

ANTI-TERRORIST LEGISLATION IN  
THE FEDERAL REPUBLIC OF GERMANY

Prepared by Dr. Miklos Radvanyi

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Prepared by Dr. Miklos K. Radvanyi

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ANTI-TERRORIST LEGISLATION IN  
THE FEDERAL REPUBLIC OF GERMANY

I. Introduction

The recent adoption of anti-terrorist legislation in the Federal Republic of Germany has generated heated discussion both there and in other countries in the last three years. Critics charge that the new laws are encroaching upon well-established civil rights. The Federal Government, as well as the governments of the Laender, on the other hand, hold that the new legislation promotes the humanization, decriminalization, and liberalization of criminal law and is consistent with the principles of the rule of law in general and those of the Constitution in particular. The Federal and Laender Governments admit, however, that the new laws have been substantially affected by the increasing number and violence of terrorist organizations. This phenomenon is viewed by government authorities to present a severe threat to the legal order and to democratic society in the Federal Republic. Essentially, it seems that the existing controversy mirrors the basic problem of every democratic society facing domestic or international terrorism, namely, determining the means by which a state can control terrorism and at the same time preserve its democratic freedom.

Because critics contend that the new laws smack of neo-Nazism, the need for an objective analysis of the controversial



anti-terrorist legislation is obvious. But this analysis cannot be made without some preliminary reference to the German system of government, the role of the multi-party system, and a brief review of protest movements as forerunners of domestic terrorism.

## II. The German System of Government

### A. Background

By the end of World War II, Germany was a broken country. During its 12-year rule the Nazi regime annihilated millions of Jews and other peoples in concentration camps, decimated the German intelligentsia, and forced thousands into exile. More than 4 million German soldiers were killed in action and 12 million were taken as prisoners of war. Almost 2 million of the civil population died as a result of Allied bombing or from lack of food and medical care. Some 5 million homes were either partially or totally destroyed, and about 20 million Germans were left homeless. Germany's economy was virtually ruined, and human suffering was extreme.

This postwar situation was marked, too, by a psychological exhaustion of the entire population. After World War I, the Germans suffered from the trauma of a negotiated peace, without defeat on the battlefield. But this time the Allied victory was clearly visible and brought upon Germany the debacle of total defeat. The main

figures of the Nazi leadership committed suicide, some of the leaders escaped, and the rest were tried by the Allied Powers. This left a political vacuum in the country and, with the removal of Admiral Dönitz by the Allies, Germany was left with no successor government. The new administration of Germany was installed by the Allied military commanders.

B. Birth of the Federal Republic

Oswald Spengler, the German philosopher, predicted with cynical self-assurance that parliamentarism would always remain alien to Germany. And indeed, the system of the Weimar Republic proved to be so unworkable that critical observers gained acceptance for their notion that Germans had no natural propensity for a parliamentary regime.

Despite such a discouraging experience with democracy in Germany, the Americans continued to advocate a federal system based on democratic principles. As James Byrnes, then U.S. Secretary of State, declared on September 6, 1946, in Stuttgart, "it never was the intention of the American government to deny to the German people the right to manage their own internal affairs as soon as they were able to do so in a democratic way with genuine respect for human rights and fundamental freedoms."<sup>1/</sup>

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<sup>1/</sup> 15 United States Department of State Bulletin 496 ff (1946).

Accordingly, between November 24 and December 1, 1946, elections were held in several Laender to establish new legislatures (Landtage) in the American Zone of Occupation. Constitutions were promulgated for the Laender Wuerttemberg-Baden, Hesse, and Bavaria.<sup>2/</sup> Other Laender constitutions followed in a short span of time.

On March 14, 1947, at the Moscow meeting of the Council of Foreign Ministers, the United States was represented by General George Marshall, the new Secretary of State. He recalled that the Berlin Conference two years earlier had instructed the Allied Control Authority "to prepare for the eventual reconstruction of German political life on a democratic basis and for eventual peaceful cooperation in international life by Germany."<sup>3/</sup> The following day he noted that according to the Potsdam Agreement "the administration of affairs in Germany should be directed towards the decentralization of the political structure and the development of local responsibility."<sup>4/</sup>

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<sup>2/</sup> Constitutions of Bavaria, Hesse and Wuerttemberg-Baden, Office of Military Government for Germany (U.S.), Berlin, Germany, February 15, 1947.

<sup>3/</sup> Supra note 1, v. 16, 1947, at 524.

<sup>4/</sup> Id. at 525.

Less than a week later, Secretary Marshall proposed a specific plan for the establishment of a German provisional government "to deal with matters of a nationwide concern which the states cannot adequately handle."<sup>5/</sup>

The following year, on March 20, 1948, the Soviet representatives withdrew from the Allied Control Council, and on April 3, "Western Germany" was included in the U.S. European Recovery Program under the Economic Cooperation Act of 1948.<sup>6/</sup>

On July 1, the military governors of the Western Zones instructed the Minister-Presidents of the Laender "to convene a constituent assembly to be held not later than September 1, 1948." General Lucius Clay, U.S. military governor, specified that

...the Constituent Assembly will draft a democratic constitution which will establish for the participating states a governmental structure of federal type which is best adapted to the eventual reestablishment of German unity at present disrupted, and which will protect the rights of the participating states, provide adequate

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<sup>5/</sup> Id. at 569.

<sup>6/</sup> 62 Stat. 137 (1948).

central authority and contain guarantees of individual rights and freedoms."<sup>7/</sup>

In accordance with this instruction, the Minister-Presidents decided on July 26 to establish a Parliamentary Council that would be charged with the drafting of a "Fundamental Law." During the following month, the eleven Landtage elected delegates to the Parliamentary Council, and between August 10 and 23, a constitutional committee of the Minister-Presidents met at Herrenchiemsee in Bavaria. The committee produced a draft constitution of 149 Articles.

Meanwhile, the text of the Occupation Statute was published. It defined the powers and responsibilities to be retained by the Allies (France, the United Kingdom, and the United States) after the establishment of the "German Federal Republic."

On May 8, 1949, the Parliamentary Council adopted the Basic Law, and between May 16 and 22, it was ratified by more than two-thirds of the diets of the constituent states (Laender).<sup>8/</sup>

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<sup>7/</sup> Albert P. Blaustein and Gisbert H. Flanz, eds., 5 Constitutions of the Countries of the World, "Federal Republic of Germany," 73 (1974- ). (Looseleaf)

<sup>8/</sup> Basic Law for the Federal Republic of Germany of May 23, 1949, Bundesgesetzblatt [BGB1., official law gazette] I, p. 1. For the official translation, see: Basic Law for the Federal Republic of Germany (Wiesbaden, 1971).

C. The Constitutional Order

Contributing to the failure of the Weimar Republic was the vulnerability of its institutions to breakdown under conditions of stress and internal discord.<sup>9/</sup> In order to remedy this problem and to prevent the recurrence of Nazism, the Parliamentary Council rejected the plebiscitary and presidential constitutional features and set out to build a representative parliamentary democracy that would combine an effective executive system with elements of democratic control.

The Federal Republic of Germany is a Federal state in which the Federation and the Laender have equal weight by constitutional norms. However, this does not mirror the constitutional reality. The equalizing tendencies of modern industrial society have undermined traditional federalism in Germany and have led to conflicts between the interests of the Federation and those of the Laender. In these conflicts, the Laender generally have been the losers. As a result, the local governments play a very secondary role in national policy.

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<sup>9/</sup> For a history of the Weimar Republic, see: Karl D. Bracher, The German Dilemma 49 ff. (1975); Gerhard Loewenberg, Parliament in the German Political System 19 ff. (c. 1966, 1967); Guido Goldman, The German Political System 21 ff. (1974); Arnold J. Heidenheimer and Donald P. Kommers, The Governments of Germany 16 ff. (4th ed. 1975).

### 1. Legislative Branch

The Basic Law confers the legislative power upon a bicameral Parliament consisting of the lower house, whose name was changed from Reichstag to Bundestag, and the upper house called the Bundesrat. With Allied encouragement, the Bundesrat was made much stronger than the former Reichsrat. The Bundestag is the only central organ of the German Government elected directly by the people.

The Federal President (Bundespräsident) is elected by the Federal Assembly (Bundesversammlung) for a term of 5 years. (The only function of the Federal Assembly is to elect the Federal President. This body consists of approximately 1,000 delegates: half are members of Parliament and the other half are delegates sent by the Laender governments in proportion to the size of their parties.) The Federal President is limited almost entirely to a figurehead position similar to that of the monarch in the British system of government.

### 2. Executive Branch

The Federal Government (Bundesregierung) is a collegial organ led by the Federal Chancellor (Bundeskanzler), who is elected pro forma without debate by the Bundestag upon the proposal of the Federal President. (The nominee is the person presumed to have the strongest support in the Bundestag.)

The Chancellor has the right to suggest to the Federal President the nomination and dismissal of the Federal Ministers and can choose the staff of the government team. He determines the guiding principles of his government's policies and is responsible for them. Although the Chancellor can discuss these principles with his colleagues in the cabinet, he is not bound to consider their ideas. Consequently, a vote of "no confidence" can be directed at him only from Parliament, and only he can ask Parliament for a vote of confidence. Thus it is the Federal Chancellor alone who is formally responsible to Parliament for the consequences of his government's policies. If he is overthrown or if he resigns, his ministers are also dismissed.

### 3. Judicial Branch

The German court system is complicated because of the Federal structure of the state. The Federal Constitutional Court (Bundesverfassungsgericht) is the highest constitutional court, and its jurisdiction covers four large areas. It settles disputes between the Federation and the Laender and between individual Laender. It also settles controversies between organs of the Federation, for example, between the Federal Government and the Bundestag. Further, it examines the compatibility of Federal laws with the Constitution



or of Land laws with Federal laws. Finally, it settles constitutional complaints (Verfassungsbeschwerde). All citizens can turn to this court if they believe their constitutional rights have been infringed by a public authority. Laws or court decisions that directly injure the plaintiff in his basic rights can be the subject of such a complaint.

It is clear from this catalogue of legal powers that the Federal Constitutional Court has the most extensive constitutional jurisdiction of all democratic states.

The other courts are entrusted with the adjudication of civil and criminal lawsuits. Besides these, there are specialized courts for questions of labor and social legislation and administrative courts for lawsuits against the executive branch. Each of these courts has its own court of appeal and its own superior Federal court.

#### D. The Multi-party System

By 1945, there was little in the German past experience on which to build a healthy and dynamic party system. Even before World War I, the party system was relatively weak, and during the war years it was largely ineffective. Following that war, the Weimar parties were important and nihilistic because of the electoral system employed and the absence of an ideological basis. This situation

contributed significantly to the chronic instability of the Republic. By the mid-1930's, the National Socialist dictatorship had eradicated the roots of the old parties and replaced them with a single, totalitarian party that in turn was destroyed by the military defeat of the Nazi regime.

In the immediate post-war period, the party structure in the Federal Republic took on a completely new character. The reestablishment of political parties in occupied Germany came quickly. During the summer of 1945, the Allied authorities agreed to four parties: the Social Democratic Party (SPD), the Christian Democratic Union (CDU), the Free Democratic Party (FDP), and the Communist Party (KPD). A few more regionally orientated political groups<sup>10/</sup> were permitted later on, but they were unable to gain national significance.

Of the four "founding parties," the Social Democratic Party was the oldest. Founded in 1863 and banned by the Nazis 70 years later, it was a working-class party with an international approach. It was pledged to eradicating private ownership of the

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<sup>10/</sup> Examples are the Bavarian Party (BP), the Center Party in North-Rhine-Westphalia, the German Party (DP) in Lower Saxony, the Reconstruction Association (WAV), the Expellees Party (BHE), and the Nazi Socialist Reich Party (SRP).

means of production and abolishing capitalist society. During the Nazi period, its leaders went into exile and concentration camps because of their anti-Nazi convictions. After 1945, Germany seemed to be fertile ground for the reestablished Social Democrats. The SPD had the strongest anti-Nazi record, and its leaders had little to fear from the denazification proceedings that the Allies had begun to impose. Moreover, the serious economic situation made planning essential, and the shortage of food suggested the need for land reform. But SPD expectations were frustrated, first of all, by the Soviet authorities, who forced the SPD in the East Zone to join the newly reestablished Communist Party. In its domestic policy, the SPD opposed economic liberalism, German rearmament, and the integration of Germany into the West. But it overlooked the fact that most German voters favored closer cooperation with the West because of their fear of communism. Added to this, a significant number of middle-class voters found the national image of a party so long pledged to an international tradition unconvincing.

The Christian Democratic Union was established in 1945 by a group of Catholics and Protestants who wanted to attract all classes. The CDU--in contrast to the tightly organized SPD--has always been a loosely connected organization of politicians and

interest groups that have never attempted to work out fundamentals or details of their political programs and, indeed, have some opposing interests. What held the party together during its early years was the strong leadership of Konrad Adenauer, Chancellor and a former mayor of Cologne. He proved to be an extremely skilled tactician and succeeded in identifying himself with Germany's reacceptance into the Western family of nations. Under his leadership the CDU gained not only national importance but in 1957 received an absolute majority of the votes cast in the Bundestag elections.

The Free Democratic Party was established as a liberal party made up of portions of the religiously emancipated middle class that were dissatisfied with both major parties. However, because of the political inconsistency of its national leadership, the party in time lost many of the farmers and business and professional voters who had earlier supported it. In several Laender, most recently in Lower Saxony and Hamburg where its members and voters are predominantly conservative, the FDP lost all of its Landtag representation by falling below 5% of the total vote in the Land election.

The Communist Party had already lost most of its popular support by the time it was declared illegal in 1956.<sup>11/</sup> Another

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11/ Action Against the Communist Party of Germany, Special Impression of the Decision of the Federal Constitutional Court of August 17, 1956 (1957).

minor party, the Neo-Nazi Socialist Reich Party had been outlawed earlier in 1952.<sup>12/</sup> Although later both parties were reformed, neither of them ever gained national significance.

The status, organizational principles, and functions of political parties are governed by the Constitution and by a special law on political parties.<sup>13/</sup> Article 21 of the Basic Law reads as follows:

Art. 21. (Political parties) (1) The political parties shall participate in the forming of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for the sources of their funds.

(2) Parties which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany, shall be unconstitutional.

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<sup>12/</sup> The SRP Decision of the Federal Constitutional Court of October 23, 1952, Entscheidungen des Bundesverfassungsgerichts [BVerfGE, Decisions of the Federal Constitutional Court] 2, p. 1 [14].

<sup>13/</sup> Law on Political Parties of July 24, 1967, BGBl. I, p. 773.

The Federal Constitutional Court shall decide on the question of unconstitutionality.

(3) Details shall be regulated by federal laws.

This provision indicates, first of all, that the Constitution places particular emphasis on the constitutionality of political parties in order to avoid the dilemma of the Weimar Republic in which political parties dominated political life without being mentioned in the Constitution. Furthermore, to avoid problems of the Weimar Republic, the authors of the Constitution wanted to furnish the possibility of prohibiting political parties that aim to undermine or abolish the democratic system, as the Communists and the National Socialists had done.

Indeed, the party system provided for in the Basic Law and later specified in the Law on Political Parties has contributed much to the achievement of political stability in the Federal Republic. On the other hand, the progress of the three major parties in becoming institutionalized components of the governmental apparatus has become a subject of general and even constitutional controversy. This is particularly true of the system whereby higher positions in the national establishment are allocated to a political party on the basis of its size. The average citizen has begun to believe

that the Federal Republic is too much of a party state and appears to see the party state as an "alliance and a system of careers." Moreover, according to the electoral system, only parties that either receive 5% of the list vote or win three constituencies outright are represented in the Bundestag.<sup>14/</sup>

This ongoing process of party system concentration has caused nonparty and even nonpolitical organs, such as the various student movements and other organizations--referred to as the Extraparliamentary Opposition--to become more important forums of deliberation. The established parties look with hostility at these organizations and their nonconformist ideas. But this anti-party tendency appears to have gained strength in the last three years.

E. Human Rights

The Basic Law contains in its first seventeen Articles a comprehensive catalogue of human rights. The supreme value under the constitutional system of the Federal Republic is human dignity. Article 1, paragraph (1), of the Basic Law reads as follows:

The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.

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<sup>14/</sup> Law on Federal Election of May 7, 1957, as amended in the Version of September 1, 1975, BGBI. I, p. 2325.

Paragraph (3) of the same Article expressly designates the right to the free development of one's personality (Art. 2, par. (1); the right to life, inviolability of one's person, and the right to liberty (Art. 2, par. (2); the right to equal treatment, including equal rights for men and women before the law (Art. 3); freedom of faith, conscience, and religion, including the right to refuse war service on grounds of conscience (Art. 4); the right to freedom of expression and freedom of information, including freedom of the press (Art. 5); the right to freedom of assembly (Art. 8); the right to freedom of association (Art. 9); the privacy of post and telecommunications (Art. 10); the right to freedom of movement (Art. 11); the right to freely choose one's occupation and place of work (Art. 12); and the inviolability of the home (Art. 13) as basic rights that are binding on the legislative, executive, and judiciary branches as directly enforceable law. This binding force means that the deputies may not enact laws that are inconsistent with the basic rights guaranteed in the Constitution, nor may judges and administrative officials apply any legal provisions inconsistent with them. Furthermore, it implies that these rights, being constitutional law, rank above any other domestic law of the Federal Republic.

