FEDERALISM AND JUDICIAL REVIEW IN GERMANY: LESSONS FOR AUSTRALIA?

ANNETTE MARFORDING*

I. INTRODUCTION

At a time when legal comparatists have begun to argue that the so-called 'civil law - common law' dichotomy should no longer be accepted,[1] or that there is a convergence between civil and common law systems,[2] a symposium such as this one is particularly apt. It provides the opportunity to reflect on solutions that other legal systems may have to offer Australia, with an open mind, so as not to exclude any consideration of the ways in which civil law systems deal with certain issues for the reason that they are too different to offer Australia anything useful. The most profitable use of comparative law is clearly in the field of law

* LLB, DipHEd, Dip Asian Studies (UNSW), LLB (Tueb Germ), Senior Lecturer and Associate, European Law Centre, Faculty of Law, University of New South Wales.

1 LM Friedman, "Legal Culture and Social Development" (1969) 4 *Law & Society Review* 29 at 35-7; A Marfording, "The Fallacy of the Classification of Legal Systems: Japan Examined" in V Taylor (ed), *Asian Laws Through Australian Eyes*, LBC (1997) at 65-89.

2 BS Markesinis, "Learning from Europe and Learning in Europe" in BS Markesinis (ed), *The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century*, Clarendon Press (1994) at 27-30; GR de Groot, "European Education in the 21st Century", in B de Witte and C Forder (eds), *The Common Law of Europe and the Future of Legal Education*, Kluwer (1992) at 7. It should be noted that this author argues that despite a convergence of sources of law and of case law, the political and cultural context of law usually leads to a divergence, rather than a convergence of law in its practical operation: A Marfording, note 1 *supra* at 78.

reform, both by the legislature and by the judiciary. Current examples of a willingness in Australia to accept that German legal principles may have lessons for local law reform include litigation reform,[3] restitution,[4] and the constitutional doctrine of proportionality.[5]

A significant lesson that the German Basic Law, and many other countries' constitutions, entail for Australia is the inclusion of an entrenched individual rights' catalogue[6] with significant ramifications for the operation of the legal justice system. I have, however, chosen not to focus on this aspect here, because there is already a large body of literature for and against a bill of rights for Australia.[7] Another very relevant aspect of the German system that could be discussed is Germany's republican system and the German method of electing the head of state.[8] I have chosen instead to focus on issues which are less publicly debated, but nonetheless deserve discussion. These are federalism and judicial review, and my examination of the German system in this regard is designed to stimulate such debate.

As comparatists have repeatedly urged, it is an essential precondition of successful law reform, especially if it involves the adoption of solutions from foreign legal systems, to carefully consider whether the proposed reform is going to be effective in the local social, political, and economic context in which it will operate.[9] Unfortunately, the scope of this article does not permit extensive discussion of whether Australia's social, political and economic circumstances prohibit the adoption of ideas from Germany in relation to the two foci of my paper; federalism and judicial review. Nevertheless I hope that my thoughts may plant a seed for contemplation, especially at this time of debate over constitutional reform in Australia. My discussion is influenced by my experience with the Australian legal system since my departure from the German legal environment twelve years ago.

---

3 Law Council of Australia, Issues Paper 20, *Submission to the Australian Law Reform Commission, Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, 1997, Chapter 2; GL Davies, "A Blueprint for Reform: Some Proposals of the Litigation Reform Commission and their Rationale" (1996) 5 *Journal of Judicial Administration* 201.

4 Sir A Mason, "An Australian Common Law?", paper presented at the Australian Law Teachers Association 50th Anniversary Conference, Melbourne, 1995, p 24.

5 For a detailed examination of the concept of proportionality as applied in Australia see J Kirk, "Constitutional Guarantees, Characterisation and the Concept of Proportionality" (1997) 21 *MULR* 1.

6 See Appendix 1, Articles 1-19 Basic Law.

7 See for instance, *Final Report of the Constitutional Commission*, AGPS (1988) at 466-76; Sir H Gibbs, "The Constitutional Protection of Human Rights" (1982) 9 *Monash University Law Review* 1; E Campbell, "Pros and Cons of Bills of Rights in Australia" (1970) 3 *Justice* 1.

8 On this topic see I von Münch, "An Example of Republicanism: The German Presidency" (1997) 20 *UNSWLJ* 466.

9 A Marfording, note 1 *supra;* LM Friedman, note 1 *supra;* O Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 *Modern Law Review* 1; E Stein, "Uses, Misuses and Nonuses of Comparative Law" (1977) 72 *Northwestern University Law Review* 198.

II. FEDERALISM

In contrast to the fairly decentralised federalist system in Australia, federalism in Germany is far more centralised. The reasons for this difference are largely historical.

In Australia, the main motivation of the colonies in forming a federation was a concern about defence, as well as the common needs of trade and a national court of appeal.[10] Members of the colonial parliaments formed the majority of the delegates to the Constitutional Conventions of the 1890s. They shared the commitment to confining Commonwealth powers within a rather narrow range to protect the rights of the new states.[11] The Australian Constitution thus restricts both exclusive and concurrent Commonwealth legislative powers to areas which arguably necessitate uniform legislation, such as defence, foreign affairs, immigration, foreign and interstate trade and commerce, currency, and so on.

In Germany, on the other hand, federalism has been a feature of German constitutionalism throughout its more than 1000 year history - with the exception of the period between 1933 to 1945 during the Third Reich.[12] Centralist federalism, as reflected in wide ranging federal exclusive and concurrent legislative powers, has been a tradition since the 1871 Constitution.

When one examines the catalogue of exclusive legislative powers of the German Federal Parliament (Art 73 Basic Law [Grundgesetz], hereafter abbreviated as GG),[13] one finds that most of these areas are subject to concurrent legislative powers only in Australia; for instance foreign affairs, defence, citizenship, currency, immigration, and so on. In addition, the catalogue of German concurrent legislative powers (Art 74 GG) is far more extensive than the Australian equivalent. German states (*Länder*) have power to legislate on matters not subject to federal power (Art 70(1) GG), which include cultural matters, education, social services, and hospitals.[14]

In my view, the most important difference between Germany and Australia with respect to the allocation of federal legislative powers is that in Germany, the Federal Parliament has the power to legislate with respect to "civil law, criminal law, and execution of sentences, the organisation and procedure of courts, the legal profession, notaries, and legal advice" (Art 74 No 1 GG), whereas in Australia the Federal Parliament does not have these powers.

The allocation of these powers to the German Federal Parliament naturally has far reaching consequences for the administration of the German justice system. Even though all German courts (with the exception of the highest level of appeal

---

10 RD Lumb, *Australian Constitutionalism*, Butterworths (1983) p 47; M Coper, *Encounters with the Australian Constitution*, CCH (1988), pp 59-73; RL Mathews, "The Development of Australian Federalism" in RL Mathews (ed), *Federalism in Australia and the Federal Republic of Germany*, ANU Press (1980) at 4.

11 RL Mathews, *ibid.*

12 DP Currie, *The Constitution of the Federal Republic of Germany*, The University of Chicago Press (1994), p 33.

13 The provisions of the Basic Law that are referred to in this paper are listed in Appendix 1.

14 DP Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press (2nd ed, 1997), p 79.

courts) are state courts, the German Code of Civil Procedure prescribes uniform procedural rules for all levels of courts throughout the country. This is one significant reason for the greater efficiency of the German civil litigation system, in comparison to Australia, where the rules of court procedure vary not only between the various states, but also between the various courts of each state. While Australian lawyers have to spend a significant amount of time to inform themselves about these differing rules and to keep up to date with ever changing rules of court at considerable cost to their clients,[15] these cost and delay problems do not exist in Germany. Similarly, time limits and service procedures are uniformly regulated by the German Code of Civil Procedure. Interestingly, the recent submission by the Law Council of Australia to the Australian Law Reform Commission *Review of the Adversarial System of Litigation* recommends consideration of the German model of uniform procedural rules for civil litigation reform.[16]

Regarding civil law, German courts administer uniform laws as stipulated in the Civil Code and other statutes, whereas contract law, property law and the law of torts are not uniform in Australia in so far as states have elected to legislate on particular aspects of these areas of law. Limitation periods for personal injury claims, for instance, as regulated in each Australian state and territory, are highly divergent, especially with respect to extension of time provisions for late discovery of material facts.[17] Often lawyers have sued in a jurisdiction other than where the injury was inflicted in an attempt to attract more favourable extension of time provisions.[18] The Australian High Court held in *McKain v RW Miller & Company (SA) Pty Ltd*[19] that limitation periods are to be classified as procedural law with the consequence that the *lex fori* was to apply. This result enhances the potential for such forum shopping by lawyers. Subsequently, all state and territory attorneys-general agreed to introduce legislation in all Australian jurisdictions providing that if the substantive law of another state, territory, or New Zealand is to govern a claim before the court, the limitation provisions of that other jurisdiction are to be regarded as part of that substantive law and applied accordingly by the court, including those provisions conferring an exercise of discretion.[20] Under conflict of laws rules, any personal injury claims must thus be brought within the limitation period specified by the law of

15 An example of a lawyer's failure to appreciate the different pleading rules for the New South Wales District Court and Supreme Court is *McDonald* v *Coles Myer Ltd (T/as "K-Mart Chatswood")* (1995) ATR ¶81-361; per Justice Powell.

