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Abstract

Two of Jhering's ideas are crucial to understanding the problems besetting the merger of East and West Germany. They are (a) the centrality of the notion of private property as the foundation, not only of property rights, but of personal rights as well; and (b) his notion of rechtsgefühl, translated clumsily as a feeling of legal right, but implying the pain and irritation a person feels when he has been put upon. [FN8] It is my thesis that a fundamental difference between the way these two concepts are viewed in the former East and West Germanies is a sword in the bed, presenting a fierce obstacle to the union that both desire.

ADDRESS

THE UNIFICATION OF GERMANY: WHAT WOULD JHERING SAY?

*The Honorable Joseph M. McLaughlin**

INTRODUCTION

In the first decade of this century a man named William Morningstar was a guest in the Lafayette Hotel in Buffalo, New York. Wearying of hotel cuisine, he went out and bought some spare ribs, which the hotel chef then cooked to Morningstar's pleasure. Not so much to his satisfaction, however, was a bill for $1 for the chef's services, which Morningstar thought exorbitant. Because of his obstinate refusal to pay the dollar, Morningstar was denied further service in the hotel dining room; and the headwaiter made sure that he announced this in full throat for the entire hotel to hear. Morningstar sued the hotel for slander.

The case wended its way to the New York Court of Appeals where the principal issue was whether evidence was admissible that in the hotel community Morningstar was a well-known "kicker," a person disposed to grumble and find endless fault. In an opinion[1] by Judge Benjamin Cardozo, perhaps the greatest judge ever to grace the New York Court of Appeals, an unanimous court held that evidence of the plaintiff's sour disposition should not have been admitted before the jury.[2]

True, the controversy that spawned the suit was trivial. But this was not a concern of the Court for, as Cardozo observed, "[t]o enforce one's rights when they are violated is never a legal wrong, and may often be a moral duty."[3] Continuing, Cardozo wrote, "A great jurist, Rudolf von [J]hering, in his *Struggle for Law*, ascribes the development of law itself to the persistence in

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1. Morningstar v. Lafayette Hotel Co., 211 N.Y. 465, 105 N.E. 656 (1914).
2. *Id.* at 468, 105 N.E. 657.
3. *Id.*

human nature of the impulse to resent aggression. . . ."[4]

I stumbled on the case in my capacity as an evidence professor, and found it unremarkable. It is memorable to me, however, because it introduced me to the Free Law Movement (*Freirechtsschule*)[5] in German jurisprudence and to the thought of the man called the Mark Twain of German jurisprudence,[6] Rudolf von Jhering.

Jhering came upon a jurisprudential stage cluttered with the dry abstractions of Kant and Hegel. He swept that stage clear of mechanical jurisprudence and replaced it with a philosophy centering upon facts, social conditions and day-to-day realities, a philosophy that captured the United States in the 1930's and 1940's under the flag of Legal Realism, waved enthusiastically by Holmes, Pound, Cardozo and Llewelyn.[7]

Two of Jhering's ideas are crucial to understanding the problems besetting the merger of East and West Germany. They are (a) the centrality of the notion of private property as the foundation, not only of property rights, but of personal rights as well; and (b) his notion of *rechtsgefühl*, translated clumsily as a feeling of legal right, but implying the pain and irritation a person feels when he has been put upon.[8] It is my thesis that a fundamental difference between the way these two concepts are viewed in the former East and West Germanies is a sword in the bed, presenting a fierce obstacle to the union that both desire.

I. *PROPERTY*

The fifty-seven men who gathered in the sweltering Philadelphia heat of 1787 to draft the United States Constitution were steeped in the philosophy of John Locke.[9] "Whatsoever then, he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labor* with, and joined it to something that

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4. *Id.*

5. *See* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 7 (1989).

6. WILLIAM SEAGLE, MEN OF LAW 306 (1947).

7. *See* James E. Herget and Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399 (1987).

8. *See* RUDOLF VON JHERING, THE STRUGGLE FOR LAW 21-31 (John J. Lalor trans., 2d ed. 1915) [hereinafter JHERING] (describing life of law as struggle).

