

Fall 1977

New Tendencies in the Development of Fundamental Rights in the Federal Republic of Germany, 11 J. Marshall J. Prac. & Proc. 1 (1977)

Ernst Benda

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Comparative and Foreign Law Commons](#)

Recommended Citation

Ernst Benda, *New Tendencies in the Development of Fundamental Rights in the Federal Republic of Germany*, 11 *J. Marshall J. Prac. & Proc.* 1 (1977)

<https://repository.law.uic.edu/lawreview/vol11/iss1/1>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

NEW TENDENCIES IN THE DEVELOPMENT OF FUNDAMENTAL RIGHTS IN THE FEDERAL REPUBLIC OF GERMANY

by DR. ERNST BENDA*

The power of constitutional review in the Federal Republic of Germany rests solely in the Federal Constitutional Court (FCC). Although the FCC is only one of several German high courts, it is the supreme interpreter of the Basic Law—the Constitution of the Federal Republic of Germany. Not surprisingly, discussions of the role and function of the FCC evoke comparisons to that of the Supreme Court of the United States. In fact, there can be no doubt that this American institution and the high esteem it has earned through nearly two centuries greatly influenced the minds of the framers of the Basic Law. The political philosophy of “limited government” and the comprehension of the constitution as “fundamental law,” as developed in American revolutionary philosophy and affirmed by the United States Supreme Court in *Marbury v. Madison*,¹ were fundamental concepts to the framers of the Basic Law.

Of course, German constitutional jurisdiction has its own tradition, independent of the United States model. Only some months ago, when the Federal Constitutional Court celebrated its twenty-fifth anniversary, Professor Schieder, a well-known historian, emphasized the origin of the concept of constitutional review in Germany nearly five hundred years ago.

A more recent basis for modern constitutional jurisdiction may be found in the German Constitution of 1849. Although the Constitution of 1849 was never ratified, it was here that the concept of constitutional review of statutes enacted by the German Diet was clearly expressed. Later, during the Weimar period (1919-1930), the wording of the constitution provided for constitutional review solely to settle disputes between the Federal Government and the Länder² or among the Länder themselves. The question of whether the judicial power to determine the constitu-

* Dr. Ernst Benda, President, Federal Constitutional Court of the Federal Republic of Germany. The substance of this article was contained in a speech given by Dr. Benda at the John Marshall Law School in May, 1977.

1. 5 U.S. (1 Cranch) 137 (1803).

2. The subordinate federal states in the Federal Republic of Germany. The Länder are the local political units which are analogous to the American states.

tionality of statutes also existed was vigorously debated, and only gradually did the Reichs Court claim such competence. In fact, the situation was quite similar to that of the *Marbury* decision in 1803; the Constitution did not expressly entrust the Court with the power of judicial review, but existing precedents and legal theory provided an atmosphere out of which the power of judicial review could develop.

Today, there is no dispute that the Basic Law provides the Federal Constitutional Court the power to annul statutes that are contrary to the Basic Law. However, this does not put an end to the ongoing, more fundamental debate concerning these vast powers of the Court, which are viewed by some as a usurpation of the power of the Länder, and therefore a threat to the very existence of federalism.

THE FEDERAL CONSTITUTIONAL COURT: THE GUARDIAN OF THE BASIC LAW

The fact that the Federal Constitutional Court is the "supreme guardian of the constitution" creates simultaneous powers and duties for the Court. The Court has the final word regarding interpretation of the Basic Law, and its decisions have binding effect on all other governmental organs, tribunals and authorities. When a decision of the Court involves the determination that a statute is or is not in conformity with the Basic Law, this determination is published in the Federal Law Reporter and the decision applies *ex tunc*. A statute contrary to the Basic Law is thereby rendered null and void.

The powers by means of which the Court accomplishes its duties as the supreme guardian of the Basic Law are extensive. These powers fall into four major areas of competency, representing the four major areas of constitutional jurisdiction in a State such as the Federal Republic of Germany.

The first of these areas of competency involves the accomplishment of a hierarchy of legal norms at the top of which stands the Basic Law, followed by the other federal law which is superior to all Land (analogous to American states) law including the respective Land constitutions. Concrete and abstract judicial review are the means by which the FCC establishes and maintains this hierarchy.

