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# Constitutional Courts in Europe

# CONSTITUTIONAL COURTS IN EUROPE

By

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## I

The years following World War II are characterized by the re-institution of democracy and constitutionalism in the European nations. This development came about as a reaction against the dictatorships of the previous years. The people of France, Italy and Germany, after years of suffering under the rule of a Laval, a Mussolini or Hitler, yearned for a participation in government which had been denied to them in the preceding years. They established popular government, or democracy. Self-government seemed most likely to protect the rights of the individual, which had been suppressed under authoritarianism. However, democracy per se was considered by many to be not a sufficient safeguard for individual freedom. Scared by the democratic revolutions that were taking place in the communist-dominated countries, and aware of the shortcomings of democratic government which were experienced in the years preceding the fascist dictatorships, under the Albertian Statute, the Weimar Republic and the Third Republic,[1] people in the West, while believing in democracy, also realized the necessity of limiting popular government.

Consequently, the quest for constitutional government existed next to the desire for democracy. And whereas the constitutions of the countries under Soviet rule vested supreme power in an omnipotent legislature,[2] those of the Western nations in general provided for what Friedrich considers the very essence of constitutionalism, namely, a division of governmental power.[3] Executive, legislative and judicial power, having been concentrated during the previous years in the hands of the head of the state, was distributed into different agencies. Thus governmental power was, for the sake of the individual's freedom, limited through a separation of powers in the sense of Montesquieu.

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1 For the political crises that confronted constitutional democracies before the rise of authoritarianism, see, for Italy: LUIGI VILLARI, THE AWAKENING OF ITALY, 1924, pp. 1-207; C. SFORZA, MAKERS OF MODERN EUROPE, 1928, pp. 319 ff. For the Weimar Republic: C. B. HOOVER, GERMANY ENTERS THE THIRD REICH, 1933, pp. 32-95; R. T. CLARK, THE FALL OF THE GERMAN REPUBLIC, 1935; E. A. MOWRER, GERMANY PUTS THE CLOCK BACK, 1939; WILLIBALT APELT, GESCHICHTE DER WEIMARER VERFASSUNG, 1946; FERDINAND FRIEDENSBURG, DIE WEIMAR REPUBLIK, 1946. For the Third Republic: ROGER PINTO, ELEMENTS DE DROIT CONSTITUTIONNEL, 1948, pp. 269-299; PAUL FARMER, VICHY, POLITICAL DILEMMA, 1955.

2 Constitutions of Albania (1946), Art. 37; Bulgaria (1947), Art. 15; Rumania (1948), Art. 37; Yugoslavia (1946), Art. 50; East Germany (1949), Art. 50. In East Germany, also the state constitutions of Brandenburg (1947), Art. 9; Mecklenburg (1947), Art. 22; Saxony (1947), Art. 26; Saxony-Anhalt (1947), Art. 24; Thuringia (1946), Art. 8, make the legislature the supreme branch of government.

3 Carl J. Friedrich, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY, pp. 5 et seq., (rev. ed. 1950), pp. 5 et seq.

Decentralization not only took place on the institutional, but also on the territorial, or spatial, level. France, the very symbol of a centralized government ever since Louis XIV and the French Revolution, became a unitary state in which the communes enjoyed a considerably greater deal of independence than before the war. In Italy, due to the fact that the country was united only in the nineteenth century, the regional feeling always had been stronger than in France. Consequently, the high degree of centralization as it was brought about by Mussolini had been very unpopular. Therefore, the new republican constitution granted a great degree of independence to the newly established component units of the country, the regions. The situation was similar in Germany. Here the particularism (*Partikularismus*) which was so characteristic of that country since the Peace of Westphalia survived even Bismarck's unification of the nation. The constitution of 1871 was of so federal a character that for some time the jurists debated whether Germany was a loose league of states or a federal state.[4] After the National Assembly at Weimar had transformed the federation into a unitary state with strong federal features,[5] Hitler deprived the Laender of the last remnants of independence and developed Germany into a highly centralized state. As a reaction, the Bonn Basic Law again established a republic that was, with respect to its federal features, reminiscent of the old Bismarckian empire.

In view of this re-establishment of democracy and constitutionalism, the framers of the different modern constitutions were confronted with the question as to how protection could be given to these main features of the new constitutions. This problem was solved in a twofold manner. On the one hand, provisions were inserted into the new fundamental laws which put democracy and constitutionalism beyond the pale of the amending power.[6] Aside from this restriction of the constitution-maker (*pouvoir constituant*), special courts were established with the task to protect the constitutional order. It is with these courts, the guardians of modern European constitutions, that we are here concerned.