9. *See* Walton H. Hamilton, *Property — According to Locke*, 41 YALE L.J. 864, 873-75 (1932).

is his own, and thereby makes it his *property*."[10] The right of an individual — and, by extension, a corporation — to own property lies at the taproot of democratic political theory.

In *The Struggle for Law*, Jhering arrived at the same conclusion as Locke, but started his journey even further back. "The preservation of existence," he wrote, "is the highest law of the whole living creation."[11] To achieve this existence the right of private ownership is essential. With uncanny prescience he observed that "[c]ommunism thrives only in those quagmires in which the true idea of property is lost."[12] This dismal prophecy was fulfilled in East Germany, scarcely a century later. It remains today one of the most serious impediments to German unification.

Although the Federal Constitutional Court (*Bundesverfassungsgericht*) has proclaimed the "economic neutrality of the Basic Law,"[13] a bedrock premise of German constitutional culture is the right to own and to dispose of property, both guaranteed by Article 14 of the German constitution ("Grundgesetz" or "Basic Law").[14]

The miraculous recovery of West Germany from the ashes of World War II and the abysmal failure of East Germany that led to its self-imposed exile behind the Berlin Wall were due in major part to the acquisition of property and wealth in the former and the stunted conception of property and wealth in the latter. As the Durants have reminded us in *The Lessons of History*, "[t]he experience of the past leaves little doubt that every economic system must sooner or later rely upon some form of the profit motive to stir individuals and groups to productivity."[15]

With the factories, plants, and most of the machinery of production owned or controlled by the state, East Germany offered little opportunity and less incentive to create wealth. Employment was assured, but not in the job of one's choice. East Germany determined where you worked and how much you should

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10. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 306, § 27 (Peter Laslett ed., 2d ed. 1967).

11. JHERING, *supra* note 8, at 31.

12. *Id.* at 53-54.

13. Judgment of July 29, 1954 (Investment Aid Case), BVerfG First Sen., 4 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 7, 17-18 (1954).

14. GRUNDGESETZ [Constitution] [GG] art. 14 (F.R.G.).

15. WILL DURANT & ARIEL DURANT, THE LESSONS OF HISTORY 54 (5th ed. 1968).

produce. Everyone earned about the same salary (1,000-1,500 marks a month).[16] The resulting lack of incentive can be seen in that hapless symbol of the East German economy: the Trabant car, now just an embarrassing memory.

The stark opposition of the two conceptions has made melding the East German work force with that of West Germany far more difficult than was anticipated. Until it is accomplished there can be little realistic hope of shaping a new legal order that will wipe out the *de facto* distinctions that still exist between the two Germanies.

II. *RECHTSGEFUHL*

Denouncing the German Historical School and his own mentors, Savigny and Puchta, Rudolf von Jhering rejected their notion that the law of a people evolves easily and naturally, the way a language does. Rather, "[t]he life of the law is a struggle, — a struggle of nations, of the state power, of classes, of individuals."[17] (Hence, the title of his masterwork, *Der Kampf ums Recht*, translated as *The Struggle for Law*).

Moving from the general to the particular, Jhering wondered what drove people to sue each other. He recognized immediately, as did Savigny and the Roman Law votaries, that private law was forged on the anvil of litigation; but what was it that moved the adversaries to "go to the law" in the first place?[18] Jhering concluded that, stripped of all rationalizations, the spark that ignited litigation was the inner pain, the angst, the rage one *feels* when he believes he has been wronged: in his word, almost untranslatable, *rechtsgefühl.*

By demanding his "rights" the incensed citizen sharpens the conflict, and its resolution adds a new contour to the law. In a famous passage, Jhering asserts:

> Irritability, that is the capacity to feel pain at the violation of one's legal rights, and action, that is the courage and the determination to repel the attack, are, in my eyes, the two criteria of a healthy feeling of legal right.[19]

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16. Thomas Irwin, *Bringing Justice to the Wild East: Reconstruction in the Former GDR*, 79 A.B.A. J. 58, 60 (Apr. 1993).

17. JHERING, *supra* note 8, at 1.

18. *See id.* at 24 (discussing decision to assert one's legal rights after violation).