Concrete judicial review may arise in the course of ordinary litigation before any court whenever that court considers as unconstitutional a statute the validity of which is relevant to its forthcoming decision. Whenever such a constitutional question arises, the proceeding must be stayed and an FCC determination

of the constitutionality of the statute must be obtained. It is important to note here that although the parties to the litigation may propose a possible need for such a FCC determination, they are *not* entitled to such review as a matter of right since concrete judicial review may only be initiated by the lower court hearing the case. Although every lower court must *consider* the constitutionality of all legal norms applicable to the case before it, only the FCC has the power to *declare* a statute unconstitutional. This division of duties and powers between the lower German courts and the Federal Constitutional Court is essential to the mechanics of the concrete review process.

Although the occasion for the exercise of concrete judicial review is relatively limited, the Court can be called upon to exercise its *abstract* judicial review power in more numerous situations. Abstract judicial review occurs in cases involving differences of opinion or doubts concerning the formal and material compatibility of federal law or Land law with the Basic Law, or the compatibility of Land law with federal law. The abstract review procedure is initiated at the request of the Federal Government, a Land government, or one third of the Bundestag members.

With respect to these review powers of the Court, two points must be emphasized. First, it is the task of the Federal Constitutional Court to enforce the Basic Law. Second, it is *not* the task of the Court to secure the correct interpretation of the law at all levels. Thus, it should become obvious that the FCC is not a super appellate or revisionary court nor is it a super legislature. Of course, today judicial opinions involve more than a mere application of existing law and are, to a certain extent, law-creating. However, the German tendency is still to consider judges as only the voice of the existing law. For example, although the FCC may interpret the Basic Law and, in so doing, invalidate a statute, the FCC cannot create a new legal norm as a substitute for the invalidated one. Such quasi-legislating may only occur in the course of the execution of its decision, and only to prevent an evil by ordering a transitory solution.

In addition to the task of enforcement of the Basic Law, the second major area of competency of the Federal Constitutional Court involves its role as the guardian of German federalism. Today the fact that the federal framework is in danger is evidenced by a clearly perceptible tendency toward the "drying up" of the Länder in favor of a more centrally balanced government. Reasons for this development can be found in the trend to a more uniform lifestyle, the increasing interdependence between the Länder, and the practical considerations involved in

the ever increasing financial burdens upon the individual Länder. In addition, new and modern problems such as environmental protection or energy distribution and conservation can no longer be handled on a local level; a common effort is essential and this presents a real danger to the autonomy and independence of the Länder. But even in the face of such "national" problems, it is worthwhile to defend federalism, and this is not only because it is a constitutional principle. Federalism is also an important value because it conserves culture and in so doing it preserves individualism; and individualism means, or at least it can mean, freedom. Furthermore, federalism is particularly important today because it provides for a balance of powers between the central and Land governments and thereby operates as an additional guarantee of freedom. It should be obvious, therefore, that it is with freedom in mind that the Basic Law protects federalism.

To provide for the protection of federalism, the Basic Law has recognized the Federal Constitutional Court as an umpire in those constitutional controversies arising out of differences of opinion on the respective rights and duties of the federal government and of the Länder, particularly in the execution of the federal law by the Länder and in the exercise of federal supervision over the Länder. This latter situation is one in which the Court has recently played the role of umpire quite often. From a theoretical point of view one may observe that constitutional review in the United States as well as in Germany developed out of this original arbiter function which has served to maintain the balance of power between the individual Länder and the central government.

The third major area of competency of the Court involves the preservation of the separation of powers at the federal level. This competence involves the authority to resolve disputes between the highest organs of the Federal Republic of Germany with the Court again assuming the role of an arbiter. However, only those disputes requiring an interpretation of the Basic Law for their ultimate determination may be brought before the Court.

The fourth major area of competency of the Federal Constitutional Court involves the protection of human rights. For the purpose of protecting human rights, the Basic Law provides a special instrument—"the constitutional complaint" (*Verfassungsbeschwerde*). Any person who claims that one of his basic rights has been violated by any public authority may file a constitutional complaint challenging the constitutionality of the public action.

