

# The Beginnings of Germany's Federal Constitutional Court

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*Abstract.* In this paper I take up aspects of the origins of the Constitutional Court of the Federal Republic of Germany, with special attention to the reasons for the aggregation of power and to the question of how far constitutional court models from abroad played a role in the development of the Court. Where the beginnings of the Federal Constitutional Court are concerned, the German tradition and the experience with the lawless regime of the national socialists played a fundamental role. To a certain degree the Austrian model and to a lesser degree that of the United States figured in the deliberations of Germany's post-War constitutional framers, too.

Perhaps the single most conspicuous characteristic of Germany's Federal Constitutional Court is its truly extraordinary power.<sup>1</sup> Among the Court's powers of review, three basic variants<sup>2</sup> of constitutional review will be emphasized in what follows. The first consists of the Court's review powers vis-à-vis the organisation of the state, that is, federal-state conflicts, conflicts between the federal government and the *Länder*, conflicts between *Länder* (*Bund-Länder-Streitigkeit*), and disputes between high federal organs (*Organstreit*). The second is constitutional review in the narrow sense (*Normenkontrolle*).<sup>3</sup> Here the Court examines the constitutionality of the law.

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<sup>1</sup> Whether the thesis that the German Federal Constitutional Court is the most powerful constitutional court in the world, either historically or today (A. Rincken, in Wassermann 1989, arts. 93–4 GG, marginal note 1), is correct, need not be decided here. It suffices, for my present purposes, to note that the Court's powers, understood both historically and comparatively, are remarkable.

<sup>2</sup> For the distinction among three basic variants, see Friesenhahn 1954, 130–1.

<sup>3</sup> The German concept *Normenkontrolle* has no counterpart in English. Given that constitutional review in its modern form is to a considerable degree an American invention, and that concrete review, as an important variant of the German *Normenkontrolle*, is a review power in both systems, the American and the German, I shall use the term "constitutional review in the narrow sense." This rubric of review powers together with the review powers vis-à-vis the organisation of the state and also vis-à-vis the constitutional complaint I shall term "constitutional review."

Within this rubric one has occasion to distinguish between abstract review and concrete review. Where abstract review (*abstrakte Normenkontrolle*) is concerned, the federal government, the government of a *Land*, and an aggregate of no fewer than one-third of the members of the *Bundestag* are all empowered to turn to the Federal Constitutional Court for a decision on the constitutionality of a law, quite apart from any concrete case. Contrariwise, in concrete review (*konkrete Normenkontrolle*), where a court of ordinary jurisdiction (any court other than the Federal Constitutional Court), deciding a case, is convinced that the applicable federal law or *Land* law is unconstitutional, it must refer the constitutional question to the Federal Constitutional Court. In short, unlike the situation in jurisdictions with decentralized constitutional review, most prominently in the United States, no court of ordinary jurisdiction has power to declare an applicable law invalid in a concrete case. In other words, the practice in the Federal Republic of Germany is, today, a prominent example of centralised constitutional review.<sup>4</sup> Finally, the third basic variant is the constitutional complaint. Any person can claim that an action of the state, a federal law or a *Land* law, a decision of any court of ordinary jurisdiction or, finally, an administrative action violates one or another of his or her basic rights, as granted in the German Basic Law.

Few democratic constitutional states vest their constitutional court with such extraordinary powers, and one can, of course, take up the pros and cons of a constitutional court with powers of this magnitude. My focus, however, lies elsewhere, namely, on the beginnings of the Federal Constitutional Court in Germany. Along with a presentation of aspects of the history of the Court's origins as a part of the history of the origins of the Federal Republic of Germany itself, I shall understand the question of the Court's beginnings as a question addressed to the reasons that lie behind this remarkable aggregation of power on the part of the Constitutional Court. The question of whether foreign constitutional courts played a role in the history of the origins of the German Federal Constitutional Court, and if so, to what degree, remains an underdeveloped issue in the literature, and, to the extent that positions on the issue have been adumbrated, controversial.

Constitutional review is linked very closely to constitution as such, and it was intended from the beginning in the post-War deliberations that the new German constitution should have a federal constitutional court. Thus, the history of the origins of constitutional review is in large part indistinguishable from the history, in the years 1948–49, of the origins of the Basic Law generally. The understanding of the members of the Constitutional Assembly was rarely formulated explicitly, and one is left with little choice but to draw inferences and engage in conjecture. Although the fundamental decisions in this first phase were taken in the Constituent Assembly, a great many questions

<sup>4</sup> On the distinction between decentralized and centralized constitutional review, see Cappelletti 1971, 46–68; see also 1989, 132–46; see also 1966, 1213–24.

relating to the Basic Law were left open. These questions were answered by statutory enactment, namely, the Federal Constitutional Court Act of 1951 (FCCA). The deliberations leading to the enactment of this statute represent the second phase. Finally, in what might be termed a third phase, amendments to the Basic Law and to the 1951 Federal Constitutional Court Act were introduced. They did not, however, alter the fundamental conception.

### **I. The Federal Constitutional Court in the Framers' Deliberations about the Basic Law**

Roughly two years after Germany's unconditional surrender at the end of World War II, the conflict between East and West came to a head. The three Western Allies concluded that a German state was to be created in their respective zones of occupation, excluding the Soviet zone. At the Six Powers Conference in London, in the spring of 1948, the United States, Great Britain and France, with the participation of Belgium, Luxemburg and the Netherlands, agreed to commission a Western German constituent assembly that would have as its mandate the fundamentals of a new constitution, in particular, federalism, democracy, and protection of basic rights.<sup>5</sup> On the question of the nature and organisation of constitutional constraints, the Western Allies gave no instructions—not then and not later either (Katz 1954, 98; Kommers 1969, 74; Fronz 1971, 645; Wilms 1999, 168). They commissioned their military governors to convey the “recommendations” of the London Conference to the Presidents of the eleven German *Länder* in the three Western occupied zones. On 1 July 1948, in Frankfurt,<sup>6</sup> the military governors presented the Presidents of the German *Länder* with corresponding documents, the so-called Frankfurt documents.<sup>7</sup> In particular, these documents comprised the authorization to call a constituent assembly no later than 1 September 1948, this with an eye to a referendum in the German *Länder*. On 8–10 July, the Presidents of the German *Länder* gathered in Coblenz. A majority feared that the creation of a German state that excluded the Soviet zone of occupation would render more intractable, indeed, permanent the division of Germany. They rejected the creation of a “constitution,” wishing instead to create a mere “organisational statute.” Confirmation by referendum was rejected, too. The assembly that would deliberate on the niceties of the “organisational statute” was not to be a “constituent assembly” but merely a “Parliamentary Council.” Disappointment on the part of the Americans and the British ran deep. After hard negotiations, the Presidents of the German *Länder* won the agreement of the Western

<sup>5</sup> The final communiqué of the conference dates from 6 March 1948 (see *Europa-Archiv* 1948, 1349), but negotiations were resumed on 20 April. The communiqué of this closing conference dates from 7 June 1948, text in English in Wagner 1975, 1–10; in part in Huber 1951, 196–7; text in German in Wagner 1975, 10–7; see also *Europa-Archiv* 1948, 1437–9.

<sup>6</sup> Protocol of the conference in German in Wagner 1975, 22–9.

<sup>7</sup> These documents are found in Wagner 1975, 30–6; Huber 1951, 197–200.

Allies, so that only a “Parliamentary Council” (*Parlamentarischer Rat*) would conduct deliberations on the new constitution, which was to be called the “Basic Law” (*Grundgesetz*).<sup>8</sup>

### 1. The Herrenchiemsee Conference

A number of different provisional drafts existed.<sup>9</sup> What with the pressure of time,<sup>10</sup> effective deliberations in the Parliamentary Council presupposed, as a starting point, a common draft. The Presidents of the German *Länder* set up a Committee,<sup>11</sup> consisting of one commissioner from each of the eleven German *Länder* along with other experts. They met on an island in Lake Chiemsee, where they deliberated from 10 to 23 August 1948. On the basis of the Frankfurt documents, the conference—whose participants’ expertise is an established fact (Säcker 1987, 269)—worked up a draft of a constitution<sup>12</sup> as a guideline for the deliberations that would follow. They succeeded in setting down many of the fundamentals of the forthcoming constitution.<sup>13</sup> The draft of the Herrenchiemsee Conference (HChE) comprises, in section viii, arts. 97 to 100, an independent section respecting the Federal Constitutional Court.<sup>14</sup> The question of whether an independent constitutional court ought to be established, or whether constitutional review powers should not be assigned instead to a high federal court, was quite explicitly left open (HCh-Rpt. in Bucher 1981, 554, 620). Otto Küster, referring to the Supreme

<sup>8</sup> The constituent assembly ought only to be termed a “Parliamentary Council” (*Parlamentarischer Rat*); acceptance by referendum was no longer seen as mandatory. The American Military Governor, Lucius D. Clay, did not accept the designation of the constitution as *Grundgesetz* until the presidents of the German *Länder* altered the literal translation into English in note 5 of their Aide-Mémoire of 22 July 1948 (text in German in Wagner 1975, 270–2) as “Basic Constitutional Law,” in contrast to “Basic Law” which had been used earlier. See Mußgnug 1987, marginal note 31–2; Eckert 2000, 20.

<sup>9</sup> In particular, the draft of the *Deutsches Büro für Friedensfragen* (Bucher 1981, lii–lvii), the *Bayrischer Entwurf eines Grundgesetzes* (*ibid.*, lvii–lxiii), the so-called *Ellwanger Entwurf* (Feldkamp 1999, 49–53) and the two so-called *Menzel-Entwürfe* (Hirscher 1989, 142–57) were of significance. A number of other drafts existed, too, as a remark by James K. Pollock, the personal consultant of Lucius D. Clay, suggests: “Every leading German has a constitution in his pocket” (Wagner 1975, xxvii).

<sup>10</sup> On the world-wide political situation during these years, see, e.g., Feldkamp 1998, 128–30.