19. JHERING, *supra* note 8, at 63.

Jhering observed that people were angered by different slights. Military officers, for example, were notoriously slovenly about their financial rights and obligations, but were quick to react to any slight upon their honor. Farmers, on the other hand, easily shrugged off personal affronts, but rose up instantly at trespasses to their land. Social and cultural forces, therefore, affect our conception of rights, and determine which wrongs should be swallowed and which should be protested. Still, even if different classes respond to different slights,[20] there must be a consensus on the core values of all the citizens if a coherent body politic is to evolve.

The most significant articulation of a people's core values is a nation's constitution. It is there you will find the major premises and recurrent aspirations of the nation. In the Basic Law of Germany lies in plain view a statement of basic principles that are utterly alien to the Marxist-Leninist cast of the East German mind.

III. *THE BASIC LAW*

The Basic Law ("Grundgesetz") of West Germany was adopted on May 23, 1949.[21] The grander term "constitution" ("*Verfassung*") was rejected since the Basic Law pledged reunification, and use of the word "constitution" might have implied a permanent jurisprudential structure excluding East Germany.[22]

A constitution of staggering detail, the Basic Law reflects its civil law tradition. Its eleven sections and well over one hundred articles codify much of the federalist structure and individual rights that our Supreme Court developed through two centuries of interpretation. Unlike the amorphous Commerce Clause of the U.S. Constitution, for instance, the Basic Law spells out the areas in which the federal government has exclusive jurisdiction, and those areas where it shares regulatory power with the *Länder*

20. Obviously, Jhering had little truck with the admonition of Saint Paul that the citizens of Corinth should avoid litigation and just turn the other cheek. 1 *Corinthians* 5:7.

21. *The Basic Law of the Federal Republic of Germany Announcement by the Parliamentary Council*, FED. L. GAZETTE, May 23, 1949 (stating that Basic Law of Federal Republic of Germany was adopted by Parliamentary Council on May 23, 1949).

22. Rudolf Dolzer, *The Path to German Unity: The Constitutional, Legal and International Framework in* SERIES DRÄGER FOUNDATION, 14 GERMANY AND ITS BASIC LAW 365, 370 (Paul Kirchhof & Donald P. Kommers eds., 1993).

(states).[23] And whereas the right to pursue an occupation of one's choice is protected in the United States by the Due Process Clause, Article 12 of the Basic Law expressly guarantees this right.[24]

The Basic Law wears its jurisprudence on its sleeve. It proudly proclaims that its core purpose is the establishment of a "free democratic basic order."[25] This "basic order" — a central notion in modern German jurisprudence dating at least from Kant — is to be achieved by the sound application of three organizing principles: *Rechtsstaat*, *Sozialstaat*, and *Parteienstaat*, (usually translated as, rule of law, social welfare, and political party state, respectively).[26] Thus, Article 20 declares that "Germany is a democratic and social federal state," and that "[l]egislation shall be subject to the constitutional order; the executive and judiciary shall be bound by law and justice."[27]

Rechtsstaat is a notion familiar to American lawyers. It appears on the facade of many of our courthouses: A government of laws, not of men.[28] *Sozialstaat* suffuses Article 14 which declares: "Property and the right of inheritance are guaranteed. . . . [but] it imposes duties. Its use should also serve the public weal."[29] Recognizing the fundamental right to own property, Article 14 also imposes an affirmative obligation on the government to ensure that the social well-being of all German citizens is provided. How this is accomplished is a matter of political policy, but, reflecting the social thinking of Bismarck, the essential needs of German citizens (health care, labor rights, etc.) must always be met.

Quite obviously, the Basic Law marches to a different drummer than the U.S. Constitution. Though the United States is also a democracy based on the rule of law, neither the U.S. Constitution nor its constitutional tradition conceives of objective organizing principles that animate social and governmental relations. The difference is starkly apparent in the absence of the

23. GRUNDGESETZ [Constitution] [GG] arts. 73-74 (F.R.G.).

24. *Id.* art. 12.

25. *Id.* art. 21.

26. KOMMERS, *supra* note 5, at 40.

27. GRUNDGESETZ [Constitution] [GG] art. 21 (F.R.G.).

28. *See* KOMMERS, *supra* note 5, at 42-43 (explaining historical and contemporary meaning of *Rechsstaat*).