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4 Among those who held that the German Empire was a loose confederation of sovereign states (*Staatenbund*) were von Seydel, Otto Mayer, von Jagemann, and Wittmayer. On the other hand, Laband, Haenel and Anschutz were of the opinion that Germany was a federal state (*Bundesstaat*). The latter doctrine had become accepted by the First World War. The controversy as to the nature of the German union was partly due to an ambiguous statement by Bismarck himself who commented before the formation of the union: "Man wird sich in der Form mehr an den Staatenbund halten mussen, diesem aber praktisch die Natur des Bundesstaates geben, mit elastischen, unscheinbaren aber weitgreifenden Ausdrucken."

5 The leading commentary on the Weimar Constitution is GERHARD ANSCHUTZ, DIE VERFASSUNG DES DEUTSCHEN REICHS, (4th rev. ed. 1932).

6 The French and Italian constitutions provide that the republican form of government may not be the subject of an amendment (Art. 95 and 139, respectively). The Bonn Basic Law prohibits amendments "by which the organization of the federation into states, the basic co-operation of the states in legislation, the individual's basic rights, the principle of the separation of powers and federalism are affected" (Art. 79). Many of the new constitutions in Eastern Europe protect the republican, democratic, and parliamentary form of government from amendment. For a discussion of the motives behind and the significance of these provisions, see the author's *Natural Law in the Modern European Constitutions* in NATURAL LAW FORUM, March, 1956.

## II

It is characteristic of the European constitutional tradition that the ordinary courts were, in general, not the guardians of the constitution. Ever since the age of absolutism, people were sceptical to trust the judges with so important a function. Under the absolute rulers, the courts often played an ominous part in what became known as cabinet-justice, which in most cases amounted to a suppression of the individual for reasons of state.

In England, the fight against the Divine Right of Kings was a struggle for a restriction of the king through popular participation in government. It resulted in the supremacy of Parliament as the representation of the people and a high prestige of that body. Acts of Parliament were considered as acts of liberation against royal oppression. Small wonder that Lord Coke's dictum in *Dr. Bonham's Case,* "the common law will control acts of Parliament, and sometimes adjudge them to be utterly void" as "against common right and reason"[7] never had the impact upon English jurists as did Blackstone's statement that "the power of parliament is absolute and without control."[8] The principle laid down by Blackstone did prevent the acceptance of judicial review in England, and made Parliament rather than the courts the guardian of the English constitution.

On the continent, the situation was similar. Distrust in the courts was a characteristic of the French Revolution. In that country the courts, which had been highly favored by the kings as an ally in the struggle with the feudal lords up to the seventeenth century became, after the civil wars of the Fronde, a check upon royalty. However, during the last years of the *ancien regime,* the courts opposed some of the reforms intended by the king and aroused the indignation of the public. As a consequence, the judges, being considered reactionary, were not treated too gallantly by the revolutionaries of 1789, and their role and influence was reduced considerably. In the Revolution, absolute power was, in accordance with the Rousseauistic doctrine, transferred from the sovereign king to the sovereign nation. In practice, this meant the establishment of an omnipotent assembly as the representation of the people. France became the prototype of the *regime conventionnel,* the government by the Convention, also known as the government by assembly (*gouvernement d'assemblee*). Under such a regime, the courts could not be the guardians of the constitution.

With the march of democracy through Europe in the wake of the Napoleonic conquests and the Romantic Movement, the examples of England and France became accepted in most of the other continental nations. Where the legislature was not the supreme branch of government, but the executive, the guardianship of the constitution fell upon that branch. Europeans know a strong executive and a strong legislature. They have never known a strong judiciary. Consequent-

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[7] 8 Rep. 107, 118 (1610).
[8] 1 Cooley's Blackstone 159 (2d ed. 1872).

ly, guardianship of the constitutional order through the ordinary courts was generally rejected.

