Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court

DONALD P KOMMERS* AND RUSSELL A MILLER** +

INTRODUCTION

Karlsruhe was the capital city of the Grand Duchy of Baden (1806–1918). During the Weimar Republic, Karlsruhe continued as the capital of the Republic of Baden (1918-1933). After the Allies crushed Hitler's Nazi regime, they reclaimed Baden from the centralizing and totalitarian policy of *Gleichschaltung* and used it as an Allied Occupation Zone that was shared by American and French forces. Karlsruhe was the Zone's hub. But Karlsruhe's run as a regional capital soon met its end. As the map of the Federal Republic of Germany was being drawn strong arguments were advanced for merging Baden with its neighboring rival Württemberg. The Federal Republic's founders could not settle the emotional and hotly contested question during the *Parlamentarischer Rat* (Parliamentary Council or constitutional convention) and left it to the states themselves to resolve the 'Southwest State' question.[1] When these rivals failed to reach a settlement, the federal government intervened and ordered a merger of the regions into the single state Baden-Württemberg, subject to approval in a federally coordinated referendum to be held in the relevant localities. Baden, fighting its demise by absorption, challenged the federal intervention and referendum before the new *Bundesverfassungsgericht* (Federal Constitutional Court).

* Joseph and Elizabeth Robbie Professor of Political Science and Professor of Law, Notre Dame Law School.
** Associate Professor, Washington & Lee University School of Law. Professor Miller is grateful to Anna Ku (W&L 2008) for her research assistance and excellent proofreading.
+ This survey draws substantially on the first chapter of Donald Kommers's English-language treatise on the jurisprudence of the Federal Constitutional Court. See Kommers, Donald P. (1997) *The Constitutional Jurisprudence of the Federal Republic of Germany* (2d ed) at 3-29. The updates and changes to those materials reflected here draw substantially on work prepared in conjunction with the forthcoming publication of the third edition of the book. See Kommers, Donald P. and Miller, Russell A. (forthcoming 2009) *The Constitutional Jurisprudence of the Federal Republic of Germany* (3d ed).
1 *Grundgesetz* [GG] [Constitution] article 118 (F.R.G.).

The Court's *Southwest State Case* (1951), its first major decision, realized Baden's worst fears about its century and a half run as a regional capital.[2] The Court explained: 'In the case of the reorganization of federal territory consigned to the federation, it is the nature of things that people's right to self-determination in a state be restricted in the interest of the more comprehensive unit'.[3] The Second Senate of the Court allowed a federally orchestrated referendum to go forward, and the new, merged state of Baden-Württemberg resulted with its capital in Stuttgart. Karlsruhe, the proud and charming 'fan city', seemed fated to the ignominy of struggling on as Baden-Württemberg's 'second city'.

But out of the *Southwest State Case* came no small portion of redemption for Baden and, most especially, Karlsruhe. After all, Karlsruhe is the seat of the Federal Constitutional Court. And, as the Court's first major decision, *Southwest State* launched the Court into the prominent role it has played in the German polity. Some have gone so far as to describe the case as 'Germany's *Marbury v. Madison*',[4] analogizing it to the epochal US Supreme Court decision widely credited as the *fons et origo* of judicial review. From this perspective,

> *Southwest's* foundational character is rooted in the general principles of constitutional interpretation stated therein and in the clarity—and forthrightness—with which the Constitutional Court defined the scope of its authority under the Basic Law. The Court boldly asserted that its judgment and the opinion on which it rests are binding on all constitutional organs, even to the extent of foreclosing parliament from debating and passing another law of the same content.[5]

Southwest State was the first major sign of the significant role the Court would play in the new Federal Republic. The *Grundgesetz* (Basic Law or Constitution) itself virtually assured that the Court would play such a role, for it confers upon the Court wide-ranging powers that place it near the epicenter of Germany's political system. In the years since, armed with these powers, the Court has found itself banning political parties as unconstitutional, striking popularly enacted legislation, policing federal-state relations, monitoring elections, overseeing the dissolution of governments, and perhaps most significantly, defining and enforcing a regime of individual rights that fairly can be described as its most important contribution to the development of Germany's constitutional democracy.

HISTORY AND STRUCTURE

History

The Basic Law and the Constitutional Court

The Germans decided on their own to establish a constitutional tribunal, to vest it with authority to nullify laws contrary to the Constitution, and to elevate this authority into an

[2] Southwest State Case, *BVerfGE* 1, 14.
[3] *Id*. at 49.
[4] Kommers, Donald P. (1997) *The Constitutional Jurisprudence of the Federal Republic of Germany* (2d ed) Duke University Press at 66.
[5] *Id*.

express principle of constitutional governance.[6] In doing so, the Germans relied mainly on their own tradition of constitutional and judicial review.

Building on the groundwork laid by Professors Hans Nawiasky and Hans Kelsen, the establishment of a constitutional tribunal modeled after the Weimar Republic's *Staatsgerichtshof* was featured prominently in the draft constitution the Parliamentary Council debated. The draft plan envisioned a tribunal vested with both the competence of the *Staatsgerichtshof* (i.e., its constitutional review jurisdiction) and the authority to hear the complaint of any person alleging that any public agency had violated his or her constitutional rights. Aware of the potential power of the proposed court the conferees recommended a plan of judicial recruitment that would broaden its political support.

As the debate over the new court's structure continued in the Parliamentary Council attention turned to the new tribunal's character.[7] Should it be like Weimar's *Staatsgerichtshof* and serve mainly as an organ for resolving conflicts between branches and levels of government (a court of constitutional review)? Or should it combine such jurisdiction with the general power to review the constitutionality of legislation (judicial review)? The framers finally agreed to create a constitutional tribunal independent of other public-law courts, but they disagreed over how much of the constitutional jurisdiction listed in the proposed constitution should be conferred on it as opposed to other high federal courts.

