A Study of the 1968 Emergency Legislation of the Federal Republic of Germany

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A STUDY OF THE 1968 EMERGENCY LEGISLATION OF THE FEDERAL REPUBLIC OF GERMANY

by

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PREFACE

During May and June in 1968 the Federal Republic of Germany passed emergency laws giving the Federal Government the constitutional power to act in a severe crisis. Prior to this time such authority resided with the three Allied Powers. Based on the Paris Treaty of 1954 the United States, France and Great Britain maintained the residual right to determine and act in an emergency in West Germany. These residual rights were to remain in effect until the Bonn Republic passed legislation which would give the Federal Government the power to act in an emergency and consequently complete sovereignty.

It took the political leaders in Bonn ten years and several drafts to hammer out emergency legislation acceptable to the parties in Parliament. No other legislation passed by the Bonn Republic since its origin has received greater opposition. The Social Democratic Party at first assailed the laws as being much too stringent on civil rights and containing insufficient safeguards. The national labor unions opposed the laws because they infringed on their right to strike. The students and intellectuals claimed that such laws would cause a return to authoritarianism and a demise of democracy in West Germany. In general, to most people the laws were reminiscent of Article 48 of the Weimar Republic. Article 48 was ultimately

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used by Hitler to make himself the proclaimed dictator of the Third Reich.

This paper addresses itself to two main issues. First, there was the argument made by many individuals that it was not good or even safe to allow the Germans again to have emergency powers. There still remained the fear that emergency powers would be abused and possibly used to establish authoritarian rule in West Germany as occurred in Weimar. Secondly, provided that West Germany was to have emergency powers, there was the concern for developing emergency legislation with safeguards and limitations so to prevent the use of such powers to destroy democracy in West Germany. Therefore, it is the purpose of this paper to analyze theoretically Bonn's emergency legislation and thereby demonstrate that it meets the standards used for evaluating such provisions. These standards are drawn from the Ancient Roman experience with constitutional dictatorship and part of the standards suggested by Clinton Rossiter in his classic work Constitutional Dictatorship. It is the basic assumption of this paper that even perfectly constructed emergency laws in countries with weak democratic systems of government can be abused or violated. The second purpose of this thesis is to examine the political, social and economic environment of the Bonn Republic. We hope to demonstrate that Bonn's environment is not conducive to the abuse of emergency powers as was the environment of the Weimar
Republic.

My approach in accomplishing the task of this paper is to divide the thesis into five chapters. The first chapter serves to establish the theoretical context of the paper. In it we review the major points of the theory of emergency powers along with a section listing the standards for measuring emergency powers. Chapter two is devoted to a historical review of Weimar's experience with emergency powers and a brief analysis of Article 48. This is an important part in developing the thesis inasmuch as an overwhelming amount of opposition to Bonn's emergency legislation was caused by a reminiscence of Article 48. In this chapter it is shown how Article 48 was used successfully and ultimately abused, thereby causing the demise of democracy in Weimar. The third chapter covers the period 1958 to 1968. It is used to review chronologically the development of the politics of obtaining passage of the laws with a concluding section summarizing Bonn's emergency legislation. The fourth chapter is an examination of the social, political and economic environment of West Germany. After reviewing in chapter two the disaster wrought by Article 48 it is necessary to demonstrate that Bonn's environment is quite different and more stable than Weimar's. The last chapter of the paper is an evaluation of the emergency legislation based upon a comparison of their safeguards with those listed in chapter one. In this chapter it is concluded that the...
legislation does in fact meet all the requirements established in the standards selected for evaluation. Last of all we address ourselves to the argument which claims Germany should not be allowed emergency powers because such powers might be ultimately abused as they were in Weimar. Our conclusion is that this is a very weak argument because, as it is demonstrated in chapter four, Bonn's environment is much too different from Weimar's to draw any direct parallels with it. Therefore, our conclusion is that Bonn's emergency legislation is a well constructed law and poses no threat to democracy in the Federal Republic of West Germany.
CHAPTER I

THE THEORY OF EMERGENCY POWERS

A problem facing all modern constitutional systems today is the proper amount of additional power to be granted governmental officials during temporary periods of crisis. In the twentieth century the demand for heavy concentration of power in the hands of the executive for the purpose of overcoming emergencies is very great. Modern constitutional systems are confronted with possible wars, internal disorders, class conflicts and natural and economic disaster. Consequently, constitutional emergency powers become an important part of the legal structure of the state. Hence, the purpose of this chapter is to discuss the theory surrounding emergency powers.

The Nature of Constitutional Dictatorship

Nations at times will be confronted with crisis when constitutionalismand can no longer be tolerated as a basis for governing but will have to turn to a temporary authoritative system in order to survive a crisis. The use of emergency power in a constitutional system of government means temporary dictatorship. Dictatorship means absolute authority. This is a situation where those in position of leadership govern without any or very few restraints upon the
exercise of their power. Constitutionalism, on the other hand, means limited authority or restraint upon those who are governing. Thus the term constitutional dictatorship presents a paradox: it appears to be antithetical. Constitutionalism means restraint and dictatorship means absolutism or no restraints. However, within the context of democracy or republicanism "constitutional dictatorship" refers to a situation where a person or a group is given near absolute authority within given legal limits.

In the real world there is no such thing as perfect absolutism or perfect constitutionalism. No society has ever gone so far as to formalize its political conduct to make its leaders purely and simply living mouthpieces. The same is true with absolutism. No government has ever been so nearly absolute that it could afford to pay no attention whatsoever to established legal principles or political culture.

There is no pure form of constitutionalism in reality, but a government can to a certain extent be constitutional. The more constitutional it is, the more legal restraints there will be upon its leaders. Legal restraints at some time are bound to stand in the way of effective political action. On the other hand, absolutism means less restraint which will allow for greater efficiency in governing. Thus, it is clear then that absolutism will always tend
to be more efficient than constitutionalism.\textsuperscript{1}

However, this point should not be exaggerated. The advantage of absolutism lies in its lack of legal restraint, but the law is not the most important obstacle to effective political action. For example, Watkins says, "But the fact is that many a South American despot with all his freedom from legal restraints, would give his right arm for the effective power possessed by a president of the United States."\textsuperscript{2}

The advantage of freedom from legal restraints are a good deal more obvious over a short period of time than a long period of time. This is true because over a long period of time there is the danger of bureaucratic stagnation and corruption, all of which are characteristic of absolute regimes where public criticism is restricted. The dangers in replacing a constitutional form of government with a temporary absolute form are well known. But on the other hand, it is true that the removal of constitutional restraints will tend to increase the effectiveness of government during a severe crisis.

It is a mistake to suppose that all threats to a society are equally lasting in character. In fact, some of the most serious


\textsuperscript{2}ibid.
crisis are among the short-lived. The most obvious threats to the life of a nation are foreign invasion and civil insurrection. Natural disaster and severe economic disruption may also bring a society to the brink of destruction. Therefore, a nation must make plans to reckon with temporary emergencies as well as for lasting stringencies of political life.

It is the purpose of a temporary absolute form of government to protect established institutions from the danger of permanent injury in a period of temporary emergency. It is therefore conceivable that the result will be to increase rather than decrease the effective span of constitutional government.

Rossiter, in his classic work of 1948, *Constitutional Dictatorship*, gives three reasons for employing a constitutional dictatorship in defending a constitutional form of government. First, he argues that a complex system of democratic government is essentially constructed to function under normal and peaceful conditions and is often unequal to the exigencies of a great national crisis. A constitutional government is government by debate and compromise. It creates an environment in which exist civil liberties and a free enterprise system. These are luxuries which can only be enjoyed during normal times of peace. Other analysts agree with this

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viewpoint. For example, Rappard said, "Democracy is a child of peace and cannot live apart from its mother."\(^1\) Writing in the *Iowa Law Review* Ruthledge said, "War is not and cannot be democratic."\(^2\)

Rossiter's second argument is that during a time of crisis the government must be altered to whatever degree is necessary to meet the peril and restore normal conditions. During periods of crisis the government will gain more power and the people's rights will diminish. In support of this argument Rossiter wrote:

> Wars are not won by debating societies, rebellions are not suppressed by judicial injunctions, the reemployment of twelve million jobless citizens will not be effected through a scrupulous regard for the tenets of free enterprise, and hardship caused by the eruptions of nature cannot be mitigated by letting nature take its course.\(^3\)

Thus the alteration in the form of government should be in terms of a legal constitutional dictatorship.

We can find support for Rossiter's second argument in the works

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of Machiavelli, in Book I of his Discourses, where he wrote, "I claim that republics which, when in imminent danger, have recourse neither to a dictatorship, nor to some form of authority analogous to it, will always be ruined when grave misfortune befalls them."\(^1\)

We also find support for Rossiter's second argument in the works of Rousseau. When nations are confronted with a severe crisis Rousseau said, "In such a case there is no doubt about the general will, and it is clear that the people's first intention is that the state shall not perish."\(^2\) This may be interpreted to mean that a nation can take all necessary measures to protect its existence even if it means the use of temporary dictatorship.

Rossiter's third argument is this: a government which at times may become an outright dictatorship, can become so only for the purpose of preserving the independence of the state, and to defend the political and social liberties of the people. The primary function then is to end the crisis and restore the normal system. And if all action taken is to that end, it extends no further in time than the attainment of that goal, makes no alterations of the political social and economic structure of the nation which cannot be


eradicated when conditions return to normal. In effect, the dictatorship is self-destructing. When the crisis comes to an end the constitutional dictatorship automatically ceases to exist.¹

It would be well for us at this point to state the distinct ways of identifying constitutional dictatorship from other various forms of absolutism. Watkins suggests three basic criteria for this purpose.² First, a constitutional dictatorship will be just sufficiently absolute to safeguard the interest of an established constitutional order. Secondly, it is to continue in existence only so long as those interests are actually in danger. Third, the constitutional dictatorship will be followed by a return to the previous constitutional system.