<sup>11</sup> On this committee see Säcker 1983, 6–10; Schuckart 1999, xv–xvii; Bucher 1981, lxxiii–cxiv; Feldkamp 1998, 28–32; in Denninger et al. 2001, Einleitung I, marginal note 19–20; Kommers 1976, 70–2; Kommers 1997, 7–8.

<sup>12</sup> The text of the draft is found in Bucher 1981, 504–630; also, but without the explanatory notes, in Huber 1951, 219–47.

<sup>13</sup> On the landmark character of the draft of the Herrenchiemsee Conference in general see Eckert 2000, 21; Kröger 1989, 1319. On the landmark character concerning constitutional review in particular, see Kommers 1976, 74; K. Stern, in Dolzer and Vogel 2001, art. 93 GG, marginal note 9; Stern 1980, 333; Steinberger 1990, 53; Robbers 1984, marginal note 26; Wengst 1984, 78–9. This landmark character stems to a certain extent from the partial continuity of personnel as between the Herrenchiemsee Conference and the Parliamentary Council, cf. Mußgnug 1987, marginal note 44.

<sup>14</sup> Report of the Herrenchiemsee Conference (HChC-Rpt.) in Bucher 1981, 599–600; cf. Huber 1951, 235–6.

Court of the United States and to the constitutional jurisdiction of Switzerland, argued on behalf of the second solution.<sup>15</sup> It was, in particular, the Hessian commissioner Hermann Louis Brill who objected here, drawing attention to the incomparability of the legal systems in question and their respective schemes of court organization.<sup>16</sup> Since neither position was able to gain acceptance, the question was left open for the time being.<sup>17</sup>

The catalogue of constitutional review powers in article 98, HChE, comprises all three basic variants of the constitutional review powers already mentioned, the review powers vis-à-vis the organisation of the state, constitutional review in the narrow sense, and the constitutional complaint. A fundamental reason for the striking powers of the Federal Constitutional Court lies in the experience of the collapse of the Weimar Republic. The institutions of the Weimar Republic reflected what proved to be an undue optimism about things democratic; indeed, these institutions facilitated the National Socialists' seizure of power early in 1933. In the wake of Hitler's so-called *Third Reich*, it was clear to the post-War Constitutional Assembly's members that another lawless regime (*Unrechtsregime*) should be prevented at all costs. Whether the structures of a constitution can accomplish this, assuring, then, that no lawless regime would be forthcoming, is less than clear. "Constitutional courts," a major commentator wrote, cannot by themselves "prevent revolution; they can, however, contribute to the feeling of the citizens that they are being treated according to the law" (Friesenhahn 1954, 161). Of course, democracy lives on the basis of presuppositions that it cannot itself create.<sup>18</sup> Still, those structures of the constitution that offer some protection against a lawless regime ought to be built into the instrument (Fronz 1971, 648; Säcker 1987, 265; Feldkamp 1998, 76). In this sense, one may say of the draft: "On the whole it is directed backwards" (Berger 1948, 80).<sup>19</sup>

Thus, one of the most important creations of the Herrenchiemsee Conference is a complete and formidable scheme of constitutional review (Säcker 1987, 269). The report of the Herrenchiemsee Conference emphasizes that the powers of the constitutional court, by comparison with those of the *Staatsgerichtshof* of the Weimar Constitution, ought to be enlarged. In this way, the new constitution could become the "real guardian of the constitution."<sup>20</sup> This strengthening of the constitutional court is the procedural side

<sup>15</sup> Otto Küster, Protocol of the 1st session of the Subcommittee III of the Herrenchiemsee Conference (HChC-SC III) on 13 August 1948 in Schneider 1999, 13–4; Protocol of the 4th session of the HChC-SC III on 16 August 1948 in *ibid.*, 14–5.

<sup>16</sup> Hermann Louis Brill in *ibid.*, 13–14 and 16–8.

<sup>17</sup> Protocol of the 6th session of the HChC-SC III on 17 August 1948 in Schneider 1999, 19; report of the HChC-SC III to the Plenary Assembly of the Herrenchiemsee Conference (HChC-Plenum) on 18 August 1948 in *ibid.*, 20; HChC-Rpt. in Bucher 1981, 554.

<sup>18</sup> On the presuppositions of democracy, see, e.g., Böckenförde 1987, marginal notes 58–80.

<sup>19</sup> All translations in this paper are by Martin Borowski.

<sup>20</sup> HChC-Rpt. in Bucher 1981, 554. Likewise the Report of the HChC-SC III in *ibid.*, 301.

of the coin. Its substantive side is a strengthening of basic rights vis-à-vis the legislature.<sup>21</sup> This is indicated in the formulation of the report on the Herrenchiemsee Conference, which says that the constitutional complaint alone establishes the full character of the basic rights as claim rights.<sup>22</sup> The strengthening of the Federal Constitutional Court is also marked by the fact that an independent section of the draft is devoted to the court. In this respect the draft reflects the intention that the powers of the Court be equal to those of the other branches of the government.<sup>23</sup>

Apart from disputes between high federal<sup>24</sup> organs,<sup>25</sup> the review powers vis-à-vis the organization of the state did not, in the main, represent an innovation (Säcker 1987, 271). They had been provided for in the Weimar Constitution of 1919 and, much earlier, in the Frankfurt Constitution of 1848–49. Comprehensive constitutional review, however, was an innovation in Germany. The Weimar Constitution had provided for abstract review in article 13 section 2, but only for *Land* laws (*Landesgesetze*), not federal laws (*Reichsgesetze*). What is more, only the highest ordinary courts, not the *Staatsgerichtshof*, were empowered to exercise the abstract review power. The abstract review power provided by the Basic Law, on the other hand, namely a review power of the Federal Constitutional Court, covers both federal laws and laws of the *Länder*. Concrete review power, namely, the requirement that the courts of ordinary jurisdiction refer a constitutional question to the Federal Constitutional Court where, in the lawsuit, it is convinced that the law in question is in conflict with the constitution, is also a fundamental innovation. Under the Weimar Constitution, the *Reichsgericht*, then the highest civil and criminal court in Germany, created the power formally and substantively to review federal laws (von Hippel 1932, 557; von Staff 1929, 103–5; Lübke-Wolff 1991, 411–34). Earlier, only the formal review power<sup>26</sup> had been recognized (Anschütz 1933, 475–8), even if some authors had

<sup>21</sup> Hermann L. Brill, Protocol of the 3rd session of the HChC-Plenum of 11 August 1948, in Schneider 1999, 335.

<sup>22</sup> HChC-Rpt. in Bucher 1981, 622. Comparable the report of the HChC-SC III in *ibid.*, 324: “full character of the basic rights as claim rights.”

<sup>23</sup> Report of the HChC-SC III in Bucher 1981, 301; Report by C. Leusser at the HChC-Plenum of 23 August 1948 in *ibid.*, 416; HChC-Rpt. in *ibid.*, 554. Cf. Säcker 1987, 271; Fronz 1971, 644. H. Nawiasky, Protocol of the 4th session of the Subcommittee I of the Herrenchiemsee Conference (HChC-SC I) of 18 August 1948, in Schneider 1999, 353: “The result is that from now on all basic rights are once again given substantive import. Given that a constitutional complaint may be filed, the basic rights acquire greater legal force, and the guarantee that the state cannot enter this sphere willy nilly is established.”

<sup>24</sup> Disputes between high organs of the *Länder* can be decided by constitutional review, too. These disputes are, however, to be decided not by the Federal Constitutional Court but by the constitutional court of the *Land* in question.

<sup>25</sup> Under the Weimar Constitution of 1919, disputes between organs of the *Reich* were understood as non-justiciable questions, political in nature, see A. Rincken, in Wassermann 1989, ahead of arts. 93–4 GG, marginal note 21.

<sup>26</sup> Formal review power is, in particular, the power to decide whether the legislator of the law in question held the corresponding legislative power and whether the conditions of the legislative process are fulfilled.

argued at the time in favour of the courts' power substantively to review federal laws (see Scheuner 1976, 39–41; Steinberger 1990, 67–9; A. Rinken, in Wassermann 1989, ahead of arts. 93–4 GG, marginal notes 14–9). Under the Basic Law, a court of ordinary jurisdiction, convinced that a statutory provision is unconstitutional, is, however, not empowered to declare that provision invalid—not *erga omnes* and not *inter partes* either.<sup>27</sup> Rather, it is obligated to refer the constitutional question to the Federal Constitutional Court,<sup>28</sup> which decides the question. Its decision is then binding on the court and the parties to the lawsuit, with additional effects *erga omnes*. Both types of review serve as a constitutional safeguard, shoring up the legislator's substantive commitment to the basic rights, explicitly provided for in article 1, section 3, Basic Law.

Evidence of those motives of participants at the Herrenchiemsee Conference that led to the creation of the both types of review cannot be found explicitly anywhere in the protocols or reports of the Herrenchiemsee Conference. On this matter, everyone fundamentally agreed, and there was therefore no need for detailed discussion. There can be no doubt, however, that the fundamental motive lay in the experience with the lawless regime of the National Socialists. Against this backdrop, the powerful safeguard provided by the legislator's substantive commitment to the basic rights is a natural step. On the other hand, the drafters feared that the power of the legislator would be weakened if every court of ordinary jurisdiction were able to declare a law null and void. Furthermore, by comparison with its decentralised counterpart, it is apparent that centralized constitutional review enhances legal certainty (Friesenhahn 1954, 136–7). For these reasons, a constitutional court *qua* centralized organ for constitutional review was planned.

Even more, the constitutional complaint broke new ground.<sup>29</sup> With regard to the establishment of this constitutional review power, there was a degree of uncertainty concerning, in particular, the question of whether the highest courts of ordinary jurisdiction might be weakened owing to the possibility

<sup>27</sup> A decision has effects only *inter partes* if the decision is binding on the parties to the case alone. Contrariwise, it has effects *erga omnes* if it is also binding on all others who find themselves similarly situated in the future. On the distinction of the effects *inter partes* and *erga omnes* in the context of judicial review, see, e.g., Cappelletti 1971, 85–8.