The controversy centered on the distinction between what some delegates regarded as the 'political' role of a constitutional court and the more 'objective' law-interpreting role of the regular judiciary. Some delegates preferred two separate courts—one to review the constitutionality of laws (judicial review) and the other to decide essentially political disputes among branches and levels of government (constitutional review). Others favored one grand multipurpose tribunal divided into several panels, each specializing in a particular area of public or constitutional law. Many German judges, alarmed by any such mixing of law and politics in a single institution, strenuously opposed this proposal. The upshot was a compromise resulting in a separate constitutional tribunal called the *Bundesverfassungsgericht* with exclusive jurisdiction over all constitutional disputes, including the authority to review the constitutionality of laws.

The final version of the Basic Law called the Court into existence in Article 92 and extended the Court's jurisdiction to twelve categories of disputes and 'such other cases as are assigned to it by federal legislation'. Originally, the Court's jurisdiction could be invoked only by federal and state governments, parliamentary political parties and, in certain circumstances, courts of law. However, the individual right to petition the Court was granted by legislation in 1951, just as the Court was summoned to life, and incorporated into the Basic Law as a constitutional guarantee in 1969.

The Basic Law's framers left other details of the Court's organization and procedure to later legislation.

[6] See Kommers, Donald P. (1976) *Judicial Politics in West Germany: A Study of the Federal Constitutional Court* Sage Publications at 70.

[7] For an excellent account of its proceedings in English, see Golay, John E. (1958) *The Founding of the Federal Republic of Germany* University of Chicago Press; Merkl, Peter H. (1963) *The Origin of the West German Republic* Oxford University Press.

The Federal Constitutional Court Act

Almost two additional years of debate were necessary after the promulgation of the Basic Law to produce the Federal Constitutional Court Act (FCCA),[8] the enabling statute creating the Court.

In its current version the FCCA includes 105 sections that codify and flesh out the Basic Law's provisions relating to the Court's organization, powers, and procedures. Representing numerous political compromises the FCCA: (1) lays down the qualifications and tenure of the Court's members; (2) specifies the procedures of judicial selection; (3) provides for a two-senate tribunal; (4) enumerates the jurisdiction of each senate; (5) prescribes the rules of access under each jurisdictional category; (6) defines the authority of the Plenum (both senates sitting together); and (7) establishes the conditions for the removal or retirement of the Court's members.

Structure

The Two-Senate Structure

The most important structural feature of the Court is its division into two senates with mutually exclusive jurisdiction and personnel.[9] The Plenum—the two senates sitting together—meets periodically to resolve jurisdictional conflicts between the senates and to issue rules on judicial administration. Justices are elected to either the First Senate or the Second Senate, with the Court's President presiding over one senate and the Court's Vice President presiding over the other.

The bifurcation was the institutional expression of the old debate between those who viewed the Court in conventional legal terms and those who saw it in political terms. The original division of jurisdiction showed that the senates were intended to fulfill very different functions. The Second Senate was designed to function much like the *Staatsgerichtshof* of the Weimar-era. It would decide political disputes between branches and levels of government, settle contested elections, rule on the constitutionality of political parties, preside over impeachment proceedings, and decide abstract questions of constitutional law. The First Senate was vested with the authority to review the constitutionality of laws and to resolve constitutional doubts arising out of ordinary litigation. More concerned with the 'nonpolitical' side of the Court's docket and the 'objective' process of constitutional interpretation, the First Senate would hear the constitutional complaints of ordinary citizens as well as referrals from other courts.

[8] Bundesverfassungsgerichtsgesetz [*BVerfGG*—Federal Constitutional Court Act], Aug. 11, 1993, BGBl I at 1473, last amended by art. 5 of the law enacted Nov. 23, 2007, BGBl I at 2614. For an excellent discussion of the FCCA's genesis, see Geiger, Will (1951) *Gesetz über das Bundesverfassungsgericht* Vahlen at iii-xxv; Laufer, Heinz (1968) *Verfassungsgerichtsbarkeit and politischer Prozess* Mohr at 97–139.

[9] The FCCA regulates the Court's organization, procedures, and jurisdiction. The Court's internal administration (i.e., budget, administrative duties of judges, authority and procedures of the Plenum, selection and responsibilities of law clerks, judicial conference procedures, and the rules governing oral argument and preparation of written opinions) is regulated by the Court's Standing Rules of Procedure. See Geschäftsordnung des Bundesverfassungsgerichts [*BVerfGGO*—Rules of Procedure of the Federal Constitutional Court], Dec. 15, 1986, BGBl I at 2529, last amended by the law enacted Jan. 7, 2002, BGBl I at 1171, § 1. The Court's organization and internal administration are treated at considerable length in Kommers, supra note 6 at 69–108.

This division of labor resulted initially in a significant imbalance between the workloads of the two senates. As a consequence, the *Bundestag* (Federal Parliament) amended the FCCA in 1956 to distribute the caseload more evenly. Much of the First Senate's work was transferred to the Second Senate, thus eroding the original rationale of the two-senate system. The Second Senate, while retaining its 'political' docket, would henceforth decide all constitutional complaints and concrete judicial review cases dealing with issues of civil and criminal procedure. The First Senate would continue to decide all such cases involving issues of substantive law.

The number of Justices serving on the two senates has also changed over the years. The FCCA originally provided for twelve members per senate. In 1956, the number was reduced to ten; in 1962, it was further reduced to eight, fixing the Court's total membership at sixteen.[10] Considerations of efficiency, coupled with the politics of judicial recruitment,[11] prompted these reductions.

Intrasenate Chamber System

To speed up the Court's decision-making process and ease the burden of an increasing number of cases, the FCCA changed the internal structure of the two senates in 1956 by authorizing each senate to set up three or more preliminary examining 'chambers', each consisting of three Justices, to filter out frivolous constitutional complaints.[12] This was necessary because, except under distinct circumstances, the FCCA obliges the Court to admit all constitutional complaints for decision.[13] A chamber may dismiss a complaint if all three of its members consider it to be 'inadmissible or to offer no prospect of success for other reasons'.[14] Under current procedure, if one of the three Justices votes to accept a complaint—that is, if he or she thinks it has some chance of success—it is forwarded to the full Senate.[15] At this stage, the 'rule of three' controls; if at least three Justices in the full senate are convinced that the complaint raises a question of constitutional law likely to be clarified by a judicial decision, or that the complainant will suffer serious harm in the absence of a decision, the complaint will be held admissible.[16] Thereafter, and on the basis of more detailed examination, a senate majority could still reject the complaint as inadmissible or trivial.[17]