Watkins goes on to say that legitimate doubt can be raised as to the practicability of living up to such conditions. To maintain constitutional restraints during normal times is difficult enough. This is especially so, if after an interlude of more or less absolute government the political system is to return to its previous political condition. Watkins said that "men have the natural tendency to seek power in proportion to their own particular resources of energy and ability."³ If this tendency is to be checked and maintained within constitutional limits a powerful restraining force will be necessary.

¹Rossiter, op. cit., p. 8.
²Watkins, op. cit., p. 329.
³ibid.
Under favorable conditions the force of law may be great enough to attain the desired results. When the prestige of constitutional principles are held so high that any violation of them causes severe opposition from the strongest element in a society the ambitious desire for absolute power may be thwarted. This of course depends on conditions where constitutional laws become habit through constant repetition of particular patterns of conduct.

Habits, insofar as they are based on repetition, will have a tendency to break down through disuse. And a temporary employment of absolutism will effect some change on the constitutional order it temporarily replaces. Thus, the changes brought about by temporary dictatorship are dangerous and may in some measure weaken the force of established institutions. This possibility, however, does not mean that the principle should be abandoned altogether. The automobile has taken the lives of many citizens. But because we cannot make the automobile perfectly safe we do not discard it and walk. In fact we consider the automobile necessary to maintain our way of life. In the case of constitutional dictatorship this same analogy should prevail. It presents a danger, yet the use of it at the proper time may be the salvation of the constitutional way of life.

\[^{1}\text{loc. cit., p. 330.}\]
When nations make no constitutional provisions for emergency powers, the lack of legal authority is filled by the doctrine of the law of necessity. This is the only acceptable rationalization of extra-constitutional emergency action. In the history of every free state executives have been faced with grave crisis in which no constitutional emergency powers were provided for. President Lincoln acted outside of constitutional bounds in order that the Union could be saved. Some of the things Lincoln did were prohibited by the constitution but he considered it necessary in order to preserve the Union.

Every man thinks he has a right to live and every government thinks it has the right to live. Every man when driven to the wall by a murderous assailant will override all laws to protect himself, and this is called the great right of self-defense. So every government, when driven to the wall by a rebellion, will trample down a constitution before it will allow itself to be destroyed. This may not be constitutional law, but it is fact.

The law of necessity may be a valid method of meeting emergencies as long as the majority of people stand behind the executive. However, it was just as easy for Hitler to shout necessity as it was for Lincoln. Therefore, in defense of constitutionalism it is better

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1 Rossiter, op. cit., p. 11.

that provisions be stipulated as to how emergencies will be dealt with.

**Legislative and Executive Emergency Powers**

In a constitutional system it is always the executive branch of government which possesses and wields the extraordinary powers during periods of severe crisis. Therefore the distinction between legislative and executive powers in an emergency may be questionable. However, under modern conditions, where a complex industrial society conducts itself under complex statutes, emergencies are likely to require constitutional authority for emergency statutory change as well as for administrative action. Because the legislative branch is often called on to delegate extraordinary powers to the executive branch and the executive has wide discretion in exercising its powers, it is necessary to discuss these types separately.

**Legislative:** Most modern constitutions are silent on the subject of legislative emergency powers.\(^1\) Nevertheless, the need for planning for emergency contingencies is paramount. It is politically naive in today's world when one crisis follows another that all emergency action be left to the discretion of the executive. In the past however, this was the case. For example, President

Lincoln found himself without an adequate army at the start of the Civil War because Congress was not in session at the time to authorize a build up of the army. So Lincoln proceeded by measures not authorized by either the constitution or Congress to achieve this apparently necessary objective. After this action Congress did authorize what he had done and passed an act of indemnity.\(^1\) So long as the majority correctly interprets this type of action as being done in the defense of constitutionalism, this method works. However, we should be quick to point out that all breaches of the law are destructive to the general belief in law upon which constitutionalism rests.

The President of the United States has emergency power because according to the U. S. Constitution he is commander in chief of the army, the navy and the national guard when called into service. Along with the power granted in the constitution, the delegation of powers from the legislature can make the president a near dictator. In fact, this was the case during the Civil War and the two World Wars.\(^2\)

During World War II both the British and United States legislative bodies enacted emergency powers which were delegated to the executive. In Britain, the parliament enacted the Defense Act which

\(^1\)ibid.

\(^2\)Friedrich, loc. cit., p. 564.
gave extensive power to the King in Council. Under it the King in Council was "to make such regulations as appear to him to be necessary or expedient for securing the public safety, the defense of the Realm, the maintenance of public order, and the efficient prosecution of any war in which His Majesty may be engaged."\(^1\)

In the United States similar powers were granted to the president in the form of such acts as the Lever Act, Selective Service Act, Espionage Act, Priority Shipment Act, Trading with the Enemy Act, Overman Act, and others.\(^2\)

Following the Second World War legislative emergency powers continued to increase. An excellent case in point is the United States. For example, in 1950 the legislature passed the Federal Civil Defense Act which gave the president extensive powers in this area. In 1961 an administrative reorganization took place in which the powers of this act were greatly increased.\(^3\) However, the provisions of this act cannot be used unless the president or by concurrent resolution of the congress finds, that an attack upon the U.S. has occurred or is anticipated and that the national safety is in jeopardy. During a civil defense emergency the president may acquire necessary

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\(^1\)ibid.

\(^2\)ibid.

materials and facilities, assume obligations on behalf of the United States, provide financial assistance to the states and direct all relief activities. These powers may be exercised without regard to the limitations of any existing laws.

Another legislative statute which allows the president emergency power is the Taft-Hartly Labor Management Relations Act of 1947. The emergency provisions of this act gives the president the power to break an actual or threatened strike or lockout and proclaim a cooling off period in which labor and management resume negotiations. The president may so act only if in his opinion an actual or threatened strike or lockout would imperil the national health or safety. ¹

The examples given above are sufficient to make the point clear that legislative bodies are often called on to provide executives with specific emergency powers. ²

Executive: Basically and ordinarily the use of emergency power applies to executive action. The implementation of the most stringent use of constitutional dictatorship is through the use of martial rule. It is most precisely defined as an extension of military

¹loc. cit., p. 102.

²See Chapter III below for examples of other countries that have recently passed emergency legislation.
government to the civilian population; that is, the will of the people's elected government is substituted by the will of a military commander.\(^1\) Martial rule consists of two major types, martial law, as it is known in the common law countries of the British Commonwealth and the United States, and the state of siege, as it is known in the civil law countries of continental Europe and Latin America.\(^2\)

Martial rule can only be understood in terms of the rule of law which it replaces. The rule of law is taken to be the core of the legal system, because it alone guarantees a certain amount of stability in legal relationships. Hence an emergency is proclaimed when the continued maintenance of the rule of law is threatened. Under threatening conditions the courts are closed and no longer perform their function. This does not mean to say that the judiciary has no jurisdiction over martial rule. In fact it is the judiciary that will ultimately determine whether or not the actions taken by executive organs are necessary.\(^3\) On the other hand, there are no limits placed on the authorities except that afterwards they must convince the courts of the necessity of their action. It is customary

\(^1\)Rossiter, op. cit., p. 9.

\(^2\)ibid.

\(^3\)It is understood that a case must first be brought to the courts before a ruling can be made.
for the executive to declare martial law before initiating extra-
ordinary measures, but the declaring of martial law does not pre-
suppose any definite consequences. It may be used just as a threat.
It may be a pre-warning of the most extreme measures, violating
all the constitutional limits that are normally placed on governmental
powers. Whatever measures are taken they must only be sufficient
to remove the threat that is facing the rule of law.

A good illustration of martial rule and the check of the courts
on its use was in Hawaii following the Japanese attack on Pearl
Harbor on December 7, 1941.¹ Martial rule was imposed on the
entire population in Hawaii from December 7, 1941 until October 24,
1944.² During this period of time two individuals were prosecuted
under martial law and sentenced to jail. Both prisoners brought
habeas corpus proceedings to test the validity of their convictions.
Their cases eventually reached the U.S. Supreme Court in which
the court ruled in their favor.³ The court ruled that martial rule
might have been proper at the time of the Pearl Harbor disaster
but its continued use and drastic application was a violation of the

²Ibid.
Hawaiian Organic Act and of constitutionally protected liberties. ¹

The second major type of martial rule is the state of siege which is somewhat different than martial rule. During a state of siege a specific declaration is made by the head of state, by the legislature or by both. This is required by law, or even by the constitution. A state of siege is defined in terms of individual rights which are withheld, particularly the right to be tried in an ordinary court, the right of free speech, and the right of free assembly. ² It is at this point where we see a clear distinction between the common law and civil law concept of martial rule. In civil law countries the legislature or the executive, or both, have the final word as to whether an emergency situation has arisen, whereas in the common law countries the court has this function. ³ From a political point of view this means that a political body has the ultimate authority in European continental jurisdiction, whereas in the Anglo-American type it is a judicial authority, which attempts to be nonpartisan, that has the final word. Friedrich has written that, "continental countries seem to see the emergency in an effective threat against public safety and

³ibid.
order, whereas in common law countries emphasis is placed upon
the suspension of the rule of law. In practice the two types of
martial rule may be the same. But the concept of public safety and
order focuses its attention on the political system or the state,
whereas the rule of law is preoccupied with the safety of the private
individual. Nonetheless, both approaches are similar in that their
primary concern is the defense of the constitutional order of
government.

For a recent example of executive employment of exceptional
powers we refer to President De Gaulle's use of Article 16 of the
current French Constitution. In 1961 the French government was
faced with a very grave situation—the "general's revolt" in Algeria. In
announcing a state of emergency President De Gaulle said, "In
the light of the misfortune which hangs over the fatherland, and the
threat which weighs on the Republic,... I have decided to put into
force Article 16 of the constitution." According to the powers of
Article 16 the president may:

When the institutions of the Republic, the independence of the nation, the integrity of its territory or the

1 ibid.