On the other hand, the protection of the constitution by a special court has been advocated and practiced ever since written constitutions came into being at the end of the eighteenth century. Abbe Sieyes, the great theorist of the French Revolution, believed in the institution of a constitutional jury as a guardian of the constitution. This was, in his opinion, necessary because the power to amend the constitution was different from the ordinary legislative power. "This jury," Sieyes said in his famous speech in the Convention on the 2nd of *Thermidor* of the year III, "must be a body of representatives which . . . should have the function of judging all protests against any infringement of the constitution. . . . If a safeguard for the constitution is desired, a salutary check which keeps each action of the representative body within the limits of its competences, then a constitutional jury should be established!"[9] Although his suggestion was not realized at that time, his idea of a constitutional jury re-appeared in the form of the *senat conservateur* in the Napoleonic constitutions and their successors[10] until finally the constitution of the Third Republic provided that "the Senate can be constituted a court of justice to try either the President of the Republic or the Ministers, and to take cognizance of attempts (*attentats*) committed against the safety of the State."[11]

After the First World War, the idea of a special court for the protection of the constitution won adherents in several continental countries and found expression in their constitutions. Austria established a High Constitutional Court, Czechoslovakia, a Constitutional Tribunal.[12] Also the Weimar constitution set up in Germany a High Court of State.[13] Like the Senate of the Third Republic that Court had jurisdiction over a wide range of matters. It decided differences of opinion between the national government and the state governments as to the proper execution of national laws in the states (Art. 15). If, in the course of territorial changes within Germany according to Art. 18 of the constitution, the parties affected could not come to terms on the question of property rights, the matter was settled by the High Court of State. In so far no other court of the Reich had jurisdiction, the High Court of State decided upon constitutional controversies within a state in which no court existed for disposing of

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9 Sieyes' speech can be found in REIMPRESSION DE L'ANCIEN MONITEUR, vol. XXV, pp. 293 ff. Concerning Sieyes constitutional jury, see ESMEIN-NEZARD, DROIT CONSTITUTIONAL, 8th ed. (1928), pp. 638 ff.

10 Title II of the Constitution of the year VIII (1799), Art. 15 ff; Title VIII of the Senatus-Consult of the year XII (1803), Art. 57 ff; Title IV of the Constitution of 1852, Art. 29; Art. 26 of the Senatus-Consult of March 14, 1867.

11 Law Upon the Organization of the Senate of Feb. 24, 1875, Art. 9.

12 See HANS KELSEN, GRUNDRISS DES OSTERREICHISCHEN STAATSRECHTS, 1923, p. 211; LEO WITTMAYER, OSTERREICHISCHES VERFASSUNGSRECHT, 1923, p. 20; CHARLES EISENMANN, LA JUSTICE CONSTITUTIONELLE ET LA HAUTE COUR CONSTITUTIONELLE D'AUTRICHE (Paris, 1928); FRAUTISEK WEYR, "Le tribunal constitutionnel de la republique tchecoslovaque," BULLETIN DE DROIT TCHECOSLOVAQUE (1925-26), vol. 1, pp. 129, 132.

13 See Anschutz, *op. cit.*, Art. 108 and the literature quoted there.

them, as well as upon controversies not of a legal nature between different states or between the Reich and a state, on the motion of either party (Art. 19). The High Court of State also had jurisdiction over matters that did not derive from the federal features of the Weimar Republic. Thus it tried, upon impeachment by the Reichstag, the national President, the national Chancellor, and the national ministers for having culpably violated the national constitution or a national law (Art. 59).

The constitutional courts also examined the constitutionality of legislation. The Czechoslovakian Constitutional Court could test whether a challenged law was properly promulgated (Art. 102). The Austrian High Constitutional Court could "suspend" laws which violated the constitution.[14] Likewise the German High Court of State could test the constitutionality of the laws and refuse their application.[15]

It may thus be said that the European countries, while in general rejecting the idea that the constitutional order should be protected by the ordinary courts of justice, admitted, to a greater or smaller degree, the institution of special tribunals for that purpose. The range of jurisdiction exercised by those courts was wide. Not only did they try executive officials for an allegedly unconstitutional behavior, but in many instances also legislative acts were tested for their constitutionality. Besides, the relation between the local and national authorities was often settled by these constitutional tribunals. The field of jurisdiction of the special courts indicates that these institutions were primarily political tribunals, supposed to guarantee the equilibrium between the different governmental agencies, as it was provided for in the constitution. After the Second World War, the thought originally conceived by Sieyes was, after its usefulness had been tested in pre-war days, again taken up by the men who drafted the new constitutions of France, Italy and West Germany. We shall turn now to the constitutional courts established by these constitutions.