<sup>28</sup> A. Süsterhenn, Protocol of the 4th session of the HChC-SC III of 16 August 1948, in Schneider 1999, 340.

<sup>29</sup> Although it is said that the constitutional complaint as a part of constitutional review "reflects a long tradition in Germany" (Drath 1952, 39), this seems exaggerated. It is true that the Frankfurt Constitution of 1848–49 provided for the constitutional complaint, but this constitution never saw the light of day. In Bavaria, the constitutional complaint was introduced in 1919. On the Bavarian constitution and its tradition, see Scheuner 1976, 48–50. Other than that, the constitutional complaint is found only in some *Land* constitutions after World War II. At the time of the deliberations on the new federal constitution, these *Land* constitutions had been, at most, valid for two years, which is to say that, with the exception of Bavaria, there had been no experience with constitutional complaints in the German practice of constitutional review.

that their final decisions could be overturned in the course of hearing constitutional complaints.<sup>30</sup> It appears that the constitutional complaint of the Bavarian Constitution of 2 December 1946, article 98 clause 4, article 120, served as a model for the Basic Law (Säcker 1987, 272; Pestalozza 1991, 160; J. Wieland, in Dreier 2000, art. 93 GG, marginal note 15; Robbers 1984, marginal note 23). The constitutional complaint had been provided for, too, in the Bavarian Constitution of 14 August 1919, par. 70, section 1.<sup>31</sup> In Hans Nawiasky's treatise on Bavarian constitutional law, published early in the 1920s, one finds the outlines of the constitutional complaint that was later adopted by amendment to the Basic Law (Nawiasky 1923, 457–61). The same is true of his commentary on article 120 of the Bavarian Constitution of 1946 (Nawiasky and Leusser 1948, 201–3). Nawiasky exercised great influence not only on the drafts for the Bavarian Constitution of 1946 (Zimmer 1987, 319–20), but also on the important Bavarian draft of the Basic Law (Stern 1980, 330–1), in which the constitutional complaint was provided for, article 62, nr. 8.<sup>32</sup> At the Herrenchiemsee Conference, with Hans Nawiasky present as one of only four experts, however, no agreement could be reached on the question of whether the constitutional complaint *qua* constitutional review power ought to be adopted.<sup>33</sup> The participants therefore reserved a special place for it, in article 98, nr. 8, HChE (see HCh-Rpt. in Bucher 1981, 622).<sup>34</sup>

Article 99, HChE, regulated the binding character of the decisions of the forthcoming Constitutional Court, in some cases with the import of a law,<sup>35</sup> while art. 100, HChE, chiefly regulated the election of judges. Here the main idea was that judges be selected in equal numbers by the *Bundestag* and the *Bundesrat*, along with the provision that a certain number of judges were to be elected by a panel of judges of the higher federal courts (see HChC-SC III Rpt. in Bucher 1981, 325–6; HChC-Rpt., in *ibid.*, 623–4).

## 2. The Parliamentary Council

After a complete draft of a constitution had been drawn up at the Herrenchiemsee Conference, in a matter of two weeks, in the atmosphere of an academic seminar (see Säcker 1987, 267–8; Mußnug 1987, marginal note 40), and after the selection of the 65 delegates (*Abgeordnete*) of the

<sup>30</sup> See Protocol of the 12th session of the HChC-Plenum of 13 August 1948 in Schneider 1999, 365–9.

<sup>31</sup> Text in Nawiasky 1923, 545. Despite differences in the constitutional complaint in the Bavarian Constitution of 1919, the Bavarian Constitution of 1946 and in the Basic Law, the core idea remains the same.

<sup>32</sup> Text of the draft in Wilms 1999, 45; cf. Bucher 1981, 24.

<sup>33</sup> Nawiasky explained this lack of agreement in terms of the lack of time, Nawiasky 1950, 33.

<sup>34</sup> The constitutional complaint was also covered in the report, see Bucher 1981, 302 and 324.

<sup>35</sup> See Report of the Subcommittee III of the Herrenchiemsee Conference (HChC-SC III Rpt.) in Bucher 1981, 324–5; HChC-Rpt. in *ibid.*, 623.

Parliamentary Council, whose deliberations reflected for the most part political disputes, deliberations on the new constitution commenced on 1 September 1948 in Bonn. They were to continue until May of the following year. The delegates of the Parliamentary Council included the most experienced politicians and the most outstanding constitutional scholars of the day, many of whom were to go on to play important roles in the public life of the Federal Republic of Germany (Mußgnug 1987, marginal note 47; Denninger 2001, *Einleitung I*, marginal note 22). Politically important is the fact that the two major parties, the Christian Democrats and the Social Democrats, were represented equally with 27 delegates each, to which three minor parties and the parliamentary party representing the F.D.P./LDP/DVP<sup>36</sup> were added, yielding eleven more delegates. That one party or even a single political persuasion might prevail by outvoting the others was not possible. Even though the Parliamentary Council was far smaller than the National Assembly in Frankfurt 1848–49, or the National Assembly in Weimar 1919, the lion's share of the deliberations nevertheless had to be conducted in committee. Aside from several select committees,<sup>37</sup> and aside from the Main Committee, which was the most important body for coordination and for preliminary decisions, seven regular committees were formed. The most important committee with respect to constitutional review, aside from the Main Committee, was the Committee for the Constitutional Court and the Administration of Justice. In the deliberations a great many ideas, arguments and drafts were altered. Following developments in the meetings of the different committees in detail is a complicated matter. My tack here is to offer an overall view of the development of the constitutional review in the constitutional deliberations, focusing on the most important themes and constitutional review powers.

#### a) Independent Constitutional Court or Constitutional Review as a Power Conferred on the Higher Federal Courts

At the very outset the question arose: Which court ought to carry out the mandate for constitutional review? At the Herrenchiemsee Conference no agreement on the nature of the courts of the forthcoming constitution could be reached. This was true, in particular, on the question of whether an independent constitutional court ought to be established or whether constitutional review ought to be conducted by the higher federal courts. In this discussion, the leitmotif of law versus politics played a certain role. Other themes included the qualifications of the judges of the forthcoming

<sup>36</sup> The three liberal parties *Freie Deutsche Partei* (F.D.P.), *Liberal-Demokratische Partei Deutschlands* (LDP, later LDPD) and *Demokratische Volkspartei* (DVP) were united in the F.D.P. in December 1948.

<sup>37</sup> On the various committees of the Parliamentary Council, see, e.g., Schuckart 1999, xxi–xxiv. In particular, on the miscellaneous select committees, see Denninger et al. 2001, *Einleitung I*, marginal note 24.

constitutional court, in particular, whether they were to be professional or lay judges.

The outlines of federal jurisdiction generally had not been determined at this point. Two models competed for favour. Following the first, for the different fields of jurisdiction an independent federal court, without further appeal, would be established (a one-level model with different federal courts). This is the solution that was in fact adopted. Following a second model, together having several federal courts with different fields of jurisdiction, a High Federal Court, with no further appeal, would be established (a two-level model). This model was followed in the initial version of the Basic Law in 1949. Depending on which scheme of federal jurisdiction one prefers and depending on whether or not an independent constitutional court is incorporated therein, the result amounts to a full constellation of federal jurisdiction and constitutional review. Corresponding to these two distinctions, four models are generated: (1) an independent constitutional court and two levels of federal jurisdiction, (2) an independent constitutional court and one level of federal jurisdiction, (3) no independent constitutional court and two levels of federal jurisdiction, and finally, (4) no independent constitutional court and one level of federal jurisdiction. Following models (1) and (2), constitutional review is conducted by the independent constitutional court, following model (3), by the Federal Supreme Court, and, following model (4), by one of the federal courts.

The question that arose in connection with the organization of federal jurisdiction and the question regarding the independence of the constitutional court were not without connection: Reciprocal ties existed. For example, Georg-August Zinn initially pleaded for an independent constitutional court, arguing that the constitutional court's task is to strike a balance between and among the legislative, administrative and judicial branches of Government.<sup>38</sup> Zinn argued, in particular, against model (4). After Walter Strauß, who wrote a memorandum that was of importance in the deliberations (Strauß 1949), had argued for an independent constitutional court and a Federal Supreme Court in the sense of model (1),<sup>39</sup> Zinn pleaded for an independent constitutional court, recognizing models (2) and (3) as falling within the realm of the possible.<sup>40</sup> Later he argued on behalf of model (3), provided that for the more political questions of constitutional review lay judges would be engaged, whereas for other questions only professional judges would serve.<sup>41</sup> Together

<sup>38</sup> G.-A. Zinn, Protocol of the 5th session of the Committee on Organisation of the Parliamentary Council (PC-CO), combined with the Committee for Constitutional Court and the Administration of Justice of the Parliamentary Council (PC-CCCAJ) of 23 September 1948, in Schneider 1999, 28, 30–1.

<sup>39</sup> W. Strauß, Protocol of the 2nd session of the PC-CCCAJ of 20 October 1948, in Schneider 1999, 42–9.

<sup>40</sup> G.-A. Zinn in *ibid.*, 65–6.