2 Martin, Harrison, "The French Experience of Exceptional

3 loc. cit., p. 139.
fulfillment of its international commitments are threatened in a grave and immediate manner and when the regular functioning of the constitutional government authorities is interrupted, the President of the Republic shall take the measures commanded by these circumstances, after official consultation with the Premier, the President of the assemblies and the Constitutional Council.

He shall inform the nation of these measures in a message.

These measures must be prompted by the desire to ensure to the constitutional governmental authorities, in the shortest possible time, the means of fulfilling their assigned functions. The constitutional Council shall be consulted with regard to such measures.

Parliament shall meet by right.

The National Assembly may not be dissolved during the exercise of emergency powers (by the President). ¹

In view of the fact that one minister was held captive by the insurgents, part of the army had rebelled in Algeria and Paris was expecting an invasion of paratroops, it could be said that the republic was threatened and that the regular functioning of government had been interrupted. Thus, President De Gaulle declared a state of emergency and assumed dictatorial powers.

Except for the conditions and limitations found in Article 16 the determination of an emergency is vested in the French president. The requirement that the president consult with other officials does not mean that he must accept their advice. Nor does the requirement

that parliament automatically meet and continue without dissolution throughout the emergency mean that it has constitutional power during that period, except, one presumes the power of impeachment could be applied in extreme cases.¹

Two important questions were raised concerning De Gaulle's use of exceptional powers. The first one concerns the length of time he retained the emergency powers. De Gaulle held the powers from April to September that year. The Algerian Coup failed in April, and many jurists were of the opinion that governmental functions had returned to normal long before September and therefore De Gaulle should have relinquished his emergency powers much sooner than he did. Secondly, during the period of crisis De Gaulle forbade the parliament to vote a motion of censure or to legislate. After the crisis had passed and the emergency powers were relinquished the Conseil d'Etat and the Constitutional Council ruled themselves incompetent to make a ruling on these two issues.²

By discussing legislative and executive emergency powers separately we see that the legislative branch has an important function even though the distinction between them seems to disappear when it comes to the actual exercise of emergency powers. This important

¹Friedrich, op. cit., p. 566.
²ibid.
function is the passing of emergency legislation which actually sets the guidelines under which executives must act during periods of crisis. We have noted that since World War II legislatures have increased their authority by passing laws which concern the use of emergency powers. The executives are the center of attention during emergencies but legislatures also share the responsibility because of their role in delegating powers.

Standards for Measuring Emergency Powers

The standards to be found in this section, which will be used later to analyze Bonn's emergency powers, are taken from two sources. First, four standards will be drawn from the ancient Roman experience of constitutional dictatorship. The Romans were the first ones to institute and successfully use a constitutional dictatorship in defense of constitutionalism. We cannot use the Roman experience as a working model for modern times because the political, social and economic conditions of this century are far different from those of twenty-four centuries ago. But as Rossiter said, the Roman dictatorship is invaluable because it can be used as a theoretical standard, as a sort of moral yardstick against modern institutions of constitutional dictatorship.\(^\text{1}\) Moreover, Rossiter is of the opinion that the

\(^{1}\)Rossiter, op. cit., p. 15.
political genius of the Roman people solved the difficult problem of emergency power like no other people in all of history. For these reasons we will briefly survey the celebrated Roman dictatorship. Secondly, we will use some of the standards suggested by Rossiter in his book, Constitutional Dictatorship.

The Roman Experience: The first Roman dictator was appointed sometime around 500 B.C., very early in the Roman Republic. The office of dictatorship was not a change in the Republic's constitutional order but rather a supplement to it. The dictatorship was actually a rebirth of monarchical principles from a previous Roman constitution.

The Romans had a very rigid constitutional system which held authority in the most narrow possible limits. Consequently Roman constitutionalism was very susceptible to the impact of temporary emergencies. This vulnerability to crisis resulted in the creation of a temporary dictatorship rigorously limited in time and purpose.

The appointment of dictator was the highest honor the government could bestow upon one of its citizens. The authority to appoint a single dictator was vested in the Roman senate. Whenever things seem to be getting too difficult for the regular officials, the senate would advise the appointment of a dictator. Acting on this advice,
the consul\textsuperscript{1} to whom the order was given would proceed to appoint
some appropriate person, usually an elder statesman of consular
rank. The nomination would then be submitted for confirmation to
the centuriate assembly.

Upon appointment of a dictator the regular officials were auto-
matically relegated to a subordinate position, and all executive
functions were concentrated in the hand of a single man. The
appointed dictator would then actually set up a monarchial authority
within the framework of the Republic. Freed from the limitations
of the ordinary magistrates, responsible to no one for his actions,
he possessed all the powers necessary which might contribute to
the successful attainment of his assignment. The dictator was a
constitutional magistrate unique in that he could take any measure
he felt necessary to preserve the constitution which gave him that
authority.

There were certain limits on the dictator which kept him from
being absolute in the pure sense. He could not withdraw funds from
the public treasury without the consent of the senate, nor was he
given legislative powers nor could he be concerned with civil
jurisdiction. One very important formal limitation that distinguished

\textsuperscript{1}Abbott, Frank F., \textit{Roman Political Institutions}, (Boston:
Harvard University Press, 1910), Chapter 9 gives a description of
the duties and authority of the consul.
the Roman dictator from unconstitutional dictatorships was the six-month term of office. Furthermore, the dictator was constitutionally bound to abdicate his office immediately after his business had been successfully terminated. The failure to relinquish his office could result in prosecution on the charge of having illegally prolonged his tenure of office. Other constitutional limits stated that there could be but one dictatorship a year and no dictator could remain in office beyond the term of the magistrates who had named him, nor could one dictator appoint another dictator. All of these limitations are convincing evidence of the constitutional character of the Roman dictatorship.

The Roman dictatorship was primarily a military office, instituted to save the state from foreign or rebellious arms. The dictator's command did extend to a certain segment of Roman civil life. He could call any of the assemblies into session and preside over them including the senate. His judicial powers extended to all criminal cases affecting the safety of the state.

During the period of the Roman Republic 88 dictators were appointed. About the second century B.C. the office of constitutional dictator fell into oblivion. After this period of time there

1 The limit was set at six months because wars were only fought during the summer months.
were dictators, not constitutional dictators, but dictators by title only. Examples of this can be seen in the dictatorships of Sulla and Caesar.\footnote{Rossiter, op. cit., p. 16.} They were dictators in today's accepted sense of the word. They had all powers and no restraints and were without any externally imposed limit of time to their office.

A number of reasons are suggested why the office of dictatorship fell from prominence. At the close of the civil wars in 287 B.C. and the withdrawal of Hannibal to Africa in 203 B.C., the last threat of foreign invasion of Rome or even against Italy had vanished. Thus the office had outlived its usefulness. Furthermore, Rome was now embarking on wars of aggression which had nothing to do with the maintenance of a republican constitution in a free state.\footnote{loc. cit., p. 27.} Moreover, the Roman senate had risen to a position of absolute power and its main concern was the maintenance of this dominance and not the continuance of the constitutional order of government.\footnote{Watkins, op. cit., p. 337.}

It is interesting to note and quite paradoxical that the Republic and the dictatorship reached the peak of their development side by side and that the Republic was matched in time and degree by the
decline of the dictatorship.\(^1\)

The argument has been made that Rome became a totalitarian state through the institution of dictatorship. Machiavelli, a great admirer of the Roman Republic emphatically refutes this argument. He wrote:

> The case, however, was not well examined by the person who held this view, and the view has been accepted without good ground. For it was neither the name nor the rank of the dictator that made Rome servile, but the loss of authority of which the citizens were deprived by the length of his rule. If in Rome there had been no such rank, the dictator would have found some other; for it is easy for force to acquire a title, but not for a title to acquire force.

> It is clear that the dictatorship, so long as it was bestowed in accordance with public institutions, and not assumed by the dictator on his own authority, was always of benefit to the state. For it is magistrates that are made and authority that is given in irregular ways that is prejudicial to a republic, not that which is given in the ordinary way, as is clear from the fact that during a very long period in Rome's history, no dictator ever did anything but good to that republic.\(^2\)

The four standards which can be drawn from the Roman experience of constitutional dictatorship are as follows; that the appointment of the dictator takes place according to precise constitutional form; that the dictatorship be instituted by others than the dictator

\(^1\)Rossiter, op. cit., p. 27.

\(^2\)The Discourses of Niccolo Machiavelli, op. cit., p. 289.
himself; that a strict time limit be fixed; and that a dictatorship is always instituted in defense of the existing constitutional order, never with a view to destroying it.

Criteria Suggested by Rossiter: On the basis of his detailed study of constitutional dictatorship Rossiter suggests eleven criteria by which to measure constitutional dictatorship. Four of Rossiter's standards are analogous to the four taken from the Roman experience and three others are to be used only for evaluating constitutional systems that have experienced severe crisis where emergency powers had been used. The four remaining standards are pertinent to the study of this paper. Quoting from Rossiter they are as follows:

(1) The dictatorship should be carried on by persons representative of every part of the citizenry interested in the defense of the existing constitutional order.

(2) Ultimate responsibility should be maintained for every action taken under a constitutional dictatorship.

(3) The decision to terminate a constitutional

1 The three standards not used are: that no constitutional dictatorship should be initiated unless it is necessary or even indispensable to preserve the state and its constitutional order; that no constitutional dictatorship be adopted, no right invaded, no normal procedure altered any more than is necessary to end a particular crisis; and that measures adopted in employing a constitutional dictatorship should never be permanent in character or effect.

dictatorship, like the decision to institute one, should never be in the hands of the man or men who constitute the dictator.

(4) The termination of the crisis must be followed by as complete a return as possible to the political and governmental conditions existing prior to the initiation of the constitutional dictatorship.

At the time Rossiter suggested his eleven criteria for measuring and analyzing a constitutional dictatorship he wrote;

No institution of constitutional dictatorship will ever conform perfectly to all of these prescriptions, but the complete disregard of any one of them is also a disregard of the theory of constitutional emergency powers and the fundamental principles of democracy. A free people should certainly be educated and encouraged to demand that the use of emergency powers in their defense conform to these standards.