16 Law Council of Australia, note 3 *supra* at 72-3.

17 A detailed discussion of all Australian limitation statutes with a focus on proceedings brought by survivors of child sexual abuse appears in A Marfording, "Access to Justice for Survivors of Child Sexual Abuse" (1997) 5 *Torts Law Journal* 221.

18 See for instance *Taylor* v *Trustees of the Christian Brothers* (1994) ATR ¶81-288; *Reidy* v *Trustees of the Christian Brothers* (1995) 12 WAR 583.

19 (1991) 174 CLR 1.

20 *Limitation Act* 1985 (ACT) ss 56-7; *Choice of Law (Limitation Periods) Act* 1993 (NSW) ss 5-6; *Choice of Law (Limitation Periods) Act* 1994 (NT) ss 5-6; *Choice of Law (Limitation Periods) Act* 1996 (Qld) ss 5-6; *Limitation Act* 1936 (SA) s 38A; *Limitation Act* 1974 (Tas) ss 32C-D; *Choice of Law (Limitation Periods) Act* 1993 (Vic) ss 5- 6; *Choice of Law (Limitation Periods) Act* 1994 (WA) ss 5-6.

the place where the injury occurred.[21] Again, this puts a high onus on lawyers to be conversant with all relevant limitation periods throughout Australia in order to file a claim on time.

Ultimately, the question must be whether there is a rational and legitimate justification for state legislative powers to remain so strong in Australia, especially with regard to civil and criminal law and procedure. One argument in favour could be that Australia is a heterogenous country, where people feel a stronger affinity to their local state than to a remote federal government as a result of the country's size.[22] But this view is not undisputed. In *Beavington* v *Godleman and Others*,[23] Sir Anthony Mason endorsed Justice Barry's views in *Walton v Walton*[24] that "social ideas and customs are substantially the same throughout [Australia]".[25] Furthermore, a comparison with other federations, where there is considerable heterogeneity among the various states, proves that local diversity is not necessarily an argument for strong state legislative powers, at least in the area of civil and criminal law and procedure. Malaysia, a country that shares the English legal tradition with Australia,[26] is a case in point. Despite strong heterogeneity among the Malaysian states,[27] the Malaysian Constitution allocates wide legislative powers to the Federal Parliament, with particular regard to civil and criminal law and procedure and the administration of justice (Art 74 Malaysian Constitution; Ninth Schedule, List 1 No 4). The same applies in Germany. While its geographical size is far smaller than Australia's, there have always been significant differences in local culture, economy and politics among the German states. These are even more pronounced today as a result of reunification. Although recent constitutional reform proposals made by the Joint Constitutional Commission of the *Bundestag* and *Bundesrat* regarding the distribution of legislative powers[28] were adopted by constitutional amendment in 1994, these amendments entail only a minor change to the balance of legislative power between the Federation and the states.

The Australian High Court has indirectly argued for greater uniformity in Australian laws. While initially interpreting Australian federal powers narrowly under the reserved state powers doctrine, it has since interpreted them liberally, especially with regard to the exercise of Commonwealth powers over external affairs, corporations and taxation; arguably in recognition of pragmatic requirements for a unified approach in these areas.[29] In *Beavington v*

21 RP Balkin and JLR Davis, *Law of Torts*, Butterworths (2nd ed, 1996), p 818.

22 K Wiltshire, "Australian Participation in Federal Decisions" in RL Mathews (ed), note 10 *supra* at 73.

23 (1987-1988) 169 CLR 41. (Hereafter referred to as *Beavington v Godleman*).

24 [1948] VLR 487 at 489.

25 Note 23 *supra* at 78-9.

26 TM Suffian, *An Introduction to the Legal System of Malaysia*, Penerbit Fajar Bakfi Sdn Bhd (2nd ed, 1989), p 4.

27 *Ibid*, p 8.

28 The proposals of the Commission are discussed in detail in U Leonardy, "To Be Continued: The Constitutional Reform Commissions from a Länder Perspective" in KG Goetz and PJ Cullen (eds), *Constitutional Policy in Unified Germany*, Frank Cass (1995) at 75-98.

29 RElse-Mitchell, "Constitutional Review in the Australian Federation" in RL Mathews (ed), note 10 *supra* at 164.

Godleman,[30] a case involving a conflict of laws issue, Sir Anthony Mason emphasised that: "Australia is one country and one nation.".[31] In the same case, Deane J asked the question whether federal and state constitutions comprise a unitary system of law. He elaborated:

> By 'a unitary system of law', I mean a comprehensive legal system in which the substantive law applicable to govern particular facts or circumstances is objectively ascertainable or predictable and internally consistent or reconcilable ... What is essential is that the substantive rule or rules applicable to determine the lawfulness and the legal consequences or attributes of conduct, property or status at a particular time in a particular part of the national territory will be the same regardless of whereabouts in that territory questions concerning those matters or their legal consequences may arise.[32]

He concluded that "it appears to me to be manifest that the comprehensive system of law which the Constitution established was intended to be a unitary one in the above sense".[33]

While these comments were made with respect to the issue of whether the *lex fori* or the *lexi loci delicti* was to govern the entitlement to damages after an interstate motor accident, and were presumably influenced by a view that forum shopping is undesirable, Justice Deane's observations could be interpreted as supporting a uniformity of civil law in Australia. Justices Wilson and Gaudron state in a similar vein in the same case that:

> [I]t is not only undesirable, but manifestly absurd that the one set of facts occurring in the one country may give rise to different legal consequences depending upon the location or venue of the court in which action is brought.[34]

One could similarly argue that it is equally undesirable that the one set of facts occurring in the one country may give rise to different legal consequences depending upon the location where an accident or a crime took place.

It may also be questioned to what extent it is rational and consistent to subject marriage and family law to federal concurrent powers (Art 51(xxi) and (xxii)), but not civil and criminal law. Marriage and family law are arguably far more closely linked to local moral convictions and social structure than contract law, property law, the law of torts and criminal law. It can be surmised that the historical reason for the exclusion of civil and criminal law from the constitutional catalogue of federal legislative powers has lain in the assumption that these areas were already under uniform regulation by the common law due to the doctrine of binding precedent and the conferral of "final and conclusive" appellate jurisdiction over appeals from state and federal courts on the Australian High Court (Art 73). Nevertheless, increasing legislative activity by state parliaments with respect to aspects of civil and criminal law suggests that it may be time to reconsider the constitutional allocation of legislative powers in Australia. The historical development of the Australian Constitution does not

30 Note 23 *supra*.
31 *Ibid* at 78.
32 *Ibid* at 121.
33 *Ibid*.
34 *Ibid* at 88.

provide a rational and legitimate justification for keeping present state legislative powers intact, especially with respect to civil and criminal law and procedure.

