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THREE CONSTITUTIONAL COURTS: A COMPARISON*

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Two years ago, when an astute critic made a half-century appraisal of comparative politics in the United States, he reminded us that the American Political Science Association was founded in 1903 as an outgrowth of moves to establish a National Conference on Comparative Legislation.¹ During the more than half-century that followed, the writings in comparative government and politics have reflected the influences which have made themselves felt in the discipline as a whole. The attention given by Charles E. Merriam after World War I to "informal government," "underlying processes and relations," and "social bases of political cohesion" is fully appreciated now by those who are projecting comparative studies of political socialization.² In the 1930s, Carl J. Friedrich's writings pointed up the need for more adequate conceptualization when combined with appropriate appreciation of empirical research.³ Mention should also be made of the earlier works of Herman Finer.⁴ In their respective ways, albeit in varying degrees, all of these writers recognized the need for an increased emphasis upon the informal and extra-legal factors affecting the political process, and for more concern with generalization and theory.

Prior to World War II, there had been a growing belief in some quarters that much of the work in comparative government was a mere

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¹ Sigmund Neumann, "Comparative Politics: A Half-Century Appraisal," *Journal of Politics*, Vol. 19, pp. 369-90 (1957).

² Note particularly his *Making of Citizens* (Chicago, 1931), with the subtitle, "A Comparative Study of Methods of Civic Training," in which Merriam sought to summarize and provide a central interpretation for eight country studies in a series on civic training.

³ See the introductory chapter of his *Constitutional Government and Politics* (Boston, 1937), subsequently published in revisions under the title of *Constitutional Government and Democracy*.

⁴ Esp., *Theory and Practice of Modern Government* (2 vols., London, 1932).

parochial accumulation of facts about Western institutions.⁵ The needs experienced during the War called for far more systematic classification and interpretation of existing data, as well as for the use of new sources of information. Developments of the postwar period—the cold war, the anti-colonial movements, and the growth of nationalism in various parts of the globe—helped place a premium on policy-oriented research.

In this setting, and cognizant of the efforts in the social science disciplines to seek for a greater comparability of research findings, the Committee on Comparative Politics of the Social Science Research Council was established in 1954. On the basis of some common orientation and with a bias for functional analysis, this committee has encouraged a large number of studies focused on political groups in Western and non-Western countries.⁶ These efforts are necessarily experimental. They have provoked some questions as to whether the interest group approach will lead to better understanding of political institutions and behaviors than would other approaches.⁷ Notwithstanding, this “pioneering” represents one of the most promising and provocative group research efforts in comparative politics today.

Work in comparative administration has also developed rapidly since World War II under the auspices of governments, universities, and professional societies. Moreover, serious attempts are being made to move beyond the “action research” which has held the center of the stage in the past.⁸ New American journals have appeared, such as the *American Journal of Comparative Law*, and *Comparative Studies in Society and History*. Both foreign and domestic institutes and centers are directing greater attention to research in comparative politics. This is also true of the international associations, including the International Political Science Association. *The Study of Comparative Government and Politics*,

⁵ E.g., Roy C. Macridis, *The Study of Comparative Government* (New York, 1955).

⁶ Over 100 articles, and formal and informal papers, have resulted from the work of the Committee. For an explanation of its evolving rationale, see Gabriel A. Almond, “A Comparative Study of Interest Groups and the Political Process,” this REVIEW, Vol. 52, pp. 270–82 (1958), and Lucian W. Pye, “Political Modernization and Research on the Political Socialization Process” (mimeo, July, 1959). The major collective and interpretive effort of this Committee to date is the forthcoming volume, *The Politics of the Underdeveloped Areas*, which deals with the characteristics and classification of the political systems and the process of political development in the new countries of Africa, South America, South Asia, and the Middle East, by Gabriel A. Almond, James S. Coleman, Lucian W. Pye, George O. Blanksten, Dankwart A. Rustow, and Myron Wiener.

⁷ Joseph LaPalombara, “The Utility and Limitations of Interest Group Theory in Non-American Field Situations” (mimeographed ms. of paper to appear in a forthcoming issue of the *Journal of Politics*), p. 6.

⁸ Note the current program of the American Society for Public Administration. On the literature, see, for example, Robert V. Presthus, “Behavior and Bureaucracy in Many Cultures,” *Public Administration Review*, Vol. 19, pp. 25–35 (1959).

edited by Gunnar Heckscher,⁹ and *Interest Groups on Four Continents*, edited by Henry W. Ehrmann,¹⁰ embody some of the reflections of foreign and American political scientists on the scope, methodology, objectives, and trends in comparative politics.

As Charles S. Hyneman recently reminded us in his *The Study of Politics*,¹¹ there are many paths for the laborer to follow in this vineyard. Each of us will doubtless be guided in that direction to which his interest, training, and experience point.

This evening, we have set for ourselves a modest assignment in an area which has received too little attention and which is deserving of more study in the future. That will be to examine, comparatively, the Constitutional Courts of three Western European countries—those of West Germany, Italy, and Austria. We shall discuss the reasons for their creation, some of their most significant decisions, and the general position which they occupy in their own political systems.

I

Constitutional Courts have been established in the three countries in accordance with the provisions of their respective Constitutions, as implemented by the necessary legislation. These Constitutions are the Austrian one of 1920 (as amended in 1925 and 1929) which was reinstated during the uncertain postwar period in 1945, the Italian Constitution of 1948, and the West German Basic Law of 1949. Though the Austrian Constitution presents a special case, all three may be classed as of post-World War II vintage. The Constitutions of West Germany and Italy were the product of negative revolutions, reflecting a deep distaste for the "dismal past." As characterized by our Chairman of this evening, "the political theory of the new Constitutions which are democratic in the traditional Western sense . . . revolves . . . around four major focal points which distinguish them from their predecessors: (1) reaffirmation of human rights, *but* (2) efforts to restrict these rights in such a way as to make them unavailable to the enemies of constitutional democracy, (3) stress upon social goals and their implementation through socialization, *but* (4) efforts to circumscribe the goals and their implementation in such a way as to prevent the reëmergence of totalitarian methods and dictatorship."¹² To achieve these goals, the specially provided Constitutional Courts were to play an important part.

⁹ (London, 1957).

¹⁰ (Pittsburgh, 1958).

¹¹ (Urbana, 1959).

¹² C. J. Friedrich, "The Political Theory of the New Democratic Constitutions," *Review of Politics*, Vol. 12, pp. 217-18 (1950).