The eight standards selected adequately serve the purpose for evaluating Bonn's emergency legislation. The successful use of constitutional dictatorship by the ancient Romans provides an excellent example and theoretical standards for evaluating modern institutions of constitutional dictatorship. And as Rossiter said, a complete disregard for standards used in measuring and analyzing a constitutional dictatorship is a disregard of the fundamental principles of democracy.

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1loc. cit., p. 298.
Modern Inadequacies Of Constitutional Dictatorship

An important question within the context of this paper is, how do modern constitutions meet the standards for evaluating emergency powers. Friedrich provides us with such a discussion using the four standards drawn from the Roman experience.

Friedrich is of the opinion that modern constitutional limitations are inadequate. As to the first criterion, that the dictatorship be instituted in precise constitutional form, modern constitutional emergency powers do not quite meet the standard. To cite some examples, in England where martial rule is applied, it is determined at the discretion of a cabinet supported by a legally and constitutionally unlimited majority in the House of Commons. But appointing or defining who the dictator will be left quite ambiguous. In the United States, no constitutional provision is made for naming a distinct dictator. The United States, however, measures up to the first criterion with the precise constitutional provision concerning the appointment of a dictator as it is clearly laid out in Article I Section 8; "Congress shall have power... to provide for calling forth the militia to execute laws of the Union, suppress Insurrections, and repel Invasions." This provision names Congress as being the

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1 This section is basically adapted from Friedrich, op. cit., pp. 566-571.
dictator when in reality this responsibility is delegated to the executive. This is only understood and not so stated, therefore, this provision omits naming a distinct dictator.

In England and the United States constitutional emergency powers seem to square with the second criterion, which states that the dictator himself must not be vested with discretionary powers for declaring or calling of the state of emergency. Constitutionally the English Parliament and the United States Congress are designated as the constitutional dictator. However, these emergency powers are delegated to their respective executives. Thus the act of delegating emergency powers to their respective executives is in a sense naming the dictator. Theoretically then, they meet the second criterion because they do indeed appoint someone else to exercise these extraordinary powers.

These legislatures, the English always, the American most of the time, are led by the executive leaders whom their majorities support. As a result, the distinction between the executive and the legislature is not very great. Therefore the executive's position as party leader tends to weaken the constitutional restraints. When effective control of both the executive and the legislature rest with a single party, or with a more or less unified coalition of parties, the possibility of using one to check the other is largely diminished. To carry this logically one step further,
constitutional emergency powers, are capable of developing into a powerful party weapon. Addressing himself to this problem Watkins wrote:

Under the stress of electoral competition, common party interest are often to be served by depriving citizens of their constitutional rights to freedom of speech and of the press. There is also a certain obvious appeal involved in any proposal for the suspension of local or judicial officials who happen to support a rival political organization. Such are the means always used by authoritarian governments in the well-explored art of "making" elections. Under the conditions of modern constitutional government there will always be a similar temptation to use emergency powers for unfairly partisan purpose... Where common party interest are at stake, therefore, it is clearly unrealistic to rely on a government-controlled majority in the legislature to exercise effective supervision over that same government in its use of emergency powers.¹

An excellent case in point of this type of abuse of emergency power was when Chancellor Adolf Hitler distorted the election results in March 1933 through the unsubstantiated claim that the Reichstag fire necessitated the outlawing of the communists and others. His supporters in the Reichstag did not, of course, question his action. Hitler's action was done under the auspices of Article 48 of the Weimar Constitution. Therefore, we must conclude that in a practical sense the modern constitutional system

¹Watkins, op. cit., p. 353.
does not fully meet the second criterion concerning the enactment of emergency powers.

The third criterion, that a limit of time be fixed in which emergency powers can be exercised, is not rigidly fulfilled by any modern constitutional order. There is an implication of some time limit in some constitutions. For example, the American President's term of office is four years, which may be said to be a time limit. Likewise, there is supposed to be an implication of such a time limit in the provisions which given the legislature the authority to check the exercise of executive power. Moreover, some constitutions and laws provide for the immediate reporting of measures taken by a dictatorial executive and for the revocation of such measures should the legislature demand it. Nevertheless, whatever the particular period of time, a constitutional fixed time limit is a vastly different thing from a legislative check which can be manipulated into an indefinite extension.

The fourth criterion for the exercise of constitutional emergency powers is that the objective be legitimate; that the action be taken to defend the constitutional order and not to destroy it. It is easy to determine on the battlefield when a victory has been won and the emergency is passed. But in social and economic crisis this determination is not made so easily. What may seem like a solution to one group may be unconstitutional to another. The most
vivid example of this today is racial problems facing the constitutional system in the United States.¹

Under emergency conditions where two groups cannot agree on the same solution, some will say that at such a point a constitutional order becomes impossible. Friedrick said, "It is undeniable that neither martial rule nor the state of siege under a parliamentary regime offers any safeguards against the abuse of power by violent partisans in a civil war situation."² He went on to say that the escape from this dilemma can be found in the arbitral position of the courts in determining the constitutional exercise of all governmental powers. Friedrick suggests that the role the United States Supreme Court played in interfering with the atrocities of the Reconstruction period is an illustration of this. A more recent example of the check on the use of emergency power can be seen in the Youngstown case³ during the Korean War, when President Truman ordered the Secretary of Commerce to seize and operate the Youngstown Company steel mills. The Presidential order was based on the premise that a threatened strike in an industry vital to defense production created a national emergency. The Supreme

¹For a full discussion of racial problems and emergency powers see section IV, Racial Equality, Rankin, op. cit., p. 188.

²Friedrich, op. cit., p. 569.

Court ruled this action to be unconstitutional.

The courts like other political institutions are subject to abuse and are likely to prove helpless in the face of a serious emergency. As a result the ultimate defense is the people's own determination to see that emergency powers be used only for the purpose of preserving the constitution. No institution can provide absolute safeguards for insuring that emergency powers be used to defend the constitutional system.

In general we can say that emergency provisions of modern constitutional systems do not conform to any exacting standards of effective limitations.

Friedrich argues that the reason for neglect of constitutional limitations "may well be that the emphasis upon legislation as the real core of government action accounts for this."¹ He goes on to say that from the time of Rossean to the present, martial rule, state of siege and constitutional emergency powers have been generally assumed to be action of executives. It has normally been considered as an extension of executive power. In the past, the legislature was considered the guardian of the constitution. It was the legislature who delegated the power to the executive, hence it was believed that the legislature could merely revoke laws it did

¹Friedrich, op. cit., p. 570.
not like. This traditional view said Friedrich, is too legalistic to be acceptable in today's world. Modern legislatures are cumbersome and incapable of meeting unusual situations. They cannot always be kept in readiness for immediate action, and crisis cannot be held back until the legislators can be assembled to act. Even when the legislators are in session they are slow to act. Moreover, during a time of temporary emergency it is conceivable that conditions may be such that absent legislators can not be assembled in order to act. As a result nations must rely on their executives. Therefore, it would be in the best interest of constitutional systems for its legislature to put limitations upon the powers of executives during periods of emergency. However, once again we must mention that it is not the institution which provides the ultimate defense but the people's desire to maintain a constitutional way of life.

From Constitutionalism to Unconstitutional Dictatorship

While the ultimate defense of constitutionalism resides with the people, there are environmental conditions which are conducive to dictatorial forces, and which the people cannot overcome. Nations such as Italy, Spain, Germany, France, Czechoslovakia, Hungary and Eastern Germany have experienced such conditions and have, in part, lost their constitutional way of life because of
Friedrich has analyzed and described the process of going from a constitutional system to an unconstitutional one. Although the process is not definitive there is a loose pattern which may give an idea of the kind of situation that is typical:

The constitutional government is weak. It lacks the support of tradition. The division of power under the constitution is faulty, resulting in too much friction or in too much power for small groups in the community. The constitution provides channels for the manifestation of mass emotions, however. Typical tools for radical democracy, such as general elections or referendum machinery (plebiscitary apparatus), are available under it. The dissatisfied groups throw their strength in this direction. They thrust forward one or more leaders who are able under the constitution to secure positions of power, and thus legitimate authority. They buttress intransigent demands for broader channels of mass emotionalism by appeals to the tenets of radical democracy. In the meantime their mass supporters carry on guerilla warfare against all opponents, thus creating a civil-war situation. The attendant disorder and the eventual anarchy stir the indifferend elements in the community into action. The tension rises. More disorder, clashes between groups of citizens, murders, burning, follow. Dictatorial methods for the maintenance of the constitutional order, indeed any order, appear inevitable. The resulting constitutional dictatorship lacks drive, because of the weakness of constitutional morale. It consequently tends to succumb to anticonstitutional elements, working either from within or from without. At the decisive point, these elements will seize the initiative, with the mass of the citizens unable to counteract such an initiative or to seize it in

\[1\] Friedrich, op. cit., p. 572.
their turn.¹

Friedrich goes on to say that the best defense against such a situation is not more radical measures for dealing with the emergency. Rather, a more important question is which side the army will take. Therefore, in defense of constitutionalism, it is important that the army is attached to and supports the constitutional system of government.

Germany was one of those nations that has gone down the transitional path of constitutionalism to an unconstitutional dictatorship. And it is generally accepted that the abuse of emergency powers authorized in Article 48 of the Weimar Constitution enhanced the dictatorial forces in the Weimar Republic. For those who were greatly opposed to the passage of emergency laws for the Bonn Republic, this presented a good argument against such powers.

¹ibid.
CHAPTER II

THE WEIMAR EXPERIENCE

The purpose of this chapter is to examine how Article 48 of the constitution contributed to the downfall of the Weimar Republic. We will briefly look at the development of Article 48, its early use, the later use and abuse of it and conclude with a brief analysis of the article.