The following remarks are designed to provide some insight into German federalism in its practical operation. While the German states have legislative power over few areas only, they do play a significant role in the federal system generally. In contrast to Australia, not only state laws, but also federal laws - with the exception of foreign affairs (Art 32 GG), defence (Art 87b GG), aviation (Art 87d GG), federal waterways (Art 89 GG), foreign service, railways, post and telecommunications (Art 87 GG) and customs and excise (Art 108 GG) - are administered by the states (Art 83 GG). Second, as mentioned above, judicial power is exercised mainly by state courts, federal courts being almost exclusively courts of last resort. Third, the states have considerable influence on federal legislative policy through the *Bundesrat* [Council of States]. The *Bundesrat* has the right to introduce legislative bills (Art 76(1) GG), and has an absolute veto over constitutional amendments (Art 79(2) GG), and over federal legislation affecting the states' interests, the states' tax revenues, or the administration of federal laws by the states.[35] The latter has a particularly significant impact. Since many federal laws include provisions on their execution and implementation by the states, the absolute veto power of the *Bundesrat* applies to about sixty per cent of all federal legislation.[36] Fourth, the *Bundesrat* acts more effectively as representative of the states than the Australian Senate does, because it is composed of members of state governments (Art 51(1) GG), whose votes may be cast only as a block vote (Art 51(3) GG) in accordance with instructions of their respective state governments. Fifth, the German states, through the *Bundesrat,* select half of the judges to be appointed to the Federal Constitutional Court (Art 94(1) GG, s 7 Law on the Federal Constitutional Court [*Bundesverfassungsgerichtsgesetz*]), which is the only court in Germany empowered to declare the unconstitutionality of legislative and executive action.[37] Again, this is in stark contrast to Australia, where the states have no power regarding the selection of judges to the High Court, the final court of appeal regarding review of constitutionality.

While the Australian High Court interprets federal legislative powers liberally, arguably in recognition of the practical benefits of greater uniformity of laws in Australia, the German Federal Constitutional Court confines federal legislative powers narrowly, in recognition of the constitutionally entrenched federalist system (Arts 30, 20(1), 79(3) GG). In the *Television I* case,[38] the Court held that the systematic order of the Basic Law demands a strict interpretation of provisions conferring power on the federation, and that exclusive legislative power over postal and telecommunication services (Art 73 No 7 GG) extends only to technical aspects of telecommunication, not to the regulation of broadcasting generally, which, as a cultural matter, falls under state power. Similarly, the Court held that concurrent power to legislate on land law (Art 74

35 DP Kommers, note 14 *supra*, p 97; BVerfGE 1, 76 (1951); 48, 127 (1978).

36 DP Conradt, *The German Polity,* Longman (3rd ed, 1986), p 154.

37 AR Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge University Press (1989), p 204.

38 BVerfGE 12, 205 (1961); extracted in part in DP Kommers, note 14 *supra*, pp 69-74.

No 18 GG) does not extend to the regulation of building construction,[39] nor does concurrent legislative power on waterways (Art 74 No 21 GG) encompass authority to legislate against water pollution.[40] Other examples of the Federal Constitutional Court's narrow interpretation of federal powers are decisions holding that concurrent power to legislate on civil law (Art 74 No 1 GG) does not authorise the regulation of government liability, of the rights of owners of condemned property, or of damages for harm to publicly owned streets.[41]

In its decisions with regard to the division of powers between the federation and the states, the Federal Constitutional Court has frequently employed the doctrine of federal comity: "the reciprocal obligation of the federation and the states to behave in a profederal manner".[42] A well known example is the *Television I* case mentioned earlier.[43] The then Federal Chancellor Konrad Adenauer, in his attempt to create a television station to be operated by the federation against strong resistance by the states, had held discussion meetings on his plan only with representatives of those states with Christian Democratic Union governments, in the hope that his strong influence in the party would sway them.[44] The Court held that:

> ... the rule of profederal behaviour also governs the procedure and style of the negotiations required in constitutional life between the federation and its members ... In the Federal Republic of Germany all states have the same constitutional status; they are states entitled to equal treatment when dealing with the federation. Whenever the federation tries to achieve a constitutionally relevant agreement in a matter in which all states are interested and participating, the obligation to act in a profederal manner prohibits the federation from trying to 'divide and conquer', that is, from attempting to divide the states, to seek an agreement with only some of them and then force the others to join ... that principle also prohibits the federal government from treating state governments differently because of their party orientation and, in particular, from inviting to politically decisive discussions only representatives from those state governments politically close to the federal government and excluding state governments which are close to opposition parties in the federal parliament.[45]

In this case, the Federal Government had accordingly violated its obligation to act profederally. In most other cases in which the Federal Constitutional Court invoked the principle of federal comity, the result was in favour of the states.[46]

---

39 BVerfGE 3, 407 (1954).

40 BVerfGE 15, 1 (1962).

41 BVerfGE 61, 149 (1982); BVerfGE 8, 229 (1958); BVerfGE 42, 20 (1976). For a brief discussion of these cases see DP Currie, note 12 *supra*, pp 46-7.

42 *Television I* case, BVerfGE 12, 205 (1961), quoted from the extract in DP Kommers, note 14 *supra*, pp 71-2.

43 BVerfGE 12, 205 (1961); text accompanying note 38 *supra*.

44 For more detail on the factual background of the case see PM Blair, *Federalism and Judicial Review in West Germany*, Clarendon Press (1981), pp 176-7.

45 BVerfGE 12, 205 (1961), quoted from DP Kommers, note 14 *supra*, pp 72-3.

46 See for instance *Housing Funding* case, BVerfGE 1, 299 (1952); *Christmas Bonus* case, BVerfGE 3, 52 (1953); *North Rhine-Westphalia Salaries* case, BVerfGE 4, 115 (1954); *Concordat* case, BVerfGE 6, 309 (1957), extracted in part in DP Kommers, note 14 *supra*, pp 80-2; *Hessian Salary Adaptation Act* case, BVerfGE 34, 9 (1972); *Broadcast Injunction* case, BVerfGE 80, 74 (1989); *Finance Equalisation III* case, BVerfGE 86, 148 (1992). For some discussion of these cases see PM Blair, note 44 *supra*, pp 164-99; DP Kommers, note 14 *supra*, pp 74-5.

This overview shows that centralised federalism in Germany is strongly balanced by protecting the role of the states through various constitutional arrangements. In addition, the jurisprudence of the Federal Constitutional Court has furthered the protection of states' rights. These may be relevant considerations for a discussion of federalism reform in Australia.

III. JUDICIAL REVIEW

The Federal Constitutional Court has a narrower competence than the Australian High Court. It is not a general court of final appeal, but adjudicates on constitutional matters only. Regarding constitutional questions, however, its jurisdiction is wider than that of the Australian High Court, and it is expressly enumerated in the Basic Law and s 13 of the Law on the Federal Constitutional Court.[47] Most significant in terms of the Court's caseload are constitutional complaints, which amount to more than 5 000 per year.[48] According to Art 93(1) No 4a GG, any person who claims that one of his or her substantive or procedural fundamental rights, protected under the Basic Law, has been violated by public authority can file a constitutional complaint, after exhausting all remedies in the ordinary courts, or immediately, if the complaint is of general significance or if the complainant would otherwise suffer a grave and inevitable disadvantage (s 90(2) Law on the Federal Constitutional Court). Since proceedings of the Federal Constitutional Court are free of charge (s 34(1) Law on the Federal Constitutional Court), and the filing procedure is informal, people are encouraged to seek enforcement of their constitutional rights. The ramifications of constitutionally entrenched individual rights are evident here, although it should be mentioned that only about one per cent of constitutional complaints are accepted for full review at preliminary examination (s 93a Law on the Federal Constitutional Court).[49]

There is one particular jurisdiction of the Federal Constitutional Court to which I wish to draw attention. Under Art 93(1) No 2 GG the Court shall decide:

> ... in case of differences of opinion or doubts on the formal and material compatibility of federal law or state law with this Basic law, or on the compatibility of state law with other federal law, at the request of the Federal Government, of a state government, or of one third of the members of the *Bundestag*.

In a case of such differences of opinion or doubts, Australian courts can only decide in the context of a real dispute between parties.[50] An abstract control of norms, as in Germany, is not possible. If the present Native Title Amendment Bill was enacted here, for instance, judicial determination of its constitutionality would have to await a real dispute.