The review of constitutional complaints constitutes the major portion of the Court's job. In the last twenty-five years about 60,000 applications have been filed with the Court, and more than 33,000 of these were constitutional complaints. It is noteworthy that less than two percent of these complaints resulted in a finding that the individual's basic rights were violated. On the one hand, these figures illustrate that people have accepted this new kind of judicial protection while on the other hand, these figures manifest the high standard of consciousness of public authority concerning human rights. To be sure, one must take into account the fact that, as a practical matter, the decisions of the FCC on constitutional complaints have a significance far exceeding the individual cases. These decisions give signals to the Executive, the Legislature, and the Judiciary and determine their future activities.

In addition to these four major areas of competency of the Federal Constitutional Court, there are several minor areas one of which at least one deserves some brief mention. The Court is, *inter alia*, competent to rule on the constitutionality of political parties which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany. Up to this time, the Court has declared the aims of two such political parties to be unconstitutional—the Communist Party of Germany and the Socialist Reichspartei, a successor organization of the National Socialist Party.

THE BASIC LAW AND THE PROTECTION OF HUMAN RIGHTS

It is not by chance that the Basic Law, the Constitution of the Federal Republic of Germany, begins with a relatively general provision calling for the protection of human dignity. The protection of human rights, as was noted earlier, is the fourth major area of competency of the FCC. Other more specific statements expanding upon this basic fundamental right of human dignity receive subsequent mention. The Basic Law was deliberately drafted to stress this fundamental approach to a constitution. Indicative of this approach is a statement by the Federal Constitutional Court:

In opposition to the omnipotence of the totalitarian State which claimed for itself limitless dominion over all areas of social life and for which, in the prosecution of its goals of state, consideration for the life of the individual fundamentally meant nothing, the Basic Law of the Federal Republic of Germany has erected an order bound together by values which place the individual human being and his dignity at the focal point of all of the first ordinances.³

3. BVerfGG (Decisions of the Federal Constitutional Court), 39, 1, 67.

The high priority which the Basic Law assigns to the task of protecting human dignity is reemphasized later in the Basic Law by a prohibition against any amendments to the Basic Law which will affect, *inter alia*, the basic rights laid down in article I.

The judicial protection of human rights corresponds to these extensive material guarantees in the Basic Law. Today, it appears as if no governmental action is exempted from judicial review, irrespective of acts of mercy, although this point is subject to dispute. Any person who claims that one of his basic rights has been violated by any public authority may, as has already been seen, file a constitutional complaint with the Federal Constitutional Court. The Court will not consider the appeal until all other legal remedies have been exhausted. So ordinarily, because of the comprehensive protection of basic rights in the lower courts, the constitutional complaints will usually be directed against the decisions of the highest courts and not against the acts of the legislature or the executive. In rare instances, the Court may rule on a constitutional complaint before the exhaustion of all other legal remedies if the complaint involves a matter of general importance or if the complainant would suffer serious harm if forced to exhaust his remedies.

The starting point of any interpretation of the fundamental rights requires an understanding of them, in the first instance, as rights of defense for the individual against the State (*status negativus*). During the late eighteenth and entire nineteenth centuries, the German people struggled for a constitutionally defined area of liberty into which no State intervention was allowed. All the liberal constitutional charters drafted during this period were based on a concept of a citizen who, as far as the State was concerned, was entitled to become holy or rich or whatever in his own fashion. This concept is capable of being extended to the point where it even includes the freedom to starve to death.

In its endeavor to give greater effect to the fundamental rights and their capacity to secure freedom and social justice, the Federal Constitutional Court has developed the idea that the basic rights are not merely defensive rights, but also represent objective value decisions. The concept of the objective value decision has recently achieved the status of a constitutional principle in the "numerous clause case" and the abortion decision. This conceptualization of the purpose of the basic rights as objective value decisions is a very significant development in German constitutional theory because it charges the State with an *affirmative duty* to implement programs to secure and protect these values. However, this conceptualization of the purpose of the

basic rights presents the problem of whether they also govern the legal relationships between private citizens. This question most often appears in the area of labor law, however, it also exists in areas where social forces are active and the government is not.

The concept of direct effect of the basic rights on private legal relationships is not shared, for the most part, by legal doctrine or by court decisions. The courts adopt a more indirect approach, in which the view that the basic rights constitute an objective system of values becomes relevant. It is the objectivity of this approach which causes the indirect influence of these basic rights values on the legal relationships between private citizens. The gateways through which this indirect influence flows are the general notions of private law such as "public order" and "good faith," which must, under this indirect approach, be interpreted in light of the constitutional choice of the basic rights as objective fundamental values.