Although it is true that Article 48 facilitated the dictatorship of Hitler the demise of the Weimar Republic cannot be told solely in terms of the use and abuse of the emergency provisions of the constitution. There are many other factors which played an important role in the short history of Germany's first republic.¹ Most of the Weimar governments were plagued with great financial, social and political problems. The period 1919-1933 was characterized by constant political party conflicts, civil unrest and high unemployment. Moreover, there was general dissatisfaction among many German

citizens and some officials with the peace treaty imposed upon them following their defeat in World War I. During the later years of the Republic the parliament very often did not function as a responsible parliamentary group because many political groups refused to participate in its proceedings or in forming governments. Another important factor, Germany was dominated by the Prussian Junker class which was monarchist at heart and willing to use emergency powers for partisan purposes. Hence the combination of many crisis and a ruling class abusing the use of emergency powers brought to an end Germany's first attempt at democracy.

Development of Article 48

Emperor William of the Hohenzollern dynasty abdicated his throne following Germany's military defeat in World War I. It was the feeling among many Germans that Germany could secure better peace terms if the emperor was no longer the ruler. The overthrow of the monarchy in Bulgaria and Austria, the proclaimed republics of Poland and Czechoslovakia gave impetus to republican sentiment in Germany. On November 7, 1918 the Socialist members of the government presented an ultimatum to the chancellor demanding that the emperor abdicate or they would withdraw from the government. On November 9, at a conference held at Spa the emperor was told that the army no longer stood behind him. Realizing that he had been

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abandoned by his ministers and the armed forces the emperor left secretly for Doorn, Holland where he spent the rest of his life in exile. On November 9, 1918 the Weimar Republic came into being. Prince Max, chancellor of Germany, turned over the reins of the government to Fritz Ebert leader of the Social Democratic Party. Ebert thereupon formed a new government of Majority Socialists and Independent Socialists. Without waiting for the convocation of a national assembly, Philipp Scheidemann, one of the leaders of the Social Democratic Party, proclaimed the formation of the German Republic.

The chaotic conditions under which the Weimar Republic was born greatly influenced the framers of the constitution. After four years of blockade and warfare the country was virtually prostrate. Thousands of soldiers came home from battle and were unemployed. Parts of the country were occupied by foreign troops. Riots and industrial strikes were a common occurrence. Certainly, it could be said that Article 48 arose "out of the necessity of the time".

On February 6, 1919, the constitutional assembly met in Weimar

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2 ibid.

to accomplish three things; the creation of a "legal" government; the making of peace, and to write a constitution. A total of 423 deputies, one for every 150,000 persons, were popularly elected (see Table 1).

**TABLE 1**

**COMPOSITION OF WEIMAR ASSEMBLY**

<table>
<thead>
<tr>
<th>Parties</th>
<th>Votes</th>
<th>Deputies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nationalist</td>
<td>3,121,500</td>
<td>44</td>
</tr>
<tr>
<td>People's Party</td>
<td>1,345,600</td>
<td>19</td>
</tr>
<tr>
<td>Centrists (including Bavaria)</td>
<td>5,980,200</td>
<td>91</td>
</tr>
<tr>
<td>Majority Socialists</td>
<td>11,509,100</td>
<td>165</td>
</tr>
<tr>
<td>Independent Socialists</td>
<td>2,317,300</td>
<td>22</td>
</tr>
<tr>
<td>Democratic Party</td>
<td>5,641,800</td>
<td>75</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>484,800</td>
<td>7</td>
</tr>
</tbody>
</table>

*a Pinson, op. cit., p. 395.

Weimar was chosen for the meeting because of its historical significance and it provided a somewhat peaceful atmosphere. There was some doubt as to the safety the assembly members could have expected

1 loc. cit., p. 395.
in Berlin. Dr. Hugo Preuss, a historian of municipal government, was commissioned to write the constitution.

Dr. Preuss and the committee were brief and to the point in framing Article 48. They wrote into Article 48 extensive powers for the chief executive in order to supplement and even supersede the ordinary legislative regulations of national concern.¹ There was little opposition from the assembly members concerning the powers found in Article 48, even though one might think there could have been. The most forceful opposition came from the Independent Socialist Party, led by Dr. Cohn. But their arguments did not prevail. The current political, social and economic conditions were enough to convince the members of the constitutional assembly that broad emergency powers were necessary if the new Republic was to withstand the violence raging around it. It was the desire of the assembly to create a strong executive and provide adequate emergency powers. Part of the answer to these two problems came in the form of Article 48:

If any state fails to perform the duties imposed upon it by the federal constitution or by federal laws, the president may hold it to the performance thereof with the aid of the armed forces.

If public safety and order in the German Reich is materially disturbed or endangered, the president may take necessary measures to restore public safety and order, intervening if necessary with the aid of the armed forces. To this end he may temporarily suspend, in whole or in part, the fundamental rights established by Articles 114 (personal liberty), 115 (inviolability of dwelling places), 117 (secrecy of postal, telegraphic and telephonic communications), 118 (freedom in the expression of opinion), 123 (freedom of assembly), 124 (freedom of association) and 153 (private property).

The president must immediately inform the Reichstag of all measures adopted by authority of the first or second paragraphs of this Article. These measures are to be revoked upon demand of the Reichstag.

In cases where delay would be dangerous the cabinet of a state government may for its own territory take provisional measures as specified in paragraph 2. These measures are to be revoked on demand of the president or of the Reichstag.

Further details will be regulated by federal law.

The discriminating reader no doubt can see the broad scope and breath of the powers written into Article 48. Paragraph one is not even concerned with an actual state of emergency. It merely says that if a state should become derelict in performing its duties under the federal constitution the president may hold it to such performances. The president may act regardless of whether or not there is a threat to public safety and order. Paragraph two is

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nearly without limitations. This paragraph allows the president a great deal of discretion when it states that he take necessary measures to restore public safety and order. To say the very least, the phrase "necessary measures" is quite vague in the extreme.

The checks on the president's emergency action were in the hands of the Reichstag and the cabinet. It was stipulated in Article 48 that the president must immediately inform the Reichstag of any action taken under this article and that this was to be withdrawn on the demand of that body. Moreover, according to Article 50 those acts had to be countersigned by a cabinet minister. These checks, however, were not sufficient to satisfy all assembly members. In the opinion of the Independent Socialist, the president's power was too much authority to reside in the hands of one person.\(^1\) It was then proposed that the powers under Article 48 should not be used unless the whole cabinet countersigned the president's orders and that the Reichstag should approve of his acts in advance. Dr. Preuss argued that such provisions, if adopted, would make the president only an ornament. He went on to say that the president's acts were bound to be democratic because they could not be

\(^1\) Heneman, op. cit., p. 47.
approved unless they were countersigned by a cabinet minister, who in turn, was responsible to the Reichstag.\(^1\) Dr. Cohn, replied by saying, that those checks were only good on paper and that in practice they were not sufficient. Dr. Cohn was primarily concerned with a situation where the future head of state would be a person who was opposed to social democracy. He said, "How will it be when a man from the German People's party or from the German Nationalist or, after fifteen years, a Hohenzollern, or earlier, a satellite of the Hohenzollerns, perhaps a general, is at the head of the Reich or the Reichswehrminister? What do you expect of such a man....?"\(^2\) Nevertheless, the majority of the delegates felt that the constitutional dictatorship was, in the words of Dr. Preuss, safely "built into the framework of the constitutional state."\(^3\) On July 31, 1919 the constitution and Article 48 as above was approved by the assembly with a vote of 262 to 75.

**Early Uses of Article 48**

Friedrich Ebert, a leader of the Social Democratic Party, was elected by the delegates as the President of the new Republic.

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\(^1\) ibid.

\(^2\) Heneman, op. cit., p. 49.

\(^3\) Rossiter, *Constitutional Dictatorship*, op. cit., p. 35.
President Ebert, armed with the constitutional emergency powers of Article 48 proceeded against the civil discord raging throughout the Republic. During the first few years of the republic Article 48 was found to be an indispensable instrument in keeping the republic afloat.

The early years of the Republic were chaotic ones. Several attempts were made to overthrow the government. Whole areas declared themselves independent of the Reich. The country experienced wild monetary inflation. To say the very least, the new republic was launched into a very hostile environment. There was little doubt that exceptional powers were needed. From 1920 to 1924 more than 130 decrees and ordinances were issued on the authority of Article 48.¹

Early in 1920 a band of ex-soldiers, led by a well-connected Junker named Wolfgang Kapp, managed by a sudden coup to take possession of the city of Berlin.² The government of the new republic, not yet firmly established, fled to the remote security of Stuttgart. The successful coup lasted only four days. Fortunately, the major part of the army remained loyal to the government as did

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¹Heneman op. cit., p. 181.
the preponderance of the bureaucracy; furthermore the workers went out on strike in protest to the coup. Consequently the coup only last four days. The immediate success of this revolt gave encouragement to forces on the extreme left and right. For the next few years the government was in constant jeopardy from the radical elements of these two groups. As a result the government often used Article 48 in quelling civil insurrection.

Most of the rebellions followed the same pattern. But of all the insurrectionary threats encountered by the Weimar Republic, the communist revolt in 1920 called for more extensive military operation than any other revolt during that year. The effectiveness of Article 48 during this revolt serves as an excellent example of its use.

The temporary success of the 1920 revolt in Berlin provided the stimulus for the Communist revolt. The Communists staged a revolt in Central Germany, the country's major industrial area. The Communists called on the workers to man the barricades, and at one time as many as 70,000 workers participated in the revolt. This rebel group, however, was no match for the highly professionalized

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2Watkins, op. cit., pp. 27-35.
military machine Germany still retained after the war. In fact, there was never any serious doubt as to the outcome of the civil war.

Article 48 was used freely and effectively during the Communist revolt. Because of Article 48, the army could proceed almost without hindrance in dealing with the rebels. The rights that these rebels had during normal times were suspended. All articles mentioned in Paragraph two of Article 48 were suspended. The rebels who were apprehended were treated as foreign enemies. Special courts were set up to prosecute the insurgents. Most newspapers located in Central Germany were prohibited from publishing. During this period, the Government took advantage of the situation by propagandizing its position. In a matter of weeks, the army was successful in putting down the rebellion. The employment of Article 48 greatly facilitated the work of the military.