<sup>41</sup> G.-A. Zinn, Protocol of the 3rd session of the PC-CCCAJ of 22 October 1948, in Schneider 1999, 78.

with Strauß, he then went on to develop a corresponding proposal.<sup>42</sup> At the next meeting of the Committee of the Constitutional Court and the Administration of Justice, the opinion of its members changed. The President of the High Court of the British zone of occupation, Ernst Wolff, present at this meeting, rejected the idea that the planned Federal Supreme Court might conduct constitutional review. Because disputes involving the constitutional review powers would be more or less political in nature, a political infiltration of the Federal Supreme Court would be inevitable. This, however, is incompatible with the required "absolute purity of the legal sphere."<sup>43</sup> The discussion over the consequences of a greater political dimension versus a greater legal presence, along with the necessity of deciding whether to call professional or lay judges to the constitutional court, continued.<sup>44</sup> At the end of this discussion, Max Becker pleaded for the separation of the Federal Supreme Court and the constitutional court.<sup>45</sup> Paul de Chapeaurouge agreed and, commenting on the drafts released thus far, added that the connection of the Federal Supreme Court and the constitutional court would not have been on the right track.<sup>46</sup>

In the 7th meeting of the Committee for the Constitutional Court and the Administration of Justice, the fundamental conception of constitutional review and federal jurisdiction was settled in the version that was in fact later adopted in the Basic Law. On the basis of a draft developed by Zinn, Strauß and Thomas Dehler, the articles on the Federal Constitutional Court and on the administration of justice in general were integrated in a single section of the draft of the Basic Law.<sup>47</sup> It had initially been planned that the Federal Supreme Court would be designated ahead of the Federal Constitutional Court;<sup>48</sup> later, however, the order was reversed.<sup>49</sup> Thus, the decision in favour of the separation of the Federal Constitutional Court and the High Federal Court was finalized, notwithstanding the fact that the Committee for the Constitutional Court and the Administration of Justice persisted in their view that the connection of the courts was plausible.<sup>50</sup>

<sup>42</sup> Text in Protocol of the 4th session of the PC-CCCAJ of 27 October 1948, in Schneider 1999, 103–4.

<sup>43</sup> E. Wolff, Protocol of the 5th session of the PC-CCCAJ of 10 November 1948, in Schneider 1999, 152–3, 178–9.

<sup>44</sup> See Protocol of the 5th session of the PC-CCCAJ of 10 November 1948, in Schneider 1999, 180–5.

<sup>45</sup> M. Becker, in *ibid.*, 185.

<sup>46</sup> P. de Chapeaurouge, in *ibid.*, 186: "wrong path."

<sup>47</sup> See Protocol of the 7th session of the PC-CCCAJ of 6 December 1948, in Schneider 1999, 195–8.

<sup>48</sup> G.-A. Zinn, in *ibid.*, 198.

<sup>49</sup> See Protocol of the 10th session of the PC-CCCAJ of 11 January 1949, in Schneider 1999, 274, 278–9.

<sup>50</sup> Report by delegate G.-A. Zinn on section IX, enclosure to the shorthand report of the 9th session of the Plenary Assembly of the Parliamentary Council (PC-Plenum) of 6 May 1949, in Schneider 1999, 211.

## b) Federal-State Conflicts and Disputes between High Federal Organs

There was widespread agreement over the constitutional review powers addressed to the issue of federal-state conflicts. This is an altogether different situation, then, from that in the case of disputes between high organs. In the 5th meeting of the Committee for the Constitutional Court and the Administration of Justice, Strauß argued in principle against the inclusion of the disputes between high federal organs in the constitutional review powers, contending, in effect, that these disputes did not lend themselves to judicial resolution.<sup>51</sup> Otto Heinrich Greve supported this position with the argument that decisions in such disputes would be political in nature.<sup>52</sup> Elisabeth Selbert pleaded in favour of this review power,<sup>53</sup> and a decision was postponed for the time being.<sup>54</sup> In the 7th meeting of the Committee for the Constitutional Court and the Administration of Justice, deliberations were resumed. In the long discussion, special emphasis was given to the question of which persons or institutions, aside from an "organ," ought to be empowered to appeal to the Federal Constitutional Court in disputes between organs or qualified parts of organs.<sup>55</sup> The decisive voting took place in the 23rd meeting of the Main Committee. After a renewed exchange of arguments, the question of disputes between high federal organs, slightly modified as defined by a petition of Dehler, was settled in the version later adopted in the Basic Law.<sup>56</sup>

## c) Abstract and Concrete Review

In the draft of the Herrenchiemsee Conference, concrete review is provided in article 98, nr. 4, 137 HChE. Abstract review in article 98, nr. 5, HChE, is limited to those "factors that figure in the legislative process" (*am Gesetzgebungsverfahren beteiligte Faktoren*). In the 4th meeting of the Committee for the Constitutional Court and the Administration of Justice, a far-reaching consensus emerged, namely, to empower only the constitutional court to declare laws invalid, and not, then, any court of ordinary jurisdiction.<sup>57</sup> There was a lengthy discussion of the question of how the examination of the constitutionality of laws by a constitutional court might be integrated into the process of the ordinary lawsuit and what effects the deci-

<sup>51</sup> W. Strauß, Protocol of the 5th session of the PC-CCCAJ of 10 November 1948, in Schneider 1999, 423–4.

<sup>52</sup> O. H. Greve, in *ibid.*, 425.

<sup>53</sup> E. Selbert, in *ibid.*, 424–5.

<sup>54</sup> See Protocol of the 5th session of the PC-CCCAJ of 10 November 1948, in Schneider 1999, 426.

<sup>55</sup> See Protocol of the 7th session of the PC-CCCAJ of 6 December 1948, in Schneider 1999, 468–77.

<sup>56</sup> See Protocol of the 23rd session of the Main Committee of the Parliamentary Council (PC-MC) of 8 December 1948, in Schneider 1999, 501–10.

<sup>57</sup> See Protocol of the 4th session of the PC-CCCAJ of 27 October 1948, in Schneider 1999, 143.

sion in the constitutional court would have for the court and participants of the ordinary lawsuit (*inter partes*) and beyond (*erga omnes*).<sup>58</sup> In the 5th meeting of the Committee for the Constitutional Court and the Administration of Justice, Strauß argued that concrete review be carried out not by the Federal Constitutional Court but by the Federal Supreme Court. As for the rest, the discussion of both variants of constitutional review in the narrow sense was postponed for the time being.<sup>59</sup> In the 6th meeting of the Committee for the Constitutional Court and the Administration of Justice, everyone agreed to delete the provision in article 98, nr. 5, HChE, on the grounds that it was regarded for the most part as redundant.<sup>60</sup>

In the proposal of the General Editorial Committee of 5 December 1948, both concrete and abstract review are provided in article 128b, section 1, nr. 3, of the draft. In this version, only the Federal Government or, alternatively, the government of a *Land* was empowered to call for a decision of the Federal Constitutional Court where abstract review was at issue.<sup>61</sup> On the following day, in the 7th meeting of the Committee for the Constitutional Court and the Administration of Justice, Strauß demanded once again that constitutional review be assigned to the Federal Supreme Court; he could not, however, prevail over Zinn and de Chapeaurouge.<sup>62</sup> With encouragement from de Chapeaurouge, the power to call for a decision in cases of abstract review was extended to "one-third of the Members of the *Bundestag*."<sup>63</sup> In the 23rd meeting of the Main Committee, Strauß demanded once again the deletion of, *inter alia*, article 128b, nr. 3, of the draft, arguing, as before, that this constitutional review power be assigned to the Federal Supreme Court. He was, however, outvoted.<sup>64</sup>

In the 37th meeting of the Main Committee, on 13 January 1949, Hans-Christoph Seebohm moved that the power to call for a decision in cases of abstract review be extended to the Federal President and to "1/5 of the Members of the *Bundestag* or a *Landtag*." This motion, too, was rejected by the majority.<sup>65</sup> Strauß raised the rejected motion again, and was again outvoted.<sup>66</sup>

One finds the combined provision of both variants of constitutional review in the narrow sense in article 128b, nr. 3, of the draft, to be in sub-

<sup>58</sup> See *ibid.*, 122–43.

<sup>59</sup> See Protocol of the 5th session of the PC-CCCAJ of 10 November 1948, in Schneider 1999, 428–9.

<sup>60</sup> See Protocol of the 6th session of the PC-CCCAJ of 16 November 1948, in Schneider 1999, 449.

<sup>61</sup> See General Editorial Committee of the Parliamentary Council (PC-GEC), Proposal on the revised version of the section "XII Gerichtsbarkeit und Rechtspflege (Abschnitt VIII Bundesverfassungsgericht entfällt)," of 5 December 1948, in Schneider 1999, 464.

<sup>62</sup> See Protocol of the 7th session of the PC-CCCAJ of 6 December 1948, in Schneider 1999, 486.

<sup>63</sup> See *ibid.*, 486–7.

<sup>64</sup> See Protocol of the 23rd session of the PC-MC of 8 December 1948, in Schneider 1999, 512–3.

<sup>65</sup> See Protocol of the 37th session of the PC-MC of 13 January 1949, in Schneider 1999, 541–4.

<sup>66</sup> See *ibid.*, 544–6.

stantial agreement with article 128 of the drafts of Basic Law on the first and second reading.<sup>67</sup> This combination was, however, eliminated by the General Editorial Committee by deleting concrete review, also provided in another article of the draft, from the catalogue of article 128 of the drafts of Basic Law.<sup>68</sup> With this decision, a state of affairs reflecting the provisions of the forthcoming Basic Law was reached, namely, abstract review by the application of the Federal Government, the government of a *Land* or one-third of the Members of the *Bundestag*, article 93, section 1, nr. 2, Basic Law, and concrete review by the application of an ordinary court, article 100, section 1, Basic Law.

#### d) Constitutional Complaint

Little in the deliberations of the Parliamentary Council can be found on the constitutional complaint. In the 5th meeting of the Committee on Organisation, combined with the Committee for the Constitutional Court and the Administration of Justice, Rudolf Katz pleaded on 23 September 1948 for the integration of the constitutional complaint into the repertoire of constitutional review powers: "That which is new is what I see in the device that colleague Zinn has called the 'popular complaint' (*Popularklage*), which is to say that each and every individual can file a suit alleging the violation of his or her basic rights. That is something that was always possible in American law. It would be a provision of enormous importance, one that ought to be incorporated into the new constitution and the forthcoming law."<sup>69</sup> Hermann Fecht argued against the constitutional complaint on grounds that it threatened to overwhelm the courts: "The extension to a constitutional complaint is something about which I have real doubts. I believe the matter should be left to the constitutional courts of the *Länder*."<sup>70</sup> More positive on the matter was Fritz Löwenthal's comment on the constitutional complaint: "The popular complaint would have the negative effect of mobilizing the troublemakers, but it would have, of course, the positive effect of yielding an authority that could review the constitutionality of the actions of the administrative bodies. This positive effect would figure more importantly, and for this reason the concern that troublemakers would abuse the institution cannot, in my opinion, be decisive."<sup>71</sup> Selbert held the same view: "In contrast to the Weimar Constitution, we want to arrive at a state of affairs in which basic rights are justiciable. Given the importance of basic rights,

<sup>67</sup> See PC-MC, comparison of the drafts of the Basic Law on the first and second reading, as of 15 January 1949, in Schneider 1999, 555–6.