## III

Articles 3 and 13 of the French constitution of October 27, 1946, provide that the legislative power shall exclusively be vested in the National Assembly. Nevertheless, a distinction is established between constitutional and ordinary laws. The adoption of the former was made subject to a referendum, unless they are adopted on second reading by a two-thirds majority of the National Assembly or by a three-fifths majority of each of the two assemblies or, in case of an amendment relative to the existence of the Council of the Republic, unless that Council approves of the amendment (Art. 90). A conflict between the constitution and ordinary legislative acts is therefore possible. Consequently there was in-

14 "Suspension of a law means that it is voided *ex nunc*, in distinction to the American practice of declaring an unconstitutional law inapplicable *ex tunc*.

15 In a decision of Nov. 17, 1928, the *Staatsgerichtshof* declared a federal law of April 9, 1927, void. See Anschutz, *op. cit.*, art. 70, no. 3.

stituted, for the peaceful settlement of such conflicts and the protection of the constitution, a Constitutional Committee (*Comite Constitutionnel*). As one author has put it, "this committee is a political institution rather than a judicial body, since its conciliatory functions have primacy over the strictly judicial functions."[16]

The political character of the Constitutional Committee is reflected in its composition. Presided over by the President of the Republic, it includes the President of the National Assembly, the President of the Council of the Republic, seven members elected by the National Assembly at the beginning of each annual session by proportional representation of party groups and chosen outside its own membership, and three members elected under the same conditions by the Council of the Republic (Art. 91). Thus the only member that is independent of the Assembly is the President of the Republic, who holds office for a term longer than that of the Assembly. Another ex offiicio member, the President of the Council of the Republic, is formally also independent of the Assembly, though less of political party organization than the President of the Republic. Although all the elected members of the Constitutional Committee are members of the public outside the legislature, they are members of the party following who are elected by the legislature, and therefore cannot be expected to have a concept of constitutionality which differs from that of the Assembly and the Council of the Republic.

According to Art. 91, the Constitutional Committee shall determine whether the laws passed by the National Assembly imply amendment of the Constitution. This means that the Committee exercises control over the possible attempts of the legislature to amend the constitution indirectly through an ordinary law. It is its function to see to it that amendments are made in conformity with the procedure prescribed by the Constitution. However, the Committee is sharply limited in its powers. It is precluded from testing legislative acts for their compatibility with the provisions of the preamble, which contains the bill of rights. It is in connection with civil rights, however, that the function of the Committee to restrain the legislature and the executive would be most important for the protection of the individual, supposed to be the very essence of the French constitution. Furthermore, the Constitutional Committee is not supposed to test all laws before they are promulgated. Besides, the Committee has no right to take the initiative in the testing process.

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16 ROLAND MASPETIOL, "Le probleme de la loi et ses developpements recent dans le droit francais," ETUDES ET DOCUMENTS, CONSEIL D'ETAT, Paris (1949), p. 62. The most comprehensive treatise on the problem of judicial review in post-war France is JEANNE LEMASURIER, LA CONSTITUTION DE 1946 ET LE CONTROLE JURISDICTIONNEL DU LEGISLATEUR, 1954. Pp. 133-246 deal with the Constitutional Committee. This work also contains a valuable bibliography. For other commentaries on the Constitutional Committee, see GEORGES VEDEL, MANUEL ELEMENTAIRE DE DROIT CONSTITUTIONNEL, 1949, pp. 551-556; JULIEN LAFERRIERE, MANUEL DE DROIT CONSTITUTIONNEL, 2d ed., 1947, pp. 953-57; MAURICE DUVERGER, MANUEL DE DROIT CONSTITUTIONNEL ET DE SCIENCE POLITIQUE, 5th ed., 1948, pp. 376-378; MARCEL PRELOT, PRECIS DE DROIT CONSTITUTIONNEL, 1950, pp. 539-541.

The procedure of law-testing is very complicated. Within the period allowed for the promulgation of the law, the Committee must receive a joint request that it examine said law from the President of the Republic and the President of the Council of the Republic, the Council having decided the matter by a majority of its members. The Committee then examines the law, must strive to bring about agreement between the National Assembly and the Council of the Republic and, if it does not succeed in this, shall decide the matter within five days after it has received the request. This period may be reduced to two days in case of emergency (Art. 92). If the law, in the opinion of the Committee, implies amendment to the Constitution, it shall be sent back to the National Assembly for reconsideration. If the Parliament adheres to its original vote, the law may not be promulgated until the Constitution has been amended according to the procedure set forth in Article 90. If the law is considered to be in conformity with Title I through X of the Constitution, it shall be promulgated (Art. 93).