In addition to these rights, certain others are protected in the same way. These include the right to resist attacks on the



constitutional order (Art. 20, par. (4)), the enjoyment of political rights under Article 33, the right to vote and the right to be eligible for election (Art. 38). Other rights are elementary guarantees for court proceedings: the right to have a lawful judge (Art. 101), the right to be heard in all questions of fact and law during court proceedings (Art. 103), and legal guarantees in the event of deprivation of liberty (Art. 104).

The Basic Law, and with it the basic rights, can be amended only with the consent of a majority of those persons qualified to vote. But even under this condition, an amendment is inadmissible if "the basic principles laid down in Articles 1 and 20" are affected (Art. 79, par. (3)). Moreover, these basic rights are protected by Article 93, paragraph (1)4a, of the Basic Law. Under this provision, anyone who has exhausted all normal remedies may lodge a constitutional complaint to the Federal Constitutional Court by claiming that his basic rights as guaranteed by the Constitution, or one of his rights affirmed in Articles 20, paragraph (4), 33, 38, 101, 103, and 104 have been violated. Finally, Article 1, paragraph (2), makes it clear that protection of human rights is not only a domestic matter but is also the basis of peace and justice throughout the world.

The basic rights may be restricted only in very specific cases and to an extent expressly admitted by the Basic Law itself (Art. 19).

III. Beginning and Development of  
the Extraparliamentary Opposition

As stated in the previous section, the authors of the Constitution committed themselves to a democratic society. Obviously, this commitment applied only to the three zones occupied by the Western Allies, but it was understood to be applicable to all of Germany after a projected reunification with the Soviet Zone. Accordingly, the Preamble of the Basic Law declared that the Parliamentary Council acted "on behalf of those Germans to whom participation was denied." It called upon all the German people "to achieve in free self-determination the unity and freedom of Germany."

The Fourth Amendment to the Basic Law of March 26, 1954, extended the areas in which the Federation was to have exclusive jurisdiction.<sup>15/</sup> In addition, this Amendment opened the way to the Federal Republic's adherence to NATO. This was viewed in certain circles of the German society as an act that could seriously jeopardize the already difficult process toward reunification of the divided Germany. Article 73, item 1, was now amended to include, among other things, not only foreign affairs but also "defence,

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<sup>15/</sup> BGBI. I, p. 45. The current version of Article 73 was adopted by the Law on the Amendment of the Basic Law of April 24, 1968, BGBI. I, p. 709.

including both military service for males over 18 years and protection of the civilian population."

Also changed at this time, as part of the Fourth Amendment, were Article 79, paragraph 1, sentence 2, and the closely connected Article 142a. All of these amendments were considered necessary as a result of the treaties signed at Bonn and Paris on May 26 and 27, 1952. The purpose was to affirm that the provisions of the Basic Law were compatible with the treaties between the Federal Republic and the three Western powers and with the European Defense Community Treaty.

The issues of rearmament, Germany's inclusion in NATO, and the storage of nuclear weapons on German soil brought to life in the mid-1950's an active and determined political movement<sup>16/</sup> consisting of intellectuals and pacifists. The movement itself began as a decidedly peaceful one employing protest marches throughout the country. The groups involved believed that the Government's actions on

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<sup>16/</sup> For a complete history of student movements and the extra-parliamentary opposition in Germany, see: Hans M. Bock, Geschichte des "linken Radikalismus" in Deutschland. Ein Versuch (Frankfurt am Main, 1976); Karl A. Otto, Vom Ostermarsch zu APO... (Frankfurt am Main, 1977); Martin Kolinsky and William E. Paterson, eds., Social and Political Movements in Western Europe (London, 1976); Giselher Schmidt, Hitlers und Maos Söhne (Frankfurt am Main, 1969).

those issues were taken in an authoritarian fashion and were an indication that the Government might be moving away from the fledgling democracy as affirmed by the Constitution. This view was reinforced by the outlawing of the Communist Party on August 17, 1956.

At this stage, Communist influence over the movement was negligible, and the students themselves were not politically radical. So long as an oppressive Communist regime was West Germany's immediate neighbor, the students could not be attracted to orthodox Marxism. But the building of the Berlin Wall in 1961 and the resulting cessation of the flow of refugees from East Germany eliminated the day-to-day contact of West German citizens with the East German Communist reality. At the same time, the Berlin Wall and the inability of the West to stop the challenge demonstrated to the residents of West Berlin that their future would be better served by divorcing the solution of their problems from those of the rest of Germany. This new direction was demonstrated by the action of some 10,000 protesters, mostly students, who stormed the Wall to protest the shooting by East German guards of a young man who was attempting to cross it. Inexplicably, the West Berlin police brutally attacked the demonstrators, causing great outrage. The situation was further inflamed by attempts of the West Berlin Senate to justify the police action on

the grounds that it was taken to protect the demonstrators from East German guards.

In its effort to radicalize the whole leftist movement, the Socialist German Student League (SDS), a radical student organization, exploited the outrage of the demonstrators over the action of the police. The SDS argued that the older, postwar generation in power had discredited itself, had lost its moral standing, and had created political apathy among the people. As a result, the political initiative was now in the hands of a younger generation with no living recollection of Nazism and no share of responsibility for it, as the older generation had.

The situation was further intensified by a crisis in the German parliamentary system caused by the coalition between the Christian Democratic Union (CDU)/Christian Socialist Union (CSU) and the Social Democratic Party that effectively eliminated all opposition in the Parliament.<sup>17/</sup>

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<sup>17/</sup> Dr. Erhard was reelected without difficulty in 1965, but his tenure was short-lived because the Free Democrats withdrew from his coalition the following year in disagreement over financial policy matters. This produced a Cabinet crisis resulting in his replacement after 5 weeks of political bargaining. In December 1966, a grand coalition of Christian Democrats and Social Democrats under Chancellor Kurt George Kiesinger and Vice-Chancellor Willy Brandt was formed.

Critical elements of the German society who had always viewed German postwar development with suspicion and were sensitive to any signs of anti-democratic tendencies now concluded that there was need for an opposition voice outside of Parliament that could reflect their views.

From this point on, the various groups in the movement deliberately sought to cooperate among themselves in order to familiarize society with their views. Since they believed that the parliamentary course was not open to them, they decided to publicize their cause through highly visible actions. This decision was the first step toward radicalizing the movement.

The most significant events marking this development took place in West Berlin. In 1956, the Free University of Berlin (die Freie Universität zu Berlin) planned to commemorate the capitulation of Germany 20 years earlier. The student council asked the Rector, the head of the university, to invite journalist Erich Kuby to give an address. Kuby, a determined opponent of the Cold War, had expressed years before, in 1958, the view that the name Free University in fact indicated "an extreme degree of non-freedom." The name, he said, had been intentionally chosen to imply that the old Humboldt University, now in East Berlin, was not free. He considered this to be a deliberate aggravation of the Cold War.

Knowing of Kuby's views, the Rector refused to invite him to speak. The indignant students protested against the decision, claiming that in light of the university's policy, Kuby's earlier criticism was fully justified. The "Kuby affair" also became an issue in the press and on television.

Although a new Rector was subsequently appointed, the conflict between students and university authorities smoldered on. Another popular cause for students at this time was the military escalation by the United States in Vietnam. Through the rest of 1965 and all through 1966, students demonstrated against the "dirty war in Vietnam." These demonstrations repeatedly brought students and police into angry clashes.

On June 2, 1967, the Shah of Iran and his wife the Empress Farah Diba were officially welcomed to Berlin. That evening they were to be driven in a motorcade to the Berlin Opera House to attend a performance of "The Magic Flute." About eight o'clock, students arrived on the scene to protest the visit of the Shah because they considered him to be a symbol of oppression. When the students started to hurl stones, eggs, and tomatoes, the police turned water cannon on them and then proceeded to pursue the fleeing students. Suddenly, without warning, police sergeant Karl-Heinz Kurras fired, and a man fell. He died about 2 hours after reaching the hospital. Soon it became known

that the man was Benno Ohnesorg, a 26-year-old Protestant student from Hannover, that he was married, and that his wife was pregnant.

For days, students brought flowers to the spot where Ohnesorg had been shot. Student and party meetings were held through the following days and nights. At a meeting in the SDS offices on the night of June 3, a girl named Gudrun Ensslin protested hysterically that the "fascist state" and its leadership belonging "to the generation of Auschwitz" were out to kill them all. Writer Günter Grass declared that the killing of Ohnesorg was "the first political murder in the Federal Republic."

During these days, an increasingly radicalized student movement emerged whose sense of eliteness, hatred for liberal democracy, anti-Semitism, attraction to violence, and adoration of a charismatic leader cannot be understood without first comprehending the long history of German student movements.

Karl Stern, a distinguished German psychiatrist, has summarized the character and significance of German student movements as follows: <sup>18/</sup> "For some unknown reason, the relationship between generations, particularly that between father and son, seems much more

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<sup>18/</sup> Karl Stern, The Pillar of Fire 48-49, 62-63 (1951).



problematic in Germany than in Anglo-Saxon countries....[In school] the teacher was always a victim of aggression and hostility. He was attacked by means of glue on the chair, stink bombs in the stove, noises of mysterious origin. It was not always funny. In reality, to some teachers life was hell on earth...."

As Stern saw it, "that extraordinary significance of the struggle of generations, that most peculiar biological revolt is nothing new in German history. It existed as 'Sturm und Drang' in the eighteenth century, it was immanent in the story of the Reformation, in other words, in the entire history of that German 'protest' of which Dostoievsky spoke." It was strong in ministers' sons like Nietzsche who "made fun of God," suggesting "a neurosis, a revolt against the father's house."

Violence pervaded the German student scene. In 1924, according to Stern, "our classmates wore daggers, revolvers and arm-ribbons." There were apparent "examples of rebellion without aim, of a cynical liking for revolution, and a love of protest and force for their own sake."

"Even today," continued Stern, "when I think of those eighteen-year-olds, I have the feeling one has while facing a man with some uncanny mental disturbance....'Protest for the sake of

protest,' and the 'Revolution of nihilism'..." were descriptive of the mentality of "the youngsters in Munich during the post-war years."

The first student movement came into being in Germany during the years after the War of Liberation against Napoleon. It was born out of a rebellion against authoritarianism and disenchantment with the older generation. The whole aim of the newly organized Burschenschaft of the German students was totalitarian. These student activists were historicists, terrorists, and anti-Semites, as well as Christian republicans. As Heinrich von Treitschke, a philosopher-poet, wrote:

The conceit of the Burschen now became intolerable. With important mien, the executive and the members of the committee strode every afternoon up and down the market place [in Jena], deliberating in measured conversation the weal of the fatherland and of the universities; they regarded themselves as lords of this small academic realm, all the more because most of the professors exhibited for these youthful tyrants a quite immoderate veneration, compounded of fear and benevolence; even now, the leaders of the

Burschenschaft looked forward to the time when their organization would rule all Germany.<sup>19/</sup>

By mid-century, the force of the German student movement was beginning to dissipate and within a few years upon the emergence of the highly authoritarian Bismarckian order in Germany, the students became willingly acquiescent. They no longer played a prominent part in politics until the 1920's. Their one aim for decades was to attack the Jews.

No wonder that most of the students after World War I became doctrinal Nazis long before they formally joined the party. Moreover, when the Student Union--organized in the time of Bismarck--officially dissolved itself in 1935, Adolf Hitler praised the action, seeing it as a unifying gesture that opened the way for students to join the National Socialist Party. In effect, the German students of that time had done everything possible to discredit themselves in the eyes of the postwar generation.

In April 1968, almost a year after Ohnesorg's death in Berlin, a major department store in Frankfurt am Main was set on fire. The next day Andreas Baader, Gudrun Ensslin, and two others

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<sup>19/</sup> Heinrich von Treitschke, History of Germany in the Nineteenth Century 52 (1917).

were apprehended as suspects. The following October they were brought to trial and found guilty. During the proceedings, Ensslin asserted: "We did it out of protest against the indifference toward the war in Vietnam."<sup>20/</sup> Baader made a kind of confession, too:

I admit that on April 2, shortly before closing time, I put a paper bag which contained a mechanism into an Old German wardrobe. It was intended to destroy the wardrobe, not more. We had no intention of endangering people or even causing a real fire....Only monopoly capitalism and the insurances, which are suffocating in profits, were to be hit at.<sup>21/</sup>

Less than 2 weeks after the department store fire, a well-known leader of the New Left in West Berlin, Rudi Dutschke, was shot three times by a young housepainter who thought Dutschke's political beliefs undermined the German society. Dutschke survived, but the shooting further radicalized the students. Journalist Ulrike Meinhof justified and defended their subsequent actions and the Extraparliamentary Opposition in her column:

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<sup>20/</sup> Jillian Becker, Hitler's Children 86 (1977).

<sup>21/</sup> Id.

The boundary between verbal protest and physical resistance has been transgressed in the protests against the attack on Dutschke these Easter holidays for the first time in a massive way, by many, not just individuals, over days, not just once, at many places, not only in Berlin, in actual fact, not only symbolically....Resistance was practiced. Was that all senseless, unrestrained, terrorist, apolitical, powerless violence?

Let us state: Those who from political power positions here condemn stone throwing and arson, but not the incitement of the House of Springer, not the bombs on Vietnam, not the terror in Iran...their commitment to non-violence is hypocritical....Johnson, who declares Martin Luther King to be a national hero, Kiesinger, who regrets the attempted assassination of Dutschke telegraphically-- they are representatives of the power against which King and Dutschke stood, the violence of the system, which brought forth Springer and the Vietnam War. They lack both the political and the moral legitimacy to protest against the students' will to resist.<sup>22/</sup>

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22/ Konkret of May 1, 1968, p. 1.

On May 14, 1970, Andreas Baader was freed from Tegel Prison in West Berlin by several armed comrades, among them Ulrike Meinhof.<sup>23/</sup> The escape marked the beginning of the Red Army Faction (RAF, die Rote Armee Fraktion), the first organized terrorist group in the Federal Republic. From Germany, Baader, Ensslin, and Meinhof moved through Italy, Yugoslavia, Bulgaria, Turkey, Lebanon and Syria and finally to a Palestinian camp in Jordan.

In July 1971, a second terrorist group, the June 2nd Movement was formed by former students of the Free University. Despite the death of two of its leaders, the Movement has played a significant role on the German terrorist scene.

Two years after his breakout from prison, Baader and companions Holger Meins and Jan-Carl Raspe were wounded and arrested after a shootout with police in Frankfurt am Main on June 1, 1972. Gudrun Ensslin and Ulrike Meinhof were arrested shortly thereafter. All were placed in pretrial detention.

More than two years later, Holger Meins died in prison on November 9, 1974, after a 2-month hunger strike. In retaliation,

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<sup>23/</sup> The cases listed in this study mark only the most serious of over 2,000 terrorist acts.

Günter von Drenkman, president of West Berlin's highest court, was killed the next day by several members of the June 2nd Movement.

Then on March 27, 1975, Peter Lorenz, chairman of the CDU and a candidate for Mayor of West Berlin, was kidnapped by the June 2nd Movement three days before the elections. The Movement demanded the release of six imprisoned terrorists in exchange for Lorenz. Five of the imprisoned terrorists were released (one refused to be exchanged) and flown to Frankfurt am Main and then on to South Yemen. Lorenz was promptly released in West Berlin. Over the next 5-6 months, eight suspects in the Lorenz kidnapping were arrested.

The month following the Lorenz kidnapping, six terrorists carried out an armed raid on the Embassy of the Federal Republic in Stockholm. The terrorists were members of the Socialist Patients' Collective (SPK) organized by Dr. Wolfgang Huber, a former scientific assistant at the Psychiatric-Neurological Clinic of Heidelberg University. They demanded the release of 22 other terrorists imprisoned throughout the Federal Republic in exchange for the hostages they had seized in the raid, among them the German Ambassador. When the Government refused to free the imprisoned terrorists, two of the hostages were killed. The other hostages were finally freed by the police, and two of the six terrorists were fatally wounded.

After Ulrike Meinhof hanged herself in her prison cell on May 9, 1976, two West German firms in Paris were bombed the same day in response to her death. The following day the U.S. Armed Forces radio station in Bavaria was bombed.

Almost a year later, on April 7, 1977, Siegfried Buback, the Federal Prosecutor of the Federal Republic, was killed in Karlsruhe on his way to work. Responsibility was claimed by the Ulrike Meinhof Action Group. Later that month the Second Criminal Senate of the Land Baden-Württemberg sentenced Andreas Baader, Gudrun Ensslin, and Jan-Carl Raspe to life imprisonment for murder.