---

47 For section 13 of the Law on the Federal Constitutional Court see Appendix 2.

48 DP Kommers, note 14 *supra*, p 15.

49 *Ibid.*

50 RElse-Mitchell, note 29 *supra* at 159.

Since Art 93(1) No 2 GG allows the abstract norm control procedure to be brought by one third of the members of the *Bundestag*, it is relatively easy for the political opposition in the *Bundestag* to use the procedure, and indeed a majority of abstract judicial review proceedings have been so brought.[51] The risk of political exposure for the Court is thus particularly high in these cases. For this reason, some critics are opposed to this form of judicial review, arguing that it constitutes a manipulation of the judicial process for political ends.[52] But as Currie correctly points out, all constitutional issues brought before the Federal Constitutional Court invariably involve political issues, and the role of the Court as guardian of the Constitution is no different here than in any other of its jurisdictions.[53] It should be added, in this context, that the Federal Constitutional Court does not apply any 'political questions' doctrine.[54] As a result of its clearly defined jurisdiction in the Basic Law and the Law on the Federal Constitutional Court, it cannot refuse to decide an issue falling within its competencies.[55] On the other hand, the Court has sometimes delayed its decision in cases involving strong political issues for several years, hoping that the issue will be resolved by political compromise, and that the case will be withdrawn.[56] In addition, the Court allows the legislature a wide discretion, and will interpret statutes as conforming with the Basic Law unless the statute in question violates the rule of law, the principle of proportionality, or a principle of justice such as legal clarity, predicability, or security.[57]

Abstract judicial review is not an adversary procedure, but an objective procedure to review the validity of statutes under the Constitution.[58] The Court is accordingly not limited by the applicant's submissions, but will examine the statute's constitutional validity from all possible legal perspectives.[59] Decisions of the Federal Constitutional Court in its abstract review jurisdiction are not only binding upon federal and state constitutional organs and all courts and authorities,[60] but, as all decisions of the Court reviewing the constitutionality of a statute, they are published in the Federal Law Gazette and have the force of law (s 31(2) Law on the Federal Constitutional Court). The Court has the option of declaring a statute or regulation that it holds to be unconstitutional as either null and void, or as incompatible with the Basic Law (s 31(2) Law on the Federal Constitutional Court). If the norm is declared null and void, it immediately ceases to operate, and decisions based on the norm, which have not as yet been

51 DP Currie, note 12 *supra*, p 169; DP Kommers, note 14 *supra*, p 28.

52 DP Currie, *ibid*; DP Kommers; *ibid*; both citing critical sources.

53 DP Currie, *ibid.*

54 PM Blair, note 44 *supra*, p 29; E Benda, "The Position and Function of the Bundesverfassungsgericht (Federal Constitutional Court) in a Reunited Germany", in E McWhinney, J Zaslove and W Wolf (eds), *Federalism in the Making*, Martinus Nijhoff Publishers (1992) at 36.

55 PM Blair, *ibid*, pp 29-30; E Benda, *ibid.*

56 PB Blair, *ibid*, p 30; DP Kommers, note 14 *supra*, p 55. It should be noted though that the case cannot be withdrawn without the Court's permission: Kommers, *ibid*, p 14.

57 DP Kommers, *ibid*, p 51; BVerfGE 2, 266 (1953); BVerfGE 4, 157 (1955); BVerfGE 7, 171 (1957); BVerfGE 48, 127 (1978); BVerfGE 50, 290 (1979); BVerfGE 51, 401 (1979).

58 DP Kommers, *ibid*, p 13; BVerfGE 1, 407 (1952); BVerfGE 2, 311 (1953); BVerfGE 20, 95 (1966).

59 DP Kommers, *ibid*; BVerfGE 1, 41 (1951).

60 As decisions of the Court always are: s 31(1) Law on the Federal Constitutional Court.

executed, can no longer be executed (s 79(2) Law on the Federal Constitutional Court). However, new proceedings may be instituted with respect to criminal convictions that were based on the norm that has been held unconstitutional (s 79(1) Law on the Federal Constitutional Court). In cases where a declaration of nullity and voidance of a norm would result in greater hardship, inconvenience, or political or economic chaos, the Court will instead declare a norm as incompatible with the Basic Law, or it will sustain it, but warn the legislature that the norm will be held null and void in the future, if the legislature does not amend or repeal it.[61]

A point that I would like to raise for discussion in this context is the occasional practice of the Federal Constitutional Court to advise the legislature on how to amend an unconstitutional norm, so as to make it compatible with the Basic Law. This method is almost always adopted if the Court declares a norm to be unconstitutional, but not null and void.[62] An example of the practice is the *Joint Income Tax* case,[63] in which a provision in the Income Tax Law, stipulating that the income of married couples was to be assessed jointly, which resulted in the imposition of a heavier tax burden on them than if they were to file their tax returns separately, was held to be unconstitutional as violating article 6(1) GG (protection of marriage) and article 3(2) and (3) GG (gender equality). In its decision, the Court advised the legislature that a tax statute favouring married couples, for instance, through an income splitting system, would be constitutional.[64] Another instance is the first *Abortion* case,[65] in which a permissive abortion scheme in the Criminal Code was held unconstitutional, the Court giving specific guidelines to the legislature on how to amend the relevant provisions of the Criminal Code so as to make the regulation of abortion constitutional. Similarly, the Court gave instructions on how to amend 1992 amendments to the abortion provisions in the Criminal Code to make them compatible with the Basic Law in the second *Abortion* case.[66] The 1992 amendments had been a compromise between the liberal abortion regime of the old GDR and the more restrictive regime in the West, which had become necessary after reunification. Another example of the Federal Constitutional Court's admonitory practice is the 1992 *Party Finance* case,[67] in which the Court issued detailed guidelines to the legislature on how to amend statutory provisions on party financing.[68]

---

61 DP Kommers, note 14 *supra*, p 53. An example is a decision regarding a statute apportioning electoral districts, which had not been amended when movement of the population resulted in the districts having unequal voting power. The statute, and therefore the election, was upheld, but the legislature was admonished to re-apportion electoral districts before the next election; BVerfGE 16, 130 at 141 ff (1963), extracted in part in DP Kommers, *ibid*, pp 193-6.

62 W Rupp-von Brünneck, "Admonitory Functions of Constitutional Courts" (1972) 20 *American Journal of Comparative Law* 387 at 393.

63 BVerfGE 6, 55 (1957), partly translated in DP Kommers, note 14 *supra*, pp 495-8.

64 BVerfGE 6, 55 at 76-7 (1957).

65 BVerfGE 39, 1 (1975); partly translated in DP Kommers, note 14 *supra*, pp 336-46.

66 BVerfGE 88, 203 (1993); partly translated in DP Kommers, *ibid*, pp 349-55.

67 BVerfGE 85, 264 (1992).

68 The case is discussed in more detail in N Johnson, "The Federal Constitutional Court: Facing up to the Strains of Law and Politics in the New Germany", in KG Goetz and PJ Cullen, note 28 *supra* at 140.

It is easy to image that it would cause immense political controversy if the Australian High Court were to adopt such a practice of advising the legislature on how to amend unconstitutional norms so as to render them constitutionally valid. In Germany also, the method has been criticised as undemocratic and as violating the separation of powers principle.[69] Nevertheless, the Federal Constitutional Court enjoys enormous public support. Public confidence in the Court as guardian of the Constitution is far higher than that in the executive and legislative institutions and political parties.[70] The practice of issuing guidelines to the legislature can also be supported from a pragmatic perspective. If the Court confined itself to merely declaring a statute unconstitutional, the legislature might be in doubt as to what amendments would make the statute compatible with the Basic Law. Rupp-von Brünneck thus supports the Court's practice as "a necessary element of a sound judgment,"[71] arguing that:

> ... [t]he legislature or Executive, having failed in their first attempt to attain their object in accordance with the constitution, are entitled to learn about the possible ways for a better ... constitutional solution ... Furthermore, the far reaching effect of any decision which declares a statute unconstitutional - far reaching not only for the Executive and legislature, but also for the individual citizen concerned - makes it imperative for the Court to prevent as far as possible other transgressions of the Constitution in the same field. Last but not least, it is a matter of avoiding unnecessary further litigation if the Court, handicapped by the heavy burden of its backlog, handles the case in this more expeditious manner.[72]

She concludes that she regards the procedure as "at once flexible and effective for accomplishing the task of a Constitutional Court".[73]

To pose a hypothetical: Assuming that the present Native Title Amendment Bill were to pass the Senate; further assuming that a real dispute were to arise involving the issue of the law's constitutionality and were to end up before the High Court for decision; and further assuming that the High Court were to hold the Amendment Act unconstitutional (for instance on the ground that the race power [Art 51(xxvi)] could only be used to benefit indigenous people), would it not be beneficial for the public community, including the legislature, the executive, indigenous people and pastoralists, to learn about constitutional solutions to the native title dilemma? Already there is a plethora of legal advice on the constitutionality of the Amendment Bill, most advisors attempting to second guess the inevitable future decision of the High Court.