The Constitutional Committee has, so far, played a very modest role.[17] It is not likely to become a powerful institution. Aside from the fact that, due to its composition and the election of its members, it will in most cases not differ from the opinion of the legislature, it is actually at the mercy of that body. Under Art. 92, the Committee shall not be competent to take action in respect to the possibility of amendment of Title XI of the Constitution. This means that, since the Committee is itself stipulated for under Title XI, it is theoretically liable to abolition by ordinary statute wthout any possibility that the technical question of constitutionality could be raised. It does not seem likely that such a contingency is going to happen in practice, since the National Assembly could without great difficulty effect their will through a formal amendment of the Constitution. Nevertheless, the Constitutional Committee is a guardian of the Constitution to the degree that it can delay legislation that is incompatible with the constitution and thus make the amending power aware of the constitutional importance of the question at issue.

## IV

Like the French constitution of the Fourth Republic, the constitution of the Italian Republic of December 27, 1947, recognizes a difference between ordinary and constitutional norms, the procedure for the adoption of statutes being simpler than that for the adoption of amendments. Consequently, a conflict between the constitution and legislative acts is possible. To safeguard the constitutional order, a Constitutional Court (*Corte Costituzionale*) has been set up under title

17 The Committee has dealt so far with two cases only. For the first, of June 18, 1948, (concerning an argument between the two legislative chambers), see AUGUSTE SOULIER, "La Deliberation du comite constitutionnel du 18 juin 1948," REVUE DU DROIT PUBLIC, 65 (1949), 195. For the second case of August 1, 1949, see MARCEL PRELOT, PRECIS DE DROIT CONSTITUTIONNEL, 3d ed. (1955), p. 517.

VI of the Constitution.[18] It also appears to be primarily a political institution like its French counterpart, although not in that obvious a manner.

This is evident in the Court's composition. The Constitutional Court is composed of fifteen judges, one-third appointed by the President of the Republic, one-third by the Parliament in joint session, and one-third by the Supreme ordinary and administrative magistratures.[19] The judges of the Court are chosen from among the magistrates, even those in retirement, of the superior ordinary and administrative jurisdiction, from the university professors of law, and from lawyers who have had twenty years of practice. The judges are appointed for a term of twelve years and are renewed partially according to a rule established by national law. They are not immediately re-eligible. While holding office, the judges are not permitted to be members of Parliament, a Regional Council, or with the legal profession or any other profession or office indicated by law. In trials in which the President of the Republic or Ministers are concerned, in addition to the ordinary judges of the Court, there shall take part also sixteen members elected at the beginning of every legislature by Parliament, in joint session, from citizens having the requisite eligibility to be a senator (Art. 135). It is obvious that, as compared with the French Constitutional Committee, the Italian Constitutional Court will be less of a mirror of the legislature and, therefore, more of a real judicial body. The exclusion of ex officio members, the prohibition for judges to hold public office or to engage in certain private practices, the stipulation for high professional qualification and the long tenure of the judges guarantee a rather independent, and, therefore, impartial tribunal.

The Constitutional Court judges: controversies concerning the constitutional legality of the laws and the acts having the force of law of the Italian State and of the Regions; conflicts of competence between the different branches of the national government, as well as conflicts arising between the Italian state and the Regions, or between the Regions. It also sits in judgment upon accusations that are brought against the President of the Republic and the Ministers according to the Constitution (Art. 134). At first sight, these seem to be important competences. But the Court is not likely to become too powerful. Most authors are of the opinion that its main function will be to protect the authority of the newly organized regions and to secure the unity of law in a regionalized nation through a control of regional laws. The Court's right to test national laws for their constitutionality is considered more or less incidental. Also, even the exercise of judicial review over national statutes would not

18 Title VI has the heading "Constitutional Guarantees." It deals also with the amending process. For discussion of judicial review in the constitutional assembly, see ATTI DELL' ASSEMBLEA COSTITUENTE (Seduta de 31 gennaio 1948), vol. XI, p. 4336. For a discussion of the Court and judicial review, see CARLO ESPOSITO, LA COSTITUZIONE ITALIANA, 1954, pp. 263-281; ROBERTO LUCIFREDI, LA NUOVA COSTITUZIONE ITALIANA, 1952, pp. 197-205, 235-237. The Court has so far not been in action, since the legislature has not been able to agree upon the judges it has to appoint under Art. 135 of the constitution.