In July, Dr. Claus Croissant, defense lawyer of numerous terrorists, left the Federal Republic and applied for asylum in France because he feared persecution.

At the end of the same month, Jürgen Ponto, President of the Dresdner Bank, was killed at his home in Oberursel/Hessen.

Early in September, Hanns Martin Schleyer, President of the Federation of German Industry, was kidnapped and then killed after having been held by terrorists for 45 days. While Schleyer was being held, another terrorist group closely affiliated with those who kidnapped Schleyer skyjacked a Lufthansa Boeing 737 with 86 passengers on board. The passengers were finally freed by a



special anti-terrorist group of the Federal Border Guard flown to Mogadishu, Somalia, where the plane had finally landed. The significance of these two terrorist acts lies in the fact that the Federal Government proved in practice, for the first time, the effectiveness of the anti-terrorist legislation (see Part VI) under very crucial circumstances.

Convinced that the Federal Government under no circumstances would release them, Andreas Baader and Gudrun Ensslin committed suicide in the Stammheim Prison in Stuttgart. Jan-Carl Raspe, who had shot himself in his cell, died soon afterward in the hospital.

#### IV. Emergency Legislation

##### A. Legislative History

The political extremism facing the Federal Republic led the country's political bodies to consider emergency legislation. After an emergency meeting on April 17, 1968, it was announced that the Government would use all legal means to deal with radical left-wing student groups such as the Socialist German Student League (SDS). Thirteen days later, the Bundestag held a special meeting at which Interior Minister Ernst Benda (CDU) pinned much of the blame on the SDS. The next month, during the second reading of the proposed emergency legislation in the Bundestag, huge demonstrations were held in

Bonn in which the SDS played a leading part. Other protest meetings took place in many universities of the Federal Republic.

Following two days of stormy debates, the Bundestag on May 16, 1968, completed the second reading of the emergency legislation that required, according to the Constitution, a two-thirds majority vote for passage. On the next day the Federal Government asked the three Western powers (the United States, Britain and France), in conformity with the Occupation Statute, to endorse the pending emergency legislation.<sup>24/</sup>

Less than two weeks later, the three governments informed the Foreign Minister of the Federal Republic, Willy Brandt of the Social Democratic Party, that they were prepared to give up their reserved powers as soon as the Federal Government was equipped to deal with national emergencies. On May 30, 1968, the Bundestag passed the emergency legislation by a vote of 384 to 100, with one abstention.<sup>25/</sup>

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<sup>24/</sup> Notstandsgesetze 12 ff. (München, 1969).

<sup>25/</sup> Id., 1968 and 1969; Darmstadt, 1969.

B. The Sixteenth Amendment to the Basic Law<sup>26/</sup>

Articles 92, 95, 96, 99, and 100 of the Basic Law were amended on June 18, 1968, and Article 96a was repealed. The amendments concerned court organization (Art. 92); the highest courts of justice of the Federation (Art. 95); and assignment of competences to the Federal Constitutional Court and the highest Federal courts in matters involving the application of laws of the Laender (Art. 99). Article 100 was amended to require the consent of the Federal Constitutional Court if any constitutional court of a Land intended to deviate from a decision of the Federal Constitutional Court. The new Article 96, which incorporated the content of the repealed Article 96a, was itself subsequently amended.<sup>27/</sup>

C. The Seventeenth Amendment of the Basic Law<sup>28/</sup>

Articles 9, 10, 11, 12, 19, 73, 87a, and 91 were amended on June 24, 1968. Also, as part of the Seventeenth Amendment, Articles 59a, 65a, paragraph (2), 142a, and 143 were repealed. Articles

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<sup>26/</sup> Law on the Amendment of the Basic Law of June 18, 1968, BGBI. I, p. 657.

<sup>27/</sup> Laws on the Amendment of the Basic Law of May 12, 1969, BGBI. I, p. 363, and August 26, 1969, BGBI. I, p. 1357.

<sup>28/</sup> Law on the Amendment of the Basic Law of June 24, 1968, BGBI. I, p. 711.

12a, 53a, 80a, and 115a-1 were introduced for the first time, and new provisions were inserted in Articles 20 and 35.

1. State of Defense Articles (115a-1)

All of the above listed amendments were made necessary by the highly controversial "state of defense" provisions contained in the new Articles 115a-1.

Article 115a answers a fundamental question, namely, when does an emergency exist? It exists, specifies the Article, if the Federal Republic is under attack by an armed force or if such an attack is directly imminent. Only then can the Federal Government request the Bundestag to determine a state of defense. The Bundestag can, with the consent of the Bundesrat, establish the existence of a state of defense if there is a two-thirds majority of the total votes cast in both houses, with at least a majority in the Bundestag.

The Basic Law further provides that the Joint Committee (der Gemeinsame Ausschuss), <sup>29/</sup> acting as a kind of substitute legislature in times of extreme emergency, shall make the determination in place of the Bundestag and Bundesrat if there is urgent need for immediate action and it is absolutely impossible for the Bundestag to meet in time, or if there is no quorum present in that body.

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<sup>29/</sup> See Art. 53a of the Basic Law, supra note 8.

The use in Article 115a of the words "imperatively," "immediate action," and "insurmountable obstacles" ensures that the Joint Committee can act effectively on behalf of the Bundestag and Bundesrat in extraordinary emergency situations.

The determination of a state of defense becomes effective when promulgated by the Federal President, as specified in the Law.

In case of a surprise attack, the determination of a state of defense "shall be deemed to have been made and promulgated at the time the attack began."

According to Article 59, paragraph (1), the international representation of the Federal Republic is vested in the Federal President. Thus, under paragraph (5) of Article 115a, only he can issue an internationally valid declaration regarding the existence of a state of defense, provided that a state of defense has been determined, the federal territory is under attack by an armed force, and the Bundestag or the Joint Committee agrees.

Article 115b delegates the power of command over the German Armed Forces to the Federal Chancellor during a state of defense.

Article 115c permits the Federation to exercise concurrent legislative responsibility during a state of defense. Of particular interest is the provision of paragraph (2)2 restricting the

deprivation of liberty. In this way, the Basic Law attempts to prevent the recurrence of some of the abuses practiced by the Nazi Regime.

When a state of defense is determined, the legislative branch facilitates action by dispensing with its usual parliamentary procedures, as specified in Article 115d.

Article 115e contains provisions on the status and functions of the Joint Committee while a state of defense exists. This Committee shall have the status of both the Bundestag and the Bundesrat and shall exercise their rights as one body under these conditions:

If...the Joint Committee determines with a two-thirds majority of the votes cast, which shall include at least the majority of its members, that insurmountable obstacles prevent the timely meeting of the Bundestag, or that there is no quorum in the Bundestag....

Article 115f gives the Federation extraordinary powers during a state of defense to:

1. commit the Federal Border Guard throughout the federal territory;
2. issue instructions not only to federal administrative authorities but also to Land governments....

Article 115g ensures the continued normal functioning of the Federal Constitutional Court and its judges during a state of defense. It further ensures the inviolability of the constitutional status and responsibilities of the Federal Constitutional Court as provided for in the Basic Law <sup>30/</sup> and in the Law on the Federal Constitutional Court. <sup>31/</sup>

Article 115h describes the legislative terms and terms of office during a state of defense.

Article 115i grants extraordinary powers to the Land governments if there is no effective Federal response to an emergency situation. But once the emergency has passed, the Federal authorities may then revoke any measures previously enacted by the Land governments.

Article 115k gives emergency legislation supremacy over existing legislation for the duration of an emergency. Thus emergency laws do not cancel existing legislation but only temporarily suspend it. This is an exception to the general rule that a subsequently enacted law supersedes previous legislation. Emergency

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<sup>30/</sup> See Arts. 93 and 94 of the Basic Law, id.

<sup>31/</sup> BGBI. 1971, I, p. 105.

legislation automatically ceases at the times designated in paragraphs 2 and 3 of this Article.

Article 1151 ensures the supremacy of the Bundestag and the Bundesrat over the Joint Committee by reserving to the legislative branch the power to repeal or revoke laws enacted by the Joint Committee.

2. Amended Articles (9-12a, 19, 73, 87a, 91)

The amendments are discussed below in numerical order:

Article 9 in its original form already had three paragraphs concerning the right of all Germans "to form associations and societies." The original third paragraph read:

The right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and to all trades and professions. Agreements which restrict or seek to impair this right shall be null and void; measures directed to this end shall be illegal.

This sentence was added to paragraph (3) with the adoption of the Seventeenth Amendment:

Measures taken pursuant to Article 12a, to paragraphs (2) and (3) of Article 35, to paragraph (4) of Article 87a, or to Article 91, may not be directed against any industrial



conflicts engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions.

This addition was obviously designed to prevent the abuse of emergency powers during a state of defense.

The original text of Article 10 dating from 1949 stated: "Privacy of posts and telecommunications shall be inviolable. This right may be restricted only pursuant to a law." But when the Article was amended, the second sentence was placed at the beginning of a new second paragraph, which states that such a law may provide

...that the person affected shall not be informed of any such restriction if it serves to protect the free democratic basic order or the existence or security of the Federation or a Land, and that recourse to the courts shall be replaced by a review of the case by bodies and auxiliary bodies appointed by Parliament.

This sentence has raised certain questions of constitutionality, in view of Article 19 on the restriction of basic rights. Paragraph (4) of this Article provides that anyone whose basic rights are violated by a public authority may seek redress in a court of law. But since

the Amendment does not require a public authority to divulge information concerning the person affected, that person obviously cannot take steps to protect his rights if he is unaware of action taken against him. Furthermore, paragraph (2) of Article 20 establishes the allocation of power between the three branches of government. In harmony with this provision, Article 92 states:

Art. 92. (Court organization) Judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the Laender.

From a practical standpoint, however, the limitation defined in paragraph (2) of Article 10 is justifiable on the grounds that the state's security interests must supersede protection of individual rights during times of emergency.

The second paragraph of Article 11 on freedom of movement was changed as part of the Seventeenth Amendment. It added another condition justifying legislative restrictions on the freedom of movement, namely, whenever it

...is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or a Land....

The amendment of Article 12 on the right to choose a trade, occupation, or profession, as well as the insertion of a lengthy Article 12a, were closely related to military and civil defense considerations. Article 12a, paragraph (1), specifies:

Men who have attained the age of eighteen years may be required to serve in the Armed Forces, in the Federal Border Guard, or in a Civil Defence organization.

In Article 19 on the restriction of basic rights, the right of any person to have recourse to the courts in cases of violations by public authorities was left unchanged. However, one important and controversial sentence was added to paragraph (4):

The second sentence of paragraph (2) of Article 10 shall not be affected by the provisions of this paragraph.

As previously noted, according to this sentence, legislation pertaining to the privacy of posts and telecommunications does not have to provide for notification of persons affected.

In 1949, when it first appeared, Article 73 listed the matters in which the Federation had exclusive power to legislate. Originally the first item consisted of only two words: "foreign affairs." Then in 1954, it was expanded to read: "foreign affairs,

as well as defence, including both military service for males over 18 years and the protection of the civilian population." It was simplified in 1968 to: "foreign affairs as well as defence including the protection of the civilian population."

Article 87a on the Armed Forces was first inserted in 1956. Its paragraph (1) read as follows:

The numerical strength and general organizational structure of the Armed Forces raised for defence by the Federation shall be shown in the budget.

A few months later, three more paragraphs were added. The functions of the Armed Forces were redefined in relationship to situations involving a "state of defense" or a "state of tension." According to paragraph (4), the Armed Forces may also be called upon to support police forces and the Federal Border Guard under conditions envisaged in paragraph (2) of Article 91 on averting dangers threatening the existence of the Federation or of a Land. However, the legislators were very conscious of the painful lessons from the Nazi era and added to paragraph (4) of Article 87a this final sentence: "Any such use of Armed Forces must be discontinued whenever the Bundestag or the Bundesrat so requests."

Article 91 was designed to define the steps that a Land may take in cases of imminent danger to the free democratic order of the

Federation or of a Land. According to the Amendment, a Land may request the assistance of "the forces and facilities of other administrative authorities and of the Federal Border Guard."

3. Inserted Articles (20, 53a, 80a)

In addition to the amended Articles discussed above, certain other provisions were inserted in the Basic Law for the first time. Besides Article 12a (see p. 44), Articles 20, paragraph (4); 35, paragraphs (2) and (3); and 53a and 80a were added.

Here again, in Article 20, paragraph (4), memories of the Nazi era are apparent. The right to resist anyone who tries to abolish the constitutional order is clearly identified as an ultimate remedy.

As part of the Seventeenth Amendment, two paragraphs were added to Article 35 on legal, administrative, and police assistance. Paragraph (2) pertaining to natural disasters or especially grave accidents was again amended four years later.<sup>32/</sup> In such cases, a Land may request assistance from the police or other forces, such as the civil defense corps, fire brigades, and similar units from other

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<sup>32/</sup> Law on the Amendment of the Basic Law of July 28, 1972, BGBI. I, p. 1305.

Laender. A Land may also request assistance from the Federal Border Guard or the Armed Forces. Paragraph (3) refers to disasters of such magnitude that they endanger an area larger than a Land. In such circumstances, the Federal Government may instruct the Laender governments to place their police forces at the disposal of others. Such measures, however, may be revoked at any time upon the request of the Bundesrat.

Article 53a created a new body called the Joint Committee. Since it did not fix the exact number of members, the Bundestag and Bundesrat agreed that 22 members should come from the Bundestag and 11 from the Bundesrat.

Article 80a introduced a new constitutional concept, the "state of tension," in connection with the provisions for governing in emergencies. Unfortunately, no specific provision is made for the termination of a state of tension by the Bundestag, but only for the termination of measures taken during that time. One therefore assumes that the Bundestag could declare the termination of a state of tension by a majority vote.

## V. Special Provisions on Civil Servants

### A. Background

The Resolution of the Prime Ministers of the Federation and the Laender of January 28, 1972, affecting 3 million civil servants,

immediately became a focal point of controversy both in the Federal Republic and abroad. Misnamed the Decree on Radicals (Radikalenerlass), it was alleged to impose a "Berufsverbot," a term implying that people are prevented from choosing or practicing their vocation or profession. But a detailed analysis of this and other resolutions discussed below proves that they did not have this aim or effect. These resolutions were addressed exclusively to those persons appointed to civil service and to other government employees.<sup>33/</sup> Any other interpretation is incorrect and therefore misleading.

The requirement that any candidate for appointment to the civil service "must be able to guarantee that he will at any time defend the free democratic basic order in the spirit of the Basic Law" is similar to one contained in the United States Code, which states:

An individual may not accept or hold a position in the Government of the United States or in the government of the District of Columbia if he--

(1) advocates the overthrow of our constitutional form of government;

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<sup>33/</sup> For an explanation of the different categories of civil servants, see: Carl Greifeld, Rechtswörterbuch 138 ff. (München, 1978).

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government....<sup>34/</sup>

Despite these shared values and concepts, however, critics in the United States, Italy, France, and in the Benelux and Scandinavian countries have declared the loyalty requirement of the German laws to be an undesirable development in a democratic country. This criticism often overlooks two very important factors. One is a historical consideration of the reasons for the failure of the Weimar Republic. The second is the incomparable legal status of civil servants in the Federal Republic of Germany. These two factors were clearly voiced by Willy Brandt, former Federal Chancellor and co-sponsor of the 1972 Resolution, in an interview on Dutch television on December 4, 1977:

Whether it was right or it was wrong, you must look at this in the context of the way in which we believed ourselves called upon to prevent a repetition of Weimar. Weimar had been ground to pieces between the large National Socialist Party on the one side and a large Communist Party

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<sup>34/</sup> 5 U.S.C. § 7311 (1976).



on the other side. When we started over, we picked up on a phrase that one of our major authors, Thomas Mann, coined while he was in exile. We wanted a forceful, a militant democracy, as he called it. I am sure he would disagree with some of the measures taken today. So I do not want to claim him as the author of specific measures, but only of the underlying intellectual concept. This was the concept, as many people described it when the Basic Law was written: democracy is not at everybody's arbitrary disposal. Those who reject its basic elements must not be given power to dispose of it. They have the same rights and enjoy the same legal protection as everybody else. But if they reject the basic democratic order, as it corresponds to our albeit brief constitutional tradition, they cannot at the same time occupy any civil service positions they want.<sup>35/</sup>

In order to make the special provisions on civil servants more understandable, it seems appropriate to explain some basic concepts of the German constitutional system.

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<sup>35/</sup> Press Release from the German Information Center of March 21, 1978, p. 7.