In seeking the explanations for the adoption of these special Courts, we are reminded that judicial review in continental Europe, as in the United States, had its roots in the higher law background and conceptions of ancient and medieval times. The precedents for special courts to protect the fundamentality of the Constitution can be traced at least as far back as the 18th century, when written constitutions came into being,¹³ with the proposals of Abbé Siéyès in the 1790s for the creation of a constitutional jury. The work of a succession of distinguished advocates of judicial review, who refused to accept some of the implications and influences stemming from the French Revolution, followed at later periods.

That this heritage and this special advocacy were alone inadequate to account for the later creation of Constitutional Courts is evident from a glance at the history of Western Europe. It was not until postmortems on World War I that the Austrian Constitutional Court came into being. And there were particular considerations after World War II which gave an impetus to the establishment of special courts in West Germany and Italy.

The most obvious influence was that of national precedent. In the case of West Germany, there were precedents which could be traced from the constitutional proposals of the National Assembly of 1848 down to the history of the National Supreme Court (*Reichsgericht*), and of the High Court (*Staatsgerichtshof*) of the Weimar period. The High Court had jurisdiction over the settlement of disputes between states (*Länder*) and between states and the *Reich*, as well as over impeachment cases. The Supreme Court passed upon the compatibility of state laws with federal laws, and it reviewed the constitutional validity not only of state, but also in several instances of federal legislation. But there were various limitations which operated to restrict the scope and effectiveness of the activities of these Courts. In Austria, traces of the Austrian Constitutional Court can be found in constitutional developments of the period between 1848-1851, and especially in the establishment in 1867 of the Court of the Empire (*Reichsgericht*). As time went on, this Court exercised jurisdiction over the claims of the provinces (*Länder*) against the Empire and *vice versa*; it dealt with conflicts of competence between judicial and administrative authorities at both the provincial and national level, and with complaints of citizens over the violation of constitutionally guaranteed political rights after other remedies had been exhausted. As for Italy, though there were certain pre-1922 procedures and institutions which pointed toward judicial review, these were of

¹³ David Deener, "Judicial Review in Modern Constitutional Systems," this REVIEW, Vol. 46, pp. 1079-83 (1952).

limited significance. The first noteworthy Italian precedent was provided by the Sicilian High Court, created by the Regional Statute of May 15, 1946.

Foreign example can also be stressed. Certain of the practices and procedures in Switzerland, particularly the use of the constitutional complaint, were given serious attention during the drafting of the Bonn Basic Law. The exercise of judicial review by the United States Supreme Court has received continued attention in European countries. As one Italian professor has observed, the "impact of *Marbury vs. Madison* was felt in Italy almost a century and a half after the decision."¹⁴ To these considerations may be added indirect pressures which were brought to bear by the occupying powers after 1945, especially by the United States in Germany. However, evidence that direct Allied pressure was responsible for the final action taken is lacking in all three instances.¹⁵

But it was definitely the reaction to excesses of the Fascist and Nazi regimes which was the most important factor in the decisions finally taken in Austria to restore her Constitution of 1920, as amended in 1925 and 1929, with its provision for a Constitutional Court; and in Italy and Germany, to establish new Courts. There was remarkable unanimity among most of the democratic parties in all three countries to grant the power of judicial review to some type of court. This same reaction helps explain the incorporation of elaborate bills of rights, to protect the individual, and of federalistic arrangements which, while borrowing from the past, were directed against the centralization of the Fascist period. Judicial review, in some hands, was widely accepted as necessary to safeguard these guaranteed liberties and arrangements. Disagreements existed over the type of court, its organization and composition, and over the method of selecting the judges. The answers were provided by the special Constitutional Courts. In short, external influences and pressures combined with domestic concerns to explain the final decisions which were taken.

The most controversial of these decisions, as evidenced in the debates in the Constituent Assembly in Austria in 1919-20, and in the German Parliamentary Council and the Italian Constituent Assembly between

¹⁴ Giuseppino Treves, "Judicial Review of Legislation in Italy," *Journal of Public Law*, Vol. 7, p. 345 (1958).

¹⁵ Even in Germany, there is considerable evidence for the view expressed by Rudolf Katz, Vice President of the Federal Constitutional Court, that there was no necessary causal relationship between the original Allied demands and the final German action. See comments and literature cited in the author's "The West German Federal Constitutional Court: An Evaluation after Six Years," *Journal of Politics*, Vol. 20, pp. 283-84 (1958), and "The *Bundesverfassungsgericht*, 1956-1958: An American Appraisal," *Jahrbuch des Öffentlichen Rechts*, Vol. 8, pp. 29-47 (1959).

1946-49, turned on the manner of selecting the judges. These discussions were concerned with the degree of independence to be accorded the Court from the political departments, especially from the parliament. In all three instances, compromises were effected, which provided for a method of selection differing from that used in choosing the judges of the highest regular court and which allowed for some participation by both houses of parliament in the selection process. Today, in Germany the 20 judges of the two Senates, or "twin courts," are selected by parliament, one-half of them by the *Bundestag* and one-half by the *Bundesrat*; six of them are chosen from the judiciary for life and the remainder for 8-year terms. In Italy, one-third of the 15 judges are chosen by the magistracy of the three highest Courts (Cassation, Council of State, and Accounts), one-third by the two houses of parliament sitting together, and one-third by the President—all eventually to hold office for 12-year terms. In Austria, the President, the Vice President, and 6 of the additional 12 judges, as well as 3 substitutes, are appointed by the President from nominees of the Federal Government; the remaining 6 judges, and 3 substitutes, are appointed in part on the recommendation of the lower house, the National Council, and in part on the recommendation of the upper house, the Federal Council. Unlike a majority of the German justices and all of the Italian justices, these are appointed for life. No instances of the use of the removal power over members by the Courts¹⁶ during the post-World War II period have been recorded, though there have been resignations. In the three countries, provisions are made for the appointment to the Courts of practicing judges and high administrative officials, as well as professors of law. Indeed, the substantial percentage of professors on all of the Courts¹⁷ reflects the long-established practice in continental European countries to look toward the universities in making high judicial appointments.

Partisan considerations have played their part in the selections, though it has not always been possible to document the extent to which such factors have been controlling. The many early criticisms of the German procedure of selection have been based in part on the charge

¹⁶ In West Germany, by the Federal President upon the request and with the consent of the Court; in Italy and Austria, by the Courts acting directly.