29. GRUNDGESETZ [Constitution] [GG] art. 20 (F.R.G.).

Sozialstaat principle in the U.S. Constitution. An American property owner has no obligation other than to ensure that he does not interfere with the rights of others as he enjoys his property. Similarly, the notion of government as a social welfare state with affirmative obligations to provide for the basic needs of its citizens is a comparatively recent notion in the United States. More importantly, it derives from political, not constitutional sources, and certainly not from enumerated or objective constitutional principles.

In Germany, the Federal Constitutional Court has an integral role in the essentially political process of allocating social benefits.[30] In the United States, on the other hand, the Supreme Court has made clear that we are not a social welfare state, except to the extent that we choose to be. Individuals are not entitled as of right to social assistance, nor is the government obligated to provide it. As Chief Justice William H. Rehnquist wrote in *DeShaney v. Winnebago County Dep't of Social Services*,[31] "our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[32]

Whereas political parties in the United States evolved by and large by chance, the doctrine of *Parteienstaat* weaves them into the fabric of German democracy. The Federal Constitutional Court has thus often recognized political parties as "constitutional organs."[33]

The Basic Law thus guarantees the free establishment of political parties for, as mandated by Article 21, they are "to participate in the forming of the political will of the people."[34] There are however, important limits to this freedom. All parties must be organized on democratic principles,[35] and parties that "seek to impair or abolish the free democratic basic order" or endanger its existence may be declared unconstitutional by the

30. KOMMERS, *supra* note 5, at 41-42.

31. DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189 (1989).

32. *Id.* at 196.

33. KOMMERS, *supra* note 5, at 202 (citing cases).

34. GRUNDGESETZ [Constitution] [GG] art. 21 (F.R.G.); KOMMERS, *supra* note 5, at 40-41.

35. GRUNDGESETZ [Constitution] [GG] art. 21(1) (F.R.G.).

Federal Constitutional Court.[36] The power to declare a political party unconstitutional (the Court has done so twice in its history)[37] is a unique feature of the Basic Law.

The series of provisions of the Basic Law, including the power to declare political parties unconstitutional, which serve as the ultimate safeguard of the Basic Law and the "free democratic basic order" constitute *Streitbare Demokratie* (militant democracy).[38] Accordingly, Article 79 provides that amendments seeking to impair the federalist nature of Germany, or the fundamental rights enumerated in Articles 1 and 20, "shall be inadmissible."[39] Similarly, Article 19 provides that "[i]n no case may the essential content of a basic right be encroached upon."[40] The Federal Constitutional Court thus has the authority to declare even amendments to the constitution unconstitutional. In addition, the Basic Law provides for the forfeiture of individual rights by those who use their guaranteed freedom to combat the "free democratic basic order," and trumpets that "[a]ll Germans shall have the right to resist any person or persons seeking to abolish that constitutional order, should no other remedy be possible."[41]

The concept of a militant democracy is alien to Americans. Like the *Sozialstaat* principle, it places affirmative obligations on German citizens to defend the objective democratic order. The benefit of a free democratic order, therefore, also means protecting that order by refraining from activity contrary to it, and coming to its defense, if necessary. Thus, freedom of association is limited in the same manner as are political parties: "Associations, the purposes or activities of which . . . are directed against the constitutional order . . . are prohibited."[42] Furthermore, civil servants and employees of the government are required by federal law to "manifest by [their] entire behavior [their] support for the free democratic basic order within the spirit of the Basic

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36. *Id.* art. 21(2).

37. Judgment of Oct. 23, 1952 (Socialist Reich Party Case), BVerfG First Sen., 2 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (1952); Judgment of Aug. 17, 1956 (Communist Party Case), BVerfG First Sen., 5 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 85 (1956).

38. KOMMERS, *supra* note 5, at 43-44.

39. GRUNDGESETZ [Constitution] [GG] art. 79(3) (F.R.G.).

40. *Id.* art. 19(2).

41. *Id.* art. 20(4).

42. *Id.* art. 9(2) (inserted by Federal Law of 24 June 1968).

