.

[48] The court's insistence on "a thriving democracy" in the member states, is, and will probably, for a long time to come, be more important for Europe than Strasbourg or legal disputes about Union jurisdiction in Luxembourg. Following World War II many democracies have become more pluralistic, more open, more objective, less hierarchical, fairer. Our future depends on these changes that have been brought about within the nation-state.

[49] At the end of the 1787 Constitutional Convention in Philadelphia, Benjamin Franklin was asked by a Mrs. Powel, "Well Doctor, what have we got, a republic or a monarchy?" Franklin's reply was, "A republic if you can keep it." This task is a permanent one, everywhere and for anyone. In the case of the United States, it took a civil war, and then many decades, to achieve an integrated republic.

[50] After fifty years of the Federal Constitutional Court, after fifty years of the "Karlsruhe Republic," the Federal Republic can face future transformations with confidence in its own thriving democracy. That is indeed a cause for celebration.

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\* Translated from the German by the author with assistance from Hedwig Weiland and Russell Miller. Professor Casper retains all rights to this text.

(1) "Verleihung des Friedenspreises an Fritz Stern: 'Was blühen kann in der Berliner Republik – Auszüge aus der Rede des amerikanischen Historikers,'" DER TAGESSPIEGEL (October 18, 1999) (visited November 6, 2001) <http://www2.tagesspiegel.de/archiv/1999/10/17/ak-ku-de-16569.html>.

(2) Press and Information Office of the Federal Government of Germany, BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY – PREAMBLE, 39 (Christian Tomuschat and David P. Currie trans.) (1998).

(3) Alfred Grosser, DEUTSCHLANDBILANZ: GESCHICHTE DEUTSCHLANDS SEIT 1945 143 (1970).

(4) Gerhard Casper, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 190 (1997).

(5) At Yale Law School I had the privilege to study Constitutional Law under the recently deceased Charles L. Black, Jr. (CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974); IMPEACHMENT: A HANDBOOK (1974)).

(6) Rudolf Laun, DAS GRUNDGESETZ WESTDEUTSCHLANDS -- ANSPRACHE GEHALTEN IM AUFTRAGE DER UNIVERSITÄT HAMBURG AN DIE STUDENTEN DER UNIVERSITÄT HAMBURG AM 24. MAI 1949, 5 (2. Auflage, 1951).

(7) Paras. 7-25 Verfassungsurkunde für das Großherzogtum Baden 1818, 1 DOKUMENTE ZUR DEUTSCHEN VERFASSUNGSGESCHICHTE 157-159 (Ernst Rudolf Huber ed., 1961) (Including, *inter alia*.; Para. 7 – Equal rights for all citizens; Para. 13 – Property rights and personal liberty; Para. 15 – Principle of legality in criminal matters; and Para. 17 – Freedom of the press).

(8) Para. 64 Verfassungsurkunde für das Großherzogtum Baden 1818, *id.*, at 165.

(9) Para. 7 Verfassungsurkunde für das Großherzogtum Baden 1818, *id.*, at 157.

(10) *Verfahren seit 7. September 1951 bis 31. Dezember 2000* (Visited November 7, 2001) <http://www.bundesverfassungsgericht.de/cgi-bin/link.pl?aktuell>.

(11) *Id.*

(12) *2000 Year-end Report of the Federal Judiciary* (Visited November 7, 2001)

<http://www.supremecourtus.gov/publicinfo/year-end/2000year-endreport.html>.

(13) Author's private correspondence with the Institut für Demoskopie Allensbach.

(14) *Id.*

(15) Elisabeth Noelle-Neumann and Thomas Petersen, ALLENSBACHER JAHRBUCH DER DEMOSKOPIE – 1993-1997, 752 (1997).

(16) *Id.*

(17) JUGEND UND DEMOKRATIE IN DEUTSCHLAND – DJI JUGENDSURVEY (Ursula Hoffmann-Lange ed.) 258, 259-60 (1995).

(18) Russell Hardin, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 134 (1999).