¹⁷ Of the present 20 justices on the German Federal Constitutional Court, seven are professors (who retain their professional status on a part-time basis); and of the 15 justices in Italy at the end of 1958, some 10 held the title of professor. The President and Vice President, as well as other members of the Austrian Constitutional Court today, are professors in Vienna and other universities. The Constitutional Council of the Fifth French Republic (which can hardly be designated as a "constitutional court") contains no professor of law for special reasons. See Stanley H. Hoffmann, "The French Constitution of 1958: I. The Final Text and Its Prospects," this REVIEW, Vol. 53, p. 341, n. 37 (1959).

that political affiliation was more important than professional attainment, but it should be noted that all of the German judges except two have been elected unanimously, and re-election has been customary. The operation of *Proporz*, that is, the proportional allocation of administrative and other posts on the basis of the strength of the two major coalition parties, was discussed in 1957, in connection with the appointment of a new president of the Austrian Constitutional Court.¹⁸ Italy had the greatest difficulties in securing the enabling legislation necessary to implement the constitutional provisions regarding the Court¹⁹ and in selecting the judges after the implementing legislation had been finally passed in 1953. The requirement that 5 of the judges must be selected by a three-fifths majority of the two houses of parliament, where approximately 40 per cent of the seats were held by the left-wing parties which demanded representation, presented particular difficulties and provided the background for much of the maneuvering which occurred.²⁰

But, withal, there has been only limited criticism of the judges after their selection; on the contrary, there has been general commendation, though the anonymity attached to the method of making decisions and the absence of dissenting opinions may offer protection from public criticism of the partisan and incompetent judge. In short, the judges have become "judicialized" rather than "politicalized" with the passage of time.

The jurisdiction of the West German Constitutional Court is the most extensive and that of the Italian Court the most limited of the three Courts. With variations as to scope and application, the Courts in all three countries have the power to review the constitutionality of federal and state, or provincial and regional, legislation.²¹ They pass upon disputes involving "conflicts of competence" between the central governments and the states, provinces, or regions, as well as between these latter political units. They also can decide jurisdictional disputes be-

¹⁸ See *Berichte und Informationen*, Dec. 6, 1957, and *Die Wochen-Presse*, Dec. 29, 1956 and Jan. 19, 1957; also Herbert P. Secher, "Coalition Government: The Case of the Second Austrian Republic," this REVIEW, Vol. 52, p. 799 (1958).

¹⁹ One of the several reasons for this delay was the hesitancy of parliament to set up a body which would restrict parliament's powers. See John Clarke Adams and Paolo Barile, "The Italian Constitutional Court in Its First Two Years of Activity," *Buffalo Law Review*, Vol. 7, pp. 250-265 (1957-58). This difficulty has reminded these two authors of the legendary story of Bertoldo, who was sentenced to be hanged and then was entrusted with the responsibility of finding an appropriate tree. In Bertoldo's case there were explainable delays.

²⁰ Note the account in David G. Farrelly, "The Italian Constitutional Court," *Italian Quarterly*, Vol. 1, pp. 53-56 (1957).

²¹ All three differentiate between "incidental" proceedings, arising out of a pending trial, and "principal" proceedings, *i.e.*, those instituted by a governmental organ.

tween "organs" of government at the national level in West Germany and Italy, and between the courts, or courts and administrative authorities, in Austria. They can try impeachments or accusations against certain officials at the national level in West Germany and Italy, or against federal and provincial officials in Austria. Both the Austrian and West German Courts have some jurisdiction in cases involving disputed elections and international law. In addition, each Court possesses some special competences which are unique to it. For example, the West German Court may pass upon the constitutionality of political parties and the forfeiture of basic rights. Advisory opinions were authorized by legislation in Germany until the repeal of the empowering provisions in 1956.

But a mere mention of the competences of the Courts will tell little, without a recognition that their functioning depends heavily upon the nature of the social structures within which they operate. These societies have been referred to as fragmented ones in which there is sharp competition between political cultures. The extent of political involvement by the citizen and the development of institutional pluralism vary in the three countries; the degree of consensus, on procedural if not substantive matters, is lower in all instances than that to be found, for example, in Britain.²² The legal backgrounds of the three countries, with their differing ingredients of Roman and Germanic law, affect the position of the judges. And there are many other considerations which have a bearing on the role of the Courts. The federalism of West Germany and Austria, and the "attenuated federalism" of Italy, merit particular attention. The nature of the party system (with the trend toward the two-party system in West Germany, government by party cartel "with built-in opposition" in Austria,²³ and shifting coalitions based upon a mass party in the center in Italy) affects the legislative product of the parliaments which is subject to review by the Courts. We must of necessity leave these matters with only passing mention, though with a full appreciation of their significance in appraising the work of the Constitutional Courts.

II

In examining the work of the Courts, some attention may be directed to selected decisions dealing with (1) equality before the law, (2) federalism, (3) delegation of legislative powers, and (4) legislation and public

²² Note the provocative comparisons in Herbert J. Spiro, *Government by Constitution* (New York, 1959), ch. 22.

²³ An expression used by Otto Kirchheimer, "The Waning of Opposition in Parliamentary Regimes," *Social Research*, Vol. 24, pp. 127-56 (1957); cf. Charles A. Gulick, "Austria's Socialists in the Trend toward a Two-Party System: An Interpretation of Postwar Elections," *Western Political Quarterly*, Vol. 11, pp. 539-62 (1958).

service relationships dating from the Fascist and National Socialist periods.

The Constitutions of each of the three countries contain an almost identical guarantee that "all persons shall be equal before the law."²⁴ In addition, they include certain other clauses which are to make more specific the general guarantees. The differences among these reflect the varied historical circumstances under which these constitutional provisions had their origins.

The significance of the equality before the law guarantees must be viewed in the light of the accessibility of the Courts in question. West Germany, to speak generally, provides a more liberal access to the Court than either Austria or Italy. For the individual, two avenues are open to the German Court, the most widely used being the constitutional complaint.²⁵ Under this arrangement, any person can question before the Court a law, an act having the force of law, or an administrative decision and order, which violates his constitutional guarantees, including equal protection before the law. He likewise may, during proceedings in regular courts, secure the judicial review of legislation, which allegedly infringes his rights, though the courts themselves must determine whether the access to the Constitutional Court is justified. While the Austrian system also provides two somewhat comparable modes of access, they are more narrowly construed than in Germany. In Italy, the access to the Constitutional Court is still more limited, as there is only the one procedure of judicial review. The institution of constitutional complaint, as it exists in Germany and, in a modified form in Austria,²⁶ is unknown in Italy.

The West German Court, in the cases before it, has applied the general principle that equal protection prohibits differential treatment of that which is essentially equal but "it does not prevent that which is essentially unequal from being treated by the legislature differentially in proportion to its inequality."²⁷ There must be a reasonableness of

²⁴ West Germany: Art. 3; Austria: Art. 7; Italy: Art. 3. In the following discussion, I am heavily indebted to Mr. W. R. Dallmayr for his assistance.