<sup>68</sup> See Statement of the PC-GEC on the version of the PC-MC on the second reading, as of 25 January 1949, in Schneider 1999, 562.

<sup>69</sup> R. Katz, Protocol of the 5th session of the PC-CO, combined with the PC-CCCAJ, of 23 September 1948, in Schneider 1999, 30.

<sup>70</sup> H. Fecht, in *ibid.*, 32.

<sup>71</sup> F. Löwenthal, in *ibid.*, 34.

we want to emphasize that it has to be possible to arrive at a decision of the Federal Supreme Court on the basis of a popular complaint. Given the importance of this matter, it is not in my view a good idea to assign it to the lower courts."<sup>72</sup> To sum up, by the end of September, the constitutional complaint was seen in rather positive terms.

Deliberations on the constitutional complaint were initially planned in the Committee for the Constitutional Court and the Administration of Justice in the 5th meeting at the beginning of November. Strauß had previously developed a proposal for the articles concerning the Federal Constitutional Court. In enclosure nr. 2, one finds, in article 21a, the constitutional complaint: "(1) Every German citizen can file a constitutional complaint if he believes that one of his basic rights or another right, granted by the Basic Law, has been violated by a decision of the administrative body."<sup>73</sup> The 5th meeting of the Committee for the Constitutional Court and the Administration of Justice was postponed at the request of Wilhelm Laforet; Strauß asked the other members of the committee to take the matter under advisement until the next meeting, referring to his proposal.<sup>74</sup> At the next meeting, the 6th, there were no comments on the constitutional complaint. In the proposal of the General Editorial Committee concerning the new version of section "XII Jurisdiction and Administration of Justice" (*XII Gerichtsbarkeit und Rechtspflege*), which was the basis for the 7th meeting of the Committee for the Administration of Justice, no constitutional complaint was provided.<sup>75</sup> Neither in this meeting nor in later meetings was the matter taken up again; no explicit decision in favour of the deletion of this review power is to be found. In the report of the Plenary Assembly of the Parliamentary Council on the draft of the Basic Law, the renunciation of the constitutional complaint is justified on the basis of the guarantee of legal protection in general, pursuant to article 19, section 4, Basic Law; it was remarked, however, that the question as to whether the failure to concentrate the protection of basic rights in a single court would have an effect on the efficacy of basic rights, would have to be decided in further amendments.<sup>76</sup>

Already in the draft of the Herrenchiemsee Conference, a provision can be found that empowers the federal legislator to create new review powers for the Federal Constitutional Court, article 98 nr. 11 HChE. The Parliamentary Council upheld this provision and it was adopted in the Basic Law,

<sup>72</sup> E. Selbert, in *ibid.*, 35.

<sup>73</sup> W. Strauß, *Neue Vorschläge zur Formulierung der Artikel 97–100* (with three enclosures), 8 November 1948, in Schneider 1999, 410.

<sup>74</sup> See Protocol of the 5th session of the PC-CCCAJ of 10 November 1948, in Schneider 1999, 432.

<sup>75</sup> See PC-GEC, Proposal on the revised version of section "XII Gerichtsbarkeit und Rechtspflege (*Abschnitt VIII Bundesverfassungsgericht entfällt*)", of 5 December 1948, in Schneider 1999, 464–5.

<sup>76</sup> See PC-Plenum, Written Report on the draft of the Basic Law for the Federal Republic of Germany, given by the referees of the PC-MC, enclosure to the shorthand report of the 9th session of 6 May 1949, in Schneider 1999, 596.

article 93, section 2. Although the constitutional complaint was not provided for in the Basic Law when it came into effect, the introduction of the constitutional complaint by federal statute remained a possibility.

#### e) Effects of Decisions, Selection of Judges, and the Organization of the Court

The provisions regarding the effects of decisions of the Federal Constitutional Court, the selection of judges, and the organization of the court were established only in part in the Basic Law. In the proposal of Zinn, Strauß and Dehler, mentioned in a) above, which was on the agenda in the 7th meeting of the Committee for the Constitutional Court and the Administration of Justice, the subject matter of articles 99 and 100, HChE, was provided in article 128c and 128e. In particular, article 128e provided, in section 1, for the composition of the court by judges drawn from the federal courts and from outside the federal courts, and in section 2, for their selection, in equal numbers, by the *Bundestag* and *Bundesrat*. Only the chairmen and the presidents of the senates had to possess the qualifications for judicial office specified in the German Judges Act, article 128e, section 3. The incompatibility of the function of the judge serving both on the Federal Constitutional Court and in the *Bundestag*, the *Bundesrat* or the Federal Government, or in a comparable office of one of the *Länder*, was provided for in section 4. The decisions of the Federal Constitutional Court in the exercise of its review powers have the force of statutory law, article 128c (von Doemming, Füsslein, and Matz 1951, 684–5). In the deliberations that followed, the ratio between those members who had been judges on the federal courts and other members, the determination of the chairmen and the presidents of the senates and especially the statutory force of decisions were all discussed (*ibid.*, 686–9). Since no agreement could be reached on these issues, the final provision in the Basic Law was confined to a minimum. Only the selection of judges, in equal numbers, in the *Bundestag* and *Bundesrat* was established in the new constitution, article 94, section 1, clause 1, Basic Law; and in the following clause of this section, the incompatibility of the office of a judge of the Federal Constitutional Court with other public offices, as noted above, article 94, section 1, clause 2, Basic Law, was established. The organisation of the Federal Constitutional Court, the rules of court procedure and the question of the force of the decisions of the courts were expressly left to the federal legislators.

## II. Federal Constitutional Court Act

Once the Basic Law had been passed on 23 May 1949, it was not possible to go on immediately to establish the Federal Constitutional Court. To be sure, in the Basic Law the fundamental review powers had been provided for, but the question of the organization of the court remained open, and no statute

respecting the rules of court procedure had been enacted. In October 1949, the Federal Ministry of Justice began work on a statute regarding the organization of the Federal Constitutional Court and its rules of court procedure. The controversies over the Constitutional Court that had already surfaced in the deliberations over the Basic Law were aggravated by the fact that the Christian Democrats were in power, the Social Democrats in opposition. Before the Federal Constitutional Court Act was finally passed and then signed, on 12 March 1951, by the Federal President, and subsequently promulgated in the Federal Law Gazette,<sup>77</sup> there had been deliberations in the *Bundestag* marked by sharp differences.<sup>78</sup>

#### a) The Organization of the Court

Those questions on the status of the Federal Constitutional Court vis-à-vis the other independent constitutional organs that had been not explicitly decided in the Basic Law were answered positively in sect. 1, para. 1, FCCA.<sup>79</sup> An agreement on the site of the Federal Constitutional Court could not be reached immediately; thus, this problem was left open in sect. 1, para. 2, FCCA—but with an eye to a special statute that, shortly thereafter, called for Karlsruhe as the site.<sup>80</sup> The Federal Constitutional Court claimed the autonomy to set down its own rules of judicial procedure without explicit authorization by statute; the first complete version of these rules was passed in 1975. The amending law first introduced this authorization in sect. 1, para. 3, FCCA, in 1985. The rules of judicial procedure<sup>81</sup> complement FCCA organisation and rules of court procedure of the Federal Constitutional Court.

According to par. 2, FCCA, the court comprises two senates, with—in the initial version of the FCCA—12 judges each, in the present version, eight judges each. The judges of each senate are selected, in equal numbers, by the *Bundestag* and the *Bundesrat*, according to sect. 5, para. 1, clause 1, FCCA, which in this respect only repeats article 94, para. 1, clause 2, Basic Law. Thus, it is assured that the Federal Government and the *Länder* can

<sup>77</sup> *Bundesgesetzblatt* (BGBl.) I, 243.

<sup>78</sup> For details on the deliberations in the legislation, see Geiger 1951, xix–xxiii.

<sup>79</sup> Thus, the Federal Constitutional Court is of a Janus-faced nature. On the one hand, as a court it is a part of the judiciary, on the other, it remains an independent constitutional body. This character, as accorded to the constitutional body, did not go uncontested in the beginning; the Court, however, laid claim to it right from the start (*Bundesverfassungsgericht* 1957a; Leibholz 1957). In particular, Richard Thoma objected to the Court's opinion regarding its own status (Thoma 1957). In replying to this expert's opinion, the Federal Constitutional Court, represented by its President, Hermann Höpker-Aschoff, answered in comprehensive terms, (*Bundesverfassungsgericht* 1957b). On the in part impassioned argument over the status of the Federal Constitutional Court as a constitutional body, see, in particular, Kommers 1997, 15–6.

<sup>80</sup> Law of 4 May 1951, BGBl. I, 288.