Law."[43]

The U.S. Constitution does not contain any similar provisions. Instead, it relies wholly on the political process to define the limits of constitutional tolerance. Rather than setting individual limits on the freedom of political or even anti-democratic action, the U.S. Supreme Court defines the limits of government and individual action that can be taken against such activity. The Constitution addresses anti-democratic activity only in a negative sense by protecting freedom of speech, the press, assembly and association. But it imposes no affirmative obligation on its citizens to promote these values.

IV. *ROLE OF THE FEDERAL CONSTITUTIONAL COURT*

The Federal Constitutional Court ("FCC") bears a surface similarity to the U.S. Supreme Court in that it is the final interpreter of the Basic Law. "Final" is slightly misleading. "Only" would be more accurate. No other German court, high or low, is competent to pass on a constitutional question and, should such a question arise in the course of litigation, the action must be stayed while the constitutional question is certified to the FCC.

As one German law professor remarked, "[t]he Basic Law is now virtually identical with its interpretation by the Federal Constitutional Court."[44] At the risk of sounding jingoistic, I think our own Chief Justice Charles Evan Hughes said it better: "[t]he Constitution is what the judges say it is."[45] The FCC conducts, in effect, an on-going school of constitutional law. Only loosely constrained by doctrines familiar to American lawyers — standing, ripeness, mootness — it does not require a case or controversy to galvanize it. It issues "Abstract Judicial" opinions in response to official inquiries about the constitutionality of questionable statutes.[46] "In practice, this extensive jurisdiction means that any constitutional matter may be brought before the Court in any form."[47] The President of the Court recently complained that many German citizens "go to court for every last

43. KOMMERS, *supra* note 5, at 237.

44. KOMMERS, supra note 5, at 63 (quoting speech of Professor Rudolf Smend on tenth anniversary of German Constitutional Court [BverfG]).

45. CHARLES EVANS HUGHES, ADDRESSES AND PAPERS 139 (1908).

46. GRUNDGESETZ [Constitution] art. 93(1) and (2) (F.R.G.); KOMMERS, *supra* note 5, at 15.

47. Klaus Stern, *General Assessment of the Basic Law — A German View in* SERIES

state benefit to which they believe they are entitled . . . ."[48] Rudolf von Jhering would applaud them.

As should be obvious, and was intended, the expansive jurisdiction of the FCC enables the Court to participate heartily in Germany's political system. Although the FCC is not a court of general jurisdiction and, with few exceptions, can only decide constitutional issues, it resolves federalism questions between the federal government and the *Länder.* It also entertains *Organstreit* proceedings which involve constitutional disputes between the "highest organs of the Federal Republic."[49] The FCC thereby takes a vigorous role in resolving the disputes between the federal government and the *Länder* and in adjusting the balance between the federal organs.

The FCC is not, however, a court of general review. There are five "Supreme" Courts to make definitive rulings on all questions of law other than constitutional questions.[50] The FCC therefore does not address questions of fact or law unless so clearly wrong as to amount to a violation of the Basic Law. When presented with a constitutional question, however, it is obligated to decide it.[51] When declaring legislation unconstitutional, it may do so in two ways. Like the U.S. Supreme Court, the FCC may declare the provision null and void (*Nichtig*).[52] It also has the option, however, of declaring the provision incompatible (*Unvereinbar*) with the Basic Law, but leaving that statute in effect until Parliament corrects the defect.[53] Strictly speaking, this means it has been upheld, yet the declaration comes with detailed advice describing its deficiency and how Parliament should amend it.

Plainly, the FCC takes a much more active role in the nuts and bolts of daily government than does the U.S. Supreme Court. Because it directly influences the balance of political power and legislation, the FCC is deeply involved in adjusting

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DRÄGER FOUNDATION, 14 GERMANY AND ITS BASIC LAW 17, 22 (Paul Kirchhof & Donald P. Kommers eds., 1993).

48. Roman Herzog, *The Separation and Concentration of Power in the Basic Law in* SERIES DRÄGER FOUNDATION, 14 GERMANY AND ITS BASIC LAW 391, 401 (Paul Kirchhof & Donald P. Kommers eds., 1993).