²⁵ Though a number of nuisance and facetious complaints are submitted, the Court in West Germany has based an increasing percentage of its important decisions on selections from the 4,800 complaints which had been made prior to December, 1958. An illustration of the facetious complaint was one which contended that the refusal of police to extend the time during which "bars" might be kept open violated the constitutionally guaranteed right of freedom of assembly.

²⁶ Against individual decrees and acts of the administration, but not against laws, ordinances, or court rulings.

²⁷ 1 *Entscheidungen des Bundesverfassungsgerichts* (hereafter cited as *B.V.G.E.*) 52; cf. Gerhard Leibholz, *Die Gleichheit vor dem Gesetz* (2d ed., Berlin and Munich, 1959), pp. 1-12.

classification in all instances, even outside the range of the specific prohibition of discrimination on the grounds of sex, race, descent, language, place of birth, or religious belief. At the same time, the Court—applying the guarantee of equal rights to men and women—has recognized permissible distinctions involving the biological and functional differences of the sexes. Thus, on May 10, 1957²⁸ the Court rejected two constitutional complaints by male plaintiffs who alleged that the provisions of the Criminal Code under which they had been committed violated Article 3 of the Basic Law, in that these provisions provided no punishment for women convicted of comparable offenses. In a highly publicized decision announced on July 29, 1959,²⁹ the Court held that certain provisions of the Civil Code³⁰ violated Article 3, Sections 2 and 3 (as well as Article 6) of the Basic Law in that they denied the equal status of man and wife with regard to their children. Several housewives had brought constitutional complaints before the Court alleging that these statutory provisions accorded to the father the right of legal representation and certain other rights with respect to the child, and thereby discriminated against the mother. The Court found no biological or functional differences between man and wife which justified the statutory differentiations.³¹

This was the first major instance involving family relations where the Court has based its decision specifically upon the provisions of the Basic Law concerning equality of the sexes. The Austrian Court had in the previous year held the provisions of Section 26, paragraph 3, of the Income Tax Law of 1953, providing for joint taxation of man and wife, to violate Article 7 of the Constitution in differentiating between the sexes for tax purposes.³² This case, and others involving the granting of con-

²⁸ 6 *B.V.G.E.* 389.

²⁹ 1 *BvR* 205/58.

³⁰ Secs. 1628 and 1629, paragraph 1. These provisions had not been altered by the Equal Protection Law of June 18, 1957. See J. Leyser, " 'Equality of the Spouses' Under the New German Law," *American Journal of Comparative Law*, Vol. 7, pp. 276-87 (1958).

³¹ We cannot avoid quoting from an editorial in an American newspaper which commented on this decision: "Thus from Karlsruhe comes the news that father no longer has the last word. It is triumph for the species. Of course, at this point, the German wife has only acquired a sort of deadlock. There is no last word. Give her time, however, and we may be sure that she not only will have deprived mere man of the last word but will, as has her American counterpart, have appropriated it, herself." *Durham Sun*, July 5, 1959, p. 3.

³² Decision of March 29, 1958; G 1, 2, 3, 5, 29, 30/58. The Federal Constitutional Court in West Germany had in 1957 invalidated somewhat comparable provisions of the Income Tax Law of 1951, but, while expressing some doubts as to the compatibility of these statutory provisions with Art. 3 of the Basic Law, the West German Court had based its decision on the grounds of violation of Art. 6, paragraph 1, of the Basic Law. 6 *B.V.G.E.* 55.

cessions and the treatment of public employees, illustrate the extension of the applicability of the equality before the law provisions to new aspects of social relationships.

Aside from the fact that access of the individual to the Courts is limited in Italy, there are other considerations which explain why the Italian Court seems to have accepted the most restrictive view on equal protection. In review cases, it allows the widest discretion to a legislative finding of facts. Said the Court in a decision in 1957: "the evaluation of the relevance of the diversity of situations in which the individuals subject to the legal regulations find themselves cannot but be reserved to the discretion of the legislature, as long as the limits specified in the first paragraph of Article 3 are observed";³³ however, the "principle of equality is violated when the legislators subject to an indiscriminate discipline situations which they consider themselves and declare to be different."³⁴

It has been particularly in cases involving equality before the law that the West German Federal Constitutional Court has given some evidence of its recognition of a higher law above the positive law, that is, of a superior and unwritten constitutional law. Though there were earlier statements by the Court to which natural law adherents might point, the Court perhaps gave its clearest expression of the acceptance of a "hierarchy of norms within the Basic Law" and of certain natural law "guidelines" in a decision of December 18, 1953,³⁵ involving the equality of the rights of men and women. There the Court did acknowledge the possibility in "extreme cases" of conflicts between the positive law of the Basic Law and of the higher law.³⁶ The Court was here reflecting something of the natural law revival in post-World War II Germany, which had resulted in part from a reaction against the earlier positivist justifications for the Nazi regime. Since 1953, it appears that the Court has been deliberately more careful in its references. It has tended more to stress the "basic principles" of the Constitution as expressed in the specific provisions of the Basic Law, and it is being cautious in providing

³³ *Raccolta Ufficiale delle Sentenze e Ordinanze della Corte Costituzionale* (hereafter cited as *R.U.*), No. 3, Vol. 2, 1957, p. 21, at 27.

³⁴ *R.U.*, No. 53, Vol. 6, p. 68 (1958); also cited in Treves, "Judicial Review of Legislation in Italy," *loc. cit.*, p. 351.

³⁵ 3 *B.V.G.E.* 225.

³⁶ Such words and phrases as "supra-positive basic norms," "natural justice," "fundamental postulates of justice," "norms of objective ethics," etc., have been used in cases. Cf. Heinrich Rommen, "Natural Law in Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany," *Natural Law Forum*, Vol. 4, pp. 1-25 (1959); Gottfried Dietze, "Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany," *Virginia Law Review*, Vol. 42, pp. 1-22 (1956).

continuing opportunity to reopen the debates on "unconstitutional constitutional norms."³⁷

Of the three Courts, the Italian Court has been the most careful to confine its reasoning narrowly to the provisions of the Constitution and to avoid overt reference to value judgments based on natural law in its decisions. Certainly, the Italian Court has insisted that its jurisdiction is limited to examination of the compatibility of laws and of acts having the force of law with the Constitution, and that it is not competent to pass upon the constitutionality of constitutional norms. The position of the Austrian Court appears to be different from the other two: it has not rejected completely the review of constitutional norms, as has the Italian Court, nor has it claimed the right to subject constitutional provisions to review in the light of higher or natural law precepts. In its much discussed decision on provincial citizenship on December 12, 1952,³⁸ the Court recognized that it could not review the substance of constitutional provisions in the light of higher or supra-positive ideas "since, in general, any standard for such an examination is missing."³⁹ It has, however, insisted upon its power to decide whether a proposed amendment involves a "total revision of the Constitution" and hence is subject to a popular referendum.⁴⁰ In this instance, the Court must go beyond the formal requirements of enactment to a consideration of those basic constitutional principles whose alteration would involve "total revision."⁴¹ Thus, in all three countries, the quest of the judges for foundations on which to base some of their decisions regarding individual rights and, specifically, the application of the equality before the law provisions of the Constitutions, continues.