1. The German Civil Service. Even before 1945, the German civil service enjoyed a privileged position in the Government. The Reich Civil Service Code of 1873<sup>36/</sup> (in effect until 1937) applied only to a Reichsbeamter, that is, to any Beamter (official) employed by the Emperor or who, according to the Reich Constitution, was obliged to obey the regulations of the Emperor.<sup>37/</sup> Appointment as a Reichsbeamter was for life, unless otherwise specifically provided. The requirements for entry and advancement in the civil service were strict, and the stratification among its ranks was rigid. In addition to a number of social benefits, civil servants were entitled to generous pensions. The German Civil Service Code of January 26, 1937, left the general principles of the Reich Civil Service Code<sup>38/</sup> unchanged.

This professional civil service (Berufsbeamtentum) was recognized by the Federal Republic in its Basic Law as a legal institution deeply rooted in German tradition. Article 33 includes such

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<sup>36/</sup> Law on the Legal Relationship of Civil Servants of March 31, 1873, Reichsgesetzblatt [RGBl., earlier version of the official law gazette of Germany], p. 6.

<sup>37/</sup> Walter F. Dodd, ed., 1 Modern Constitutions 325 ff. (1909).

<sup>38/</sup> Law on German Civil Servants of January 26, 1937, RGBl. I, p. 39.

a wide range of rights and duties affecting the political status of all Germans that it is quoted in full below:

Article 33 (All Germans have equal political status)

- (1) Every German shall have in every Land the same political (staatsbuergerlich) rights and duties.
- (2) Every German shall be equally eligible for any public office according to his aptitude, qualifications, and professional achievements.
- (3) Enjoyment of civil and political rights, eligibility for public office, and rights acquired in the public service shall be independent of religious denomination. No one may suffer any disadvantage by reason of his adherence or non-adherence to a denomination or ideology.
- (4) The exercise of state authority as a permanent function shall as a rule be entrusted to members of the public service whose status, service and loyalty are governed by public law.
- (5) The law of the public service shall be regulated with due regard to the traditional principles of the professional civil service.

The requirements established in this Article emphasize the aptitude and qualifications of applicants and their loyalty to the Constitution. These requirements are uniformly regulated in the German Civil Service Code of 1953, which completely replaced the 1937 Code and is applicable to all Laender.<sup>39/</sup> Section 7, paragraph 1, states:

(1) Civil service positions shall be open only to persons who

1. are German nationals, according to Article 116 of the Basic Law;
2. guarantee that they will defend at all times the free democratic basic order in the spirit of the Basic Law;
3. a. meet all the requirements for a particular position; or  
b. are qualified because of previous professional experience within or outside the civil service.

(2) The Federal Minister of the Interior shall authorize exceptions to paragraph 1, whenever the urgent need for such appointments arises.

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<sup>39/</sup> Law on Federal Civil Servants of July 14, 1953, BGBI. I, p. 551, as amended, in the Version of July 17, 1971, BGBI. I, p. 1557.

The same principles are contained in the legislation of the Laender and in the overall wage agreements applying to wage and salary earners in the civil service.<sup>40/</sup> These legislative acts, it should be emphasized, are neither special laws nor ordinances of the Federal or Laender governments. Rather, they are legislative acts of free parliaments, as well as agreements between free trade unions and public employers' associations.

2. The Concept of a Free Democratic Basic Order  
(Die freiheitliche demokratische Grundordnung).

In discussions of provisions on civil servants, the concept of a free democratic basic order is often considered alongside the Constitution itself.<sup>41/</sup> But this viewpoint is misleading because the term "free democratic basic order" includes only the highest values of the constitutional system. These values are the elementary principles that make the constitutional system a liberal one, principles on which at least all parties must agree if this type of democracy is to function at all sensibly.

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<sup>40/</sup> For the entire legislation, see: Fundstellennachweis A, 1975 and 1977, p. 203.

<sup>41/</sup> Peter Frisch, Extremistenbeschluss... [hereafter cited as Frisch] 54 ff. (Leverkusen, 1977).

The Federal Constitutional Court in its famous SRP (Sozialistische Reichspartei) Decision of October 23, 1952, explained that the free democratic basic order constitutes:

...a system of government under the rule of law which excludes any form of despotic and arbitrary rule and is based on freedom, equality and government by the people according to the will of the existing majority. Its fundamental principles include at least the following: respect for the human rights of the individual to life and free development of his personality, the sovereignty of the people, the separation of powers, responsibility of government, the duty of the public authorities to act in accordance with the law, the independence of the courts, the multi-party principle, equality of opportunity for all political parties, and the constitutional right to form and exercise the functions of an opposition.<sup>42/</sup>

According to the above principles, all that the law at present demands of public servants in the Federal Republic is that they

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<sup>42/</sup> Supra note 12.

will support parliamentary democracy as understood by all the member states of the Council of Europe.<sup>43/</sup>

3. Loyalty to the Constitution (Verfassungstreue)

Under section 35, paragraph 1, of the Civil Service Code, civil servants must comply with certain requirements, including the following:

In his whole behavior a civil servant must demonstrate his support for the constitutional principles of freedom and democracy laid down in the Basic Law and do his utmost to stand up for their maintenance.<sup>44/</sup>

According to the wage agreements between employing authorities and civil servants' trade unions, this provision also applies to employees and workmen in the public service. Therefore, before an application for employment can be acted upon, the candidate must be considered likely to comply with the official duty specified above. The candidate, of course, must also meet such other previously

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<sup>43/</sup> Convention on the Protection of Human Rights and Basic Freedoms of November 4, 1959, in force in the Federal Republic of Germany since September 3, 1953, BGBl. II, p. 14 [1954].

<sup>44/</sup> Frisch, at 23.

mentioned requirements as German nationality, health, and the necessary educational qualifications.

#### 4. Extremist Groups

The Annual Report of the Federal Minister of the Interior names a whole series of extremist groups on the right and on the left. Their thinking and objectives aim to encroach upon the free democratic basic order and even to endanger the existence of the Federal Republic itself. These groups include the German Communist Party (DKP), the Marxist Student Federation Spartacus (MSB), the Socialist German Worker Youth (SDAJ), the Socialist Graduate School Federation (SHB), the Communist Party of Germany (KPD), the League Against Imperialism, the Communist Federation of West Germany (KBW), the Communist Party of Germany/Marxists-Leninists (KPD/ML) and the National Democratic Party of Germany (NPD).

Of these political groups, the German Communist Party (DKP) is the largest and is unique in its doctrinaire approach. The incompatibility of its conduct with the governmental system of the Federal Republic follows both from the Marxist-Leninist doctrine,<sup>45/</sup> which the DKP considers binding upon itself, as well as from the party's

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<sup>45/</sup> S. P. Tshaushov, ed., Ausgewählte Kapitel aus den Schriften von Karl Marx und Friedrich Engels (Sofia, 1950); V. I. Lenin, Shämtliche Werke (Wien, 1927).



established, concrete objectives, particularly those of national reunification. According to the present program of the DKP, the party "is guided in all its activities by the theory of Marx, Engels, and Lenin."<sup>46/</sup> The DKP thereby gives expression to the fact that it considers the writings and other testimonials by those thinkers and politicians to be the component parts of a unified doctrine complete within itself and, as such, makes it the basis for political thinking and action.

From the main writings of these three theorists, and from the voluminous literature connected with them, it becomes clear that Marxism-Leninism embraces two concepts: that of "dialectic materialism" and the other of "historical materialism." The concept of dialectic materialism includes the idea that all natural phenomena must be understood "materialistically" and that their development must be interpreted by the dialectic method. Historical materialism means to view the development of human society from the materialistic point of view. That is, the material life of society is primary and original; its spiritual life, however, is secondary and emanates from the primary. The material life of society is considered to be an

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<sup>46/</sup> Marxistische Blätter Heft 4, 1971; unsere zeit, Nr. 41 vom 9 October 1971, p. 2.

objective reality that exists independent of the human will, while the spiritual life of society, in contrast, is a reflection of objective reality. As a result of this materialistic outlook, the decisive importance of the "economic factor" in social development becomes clear. According to Marx and Engels, the economic structure of society is the basis by which the whole superstructure of legal and political institutions, as well as the religious, philosophical, and other ideologies (Weltanschauung) of every historical period must ultimately be explained. Since the first cause of all social development is to be found in economic conditions, the forces and conditions of production, and since, ultimately, the shaping of the conditions of production depends on who the owner of the means of production may be, the formation of different classes that oppose each other as the ruling and the downtrodden, as the exploiters and the exploited, becomes the decisive factor in social development. In this process, the ruling class is always the one that owns the means of production. Therefore, every human society is a "class society," and the conflict existing between these antagonistic classes--the so-called class war--is in its dialectic the driving force of social development.

If this general concept of social development is applied to the now existing historical conditions of bourgeois-capitalist society, then, according to this doctrine, the class war between the

bourgeoisie and the proletariat must ultimately be resolved by a social revolution. By transferring the means of production, this revolution will change the conditions of production so that the products themselves are enjoyed by society at large.

The bourgeois state claims for itself a position above classes as the "state of pure democracy." On the basis of these ideas, it is considered as a "dictatorship of the bourgeoisie," in effect an "executive committee of the capitalist class." This dictatorship, with its inner conflicts, must lead inevitably to the downfall of capitalism, to the victory of the proletariat, and to the dictatorship of the proletariat. The proletariat will rise in revolution, dethrone the bourgeoisie, and erect its own dictatorship. This will lead to the construction of a socialist social system in which class differences will disappear and the state will begin to "wither away." With that, the class and stateless form of communism, as the highest form of human society, will have been reached.

Reduced to a formula, the social development resulting from the Marxist-Leninist doctrine is: erection of a socialist-communist social order by means of a proletarian revolution and the dictatorship of the proletariat.

As far as Germany is concerned, the DKP finds the embodiment of the above ideals and theories realized in the German Democratic

Republic, and it is for these reasons that this Party and others influenced by it hold up East Germany as a model upon which the reunited Germany must be organized.<sup>47/</sup>

The Marxist Student Federation Spartacus, the Socialist German Worker Youth, and the Socialist Graduate School Federation are financially supported by the German Communist Party and also share its ideology.<sup>48/</sup>

The Communist Party of Germany, the League Against Imperialism, the Communist Federation of West Germany, and the Communist Party of Germany/Marxists-Leninists are leftwing groups based on the philosophy of Mao Tse-tung.<sup>49/</sup>

The only rightwing group of any significance is the National Democratic Party of Germany. Its objectives, which are based on the ideology of the Nazis, are unconstitutional.

B. The Resolution of the Prime Ministers of the Federation and the Laender of January 28, 1972. <sup>50/</sup>

During a discussion with the Federal Chancellor on January 28, 1972, the Heads of Government of the Laender, acting on a

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<sup>47/</sup> Frisch, at 67 ff.

<sup>48/</sup> Id.

<sup>49/</sup> Id. at 76-84.

<sup>50/</sup> Id. at 144 ff.

proposal of the Standing Conference of the Ministers of the Interior of the Laender, adopted in their Resolution a set of guidelines that attempted to spell out some specific criteria for the evaluation of civil service candidates. These guidelines, which were published in a Joint Circular by the Prime Ministers and all Land Ministers the following month did not create any new law, but sought to guarantee that existing laws would be applied impartially and without discriminating against anyone.

The Resolution deals exclusively with appointment to the civil service and retention in it. The mandatory requirement is that only persons who support the constitutional system may be appointed to the civil service, and the existence of such a commitment must be examined and decided individually in each case. Consequently, membership in an organization pursuing anti-constitutional aims and the failure to demonstrate support of constitutional principles of freedom and democracy as affirmed in the Basic Law cast doubt on a candidate's readiness to uphold these fundamental principles.

The most controversial aspect of the Resolution is the question of whether membership in a party with anti-constitutional goals is sufficient ground for rejecting a candidate. This question has been settled by the Federal Constitutional Court in its Decision of

May 22, 1975.<sup>51/</sup> In this Decision, the Court stated that every public servant has a special obligation of loyalty to the state and its constitution. Among other things, this requires, in particular, that a public servant must clearly disassociate himself from groups that aim to undermine the constitutional system. As delineated in the law, an act of disloyalty, either by a civil servant or by an employee in the public service, can lead to dismissal. Membership in a political party pursuing anti-constitutional aims may be considered as a factor in assessing a candidate for public service.

Moreover, the Federal Constitutional Court made it explicitly clear that membership in a political party that pursues anti-constitutional aims can be an important fact influencing the judgment of the candidate's personality, but cannot alone lead to his or her automatic rejection. In all such cases, further facts must be adduced which enable the authorities in question to judge the candidate's activities and motivations.

C. The Resolution of the Bundestag of October 24, 1975<sup>52/</sup>

The immediate result of the decision of the Second Chamber of the Federal Constitution Court was a Resolution issued by the

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<sup>51/</sup> Id. at 266 ff.

<sup>52/</sup> Id. at 145 ff.

Bundestag on October 24, 1975, requesting the Federal Government and the Laender to ensure the observance of the principles laid down in this decision. It was adopted by the governing majority parties (SPD/FDP), with the Opposition (CDU/CSU) rejecting the measure.

D. The Resolution of the Federal Government of May 19, 1976<sup>53/</sup>

Following the request of the Bundestag as expressed in its Resolution, the Federal Government on May 19, 1976, published a Resolution entitled "Principles for Deciding Upon a Candidate's Loyalty to the Constitution." This Resolution simply repeats the arguments of the request submitted to the Federal Government by the Bundestag.

E. The Practices of the Laender

By the early 1960's, it had already become obvious that procedural differences existed among the Laender in the way they rejected applicants for civil service positions. Attempts in 1972, 1975, and 1976 to ensure a uniform employment procedure failed mainly because it proved impossible for the Bundestag and the Bundesrat to reach an agreement on how to assess a person's membership in an organization having anti-constitutional aims. As a result, Laender with a Christian Democratic or Christian Socialist government consider themselves bound by the Resolution of January 28, 1972.

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<sup>53/</sup> Id. at 147 ff.

On the other hand, the Federal Government and those Laender with Social Democratic or Free Democratic governments follow the Federal Constitutional Court Decision of May 22, 1975. By that decision, the employing authority, when examining an individual case, must form a broader judgment of an applicant's personality. Under the procedural principles established on May 19, 1976, the Federal Government and the SPD/FDP governed Laender claim that membership in a political organization pursuing anti-constitutional aims does not necessarily mean that the applicant is lacking in loyalty to the Constitution.

In contrast, the CDU/CSU governed Laender maintain that generally it can be inferred from such membership that the applicant does lack the necessary loyalty. Therefore, the burden is on the applicant to prove his loyalty beyond all doubt, and if he cannot, he should be barred from the civil service.

An employing authority, in seeking to gain a comprehensive picture of an applicant, must ask the Federal Registration Office whether the applicant has any previous convictions. It must also ask authorities for internal security (Ämter für Verfassungsschutz) whether the applicant has ever been known to be an active opponent of the free democratic basic order. These agencies simply consult their card indexes that contain such data.



In every Land, an applicant must be told of any information held against him and must be given an opportunity to respond orally and in writing. In doing so, he may use the services of a legal adviser.

Under certain circumstances, rejected applicants may be reexamined by administrative courts (Verwaltungsgerichte). For this, the candidate must show reason to believe that the decision constituted a breach of two provisions of the Basic Law contained in Article 33. One requires that "[e]very German shall be equally eligible for any public office according to his aptitude, qualifications, and professional achievements." The other states that no one shall suffer a disadvantage in appointment to public office "by reason of his adherence or non-adherence to a denomination or ideology."

Once a candidate is appointed as a civil servant, he can be removed only by the judgment of a disciplinary court. In such proceedings it is not enough for the employing authority to offer doubts about his loyalty to the Constitution. It must prove that the civil servant has actually committed so serious a breach of his duty that the only appropriate sanction would be his removal from office.

VI. Recent Amendments to the Criminal and Criminal Procedure Codes <sup>54/</sup>

A. Background

In addition to the amendments of the Constitution and the German Civil Service Code described above, the parties represented in the Bundestag felt the need to make certain changes in the Criminal law in response to public pressure generated by the rise in terrorist activities. The resulting laws issued from 1974 to 1978 immediately caused heated debates. <sup>55/</sup>

Even by October 1975, the effects of such debate were so widespread that the German Section of Amnesty International felt obliged to write an open letter to the Federal President to call

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<sup>54/</sup> Criminal Code (CrimC) of May 15, 1871, as amended, in the Version of January 2, 1975, BGBI. I, p. 1; Criminal Procedure Code [CrimPC] of February 1, 1877, as amended, in the Version of January 7, 1975, BGBI. I, p. 129 and 650.