Article 48 was also successfully used in maintaining a republican form of government in the states, which in turn helped to protect the life of the Republic. In 1920 the precedent was set when the state of Thuringia was in rebellion against the Republic. President Ebert appointed a commissioner to supervise the affairs
normally under the control of the state government. The commissioner was given extensive military and administrative powers for the purpose of restoring public order. His primary objective was "to install a state government that conformed in organization and spirit to the important criteria of Weimar democracy, to guarantee to the people of Thuringia, whether they liked it or not, a republican form of government."  

A more notable example of Reich intervention took place in the state of Saxony in the fall of 1923. The Communists were attempting to set up an independent government there. They had begun to organize class-oriented workers into military companies known as proletarian hundreds. Again a commissioner, the local military commander, was appointed by President Ebert to take charge of the functions of the state. The commissioner ordered the dissolution and disarmament of all proletarian groups, but the leftist Saxon cabinet refused to obey these orders. As a result, the army took over all governmental functions within the territorial limits in Saxony. The army then proceeded forcefully to disarm and scatter the proletarian hundreds. By the authority of a presidential decree

1Rossiter, op. cit., p. 39.

2ibid.


the commissioner had the right to remove Saxon officials and replace them with others. The military rule, in Saxony, was maintained as long as the left coalition cabinet remained in office.\(^1\)

Also in 1923, the Federal government demanded that action be taken against the Nationalist movement, led by Adolf Hitler, attempting to take over the Bavaria government. General Otto von Lassow, the local military commander, was commissioned to take action against the movement. He refused to do so and was relieved of his command. Rather than permit this to happen, the Bavarian state government took control of the army and re-instated General von Lassow as commander. The Bavarian government wanted the restoration of the monarchy. Therefore, they refused to repress Hitler's rightist movement. However, as soon as it became obvious that Hitler was not for a monarchy, General von Lassow followed the orders of the Federal government and suppressed the Nazi mobs running rampant through the streets of Munich. This revolt came to be known as Hitler's Beer Hall Putsch of 1923.\(^2\) This incident clearly demonstrated that without the support of the army Article 48 would have little meaning in suppressing insurrections. Fortunately, for

\(^1\)Watkins, loc. cit. pp. 43-44.

\(^2\)ibid.
Germany, the army supported the Weimar Republic in almost all cases during the first five years of its existence. As a result emergency powers were almost always successful in contributing to the maintenance of the new republic.

Not only was Article 48 used against rebellious elements in the society but it also came to be used in solving severe economic problems. In 1922 President Ebert issued a decree forbidding speculation in foreign currencies. It was now determined by the President and the Chancellor that "the public safety and order," as was stated in Article 48 could be, "seriously disturbed and endangered," by economic disorder as well as by political rebellion. ¹

Although many decrees and ordinances were issued under the authority of Article 48, they did not solve all of the government's problems. Article 48 was not yet regarded as the solution to solving the problems facing the government. The cabinet then turned to the use of enabling acts which were used during the first two years of the Republic to facilitate the change over from a wartime to a peacetime economy. Such acts were only possible with the assent of a two-thirds majority of the Reichstag. An enabling act, which really was a quasi-constitutional amendment, gave the executive

¹Rossiter, op. cit., p. 41.
the power to legislate by decree. The check against the abuse of this power rested with the Reichstag. All decrees issued under the authority of an enabling act had to be revoked on demand of the Reichstag.\footnote{loc. cit., pp. 44-46.}

In February 1923, the Reichstag passed an enabling act which empowered the cabinet to take all measures necessary to resist the French invasion of the Ruhr area.\footnote{Rossiter, op. cit., p. 45.} The powers granted under this act were not used extensively. Rather, the passive resistance of the German people had a greater effect than did the action taken by the government.\footnote{ibid.} Nevertheless, the passage of this emergency device had established a further precedent.

In the spring and summer of 1923 economic conditions in Germany grew steadily worse. Chancellor Gustav Stresemann,\footnote{The chancellor and his cabinet were appointed by the president who in turn were responsible to the Reichstag. Therefore, the appointments had to reflect the composition of the Reichstag. All emergency decrees issued by the president had to be countersigned by the chancellor or the appropriate minister. As a result the chancellor and the cabinet assumed responsibility for the emergency decrees issued. But yet it must be remembered that according to Article 48 all authority rested with the president.} in an attempt to rectify conditions, issued several economic decrees...
under the authority of Article 48 (see Table 2). But these steps were not sufficient to correct the economic problems. In October 1923, Stresemann asked the Reichstag to approve an enabling act which would give him broad powers in the financial, economic and social spheres. The Reichstag approved Stresemann's proposed enabling act, which read as follows:

The federal government is authorized to take those measures which it considers to be absolutely necessary in the financial, economic and social realms. Fundamental rights guaranteed in the Weimar Constitution may be disregarded in the process.

This authorization does not extend to regulations affecting hours of labor, nor to the reduction of pensions, social insurance or unemployment insurance.

Decrees issued on this basis shall be reported without delay to the Reichstag and to the Reichsrat. On demand of the Reichstag they are to be revoked immediately.

This law goes into effect on the day of promulgation. It shall cease to operate at the very latest on March 31, 1924, and shall lapse even before that time with any change in the party composition of the present government.¹

Within three weeks after passage, Stresemann issued 40 emergency decrees under this enabling act. These decrees did much toward the restoration of Germany's credit in the foreign and domestic markets. Two important internal changes took place: first, the financial structure of the Reich was overhauled; and

¹Watkins, op. cit., p. 76.
### TABLE 2

**REICH CABINS OF WEIMAR REPUBLIC**

<table>
<thead>
<tr>
<th>Chancellor</th>
<th>Chancellor's Party</th>
<th>Term of Office</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Schiedemann</td>
<td>Social Dem. Party</td>
<td>2/13/19 to 6/19/19</td>
</tr>
<tr>
<td>2. Bauer</td>
<td>Social Dem. Party</td>
<td>6/19/19 to 10/3/19</td>
</tr>
<tr>
<td>5. Fehrenbach</td>
<td>Center</td>
<td>6/19/20 to 5/4/21</td>
</tr>
<tr>
<td>6. Wirth</td>
<td>Center</td>
<td>5/9/21 to 10/22/21</td>
</tr>
<tr>
<td>7. Wirth</td>
<td>Center</td>
<td>10/16/21 to 11/14/22</td>
</tr>
<tr>
<td>8. Cuno</td>
<td>Non-Partisan</td>
<td>11/22/22 to 8/12/23</td>
</tr>
<tr>
<td>10. Stresemann</td>
<td>People's Party</td>
<td>10/6/23 to 11/28/23</td>
</tr>
<tr>
<td>11. Marx</td>
<td>Center</td>
<td>11/30/23 to 5/26/24</td>
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<tr>
<td>12. Marx</td>
<td>Center</td>
<td>6/3/24 to 12/15/24</td>
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<tr>
<td>13. Luther</td>
<td>Non-Partisan</td>
<td>1/16/25 to 10/29/25</td>
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<td>14. Luther</td>
<td>Non-Partisan</td>
<td>1/20/26 to 5/18/26</td>
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<tr>
<td>15. Marx</td>
<td>Center</td>
<td>5/18/26 to 2/1/27</td>
</tr>
<tr>
<td>16. Marx</td>
<td>Center</td>
<td>2/1/27 to 6/28/28</td>
</tr>
<tr>
<td>18. Bruning</td>
<td>Center</td>
<td>3/29/30 to 10/7/31</td>
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<tr>
<td>19. Bruning</td>
<td>Center</td>
<td>10/9/31 to 5/30/32</td>
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<tr>
<td>20. Von Papen</td>
<td>Non-Partisan</td>
<td>5/31/32 to 11/17/32</td>
</tr>
<tr>
<td>21. Von Schleicher</td>
<td>Non-Partisan</td>
<td>12/2/32 to 1/28/33</td>
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*aThe information for this table was adapted from Pinson, op. cit., p. 605.*
second, the federal tax structure was organized on a more logical basis.¹

Shortly after the decrees took effect, the Social Democrats withdrew their support from the Stresemann government. Chancellor Stresemann immediately resigned and Centrist Wilhelm Marx formed a new government with Stresemann as a member of the new cabinet. Like Stresemann, Chancellor Marx at first issued decrees under the authority of Article 48 but then later requested legislative authority from the Reichstag in the form of another enabling act.² Chancellor Marx threatened the Reichstag with dissolution if it failed to approve his enabling act. The Social Democrats, having no desire to face another election, gave their support and the new enabling act was promulgated on December 8, 1923.³

This second act gave the chancellor greater powers than what Stresemann had under the previous enabling act. Chancellor Marx had the power to regulate labor hours and reduce social and unemployment insurance, whereas Stresemann could not. The legislative powers of this act were increased, but so was the control

¹Watkins, op. cit., p. 78.
²For a full text of the second enabling act see Watkins, op. cit., p. 80.
³loc. cit., p. 83.
of the Reichstag over its implementation. An advisory committee was established in the Reichstag and Reichsrat. Moreover, the Cabinet was forbidden to invade civil liberties guaranteed in the constitution. Furthermore, the act was only valid for two months.¹

During the two months the enabling act was in existence, more than 70 legislative decrees were issued. By the time the act expired the Marx regime had brought stability to the currency of the Reich, organized a workable budget, called a halt to monetary speculation, and re-established public confidence in the economic future of Germany.²

At the conclusion of the two month period Chancellor Marx felt the enabling act should continue in force. He appeared before the Reichstag and demanded that they continue the enabling act beyond the two month limitation. The Reichstag was unwilling to do this. Chancellor Marx responded by dissolving the Reichstag.³ Hence, for the next two months there was no authority capable of interfering with the existing body of emergency legislation. The new Reichstag (returned by the electorate) on May 4, 1924 made no

¹loc. cit., p. 76.
²loc. cit., p. 83.
³loc. cit., p. 84.
attempt to interfere with the achievements of the earlier regime (see Table 3). Between October 13, 1923 and February 15, 1924 a hundred and ten legislative measures were issued under the authority of enabling acts.¹ In addition, many more executive decrees were issued on the basis of Article 48.