In 1986, on the Court's recommendation, the Federal Parliament enhanced the power of the three-Justice chambers. In addition to their normal screening function, the chambers were empowered to rule on the merits of a constitutional complaint if all three Justices agree

[10] *BVerfGG*, sec. 2 (a).
[11] See Kommers, supra note 6, at 128–44.
[12] Gesetz, July 21, 1956, BGBl I at 662. *BVerfGG*, sec. 93a (earlier version of the law). The procedures for establishing these chambers were initially laid down in the *BVerfGG*O, §§ 38 and 39.
[13] *BVerfGG*, § 93a(1).
[14] *BVerfGG*, § 93b (2).
[15] *BVerfGG*O, § 40 (1).
[16] *BVerfGG*, § 93d (3).
[17] See Spanner, Hans (1976) 'Die Beschwerdebefugnis bei der Verfassungsbeschwerde' in Starck, Christian (ed) *Bundesverfassungsgericht und Grundgesetz* at 374; Zacker, Hans H. (1976) 'Die Selektion der Verfassungsbeschwerden—die Siebftunktion der Vorprüfung, des Erfordernisses der Rechtswegerschöpfung and des Kriteriums der unmittelbaren and gegenwartigen Betroffenheit des Beschwerdeführers' in Starck, Christian (ed) *Bundesverfassungsgericht und Grundgesetz* at 396.

with the result and the decision clearly lies within standards already laid down in a case decided by the full senate.[18] However, the authority to declare a statute unconstitutional or in conflict with federal law is reserved to the full senate.[19]

By separating the wheat from the chaff, the chambers dispose of more than 95 percent of all constitutional complaints, relieving the full senates of what would otherwise be an impossible task. Some form of gate-keeping procedure involving less than full senate review is necessary as a practical matter if the Court is to cope with a system that 'entitles [anyone] to complain to it about virtually anything'.[20]

Qualifications and Tenure

To qualify for a seat on the Constitutional Court, appointees must be forty years of age, eligible for election to the *Bundestag*, and possess the qualifications for judicial office specified in the *Deutsches Richtergesetz* (German Judges Act).[21] This means that prospective Justices must have successfully passed the first and second major state bar examinations. Additionally, Justices may not simultaneously hold office in the legislative or executive branch of the federal or a state government. Finally, the FCCA provides that the 'functions of a Justice shall preclude any other professional occupation save that of a professor of law at a German institution of higher education', and that the Justice's judicial functions must take precedence over any and all professorial duties.[22]

Justices enjoy single 12-year terms with no possibility of reelection.[23] Three of the eight Justices serving in each senate must be elected from the federal judiciary. All Justices must retire at age 68, even if they have not completed their 12-year term.

Machinery for Judicial Selection

The Basic Law provides that half the Court's members be elected by the *Bundestag* and half by the *Bundesrat* (Federal Council of States). The participation of the *Bundestag* in the selection of the Court's Justices underscores the significant role the Court plays in reviewing the content and democratic quality of the decisions of the popularly elected federal parliament. It seems appropriate, then, that the *Bundestag* plays some role in staffing the Court.[24] Similarly, the participation of the *Bundesrat* in the selection of the Court's Justices was meant to ensure that the Court was, at least with respect to its staffing, steeped in Germany's federalism.

18 *BVerfGG*, § 93b (2). Provided all three Justices agree, the FCCA authorizes the chambers to reject as 'inadmissible' referrals on concrete review from other courts. Only the full senate, however, may reject a referral for lack of admissibility if it originates in a state constitutional court or one of the high federal courts. *BVerfGG*, § 81a.

19 *BVerfGG*, § 93c (I).

20 Singer, Michael (1982) 'The Constitutional Court of the German Federal Republic: Jurisdiction over Individual Complaints' (31) *Int'l & Comp. L.Q.* at 332.

21 Deutsches Richtergesetz [German Judges Act], Apr. 19, 1972, BGBl I at 713, last amended by the law enacted Dec. 22, 2006, BGBl I at 3416, § 5.

22 *BVerfGG*, § 3 (4).

23 *BVerfGG*, § 4 (1).

24 Schlaich, Klaus and Korioth, Stefan (2007) *Das Bundesverfassungsgericht — Stellung, Verfahren, Entscheidungen* CH Beck at 25.

Under the FCCA the *Bundestag* elects its eight Justices indirectly through a twelve-person Judicial Selection Committee (JSC) known as the *Wahlmännerausschuss*. Party representation on the JSC is proportional to each party's strength in the *Bundestag*; eight votes—a two-thirds super-majority—are required to elect.[25] The *Bundesrat* votes as a whole for its eight Justices, with a two-thirds vote also being required to elect.[26] The two chambers alternate in selecting the Court's president and vice president.

The process of judicial selection is highly politicized. The JSC, which consists of senior party officials and the top legal experts of each parliamentary party, conducts its proceedings behind closed doors and after extensive consultation with the *Bundesrat*. The two-thirds majority required to elect a Justice endows opposition parties in the JSC with considerable leverage over appointments to the Constitutional Court. Social and Christian Democrats are in a position to veto each other's judicial nominees, and the Free Democratic and Green parties, when in coalition with one of the larger parties, have won seats for their nominees through intra-coalition bargaining. Compromise is a practical necessity.

Compromise among contending interests and candidacies is equally necessary in the *Bundesrat*, where the interests of the various states, often independent of party affiliation, play a paramount role in the selection of the Justices. An advisory commission consisting of the state justice ministers prepares a short list of potentially electable nominees. The justice ministers on the commission, like certain state governors (*Ministerpräsidenten*) and members of the *Bundestag's* JSC, are often themselves leading candidates for seats on the Constitutional Court. Informal agreements emerge from the commission's proceedings, specifying which states shall choose prospective Justices and in what order. Throughout this process, the commission coordinates its work with that of the JSC. It is important to avoid duplicate judicial selections, and the two chambers need to agree on the particular senate seats each is going to fill and which of these seats are to be filled with Justices recruited from the federal high courts.