<sup>55/</sup> First Law on the Reform of the Criminal Procedure of December 9, 1974, BGBI. I, p. 3393; Supplemental Act to the First Law on the Reform of the Criminal Procedure of December 20, 1974, BGBI. I, p. 3693; 15th Law on Modification of the Criminal Code of May 18, 1976, BGBI. I, p. 1213; Law on Amendment of the Criminal Code, the Criminal Procedure Code, the Law on the Judiciary, the Law on Federal Administrative Regulations, and the Law on Execution of Sentences of August 18, 1976, BGBI. I, p. 2181; Introductory Law to the Law on the Judiciary of September 9, 1977, BGBI. I, p. 1877; Law on Modification of the Criminal Procedure of April 14, 1978, BGBI. I, p. 497.

his attention to "the steadily worsening political climate in the Federal Republic." It advised him that Amnesty International, despite its political independence, was finding it increasingly difficult to persuade Germans to sign even the most innocuous political petitions, such as one aimed generally at "the abolition of torture in the world."<sup>56/</sup>

In December 1975, the Reuters News Service made public the fact that the International Commission of Jurists had criticized the Federal Republic for endangering the rule of law.<sup>57/</sup> The ICJ based its criticism on an article written by Karin Rose, assistant at the Max-Planck-Institute for Foreign and International Criminal Law in Freiburg in Breisgau.<sup>58/</sup> Although she did not identify herself with the view that the new amendments were "incompatible with principles based on law and justice," she stated:

Whether one thinks that the current development of the reform of criminal procedure in the Federal Republic tends to protect or to endanger the rule of law, one thing

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<sup>56/</sup> Press Release, German Section of Amnesty International, October 7, 1975.

<sup>57/</sup> Reuters News Service, December 18, 1975.

<sup>58/</sup> Karin Rose, "The Baader-Meinhof Trials," Review of the International Commission of Jurists, No. 15, 46 (December, 1975).

is certain: Narrow limits have been set to its liberality and they are about to be drawn narrower still. Ten years of efforts to liberalize the law of criminal procedure have thus suffered a regrettable set-back.

Since emotionally charged arguments do not always reflect what is actually contained in laws, an objective analysis of these amendments is needed.

B. Special Provisions of the Criminal Code on Terrorist Activities

The recent amendments to the Criminal Code are aimed to give the authorities a more efficient means of combating the growing problem of terrorist activities.

The most important of the newly introduced provisions of the Criminal Code are sections 129 and 129a. Pursuant to paragraph (1) of section 129, anyone who forms an association (Vereinigung) whose aims or activities are directed towards the commission of an offense, or who participates as a member of, recruits for, or aids such an association, shall be punished by deprivation of liberty up to 5 years or by a fine.

Under paragraph (2) of the same section, however, these activities shall not constitute an offense if:

- (1) the association is a political party that has not been declared unconstitutional by the Federal Constitutional Court;
- (2) the commission of an offense represents an aim or an activity of minor importance, or
- (3) the aims and activities of the association constitute offenses under sections 84 to 87.<sup>59/</sup>

The provision under section 129, paragraph (2)2 is meant to preclude the application of this section to minor violations. Thus, the removal of posters, defacement of house walls, political defamation, or fighting during a demonstration would not constitute an offense under section 129.

The provision under section 129, paragraph (2)3 seeks to prevent the possibility of the same crime being punished twice, first under section 129 and then under sections 84 to 87.

Additionally, the court can, under paragraph (5) of section 192, dispense with punishment if the participant's guilt is insignificant or his participation is of minor importance. Furthermore, the

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<sup>59/</sup> See also: Schönke-Schröder, Strafgesetzbuch. Kommentar. 1046 (München, 1978).

court can reduce the punishment at its discretion or dispense with punishment under these provisions if the offender:

- (1) voluntarily and seriously endeavors to discontinue his association or the commission of an offense pursuant to the aims of the association, or
- (2) voluntarily and duly reports to the proper office his knowledge of offenses which he knows are being planned and could still be prevented.<sup>60/</sup>

On the other hand, ringleaders shall be punished by deprivation of liberty for not less than 6 months. The same punishment also applies to anyone if the case is particularly serious.<sup>61/</sup> Under section 129, the attempt to form a criminal association is an offense.<sup>62/</sup> Its provisions are qualified in section 129a, entitled "Forming a Terrorist Association." Pursuant to paragraph (1) of this section, anyone who forms an association whose aims or activities are directed towards the commission of specified crimes or who participates as a member of, or recruits for, or aids such an association, shall be

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<sup>60/</sup> Id. at 1048 f.

<sup>61/</sup> CrimC, sec. 129, par. 4.

<sup>62/</sup> Id., par. 3.

punished by deprivation of liberty for 6 months to 5 years. These crimes are:

- (1) murder, homicide, genocide;<sup>63/</sup>
- (2) offenses against personal freedom as listed in sections 239a or 239b,<sup>64/</sup> or
- (3) offenses constituting a public danger under sections 306 to 310b, paragraph (1); section 311, paragraph (1); section 311a, paragraph (1); section 312; section 316c, paragraph (1); or section 324.<sup>65/</sup>

In addition to punishment by deprivation of liberty for at least 6 months the court can forbid the offender to hold any public office<sup>66/</sup> or to acquire any rights from a public election<sup>67/</sup> for a period of 2-5 years.<sup>68/</sup>

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<sup>63/</sup> Id., secs. 211, 212, 220a.

<sup>64/</sup> Supra note 59, at 1549 ff.

<sup>65/</sup> Id. at 1904 ff.

<sup>66/</sup> CrimC, sec. 129a, par. 6.

<sup>67/</sup> Id.

<sup>68/</sup> Id., sec. 25, par. 2.

Ringleaders shall be punished by deprivation of liberty up to 10 years.<sup>69/</sup>

Even the attempt to form a terrorist association is an offense.

Crimes of conspiracy also exist in the United States and some West European countries. This concept is well defined in the Federal Criminal Code of the United States, for example.<sup>70/</sup> A person is guilty of criminal conspiracy when he agrees with one or more persons to engage in or cause the performance of conduct constituting a crime.

In English law,<sup>71/</sup> conspiracy results when several persons join together for any unlawful act, whether or not it is a felony. Something similar to the German legislation on association is contained in England in section 1 of the Prevention of Terrorism Act.<sup>72/</sup> According to it, anyone who belongs to a specified, officially

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<sup>69/</sup> Id., sec. 129a, par. 2.

<sup>70/</sup> 18 U.S.C. § 371 (1976). See also: 50 U.S.C. § 783 (1970).

<sup>71/</sup> 11 Halsbury's Laws of England, "Criminal Law," par. 58 (4th ed.)

<sup>72/</sup> The Prevention of Terrorism Act 1976, c. 8.



described organization, or who confesses to his participation in it, shall be punished.

In France, Article 256 of the Criminal Code<sup>73/</sup> makes punishable the "association de malfaiteurs," while Article 87 makes punishable an agreement to commit political crimes.

A further important provision of the German amendments is section 88a that punishes support of an offense directed against the Constitution (verfassungsfeindliche Befürwortung von Straftaten). Pursuant to paragraph 1 of this section, "anyone who disseminates, publicly issues, placards, produces or otherwise renders accessible a text that supports an unlawful act named in section 126, or who obtains, provides, keeps, offers, announces, praises, or attempts to import or export it within the spatial jurisdiction of the German Criminal Code" shall be punished.<sup>74/</sup> Such text must be of a nature that under special circumstances encourages the willingness of other persons to commit the offense against the existence or the safety of the Federal Republic of Germany. The punishment is deprivation of liberty up to 3 years or a fine. Furthermore, whoever publicly or

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<sup>73/</sup> Code pénal 129 (Paris, Dalloz, 1976-1977).

<sup>74/</sup> CrimC, sec. 88a.

in an assembly advocates the commission of an unlawful act named in section 126, paragraph 1, nos. 1-6, in order to encourage the willingness of other persons to commit the offense against the Federal Republic of Germany or the fundamental principles of the Constitution shall be punished in the same manner.<sup>75/</sup>

The "glorification of violence"<sup>76/</sup> and public "approval of criminal acts"<sup>77/</sup> are also punishable.

Similar legislation exists to a rather extended degree in France in the Law on the Freedom of the Press.<sup>78/</sup> A special provision in it prohibits writing that may induce persons to commit crimes. This also includes not only the glorification or approval of crimes, especially murder, plunder, arson and theft, but also war crimes and collaboration. The punishment is imprisonment up to 5 years and fines from 300-300,000 francs (ca. US \$65-\$65,000).

In England, according to the Public Order Act, conduct conducive to a breach of peace is prohibited. Whoever distributes

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<sup>75/</sup> Id., par. 2.

<sup>76/</sup> Id., sec. 131.

<sup>77/</sup> Id., sec. 140.

<sup>78/</sup> Supra note 73, at 735.

or displays any writing, sign or visible representation that is threatening, abusive or insulting with intent to provoke a breach of peace can also be held responsible. Punishment ranges from imprisonment up to 3 months for a summary conviction or 12 months for a conviction on indictment, or a fine of between 100-500 pounds, or both.<sup>79/</sup>

C. Special Provisions of the Criminal Procedure Code on Terrorist Activities

1. Litigation in the Absence of the Accused

Pursuant to sections 231a, 231b, and 255, the court can hold hearings in the absence of the accused if he "intentionally and willfully causes his own unfitness to stand trial."<sup>80/</sup> It should be emphasized that this provision is not contrary to the Constitution or to the European Convention on Human Rights because the court can deprive the accused of his right to be present only if he tries to obstruct or delay the proceeding.<sup>81/</sup> Litigation in the absence of

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<sup>79/</sup> The Public Order Act, 1936, I Edw. 8 & I Geo. 6, c. 6, as amended by The Public Order Act, 1963, c. 52.

<sup>80/</sup> CrimPG, sec. 231a, par. 1.

<sup>81/</sup> Theodor Kleinknecht, Strafprozessordnung...564 ff. (München, 1977).

the accused is admissible, however, only after he has been interrogated about the charge. If a trial is held in his absence and he does not have a defense attorney, the court must appoint one. Furthermore, if the accused regains his fitness to stand trial, the presiding judge must inform him of the hearings conducted in his absence.

These provisions were provoked by the organized hunger strikes of the terrorists held in various German penitentiaries and were intended to prevent a delay or even a stoppage of the proceedings against those terrorists.

Section 231b takes into account in its provisions a new type of criminal, as manifested in the behavior of the imprisoned terrorists. According to this section, an accused person who is excluded from the courtroom as a result of his hostile conduct will continue to be excluded so long as his presence is considered incompatible with the peaceful conduct of the trial.<sup>82/</sup> Under sections 231a and 231b, the presence of the accused may be dispensed with even before interrogation on the matter at issue, provided he has been given the opportunity to plead to the charge.<sup>83/</sup>

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<sup>82/</sup> CrimPC, sec. 231b, par. 1.

<sup>83/</sup> Supra note 81.

In France, "permission to conduct proceedings in the absence of the defendant" is much broader than in the Federal Republic. There, whoever has been called to appear and does not may be subject to a proceeding in his absence without further formality.<sup>84/</sup>

In England, where no general legal provision for this exists, the courts decide on a case-by-case basis.

## 2. The Exclusion of a Defense Counsel

Perhaps the most controversial provisions of the amendments to the criminal law are those concerning the exclusion and surveillance of defense attorneys. The exclusion of a defense counsel from a particular criminal trial because of his serious interference with criminal procedures is, in its written form, a new legal institution in German criminal law. It was introduced as a consequence of the exclusions of the Becker couple and Jurgen Laubscher on November 30, 1971, by the Magistrate's Court of Karlsruhe, and also that of Otto Schily, defense attorney of Gudrun Ensslin, by the order of the Investigating Judge of the Federal Supreme Court. The exclusion orders against the Beckers and Laubscher were reversed by the district court

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<sup>84/</sup> CrimPC, Art. 320, par. 1, and Art. 410, par. 2, Code de procédure pénal 206, 238 (Paris, Dalloz, 1974-1975).

(Landgericht) of Karlsruhe on the basis of inadequate evidence for consideration. The exclusion of Otto Schily was affirmed by the Third Criminal Senate of the Federal Supreme Court on August 25, 1972, but was finally reversed by the decision of the Federal Constitutional Court the following February.<sup>85/</sup> The latter court referred with disapproval to the lack of any statutory grounds for excluding defense attorneys from certain cases. The Court called this a "highly unsatisfactory legal situation" and invited the Bundestag and the Bundesrat to introduce suitable legislation.

Since the amendments of 1975, a defense counsel in the Federal Republic can be excluded from the trial if he is suspected of:

- (1) having participated in any offense;
- (2) misusing his right of contact with the incarcerated client in order to commit an offense or to endanger the security of a penitentiary;
- (3) aiding and abetting an offense; or
- (4) endangering the security of the State.<sup>86/</sup>

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<sup>85/</sup> BVerfGE 34, p. 293 [26].

<sup>86/</sup> CrimPC, sec. 138a, par. 2.

The exclusion of a defense attorney may be initiated directly by the police, the prosecuting authority, or the court, or indirectly through the ethical court of the Bar at any stage of the proceedings. The exclusion order is issued either by the Higher Regional Court or by the Federal Court of Justice. Thus, the court before which the case is pending cannot decide for exclusion on any grounds.<sup>87/</sup>

The defense counsel and his client may appeal the exclusion.<sup>88/</sup> Furthermore, the defendant and his new defense counsel may, for the purpose of preparing a proper defense, apply for the trial to be recessed.<sup>89/</sup> Whenever a defense is mandatory, an official defense counsel must be assigned or the defendant must be given an opportunity to brief the new defense counsel of his own choosing.

The institution of the exclusion of a defense counsel is not unknown in other West European countries. For example, under Belgian and Swiss law, a defense counsel may be excluded if he is reasonably suspected of participating in an offense or of aiding

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<sup>87/</sup> Id., sec. 138c.

<sup>88/</sup> Id., sec. 138d, par. 6.

<sup>89/</sup> Id., sec. 145.

and abetting it, or of abusing his right of communication with the defendant in order to commit an offense or disclose a secret.<sup>90/</sup>

The same is true in the Netherlands.<sup>91/</sup>

In France, the defense counsel may be excluded if he commits a grave breach of his professional duties that are, at the same time, criminal offenses. During the trial, the defense counsel may also be excluded for grave criminal slander.<sup>92/</sup>

### 3. Surveillance of a Defense Counsel

In the past, correspondence between the defense counsel and his client in custody was, in principle, not subject to any restrictions. However, as a result of the terrorist situation: "Correspondence or other objects shall be returned insofar as the sender does not

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<sup>90/</sup> Code Judiciaire de October 10, 1967, Art. 456, Jean Servais et E. Mechelynck, 1 Codes belges 183 (Bruxelles, 1977). See also: Pasicrisie belge 294 (Bruxelles, 1870) and Pasicrisie ou recueil général de la jurisprudence des cours de France et de Belgique 114 (Bruxelles, 1865).

<sup>91/</sup> Bundesgesetz über die Bundesstrafrechtspflege of June 15, 1934, Art. 25, 3 Systematische Sammlung des Bundesrechts 34 ff.; Gesetz betreffend den Strafprozess (Zürich) of May 4, 1919, Art. 19, 4a Législation Genevoise (Looseleaf); Wetboek van Strafvordering (Code of Criminal Procedure), Art. 50.

<sup>92/</sup> Law No. 71-1130, Arts. 3 and 11, Journal officiel [official law gazette of France], January 5, 1972, p. 131 f.



agree to place them first before a magistrate."<sup>93/</sup> According to the prevailing opinion, both visual and auditory supervision of conversations between defense counsel and his client are inadmissible.<sup>94/</sup>

Moreover, under the Contact Ban Law (Kontaktsperregesetz),<sup>95/</sup> it is possible to exclude the prisoner for a specified period of time from any contact with the outside world if due to terrorism a "present danger to life, limb or liberty" exists. The order to bar the contact between defense counsel and his client must be issued by a Land government or the Federal Minister of Justice and must be affirmed by judicial decree within 2 weeks; otherwise it expires.<sup>96/</sup>

Correspondence between defense counsel and his client is also subject to certain restrictions in Belgium, Denmark, England, the Netherlands, Austria, and Switzerland. In Belgium, the order may be given to keep the defendant in isolation (mise au sécrét) during the first 3 days following arrest. Immediately before the trial and during recesses, the defendant will be locked up in a cell of the

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<sup>93/</sup> CrimPC, sec. 148.

<sup>94/</sup> Supra note 81, at 402.

<sup>95/</sup> BGBI. I, p. 1877, sec. 31.

<sup>96/</sup> Id., sec. 32.

court building, and the public prosecutor may refuse to allow the defense counsel to enter the cell.<sup>97/</sup>

In the Netherlands, communication may be restricted if a defense counsel informs the defendant of items which, according to the investigating judge's order, should still be withheld from him, or if such communication is aimed at preventing ascertainment of the truth. For a period not exceeding 6 days, a defense counsel may be entirely prohibited from visiting his client in prison, or his conversation with the defendant may be supervised, and/or correspondence may be stopped.<sup>98/</sup>

Communication in Austria between defense counsel and defendant may be restricted in the case of all criminal offenses where there is danger that witnesses might be interfered with or the course of justice might otherwise be obstructed. Supervision of correspondence and of conversations between counsel and defendant is admissible for a period up to 3 months. Visual supervision is admissible up to the time when the indictment is served on the defendant. Supervision will

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<sup>97/</sup> G. J. Timmermans, Etude sur la détention préventive 136 f. (Paris, 1878).