The achievements of the Stresemann and Marx governments, combined with the beneficial effects of the Dawes plan, which set up a reasonable schedule of reparation payments, greatly improved the social and economic conditions of Germany. The period 1920-1924 is a good illustration of the benefits a constitutional system can derive from emergency legislation.

In 1925, General Paul von Hindenburg supported by the nationalists and People's party, was elected president. He issued very few emergency decrees. In fact, during his first few years in office President Hindenburg used Article 48 as a means of revoking decrees earlier promulgated by President Ebert.²

The period 1925 to 1929 was characterized by stability in the economic, social, and political life of the new republic. In-

¹ibid.

²For a list of all decrees issued under the authority of Article 48 see, Rogers, Lindsay and others, "German Political Institutions, II Article 48," Political Science Quarterly, XLVII (June 1932), pp. 583-594.
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Maj. Soc. - Majority Socialists
Indep. Soc. - Independent Socialists
Comm. Party - Communist Party
Cent. Party - Center Party
Dem. - Democrats
Nat'l Soc. - Nationalist
Nat'l Soc. - Nationalist Socialist

a The information for this table was adapted from Pinson, op. cit., P. 603-4.
flation was ended. Reparation payments were placed on a new stable basis by the Dawes Commission. Political parties on the extreme left and right realized that with the aid of Article 48 the Federal Government could prevent them from using extra-legal means in attempting to gain control of the government. Both the Communists and the National Socialists turned to legal means of attracting mass support. Employment was on the rise. Germany was admitted to the League of Nations. It began to seem as though the Weimar Republic had weathered its stormy beginning.¹

Later Use and Abuse of Article 48

In the early years of the Republic, Article 48 served the purpose of quelling insurrection, but during the last years of the Republic it came to be used as an economic dictatorship.

The Weimar Republic's five year period (1925-1929) of stability ended with the advent of the World Depression of 1929. The Federal Government was once again confronted with economic disaster. Both the Communists and the National Socialists had retained a fair degree of strength during the five-year period of

¹Heneman, op. cit., pp. 181-182.
calm. As economic conditions worsened they again began to assert themselves and drew new members. The Weimar Republic was once again tossed into a state of chaos, which would prove to be too great for the constitutional system to overcome.

Following the resignation of Chancellor Muller of the Social Democratic Party in March 1930, President Hindenburg appointed a new chancellor, Heinrich Bruning, leader of the Center Party (see Table 2).

Faced with the problem of rising expenditures and declining receipts, Chancellor Bruning proposed drastic increases in federal and local taxation. The Reichstag immediately pronounced its unwillingness to accept this proposal by debating the issue for several weeks and ending in a legislative deadlock. Later on July 16, 1930, the Reichstag voted 256-193 to reject Bruning's tax proposal. On this very same day Chancellor Bruning issued two executive decrees on the basis of Article 48 enacting his tax program. The Reichstag, in turn, voted 236-221 to revoke the decrees. Bruning immediately dissolved the two decrees and the Reichstag along with them. Ten days later he reissued the same two decrees. 1

The election held in September of 1930 returned a Reichstag which strengthened the Bruning government. However, the

Nationalists and the Communists also gained. The Nazis' seats in the Reichstag jumped from 12 to 107 and the Communists increased from 54 to 77.\(^1\)

On October 18, 1930 the Reichstag by a vote of 318 to 236 expressed confidence in favor of Chancellor Bruning. Following the vote of confidence the Reichstag adjourned. From 1930 to 1932 the Reichstag was willing to support Bruning as Chancellor but was unwilling to cooperate with him in his emergency legislative enactments. As a result the Reichstag found itself in recess most of the time. From March 27, 1931 to May 8, 1932, there were only two sessions of three days each.\(^2\) No legislation was considered or enacted. The Reichstag was no longer functioning as a parliamentary body under the constitutional scheme. Whether Chancellor Bruning wanted to or not he had no choice but to assume the legislative function of the Reichstag. During this period of intransigence, Bruning issued more than 60 decrees under the authority of Article 48.

In order to keep vital industries from collapsing, such as banks and other private institutions, Chancellor Bruning lent them large sums of money from the public treasury. The financial position of

\(^1\)Watkins, op. cit., p. 87.

\(^2\)loc. cit., p. 95.
the government was maintained by reducing expenditures in salaries, pensions and other social services.¹

In the last few years of the Republic the government became authoritarian and harsh. However, conditions seemed to warrant such an attitude. The Nazis and the Communists adopted a new technique in their revolutionary attempts to gain control of the government. They made a concerted effort to get party members elected to governmental positions in the states, "and from these vantage-points the republican system was harassed with devastating effect."² Rather than assaulting the government, the two parties began assaulting one another. Both political parties had developed private quasi-armies early in the Weimar Republic and now they were pitting them against one another in a battle for the streets. Neither party was able to hold assemblies without the other party making an attempt to break it up.³

Article 48 was also used here in an attempt to dispel the civil discord raging in the major cities across Germany. Decrees were issued on several occasions which forbade the right of assembly. The semi-military organizations were temporarily dissolved along with

¹loc. cit., p. 94.
²Rossiter, op. cit., p. 54.
³Watkins, op. cit., p. 55.
the extremist publications. In one decree, Nazi troops were forbidden to wear their brown shirts on public streets. On another occasion in April, 1932, a decree was issued which dissolved the Storm Troops. Their headquarters was locked up and the material confiscated. Although this only lasted a couple of months, Bruning's government later fell from power and his successor, Chancellor Franz von Papen, lifted the ban on the Storm Troops.

In 1932, President von Hindenburg's first term expired. Hoping to remain in power with von Hindenburg as President, Bruning and his coalition government persuaded Hindenburg to run again. On April 10, 1932 Paul von Hindenburg was reelected President over Adolf Hitler candidate of the National Socialist Party and Ernst Thalmann, the candidate of the Communist Party.

Bruning and his coalition government fell from power sooner than expected. Later, in 1932, Bruning was attempting to use emergency powers to liquidate and redistribute the hopelessly bankrupt estates in East Prussia, the President's own homeland. Hindenburg, being a member of the aristocratic landowners, would not let this happen. He immediately informed his chancellor that he would not allow a program of "agarian bolshevism" to be inaugurated in his name.\(^1\) Bruning submitted his resignation on May 30, 1932 and

\(^1\)Watkins, loc. cit., p. 97.
Hindenburg accepted it. As a result, "one of the most promising of all modern experiments in constitutional emergency action was brought to an untimely end."¹

Chancellor Bruning was the last chancellor of the Weimar Republic to enjoy the confidence of the Reichstag and this episode marks the transition from parliamentary government to a period of presidential government. The resignation of Chancellor Bruning was a step towards destroying the first experience with democratic government in Germany. From the dismissal of Bruning to the advent of Hitler, the President became the main focus of government.

President Hindenburg named Colonel Franz von Papen as Bruning's successor. Von Papen was strictly a personal appointee of President Hindenburg and many members of the new cabinet were not members of Parliament. According to Watkins,² von Papen and his fellow cabinet members were not the least interested in the maintenance of the Weimar Republic. Rather, they were contemptuous of parliamentary democracy. Therefore, von Papen along with the support of Hindenburg, proceeded on the authority of Article 48 to overthrow the Weimar constitution rather than defend it.

¹Ibid.

²Watkins, loc. cit., p. 103.
The members of Parliament who formerly supported Bruning refused to give their support to von Papen and so he dissolved the Reichstag. Being without Reichstag authority, Chancellor von Papen continued to rule on the basis of Article 48. The Reichstag returned by the electorate, provided no clear-cut majority with which to form a majority cabinet. Therefore, the minority cabinet formed by Hindenburg could take action without opposition from the Reichstag.

The most flagrant abuse of Article 48 by von Papen was in the action he took in disposing the state government of Prussia in 1932.\(^1\) In this incident, von Papen issued two decrees based on paragraph one and two of Article 48. The first decree suspended all seven fundamental rights in Greater Berlin and the province of Brandenburg. The second decree transferred the executive and police powers in the area to the Reich Minister of Defense. Chancellor von Papen then appointed himself commissioner of Prussia, giving him all the powers normally within the jurisdiction of the Prussian government. The official explanation for this action was that the Prussian state had failed to suppress the bitter campaign of civil violence in its industrial cities. But as a matter of fact this condition prevailed throughout all of Germany. However, the real reason for von Papen's

\(^{1}\text{Rossiter, op. cit., p. 57.}\)
action was that Prussia was a stronghold of the Social Democrats who were in power there. It was feared that the Braun government in Prussia would be a serious obstruction to von Papen's cause of reaction.¹

A number of the ousted Prussian cabinet members took their case to the Supreme Court. The court ruled that conditions were such, in the state of Prussia, that would allow the Federal Government to assume authority according to Article 48. However, as the self-appointed commissioner for the state of Prussia, von Papen replaced the Reichsrat members from Prussia with others of his own choosing. This the court ruled as illegal. Because of this adverse decision von Papen was greatly discredited and he resigned.²

General Kurt von Schleicher, former minister of war was simply promoted to the head of the cabinet by President Hindenburg. His term of office was also very short. He came to power December 2, 1932 and on January 28, 1933 it came to an end. Adolf Hitler was appointed chancellor on January 30, 1933.³ One of Hitler's first

¹loc. cit., p. 58.


official acts was to dissolve the Reichstag. Like his predecessors, Hitler made wide use of Article 48, although under false pretenses. Three days after the return of the newly elected Reichstag with a Nazi majority, Hitler demanded the passage of an enabling act giving him full powers of executive decree. The Reichstag gave their approval by a vote of 441 to 94. Hitler's enabling act was to last for four years, whereas previous acts lasted only six months. Under the authority of this act Hitler did not have to report emergency action taken to the Reichstag. The Reichstag could not revoke measures on demand as they could with earlier enabling acts. The enabling act gave Hitler the right to deviate from the constitution. He had the right to interfere with the power of political member states, with the organization and functioning of political parties, with the position of the judiciary, and with other vital elements in the political structure of the country. To put it simply Hitler now had the power to change the constitution by decree. This fact alone suffices to remove the Hitler enabling act from the true category of constitutional emergency action.¹

The constitution Hitler swore to uphold was soon rendered meaningless by his acts. Constitutional emergency powers were used as a powerful weapon for creating electoral majorities. The National

¹Watkins, op. cit., p. 125.
Socialist Party violently attacked left parties. On February 2, 1933 communist party meetings and demonstrations were prohibited for one day, and two weeks later the ban was reimposed indefinitely. Following the Reichstag fire on February 27, 1933 the Communist delegation to the Reichstag were arrested. Communists were blamed for the Reichstag fire. The National Socialists later also accused the Social Democrats for causing the Reichstag fire.