---

69 K Doehring, "Functions and Limits of Judge-Made Law in German Constitutional Law and European Community Law" in E McWhinney, J Zaslove and W Wolf (eds), note 54 *supra* at 48-59. Further references are noted in W Rupp-von Brünneck, note 62 *supra* at 400 and note 48 therein.

70 N Johnson, note 68 *supra* at 132-3.

71 W Rupp-von Brünneck, note 62 *supra* at 401.

72 *Ibid.*

73 *Ibid* at 403.

IV. CONCLUSION

I have focused in this paper on some aspects of the German Basic Law and of German constitutional and judicial practice, which to me appear of value for discussion in Australia. It would be unfortunate, I suggest, if the Constitutional Convention and other constitutional reform debate were to focus solely on the issue of an Australian Republic, even though I regard this subject as a very important aim. The impracticalities, inefficiencies, and injustices which often flow from the current division of legislative powers between the Commonwealth and the states, merit discussion of a reallocation of legislative powers while sustaining federalism. Equally, the composition of the Australian Senate may warrant re-evaluation, especially if the legislative power balance were tipped towards centralism, to give the Senate a stronger position as representative of the states.

With respect to judicial review, the introduction of an abstract review procedure without the need for a real dispute between parties would enable timely review of norms of doubtful constitutionality and thus enhance certainty in the law. It is probably not feasible in the current political climate to suggest that the Australian High Court adopt the practice of issuing admonitory guidelines to the legislature with respect to amendments of statutes held to be unconstitutional. Nevertheless, for the reasons outlined, I regard it as a valuable practice, which merits consideration.

APPENDIX 1

THE GERMAN BASIC LAW

I. BASIC RIGHTS

Article 1 [Human Dignity]

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace, and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly enforceable law.

Article 2 [Liberty]

(1) Everyone shall have the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code.

(2) Everyone shall have the right to life and to inviolability of his person. The liberty of the individual shall be inviolable. These rights may be encroached upon only pursuant to a law.

Article 3 [Equality Before the Law]

(1) All persons shall be equal before the law.

(2) Men and women shall have equal rights. The state shall seek to ensure equal treatment of men and women and to remove existing disadvantages.

(3) No one may be prejudiced or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions. Persons may not be discriminated against because of their disability.

Article 4 [Freedom of Faith, of Conscience, and of Creed]

(1) Freedom of faith, of conscience, and of creed, religious or ideological, shall be inviolable.

(2) The undisturbed practice of religion is guaranteed.

(3) No one may be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.

Article 5 [Freedom of Expression]

(1) Everyone shall have the right freely to express and disseminate his opinion by speech, writing, and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.

(2) These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honour.

(3) Arts and science, research and teaching shall be free. Freedom of teaching shall not absolve from loyalty to the Constitution.

Article 6 [Marriage, Family and Illegitimate Children]

(1) Marriage and family shall enjoy the special protection of the state.

(2) The care and upbringing of children are a natural right of, and a duty primarily incumbent on, the parents. The national community shall watch over their endeavours in this respect.

(3) Children may not be separated from their families against the will of the persons entitled to bring them up, except pursuant to a law, if those so entitled fail, or the children are otherwise threatened with neglect.

(4) Every mother shall be entitled to the protection and care of the community.

(5) Illegitimate children shall be provided by legislation with the same opportunities for their physical and spiritual development and their place in society as are enjoyed by legitimate children.

Article 7 [Education]

(1) The entire educational system shall be under the supervision of the state.

(2) The persons entitled to bring up a child have the right to decide whether it shall receive religious instruction.

(3) Religious instruction shall form part of the ordinary curriculum in state and municipal schools, except in secular schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious communities. No teacher may be obliged against his will to give religious instruction.

(4) The right to establish private schools is guaranteed. Private schools, as a substitute for state or municipal schools, shall require the approval of the state and shall be subject to the laws of the *Länder*. Such approval must be given if private schools are not inferior to the state or municipal schools in their educational aims, their facilities, and the professional training of their teaching staff, and if segregation of pupils according to the means of the parents is not promoted thereby. Approval must be withheld if the economic and legal position of the teaching staff is not sufficiently assured.

(5) A private elementary school shall be permitted only if the education authority finds that it serves a special pedagogic interest, or if, on the application of persons entitled to bring up children, it is to be established as an interdenominational or denominational or ideological school, and a state or municipal elementary school of this type does not exist in the local community ...

Article 8 [Freedom of Assembly]

(1) All Germans shall have the right to assemble peacefully and unarmed without prior notification or permission.

(2) With regard to open-air meetings this right may be restricted by or pursuant to a law.

Article 9 [Freedom of Association]

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

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

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

Article 10 [Privacy of Letters, Posts and Telecommunications]

(1) Privacy of posts and telecommunications shall be inviolable.

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

Article 11 [Freedom of Movement]

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

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

Article 12 [Right to Choose Trade, Occupation or Profession]

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

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

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

Article 12a [Liability of Military and Other Service]

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

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

(3) Persons liable to military service who are not required to render service pursuant to Paragraph (1) or (2) can, during a state of defence, be assigned by or pursuant to a statute to employment involving civilian services for defence purposes, including the protection of the civilian population; assignments to employment subject to public law are only admissible for the purpose of discharging police functions or such other functions of public administration as can only be discharged by persons employed under public law. Employment according to the first sentence of this paragraph can also be established with the Armed Forces, in the area of their supply services, or with public administrative authorities; assignments to employment connected with supply services for the civilian population are only admissible to provide for their vital provisions or to guarantee their safety.

(4) Where, during a state of defence, civilian service requirements in the civilian health system or in the stationary military hospital organisation cannot be met on a voluntary basis, women between eighteen and fifty five years of age can be assigned to such services by or pursuant to a statute. They may in no case render service involving the use of arms.

(5) Prior to the existence of a state of defence, assignments under Paragraph (3) may only be made where the requirements of Article 80a (1) are satisfied. To prepare services mentioned in Paragraph (3) for which special knowledge or skills are required, persons can be obliged by or pursuant to a statute to attend training courses, in so far as the first sentence of this paragraph does not apply.

(6) Where, during a state of defence, staffing requirements for the purposes referred to in Paragraph (3) 1 cannot be met on a voluntary basis, the freedom of Germans to quit the pursuit of his or her occupation or quit his or her place of work may be restricted by or pursuant to a statute in order to meet these requirements. Paragraph (5) 1 applies *mutatis mutandis* prior to the existence of a state of defence.

Article 13 [Inviolability of the Home]

(1) The home shall be inviolable.

(2) Searches may be ordered only by a judge or, in the event of danger in delay, by other organs as provided by law and may be carried out only in the form prescribed by law.

(3) Intrusions and restrictions may otherwise only be made to avert a general danger or a mortal danger to individuals, or, pursuant to a statute, to prevent present danger to public safety and order, particularly to relieve a housing shortage, to combat the danger of epidemics, or to protect endangered juveniles.

Article 14 [Property, Right of Inheritance, Expropriation]

(1) Property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws.

(2) Property imposes duties. Its use should also serve the public weal.

(3) Expropriation shall be permitted only in the public weal. It may be effected only by or pursuant to a law which shall provide for the nature and extent of the compensation. Such compensation has to be determined by establishing an equitable balance between the public interest and the interests of those affected. Regarding disputes about the amount of compensation, recourse may be had to the ordinary courts.