Furthermore, if one were to start with the position that human rights form a catalog of human values which require affirmative constitutional protection and therefore exert an impact on *all* areas of the law, certain conclusions must be drawn. The more extensive the modern State's activity in the area dealing with social security and cultural advancement, the greater becomes the dependence of the individual upon the modern State, and the more important becomes the guarantee of the fundamental right of the individual to share in the achievements of the State. Thus, the problem that arises is whether such "sharing rights" (*teilhaberechte*), at least to a certain extent, rise to the status of constitutionally protected social rights in view of the fact that the State guarantees a fundamental system of values.⁴

This question was placed concretely before the FCC when it considered the so-called "numerus clausus case." According to article XII of the Basic Law, "all Germans shall have the right to freely choose their trade, occupation, or profession, their place of work and their place of training." As the number of applicants for almost all the natural sciences as well as other fields of study far exceeded the capacity of the State supported universities, strict admission restrictions were enacted. Here the question presented to the Court was whether the right to the claim of enrollment was derived directly from article XII of the Basic Law when combined with the equality clause and the principle of the "social state." This was especially possible where the State, as in the case of German higher education, has claimed

4. BVerfGG (Decisions of the Federal Constitutional Court), 33, 303, 330.

a *de facto* monopoly, and where sharing in the benefits of such a State system is at the same time a prerequisite for the realization of a constitutionally guaranteed fundamental right—" . . . the right to freely choose their trade, occupation, or profession"

There are other examples supporting the view that freedom is secured only if the basic rights are also understood as the real basis for claims to affirmative State action, such as the "right to work," the "right to a decent environment," and even the "right to a stable currency." One already finds such or similar formulations at the official State level in constitutions of western countries, and especially in socialist states.

The formulations sound good, and politically and morally one wishes to emphasize these rights. However, although they are firmly established in the Basic Law, the concept of the "sharing or social rights" has met serious objections which have not been overcome to this day. For example, in the "numerus clausus case" the Federal Constitutional Court did not deny the existence of sharing rights at all, but it expressed itself in a very cautious manner:

[I]n as much as sharing rights are not from the outset limited to the already existing facilities, they have to be considered within the limits of what is possible in the sense of what the individual can reasonably demand of society. It is primarily the responsibility of the legislature to decide on this

It could not be required that student places be made available for every applicant at any given time in his particular field of study, thereby making the costly investments in higher education entirely dependent upon the frequent fluctuation of individual demand which is influenced by a multiplicity of factors.

This would mean, a real misunderstanding of liberty, misjudging that personal liberty in the long run cannot be realized if it is considered separately from the functioning and equilibrium of the entire system, and that the view of an unlimited individual claim at the cost of society as a whole is incompatible with the spirit of the social state.⁵

Another point which must be taken into account is illustrated by the comment of the late Professor Kauper pertaining to the endeavors of several Länder to create new constitutions and to implement therein, *inter alia*, a right to a healthy environment: "[r]ights of this kind, stated in a constitution, are 'programmatic' in character. They are not judicially enforceable and require legislative acts for their implementation. To define the limit and scope of these rights is necessarily reserved for legis-

5. BVerfGG (Decisions of the Federal Constitutional Court), 33, 303, 333.

lation." One could add that such rights as "constitutional rights" are not of great value in and of themselves because before they have any independent legal significance it is necessary for the State to implement them by means of affirmative federal programs. In this connection an interesting observation can be made. One can see that the legislature and the executive try to pass inconvenient and politically "hot" issues on to the judiciary. From a practical standpoint, the erection of nuclear power stations supplies a good example. The power of the judiciary expands when it is forced to work with legal rules whose parameters are not delineated sufficiently to be judicially manageable. It is indeed ironic that the same people who view the work of the FCC with the greatest skepticism propose to burden the courts, especially the FCC, with new tasks which far exceed the traditional domain of the judiciary.