For all its opacity, the German process, largely as a consequence of the super-majority required for election, has consistently produced a Court reflective of Germany's most prominent political parties, regional divisions, and confessions.[27] In one respect, however, the Court has been less than representative of German society. The recently concluded Constitutional Court Presidency of Jutta Limbach, the first woman to hold the position, draws attention to the fact that the Court continues to be dominated by men. In 1951 the remarkable Erna Scheffler, who participated in the Parliamentary Council, was elected as one of the Court's first Justices. In the subsequent half-century, only ten other women have found their way onto the Court.

Jurisdiction

The Basic Law enumerates the totality of the Court's jurisdiction, with elaboration where necessary in the FCCA. The most important of these competencies are described briefly here.

[25] *BVerfGG*, § 6 (2).
[26] *BVerfGG*, § 7.
[27] (2004) *Uwe Wesel, Der Gang nach Karlsruhe* Karl Blessing Verlag at 41.

Prohibiting Political Parties

The Court's function as guardian of the constitutional order finds its most vivid expression in Article 21(2) of the Basic Law. Under this provision, political parties seeking 'to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional'.[28] The article goes on to declare that only the Federal Constitutional Court may declare parties unconstitutional. The Court has received only eight party-ban petitions from the other federal organs and it has decided just five of those cases. In only two, concluded early on, did the Court sustain the petitions: in 1952 when it banned the neo-Nazi Socialist Reich party,[29] and in 1956 when it ruled the Communist party unconstitutional.[30]

Disputes Between High Federal Organs

Conflicts known as *Organstreit* proceedings involve constitutional disputes between the highest 'organs', or branches, of the German Federal Republic.[31] The Court's function here is to supervise the operation and internal procedures of these executive and legislative organs and to maintain the proper institutional balance between them.[32] The governmental organs qualified to bring cases under this jurisdiction are the *Bundespräsident* (Federal President), *Bundestag* (Federal Parliament), *Bundesrat* (Federal Council of States), *Bundesregierung* (Federal Government), and units of these organs vested with independent rights by their rules of procedure or the Basic Law.[33] Included among these units are individual members of the *Bundestag*, any one of whom may initiate an *Organstreit* proceeding to vindicate his or her status as a parliamentary representative.[34] These units also include the parliamentary political parties.[35] An *Organstreit* proceeding is not available, however, to administrative agencies, governmental corporations, churches, or other corporate bodies with quasi-public status.

Federal-State Conflicts

Constitutional disputes between a *Land* (state) and the *Bund* (federation) ordinarily arise out of conflicts involving a state's administration of federal law or the federal government's supervision of state administration.[36] Proceedings may be brought only by a state government or by the federal government.

[28] *Grundgesetz* [GG] [Constitution] art. 21(2); *BVerfGG*, § 13(2).
[29] Socialist Reich Party Case, *BVerfGE* 2, 1.
[30] Communist Party of Germany Case, *BVerfGE* 5, 85.
[31] *Grundgesetz* [GG] [Constitution] art. 93(1)(1); *BVerfGG*, § 13(5).
[32] See Lorenz, Dieter (1976) 'Der Organstreit vor dem Bundesverfassungsgericht' in Starck, Christian (ed) *I Bundesverfassungsgericht und Grundgesetz* Mohr at 255.
[33] With respect to the Bundestag, these units would include the Committees on Foreign Affairs and Defense (GG, art. 45a), the parliamentary commissioner (GG, art. 45b), the Petitions Committee (GG, art. 45c), and even individual deputies deprived of rights or entitlements under GG, arts. 46, 47, and 48.
[34] Abelein Case, *BVerfGE* 60, 374; Wüppesahl Case, *BVerfGE* 80, 188.
[35] Party Finance III Case, *BVerfGE* 73, 40. See Kretschmer, Gerald(1992) *Fraktionen: Parteien im Parliament* (2d ed) von Decker.
[36] *Grundgesetz* [GG] [Constitution] art. 93(1)(3) and (4); *BVerfGG*, § 13(7) and (8).

Concrete Judicial Review

Concrete, or collateral, judicial review arises from an ordinary lawsuit.[37] If an ordinary German court is convinced that a relevant federal or state law under which a case has arisen violates the Basic Law, it must refer the constitutional question to the Federal Constitutional Court before proceeding to a resolution of the case. Judicial referrals do not depend on the issue of constitutionality having been raised by one of the parties. An ordinary court is obliged to make such a referral when it is convinced that a law under which a case has arisen is in conflict with the Constitution.

Abstract Judicial Review

The Court may decide differences of opinion or doubts about the compatibility of a federal or state law with the Basic Law on the mere request of the federal or a state government or of one-third of the members of the *Bundestag*.[38] Oral argument before the Court, a rarity in most cases, is always permitted in abstract review proceedings. The question of the law's validity is squarely before the Court in these proceedings, and a decision against validity renders the law null and void.[39]

Constitutional Complaints

A constitutional complaint may be brought by individuals and entities vested with particular rights under the Constitution. After exhausting all other available means to find relief in the ordinary courts, any person who claims that the state has violated one or more of his or her rights under the Basic Law may file a constitutional complaint in the Federal Constitutional Court. Constitutional complaints must be lodged within a certain time, identify the offending action or omission and the agency responsible, and specify the constitutional right that has been violated.[40] The FCCA requires the Court to accept for decision any complaint if it is constitutionally significant or if the failure to accept it would work a grave hardship on the complainant.[41] 'Any person' within the meaning of this provision includes natural persons with the legal capacity to sue as well as corporate bodies and other 'legal persons' possessing rights under the Basic Law.[42]

The procedure for filing complaints is relatively easy and inexpensive. No filing fees or formal papers are required. Most complaints are prepared without the aid of a lawyer (attorneys prepare about a third). No legal assistance is required at any stage of the complaint proceeding. As a consequence of these rather permissive standing rules, the Court has been flooded with complaints, which have swelled in number from well under

[37] *BVerfGG*, § 13(11).
[38] *Grundgesetz* [GG] [Constitution] art. 93.
[39] *BVerfGG*, § 31 (2).
[40] *BVerfGG*, § 93. See Singer, supra note 20, at 331–36; see also Seuffert, Walter (1971) 'Die Verfassungsbeschwerde in der Verfassungsgerichtsbarkeit' in Schmücker, Kurt (ed) *Bundesverfassungsgericht 1957–1971* (rev ed) C.F. Müller at 159–69.
[41] *BVerfGG*, § 93a (2).
[42] See, e.g., Factual Determination Case, *BVerfGE* 3, 359; Treasury Bonds Case, *BVerfGE* 23, 153. The Court has also granted standing to public broadcasting stations claiming free speech rights under GG, art. 5. See Television II Case, *BVerfGE* 31, 314.