49. KOMMERS, *supra* note 5, at 13.

50. *Id.* at 4.

51. *Id.* at 14.

52. *Id.* at 15.

53. *Id.*

political and social reality to achieve the constitutional order of the Basic Law.

In contrast, while the U.S. Supreme Court remains the ultimate safeguard of individual rights, its guiding principles in the U.S. Constitution dictate that it remain completely above the political fray. Its separation of powers cases are a means of ensuring its separateness, not of adjusting the relative positions of the coordinate branches.

V. *PROBLEMS AFTER REUNIFICATION*

On October 3, 1990, sixteen million East Germans became part of an unified Germany. They arrived with cultural baggage markedly setting them apart from their brethren in the West. Forty-five years of Communist domination has produced two generations of Germans who simply do not think the same way as their brothers and sisters in the West. This dysfunction will probably take another generation to rectify.

Popular German slang divides all Germany, like ancient Gaul, into three parts: *Wessis* (Western Germans), *Ossis* (Eastern Germans) and *Wossis* (Westerners who have recently moved east for capitalist ventures).[54] This cleavage reflects the cultural chasm that has developed in the past fifty years between the West Germans — individualists fueled by the profit motive but with a social conscience — and East Germans — conformists with guaranteed jobs and little incentive to improve their lot in life. As Jhering might say, the German Law cannot continue to be woodenly applied to all German citizens when there are two distinct peoples marching to different juridical drummers. Heinrich Lehmann-Grube, a *Wossi* who headed east when The Wall fell and is now Mayor of Leipzig, spoke of the problem in a recent interview:

> We didn't realize it at the time, but the difference between East and West Germany was far greater than the difference between, say, West Germany and England or West Germany and Italy . . . . Imagine if, overnight, the United States had to adopt the Chinese or Japanese system of politics, laws and customs. It means that everything changes completely, and it leads to tremendous disorientation and fear. Many people here are carrying very heavy psychological burdens.

54. Irwin, *supra* note 16, at 60.

This is going to be part of life here for at least a generation.[55]

West Germany has struck a workable balance between market and welfare economies. The state regulates and even subsidizes vital economic sectors, but it also provides a social safety net. Job security and social assistance are accepted as obligations of the German government. But expectation is tempered by the limited nature of the benefits and the realities of a market-driven economy. Market forces drive production. Quality and supply of goods influence demand. Labor thus has an important stake in the life of the enterprise.

West Germany has absorbed at least eighteen million people (approximately one-quarter of the present population) since 1989. Many of them are impoverished. Their expectations necessarily exceed the ability of Germany to satisfy them. Evidence of the clash of values between the *Wessis* and the *Ossis* is everywhere. Eastern Europeans unable to find work have turned to the government for assistance. Citizens of the former West Germany have responded, both politically and socially, with increasing vehemence (and violence), as escalating costs have reached nearly half of the government budget.

The common values and cultural assumptions on which the objective order of the Basic Law was based are evaporating. Industrial workers in West Germany for example, have grown accustomed to thirty paid vacation days a year — six weeks — and to an extra month's salary at Christmas. Health insurance, pensions, and unemployment contributions add 19.4% of each employee's pay to payroll costs.[56] To absorb the rickety East German industrial economy and accord the workers the same benefits poses a colossal economic obstacle.[57] Even Chancellor Helmut Kohl, who in a burst of exuberance, declared at the time of unification that East Germany would soon become a "blooming landscape," conceded just last month that he had underestimated the ability of a united Germany to finance the merger.[58]

Demographics do not bode well either. Each German woman of childbearing age, for example, is statistically expected to

55. Stephen Kinzer, *Apolda Journal; When Laissez-Faire Collides with Just Plain Lazy*, N.Y. TIMES, July 3, 1993, at A4.

56. Craig R. Whitney, *Western Europe's Dreams Turning to Nightmares*, N.Y. TIMES, Aug. 8, 1993, at A1.

57. *Id.*

58. *See* Kinzer, *supra* note 55, at A4.