(19) Konrad Hesse, "Die Normative Kraft der Verfassung – Freiburger Antrittsvorlesung," 222 RECHT UND STAAT IN GESCHICHTE UND GEGENWART 13-14 (1959) (Trans.).

(20) DIE KARLSRUHER REPUBLIK (Gary S. Schaal, Sabine Friedel and Andreas Endler eds., 2000).

(21) A good overview of the forms of judicial review in use around the world can be found at the web-site of the Slovenian Constitutional Court, which contains a number of useful comparative charts and graphics, including a world map with the states color-coded according to the nature of their system of constitutional review. The web-site identifies more than 50 Constitutional Courts based on the European model. Arne Mavcic, *A Tabular Presentation of*

*Constitutional/Judicial Review Around the World* (visited November 7, 2000) <http://www.us-rs.com/review/enie/tab1emps.php?stat=1&srt=0>.

(22) See, e.g., *Alix Jean Carmichele v. The Minister of Safety and Security*, CCT 48/00, Para. 54 (August 16, 2001), <http://www.concourt.gov.za/cases/2001/carmichelesum.shtml>. ("Our Constitution is not merely a formal document regulating public power. It also describes, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court: 'The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and judiciary.' BVerfGE 39, 1(41).")

(23) BVerfGE 7, 198; 2 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT (FEDERAL CONSTITUTIONAL COURT) FEDERAL REPUBLIC OF GERMANY 1 (Trans., 1998); Donald Kommers, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 368, 370 (Trans., 1989).

(24) *Id.*

(25) Article 5 of the Basic Law provides: (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship. (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor. (3) Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution. Press and Information Office of the Federal Government of Germany, *BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY – ARTICLE 5*, 41 (Christian Tomuschat and David P. Currie trans.) (1998).

(26) BVerfGE 7, 198 (205) (citations omitted); 2 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT (FEDERAL CONSTITUTIONAL COURT) FEDERAL REPUBLIC OF GERMANY 1, 5 (Trans., 1998) (citations omitted); Donald Kommers, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 368, 370 (Trans., 1989) (citations omitted).

(27) Dieter Grimm, *DIE ZUKUNFT DER VERFASSUNG* 408-409 (1991).

(28) BVerfGE 7, 198 (205) (citations omitted); 2 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT (FEDERAL CONSTITUTIONAL COURT) FEDERAL REPUBLIC OF GERMANY 1, 5 (Trans., 1998) (citations omitted); Donald Kommers, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 368, 370 (Trans., 1989) (citations omitted).

(29) BVerfGE 89, 214.

(30) BVerfGE 89, 214 (232) (Trans.).

(31) BVerfGE 18, 85 (92 ff.).

(32) BVerfGE 39, 1 (71-72) (Dissenting Opinion of Justice Rupp-v. Brünneck and Justice Simon) (citation omitted); Donald Kommers, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 348, 357-58 (Trans., 1989) (citation omitted).

(33) Jutta Limbach, "IM NAMEN DES VOLKES" 164 (1999).

(34) Bundesministerium der Justiz, *Bericht der Kommission zur Entlastung des Bundesverfassungsgerichts*, at Para. 3.A(1) (1997).

(35) Gerhard Casper and Richard A. Posner, *THE WORKLOAD OF THE SUPREME COURT* 92 (1976). ("There is no compelling quantitative (or, we might add, qualitative) evidence either that this increase in time pressure has interfered significantly with the ability of the Court to discharge its various responsibilities or that the Court is denying review in cases where Supreme Court review would serve an important function.")

(36) Concerning the process for admitting a constitutional complaint for consideration by the Federal Constitutional Court, see, Para. 93a Abs.2 *Bundesverfassungsgerichtsgesetz* (BVerfGG – Federal Constitutional Court Act) ("(2) It shall be accepted, a) in so far as it has fundamental constitutional significance, b) if this is indicated in order to enforce the rights referred to in Article 90(1) above; this can also be the case if the complainant suffers especially grave disadvantages as a result of refusal to decide on the complaint."). Concerning the process for admitting a case for review by the United States Supreme Court, see, *Rules of the Supreme Court*, Part III, Rule 10. ("Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.")