Article 15 [Socialisation]

Land, natural resources, and means of production may for the purpose of socialisation be transferred to public ownership or other forms of publicly controlled economy by a law which shall provide for the nature and extent of compensation. In respect of such compensation the third and fourth sentences of paragraph (3) of Article 14 shall apply *mutatis mutandis.*

Article 16 [Deprivation of Citizenship, Extradition]

(1) No one may be deprived of his German citizenship. Citizenship may be lost only pursuant to statute, and it may be lost against the will of the person affected only where such person does not become stateless as a result thereof.

(2) No German may be extradited to a foreign country.

Article 16a [Right of Asylum]

(1) Persons persecuted on political grounds shall enjoy the right of asylum.

(2) Paragraph (1) cannot be invoked by a person who enters from a member country of the European Communities or from another third country in which application of the Agreement Concerning the Status of Refugees and of the Convention for the Protection of Human Rights and Fundamental Freedoms is guaranteed. The states outside the European Communities to which the criteria of the first sentence of this paragraph apply shall be specified by a statute requiring the consent of the *Bundesrat.* In the cases specified in the first sentence of this paragraph, measures to terminate an applicant's stay may be taken without regard to any legal action commenced against such measures.

(3) By a statute requiring the consent of the *Bundesrat,* nations may be specified in which, on the basis of their legal situation, enforcement of law, and general political conditions, it seems assured that neither political persecution nor cruel or demeaning punishment or treatment exists. It will be presumed that a foreigner from such a state is not persecuted, so long as he does not present evidence justifying a claim that, contrary to this presumption, he is persecuted on political grounds.

(4) In the cases specified by paragraph (3) and in other cases which are apparently unfounded or deemed apparently unfounded, the execution of measures to terminate an applicant's stay may be suspended by a court only if serious doubts exist as to the legality of the measures; the extent of the investigation may be limited, and evidence tardily presented may be disregarded. Further details shall be determined by statute.

(5) Paragraphs (1) through (4) shall not interfere with international treaties of member countries of the European Communities among each other or with non-member countries which, while respecting those obligations arising from the Agreement Concerning the Status of Refugees and the Convention for the Protection of Human Rights and Fundamental Freedoms whose enforcement must be guaranteed in the contracting states, establish rules respecting competency to determine requests for asylum, including the reciprocal recognition of decisions regarding refugees.

Article 17 [Right of Petition]

Everyone has the right individually or jointly with others to address written requests or complaints to the competent agencies and to parliaments.

Article 17a [Defence and Substitute Service]

(1) Statutes concerning military service and substitute service may, by provisions applying to members of the Armed Forces and of the substitute services during their period of military or substitute service, restrict the basic right to freely express and disseminate opinions in speech, writing, and pictures (first half-sentence of paragraph (1) of Article 5), the basic right of assembly (Article 8), and the right of petition (Article 17) in so far as this right permits the submission of requests or complaints jointly with others.

(2) Statutes serving defence purposes including protection of the civilian population may provide for the restriction of the basic rights of freedom of movement (Article 11) and inviolability of the home (Article 13).

Article 18 [Forfeiture of Basic Rights]

Whoever abuses freedom of expression of opinion, in particular freedom of the press (paragraph (1) of Article 5), freedom of teaching (paragraph (3) of Article 5), freedom of assembly (Article 8), freedom of association (Article 9), privacy of posts and telecommunications (Article 10), property (Article 14), or the right of asylum (Article 16a) in order to combat the free democratic basic order shall forfeit these basic rights. Such forfeiture and the extent thereof shall be pronounced by the Federal Constitutional Court.

Article 19 [Restriction of Basic Rights]

(1) In so far as a basic right may, under this Basic Law, be restricted by or pursuant to a law, such law must apply generally and not solely to an individual case. Furthermore, such law must name the basic right, indicating the Article concerned.

(2) In no case may the essential content of a basic right be encroached upon.

(3) The basic rights shall apply also to domestic juristic persons to the extent that the nature of such rights permits.

(4) Should any person's right be violated by public authority, recourse to the court shall be open to him. If jurisdiction is not specified, recourse shall be open to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by the provisions of this paragraph.

II. THE FEDERATION AND THE STATES

Article 20 [Basic Principles of the Constitution - Right to Resist]

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

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

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

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

Article 20a [Protection of Natural Resources]

The state, aware of its responsibility for present and future generations, shall protect the natural sources of life within the framework of the constitutional order through the legislature and, in accordance with the law and principles of justice, the executive and the judiciary.

Article 21 [Political Parties]

(1) The political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. They must publicly account for the sources and use of their funds and assets.

(2) Parties which, by reason of their aims or the behaviour of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality.

(3) Details shall be regulated by federal law.

. . . . .

III. THE *BUNDESTAG*

Article 30 [Competencies of Federation and States]

The exercise of governmental powers and the discharge of governmental functions shall be incumbent on the *Länder* in so far as this Basic Law does not otherwise prescribe or permit.

Article 31 [Precedence of Federal Law]

Federal law shall override *Land* law.

Article 32 [Foreign Relations]

(1) Relations with foreign states shall be conducted by the Federation.

(2) Before a treaty which affects the specific circumstances of a German *Land* is concluded, that *Land* shall be consulted in good time.

(3) In so far as the *Länder* have power to legislate, they may, with the consent of the Federal Government, conclude treaties with foreign states.

. . . . .

IV. THE *BUNDESRAT*

Article 50 [Functions]

The *Länder* shall participate through the *Bundesrat* in the legislation and administration of the Federation and in matters concerning the European Union.

Article 51 [Composition]

(1) The *Bundesrat* shall consist of members of the *Land* governments, which appoint and recall them. Other members of such governments may act as substitutes.

(2) Each *Land* shall have at least three votes; *Länder* with more than two million inhabitants shall have four, *Länder* with more than six million inhabitants five, and *Länder* with more than seven million inhabitants six votes.

(3) Each *Land* may appoint as many members as it has votes. The votes of each *Land* may be cast only as a bloc vote and only by members present or their substitutes.

. . . . .

VII. FEDERAL LEGISLATION

Article 70 [Legislative Competency of the Federation and *Länder*]

(1) The *Länder* shall have the right to legislate in so far as this Basic Law does not confer legislative power on the Federation.

(2) The division of competence between the Federation and the *Länder* shall be determined by the provisions of this Basic Law concerning exclusive and concurrent legislative powers.

Article 71 [Exclusive Legislative Competency of the Federation]

In matters within the exclusive legislative power of the Federation the *Länder* shall have power to legislate only when and to the extent that a federal law explicitly so authorises them.

Article 72 [Concurrent Legislative Competency of the Federation]

(1) In matters within the concurrent legislative power, the *Länder* shall have power to legislate so long as and to the extent that the Federation does not exercise its right to legislate by statute.

(2) In this field, the Federation has legislation if and in so far as the establishment of equal living conditions in the federal territory or the preservation of legal and economic unity necessitates, in the interest of the state at large, a federal regulation.

(3) A federal statute can stipulate that a federal regulation for which the conditions of Paragraph (2) no longer hold true is replaced by law of the states.

Article 73 [Subjects of Exclusive Legislative Competency]

The Federation has exclusive power to legislate in the following matters:

1. foreign affairs and defence, including protection of the civilian population;
2. citizenship in the Federation;
3. freedom of movement, passport matters, immigration, emigration, and extradition;
4. currency, money, and coinage, weights and measures, as well as the determination of standards of time;
5. the unity of the customs and trading area, treaties respecting commerce and navigation, freedom of movement of goods, and the exchange of goods and payments with foreign countries, including customs and other frontier protection;

6. air transport;

6a. the traffic of railroads owned completely or mainly by the Federation (railroads of the Federation), the construction, maintenance, and operation of railway tracks and railroads of the Federation as well as the charging for the use of these railways;

7. postal and telecommunication services;

8. the legal status of persons employed by the Federation and by federal corporate bodies under public law;

9. industrial property rights, copyrights, and publishing law;

10. cooperation between the Federation and the *Länder* concerning

(a) criminal police,

(b) protection of the free democratic basic order, of the existence and the security of the Federation or of a *Land* (protection of the constitution), and

(c) protection against activities in the federal territory which, by the use of force or actions in preparation for the use of force, endanger the foreign interests of the Federal Republic of Germany,

as well as the establishment of a Federal Criminal Police Office and the international control of crime;

11. statistics for federal purposes.