There is another development in the field of human rights which deserves to be stressed. The FCC has explicitly recognized that the realization of the objective value decisions which are contained in the basic rights is a permanent duty of the State. In the "numerus clausus case" the issue presented was "whether an objective social state directive for sufficient educational capacity for the various fields of study derives from the value catalog of the fundamental rights and the claim of the educational monopoly." In another decision concerning the freedom of research and teaching in connection with the inner organization of the universities, the Court answered that principal question in the affirmative. According to the Federal Constitutional Court, the State is obliged to realize the idea of free science, i.e., to prevent, by protective and promotional means, any undermining of the constitutional guarantee.⁶ The culmination of this direction toward the constitutional protection of the basic objective values was the so-called "abortion decision."

THE ABORTION DECISION

After acrimonious discussions within and without the Federal Parliament, the Bundestag approved the Abortion Reform Act of 1974. The Penal Code, as it stood before the Reform Act, had provided for a general punishment of any person (including the mother) who destroyed the fetus or permitted it to be destroyed by another. Only an interruption of pregnancy performed to save the life and health of the mother was considered legally justifiable. However, the Reform Act altered this legal situation.

6. BVerfGG (Decisions of the Federal Constitutional Court), 35, 79, 114.

According to the Reform Act, no abortion performed prior to the thirteenth day following conception would be punished. Further, termination of a pregnancy would no longer be punishable during the first twelve weeks after conception if performed by a physician with the consent of the mother. Third, destruction of the fetus after the first twelve weeks would not be punishable if warranted by medical or eugenic indications, provided that not more than twenty-two weeks had elapsed since conception. Finally, before any abortion could be legally performed, the mother had to consult a physician for a medical opinion and a licensed counselling board for information about public and private assistance available for pregnant women.

This Reform Act was brought before the FCC by nearly two hundred members of the Bundestag belonging to the Christian Democratic Party and by several Land governments. They contended that the statute was incompatible with the Basic Law, and petitioned the FCC to annul the statute in exercise of its abstract judicial review power.

It is worthy of note that all the parties concerned with the abortion case—the applicants, the majority of the Diet, the federal government, all the counselors, and the two dissenting judges—were of the unanimous opinion that life growing in the womb enjoyed the protection provided by article II of the Basic Law. Article II, paragraph two of the Basic Law states that *everyone* shall have the right to life and to the inviolability of his person. None of the parties concerned put forth the argument that “everyone” means only a person already born, and the Court did not see itself fit to so limit the meaning of the term. Human life, the Court said, begins in any case not later than thirteen days after conception. The process is a continuous one, and no precise time can be admitted in the different stages of the development of human life. The process continues even after birth. Since the right to life is guaranteed to everyone who lives, the yet unborn being is protected as well. This view is supported by the legislative history of article II of the Basic Law. Further, prenatal life participates in the protection of human dignity because human dignity is present where human life exists, regardless of whether there is consciousness of this dignity or not. The potential abilities given to every human being by origin entitle him to human dignity.⁷ The Court stated that “[t]his extensive interpretation corresponds to the principle established in the opinions of the FCC, according to which, in

7. BVerfGG (Decisions of the Federal Constitutional Court), 39, 1, 36.

doubtful cases, that interpretation is to be selected which develops to the highest degree the judicial effectiveness of the fundamental legal norm."⁸

At this point it must be reemphasized that the fundamental rights represent objective values which all State organs are obliged to protect. The Court did *not* need to decide whether or not a particular fetus was a bearer of basic rights, since it had only to examine the Reform Act under its *abstract* judicial review power. Here any violation of the Basic Law is conclusive.

Thus, the issue before the Federal Constitutional Court concerning the constitutionality of the Reform Act was whether or not the government had satisfied its obligation to protect the objective legal values expressed through the basic rights. In answering this question, the Court continued in line with previous precedents.

The duty of the State to protect is comprehensive. It forbids not only—self-evidently—direct State attacks on the developing life itself but also *requires* the State to take a position protecting and promoting this life, that is to say, it must, above all, preserve it even against illegal attacks by others. It is for the individual areas of the legal order, each according to its special function, to effectuate this requirement. The degree of seriousness with which the State must take its obligation to protect increases as the rank of the legal value in question increases in importance within the order of values within the Basic Law. Human life represents, within the order of the Basic Law, an ultimate value, the particulars of which need not be established; it is the living foundation of human dignity and prerequisite of all other fundamental rights (emphasis added).⁹

The Court admitted that this requirement to protect developing life is directed, in the first instance, to the legislature. However, it is up to the Federal Constitutional Court to determine whether the legislature has fulfilled its task, i.e., whether the legislature has done what is necessary to avert dangers to the legal value to be protected, namely, the life of the unborn child.