have 1.5 children between 1990 and 1995.[59] This is almost the lowest in the world. (In Rwanda, 8.5 children are predicted. In Italy, the lowest, 1.3 are projected.) Although "a high birth rate . . . usually accompanie[s] a culturally low civilization, and a low birth rate a civilization culturally high,"[60] the cruel fact remains that it will not be long before the retirees, who now enjoy longer lives, will outnumber the productive workers and the demands of the *sozialstaat* will collide with the inexorably grinding laws of supply and demand. Chancellor Kohl himself has recently acknowledged the problem.[61]

Communist economic policy deliberately ignored market influence for the sake of full employment. Communist worker expectation bore little resemblance to market reality. Because all the means of production were under state control, quantity and quality of production were of little consequence. Production levels were set largely without regard to product suitability, desirability or demand. Workers were employed regardless of their efficiency or the overall efficiency of the enterprise. If product demand is ignored, and if state production levels are enforced without regard to product quality, worker incentive is diminished. When this is compounded by guaranteed employment, you have a prescription for institutional complacence.

While I believe the economic problems caused by reunification are the single most vexing obstacle, there are other fundamental differences between East and West suggesting that the people do not share a common *weltanschauung*, or world view. For example, in a recent international survey of religious beliefs, nineteen thousand people in twelve countries were asked whether they believed in God. Sixty-seven percent of West Germans and only twenty-six percent of East Germans said yes.[62] This can translate into practical difficulties.

In East Germany, abortion has long been available on demand. In West Germany, although the Basic Law is silent, the FCC, as early as 1975[63] and as recently as this May has held that

59. Alan Cowell, *Low Birthrate Is Becoming a Headache for Italy*, N.Y. TIMES, Aug. 28, 1993, at A1, A5 (reporting United Nations Population Fund study).

60. DURANT, *supra* note 15, at 21.

61. *Kohl Lauds Work Ethic*, N.Y. TIMES, Sept. 4, 1993, § 1, at 44.

62. *Religious Beliefs Internationally*, THE TABLET, June 5, 1993, at 2.

63. Judgment of Feb. 25, 1975, BVerfG First Sen., 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (1975).

because it is fundamentally wrongful (*Unrecht*), abortion is available only for medical or eugenic reasons or in circumstances of extreme social hardship.[64] With two such different mind-sets, it is not unlikely that Germany will eventually be wracked, as has been the United States since *Roe v. Wade*.[65]

In East Germany, divorce was available upon demand. A spouse had only to show that the union "had lost its meaning for socialism."[66] In an Orwellian twist, however, because of the lack of housing in the East, the parties usually had to continue to live together while they sought the divorce. West German law requires a year of physical separation before a divorce. Someone is going to have to give.

Child support following a divorce was routine in East Germany. Since most workers earned the same salary the judge could easily order that the support be docked from his salary and turned over to the mother. In West Germany the process of getting child support mimics the American system of catch-as-catch-can. To many *Ossi* mothers the *ancien regime* was utopian "with full employment, equal wages and no possibility of leaving the country[,] [d]addy couldn't lose his job and he couldn't run away. And Big Brother made sure that he paid it."[67]

If order is to be restored, a new balance must be struck; a new objective order must be conceived. If the FCC is to meet these challenges, it must respond to them through each of its jurisdictional channels.

Initially, it must restrain the conservative will of the majority when challenged in *Organstreit* and abstract judicial review cases. On the other hand, as the political voice of the minority grows and challenges majority legislation, the minority will have to be reigned in. More prosperous *Länder* can be expected to challenge their mushrooming obligations to the poorer *Länder* in the equal distribution scheme. And private citizens will doubtless challenge more federal and state laws through the constitutional complaint procedure.

That the FCC will prove equal to this occasion is evident

64. Judgment of May 28, 1993 (2 BvF 2/90, 2 BvF 4/92, 2 BvF BvF 5/92), BVerfG Second Sen. (unpublished slip opinion) (unofficial translation on file with *Fordham International Law Journal*).

65. Roe v. Wade, 410 U.S. 113 (1973).

66. Irwin, *supra* note 16, at 60.

67. *Id.*

from how it handled Germany's recent amendment to the asylum provision of the Basic Law.[68] Responding to the certain constitutional challenge, the FCC held that the unlimited right to remain in Germany during years of immigration appeal impermissibly interfered with Germans' right to self-determination. The limiting amendment was therefore constitutional in light of the objectives of the Basic Law as a whole.