The restraints which are imposed by a federalistic system and by federalistic arrangements upon the exercise of arbitrary power at the

³⁷ Cf. the author's "The West German Federal Constitutional Court: An Evaluation after Six Years," *loc. cit.*, pp. 300-304, and the literature there cited.

³⁸ *Sammlung der Erkenntnisse und wichtigsten Beschlüsse des VGH* (hereafter cited as *Slg.*), No. 2455.

³⁹ For pertinent comments by the three Presidents of the Court during the period since 1946, note Ludwig Adamovich, "Probleme der Verfassungsgerichtsbarkeit," *Juristische Blätter*, Vol. 72, p. 73 (1950), and "Die Verfassungsmässige Funktion des Richters," *Osterreichische Juristenzeitung*, Vol. 9, p. 410 (1954); Gustav Zigeuner, "Zehn Jahre Verfassungsgerichtshof in der Zweiten Republik," *Juristische Blätter*, Vol. 78, pp. 631-32 (1956); and the somewhat more natural-law oriented position of the present President, Walter Antonioli, "Gleichheit vor dem Gesetz," *ibid.*, Vol. 78, pp. 611 ff. (1956).

⁴⁰ See Constitution, Arts. 44 and 140.

⁴¹ At this point, as Professor Felix Ermacora has said, "the Constitutional Court is . . . the guardian of the Constitution and also the guarantor of the implementation of the requirements of direct democracy." "Die Bedeutung der Überprüfung von Bundesverfassungsgesetzen durch den Osterreichischen Verfassungsgerichtshof," *Juristische Blätter*, Vol. 75, p. 539 (1953).

center were recognized by many of the framers of the Bonn Basic Law and the Italian Constitution. They also helped influence the sequence of events in Austria in 1919–20 and, again, during 1945–46. Since only four of the regions in Italy have as yet been created, the relationships in that state can be called only pseudo-federalistic. Nevertheless, the regions which have been established are guaranteed a significant degree of autonomy which can be altered only by constitutional amendment.

It is easy to overstress the centralizing trends in West Germany, unless there is adequate appreciation of the functioning of the *Bundesrat* and of the Federal Constitutional Court. Two of the most significant decisions of the Federal Constitutional Court, in particular, have evidenced its efforts to draw the lines between the competences of the Federal and the state governments. In the highly controversial Concordat case, decided on March 26, 1957,⁴² while the Court recognized that the Concordat of 1933 was still a binding treaty, it did sustain the school legislation of Lower Saxony as falling under its reserved powers.

Several events in the spring and early summer of 1958 provided the setting for the much publicized atomic rearmament referenda cases involving the states of Hamburg, Bremen, and Hesse and decided on July 30, 1958.⁴³ In the play of party politics, the Social Democratic Party had sought and failed to secure the passage by the *Bundestag* of an act to provide for a national referendum on atomic rearmament. It resorted to other tactics to secure what it termed "consultative plebiscites." The states of Hamburg and Bremen, both with legislative bodies containing Social Democratic majorities, passed legislation for holding referenda at the state level. At the request of the Federal Minister of Interior, the Federal Constitutional Court issued on May 27, 1958, restraining orders to prevent the implementation of state laws pending a final decision by the Court as to their constitutionality. The Court, in following certain selected arguments of the Federal government in its joint decision, found the acts of Hamburg and Bremen to be unconstitutional. They represented attempts to provide for the participation of the citizens "in an area within the exclusive jurisdiction of the Federal Government." In addition, "instructions" through referenda from the people of the state to "representatives" were violative of the Basic Law. The Court, in its brief decision, was particularly parsimonious in its discussion of Article 28 of the Basic Law, which recognizes the right of the states to deal with their own constitutional organization as long as they meet "republican, democratic, and social rule of law" requirements. But, recognizing the restricted grounds on which it based its decisions,

⁴² 6 *B.V.G.E.* 309.

⁴³ 2 *BvF* 3/58 and 2 *BvF* 6/58. See also 2 *BvG* 1/58 of July 30, 1958.

the Court did give evidence that it would impose limits on the efforts of the states to explore at the behest of a political party uncharted jurisdictional areas under the federal system. These, and other recent decisions,⁴⁴ indicate some of the efforts of the Federal Constitutional Court to draw the lines between the competences of the federal and state governments.

The Constitutional Court in Austria has been faced with equally complex problems. After World War II, this Court has taken again as a basis for some of its decisions the theory of freezing of the distribution of competences (*Versteinerungstheorie*) at a given time in the constitutional development during the First Republic. The date chosen was that of the effectiveness of the first constitutional amendment on October 1, 1925.⁴⁵ Nevertheless, certain general trends in the decisions of the Court may be noted. During the first years after 1946, the Court's decisions were seemingly directed toward the protection of the modest sphere of reserved powers of the provinces.⁴⁶ However, in later years, the Court has more frequently decided in favor of the Federation. Thus, by a decision in 1951, the Constitutional Court upheld the second Nationalization Law of March 26, 1947, which recognized the power of the Federation to nationalize electricity and power plants.⁴⁷ Again in 1952, the Court sustained the law of 1949 providing for the equalization of economic burdens as falling within federal jurisdiction.⁴⁸ In a suit brought in 1953, while several provisions of the law establishing the Federal Chamber of Commerce were invalidated, the essential contentions of the plaintiff government of Vienna were rejected.⁴⁹ In 1954, the Court recognized

⁴⁴ Note the decision of June 16, 1959, in which the Court held a Federal Law concerning the Payment of Compensation Claims of 1956 to be incompatible with Article 120 of the Basic Law in that it required the states to bear expenditures which represented obligations of the Federal Government (2 *BvF* 5/56); and the decision of July 14, 1959, in which the Court held that the 1957 Federal Law for the Establishment of a Foundation called "Prussian Cultural Property" and the Transfer of Assets of the former *Land* Prussia was not in violation of Article 135 of the Basic Law. 2 *BvF* 1/58.

⁴⁵ *Slg.*, Nos. 2217 (1951), 2319 (1952), 2546 (1953), and 2721 (1954).