1,000 per year in the 1950s, to around 3,500 per year in the mid-1980s, and rising from around 5,000 per year in the 1990s to nearly 6,000 in 2006. The Court grants full review to barely more than 1 percent of all constitutional complaints, but such complaints result in some of its most significant decisions and make up more than 50 percent of its published opinions.

Process

Internal Administration

The Court achieved a major victory when it won the authority early on to administer its own internal affairs. Administrative autonomy had the notable consequence of arming the Court with the power to prepare its own budget in direct consultation with Parliament and the Ministry of Finance. This, in turn, allowed the Court to plan its own future. In 1975, Parliament enacted a set of standing rules of procedure governing the Court's internal operations. The new rules charge the Plenum, over which the Court's president presides, with preparing the budget, deciding all questions pertaining to the Justices' duties, and formulating general principles of judicial administration. Overall judicial administration is the responsibility of the Court's director, the highest administrative official in the Court, who answers only to the Court's president.[43] The director, like the Justices themselves, must be a lawyer qualified for judicial office. Finally, each Justice is entitled to four legal assistants or clerks of his or her own choosing. Legal assistants usually have embarked already on legal careers as judges, civil servants, or professors of law. Most serve for two or three years, although some legal assistants have stayed on for longer periods.[44]

Decision-Making

The Court's deliberations are secret, and the Justices render their decisions on the basis of the official record. The rules require that an official opinion signed by all participating Justices (six Justices constitute a quorum) justify each senate decision.[45] Recording the Justices' participation is vastly different than confirming their unanimity; the FCCA grants the senates the discretion to disclose or withhold information about the number of votes for or against the final decision. Oral arguments are the exception; they are limited to cases of major political importance. In 2006, the Court decided only six cases with the benefit of oral argument. A decision handed down on the basis of an oral proceeding is known as an *Urteil* (judgment); a decision handed down in the absence of oral argument is labeled a *Beschluss* (order or ruling). The distinction is formal; whether an *Urteil* or a *Beschluss*, the judgment binds all state authorities, and decisions have the force of general law.

[43] *BVerfGG*, § 13.
[44] See Schalich & Korioth, supra note 24, at 27–28.
[45] *BVerfGG*, § 30.

Assignment

Specialization is a major feature of the judicial process within the Court. As noted earlier, each senate has a specified jurisdiction. Incoming cases are channeled to the appropriate senate and then passed on to the various Justices according to their areas of expertise. Before the start of the business year, each senate establishes the ground rules for the assignment of cases. By mutual agreement, and in consultation with his or her senate's presiding officer, each Justice agrees to serve as the rapporteur (*Berichterstatter*) in cases related to his or her particular interest or specialty. At least one Justice of the Second Senate, for example, has a background in international law and serves as the rapporteur in cases involving international legal issues. Another Justice might take charge of cases involving tax and social security law. Still another might be assigned cases dealing with issues arising from family law.

The rapporteur's job is to prepare a *Votum*, which amounts to a major research report. The preparation of the *Votum* is a crucial stage in the decisional process. In it the rapporteur describes the background and facts of the dispute, surveys the Court's previous decisions and the legal literature, presents fully documented arguments advanced on both sides of the question, and concludes with a personal view of how the case should be decided. A *Votum*, which may be well over 100 pages long, may take weeks, even months, to prepare, and often it forms the basis of the first draft of the Court's final opinion.[46] In any one calendar year, each Justice prepares several major *Votums*, studies another 30 to 40 that are authored by his or her colleagues, drafts shorter reports (mini-*Votums*)—about two hundred per year—for his or her two colleagues on the three-Justice chambers, writes the opinion in cases assigned to him or her as rapporteur, and prepares for the weekly conference.

Oral Argument

As already noted, formal hearings before the Court are rare. Each senate hears oral argument in three or four cases annually, usually in *Organstreit* and abstract judicial-review cases, in which oral argument is mandatory unless waived by the major organs or units of government bringing these cases. The rapporteur, who by this time has nearly completed his or her *Votum*, usually dominates the questioning. The main function of the oral argument is less to refine legal issues than to uncover, if possible, additional facts bearing on them. For this reason, the Court may hear from fact experts during the oral argument in order 'to establish the truth',[47] as well as the lawyers, law professors, or public officials formally advocating for the parties. In spite of this genuine commitment to transparency, openness, and inclusion, the Court's oral arguments cannot be taped or broadcast.

[46] Kommers, supra note 6, at 178.
[47] *BVerfGG*, § 26(1).

Conference and Opinions

The presiding officer of each senate schedules regular meetings to decide cases and dispose of other judicial business. *Votums* and draft opinions of cases already decided dominate the agenda. In considering a *Votum*, the presiding Justice calls on the rapporteur to summarize the case and state the reasons for his or her recommendation. The rapporteur's role is crucial here, for a carefully drafted and well-organized *Votum* usually carries the day in conference. In addition, the pressure of time often prompts Justices to defer to the rapporteur's expertise and judgment.[48] The rapporteur has the task of writing the Court's opinion. A rapporteur with strong dissenting views may request that the writing of the opinion be assigned to another Justice, but this rarely happens.

The well-settled tradition of the Court is to speak as an institution and not as a panel of individual Justices. Collegiality and consensus are the norm; despite the introduction of signed dissenting opinions in 1970, the Court continues unanimously to decide more than 90 percent of its reported cases. Although the FCCA requires the disclosure of the identities of the Justices participating in every case, authorial responsibility for unanimous and even majority opinions remains undisclosed. In the rare instances when the Court's institutional unanimity fractures, the Court is not required to identify which Justices voted with the majority and which voted with the minority. Only the publication of a signed dissenting opinion, an even rarer departure from the Court's prized institutional unanimity, might provide formal insight into the Court's voting constellations.