<sup>98/</sup> Wetboek van Strafvordering (Code of Criminal Procedure), Art. 50.

be effected by prison officers; in special cases the investigating judge will monitor the conversation between defense counsel and defendant.<sup>99/</sup>

In Switzerland, also, communication between defense counsel and defendant can be restricted in the investigation proceedings. Written and oral communication may be supervised by police or by prison officers upon orders by the public prosecutor or the investigating judge if there is sufficient evidence for suspicion.<sup>100/</sup>

#### 4. Restriction of the Number of Defense Counsels

According to section 137, paragraph 1, of the German Criminal Procedure Code, the number of defense counsels cannot exceed three per accused person.<sup>101/</sup>

In Switzerland before a federal court and in Italy, the number of counsel of the defendant's own choosing is limited to two.<sup>102/</sup>

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<sup>99/</sup> Foregger-Serini, Die österreichische Strafprozessordnung... 59 ff. (Wien, 1976), sec. 45, pars. 3 and 4.

<sup>100/</sup> Supra note 91, Bundesgesetz über die Bundesstrafrechtspflege, Art. 36; and Gesetz betreffend den Strafprozess, Art. 18.

<sup>101/</sup> CrimPC, secs. 137 and 146.

<sup>102/</sup> Supra note 91, Bundesgesetz, Art. 35, par. 1; F. Carnelutti, et al., Quattro Codici (Padova, 1976), Arts. 124-125.

A further new provision of the German Criminal Procedure Code, section 146, forbids without exception the simultaneous joint defense of several accused persons by the same lawyer. But in the other countries mentioned, it is, in principle, admissible for a lawyer to defend several defendants.

5. Increasing the Prosecutory Power in Procedural Matters

a. General aspects

In contrast to the "Police Law,"<sup>103/</sup> the Code of Criminal Procedure does not give law enforcement agencies general authorization to interfere with the rights of private individuals as guaranteed in the Constitution. The Criminal Procedure Code, as an implementing law to the Constitution itself, only grants such authorization on the basis of the principle of proportionality. While the strength of this principle is that it prevents unnecessary encroachment upon basic individual rights, its weakness is that it hinders the possibility of immediate and effective police action. This weakness has become particularly evident in the response to terrorist threats. In order to correct this legislative shortcoming, the Bundestag has enacted by a

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<sup>103/</sup> See: Drews-Wacke-Vogel-Martens, Gefahrenabwehr II 39 ff. (8 Aufl. München, 1977).

two-thirds majority a law that gives enforcement agencies more effective means to combat terrorism.

b. Special provisions

(1) Search of entire buildings. Pursuant to section 103 I of the Code of Criminal Procedure, the police are authorized to search an entire building when there is reason to believe that a person suspected of having committed an offense, as defined by section 129 of the Criminal Code, is inside.

It should be emphasized that this section limits the exercise of such searches to those cases where an individual is suspected of having committed an offense listed in section 129.<sup>104/</sup>

(2) Establishment of road barriers. Section 111 of the Criminal Procedure Code, as amended, permits under certain conditions the establishment of roadblocks to carry out identity checks. First, the police must possess sufficient facts leading them to believe that an offense defined in sections 129a and 250 of the Criminal Code<sup>105/</sup> has been committed. Second, the establishment of roadblocks must be necessary either to apprehend the

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<sup>104/</sup> Hans-Jochen Vogel, "Strafverfahrensrecht und Terrorismus -- eine Bilanz," in Neue Juristische Wochenschrift, No. 25/1978, p. 1226.

<sup>105/</sup> Sec. 250 I, par. 1, contains the crime of armed robbery.

alleged criminal or to obtain evidence relating to such an offense.

Judgment as to whether these conditions have been fulfilled remains at the discretion of the judge. In cases of immediate danger, the prosecutor or his assistant may order roadblocks to be established.

(3) Determination of identity. Before the adoption of new sections 163b and 163c of the Code of Criminal Procedure, the determination of identity was regulated by various laws of the Laender. The new sections give uniformity to regulations in this particular field of criminal procedure.

Section 163b establishes:

- the conditions under which a person's identity may be checked;
- the measures that may be taken while checking the identity;
- the jurisdiction of federal and Laender law enforcement agencies.

In addition, section 163c I-III regulates in detail the specific procedure for determining a person's identity.

Finally, section 163c IV requires the destruction of the files of persons who are innocent.

Pursuant to section 163b I, all legally permitted measures designed to determine a person's identity are allowed. However, this

section distinguishes between determining the identity of persons suspected of having committed an offense and those not suspected. The identity of persons under suspicion can always be determined by any necessary legal measures. In contrast, the identity of persons who are not suspected of having committed an offense may be determined only to the extent of verifying the facts and circumstances of the case in question, and it is forbidden to search them against their will or to employ the legal measures permitted against suspected persons. Thus, in the case of an unsuspected person, the law enforcement agencies must accept his oral representations, subject to verification from other agencies. If verification confirms the person's oral account, the law enforcement agencies must destroy all the files established during the case.

In general, deprivation of liberty while identity verification procedures are being carried out is subject to two conditions:

- no one may be deprived of his liberty for a period longer than absolutely essential to determine the person's identity;
- under no circumstances can the deprivation of liberty extend for more than 12 hours.

A judicial order is generally required in order to deprive a person of his liberty. However, a judicial order is not required

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when the person's identity can be determined more quickly than the order can be issued. Furthermore, a person who has been deprived of his liberty has the right to communicate immediately with any person he wishes. In addition, the deprived person must be informed of the charges against him.

VII. Efforts of the Federal Government  
To Combat International Terrorism

A. Background

The phenomenon of international terrorism is not at all new. Near the end of the 19th century, Italian, Spanish, and French bomb-throwing anarchists were inspired by those Russian masters Bakunin and Kravchinsky, as well as by Kropotkin in his earlier, violent phase. President Sadi Carnot of France was knifed to death by an Italian in 1894 in Lyon. Another Italian fatally stabbed Empress Elizabeth of Austria in 1898 in Geneva. Russian terrorists were supported in the early 1900's by American sympathizers who sent special emissaries across the ocean to contact the Russian underground. Moreover, Maxim Gorky came to New York in 1906 to obtain financial aid for the Bolsheviks. In the United States, the assassin of President McKinley in 1901 was the son of Polish immigrants.

In 1970, at an international revolutionary congress held in Pyongyang, North Korea, Dr. Habash, the leader of an extremist Arab fedayeen group, harangued the delegates:

At this time of people's revolution against the world-wide imperialistic system there can be neither geographic and political borders nor any moral prohibitions against the terrorist enterprises of the people's camp. <sup>106/</sup>

In September 1972, in Munich, Israeli athletes at the Olympic games became the target of Arab guerillas. The previous May, three Japanese terrorists perpetrated a massacre at the Lod airport in Israel, killing 22 persons. Afterwards, two Israeli professors wrote an essay titled "The Ecology of Terror" in which they stated:

...an operation can be planned in Germany by a Palestine Arab, executed in Israel by terrorists recruited in Japan, with weapons acquired in Italy but manufactured in Russia, supplied by an Algerian diplomat financed with Libyan money. <sup>107/</sup>

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<sup>106/</sup> Albert Parry, Terrorism: from Robespierre to Arafat 538 (1976).

<sup>107/</sup> D. V. Segre and J. H. Adler, "The Ecology of Terror," 40 Encounter, No. 2, 17-24 (February, 1973).

The list of terrorist activities at the international level can be easily extended. But it is sufficient to say that since January 1, 1970, there have been about 2,000 major terrorist incidents.<sup>108/</sup>

The Federal Government at last realized during the Munich massacre that organized terrorism is not confined to national boundaries. After the Arab terrorists were successful in obtaining the release of the three Palestinian survivors of the attack at the Olympic Village, the German Federal Foreign Office released a statement on November 6, 1972. In it, the Foreign Office acknowledged that terrorism had become a worldwide fact that jeopardized the basic rules of coexistence between states and peoples of different nationalities. Furthermore, the statement went on to say:

The German Federal Government hopes that international--as well as its own--efforts will induce hesitant Governments to cooperate in the world-wide fight against terrorism. These efforts can have a chance of success only if relations with these Governments remain intact and if we do not forfeit our opportunities of exerting our influence.<sup>109/</sup> Confrontation would not yield results here.

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<sup>108/</sup> John D. Elliott and Leslie K. Gibson, eds., Contemporary Terrorism: Selected Readings ix, xi, 1-9 (1978).

<sup>109/</sup> Press Release of the Federal Government of November 9, 1972.

In July 1976, Baron Rudiger von Wechmar, Permanent Representative of the Federal Republic to the United Nations, requested the Security Council to take international measures against terrorism. Among other things, he warned that international terrorism jeopardizes international security and threatens the foundation of normal inter-governmental relations. He noted that the "community of nations has failed so far to create effective instruments to combat [international] terrorism and in particular the taking of hostages" and requested "the preparation of a convention on international measures against the taking of hostages which ensures in particular that those perpetrating such acts are either extradited or prosecuted in the country where they are apprehended."<sup>110/</sup>

More successful was the effort of the Federal Government to reach an anti-terrorist agreement within the framework of the Council of Europe. On November 10, 1976, the Council adopted a Convention on the Suppression of Terrorism that represents, despite its obvious shortcomings, the most constructive effort to date in the international fight against terrorism.<sup>111/</sup>

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<sup>110/</sup> Press Release of the German Information Center in New York City of July 13, 1976.

<sup>111/</sup> U.N. Document A/AC. 188/L. 2; 15 International Legal Materials 1272 (1976).

B. European Convention on the Suppression of Terrorism

The sense of the Convention, which entered into force on August 4, 1978, is that the signatories shall not regard offenses enumerated in Article 1 as political offenses. For purposes of extradition, this includes offenses connected with political offenses or ones inspired by political motives. The list includes the following:

(a) an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;

(b) an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;

(c) a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;

(d) an offence involving kidnapping, the taking of a hostage or serious unlawful detention;

(e) an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;

(f) an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

In addition to the categories of offenses listed in Article 1, any Contracting State may decide to extend these provisions to a serious offense involving an act of violence

- (1)...against the life, physical integrity or liberty of a person;
- (2)...against property...if the act created a collective <sup>112/</sup> danger for persons.

The attempt to commit any of the foregoing offenses, or participation as an accomplice of a person who commits or attempts to commit such an offense, is also an offense. <sup>113/</sup>

Articles 3 and 4 incorporate by reference the above-mentioned provisions of the Convention's Articles 1 and 2 into the extradition treaties and arrangements of the Contracting States, including the European Convention on Extradition.

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112/ European Convention on the Suppression of Terrorism, Art. 2, id.

113/ Id., Art. 1 (f).

However, the purportedly absolute obligation to exclude for purposes of extradition certain crimes of violence listed in Articles 1 and 2 from the political asylum rule is limited by the provisions of Articles 5 and 13. Article 5 is couched in terms so vague that it may most seriously detract from the effectiveness of the Convention:

Nothing in this convention shall be interpreted as imposing an obligation to extradite if the requested state has substantial grounds for believing that the request for extradition for an offense mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that the person's position may be prejudiced for any of these reasons.

If viewed from a concern of combatting international terrorism, this reservation obviously has advantages and disadvantages. On the one hand it gives nations grounds for refusing extradition when such is requested for blatantly political, racist or other reasons, or because of those nations' lack of confidence in the impartiality of the requesting state in administering criminal justice. On the

other hand, it justifies refusal when the requested state harbors ideological sympathy for the terrorist cause.

This same option is reflected in Article 8 of the Convention. While paragraph 1 of this Article pledges mutual assistance in criminal matters between the Contracting States and provides that assistance may not be refused solely on the basis of the political offense exception, paragraph 2--identical with Article 5--affords the requested state the opportunity to deny extradition.

A further exception is provided in Article 13, which authorizes any state to

...declare that it reserves the right to refuse extradition in respect of any offence mentioned in Article 1 which it considers to be a political offence, an offence connected with a political offence or an offence inspired by political motives....

On the other hand, the same Article requires the state declaring the reservation to undertake

...to take into due consideration, when evaluating the character of the offence, any particularly serious aspects of the offence....



Unfortunately, the Convention does not provide an exhaustive enumeration of such aspects. It merely mentions three of them, including:

- 1) that it created a collective danger to the life, physical integrity or liberty of persons; or
- 2) that it affected persons foreign to the motives behind it; or
- 3) that cruel or vicious means have been used in the commission of the offence.<sup>114/</sup>

Furthermore, it remains within the discretion of the requested state to determine what actually constitutes "due consideration" in each particular case.

Despite these shortcomings, the European Convention on Suppression of Terrorism signifies a heightened awareness of the necessity of cooperative efforts to combat terrorism by means of international law.

### C. International Treaty Law on Terrorism

#### 1. Background

The Strasbourg Convention of 1976, open only to members of the Council of Europe, is the sole international convention that

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<sup>114/</sup> Id., Art. 13.

attempts to outline crimes associated with terrorist activities. No other international convention is in force that deals exclusively with the general category of international terrorism. It seems that the international community has still not been able to agree on problems such as jurisdiction, extradition, distinguishing between common criminal acts and political ones, and the rights of states to grant asylum.

Five conventions agreed to since 1963 deal with specific segments of terrorism. Three deal with piracy of aircraft and two with acts of violence committed against internationally protected persons. The Federal Republic of Germany is a party to all of conventions, except for the one negotiated by the Member States of the Organization of American States.

## 2. Crimes Involving Aircraft

Three conventions cover crimes involving aircraft:

--The Convention on Offenses and Certain Other Acts Committed on Board Aircraft [Tokyo Convention] of September 14, 1963. <sup>115/</sup>

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<sup>115/</sup> T.I.A.S. 6768; 20 U.S.T. 2941.

--The Convention for the Suppression of Unlawful Seizure of Aircraft  
(Hijacking) [The Hague Convention] of December 16, 1970. <sup>116/</sup>

--The Convention for the Suppression of Unlawful Acts Against the  
Safety of Civil Aviation (Sabotage) [Montreal Convention] of  
September 23, 1971. <sup>117/</sup>

Article 1 of the Tokyo Convention covers offenses against  
the criminal law and acts that "jeopardize the safety of the aircraft  
or of persons or property therein or which jeopardize good order and  
discipline on board."

Article 1 of The Hague Convention makes it an offense for  
a person who, either alone or with others, on board an aircraft in  
flight "unlawfully, by force or threat thereof, or by any other form  
of intimidation, seizes, or exercises control of, that aircraft, or  
attempts to perform any such act...."

Article 1 of the Montreal Convention reads as follows:

1. Any person commits an offence if he unlawfully and  
intentionally:
  - (a) performs an act of violence against a person on  
board an aircraft in flight if that act is likely  
to endanger the safety of that aircraft; or

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<sup>116/</sup> T.I.A.S. 7192; 22 U.S.T. 1641.

<sup>117/</sup> T.I.A.S. 7570; 24 U.S.T. 564.

- (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
  - (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or
  - (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
  - (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.
2. Any person also commits an offence if he:
- (a) attempts to commit any of the offences mentioned in paragraph 1 of this Article; or
  - (b) is an accomplice of a person who commits or attempts to commit any such offence.

As can be seen, each successive convention has gone further in defining the offenses covered.

The Conventions require the Contracting States to include in their countermeasures all necessary steps for the custody of the offenders. These states are also required to notify immediately "the State of registration of the aircraft and the State of nationality of the detained person...."<sup>118/</sup>

If the state holding custody does not extradite the offender, it must prosecute him.

In addition, The Hague and the Montreal Conventions place greater emphasis on reciprocal assistance to other states and require that a hijacked aircraft be returned to its pilot and the flight continued as soon as possible. The Montreal Convention added a provision that requires Contracting States under certain conditions to supply to other affected states any relevant information obtained on the offense committed.

The main shortcoming of all these conventions is that none of them has any sort of enforcement clause. Hence the provisions are merely advisory.

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<sup>118/</sup> Art. 13 of the Tokyo Convention, Art. 6 of The Hague Convention, and Art. 6 of the Montreal Convention.

### 3. Protection of Diplomats

There are two conventions concerning the protection of diplomats. One is a convention negotiated by the Organization of American States to which the Federal Republic is not a party, although the convention is also open to adherence by non-OAS states.<sup>119/</sup>

The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, is a United Nations convention.<sup>120/</sup> It attempts to determine who shall be protected, what steps shall be taken by host governments to protect these persons and, also, what punishment shall be established for those who attack a protected person.

Article 1 of the Convention defines an "internationally protected person" as follows:

(a) a Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him;

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<sup>119/</sup> T.I.A.S., 8413.

<sup>120/</sup> T.I.A.S., 8532.