⁴⁶ Note *Slg.*, No. 2087 (1951), where the Court criticized the Federation for using the powers granted in Art. 12, Sec. 1 (under which the *Bund* lays down the "basic principles" and the province retains the power of execution) in such a way as to infringe upon the competences of the province by providing detailed regulation of the subject matter in question. For earlier post-war cases, see Paul L. Baeck, "Postwar Judicial Review of Legislative Acts: Austria," *Tulane Law Review*, Vol. 26, pp. 76-77 (1951-52).

⁴⁷ *Slg.*, No. 2092 (1951).

⁴⁸ *Slg.*, No. 2264 (1952). See the criticisms of this decision in Hans Spanner, "Die Prüfung von Gesetzen und Verordnungen durch den Verfassungsgerichtshof in der Zeit von 1950-1952," *Österreichische Zeitschrift für Öffentliches Recht*, Vol. 6, pp. 181-82 (1954).

⁴⁹ *Slg.*, No. 2500 (1953). See also H. P. Secher, "Representative Democracy or Chamber State" (mimeographed paper delivered at the 1959 Annual Meeting of the Midwest Conference of Political Scientists), pp. 9-10.

that the control of radio fell entirely within the jurisdiction of the Federation;⁵⁰ in 1956, the first Nationalization Law of 1946 was sustained.⁵¹ These decisions must, of course, be compared with those which have favored the provinces.⁵² But they must also be read in the light of the realities of the coalition government and of the changing international status of Austria, which have served to encourage federal legislation tending to narrow progressively the area of provincial autonomy.

Though the constitutional provisions have been only partially implemented, regionalism in Italy has provided more than its share of legal controversy. Indeed, more than half of the 381 cases "disposed of" by the Italian Constitutional Court prior to March 31, 1957 involved disputes between the central government and the regions.⁵³ The most controversial questions have involved the relations between the Sicilian High Court, which was created in accordance with Articles 24-30 of the Special Statute for Sicily on May 15, 1946, and was authorized to pass upon the constitutionality of laws enacted by the Sicilian legislature and the compatibility of national laws with the Regional Statute.⁵⁴ After the Italian Constitutional Court began to function in 1956, the problem of the relationship of the two Courts arose. In a decision of February 27, 1957⁵⁵ the Constitutional Court refused to recognize the possibility of a coexisting and competing jurisdiction with the High Court, at least over subjects within the competence of the Constitutional Court. But there are still unsettled questions involving the relationships between the two, as recent decisions of the Constitutional Court bear witness.⁵⁶ Indeed, the Italian Constitutional Court has evidenced a cautious approach in its efforts to demarcate the autonomous sphere of the sensitive regions.⁵⁷

Thus, the West German Court is looked upon more as a protector of the reserved powers of the states than is the Austrian Court. The decisions of the Federal Constitutional Court appear to be of the greater

⁵⁰ *Slg.*, No. 2721 (1954).

⁵¹ *Slg.*, No. 3118 (1956).

⁵² For references to certain of these cases, including ones involving hunting, real estate transactions, area planning, etc., see Felix Ermacora, "Die Entwicklung des Österreichischen Verfassungsrechts seit dem Jahre 1951," *Jahrbuch des Öffentlichen Rechts*, Vol. 6, p. 339 (1957), and *Der Verfassungsgerichtshof* (Vienna, 1957), pp. 145-46. Note, particularly, a decision of June 28, 1958 (G 32/58) in which the Court declared unconstitutional a federal law of 1957 levying import duties on certain products.

⁵³ Adams and Barile, *loc. cit.*, p. 258.

⁵⁴ The Sicilian Statute was converted by the Constituent Assembly, under pressure of time, into a Constitutional Law of Feb. 26, 1948, No. 2.

⁵⁵ *R.U.*, No. 38, Vol. 2, p. 375.

⁵⁶ *E.g.*, a decision of January 24, 1958. *R.U.*, No. 7, Vol. 5, p. 61 (1958).

⁵⁷ Note the discussion by P. Biscaretti di Ruffia, "The First Two Years of Functioning of the Italian Constitutional Court," *Il Politico*, Vol. 23, pp. 477 ff. (1958).

significance in the total political picture, but its competences are broader. Its decisions have commanded more attention, but it is the newer creation. There has been less concern generated by the decisions of the Austrian Court, possibly because there is little evidence that its decisions have threatened major parts of the legislative program of the coalition government. The jurisdictional controversies between the central government and the regions in Italy, while occupying much of the Court's attention, necessarily have limited application.

The concern over the dangers of unlimited delegation of legislative powers was reflected in the attempts of the Constitution makers to place constitutional restraints upon such delegation, as, for example, in Article 80 of the Basic Law in West Germany. This Article, empowering legislative bodies to authorize the Federal Government, a minister, or a state government to issue decrees implementing legislation, requires that the "content, purpose, and scope" of the statutory basis be specific. In 1956,⁵⁸ and again in 1958,⁵⁹ the Court has found provisions of legislation to be lacking in clarity as to "content, purpose, and scope" insofar as they authorized certain implementing decrees. But, said the Court in 1958, in a case involving designated paragraphs of the Price Law of 1948,⁶⁰ it is not necessary that "content, purpose, and scope" be expressly stated in the statutory basis; it suffices if they can be deduced from the whole statute, its styling, its meaning in context, its history. "This can be done in the present case."

In Italy, Article 76 of the Constitution provides that "the exercise of the legislative function cannot be delegated to the Government unless directive principles and criteria have been determined and only for a limited time and for definite purposes." There the Court has recognized that the determination of cases involving the unconstitutional delegation of legislative powers is one of its most important tasks.⁶¹ The Court has invalidated, as being in effect "unconfined and vagrant," a law which left to the administrative authorities the determination of contributions (and of the persons required to contribute) to the tourist offices.⁶² While it did not do so, the Court might well have borrowed

⁵⁸ 5 *B.V.G.E.* 71.

⁵⁹ 7 *B.V.G.E.* 282.

⁶⁰ 8 *B.V.G.E.* 274.

⁶¹ Note the comments of President Azzariti at the beginning of the second year of activity of the Court, in *R.U.*, Vol. 3, pp. 13-14 (1957). The Italian Court has held that both the law of delegation and the authorized act are subject to its review. *R.U.*, No. 3, Vol. 2, p. 21 (1957). Cf. Giovanni Cassandra, "The Constitutional Court of Italy," *American Journal of Comparative Law*, Vol. 8, pp. 4-5, n. 8 (1959); Gaetano Sciascia, "Die Rechtsprechung des Verfassungsgerichtshofs der Italienischen Republik," *Jahrbuch des Öffentlichen Rechts*, Vol. 6, pp. 7-9 (1957).