The institutional bias against personalized judicial opinions has tended to minimize published dissents. There have been only 134 since they were first allowed in 1970.[49] The prevailing norm seems to be that personalized dissenting opinions are proper only when prompted by deep personal convictions. As one commentator remarked, '[i]n their justification, style and intent, dissenting opinions are a departure from the Court's unanimity … [T]hey can draw attention to the dissenting Justice as a public figure, who may dissent in order to highlight his or her ethical or jurisprudential differences with the majority … Such dissenting opinions can endanger the Court's majority opinion'.[50]

Caseload and Impact

In a given calendar year, the Court receives 8,000-10,000 letters, notes, or communications from citizens throughout the Federal Republic. When these poorly articulated 'constitutional complaints' are obviously inadmissible or hopeless, they are provisionally assigned to the Court's General Register's Office, which reviews the submissions and responds on behalf of the Court with an explanation of the legal nature of the matter that was the subject of the submission and, in light of this clarification, the General Register's view on whether a judicial decision is at all necessary or appropriate.[51] Of course, if the General Register's Office finds that a judicial treatment of the submission is necessary,

[48] Kommers, supra note 6, at 179–81.

[49] Bundesverfassungsgericht, Aufgaben, Verfahren und Organisation—Jahresstatistik 2006—Entscheidungen mit / ohne Sondervotum, grafisch, *available at* http://www.bverfg.de/organisation/gb2006/A-I-7.html (last visited Feb. 26, 2008) (on file with the authors).

[50] Schlaich & Korioth, supra note 24, at 30–31 (authors' translation).

[51] *BVerfGG*O, § 59.

the case is lodged for review in the ordinary admissibility process of the appropriate senate. If, in response to the General Register's clarification, the petitioner writes back demanding to be heard, his or her submission is lodged with one of the senates.[52] This process highlights the fundamental aim of the General Register's review, which is to give the petitioner an informed characterization of the submission while underscoring his or her ultimate responsibility for the 'complaint'. In 2006, the Court received 8,536 communications. The General Register's Office classified the great majority of them as 'petitions' or 'constitutional complaints'. In all, the General Register lodged some 46 percent of these communications with the Senates for ordinary admissibility review. However, a total of 3,332 communications merited only an explanatory letter from General Register's Office and were not passed along to the senates.[53] The General Register, thus, serves as an important checkpoint. Through it pass only the most insistent of complainants.

Constitutional complaints and concrete judicial review references make up the bulk of the Constitutional Court's very heavy docket. The General Register, along with the chamber review process described earlier, seem to have given the Court the flexibility it needs to cope with its caseload. The legal assistants each Justice is able to employ, recently increased to four, also help the Court manage its docket.

The number of concrete review references has not contributed to the Court's heavy docket. The number is surprisingly low in light of a judiciary consisting of twenty thousand judges. The apparent reluctance of judges to refer constitutional questions to the Court may be attributed to the strong tradition of legal positivism that continues to hold sway in the ordinary judiciary. Jealous of their own limited power of judicial review, judges usually resolve doubts about the constitutional validity of laws at issue in pending cases by upholding them or interpreting them so as to avoid questions of constitutionality, thus obviating the necessity of appeal to the Federal Constitutional Court.

At the same time, the constitutional complaint procedure has served as an escape hatch for litigants upset with the performance of the judiciary. More than 90 percent of all constitutional complaints are brought against judicial decisions. The remaining 10 percent focus on legislative or executive infringements of basic rights. Nearly all complaints alleging that court decisions have violated the procedural guarantees of the Basic Law are disposed of by the Second Senate. The First Senate has jurisdiction over most complaints involving claims to substantive constitutional rights such as human dignity (Article 1); life, liberty and personality (Article 2); equal protection (Article 3); the freedom to choose a trade or profession (Article 12); and property (Article 14).[54] Even though the full senate decides a mere handful of such cases—15 of 5,918 complaints filed in 2006—the constitutional complaint procedure is now deeply rooted in Germany's legal culture.

In general, however, the Court is most politically exposed when deciding cases on abstract judicial review. These cases are almost always initiated by a political party on the short end of a legislative vote in the Federal Parliament or by the national or a state government challenging an action of another level of government controlled by an

[52] *BVerfGGO*, § 60.

[53] Bundesverfassungsgericht, Aufgaben, Verfahren und Organisation—Jahresstatistik 2006—Geschäftsanfall Allgemeines Register, *available a*t http://www.bverfg.de/organisation/gb2006/D.html (last visited Feb. 26, 2008) (on file with the authors).

[54] Kommers, supra note 6, at 173.

opposing political party or coalition of parties. The apparent manipulation of the judicial process for political purposes in these cases has led some observers to favor the abolition of abstract judicial review.[55] But those who decry the judicialization of politics—or, alternatively, the politicization of justice—have not gained much parliamentary support for the constitutional amendment that would be necessary to abolish abstract review. Equally disconcerting for those who would eliminate the thin line between law and politics trod by the Court in these cases is the failure of the Justices themselves to mount any opposition to abstract judicial review. Indeed, the elimination of abstract review would run counter to the view of constitutionalism currently prevalent in the Federal Republic; the Court, as guardian of the constitutional order, is expected to construe and enforce the Constitution whenever statutes or other governmental actions raise major disputes over its interpretation.

The Federal Constitutional Court and the Polity

Practice of Judicial Review

Federal Constitutional Court Justice Hans G. Rupp once noted: 'The only marshal there is to enforce the Court's ruling is its moral authority, the conscience of the parties concerned, and in the last resort, the people's respect for law and good government. It is mainly this limitation that renders it less objectionable to let a court settle legal issues that are closely connected with domestic or international politics'.[56] As it turns out, the Court has accumulated a considerable store of moral authority and public approval. A series of public opinion polls taken in recent years shows that the Court enjoys substantially more public trust than any other major political or social institution, including parliament, the military establishment, the regular judiciary, the television industry, and even churches and universities.[57] It relies on this goodwill when, as it often does, it wades into Germany's most contentious issues.