(b) any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household;

Article 2 requires that each state will make the commission of the following offenses a crime under its internal law:

(a) a murder, kidnapping or other attack upon the person or liberty of an internationally protected person;

(b) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty;

(c) a threat to commit any such attack;

(d) an attempt to commit any such attack; and

(e) an act constituting participation as an accomplice in any such attack.

As in the case of the "anti-hijacking" conventions already examined, no sanctions whatever are provided against states for violating this convention on internationally protected persons. Furthermore, it remains within the discretion of the requested state to decide whether or not it will prosecute an offender. To a great extent these shortcomings nullify the effectiveness of this convention in combatting international terrorism.

#### VIII. Conclusion

For a country whose slogan "Ordnung muss sein" (There must be order!) has become a philosophy and a way of life, terrorism and resulting disorder have been an incongruous part of daily reality over the past 10 years. As a matter of fact, the average German is puzzled over the widespread terrorism that has struck the Federal Republic of Germany, a stable and extremely prosperous democracy. He wonders why the young people, the student activists, and even the terrorists cannot appreciate the monumental job their parents have done in building out of the rubble of World War II a thriving country in which the people as a whole are comfortable and uncomplaining.

Leading politicians like Walter Scheel, the Federal President, and Helmut Schmidt, the Federal Chancellor, believe that the terrorism is rooted in the territorial division of Germany and the



consequent inability of young West Germans to identify with a whole country. Some foreign observers think that German terrorism is part of Hitler's legacy. There is probably some truth in these theories, but the major reasons for the emergence of student unrest and the birth of terrorism lie deeper in the social, political and economic realities of the Federal Republic.

The current leaders of the country, who to some extent belong to the generation that in its youth supported Hitler against the previous generation discredited for losing World War I have become skeptical for two reasons. First, they saw how their pure ideals were transformed into the Nazi holocaust. Then, on the other side of the border, in East Germany, they saw another type of betrayal to tyranny. These factors have led to a turning inward, a self-centeredness, and an apolitical approach. It is a generation obviously unable to provide a consistent ideology for today's German youth because it has none of its own. Instead, it has provided political liberalism and economic well-being without an ideology. The absence of an ideology coupled with the political uncertainty surrounding the Federal Republic created a diffused feeling among the students of the early sixties. The feeling was unconscious at the beginning. The students knew only that they opposed the existing order and that they wanted a change,

but they could not identify their goals. After the building of the Berlin Wall and the establishment of the grand coalition of Christian Democrats and Social Democrats in 1966, the youth felt that the older generation was no longer capable of solving the problems of the society.

In this situation, they believed that it was their historical responsibility to take the political initiative. The response of the older generation was one of panic because it saw the trend as a confrontation between generations. Overreaction by the authorities coinciding with the incisive constitutional amendment of 1968, which in reality was a measure of democratic self-preservation, served to sober a large part of the student body. But a small segment that would not compromise became radicalized by these measures.

The initial response by the authorities to each successive act of terrorism was to issue new legal provisions that were undoubtedly constitutional but addressed only the criminal act. The provisions never considered the underlying human aspect, namely, that the terrorists represented an entirely new type of criminal whose philosophy and psychology were different from that of normal criminals. Their philosophy can best be summarized in this way: society is corrupt and must be destroyed; that which comes later will be better.

Furthermore, the terrorists believe in an absolute ethical conception of justice and a right to judge the older generation and its society in the light of this conception.

In view of these facts, it has become apparent that traditional legal methods are inadequate to solve the problem of terrorism. On the other hand, it is obvious that society has an interest in maintaining some degree of order. The analysis of anti-terrorist legislation in Part IV indicates that such order has been accomplished by the comprehensive reform of the criminal law. But the German experience well demonstrates the fact that the criminal law is not the ultima ratio for the elimination of terrorism. Since terrorism is essentially a social phenomenon, it is imperative that the sanctions of the criminal law be joined with balanced measures aimed at improving the social environment of German youth. Without recognition of this fundamental reality, there will always be a potential danger of terrorism in Germany.

APPENDIX I  
TRANSLATION FROM THE GERMAN

EMERGENCY LEGISLATION <sup>121/</sup>

A. State of Defense Articles (115a-1)

Article 115a (Determination of a state of defence)

(1) The determination that the federal territory is being attacked by armed force or that such an attack is directly imminent (state of defence) shall be made by the Bundestag with the consent of the Bundesrat. Such determination shall be made at the request of the Federal Government and shall require a two-thirds majority of the votes cast, which shall include at least the majority of the members of the Bundestag.

(2) If the situation imperatively calls for immediate action and if insurmountable obstacles prevent the timely meeting of the Bundestag, or if there is no quorum in the Bundestag, the Joint Committee shall make this determination with a two-thirds majority of the votes cast, which shall include at least the majority of its members.

(3) The determination shall be promulgated in the Federal Law Gazette by the Federal President pursuant to Article 82. If this cannot be done in time, the promulgation shall be effected in another manner;

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121/ Taken from the Basic Law; for citation, see supra note 8.

it shall subsequently be printed in the Federal Law Gazette as soon as circumstances permit.

(4) If the federal territory is being attacked by armed force and if the competent organs of the Federation are not in a position at once to make the determination provided for in the first sentence of paragraph (1) of this Article, such determination shall be deemed to have been made and promulgated at the time the attack began. The Federal President shall announce such time as soon as circumstances permit.

(5) When the determination of the existence of a state of defence has been promulgated and if the federal territory is being attacked by armed force, the Federal President may, with the consent of the Bundestag, issue internationally valid declarations regarding the existence of such state of defence. Subject to the conditions mentioned in paragraph (2) of this Article, the Joint Committee shall thereupon deputize for the Bundestag.

Article 115b (Power of command during state defence)

Upon the promulgation of a state of defence, the power of command over the Armed Forces shall pass to the Federal Chancellor.

Article 115c (Legislative competence of the Federation during state of defence)

(1) The Federation shall have the right to exercise concurrent legislation even in matters belonging to the legislative competence of

the Laender by enacting laws to be applicable upon the occurrence of a state of defence. Such laws shall require the consent of the Bundesrat.

(2) Federal legislation to be applicable upon the occurrence of a state of defence to the extent required by conditions obtaining while such state of defence exists, may make provision for:

1. preliminary compensation to be made in the event of expropriations, thus diverging from the second sentence of paragraph (3) of Article 14;
2. deprivations of liberty for a period not exceeding four days, if no judge has been able to act within the period applying in normal times, thus diverging from the third sentence of paragraph (2) and the first sentence of paragraph (3) of Article 104.

(3) Federal legislation to be applicable upon the occurrence of a state of defence to the extent required for averting an existing or directly imminent attack, may, subject to the consent of the Bundesrat, regulate the administration and the fiscal system of the Federation and the Laender in divergence from Sections VIII, VIIIa and X, provided that the viability of the Laender, communes and associations of communes is safeguarded, particularly in fiscal matters.

(4) Federal laws enacted pursuant to paragraph (1) or subparagraph (1) of paragraph (2) of this Article may, for the purpose of

preparing for their execution, be applied even prior to the occurrence of a state of defence.

Article 115d (Shortened procedure in the case of urgent bills during state of defence)

(1) While a state of defence exists, the provisions of paragraphs (2) and (3) of this Article shall apply in respect of federal legislation, notwithstanding the provisions of paragraph (2) of Article 76, the second sentence of paragraph (1) and paragraphs (2) to (4) of Article 77, Article 78, and paragraph (1) of Article 82.

(2) Bills submitted as urgent by the Federal Government shall be forwarded to the Bundesrat at the same time as they are submitted to the Bundestag. The Bundestag and the Bundesrat shall debate such bills in common without delay. In so far as the consent of the Bundesrat is necessary, the majority of its votes shall be required for any such bill to become a law. Details shall be regulated by rules of procedure adopted by the Bundestag and requiring the consent of the Bundesrat.

(3) The second sentence of paragraph (3) of Article 115a shall apply mutatis mutandis in respect of the promulgation of such laws.

Article 115e (Status and functions of the Joint Committee)

(1) If, while a state of defence exists, the Joint Committee determines with a two-thirds majority of the votes cast, which shall include

at least the majority of its members, that insurmountable obstacles prevent the timely meeting of the Bundestag, or that there is no quorum in the Bundestag, the Joint Committee shall have the status of both the Bundestag and the Bundesrat and shall exercise their rights as one body.

(2) The Joint Committee may not enact any law to amend this Basic Law or to deprive it of effect or application either in whole or in part. The Joint Committee shall not be authorized to enact laws pursuant to paragraph (1) of Article 24 or to Article 29.

Article 115f (Extraordinary powers of the Federation during state of defence)

(1) While a state of defence exists, the Federal Government may to the extent necessitated by circumstances:

1. commit the Federal Border Guard throughout the federal territory;
2. issue instructions not only to federal administrative authorities but also to Land governments and, if it deems the matter urgent, to Land authorities, and may delegate this power to members of Land governments to be designated by it.

(2) The Bundestag, the Bundesrat, and the Joint Committee, shall be informed without delay of the measures taken in accordance with paragraph (1) of this Article.



Article 115g (Status and functions of the Federal Constitutional Court during state of defence)

The Constitutional status and the exercise of the constitutional functions of the Federal Constitutional Court and its judges must not be impaired. The Law on the Federal Constitutional Court may not be amended by a law enacted by the Joint Committee except in so far as such amendment is required, also in the opinion of the Federal Constitutional Court, to maintain the capability of the Court to function. Pending the enactment of such a law, the Federal Constitutional Court may take such measures as are necessary to maintain the capability of the Court to carry out its work. Any decisions by the Federal Constitutional Court in pursuance of the second and third sentences of this Article shall require a two-thirds majority of the judges present.

Article 115h (Legislative terms and terms of office during state of defence)

(1) Any legislative terms of the Bundestag or of Land diets due to expire while a state of defence exists shall end six months after the termination of such state of defence. A term of office of the Federal President due to expire while a state of defence exists, and the exercise of his functions by the President of the Bundesrat in case of the premature vacancy of the Federal President's office,

shall end nine months after the termination of such state of defence. The term of office of a member of the Federal Constitutional Court due to expire while a state of defence exists shall end six months after the termination of such state of defence.

(2) Should the necessity arise for the Joint Committee to elect a new Federal Chancellor, the Committee shall do so with the majority of its members; the Federal President shall propose a candidate to the Joint Committee. The Joint Committee can express its lack of confidence in the Federal Chancellor only by electing a successor with a two-thirds majority of its members.

(3) The Bundestag shall not be dissolved while a state of defence exists.

Article 115i (Extraordinary power of the Land governments)

(1) If the competent federal organs are incapable of taking the measures necessary to avert the danger, and if the situation imperatively calls for immediate independent action in individual parts of the federal territory, the Land governments or the authorities or commissioners designated by them shall be authorized to take, within their respective spheres of competence, the measures provided for in paragraph (1) of Article 115f.

(2) Any measures taken in accordance with paragraph (1) of the present Article may be revoked at any time by the Federal Government, or in the case of Land authorities and subordinate federal authorities, by Land Prime Ministers.

Article 115k (Grade and duration of validity of extraordinary laws and ordinances having the force of law)

(1) Laws enacted in accordance with Articles 115c, 115e, and 115g, as well as ordinances having the force of law issued by virtue of such laws, shall, for the duration of their applicability, suspend legislation contrary to such laws or ordinances. This shall not apply to earlier legislation enacted by virtue of Articles 115c, 115e, or 115g.

(2) Laws adopted by the Joint Committee, and ordinances having the force of law issued by virtue of such laws, shall cease to have effect not later than six months after the termination of a state of defence.

(3) Laws containing provisions that diverge from Articles 91a, 91b, 104a, 106 and 107, shall apply no longer than the end of the second fiscal year following upon the termination of the state of defence. After such termination they may, with the consent of the Bundesrat, be amended by federal legislation so as to lead up to the settlement provided for in Sections VIIIa and X.

Article 1151 (Repealing of extraordinary laws, Termination of state of defence, Conclusion of peace)

(1) The Bundestag, with the consent of the Bundesrat, may at any time repeal laws enacted by the Joint Committee. The Bundesrat may request the Bundestag to make a decision in any such matter. Any measures taken by the Joint Committee or the Federal Government to avert a danger shall be revoked if the Bundestag and the Bundesrat so decide.

(2) The Bundestag, with the consent of the Bundesrat, may at any time declare the state of defence terminated by a decision to be promulgated by the Federal President. The Bundesrat may request the Bundestag to make a decision in any such matter. The state of defence must be declared terminated without delay when the prerequisites for the determination thereof no longer exist.

(3) The conclusion of peace shall be the subject of a federal law.

B. Amended Articles (9-12a, 19, 73, 87a, 91)

Article 9 (Freedom of association)

(1) All Germans shall have the right to form associations and societies.

(2) Associations, the purposes or activities of which conflict with criminal laws or which are directed against the constitutional order or the concept of international understanding, are prohibited.

(3) The right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and to all trades, occupations and professions. Agreements which restrict or seek to impair this right shall be null and void; measures directed to this end shall be illegal. Measures taken pursuant to Article 12a, to paragraphs (2) and (3) of Article 35, to paragraph (4) of Article 87a or to Article 91, may not be directed against any industrial conflicts engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions.

Article 10 (Privacy of posts and telecommunications)

- (1) Privacy of posts and telecommunications shall be inviolable.
- (2) This right may be restricted only pursuant to a law. Such law may lay down that the person affected shall not be informed of any such restriction if it serves to protect the free democratic basic order or the existence or security of the Federation or a Land, and that recourse to the courts shall be replaced by a review of the case by bodies and auxiliary bodies appointed by Parliament.

Article 11 (Freedom of movement)

- (1) All Germans shall enjoy freedom of movement throughout the federal territory.

(2) This right may be restricted only by or pursuant to a law and only in cases in which an adequate basis of existence is lacking and special burdens would arise to the community as a result thereof, or in which such restriction is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or a Land, to combat the danger of epidemics, to deal with natural disasters or particularly grave accidents, to protect young people from neglect or to prevent crime.

Article 12 (Right to choose trade, occupation, or profession)

(1) All Germans shall have the right freely to choose their trade, occupation, or profession, their place of work and their place of training. The practice of trades, occupations, and professions may be regulated by or pursuant to a law.

(2) No specific occupation may be imposed on any person except within the framework of a traditional compulsory public service that applies generally and equally to all.

(3) Forced labour may be imposed only on persons deprived of their liberty by court sentence.

Article 12a (Liability to military and other service)

(1) Men who have attained the age of eighteen years may be required to serve in the Armed Forces, in the Federal Border Guard, or in a Civil Defence organization.

(2) A person who refuses, on grounds of conscience, to render war service involving the use of arms may be required to render a substitute service. The duration of such substitute service shall not exceed the duration of military service. Details shall be regulated by a law which shall not interfere with the freedom of conscience and must also provide for the possibility of a substitute service not connected with units of the Armed Forces or of the Federal Border Guard.

(3) Persons liable to military service who are not required to render service pursuant to paragraph (1) or (2) of this Article may, when a state of defence (Verteidigungsfall) exists, be assigned by or pursuant to a law to specific occupations involving civilian services for defence purposes, including the protection of the civilian population; it shall, however, not be permissible to assign persons to an occupation subject to public law except for the purpose of discharging police functions or such other functions of public administration as can only be discharged by persons employed under public law. Persons may be assigned to occupations--as referred to in the first sentence

of this paragraph--with the Armed Forces, including the supplying and servicing of the latter, or with public administrative authorities; assignments to occupations connected with supplying and servicing the civilian population shall not be permissible except in order to meet their vital requirements or to guarantee their safety.

(4) If, while a state of defence exists, civilian service requirements in the civilian public health and medical system or in the stationary military hospital organization cannot be met on a voluntary basis, women between eighteen and fifty-five years of age may be assigned to such services by or pursuant to a law. They may on no account render service involving the use of arms.

(5) During the time prior to the existence of any such state of defence, assignments under paragraph (3) of this Article may be effected only if the requirements of paragraph (1) of Article 80a are satisfied. It shall be admissible to require persons by or pursuant to a law to attend training courses in order to prepare them for the performance of such services in accordance with paragraph (3) of this Article as presuppose special knowledge or skills. To this extent, the first sentence of this paragraph shall not apply.

(6) If, while a state of defence exists, the labour requirements for the purposes referred to in the second sentence of paragraph (3) of



this Article cannot be met on a voluntary basis, the right of a German to give up the practice of his trade or occupation or profession, or his place of work, may be restricted by or pursuant to a law in order to meet these requirements. The first sentence to paragraph (5) of this Article shall apply mutatis mutandis prior to the existence of a state of defence.