⁶² *R.U.*, No. 47, Vol. 2, p. 507 (1957).

from the language used by Justice Cardozo in 1935 in dissenting in the *Panama Refining Co.* and in concurring in the *Schechter* cases.⁶³

The complicated history of restraints on legislative delegation, and of the legality of "law-amending ordinances" in Austria, defies brief summarization. But, according to numerous decisions of the Court, Article 18 of the Constitution permits the legislature to authorize the issuance only of implementing and not of "law-amending" ordinances; in order to justify the implementation, the statutory basis must prescribe the essential limits within which the intended regulations will be confined and the purposes toward which they will be directed.⁶⁴ The Court has not hesitated to strike down statutory provisions which have violated these requirements. In short, in differing ways but with rather similar results, the Constitutional Courts of the three countries have been concerned with the application of constitutional provisions designed to prevent the legislature from leaving ill-defined and broad discretion in the hands of the administrator.

The Courts have been called upon to pass on the constitutionality of post-World War II legislation which dealt with public officials and military personnel in service during the Nazi regime in Germany, and of legislation enacted during the Fascist and Nazi regimes in Italy and Austria and affecting the private rights of individuals.

In West Germany, Article 131 of the Bonn Basic Law provides that the legal relationship of persons, including refugees and expellees, who were in the public service on May 8, 1945 and had been excluded from the public service on other than civil service or salary grounds, and who had not received positions comparable to their previous posts, was to be regulated by law. Such a law was passed on May 11, 1951. The Court rejected on December 17, 1953,⁶⁵ constitutional complaints of certain public officials who alleged that various constitutional rights had been violated by the law. The Court pointed out that, while under international law the state had retained its identity after 1945, the public service relationship had fundamentally changed during the Nazi regime. Consequently, the legislature could, in the exercise of its discretion, determine the status of the plaintiffs without allowing them any grounds for constitutional complaint against the law based upon their previous public service relationships. Similarly, the Court held that the *Wehrmacht* ceased to exist with the unconditional surrender of German military forces in 1945, and rejected the constitutional complaints entered by various officers, officials, and members of the former *Wehrmacht* di-

⁶³ 293 U.S. 388 (1935) and 295 U.S. 495 (1935); Adams and Barile, *loc. cit.*, p. 259.

⁶⁴ *E.g.*, *Slg.*, Nos. 2109 (1951), 2276 (1952), 2462 (1953), and 2664 (1954).

⁶⁵ 3 *B.V.G.E.* 58.

rected against the Law of May 11, 1951.⁶⁶ In particular, the Court in a constitutional complaint of a former official of the *Gestapo*, took the opportunity to answer various criticisms of its previous "131" decisions and presented a lengthy and devastating analysis of the nature of the public service relationship during the Third Reich.⁶⁷ The tenor of the Court decisions, in passing upon the rights of officialdom of a previous totalitarian regime, has been consistent with its application of Article 21 of the Basic Law, under which the Nazi-oriented Socialist Reich Party was dissolved and its assets confiscated in 1952,⁶⁸ and the successor case, decided in 1956,⁶⁹ in which the Communist Party of West Germany was subjected to the same penalties.

In Italy, a large percentage of the "civil liberties cases," have involved the constitutionality of legislation which was enacted during the Fascist period (including the Criminal Code, the Code of Criminal Procedure, and the Police Law of 1931). Indeed, roughly one-third of the first forty decisions of the Court involved the constitutionality of criminal laws and regulations, most of them of Fascist vintage.⁷⁰ To take a few examples: in 1956, Article 157 of the Police Law of 1931 providing for repatriation to the community of origin by administrative decree was held to be incompatible with the Articles of the Constitution guaranteeing the inviolability of personal liberty and freedom of travel;⁷¹ in 1957, a section of the Police Law of 1931 requiring notification in case of religious ceremonies outside of churches, irrespective of the place where held, was considered inconsistent with the Constitution;⁷² in the following year, the Court invalidated the provisions of a Law of 1942, which left to administrative officials the discretion to authorize the opening of private schools.⁷³ "Such a system," preserved "even after the collapse of the regime which established it," said the Court, "is incompatible with the meaning which the Republican Constitution attributes to the freedom of the school."

Under the provisional Constitution of Austria of 1945, two constitu-

⁶⁶ 3 *B.V.G.E.* 288.

⁶⁷ 6 *B.V.G.E.* 132.

⁶⁸ 2 *B.V.G.E.* 1.

⁶⁹ 5 *B.V.G.E.* 85.

⁷⁰ Since the Constitution was silent on this point, there was doubt as to whether the Court has the power to pass upon the constitutionality of "anterior legislation," but the Court in its first decision laid all questions at rest as to its jurisdiction. *R.U.*, No. 1, Vol. 1, p. 25 (1956). See David G. Farrelly and Stanley H. Chan, "Italy's Constitutional Court: Procedural Aspects," *American Journal of Comparative Law*, Vol. 6, p. 326 (1957).

⁷¹ *R.U.*, No. 2, Vol. 1, p. 41 (1956).

⁷² *R.U.*, No. 45, Vol. 2, p. 491 (1957); cf. *R.U.*, Nos. 13 and 14, Vol. 5, pp. 101-107 (1958).

⁷³ *R.U.*, No. 36, Vol. 5, p. 231 (1958).

tional transitional laws were passed, the one to nullify constitutional provisions of the period after 1933, and the other, to deal with the period after 1938.⁷⁴ The latter of these transitional laws provided that "all laws and ordinances . . . passed after March 13, 1938 which are incompatible with the existence of a free and independent Austria or with the principles of true democracy, or which contradict the legal conceptions of the Austrian people or reflect typical National-Socialist ideas, are abrogated." This provision which, at least after 1953, the Court has held to be applicable without any governmental ordinance designating the laws or ordinances to be abrogated, has provided the basis for several decisions of the Austrian Court.⁷⁵

There is no need to mention the several illustrations which might be cited. Suffice it to say that in Austria, as in Italy, the Court has been continuously concerned with an examination of legislation, or legal norms, dating from the previous regimes and has invalidated many of them which have been violative of the Constitution. In so acting, the Courts in these two countries have perhaps offered some instigation to parliaments which have been slow to revise legislation still bearing some of the Fascist and National Socialist substance as well as imprint.

If we have dwelt at some length on certain selected decisions of these Courts, it has been to indicate the ways in which the Constitutions are being interpreted by the judges of the Constitutional Courts. They have clearly pointed out some of the effective constitutional limits beyond which the legislator and the administrator cannot go in their actions affecting individual rights.

III

Any conclusion regarding the role of the Constitutional Courts must be highly tentative and subject to much more critical examination. The record of the West German Constitutional Court has occasioned more comment than that of either Italy or Austria, possibly because of the breadth of its jurisdiction, its daring during the formative years, and the controversial character of some of its decisions.