In this respect, the protection must be upheld even against the mother. The two dissenters to the majority opinion called special attention to the particular situation of the mother. As a matter of fact, in this context there is always a unique unity of "actor" and "victim."¹⁰ This unity with the mother illustrates that not only every interruption, but also every continuation of pregnancy affects the pregnant woman herself very intensively. This fact leads necessarily to a balancing of two areas of freedom

8. *Id.* at 38.

9. *Id.* at 42.

10. *Id.* at 79.

that are in opposition to each other—the freedom of the mother and the freedom of the unborn child.

The mother's freedom which is to be protected is her constitutional right to the free development of her personality. Pregnancy belongs to that sphere of the mother's intimacy, or privacy, which is without any doubt protected by articles I and II of the Basic Law. However, there are two restrictions upon a woman's right to the free development of her personality. First, the right to free development of personality is limited by the rights of others, the constitutional order, and the moral code. Second, for the purpose of balancing rights in opposition to one another, one has to view them in their relationship to human dignity, which is the center of the constitutional value system. It was through the application of this balancing test that the Federal Constitutional Court gave precedence to the life of the fetus, because on the one side, the unborn *life* would be destroyed through the interruption of pregnancy, and on the other side, the mother may be only inconvenienced through pregnancy, birth and education of the child. Hence, it follows that the woman's right to self-determination must not be the sole guideline of the State's rulemaking. Thus "the State must proceed, as a matter of principle, from a duty to carry the pregnancy to term and therefore to view, as a matter of principle, its interruption as an injustice. The condemnation of abortion must be clearly expressed in the legal order."¹¹

The majority of the Bundestag argued that the Reform Act complied with these conditions; they contended that the statute was based upon the idea that developing life would be better protected through individual counselling than through a threat of punishment. Concerning the regulation of counselling, the Court countered that such counselling would not provide any assurances that the woman would be motivated to carry on her pregnancy, and thus failed to be truly protective. Moreover, a total consideration of all elements of the problem illustrates that the State is under an obligation to employ the penal law to protect the high value of unborn human life. It is not disputed that the penal law is and must remain the "ultimate reason" in the armory of the State. But this final means must be employed if an effective protection of life cannot be achieved through other means. There are women who would not be influenced by a counselling at all, since they decline pregnancy simply because they do not desire to take on the resulting responsibilities and inconveniences. In these cases, without penal

11. *Id.* at 44.

law provisions, the life of the unborn child would be abandoned without protection from the arbitrary decision of the mother.¹²

The two dissenting judges, although concurring with the majority in the view that the basic rights are objective value decisions, maintained that the majority reversed the function of fundamental rights. For the majority to derive a duty to punish from those rights meant, to the dissenters, that those rights could be used to restrict rather than to secure freedom.¹³ The majority, on the other hand, asserted that an effective protection of a constitutionally protected value against the attacks of third persons always affects the basic right of those persons. This happens also when the State defines the rights of its citizens in other fields of law, as in civil law or in social-legal law, and there is no fundamental difference concerning the enactment of a penal norm.¹⁴

However, the Court did not overlook the unique situation of the pregnant woman. It recognized that there are cases in which the continuation of the pregnancy may not be reasonably expected. Such cases are defined by those burdens on a woman which essentially go beyond those normally associated with pregnancy. These burdens are present if the woman is thrown into serious inner mental or physical conflicts by fulfilling her duty to carry the pregnancy to term. However, circumstances must be excluded which do not seriously burden the woman since they represent the normal complications involved with child bearing.

In this sense the continuation of pregnancy is, according to the Court, "not reasonably expectable" when the interruption is required to protect the woman from the danger of death or grave impairment of her condition of health. Similar extraordinary burdens upon the woman may exist in cases of eugenic, ethical (criminological), social or emergency situations. Under these circumstances the State is not obliged, and perhaps not allowed, to fulfill its protective duty by the means of a penal law. Here, the State may comply with this duty by preparation of a counselling procedure, provided that the counselling plan incorporates a pronounced pro-life orientation.¹⁵

According to the Court's decision in the abortion case, two categories for State action presently exist. First, there are those cases where the continuation of pregnancy is "exactable" because the inconveniences involved do not exceed those normally incurred

12. *Id.* at 47, 55.