19 Court of Cassation, Court of Accounts, and Council of State.

necessarily work to the advantage of the individual and protect him from an encroachment upon his rights by the legislature or executive, since under the Italian Constitution the scope and definition of private rights are left to the discretion of the legislature and administration.

The constitution prescribes that the conditions, the form, and the time limits for considering the constitutional legality and the guarantees of the independence of the judges of the Court were to be established by a constitutional law. The constitution further provides that other rules for the formation and the functioning of the Court are to be established by ordinary law (Art. 137). The constitutional law was passed on February 9, 1948.[20] Under it, the question of constitutional legality of a national law or an act having the force of law can be raised in the lower courts by either one of the litigant parties or by the court itself. If the judge in the lower court does not consider the question of unconstitutionality unfounded, that question is referred to the Constitutional Court for its decision. Likewise, whenever a Region deems a national law or act having the force of law as invading regional rights, it may, upon the deliberation of the Regional Council, bring the question of constitutional legality before the Court. Against the decisions of the Constitutional Court no appeal is admitted (Art. 137).

The Constitutional Court has, unlike its French counterpart, so far not only played a modest role; it has played no role at all. Due to the fact that the parties in Parliament could not agree as to whom they should elect for membership in the Court through all the years following the adoption of the Constitution, the Constitutional Court was only established in December, 1955. It has yet to prove its function as the guardian of the Italian Constitution.

## V

The most powerful of the modern European constitutional courts is without any doubt the Federal Constitution Court (*Bundesverfassungsgericht*), as established under the Basic Law of the German Federal Republic of May 8, 1949.[21] Also in Germany, where the principle "law is law" had shown disastrous consequences under the Weimar regime, the distinction between the superior constitutional and the inferior ordinary law was made. The Federal Constitutional Court became the guardian of the new democratic constitutional order. As the French and Italian courts, the Federal Constitutional Court is a political tribunal. It resembles the Italian court rather than the Constitutional Committee in France.

The Court is composed of twenty-four judges, who are elected by the two legislative chambers, the Federal Council and the Federal Diet in equal numbers (Art. 94 Basic Law; § 2 BVGG.). Eight of the judges are taken from the

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20 *Gazzetta ufficiale* (Feb. 20, 1948), n. 43; *Lex legislazione Italiana* (1948), p. 33. For a further law, see report, Camera dei Deputati, Documenti (1950), n. 469-A. A text of that norm appears in *Rassegna di diritto pubblico* (1950), V, 254-64.

21 The Court's legal constitution and procedure were, in detail, regulated by the federal Law Concerning the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*, abbreviated BVGG.) of April 16, 1951 (*Bundesgesetzblatt*, 1951, I, 243).

high federal courts, with the same tenure to which they are entitled there, i.e., in most cases, for life. The other judges are elected for eight years by the legislature. The Federal Diet elects twelve electors according to a specified proportional system; a candidate who gets nine electoral votes is elected (§ 6 BVGG.). The Federal Council elects its quota with a majority of two-thirds (§ 7 BVGG.). The Federal Council and the Federal Diet alternately elect the President of the Court and his deputy (§ 9 BVGG.). The elected candidates are then appointed by the Federal President (§ 10 BVGG.). The judges must have the qualifications required for members of the Federal Diet. They must, besides, be forty years of age, qualified for judicial office or for the higher administrative service and distinguish themselves by a special knowledge of public law (§ 3 BVGG.). The mode of election combines permanency with change. Whereas the eight permanent judges selected from the High German tribunals form a core which is independent from political change, the other sixteen members reflect the composition of the legislature at a given time and in all likelihood will be replaced after eight years. The rule that a candidate needs nine votes for his election makes it probable that he will be elected by a party coalition rather than one single party. In case one party succeeds in electing nine electors, it could, of course, man the Court with one-third of its judges at one election. However these eight members would still be out-balanced by the eight permanent judges and the eight members remaining from the preceding election.