(37) BVerfGE 7, 198 (205-06); 2 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT (FEDERAL CONSTITUTIONAL COURT) FEDERAL REPUBLIC OF GERMANY 1, 6-7 (Trans., 1998); Donald Kommers, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 368, 371-72 (Trans., 1989).

(38) Wilhelm Hennis, "Verfassung und Verfassungswirklichkeit: Ein deutsches Problem," 373/374 *RECHT UND STAAT IN GESCHICHTE UND GEGENWART* 15 (1968) (Trans.).

(39) Gerhard Casper, "Redefreiheit und Ehrenschutz," 104 *JURISTISCHE STUDIENGESSELLSCHAFT KARLSRUHE* 36 (1971) (Quoting the Spiegel Case decided by the Federal Constitutional Court in 1966: "Die Bundesrepublik Deutschland ist eine Demokratie, die von ihren Bürgern eine Verteidigung der freiheitlichen Ordnung erwartet und einen Mißbrauch der Grundrechte zum Kampf gegen diese Ordnung nicht hinnimmt . . . Dieses Prinzip der streitbaren Demokratie gilt auch für die innere Ordnung der Bundeswehr." BVerfGE 20, 162). For a translation of the case, see, 2 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT (FEDERAL CONSTITUTIONAL COURT)



FEDERAL REPUBLIC OF GERMANY 71 (1998) (citations omitted); Donald Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 397 (Trans., 1989) (citations omitted).

(40) In 1995, the Federal Constitutional Court issued its decision in the case that has come to be known as the "Soldaten sind Mörder" ("Soldiers are Murderers") Case. BVerfGE 93, 266. The Court overturned the defamation convictions of a number of pacifists who had, inter alia, made use of the slogan, in various forms, "soldiers are murderers," which had been coined by the German poet Kurt Tucholsky. The Court concluded, in part, that the lower courts had failed to adequately weigh the defendants' constitutionally secured free speech interests against soldiers' constitutionally secured interests in human dignity and the free development of one's personality. For a translation of the case, see, 2 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT (FEDERAL CONSTITUTIONAL COURT) FEDERAL REPUBLIC OF GERMANY 659 (1998). As an example of the criticism of the Federal Constitutional Court's decision in the "Soldiers are Murderers" Case, see, Georgios Gounalakis, "Soldaten sind Mörder," 49 NEUE JURISTISCHE WOCHENSCHRIFT 481 (1996) ("[The decision] is, in its result, correct; but the basis for the decision is not convincing.") (Trans.).

(41) BVerfGE 102, 370. See, *Federal Constitutional Court Hears Arguments in Church/State Case: should the Jehovah's Witnesses be Granted Status as a Quasi-Public Entity?*, 1 GERMAN L. J. 1 (October 15, 2000) [www.germanlawjournal.com](http://www.germanlawjournal.com); *From the Outside Looking In: The Jehovah's Witnesses' Struggle for Quasi-Public Status under Germany's Incorporation Law*, 2 GERMAN L. J. 1 (January 15, 2001) [www.germanlawjournal.com](http://www.germanlawjournal.com).

(42) *Id.*

(43) Russell Hardin, LIBERALISM, CONSTITUTIONALISM AND DEMOCRACY 154 (1999).

(44) BVerfGE 89, 155.

(45) BVerfGE 89, 155 (185-86) (Trans.).

(46) *Charter of Fundamental Rights of the European Union – Nice, December 7, 2000*, C 364 -- 18/12/2000 OFFICIAL JOURNAL 1 – 22, (last visited November 9, 2001)

[http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=32000Y1218\(01\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=32000Y1218(01)&model=guichett).

(47) U.S. Constitution, Article 1, Section 8.

(48) See, *id.*: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; To borrow Money on the credit of the United States; To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures; To provide for the Punishment of counterfeiting the Securities and current Coin of the United States; To establish Post Offices and post Roads; To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; To constitute Tribunals inferior to the supreme Court; To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;-- And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."