Among the many reasons for the widespread acceptance the Court enjoys are its passive posture in the scheme of separation of powers and the restraint is has typically shown when it does act.

With respect to its passive posture, it is often noted that, although the Court enjoys equal standing alongside the other 'high' federal organs that have principle responsibility for governing Germany (*Bundestag*, *Bundesrat*, *Bundesregierung* and *Bundespräsident*), it is unique in that it cannot call itself to action. It is bound, instead, to dispose of the cases and controversies that find their way to its door.

Even when summoned to service, in numerous ways the Court shows considerable restraint. First, the Court traditionally has refrained from anticipating a question of constitutional law in advance of the necessity for deciding it. While every case properly before the Court involves a constitutional question, the Court usually refrains from deciding ancillary constitutional issues not yet ripe for decision. Second, the approach

[55] See Dolzer, Rudolf (1972) *Die staatstheoretische und staatsrechtliche Stellung des Bundesverfassungsgerichts* Duncker und Humblot at 114-18.
[56] Rupp, Hans G. (1960) 'Some Remarks on Judicial Self-Restraint' (21) *Ohio St. L.J.* at 507.
[57] Conradt, David P. (2005) *The German Polity* (8th ed) Pearson Longman at 254.

the Court takes towards statutory interpretation exemplifies its reserve. A leading principle of judicial review in Germany obliges the Court to interpret statutes, when possible, in conformity with the Basic Law (*Pflicht zur verfassungskonformen Auslegung*). Additionally, the Court frequently has stated that it will not substitute its judgment of sound or wise public policy for that of the legislature.[58] The Court also will not overturn statutes simply because the legislature may have inaccurately predicted the consequences of social or economic policy. Third, the Court abides by several rules that limit the number of concrete judicial review referrals from ordinary courts. Fourth, while the Court does not enjoy discretion akin to the *certiorari* power of the United States Supreme Court, it does have limited control over its docket through the three-Justice chambers. This admissibility review can, to no small degree, be instrumentalized to serve the Court's interests, including its interest in preserving its moral authority.

The Court's Impact

The Court's record, in spite of the modesty just described, reveals a self-confident tribunal deeply engaged in Germans' lives and politics. By 1 January 2007 the Court had invalidated 596 laws and administrative regulations (or particular provisions thereof) under the Basic Law. The large majority of these rulings admittedly involved minor legal provisions, but a fair number featured important public policies.[59] The number and range of cases in which the Federal Constitutional Court has acted to dramatically impact German politics are too great to systematically or comprehensively recount in this brief introduction. As already noted, the Court has banned political parties as unconstitutional,[60] policed federal-state relations, monitored the democratic process,[61] overseen the dissolution of parliament,[62] supervised the unification of West and East Germany,[63] shaped education policy,[64] delineated Germany's social market economy and cradle-to-grave welfare regime,[65] and defined and enforced a regime of basic liberties.

The selection of any single field of the Court's expansive activity as representative of its significant influence and impact must necessarily be arbitrary. Uwe Wesel's recent book *Der Gang nach Karlsruhe* (*The Path to Karlsruhe*),[66] an affectionate and accessible tour through

[58] See, e.g., Saar Treaty Case, *BVerfGE* 4, 157 (168) and Conscientious Objector II Case, *BVerfGE* 48, 127 (160).

[59] See Benda, Ernst (1979) *Grundrechtswidrige Gesetze* Nomos Verlagsgesellschaft at 64-75; von Beyme, Klaus (1991) *Das Politische System der Bundesrepublik Deutschland nach der Vereinigung* Taschenbush Piper at 382.

[60] See Socialist Reich Party Case, *BVerfGE* 2, 1; Communist Party of Germany Case, *BVerfGE* 5, 85.

[61] See, e.g., Apportionment II Case, *BVerfGE* 16, 130; National Unity Election Case, *BVerfGE* 82, 322; Maastricht Case, *BVerfGE* 89, 155;

[62] See Parliamentary Dissolution I Case, *BVerfGE* 62, 1; Parliamentary Dissolution II Case, *BVerfGE* 114, 121.

[63] See, e.g., East-West Basic Treaty Case, *BVerfGE* 36, 1; Land Reform II Case, *BVerfGE* 94, 12; Stasi Questionnaire Case, *BVerfGE* 96, 171; Wall Shootings Case, *BVerfGE* 95, 96.

[64] See, e.g., Concordat Case, *BVerfGE* 6, 309; Hessen Mixed Ability School Case, *BVerfGE* 34, 165; Interdenominational School Case, *BVerfGE* 41, 29; 'LER' Conciliation Proposal Case, *BVerfGE* 104, 304; Junior Professor Case, BVErfGE 111, 226.

[65] See, e.g., Family Assistance in the Miners' Guild, *BVerfGE* 40, 65; Alimony Case, *BVerfGE* 53, 257; Geriatric Case, *BVerfGE* 76, 256; Homermaker's Pension Case, *BVerfGE* 87, 1; Sickness Benefits Case, *BVerfGE* 97, 378; Nursing Care Insurance III Case, *BVerfGE* 103, 242.

[66] Wesel, supra note 27. For English language surveys, see Kommers, Donald P. and Miller, Russell A. (forthcoming 2009) *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd ed) Duke University Press; and Currie, David P. (1994) *The Constitution of the Federal Republic of Germany* University of Chicago Press.

the Court's history and many of its most remarkable decisions, suggests two possibilities: security policy and European integration.

Regarding security policy, Wesel concludes that the Court's interference with Chancellor Konrad Adenauer's early post-war efforts at remilitarization as the first of the Court's most inflammatory moments.[67] The politicized and highly strategic role the Court played in the question of the ratification of the European Defence Community Treaty reportedly prompted Adenauer to underscore his role as President of the West German constitutional convention and complain: 'That is not what we imagined'.[68] Contrary to this characterization of the founders' intent, the Court consistently has been involved in security policy and Germany's engagement with Europe's supranational undertakings.