The jurisdiction of the Federal Constitutional Court is very extensive. It decides: (1) disputes concerning the extent of the rights and duties of the high federal organs, i.e., the Federal President, the Federal Council, the Federal Diet, etc.; (2) disputes between the federal and land governments regarding the constitutionality of federal and Land legislation; (3) disputes between the federal and Land governments arising out of the execution of federal law by the States and the exercise of federal supervision;[22] (4) disputes between the Laender in cases for which no other jurisdiction is provided; (5) constitutional disputes within a Land if Land legislation so provides; (6) disputes over the constitutionality of federal or Land law which arise in ordinary litigation (Art. 93 Basic Law). The Federal Constitutional Court also considers complaints by private persons who assert that their constitutional rights are violated by the public authority (§§ 90 et seq. BVGG.). Finally, the Court determines whether political parties are constitutional and whether subversive individuals forfeit certain constitutional rights (Art. 21, 18 Basic Law). Upon impeachment, it tries the Federal President (Art. 61 Basic Law) and federal judges (Art 98 Basic Law). Upon request from the Federal President, the federal government, the Federal Diet and the Federal Council, the Court may give advisory opinions (§ 97 BVGG.). As can be gathered from the enumeration of the Court's powers,

22 Federal supervision (*Bundesaufsicht*) is an institution typical for German federalism. It means the right of the national government to supervise the enforcement of national legislation by the Laender.

it can be said that the scope of its jurisdiction is considerably broader than that of the French Constitutional Committee or of the Italian Constitutional Court. What is especially to be noticed is that the Federal Constitutional Court is not only guarding the constitution by settling conflicts between different branches of government, but also by protecting the individual from governmental infringements upon his private rights. The absence of the latter protection had been, as was shown, one of the main shortcomings under the French and Italian systems.

It is relatively easy to bring a question involving the infringement of the constitutional rights of individuals or governmental authorties before the Court. If there are differences of opinion or doubts on the compatibility of federal law or Land law with the Basic Law, or on the compatibility of Land law with some other federal law, the case can be brought before the Federal Constitutional Court by the Federal Government, a Land government, or by one-third of the members of the Federal Diet (Art. 93 Basic Law). Whenever a lower court in a pending case reaches the conclusion that the law which is pertinent to the adjudication of the case violates the Basic Law, the court must, ex officio, stay the proceedings and refer the question of constitutionality to the Federal Constitutional Court. This applies also whenever a lower court thinks that a Land law conflicts with federal law. If a party to a litigation challenges the constitutionality of the law pertinent to the case and the court holds against him, that person may, after exhaustion of appeals, carry the case to the Federal Constitutional Court on the ground that the law in question violates a basic right. This is known as constitutional complaint. Such a complaint can be launched by anyone, i.e., also by persons who are not a party to a lawsuit.[23] The decisions of the Federal Constitutional Court are binding upon all constitutional agencies of the Federation and the Laender as well as upon all courts and public authorities (31 BVGG.). In case the Court declares a law unconstitutional, its decision has the effect of a new law and its tenor must be published in the official law gazette (31 BVGG.).

In distinction to its French and Italian counterparts, the Federal Constitutional Court has developed into a very powerful institution which in the past years displayed a great deal of activity.[24] Guided by the desire to protect the principles of constitutionalism and private rights as they were put down in the

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23 Section 90 of the BVGG. provides: "Any one claiming that he has been injured by the public authority in one of his basic rights . . may file a constitutional complaint with the Federal Constitutional Court. If recourse to the courts is admissible with regard to the injury alleged, the constitutional complaint may not be filed until the ordinary remedies are exhausted. The Federal Constitutional Court may, however, immediately decide upon a constitutional complaint before the ordinary remedies are exhausted, if the complaint concerns a question of general interest or if the complainant would suffer a serious and irremediable disadvantage by pursuing the regular course of appeal. The right to file a constitutional complaint in a Land Constitutional Court under the law of a Land Constitution shall not be affected hereby."

24 For a survey of the most important decisions of the Federal Constitutional Court, see FRIEDRICH GIESE, GRUNDGESETZ FUR DIE BUNDESREPUBLIK DEUTSCHLAND, 1953, pp. 225-236.