<sup>81</sup> Rules of Judicial Procedure of the Federal Constitutional Court from 15 December 1986 (BGBl. I, 1571) in the version of the altering resolution of the plenum of the Federal Constitutional Court of 18 December 1995 (BGBl. I, 1996, 474), printed in Maunz et al. 2001, para. 3.

influence the selection of the judges of the court equally. The selection in the *Bundestag* takes place in a special committee with 12 members, the Judicial Selection Committee, and in the *Bundesrat*, with all the members of that body casting a vote. According to sect. 6, para. 5, sect. 7, FCCA, in both instances a majority of two-thirds<sup>82</sup> is required—an important point. As a result, the parliamentary majority or majority in the *Bundesrat* cannot as a rule select, by itself, the respective part of the senates by outvoting its opposition. This leads *de facto* to the necessity that the large political parties arrive at a consensus. The procedure works to the great advantage of the continuity of the court's jurisdiction. It is remarkable that this provision can grant no effective protection against a simple majority of the *Bundestag* or *Bundesrat*, for the parliamentary statute that provides for the two-thirds majority can be altered so as to require only a simple majority; this simple majority might, then, determine the appointment of judges, and after the enactment of such an amending law, the simple majority would then select the judges. However, when the FCCA was initially enacted, a broad consensus existed to the effect that the function of the Federal Constitutional Court, namely, the control of all state authority, implied that the selection of judges by a simple majority was precluded.<sup>83</sup> This consensus still exists today.

The judges must possess the qualifications for judicial office specified in the German Judges Act (sect. 3, para. 2, FCCA), which is to say that they do not have to be professional judges, though it is required that they be "full jurists"<sup>84</sup> (*Volljuristen*). In the deliberations on the German Basic Law, the idea of the participation of lay judges (*nichtrichterliche Mitglieder*) in constitutional review was considered. The possibility of calling important persons in public life (*Personen des öffentlichen Lebens*) to the office of judge is severely limited by the FCCA's requirement that the judge be a "full jurist." Where, in the voting in the senate, there is a parity of votes—not an improbable event considering the even number of the members of the senate—the claimed violation of the Basic Law or other Federal Law is, then, not established, sect. 15, para. 2, clause 4, FCCA (at present para. 3, clause 4, FCCA). This provision is justified by the fact that there exists a presumption in favour of the legality of the contested act of the state in the event of doubt (Geiger 1951, 56). According to sect. 14, FCCA, both senates have specified competences for different review powers or subtypes of review powers. Although the line of demarcation has been changed several times,<sup>85</sup> the principle of specified competences has been maintained.

<sup>82</sup> Until the amending law in 1956, for three judges elected by the *Bundestag*, a majority of no less than three quarters was required (nine votes of twelve delegates of the Judicial Selection Committee).

<sup>83</sup> F. Klein in Maunz 2001, sect. 6 BVerfGG, marginal note 14.

<sup>84</sup> A "full jurist" is one who has passed the First and Second State Law Examinations.

<sup>85</sup> On the history of the amending laws regarding the demarcation of the jurisdiction of both senates, see G. Ulsamer, in Maunz et al. 2001, sect. 14, marginal notes 1–7.

## b) The Rules of Court Procedure

The FCCA includes both a group of general procedural rules, applicable to all aspects of the Court's procedures (sect. 17–35), and a group of special procedural rules (sect. 36–95).<sup>86</sup> Among the general procedural rules, only the most important will be mentioned here. In the initial version of the FCCA, the conferral of power to the judges to enter a dissenting vote, an unusual institutional practice in the German administration of justice, was not provided for. The establishment of this practice had been rejected by a narrow majority in the legislature (Geiger 1951, 66). Nevertheless, the view persisted that dissenting votes were permissible (*ibid.*, 66–7; for a different view cf. Roemer 1951, 195). Then, in 1970, dissenting votes were explicitly authorized.<sup>87</sup> Furthermore, sect. 31, FCCA, provides that the effects of the decisions of the Federal Constitutional Court have the force of statutory law. According to sect. 31, para. 1, FCCA, all constitutional organs of the Federal Government and the *Länder*, and all courts and public authorities are bound by decisions of the Federal Constitutional Court. With respect to the binding character of decisions of the Federal Constitutional Court vis-à-vis courts of ordinary jurisdiction, it is noteworthy that—as always in the Continental legal systems—the *stare decisis* rule is unknown.<sup>88</sup> In cases of abstract and concrete review, the question of whether a rule of international law counts as a part of federal law and, likewise, whether decisions on the continuing validity of preconstitutional statutes count as federal law according to sect. 31, para. 2, clause 1, FCCA, the Court's decision will have the force of statutory law, and this was provided from the start.<sup>89</sup> This corresponds to the fact

<sup>86</sup> The initial provisions sect. 96 (*ne bis in idem* in the procedure of the constitutional complaint) and sect. 97, the latter regarding an expert opinion of the Federal Constitutional Court by a common application stemming from the *Bundestag*, *Bundesrat*, and *Bundesregierung* or by an application on the part of the *Bundespräsident* (see Geiger 1951, 297–300), was rescinded in the meantime.

<sup>87</sup> Fourth Amending Law of 21 December 1970, BGBl. I, 1765.

<sup>88</sup> On the range of the binding character, see T. Maunz and H. Bethge, in Maunz et al. 2001, sect. 31 BVerfGG, marginal notes 5–27.

<sup>89</sup> On the legal force of the decisions of the Federal Constitutional Court, see *ibid.*, marginal notes 28–37. Originally the legal force of decisions within the scope of the constitutional complaint had not been explicitly provided for. Under certain conditions, a citizen can file a constitutional complaint directly against a legal provision. In such a case, the inquiry by the court corresponds basically to the inquiry undertaken in cases of abstract and concrete review. As the inquiry is basically the same, the effects have to be the same, too. This is obvious where the constitutional complaint is filed directly against a legal provision. If the constitutional complaint is filed against an individual act of the administration or judiciary, a claim that a basic right has been violated can be justified in either of two ways. The violation of a basic right can occur owing to the fact either that an application of a certain legal provision is a violation of basic rights as such or that the legal provision that has been applied itself counts as a violation of a basic right. In abstract or concrete review, the inquiry into the incompatibility of the legal provision in question—as far as basic rights are concerned—is the same as the inquiry in the constitutional complaint filed directly against a statute, so for these cases the fact that the decision has the force of statutory law is obvious. A corresponding explicit extension of sect. 31, para. 2, BVerfGG was introduced into the FCCA with the Third Amending Law from 3 August 1963 (BGBl. I, 589).

that according to sect. 31, sect. 2, clause 2, FCCA, the rule of the decision is promulgated in the Federal Law Gazette exactly in the manner of a statute. Doubts and objections directed against this development were not, in the end, able to prevail in the constitutional deliberations.

### c) The Constitutional Complaint

The constitutional complaint, not explicitly provided for in the Basic Law in the beginning, was first introduced in the FCCA.<sup>90</sup> Not until the amendment to the Basic Law on 29 January 1969 (BGBl. I, 97), however, was the constitutional complaint established in the Basic Law itself, namely, in article 93, para. 1, nr. 4a.

This review procedure quickly developed into the most important review power, the “flagship,” so to speak, of the Federal Constitutional Court (Graßhoff 2000, 53). It has also become the most burdensome aspect of the Court’s work.<sup>91</sup> Constitutional complaints are filed in large numbers, with the unsuccessful complaints predominating; indeed, they account for between 97 and 99 per cent of all the constitutional complaints filed.<sup>92</sup> To ease the burden of both senates, the decision-making process of the Federal Constitutional Court was accelerated and, with an eye to concentrating on the most important cases, the amending law of the FCCA in 1956 established Preliminary Examination Committees. In 1963, the procedure regarding Preliminary Examination Committees was amended, and, in 1985, amended comprehensively. Also, in 1993, the amending law gave rise to a number of changes.<sup>93</sup> Still, in spite of all the restrictions of access to a decision of the senate of the Federal Constitutional Court where constitutional complaints are heard, the basic idea, that they are to serve as a form of legal protection accorded to the individual, has not been forgotten.<sup>94</sup> This notion of legal protection accorded to the individual, following well-known parlance, is called the subjective function (*subjektive Funktion*) (Benda and Klein 1991, marginal notes 331–50). To be sure, it is often emphasized that the constitutional complaint comprises, along with the subjective function, an objective function (*objektive Funktion*). The latter is served when a decision clarifies fundamental developments or tends to preserve the legal system in general (Decisions of the German Federal Constitutional Court [BVerfGE] 33, 247

<sup>90</sup> On the history of the origins of the constitutional complaint in the scope of the deliberations on the FCCA, see B. Schmidt-Bleibtreu, in Maunz et al. 2001, sect. 90, BVerfGG, marginal note 8.

<sup>91</sup> K. Graßhoff, in Maunz 2001, sect. 93a, BVerfGG, marginal note 1.

<sup>92</sup> K. Graßhoff, in Maunz 2001, sect. 93a, BVerfGG, marginal note 1; B. Schmidt-Bleibtreu, in Maunz 2001, sect. 90, BVerfGG, marginal notes 8a, footnote 74 and marginal note 8b, footnote 78a.

<sup>93</sup> On the history of the preliminary procedures in deciding constitutional complaints, see *ibid.*, marginal notes 8, 8a, 8b; K. Graßhoff, in Maunz et al. 2001, par. 93a, BVerfGG, marginal notes 3–9.

<sup>94</sup> K. Graßhoff, in Maunz 2001, sect. 93a, BVerfGG, marginal note 2.

[259]; 45, 63 [74]; 81, 278 [290]; Schumann 1963, 113; Stern 1988, 1493–4). If, for example, a complainant withdraws a constitutional complaint, a decision of the Court can no longer serve the subjective function. If, however, the answer to the constitutional question is of general interest to the legal system, the court can decide the case notwithstanding the fact that the complaint has been withdrawn, thereby serving the objective function (BVerfGE 98, 218 [242–3]). This objective function, however, can never completely rule out the primary character of the constitutional complaint as a form of legal protection accorded to the individual.<sup>95</sup>

### III. Foreign Influences on the Beginnings of Federal Constitutional Court

There is no straightforward answer to the question of whether and to what extent the beginnings of the Basic Law and the Federal Constitutional Court were influenced by constitutional models from abroad. Three views on this problem can be distinguished. According to the first, foreign models played no role at all, or virtually no role.<sup>96</sup> According to the second view, foreign models may well have played a certain role *vis-à-vis* the beginnings of the Federal Constitutional Court, but no decisive role,<sup>97</sup> and, according to the third view, the creation of the Court was influenced decisively by foreign models, especially that of the United States (Steinberger 1990, 53; Wilms 1999, 283; Katz 1954, 97).