Article 74 [Subjects of Concurrent Legislative Competency]

(1) Concurrent legislative powers extend to the following subjects:

1. civil law, criminal law, and execution of sentences, the organisation and procedure of courts, the legal profession, notaries, and legal advice;

2. registration of births, deaths, and marriages;

3. the law of association and assembly;

4. the law relating to residence and settlement of aliens;

4a. the law relating to weapons and explosives;

5. [deleted];

6. refugee and expellee matters;

7. public welfare;

8. [deleted];

9. war damage and reparations;

10. benefits to war-disabled persons and to dependents of those killed in the war as well as assistance to former prisoners of war;

10a. war graves of soldiers, graves of other victims of war and of victims of despotism;

11. the law relating to economic matters (mining, industry, supply of power, crafts, trades, commerce, banking, stock exchanges, and private insurance);

11a. the production and utilisation of nuclear energy for peaceful purposes, the construction and operation of installations serving such purposes, protection against hazards arising from the release of nuclear energy or from ionising radiation, and the disposal of radioactive substances;

12. labour law, including the legal organisation of enterprises, protection of workers, employment exchanges and agencies, as well as social insurance, including unemployment insurance;

13. the regulation of educational and training grants and the promotion of scientific research;

14. the law regarding expropriation, to the extent that matters enumerated in Articles 73 and 74 are concerned;

15. transfer of land, natural resources, and means of production to public ownership or other forms of collective enterprise for the public benefit;

16. prevention of the abuse of economic power;

17. promotion of agricultural production and forestry, securing the supply of food, the importation and exportation of agricultural and forestry products, deep-sea and coastal fishing, and preservation of the coasts;

18. real estate transactions, land law (excluding the law of charges for development), and matters concerning agricultural leases, as well as housing, settlement, and homestead matters;

19. measures against human and animal diseases that are communicable or otherwise endanger public health, admission to the medical profession and to other medical occupations or practices, as well as trade in medicines, curatives, narcotics, and poisons;

19a. the economic viability of hospitals and the regulation of hospitalisation fees;

20. protection regarding the marketing of food, drink, and tobacco, of necessities of life, fodder, agricultural and forest seeds and seedlings, and protection of plants against diseases and pests, as well as the protection of animals;

21. ocean and coastal shipping, as well as navigational markers, inland navigation, meteorological services, sea routes, and inland waterways used for general traffic;

22. road traffic, motor transport, construction and maintenance of long-distance highways, as well as the collection of charges for the use of public highways by vehicles and the allocation of revenue therefrom;

23. non-federal railroads, except mountain railroads;

24. [deleted];

25. state liability;

26. artificial insemination of humans, research on manipulations of genes, and regulations for transplantation of organs and living matter.

(2) Federal statutes enacted pursuant to paragraph (1) No 25 of this Article require the consent of the *Bundesrat*.

. . . . .

Article 76 [Bills]

(1) Bills may be introduced in the *Bundestag* by the Federal Government or by members of the *Bundestag* or by the *Bundesrat*.

(2) Bills of the Government first have to be submitted to the Senate. The Senate is entitled to state its position on such bills within six weeks. If, for important reasons and particularly with regard to the volume of the bill, the Senate asks for deferral, the period is nine weeks. A bill which, on submission to the Senate, is exceptionally specified by the Government to be particularly urgent may be submitted by the latter to the House of Representatives three weeks later, or, if the State asked for deferral according to sentence 3, six weeks later, even though the Government may not yet have received the statement of the Senate's position; upon receipt, such statement has to be transmitted to the House of Representatives by the Government without delay. The time limit for statements to bills changing this Constitution or delegating sovereign powers according to Article 23 or 24 is nine weeks; sentence 4 is not applied.

(3) Bills of the Senate have to be submitted to the House of Representatives by the Government within six weeks. In doing so, the Government states its own view. If, for important reasons and particularly with regard to the volume of the bill, the Government asked for deferral according to sentence 3, six weeks. The time limit for statements to bills changing this Constitution or delegation of sovereign powers according to Article 23 or 24 is nine weeks; sentence 4 is not applied. The House of Representatives has to debate about bills within adequate time and reach a decision.

. . . . .

Article 79 [Amendment of the Constitution]

(1) This Basic Law can be amended only by statutes that expressly amend or supplement its text. In the case of an international treaty respecting a peace settlement, the preparation of a peace settlement, or the phasing out of an occupation regime, or designed to promote the defence of the Federal Republic, it shall be sufficient, for the purpose of clarifying that the provisions of this Basic Law do not preclude the conclusion and entry into force of such a treaty, to add language to the Basic Law confined to such clarification.

(2) Any such statute shall require the consent of two thirds of the members of the *Bundestag* and two thirds of the votes of the *Bundesrat*.

(3) Amendments of this Basic Law affecting the division of the Federation into *Länder*, the participation in principle of the *Länder* in legislation, or the basic principles laid down in Articles 1 and 20 shall be inadmissible.

. . . . .

VIII. THE EXECUTION OF FEDERAL LAW AND THE FEDERAL ADMINISTRATION

Article 83 [Distribution of Competence between the Federation and the *Länder*]

The *Länder* shall execute federal laws as matters of their own concern in so far as this Basic Law does not otherwise provide or permit.

. . . . .

Article 87 [Matters for Direct Federal Administration]

(1) The foreign service, the federal financial administration, the federal railroads, the federal postal service and, in accordance with the provisions of Article 89, the administration of federal waterways and of shipping shall be conducted as matters of direct federal administration with their own administrative substructures. Federal legislation may be enacted to establish Federal Border Guard authorities and central offices for police information and communications, for the criminal police, and for the compilation of data for purposes of protection of the constitution and of protection against activities within the federal territory which, through the use of force or acts preparatory to the use of force, endanger the foreign interests of the Federal Republic of Germany.

(2) Social insurance institutions whose sphere of competence extends beyond the territory of one *Land* shall be administered as federal corporate bodies under public law.

(3) In addition, autonomous federal higher authorities as well as new federal corporate bodies and institutions under public law may be established by federal legislation for matters on which the Federation has the power to legislate. When new functions arise for the Federation with respect to matters on which it has the power to legislate, federal authorities at the intermediate and lower levels may be established, in case of urgent need, with the consent of the *Bundesrat* and of the majority of the members of the *Bundestag*.

. . . . .

Article 87b [Administration of the Federal Armed Forces]

(1) The Federal Armed Forces Administration shall be conducted as a direct federal administration with its own administrative substructure. Its function shall be to administer personnel matters and directly to meet the material requirements of the Armed Forces. Tasks connected with benefits to injured persons or with construction work shall not be assigned to the Federal Armed Forces Administration except by federal legislation requiring the consent of the *Bundesrat*. Such consent is also required for any statutes to the extent that they empower the Federal Armed Forces Administration to interfere with rights of third parties; this requirement, however, does not apply in the case of statutes concerning personnel matters.

(2) Moreover, federal statutes concerning defence, including recruitment for military service and protection of the civilian population, may, with the consent of the *Bundesrat*, provide that they shall be executed, wholly or in part, either by means of direct federal administration with its own administrative substructure or by the *Länder* acting as agents of the Federation. If such statutes are executed by the *Länder* acting as agents of the Federation, they may, with the consent of the *Bundesrat*, provide that the powers vested in the Federal Government or appropriate highest federal authorities by virtue of Article 85 be transferred wholly or in part to higher federal authorities; in such an event it may be enacted that these authorities shall not require the consent of the *Bundesrat* in issuing general administrative rules as provided in the first sentence of paragraph (2) of Article 85.

. . . . .

Article 87d [Aviation Administration]

(1) Aviation administration shall be conducted as a direct federal administration. Whether it shall be organised under public or private law shall be determined by federal statute.

(2) By federal legislation requiring the consent of the *Bundesrat*, functions of aviation administration may be transferred to the *Länder* acting as agents of the Federation.

. . . . .

Article 89 [Federal Waterways]

(1) The Federation shall be the owner of the former Reich waterways.

(2) The Federation shall administer the federal waterways through its own authorities. It shall exercise those governmental functions relating to inland shipping which extend beyond the territory of one *Land*, and those governmental functions relating to maritime shipping which are conferred on it by statute. Upon request, the Federation may transfer the administration of federal waterways, in so far as they lie within the territory of one *Land*, to that *Land* as its agent. If a waterway touches the territories of several *Länder*, the Federation may designate one *Land* to be its agent if so requested by the affected *Länder*.