The potential constitutional impediments to Germany's participation in the European Defence Community that were highlighted by the opposition's appeals to the Federal Constitutional Court had to be resolved by amendments made to the Basic Law in 1954. These amendments allowed West Germany to join the North Atlantic Treaty Organization in 1955. Germany's NATO membership would, in turn, give the Court occasion frequently, and sometimes dramatically, to enter the field of security policy. In two decisions in the 1980s the Court refused to credit constitutional challenges to the deployment of nuclear missiles in Germany under NATO auspices.[69] The missile deployment had galvanized strong pacifist sentiment among many Germans, leading to demonstrations that sometimes involved thousands of protesters 'blocking truck and tank traffic traveling up the main road to the Pershing missile base'.[70] This protest movement, and the lingering disappointment over the Court's rulings, solidified Germany's Green Party as a credible political force. Since reunification the Court has given the constitutional imprimatur to a gradual expansion of the role of Germany's armed forces. To the great frustration of governments of all political stripes the Court has repeatedly insisted, first and foremost, that every foreign troop deployment be authorized by the *Bundestag*. This proved to be so significant a barrier to Chancellor Gerhard Schröder's plans to support the U.S. invasion of Afghanistan in 2001 that he was compelled to couple the request for *Bundestag* approval with a no-confidence vote. But the very possibility of *foreign* troop deployments was the Court's handiwork. In 1994 the Court broke with the settled, Cold War understanding that the Basic Law envisioned a strictly defensive role for Germany's armed forces.[71] The Court has since upheld the expansion of the geographic range of foreign troop deployments to include actions taken outside NATO territory.[72] The Court has issued several rulings with respect to German involvement in the war in Iraq.[73]

Still in the realm of security policy, the Court has played a fundamental role with respect to the German 'front' in the so-called 'War on Terror'. Like most countries, following the 11 September 2001 terrorist attacks in the United States, German policymakers sought to

[67] Germany Treaty Case, *BVerfGE* 1, 396; EDC Treaty Case, *BVerfGE* 2, 143.

[68] Wesel, supra note 27, at 76 (authors' translation). Wesel explained: 'The Court, at least as Adenauer anticipated it, should render decisions against communists and fascists, but not against them, the representatives of a democratic government', *Id*. at 12-13 (authors' translation). See Limbach, Jutta (2001) *Das Bundesverfassungsgericht* CH Beck at 7.

[69] Arms Deployment Case, *BVerfGE* 66, 39; Atomic Weapons Deployment Case, *BVerfGE* 68, 1.

[70] Quint, Peter E. (2008) *Civil Disobedience and the German Courts* Routledge at 11.

[71] Military Deployment Case, *BVerfGE* 90, 286.

[72] NATO Strategic Concept Case, *BVerfGE* 104, 151.

[73] See, e.g., AWACS II Case, *BVerfGE*, 108, 34.

implement a series of domestic security reforms that were aimed at equipping authorities to better detect and interdict the growing threat of global terrorism. Almost without exception, the Federal Constitutional Court has invalidated these reforms, perhaps most spectacularly with its ruling striking down the provisions of the Air Security Act that authorized the German Air Force to shoot down hijacked airplanes that might be crashed into buildings, population centers or other contexts that would increase the number of casualties.[74] Coming on the heels of the Court's refusal to endorse other provisions of the post-9/11 security regime, the *Air Security Act Case* prompted some policymakers to propose amendments to the Basic Law that would deprive the Court of the constitutional bases for its defiance.

With respect to European integration, the Court has exercised a degree of caution lacking in the enthusiasm exhibited by Germany's policymakers. Starting with the *So Long As I Case* in 1974 the Court articulated the strict but not insurmountable constitutional conditions on Germany's deepening participation in the European project.[75] As governing authority is shifted to the supranational European institutions, the Court reserved the right to determine whether Europe would exercise that authority in line with the fundamental principles outlined in the Basic Law. This restriction was repeatedly affirmed by the Court[76] and eventually became the content of the 1992 amendment to Article 23 (1) of the Basic Law: 'With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law'.[77]

These and many other decisions have inspired strong criticism of the Court from across the political spectrum, which is perhaps the best indication that it is fulfilling its mandate to serve as the 'Guardian of the Constitution'.

CONCLUSION

Karlsruhe, it seems, has benefited from a Faustian bargain implicit in the Court's *Southwest State Case*. As a result of that case, Karlsruhe traded its historical role as a regional capital for the title 'the capital of German justice'. From its home in Karlsruhe, the Federal Constitutional Court enjoys a breathtaking mandate, both in scope and depth; its jurisdiction is unlike any German court that has preceded it and remains unique when compared with other courts around the world.[78] The Federal Constitutional Court is often regarded as the 'most powerful constitutional court in the world'[79] and the 'most original and interesting institution' in the German system.[80] Symbolic of Karlsruhe's triumph, it

[74] Air Security Act Case, *BVerfGE* 115, 118.
[75] So Lang As I Case, 37, 271.
[76] See, e.g., So Long As II Case, *BVerfGE* 73, 339; Maastricht Case, *BVerfGE* 89, 155.
[77] *Grundgesetz* [GG] [Constitution] article 23 (F.R.G.).
[78] Schlaich & Korioth, supra note 24, at 1–2.
[79] Wesel, supra note 27, at 7.
[80] von Beyme, Klaus (2002) 'The German Constitutional Court in an Uneasy Triangle between Parliament, Government and the Federal Laender' in Sadurski, Wojciech (ed) *Constitutional Justice, East and West* Kluwer at 101, 102.

was not an exaggeration for Gerhard Casper to suggest in his keynote address at the state ceremony commemorating the fiftieth anniversary of the Court's founding that modern Germany might properly be called the 'Karlsruhe Republic':

> 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* … [T]he constitutional history of the past fifty years, as it has been shaped by the Federal Constitutional Court, continues as unassailable constitutional tradition. It is this fact that I first and foremost have in mind when I refer to the 'Karlsruhe Republic'.[81]

[81] Casper, Gerhard (2001) 'The 'Karlsruhe Republic', Keynote Address at the State Ceremony Celebrating the 50th Anniversary of the Federal Constitutional Court' (2) *German L.J.* at ¶¶ 3–4, available at http://www.germanlawjournal.com/article.php?id=111.