13. *Id.* at 73.

14. *Id.* at 47.

15. *Id.* at 48.

by a pregnant woman; here the abortion remains a wrong deserving punishment. Second, there are those cases in which the continuation of pregnancy is "non-exactable." In this second situation, it has become clear that abortion under such conditions is not a punishable wrong. While it is clear that abortion in such cases is not a punishable wrong, there is still a philosophical question as to whether the "non-exactability" label merely removes those cases from punishability and criminality or whether such abortions are no longer illegal acts at all.¹⁶

Initially, some confusion might exist about the notion of "non-exactability" (Zumutbarkeit). Usually, the word is used in the context of the penal law and goes to personal guilt rather than the objective illegality of an act. A man may have committed a criminal wrong but personal circumstances lead to the conclusion that the illegal conduct was "non-exactable"; thus, because of lack of personal guilt he will not be punished. In the context of the abortion decision the words exactability and non-exactability are *not* used in this sense, but rather in a specific constitutional sense. Of course, there is some connection with the penal law since it was from the penal law that these concepts were borrowed. However, since the examination of the Abortion Reform Act proceeded under the objective abstract review process, the Court did not have to determine the demarcation between illegality and personal guilt since no individual defendant was involved. Rather, the Court had only to answer the question of whether or not and how far the legislature is obliged to threaten the performance of an abortion with punishment. Therefore, when used in their constitutional sense, "exactability" and "non-exactability" are the criteria against which the Federal Constitutional Court reviews legislative acts, and thereby determines if the legislature has fulfilled its duty to preserve the objective value decisions contained in the Basic Law.

Nevertheless, the question which still exists for the future is whether the non-exactable cases remain illegal, though non-punishable acts. The foregoing explains why the Court's answer to this question was not very clear, and indeed was a cautious one. The Court stated that "[i]f the legislature removes genuine cases of conflict of this kind from the protection of the penal law, it does not violate its duty to protect life."¹⁷ However, it should be taken into consideration, that under the old law, abortions were already justified in the case of medical indications.

16. See, Gorby and Jonas, *West German Abortion Decision; A Contrast to Roe v. Wade*, 9 J. MAR. J. 551 (1976).

17. BVerfGG (Decisions of the Federal Constitutional Court), 39, 1, 50.

One can hardly imagine that the Court's intention was to retreat behind this line of precedent. As the other cases of non-exactability (in the constitutional sense) must be of comparable weight to that of the medical indication one does not really see why the legislature should classify the other indications differently. At one point, the Court itself stated that those cases in which the continuation of pregnancy is not exactable from the mother can be excepted from legal condemnation.¹⁸ As a matter of fact, the legislature in altering the Reform Act to conform to the ruling in the abortion case, treated all the indications which remove the interruption of pregnancy from punishability, as justifying reasons, and not only as reasons which exclude the personal guilt of the actor.

As a result of the abortion decision, the new Abortion Act of 1976 incorporated the "indications solution," which makes the continuation of pregnancy in the fact of certain medical, eugenic, ethical, and social or other emergency indications "not reasonably expectable." The emergency indication is relatively broad; according to the penal code it is described as the indication of an emergency situation which is so grave that the continuation of pregnancy may not be demanded and may not be averted in any other "reasonably expectable" way for the pregnant woman. The counselling procedure has also been improved. It should be emphasized that under the new law the pregnant woman herself will not be punished even if none of the above indications are present, provided, the interruption of pregnancy is performed no later than the first twenty-two weeks after conception and the woman has undergone counselling. Although the new law was heavily debated during passage, the Federal Constitutional Court has not, as yet, been called upon to render its opinion concerning the constitutionality of the new Abortion Act.

The significance of the "numerus clausus case" and the abortion decision can be found in the Federal Constitutional Court's notion of fundamental rights as constitutional objective value decisions. From this notion the Federal Constitutional Court has deduced a duty on the part of the State not only to refrain from interference with these rights through government action but also to affirmatively protect these constitutional objective value decisions even as to conduct between individuals.

18. *Id.* at 53.