(2) In the administration, development, and new construction of waterways, the requirements of land improvement and of water economy shall be safeguarded in agreement with the *Länder*.

. . . . .

IX. ADMINISTRATION OF JUSTICE

Article 92 [Court Organisation]

Judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the *Länder*.

Article 93 [Federal Constitutional Court - Jurisdiction]

(1) The Federal Constitutional Court shall decide:

1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a highest federal organ or of other parties concerned who have been vested with rights of their own by this Basic Law or by rules of procedure of a highest federal organ;
2. in the case of differences of opinion or doubts on the formal and material compatibility of federal law or *Land* law with this Basic Law, or on the compatibility of *Land* law with other federal law, at the request of the federal government, of a *Land* government, or of one-third of the *Bundestag*'s members;
3. in case of differences of opinion on the rights and duties of the Federation and the *Länder*, particularly in the execution of federal law by the *Länder* and in the exercise of federal supervision;
4. on other disputes involving public law, between the Federation and the *Länder*, or within a *Land*, unless recourse to another court exists;

4a. on complaints of unconstitutionality, which may be entered by any person who claims that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103, or 104 has been violated by public authority;

4b. on complaints of unconstitutionality, entered by local communities or associations of local communities on the ground that their right to self-government under Article 28 has been violated by a law other than a *Land* law open to complaint to the respective *Land* constitutional court;

5. In other cases provided for in this Basic Law.

(2) The Federal Constitutional Court shall also act in such other cases as are assigned to it by federal legislation.

Article 94 [Federal Constitutional Court - Composition]

(1) The Federal Constitutional Court shall consist of federal judges and other members. Half of the members of the Federal Constitutional Court shall be elected by the *Bundestag* and half by the *Bundesrat.* They may not be members of the *Bundestag*, the *Bundesrat*, the federal government, nor any of the corresponding organs of a *Land.*

(2) The constitution and procedure of the Federal Constitutional Court shall be regulated by a federal law which shall specify in what cases its decisions shall have the force of law. Such law may require that all other legal remedies must have been exhausted before any such complaint of unconstitutionality can be entered, and may make provision for a special procedure as to admissibility.

Article 95 [Highest Courts of Justice of the Federation - Joint Panel]

(1) For the purposes of ordinary, administrative, fiscal, labour, and social jurisdiction, the Federation shall establish as highest courts of justice the Federal Court of Justice, the Federal Administrative Court, the Federal Fiscal Court , the Federal Labour Court, and the Federal Social Court.

(2) The judges of each of these courts shall be selected jointly by the competent federal minister and a committee for the selection of judges consisting of the competent *Land* ministers and an equal number of members elected by the *Bundestag*.

(3) In order to preserve uniformity of jurisdiction, a joint panel of the courts specified in paragraph 1 of this article shall be set up. Details shall be regulated by a federal law.

. . . . .

Article 97 [Independence of the Judges]

(1) The judges shall be independent and subject only to the law.

(2) Judges appointed permanently on a full-time basis in established positions cannot against their will be dismissed or permanently or temporarily suspended from office or given a different function or retired before the expiration of their term of office except by virtue of a judicial decision, and only on the grounds and in the form provided for by law. Legislation may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in districts of jurisdiction, judges may be transferred to another court or removed from office, provided they retain their full salary.

X. FINANCE

Article 108 [Revenue Administration]

(1) Customs duties, fiscal monopolies, excise taxes subject to federal legislation, including the import sales tax, and charges imposed within the framework of the European Communities shall be administered by federal revenue authorities. The organisation of these authorities shall be regulated by federal statute. The heads of authorities at the intermediate level shall be appointed in consultation with the respective *Land* governments.

(2) All other taxes shall be administered by *Land* revenue authorities. The organisation of these authorities and the uniform training of their civil servants may be regulated by a federal statute requiring the consent of the *Bundesrat*. The heads of authorities at the intermediate level shall be appointed in agreement with the Federal Government.

(3) To the extent that taxes accruing wholly or in part to the Federation are administered by *Land* revenue authorities, those authorities shall act as agents of the Federation. Paragraphs (3) and (4) of Article 85 shall apply, the Federal Minister of Finance, however, being substituted for the Federal Government.

(4) With respect to the administration of taxes, a federal statute requiring the consent of the *Bundesrat* may provide for collaboration between federal and *Land* revenue authorities, or in the case of taxes under paragraph (1) of this Article for their administration by federal revenue authorities, if and to the extent that the execution of revenue statutes is substantially improved or facilitated thereby. As regards taxes whose revenue accrues exclusively to communities or associations of communities, their administration may wholly or in part be transferred by the *Länder* from the appropriate *Land* revenue authorities to communities or associations of communities.

(5) The procedure to be applied by federal revenue authorities shall be laid down by federal legislation. The procedure to be applied by *Land* revenue authorities or, as envisaged in the second sentence of paragraph (4) of this Article, by communities or associations of communities may be laid down by a federal statute requiring the consent of the *Bundesrat*.

(6) The jurisdiction of revenue courts shall be uniformly regulated by federal legislation.

(7) The Federal Government may issue appropriate general administrative rules which, to the extent that administration is entrusted to *Land* revenue authorities or communities or associations of communities, shall require the consent of the *Bundesrat*.

APPENDIX 2

LAW ON THE FEDERAL CONSTITUTIONAL COURT (GERMANY), 1951

Section 13

The Federal Constitutional Court shall decide in the cases determined by the Basic Law, to wit:

1. on the forfeiture of basic rights
   (Article 18 of the Basic Law),

2. on the unconstitutionality of parties
   (Article 21 (2) of the Basic Law),

3. on complaints against decisions of the *Bundestag* relating to the validity of an election or to the acquisition or loss of a deputy's seat in the *Bundestag*
   (Article 41 (2) of the Basic Law),

4. on the impeachment of the Federal President by the *Bundestag* or the *Bundesrat*
   (Article 61 of the Basic Law),

5. on the interpretation of the Basic Law in the event of disputes concerning the extent of the rights and duties of a highest federal organ or of other parties concerned, who have been vested with rights of their own by the Basic Law or by rules of procedure of a highest federal organ
   (Article 93 (1) 1 of the Basic Law),

6. in case of differences of opinion or doubts on the formal and material compatibility of federal law or *Land* law with the Basic Law, or on the compatibility of *Land* law with other federal law, at the request of the Federal Government, of a *Land* government, or of one third of the *Bundestag* members
   (Article 93 (1) 2 of the Basic Law),

7. in case of differences of opinion on the rights and duties of the Federation and the *Länder*, particularly in the execution of federal law by the *Länder* and in the exercise of federal supervision
   (Article 93 (1) 3 and Article 84 (4), second sentence, of the Basic Law),

8. on other disputes involving public law, between the Federation and the *Länder*, between different *Länder* or within a *Land*, unless recourse to another court exists
   (Article 93 (1) 4 of the Basic Law),

8a. on complaints of unconstitutionality
   (Article 93 (1) 4a and 4b of the Basic Law),

9. on the impeachment of federal and *Land* judges
   (Article 98 (2) and (5) of the Basic Law),

10. on constitutional disputes within a *Land* if such decision is assigned to the Federal Constitutional Court by *Land* legislation
   (Article 99 of the Basic Law),

11. on the compatibility of a federal or *Land* law with the Basic Law or the compatibility of a *Land* law or other *Land* right with a federal law, when such decision is requested by a court
   (Article 100 (1) of the Basic Law),

12. in case of doubt whether a rule of public international law is an integral part of federal law and whether such rule creates rights and duties for the individual, when such decision is requested by a court
(Article 100 (2) of the Basic Law),

13. if the constitutional court of a *Land*, in interpreting the Basic Law, intends to deviate from a decision of the Federal Constitutional Court or of the constitutional court of another *Land*, when such decision is requested by that constitutional court
(Article 100 (3) of the Basic Law),

14. in case of differences of opinion on the continuance of law as federal law
(Article 126 of the Basic Law),

15. in such other cases as are assigned to it by federal legislation
(Article 93 (2) of the Basic Law).