At a minimum, everyone agreed that the Allies brought little pressure to bear on the post-war Germans where the implementation of the constitutional review was concerned (Kommers 1969, 74; Katz 1954, 98; Fronz 1971, 645; Wilms 1999, 168). In other words, the Allies had merely the outlines of a system of constitutional review in mind.<sup>98</sup> Still, the post-war Germans went beyond this minimal requirement right from the start. The question, then, remains: Did the members of the Herrenchiemsee Conference and Parliamentary Council reflect a foreign orientation in their constitutional deliber-

<sup>95</sup> On the so-called “double function,” subjective and objective, of constitutional complaint and on the relation between subjective and objective function, see BVerfGE 33, 247 (258–9); 45, 63 (74); 81, 278 (290), 85, 109 (113); also Benda and Klein 1991, marginal notes 331–50; Graßhoff 2000, 57–64; Schlaich and Koriath 2001, marginal note 197. This distinction can already be found in Nawiasky 1923, 459.

<sup>96</sup> This point of view is rarely expressed explicitly. One may assume, however, that among the numerous writers who make no mention of any foreign model or influence, or do so only incidentally, a number are of the opinion that the beginnings of the Federal Constitutional Court reflect solely a German tradition and ideas that had evolved in Germany.

<sup>97</sup> See Kommers 1969, 74: “Still, the creation of the Federal Constitutional Court was basically a German decision.” See also Kommers 1997, 7: “While they were familiar with the American system of judicial review and looked to the American experience for guidance in shaping their constitutional democracy, they relied mainly on their own tradition in constitutional review.”

<sup>98</sup> The basic demands in the Frankfurt Documents respecting constitutional review may be understood in this sense, see above, sect. I. More explicit in this direction is the memorandum of the Allies of 22 November 1948, Schneider 1999, 457.

ations, and if so, to what extent? In the protocols and reports on the Herrenchiemsee Conference and Parliamentary Council, one finds little on the issue that is explicit. Most of what we know has been arrived at indirectly.

The question of the foreign orientation in the constitutional deliberations respecting the Federal Constitutional Court is a case of the general question of foreign influences in constitutional history. The question of the extent to which foreign models influence the creation of a constitution and its institutions is a complex historical issue. As an example, one can point to the controversy between Georg Jellinek and Emile Boutmy on the origin of the French *Déclaration des droits de l'homme et du citoyen* of 1789. Jellinek emphasized the North American declarations of rights, especially the "Virginia Bill of Rights" as models of the French declaration of rights (Jellinek 1901, 88–9), whereas Boutmy regarded original French ideas and developments as more important (Boutmy 1902, 420–42). There can be no wholesale agreement with either position. Both writers exaggerated their respective theses. Still, there is something to be said for and against each of the theses. Against Boutmy, one can argue that the North American declarations of rights were well known and widely discussed in France during the revolutionary period, which is to say that their influence cannot be denied. On the other hand, the French Declaration of Rights hardly represents an uncritical adoption of the North American declarations, and in the deliberations in the French National Assembly, American models were seldom mentioned. Beyond this, European discussions in the seventeenth and eighteenth century on natural law, in which French philosophers played a part, created the conditions for the North American declarations of rights.

The answer to the question about foreign influences on the beginnings of the Federal Constitutional Court proves to be equally complex and diffuse.

### 1. *The German Tradition*

When it is said that the Federal Constitutional Court is "without a historical model,"<sup>99</sup> this, if taken literally, is surely wrong. Part and parcel of the creation of constitutional review in the Federal Republic of Germany was its fully developed system of judicial control, and for different parts of this system there existed different models at different times and in different places. First of all, the question arises as to the extent to which models can be found in Germany itself. On the one hand, very modest beginnings<sup>100</sup> of constitutional review can be found in the Court of the Imperial Chamber (*Reichskammergericht*) in the Holy Roman Empire (Geiger 1952, xi; Robbers 1984, marginal notes 5–8). On the other, after the fall of the empire in the German Confederation (*Deutscher Bund*) after 1815, and in the North

<sup>99</sup> A. Rinke, in Wassermann 1989, ahead of arts. 93–4 GG, marginal note 1.

<sup>100</sup> Kommers 1997, 4, speaks of constitutional review in an "embryonic form."

German Confederation (*Norddeutscher Bund*) after 1867, as well as in the German Empire after 1871, no comparable institutions were established (Robbers 1984, marginal notes 9–11). To be sure, the Frankfurt Constitution of 1848–49 could boast of a scheme of constitutional review including constitutional complaints, disputes between high federal organs and extended review powers for settling federal-state conflicts,<sup>101</sup> but the constitution never went into effect.<sup>102</sup> In the Weimar Republic, as noted above, only federal-state conflicts and a limited power of constitutional review in the narrow sense by the High Federal Court (*Reichsgericht*) were recognized (Robbers 1984, marginal notes 13–14). In Germany's past one finds, then, numerous elements reflected in the system of constitutional review of the Federal Republic of Germany, such that it is not inappropriate to speak of a continuing German tradition.<sup>103</sup> Still, a complete system of review powers awaited the Federal Constitutional Court, and in this respect it represents a fundamentally new development, going well beyond all that had pointed toward it in the tradition.

## 2. Foreign Models

As emphasized above, foreign models were only rarely mentioned in the deliberations on the constitution. It can be said, in general, that those who took part in the constitutional deliberations were among the most distinguished constitutional authorities in Germany, and that a constituent component of a deep and broad-ranging knowledge in constitutional law had always included a comparative dimension. Thus, one has to assume that the members of Herrenchiemsee Conference and Parliamentary Council were relatively well-informed about the developed systems of constitutional review in other countries. Among the countries with developed systems, Austria and the United States, in particular, were of special interest. They are generally considered as the prototypes of centralised and decentralised constitutional review respectively (Cappelletti 1971, 69–77; 1989, 133, 136). Along with these countries, Switzerland, too, is often referred to as a model.<sup>104</sup> One can have doubts, however, about a Swiss influence where the beginnings of Germany's Federal Constitutional Court are concerned (Eichenberger 1990, 71). It was, in large part, merely Swiss procedural provisions that influenced the deliberations on the FCCA (Geiger 1951, xviii).

<sup>101</sup> A. Rinken, in Wassermann 1989, ahead of arts. 93–4 GG, marginal note 12; cf. Robbers 1984, marginal note 12.

<sup>102</sup> On the failure of the Frankfurt Constitution of 1848–49, see Kühne 1998, 48–50; Grimm 1988, 194–5.

<sup>103</sup> K. Stern, in Dolzer and Vogel 2001, art. 93 GG, marginal note 9; cf. Stern 1980, 333, 968.

<sup>104</sup> A. Rinken in Wassermann 1989, ahead of arts. 93–4 GG, marginal note 28; K. Stern, in Dolzer and Vogel 2001, art. 93 GG, marginal note 9; cf. Stern 1980, 333; Robbers 1984, marginal note 17.

### a) The Influence of Austrian Constitutional Review

Under the influence, not least of all, of Hans Kelsen, the Austrian Federal Constitution of October 1920 (*Österreichische Bundes-Verfassung von Oktober 1920*) assigned power to the Constitutional Court (*Verfassungsgerichtshof*) to declare statutes null and void.<sup>105</sup> It seems fairly clear that this system of centralized constitutional review served as a model both for the constitutional review powers of the Federal Constitutional Court as well as for the separation of federal courts of ordinary jurisdiction and the constitutional court.<sup>106</sup> As one of the four experts at the Herrenchiemsee Conference, Hans Nawiasky, profoundly influenced at the beginning of his career by Kelsen, made a decisive contribution,<sup>107</sup> and the treatises and articles on Austrian constitutional review were, of course, available in Germany and were indeed well-known to German scholars in constitutional law. Review powers addressed to disputes between high federal organs and the constitutional complaint had not, however, been established in the Austrian system, and in this respect the role of the Austrian system *qua* model for the Federal Constitutional Court was limited.

### b) The Influence of Constitutional Review as Practiced in the United States

It is not infrequently claimed that the Supreme Court of the United States was an important model where the beginnings of the Federal Constitutional Court are concerned (Steinberger 1990, 53; Wilms 1999, 283; Katz 1954, 97). With an eye to some central aspects, namely, the question of the separation of federal courts of ordinary jurisdiction from the constitutional court, and the question of the most important constitutional review powers, I turn now to the claim that the United States Supreme Court served as a model.

#### (1) Non-Distinct Constitutional Court

In the German discussion on the structure of the federal administration of justice, the United States Supreme Court was seen from the standpoint of its constitutional functions, as an example of an undifferentiated court, that is to say, a court in which constitutional and ordinary review powers are found side by side. When the question of the structure of the federal administration of justice arose, however, the Parliamentary Council decided against this option, and the decision counts against the claim that the United

<sup>105</sup> On Kelsen's influence on constitutional review in the Austrian Federal Constitution, see Paulson 2000, 385–95, and, for Kelsen's own statement, Kelsen 1923, 160–3. See also Kelsen 1942, 183–200.

<sup>106</sup> A. Rincken, in Wassermann 1989, ahead of arts. 93–4, GG, marginal note 28; K. Stern, in Dolzer and Vogel 2001, art. 93 GG, marginal note 9; cf. Robbers 1984, marginal note 16; cf. also Geiger 1951, xviii–xix; von Beyme 1988, 25; Stern 1980, 333.

<sup>107</sup> On Nawiasky's influence on the deliberations on constitutional review in the Basic Law, see von Beyme 1988, 34: "major influence of Nawiasky." See also Unruh 2002, 506.