Bonn Basic Law, the Court did not only make ample use of its right to review legislative and administrative acts for their constitutionality. Following a development that had taken place in Germany on the Land level in the years after the war, the Federal Constitutional Court also tested constitutional norms for their compatibility with those higher constitutional norms that transmuted, for the sake of the individual, the principles of constitutionalism into constitutional norms.[25] By holding that it is theoretically possible that a constitutional norm may be incompatible with those constitutional norms that express the spirit of the constitution as a whole, the Court did not only demonstrate its powerful position, but also brought about, for the sake of constitutionalism, an interesting broadening of judicial review.[26]

## VI

When, after the Second World War, the new constitutions of France, Italy and Germany were drafted, there existed strong tendencies to introduce, for the protection of the constitutional order, judicial review as it exists in the United States. In France, some rightist groups were advocating judicial review by a "court of independent personalities."[27] In the Italian Constituent Assembly, similar aims could be noticed.[28] Also in the Parliamentary Council that drafted the Bonn Basic Law, delegates of the right were in favor of a judicial review that was exercised by independent judges rather than by a political court.[29] These tendencies were strongly opposed by the leftist parties.[30] Remindful of the activities of America's lions under the throne and obsessed by the memory of Roosevelt's struggle with the Supreme Court, those groups rejected judicial review as a reactionary institution that would obstruct future social and economic reforms. The institution of special courts as the guardians of the constitution can thus be considered a compromise between the extremes to the right and left. The guardianship of the constitutional order was vested in courts that were political tribunals rather than strictly judicial bodies, the majority of its members being elected by the representatives of the people for a restricted term and thus to a larger or smaller degree dependent upon the political branches of government. This solution was, as was shown on the preceding pages, in keeping with the continental tradition.

The pro's and con's of the American system of judicial review and the European practice of vesting the guardianship of the constitution in special constitutional courts have often been discussed. American judicial review was, from Jefferson to Roosevelt, as much attacked by Americans for being undemo-

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25 Decision of December 18, 1953, published in *Juristenzeitung*, 1954, pp. 32 ff.
26 For the development of the problem of unconstitutional constitutional norms in post-war Germany, see the author's "Unconstitutional Constitutional Norms?", *Virginia Law Review*, January, 1956.
27 SEANCES, Commission de la Constitution, December 19, 1945, p. 133.
28 See *Atti della assemblea costituente, discussioni* (Rome, n.d.).
29 See *Jahrbuch des Oeffentlichen Rechts*, New Series, vol. 1, pp. 667 ff.
30 See notes 27 through 29 *supra.*

cratic as the European constitutional courts were attacked by Europeans for being too democratic and not sufficiently judicial in character. Neither the Americans nor the Europeans, though, have taken the step to adopt the system from the other side of the Atlantic. The question is, first, whether they could do so, and it seems doubtful whether people can reject a tradition of generations and replace it with something that has not grown on their own soil. Another question is whether they should do so. This boils down to the problem whether a politicalization of the judiciary is to be preferred to a judicialization of politics. The subtlety of this distinction has been evident in practice. The United States Supreme Court often appeared to be a political institution, just as the European constitutional courts in many instances proved to be genuinely juridical bodies. Nevertheless a possibly political judiciary, as in the United States, being composed of independent judges, still seems to be a better guardian of constitutionalism than a court whose majority is temporarily elected by the political branches of government, as in Europe. A dependent judiciary is a contradiction in terms. The rule can therefore be stated that the probability of the protection of the constitution increases with the decrease of the political characteristics of constitutional courts.

Judged under this criterion, the Constitutional Committee in France is, of the modern constitutional courts, the one that is least likely to be an effective guardian of the constitution. As a matter of fact, its function is conceived by many to make the constitution conform to the statute rather than the reverse. The Italian solution is more adequate. Here the members of the Constitutional Court hold office for a considerably longer period than in France, and the arrangement that the judges' terms expire at different times will probably prevent the Court from being a mere mirror of existing power-constellations and give it a status of its own. Besides, the election of the judges not only by the legislative body, but also by the executive and judiciary will contribute to the Court's independence. It is regrettable that the Bonn Basic Law provides for the election of the judges by the legislative chambers only. However, this shortcoming seems to be neutralized by the provision that gives life tenure to about one-third of the judges.

The organization of European constitutional courts thus has, since the adoption of the French constitution in 1946, progressively approached the American system, under which the judges enjoy life tenure. There is no reason why further improvements could not be made toward a greater independence of the constitutional courts. It might be ideal to combine the Italian and German solutions. The members of the constitutional court should be elected in equal numbers by the executive, legislative and judicial branches of government. More than one-half of them should have life tenure, the rest hold office as under the present Italian or German systems. Such an arrangement is most likely to secure constitutionalism in a democracy—and to protect the individual from sheer majority rule.