In thus restricting immigration, the FCC decision reflects the conservative alarm. At the same time, however, the FCC has affirmatively acted to ensure that review procedures are safeguarded. The FCC has found a palatable middle ground. While conservatives have argued that the new policies are not strict enough, liberals have argued that the amendment has infringed too greatly on a fundamental provision of the Basic Law. That the decisions have been attacked by both camps is probably a portent that the FCC found the *via media.*

The FCC has also displayed its jurisprudential maturity in the handling of the constitutional challenge to Germany's ratification of the Treaty on European Union, popularly known as the Maastricht Treaty. Not surprisingly, the genuine European unity envisioned by the European Community ("EC"), carries in its wake a diminution of German sovereignty, just as the creation of the United States diluted the sovereignty of the individual states two hundred years ago in our country.

When the inevitable constitutional challenge to the German government's ratification of the Maastricht Treaty was mounted, the FCC was able to strike a balance between encouraging greater European unity while still safeguarding German individual rights.[69] Happily, the Basic Law specifically provides for the cession of federal power to a supranational authority like the EC.[70] The FCC, therefore, was once again able to find a middle

68. GRUNDGESETZ [Constitution] [GG] art. 16(a) (amending art. 16, effective July 1, 1993). The amendment and accompanying legislation essentially create a presumption against the existence of political persecution of Eastern European immigrants seeking to enter Germany.

69. *See* Judgment of Oct. 12, 1993 (2BvR 2134/92, 2 BvR 2159/92), BVerfG Second Sen. (unpublished slip opinion) (unofficial translation on file with the *Fordham International Law Journal*).

70. *See* GRUNDGESETZ [Constitution] [GG] art. 24(1). Although this provision of the Basic Law was enacted to address the cession of sovereign authority required for West Germany to join both the United Nations and the North Atlantic Treaty Organization,

ground to reconcile the demands of both the Basic Law[71] and the Maastricht Treaty.[72] The FCC upheld the government's ratification of the Treaty, but specifically tied progress toward European unity to the increased democratic legitimation of the EC legislative processes, each envisioned by the Maastricht Treaty. The FCC solution approaches the Solomonic.

CONCLUSION

The FCC faces its greatest challenge since its establishment. German unification presents a serious and unanticipated threat to the political and social order under which West Germany has thrived. With the former East Germans and Eastern Europeans comes a set of expectations based on what we would regard as distorted notions of a social welfare state. The existence of a significant and growing number of people who envision a different balance between the right to social welfare and economic liberty upsets the delicate balance of the objective constitutional order maintained by the FCC.

If the new, larger Germany is to take its rightful place in the world community, the FCC, as the only organ competent to define and adjust the objective order of the Basic Law, must accommodate the rapidly changing economic, political and social implications of the influx. It must also respond to the increasingly conservative direction of what was — until recently — the settled order of West Germany. In short, the objective order conceived in 1949 by the Basic Law and thereafter articulated by the FCC, must reflect a new reality that now bears little resemblance to the reality of the FCC's first four decades.

I can think of no more suitable peroration than to repeat Jhering's plea for *rechtsgefühl.* Though written a century ago it has particular resonance in this Age of Unification:

> For the state which desires to be respected abroad, and to be firm and unshaken internally, there is no more precious good which it has to guard and foster than the national feeling of legal right. The fostering of it is one of the highest and

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it has been interpreted more broadly to include the greater cession of sovereignty necessary for Germany's inclusion in the European Community.

71. The FCC reads article 20(1) of the Basic Law in conjunction with article 79(3), declaring the democratic basis of Germany to be inviolable.

72. Treaty on European Union, [1992] 1 C.M.L.R. 719, *reprinted in* 31 I.L.M. 247 (1992).

most important duties of political pedagogy. In the healthy, vigorous feeling of legal right of the individual, the state possesses the most fruitful source of its own strength, the surest guaranty, from within and from without, of its own existence. The feeling of legal right is the root of the whole tree.[73]

73. JHERING, *supra* note 8, at 103.