Article 19 (Restriction of basic rights)

- (1) In so far as a basic right may, under this Basic Law, be restricted by or pursuant to a law, such law must apply generally and not solely to an individual case. Furthermore, such law must name the basic right, indicating the Article concerned.
- (2) In no case may the essential content of a basic right be encroached upon.
- (3) The basic rights shall apply also to domestic juristic persons to the extent that the nature of such rights permits.
- (4) Should any person's right be violated by public authority, recourse to the court shall be open to him. If jurisdiction is not specified, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by the provisions of this paragraph.

Article 73 (Exclusive legislation, catalogue)

The Federation shall have the exclusive power to legislate in the following matters:

1. foreign affairs as well as defence including the protection of the civilian population;
2. citizenship in the Federation;
3. freedom of movement, passport matters, immigration, emigration, and extradition;
4. currency, money and coinage, weights and measures, as well as the determination of standards of time;
5. the unity of the customs and commercial territory, treaties on commerce and on navigation, the freedom of movement of goods, and the exchanges of goods and payments with foreign countries, including customs and other frontier protection;
6. federal railroads and air transport;
7. postal and telecommunication services;
8. the legal status of persons employed by the Federation and by federal corporate bodies under public law;
9. industrial property rights, copyrights and publishers' rights;
10. co-operation of the Federation and the Laender in matters of criminal police and of protection of the constitution, establishment

of a Federal Criminal Police Office, as well as international control of crime;

11. statistics for federal purposes.

Article 87a (Build-up, strength, use and functions of the Armed Forces)

(1) The Federation shall build up Armed Forces for defence purposes. Their numerical strength and general organizational structure shall be shown in the budget.

(2) Apart from defence, the Armed Forces may only be used to the extent explicitly permitted by this Basic Law.

(3) While a state of defence or a state of tension exists, the Armed Forces shall have the power to protect civilian property and discharge functions of traffic control in so far as this is necessary for the performance of their defence mission. Moreover, the Armed Forces may, when a state of defence or a state of tension exists, be entrusted with the protection of civilian property in support of police measures; in this event the Armed Forces shall co-operate with the competent authorities.

(4) In order to avert any imminent danger to the existence or to the free democratic basic order of the Federation or a Land, the Federal Government may, should conditions as envisaged in paragraph (2)

of Article 91 obtain and the police forces and the Federal Border Guard be inadequate, use the Armed Forces to support the police and the Federal Border Guard in the protection of civilian property and in combatting organized and militarily armed insurgents. Any such use of Armed Forces must be discontinued whenever the Bundestag or the Bundesrat so requests.

Article 91 (Aversion of dangers to the existence of the Federation or of a Land)

- (1) In order to avert any imminent danger to the existence or to the free democratic basic order of the Federation or a Land, a Land may request the services of the police forces of other Laender, or of the forces and facilities of other administrative authorities and of the Federal Border Guard.
- (2) If the Land where such danger is imminent is not itself willing or able to combat the danger, the Federal Government may place the police in that Land and the police forces of other Laender under its own instructions and commit units of the Federal Border Guard. The order for this shall be rescinded after the removal of the danger or else at any time upon the request of the Bundesrat. If the danger extends to a region larger than a Land, the Federal Government may, in so far as is necessary for effectively combatting such danger,

issue instructions to the Land governments; the first and second sentences of this paragraph shall not be affected by this provision.

C. Inserted Articles (20, 53a, 80a) [Article 35 for reference]

Article 20 (Basic principles of the Constitution--Right to resist)

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority emanates from the people. It shall be exercised by the people by means of elections and voting and by specific legislative, executive, and judicial organs.

(3) Legislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice.

(4) All Germans shall have the right to resist any person or persons seeking to abolish that constitutional order, should no other remedy be possible.

Article 35 (Legal, administrative and police assistance)

(1) All federal and Land authorities shall render each other legal and administrative assistance.

(2) In order to deal with a natural disaster or an especially grave accident, a Land may request the assistance of the police forces of

other Laender or of forces and facilities of other administrative authorities or of the Federal Border Guard or the Armed Forces.

(3) If the natural disaster or the accident endangers a region larger than a Land, the Federal Government may, in so far as this is necessary effectively to deal with such danger, instruct the Land governments to place their police forces at the disposal of other Laender, and may commit units of the Federal Border Guard or the Armed Forces to support the police forces. Measures taken by the Federal Government pursuant to the first sentence of this paragraph must be revoked at any time upon the request of the Bundesrat, and in any case without delay upon removal of the danger.

#### The Joint Committee

##### Article 53a

(1) Two thirds of the members of the Joint Committee shall be deputies of the Bundestag and one third shall be members of the Bundesrat. The Bundestag shall delegate its deputies in proportion to the sizes of its parliamentary groups; such deputies must not be members of the Federal Government. Each Land shall be represented by a Bundesrat member of its choice; these members shall not be bound by instructions. The establishment of the Joint Committee and its procedures shall be

regulated by rules of procedure to be adopted by the Bundestag and requiring the consent of the Bundesrat.

(2) The Federal Government must inform the Joint Committee about its plans in respect of a state of defence. The rights of the Bundestag and its committees under paragraph (1) of Article 43 shall not be affected by the provision of this paragraph.

Article 80a (State of tension)

(1) Where this Basic Law or a federal law on defence, including the protection of the civilian population, stipulates that legal provisions may only be applied in accordance with this Article, their application shall, except when a state of defence exists, be admissible only after the Bundestag has determined that a state of tension (Spannungsfall) exists or if it has specifically approved such application. In respect of the cases mentioned in the first sentence of paragraph (5) and the second sentence of paragraph (6) of Article 12a, such determination of a state of tension and such specific approval shall require a two-thirds majority of the votes cast.

(2) Any measures taken by virtue of legal provisions enacted under paragraph (1) of this Article shall be revoked whenever the Bundestag so requests.

(3) In derogation of paragraph (1) of this Article, the application of such legal provisions shall also be admissible by virtue of, and in accordance with, a decision taken with the consent of the Federal Government by an international organ within the framework of a treaty of alliance. Any measures taken pursuant to this paragraph shall be revoked whenever the Bundestag so requests with the majority of its members.



APPENDIX II  
TRANSLATION FROM THE GERMAN

SPECIAL PROVISIONS ON CIVIL SERVANTS

A. Resolution of the Prime Ministers of the Federation  
and the Länder of January 28, 1972 122/

1. According to the Public Servants Acts of the Federation  
and the Länder:

Only persons who can guarantee that they are prepared at all  
times to uphold the fundamental principles of freedom and democ-  
racy as laid down in the Basic Law, may be appointed to the pub-  
lic service. Whether on duty or otherwise public servants are  
required to take an active part in maintaining this constitu-  
tional system.

The above provisions are mandatory.

2. Each individual case must be examined and settled on its own mer-  
its. The following principles should be taken into account:

2.1. Candidates

2.1.1. A candidate pursuing anti-constitutional activi-  
ties shall not be appointed to the public service.

2.1.2. The fact of belonging to an organisation pursuing  
anti-constitutional aims, casts doubts on a candidate's

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122/ Supra note 41, at 144 ff.

readiness at all times to uphold the basic constitutional principles of freedom and democracy. In most cases such doubts would justify rejecting the candidate's application.

2.2. Public servants

Should a civil servant fail, by reason of his actions or of membership of an organisation with anti-constitutional aims, to comply with the requirements of paragraph 35 of the Public Servants (Governing Principles) Act, under which he is bound in his whole behaviour to demonstrate his support for the constitutional principles of freedom and democracy as laid down in the Basic Law and do his utmost to defend their maintenance, his employing authority shall take such steps as may be indicated by the facts revealed by the investigation and, in particular, consider whether measures should be taken to remove the public servant from office.

3. These same principles shall apply to workmen and employees in the public service in accordance with the provisions of current wage agreements.

1. It is a time honoured principle of the permanent civil service ("Berufsbeamtentum") (Article 33 (5) GG [GG=Grundgesetz=Basic Law]), that a public servant has a special duty of loyalty to the state and its constitution.

2. Such loyalty demands an acceptance of the state and the existing constitution (including any changes that may result from lawful amendments) not only in words but, also more particularly, in his work, by observing and fulfilling the existing constitutional and statutory provisions and performing his official duties in the spirit of these provisions. This loyalty calls for more than a formally correct but otherwise indifferent, cool, and uncommitted attitude to the state and the constitution; in particular, it requires that a public servant should clearly dissociate himself from groups and movements that attack, oppose and slander the state, its constitutional organs and the prevailing constitutional system. A public servant is expected to recognise and acknowledge the state and its constitutional system. A public servant is expected to recognise and acknowledge the state and its constitution as something of great positive value that is worth defending. Loyalty proves its worth at times of crisis and in situations of serious conflict in which the existence of the state depends on public servants taking its part.

3. In the case of probationers or public servants holding office subject to termination, an act of disloyalty normally warrants dismissal. In the case of established public servants, a breach of this official duty can result in removal from office following formal disciplinary proceedings.

4. The Constitution (Article 33 (5) GG) lays down the requirements now embodied in an ordinary law, that to enter the public service a candidate must show that he is prepared at all times to uphold the fundamental constitutional principles of freedom and democracy.
5. The conviction that the candidate does not offer the necessary guarantee is based on a judgement of his personality which also contains a prognosis and is founded on the assessment of a number of factors, which vary from case to case.
6. The rule derived from Article 33 (5) GG, applies to every type of public servants whether they are temporary, probationers, subject to termination or permanent public servants.
7. Although the demands made of employees in the public service will be less than what is required of public servants they are nevertheless expected to be loyal and conscientious in the performance of their duties; they, too, may not attack the state they work for, or its constitution; they too may be dismissed without notice for any serious breach of these duties and their applications for employment may be rejected if they are likely to be unable or unwilling to carry out the duties inherent in their appointment.
8. One aspect of behaviour that may be material in assessing the personality of a candidate for the public service is the fact of joining

or belonging to a political party pursuing anti-constitutional aims, regardless of whether its unconstitutionality has been established by a judgement of the Federal Constitutional Court.

9. The legal provisions relating to civil servants and to their discipline covered by Article 33 (5) GG are general laws in the meaning of Article 5 (2) GG.

10. It is not contrary to Article 12 GG for the law governing public servants to incorporate the traditional principle of the permanent public service by requiring a candidate to a post to show that he is prepared at all times to uphold the fundamental constitutional principles of freedom and democracy.

11. The State is entitled to organise a form of pre-service training, the successful completion of which is required both for appointment to the public service and for private practice, in such a way that trainees are either employed under a civil law contract or in a special public law relationship different from that applying to public servants. If it decides that pre-service trainees shall be treated as public servants, it must either offer those who are likely to be employed outside the public service a non-discriminatory form of pre-service training of equivalent value, that does not require the candidate to become a public servant, or include a special clause

in its public service regulations enabling trainees who so desire to complete their course without becoming public servants. Seeing that the two-stage legal training is increasingly being replaced by a single undivided course, it might well be advisable, with a view to standardising the provisions governing pre-service training for lawyers, to make provision in future for all law students to complete their practical training before the second state examination in a special public law relationship as legal trainees and not as public servants.

B. Resolution of the Bundestag of October 24, 1975<sup>123/</sup>

1. The Bundestag is of the opinion that this Act makes the procedural regulations necessary to complete the substantive provisions governing the loyalty of public servants, judges and soldiers. Under the new regulations, which take into account the decision given by the second Chamber of the Federal Constitutional Court on 22 May 1975, the appointing authorities are given appropriate and unequivocal directions on the procedure to be observed when making appointments. The aim of the provisions, which apply uniformly and directly to the Federation and the Länder, is to ensure that, in every branch of the

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<sup>123/</sup> Id. at 145 ff.

service, candidates' loyalty to the constitution is examined according to identical principles guaranteeing the maximum respect for the rule of law and that due consideration is given to the legitimate and recognised interests of those concerned, in particular their right to fair proceedings capable of being reviewed.

The Bundestag expects that, in examining whether a candidate for appointment to the public service offers the guarantees required by the constitution of his readiness at all times to uphold the fundamental constitutional principles of freedom and democracy, the procedure will be based on the Federal Constitutional Court's decision of 22 May 1975, paying particular attention to the following principles:

- a free, democratic state assumes that its citizens are loyal to the constitution. There is, therefore on principle a presumption in favour of candidates for the public service that their personal loyalty to the constitution can be relied on. If an authority is in possession of facts likely to cast serious doubt on the truth of this presumption in a particular case, the appointing authorities have both the right and the duty to investigate the actual facts.

- the candidate shall have the right to state his position with regard to the facts and grounds casting doubt on his loyalty to the constitution. He shall be entitled to the assistance of a legal adviser.

- the statement of the grounds for rejecting an application must contain not only the facts on which the decision is based but also the interpretation put on them (opposition to constitution).

- the words and actions of a young person while still a student or undergoing training, particularly if they go back some considerable time, may only be adduced as reasons for rejecting an application, if their nature and gravity is such as to warrant the supposition that, after his appointment the candidate cannot be relied on at all times to uphold the fundamental principles of freedom and democracy.

The Federal Constitutional Court has expressed the following opinion on this question:

"'Investigations' of the above mentioned kind can only dig out instances of behaviour belonging to a young person's



student or training days, frequently based on a mixture of emotions and sincere protest forming part of environmental and group reactions. These are, therefore, not suitable to be included as one of the (many) factors on which a decision on the personality of the person in question could be based; moreover, they poison the political atmosphere, upsetting the confidence in democracy of those concerned and discrediting a state based on the principles of freedom. They are quite out of proportion to their 'yield' and represent a danger since once stored, they can all too easily be misused."

2. The Federal Government is requested to ensure that the above principles are observed in all areas falling under its jurisdiction, including public corporations, institutions and foundations entitled to act as employing authorities.

3. In the interest of legal uniformity in the Federal Republic the Länder are requested to pass uniform regulations on the procedure for appointing candidates to the public service and in particular to respect the above stated principles.

In view of the fact that the local authorities are supreme employing authority within the bounds of their own jurisdiction the

Länder are requested to do everything legally possible to ensure that any applications for employment with local authorities are rejected only in accordance with the above principles. The same applies to other public corporations, institutions and foundations entitled under Land legislation to act as employing authorities.

C. Resolution of the Federal Government of May 19, 1976<sup>124/</sup>

On 19 May 1976 the Federal Cabinet approved the following principles for deciding on a candidate's loyalty to the constitution:

I. The decision whether the candidate provides the required guarantee of loyalty to the constitution shall be taken by the competent authorities in accordance with the Federal Constitutional Court's decision of 22 May 1975 - 2 Bv 13/73 - and the principle set out in the resolution passed by the German Bundestag on 24 October 1975.

II. In deciding whether a candidate offers the guarantee of loyalty to the constitution required for appointment to the public service, the following procedural principles shall be followed in all cases:

1. It is the duty of the appointing authorities to communicate in writing any doubts as to a candidates's suitability for

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<sup>124/</sup> Id. at 147 ff.

appointment and the material facts on which they are based.

2. The candidate has a right to comment thereon orally or in writing.

3. If a hearing is arranged, a record shall be made of the proceedings which the candidate is entitled to inspect on request.

4. At his own request, the candidate may be assisted by a legal adviser. The latter's role shall be confined to advising the candidate and to procedural matters.

5. In cases in which the candidate's suitability cannot be established, the final decision shall rest with the highest official authority, i.e. in principle the politically responsible Minister.

6. Adverse decisions may be based only on facts that can be assessed by a court of law.

7. The candidate shall, at all events if he so requests, be informed in writing of the grounds for the rejection of his application and of the material facts on which it is based. The decision shall be accompanied by an instruction how to appeal.

8. Steps shall be taken to ensure that only such facts (suitable for use in evidence or being put to the candidate in examination) are supplied to authorities entitled to make enquiries as are capable of establishing doubts as to a candidate's loyalty to the constitution.

In addition to these principles, the following points taken from the Resolution of the German Bundestag of 24 October 1975 are of particular importance:

- a free, democratic state assumes that its citizens are loyal to the constitution. There is, therefore, on principle a presumption in favour of candidates for the public service that their personal loyalty to the constitution can be relied on. If an authority is in possession of facts likely to cast serious doubt on the truth of this presumption in a particular case, the appointing authorities have both the right and the duty to investigate the actual facts;
- the words and actions of a young person while still a student or undergoing training, particularly if they go back some considerable time, may only be adduced as reasons for rejecting an application, if their nature and

gravity is such as to warrant the supposition that, after his appointment, the candidate cannot be relied on at all times to uphold the fundamental principles of freedom and democracy.

The Federal Constitutional Court has expressed the following opinion on this question:

"'Investigations' of the above mentioned kind can only dig out instances of behaviour belonging to a young person's student or training days, frequently based on a mixture of emotions and sincere protest forming part of environmental and group reactions. These are, therefore, not suitable to be included as one of the (many) factors on which a decision on the personality of the person in question could be based. Moreover, they poison the political atmosphere, upsetting the confidence in democracy of those concerned and discrediting a state based on the principles of freedom. They are quite out of proportion to their 'yield' and represent a danger since once stored, they can all too easily be misused."

**END**