States Supreme Court served as a model for the Federal Constitutional Court (Geiger 1951, xvii). There existed important differences on other issues, too, for example, the selection of the judges<sup>108</sup> and the nature of the binding character of the court's decisions.<sup>109</sup>

## (2) Federal-State Conflicts

Federal-State conflicts are the constitutional review powers most deeply rooted in the tradition of German constitutional review (Friesenhahn 1932, 528–9). It would appear that the review powers addressed to federal-state conflicts did not reflect a foreign model. On the contrary, they were seen in the constitutional deliberations as an element clearly stemming from the tradition of German constitutional review.

## (3) Disputes between High Federal Organs

A constitutional review procedure for settling disputes between high federal organs is not only not established in the United States but is, indeed, largely ruled out by the "political question" doctrine (see, e.g., *Baker vs. Carr*, United States Reports 369 [1962], 186). In the long period preceding the Basic Law, no such constitutional review power had been established in Germany either. These disputes were only resolved by political decision. Here, too, the review power at issue does not serve as a point of contact for understanding the Supreme Court as a model for the Federal Constitutional Court.

## (4) Decentralized Constitutional Review

Those who consider the United States Supreme Court as a far-reaching model for the Federal Constitutional Court look, first of all, to decentralized constitutional review (Steinberger 1990, 53; Wilms 1999, 176). It is true that in the Herrenchiemsee Conference, as well as in the Parliamentary Council, everyone agreed that effective control of the legislature by the standard of the constitution ought to be established. It is also true that such control had been exercised by the United States Supreme Court, beginning with Chief Justice John Marshall's decision in *Marbury vs. Madison*.<sup>110</sup> What is more, the American version of constitutional review was discussed in the deliberations on constitutional review powers envisaged in the forthcoming German constitution.<sup>111</sup> This does not count, however, as a far-reaching ori-

<sup>108</sup> On the selection of judges in Germany see Landfried 1988, 147–51; on the selection of judges in the United States, see, in particular, Abraham 1999.

<sup>109</sup> The binding force of the decisions of the Federal Constitutional Court lies in the statutory force of its decisions; in the case of the Supreme Court binding force is established by the *stare decisis* rule.

<sup>110</sup> Before Marshall's decision, the question of constitutional review of legal provisions had, to be sure, already been discussed, in particular, in Alexander Hamilton's *Federalist: Paper nr. 78*, see Alleweldt 1996, 205–39. See also Ehrlich 1990a, 27, who considers "judicial review [...] perhaps the most important innovation of the Constitution of the United States."

<sup>111</sup> The unfortunate situation where the publication of the constitutional deliberations regarding this question is concerned, deplored, in particular, by Wilms 1999, 166–7, was improved

entation in the direction of the American system. Rather, where a constitutional court is established with powers to examine and pass on the formal and substantial constitutionality of all statutes, one is confronted with a constitutional court of far greater power than the High Court in America. As already noted, the most important and in the constitutional deliberations most conspicuous reason for a constitutional court of such extraordinary power was that an authority for controlling the legislature had to be established in the wake of the disaster of the so-called *Third Reich* (von Beyme 1988, 33; Stolleis 1999, 101). Given that this reason, a specific reason from German history, is the point of departure, the fact that in the constitutional deliberations cognizance was taken of foreign models, among them that of the United States, is not particularly surprising.

In summary, a great many reasons count against the thesis that the United States Supreme Court served as a far-reaching model for the Federal Constitutional Court. First, there is the fact that the system of the constitutional review powers in the United States does not comprise abstract review. Second, where concrete review is concerned, the United States is the prototype of the decentralized system of constitutional review, whereas the version of concrete review developed for the Federal Constitutional Court follows the model of the Austrian system, the prototype of the centralized system of constitutional review (Cappelletti 1971, 46–68; 1989, 132–46; see also 1966, 1213–24).

It might be noted, too, that there was resistance to the adoption of structures stemming from foreign constitutional systems. In the German deliberations, Dehler for one delivered a speech arguing that the German tradition vis-à-vis the structure of the federal administration of justice be upheld: “I believe the attempt to establish the apex of our administration of justice by appealing to models stemming from foreign countries flies in the face of the development of our administration of justice. To copy foreign models is always a very dangerous affair. Appealing in the beginning, thanks to the possibility of standardization, of concentration, it is in reality a slap in the face of one who thinks historically and traditionally.”<sup>112</sup>

##### (5) The Constitutional Complaint

It is said, moreover, of the constitutional complaint that its basic idea can be found in the legal system of the United States.<sup>113</sup> Closer examination of this claim requires, however, that one make certain distinctions. It is true that

markedly with the publication of the detailed work of Schneider 1999. Wilms’ thesis, namely, that the delegates of the Parliamentary Council had “truly far-reaching interest in the structure of the United States Supreme Court” (Wilms 1999, 170), seems highly exaggerated. Beyond the few passages he quotes in his book (*ibid.*, 176–7), one finds nothing to support his view.

<sup>112</sup> T. Dehler, Protocol of the 9th session of the PC-Plenum of 6 May 1949, in Schneider 1999, 208. See also Ehrlich 1990b, 89.

<sup>113</sup> R. Katz, Protocol of the 5th session of the PC-CO, combined with the PC-CCCAJ, of 23 September 1948, in Schneider 1999, 30; see also Wilms 1999, 172.

basic rights *qua* rights—in German parlance, “subjective rights”—were from the very start a constituent part of the constitutional tradition of the United States, and were, then, altogether different from, for example, the rights of the French declaration of human and civil rights, which were considered as mere philosophical promises (Boutmy 1964, 423–4). From this point of view, basic rights *qua* rights have, indeed, a long and noble tradition in the Anglo-American world. The Basic Law follows this tradition. One has to distinguish, however, between the character of basic rights *qua* “subjective rights” on the one hand and the character of review powers of the constitutional court on the other. In view of the fact that the American system is the prototype of decentralised constitutional review, while Germany follows the Austrian model of centralised constitutional review, it is not surprising to find a great many differences between the German constitutional complaint and American procedures for enforcing individuals’ basic rights. It has already been pointed out that, in particular, the tradition of the constitutional complaint in Bavaria served, in the deliberations on the Basic Law (see sect. I. 1., above), as a model for this review power. Despite the technical differences between Germany and the United States, there is a tendency towards convergence in judicial practice. Sustained inquiry into these matters would call, however, for a detailed comparison of a whole complex of questions, reaching to constitutional provisions (in Germany), statutes, and applicable precedents. Such an inquiry lies well beyond the scope of this paper.

#### IV. Concluding Remark

Among the review powers of the Federal Constitutional Court, one has to distinguish between three basic variants of constitutional review. The first basic variant consists of the review powers *vis-à-vis* the organisation of the state. The second is constitutional review in the narrow sense, that is to say, abstract review and concrete review. The third basic variant is the constitutional complaint.

The development, in particular, of the constitutional complaint in Germany is remarkable. In the framers’ deliberations, uncertainty prevailed with respect to this, for certain purposes, new review power. Despite the fact that it was not provided for in the initial version of the Basic Law, but only in the FCCA, it quickly developed into the Federal Constitutional Court’s most important review power. In the last decades, the idea of limiting the range of application of the constitutional complaint has arisen from time to time. This is understandable, for the constitutional complaint counts as the most burdensome aspect of the Court’s work. Still, in its present, expansive form the constitutional complaint is a formative and fundamental constituent component of German constitutional law, worthy of being maintained.

As for the question of influences on the Federal Constitutional Court in its origins, influences, namely, stemming from foreign prototypes, one has

to go back a bit in time. In the 14 years of the Weimar Republic, the constitutional development consisted largely in a more effective substantive commitment to basic rights along with steps toward an aggregation of constitutional review powers. To be sure, this development along both of its paths ceased long before it had been completed, with the National Socialists' assumption of power early in 1933. In the deliberations culminating in the Basic Law, the thread of the development under the Weimar Constitution was picked up once again. This time around, it was given truly powerful expression. With an eye to the disaster of the *Third Reich*, the establishment of an effective substantive commitment to basic rights, coupled with a powerful constitutional court, prevailed.

The basic ideas of an effective substantive commitment to basic rights and a formidable system of constitutional review have a long tradition in America. In one respect then, it may be said that the American system served as a model for the Basic Law. Still, in their deliberations on the greater institutional framework of constitutional review, the framers of the Basic Law found themselves far removed from the American model.<sup>114</sup> In this respect, it can be said that the Austrian model was a far more significant influence. And since the institutional framework serves to distinguish the German system of constitutional review as a species of centralized constitutional review, with all that that implies, it can be said that the Austrian model was by far the more important model generally.

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## Abbreviations

BGBL: Bundesgesetzblatt

BVerfGE: Decisions of the German Federal Constitutional Court

BVerfGG: Bundesverfassungsgerichtsgesetz

DVP: Demokratische Volkspartei

F.D.P.: Freie Deutsche Partei

FCCA: Federal Constitutional Court Act (see BVerfGG)

HChC: Herrenchiemsee Conference

HChC-Plenum: Plenary Assembly of the Herrenchiemsee Conference

HChC-Rpt.: Herrenchiemsee Conference Report

HChC-SC I: Subcommittee I of the Herrenchiemsee Conference

HChC-SC III: Subcommittee III of the Herrenchiemsee Conference

<sup>114</sup> Katz 1954, 99: "One may say the Basic Law has taken over from the American legal system only the fundamental core, not the form" of the system developed in America. In its form, Katz continues, "the American model would have been completely unsuited for a reception into the German legal system."

HChC-SC III Rpt.: Report of the Subcommittee II of the Herrenchiemsee Conference  
 LDP (later LDPD): Liberal-Demokratische Partei Deutschlands  
 PC-CCCAJ: Committee for the Constitutional Court and the Administration of  
 Justice of the Parliamentary Council  
 PC-CO: Committee on Organisation of the Parliamentary Council  
 PC-GEC: General Editorial Committee of the Parliamentary Council  
 PC-MC: Main Committee of the Parliamentary Council  
 PC-Plenum: Plenary Assembly of the Parliamentary Council

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