In the relation of the Constitutional Courts to other governmental organs at the national level, there have been crisis periods in each of the

⁷⁴ *StGBL.*, Nos. 4 and 6.

⁷⁵ For example, in 1953, in the decision which declared governmental proclamation unnecessary, the Court abrogated a National Socialist Law of November 5, 1935 on Exchanges, Vocational Guidance, and Procurement of Apprentices, which had been extended to Austria after the Nazi *Anschluss*, as reflecting "typical National Socialist ideas" and as "being incompatible with . . . true democracy." *Slg.*, No. 2620 (1953). The plaintiff had, moreover, been deprived of certain rights guaranteed under Article 12 of the Basic Law of 1867 and under Article 83, paragraph 2, of the Constitution.

countries. The German crisis occurred during 1952-53, when the consideration of the European Defence Community Treaties eventuated in what one critic called a "period of judicial frustration."⁷⁶ However, despite the critical position taken at that time in certain official quarters, the Adenauer Government has looked with increasing sympathy upon the Court in recent years. The *Bundesrat* has furnished more friendly support for the Court than has the governmental coalition in the *Bundestag*. The Social Democratic Party, as the opposition party, and the governments of certain of the states, as the weaker elements in the federal system, have viewed the Court as the protector of the rights of minorities. Although there have been various proposals coming from several circles for the reform of the Court, such minor changes in composition, organization, and jurisdiction as were made by legislation in 1956 and 1959, have emanated from the Court itself.

The crises in the brief history of the Italian Court were those which took place during the long period of delay after 1948, before implementing legislation could be enacted, and after 1953, before the judges were finally appointed. The assortment of internal and external problems faced by the Court, culminating in the final resignation of its first President, De Nicola, in 1957, were brought sharply to public and parliamentary attention. However, the reticence of the Court to go behind a legislative finding of facts in Italy and the limited exercise of the power to invalidate statutes enacted since 1948 have kept parliamentary criticism at a minimum.

In Italy, dissatisfied groups and organizations have on occasion attacked decisions of the Court. For example, the Communists have objected to certain ones respecting land reform legislation; the Church, to others involving the application of constitutional provisions regarding freedom of worship. Some opposition to the Court has also come from the lower bureaucracy. But the really violent opposition has emanated from the regions, especially from Sicily. These reactions, when coupled with the lethargy of the Italian populace toward the Constitution, have combined to create a negative image of the Court which is gradually being erased.

In Austria, neither of the major political parties nor any important pressure groups have made the Constitutional Court a target for continuing criticism. There have been past occasions, as in 1956-57, when partisan differences almost involved the Court, but these were exceptional instances. The relationship between the Constitutional Court and

⁷⁶ Karl Löwenstein, "The Bonn Constitution and the European Defence Community Treaties, A Study in Judicial Frustration," *Yale Law Journal*, Vol. 64, pp. 805-39 (1955).

the other highest courts has provoked some controversy,⁷⁷ and there has been continuing academic discussion of the right of access to and the jurisdiction of the Court. Those who favor an expansion of its jurisdiction sometimes look toward West Germany; those who favor a more restricted status, may point toward Italy. But the recent constitutional law and legislation of 1958 dealing with the Court have resulted in only slight changes in its jurisdiction and organization. In Austria, as in West Germany and Italy, there has been general acceptance of the Court, though without either generous enthusiasm or violent criticism.

There have been problems of implementation of decisions. Some have been considered in West Germany, in connection with the atomic rearmament referenda cases, and others with decisions requiring parliamentary action.⁷⁸ The failures on the part of the parliament and the bureaucracy in Italy, to accept his strictures as to implementation, help explain De Nicola's threatened resignation in 1956 as President of the Court. But the record does not show any situation comparable to the effective nullification of a Court's decision, as occurred in the United States during President Jackson's administration following the Cherokee Indian cases.⁷⁹ There have been more warnings to the Federal Constitutional Court of Germany to exercise "intellectual humility," and "self restraint" in not pushing its jurisdictional bounds beyond the limits of the feasible and the practicable, than there have been in Italy and Austria, where the more limited jurisdiction of the Courts and the greater hesitancy to question legislative enactments have been evidenced. Its record indicates that the West German Court is seeking to follow this advice, and is sensitive to the charges of "judicial legislation," but it apparently has been unable to extricate itself from involvement with what the United States Supreme Court would call political questions.

The Constitutional Courts in Europe are in part the products of reaction against a gloomy past, as previously mentioned. Some of their activities have been devoted to a liquidation of this heritage and to a prevention of its repetition. But, today, the Courts are increasingly faced with the new issues which have developed during the post-World War II period. These new issues, as well as the old ones, have continued to involve the application of the pertinent constitutional provisions regarding equality before the law, federalism, and the delegation of legislative powers.

⁷⁷ See *Juristische Blätter*, Vol. 79, pp. 263-65, and 287-89 (1957).

⁷⁸ 8 *B.V.G.E.* 1, of June 11, 1958.

⁷⁹ *Cherokee Nation v. Georgia*, 5 Peters 1 (1831), and *Worcester v. Georgia*, 6 Peters 515 (1832).

The idea that courts, or some judicial body, should serve as the final guardian of the constitution had its roots and origins in Europe. It has seen its widest acceptance and expansion in the United States. In turn, American application and judicial experience have helped undergird the European precedents and theoretical support for the formation of special judicial bodies to guarantee the fundamentality of their constitutions.

Today, there are those who believe that the significance of judicial review in the United States is diminishing and that our Supreme Court can no longer serve as an effective protector of individual liberties and minority rights against legislative majorities and executive discretion. Is it possible, asked one thoughtful observer, that we may borrow in the future from the experience of these European Constitutional Courts rather than contribute to it—that there will be another period in the “give-and-take between the new and the old worlds?”⁸⁰

However, it is still too early in their history to speculate about the future of these Constitutional Courts. During the past decade, they have not faced that type of crisis which economic adversity, the messianic leader, or foreign military experiment might provide. Until such a time there will be uncertainty as to the degree to which constitutional democracy today reflects an active faith, and the extent to which it is the formal expression resulting from Allied political pressure, a prosperous economy, and anti-totalitarian resentment.⁸¹ Only then will we know how deeply rooted are the constitutions for which these Courts serve today as interpreters and guarantors.

⁸⁰ Gottfried Dietze, “America and Europe—Decline and Emergence of Judicial Review,” *Virginia Law Review*, Vol. 44, p. 1272 (1958).

⁸¹ Cf. Leonard Krieger, *The German Idea of Freedom* (Boston, 1957), p. 468.