Only four months had transpired since the passage of the first enabling act and all opposition to the National Socialists was either forced or voluntarily dissolved. A second enabling act was passed on January 30, 1934, which abolished federalism and gave the cabinet an explicit and unlimited right to determine new constitutional law.¹

In all respects it could be said that at this point the Weimar Republic was now dead.

Analysis of Article 48

It is quite obvious that without Article 48 the Weimar Republic could not have survived as long as it did. Nevertheless, there were some grave inherent weaknesses in the constitutional scheme of Article 48.

The problem facing Article 48 was not one of power, but improper

¹loc. cit., p. 128.
legal limitations. The powers given Article 48 were very broad and allowed a great amount of discretion on the part of the president. This tremendous grant of power reflected the assumptions of most assembly members who gathered at Weimar; namely, that the president would always be dedicated to democratic principles.

The broad discretionary powers given the president are found in the opening sentence of paragraph two of Article 48: "If public safety and order in the German Reich is materially disturbed or endangered, the president may take necessary measures to restore public safety and order...." Under the guise of this phrase the president could determine when an emergency existed and he could determine the way in which the crisis would be solved.

At a first glance there would appear to be sufficient checks on the power of the president under this article. The chief executive had to immediately inform the Reichstag of all action taken. All acts had to be revoked upon the demand of the Reichstag. Furthermore, the president could not act without the approval of at least one other cabinet minister. And moreover, the president was bound by an oath to observe and defend the constitution.

These apparently sufficient checks were to a great extent negated by Articles 25 and 53 of the constitution. Under the authority of Article 25 the president could dissolve the Reichstag and send deputies home for three months at a time. This was even true during
periods of crisis. Article 52 gave the president the prerogative to appoint and dismiss all cabinet ministers without the approval of the Reichstag. With the combination of Articles 25, 48 and 53 the President could virtually govern without the Reichstag. And this is exactly what happened with the appointment of von Papen as Chancellor. While democratic forces were in leadership positions, this did not happen and the Weimar Republic continued to exist. But as Dr. Cohn so aptly warned during the debates at the Weimar Assembly, if anti-democratic forces gained control of the government the checks would become meaningless.

Germany's experience with emergency powers clearly illustrates two important elements discussed in Chapter One of this paper. First, that constitutional systems with emergency powers may find that the proper use of such powers will increase rather than decrease the effective span of its constitutional system. This certainly was the case in Weimar during the first five years of its existence. Secondly, the point was made that the ultimate defense of constitutionalism resides in the determination of the people to maintain such a way of life. From 1929 to 1933 the anti-democratic forces in Germany were greater than the democratic elements desiring to maintain a constitutional system of government.

The improperly constructed Article 48 facilitated the downfall of the Weimar Republic. But this hardly tells the complete story.
As Rossiter said, "Perhaps the men of Germany could not have worked any constitution while the men of Massachusetts could have made a ringing success of the Weimar Constitution and its Article 48."¹

The experience with emergency power left a strong impression on the minds of the German people. In 1949 another German Republic was born, only this time no "article 48" was given a place in the new "constitution". Rather, emergency powers were left in the hands of Britain, France and the United States. With the restoration of Germany to a major world industrial power, this arrangement came to be anachronistic.

¹ Rossiter, op. cit., p. 73.
The Bonn Republic has been in existence for two decades. Throughout the second decade there were intermittent debates concerning the passage of emergency legislation. Finally in June of 1968 the Basic Law was amended giving the Federal Government emergency powers. Based upon Germany's past experience with emergency powers during the Weimar Republic it is not at all surprising that it took this long before the people and parliament would again allow the passage of such powers. It is the purpose of this chapter to define Bonn's status prior to passage, review the politics and opposition involved in obtaining passage and to present the powers granted in these emergency laws.

The Establishment of the Bonn Republic

The Federal Republic of West Germany came into being in September 1949, following the election of Bundestag and Bundesrat members, and with the election of a federal president and federal chancellor and the formation of a cabinet. The immediate origin of the Federal Republic of Germany can be traced to the London Conference held in 1948. Meeting at this conference was the United States,
The purpose of this conference was to establish a new Western policy aimed at a defensive alliance of the United States and all Western European nations. In the opinion of the Western Allies this was necessary because since the Council of Foreign Minister's meeting held in December 1947, it was quite obvious that the Soviet Union would make no settlement concerning Germany. The Soviets had made it quite clear that the only settlement they would accept would be one in which they could have virtual control over Germany.\footnote{ibid.}

The main obstacle in creating a Western Defensive Alliance was the unsettled state of Germany. Moreover, Germany's current economic and political state left it vulnerable to Soviet infiltration. In addition, West Germany's industrial potential was essential for the general economic recovery of Europe, and a democratic West Germany was a possible ally in the anti-Soviet front.\footnote{ibid.} Thus, it was agreed upon by the six nations present at this conference that West Germany would be established as a state.

A request was presented to the Ministers-Presidents (governors)
of the eleven states meeting at Koblenz in July 1948 to form a constitutional assembly to write a constitution. The initial response of the Ministers-Presidents was one of refusal. They instead proposed that a temporary document arranged on a democratic basis with a temporary executive be written, along with a document formulating the rights of the occupying powers. This reluctance, on the part of the Ministers-Presidents stemmed from the fact that they thought the creation of a West German state would only lead to a deeper rift between East and West and, eventually, to the partition of Germany. The Allies rejected their proposal and a compromise was worked out. Rather than writing a formal constitution the Germans agreed to convene a Parliamentary Council to draft a Basic Law.

The Ministers-Presidents preferred to call the assembly a Parliamentary Council rather than a constitutional assembly because the latter inferred permanency and they wanted to construct a provisional government until such time a permanent one could be created.

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2 ibid.

3 The temporary nature of the Basic Law is stipulated in Article 146 of the Basic Law, which states; "This Basic Law shall cease to be in force on the day on which a constitution adopted by a free decision of the German People comes into force."
based on a unified Germany.

The Parliamentary Council, consisting of sixty five members met in Bonn, Germany on September 1, 1948. The sixty five members were elected by the Landestag of each Land on a popular basis. There was one representative for every 750,000 of population with an extra one for any remainder over 200,000.¹

After several months of debating and compromising the proposed Basic Law was voted on by the Parliamentary Council on May 8, 1949. The text of the Basic Law was accepted by the Council against a minority of twelve votes.² Four days later it was approved by the Allies and brought into force on May 23, 1949.

Bonn's Status 1949-1968

From 1949 to 1955 the three Allied Powers, Britain, France and the United States maintained the ultimate authority in West Germany under the Occupation Statute promulgated by the three Allied military governors. In certain fields the Allies remained supreme, such as in the area of demilitarization and security of the Allied occupational forces. In the fields left to the Germans, the Allies reserved the right to veto agreements between the Federal Government and foreign

¹ Balfour, op. cit., p. 189.
² Balfour, loc. cit., p. 190.
countries and in exceptional cases the Allies could repeal German
law. Last of all, the Allies reserved the right to resume full author-
ity in matters essential to security or to preserve democratic govern-
ment in Germany or in pursuant to the international obligation of
their governments.¹

In 1955 the three Allied Powers, relinquished their occupation-
al control over West Germany. The termination of the Occupational
Regimes is stipulated in Article I of the Paris Protocol of 1954.²
The signing of this document made West Germany a sovereign state
except in a limited area of security. The three Allied Powers re-
served the right to act in an emergency until the German Federal
Government passed legislation giving itself the authority to act in an
emergency situation. These residual rights were legalized in Article V
paragraph two of the Paris Protocol of 1954. This paragraph reads
as follows:

The right of the Three Powers, heretofore held
or exercised by them, which relate to the protection

¹Carter, Gwendolen M., and Herz, John H., Major Foreign Powers,

²"Convention on Relations between the Three Powers and the
Federal Republic of Germany, May 26, 1952, as Amended by Schedule
I to the Protocol on the Termination of the Occupation in the Federal
Republic of Germany, October 23, 1954," American Foreign Policy,
of the security of armed forces stationed in the Federal Republic and which are temporarily retained, shall lapse when the appropriate German authorities have obtained similar powers under German legislation enabling them to take effective action to protect the security of those forces, including the ability to deal with a serious disturbance of public security and order. To the extent that such rights continue to be exercisable they shall be exercised only after consultation, insofar as the military situation does not preclude such consultation, with the Federal Government and with its agreement that the circumstances require such exercise. In all other respects the protection of the security of those forces shall be governed by the Forces Convention or by the provisions of the Agreement which replaces it and, except as otherwise provided in any applicable agreement, by German law.

While these rights were in force it was conceivable, but rather unlikely, that the three Allied Powers could again occupy and govern West Germany. This was a rather awkward position for the Allied Powers to be in. As a result it was already stated in Article V that these rights would terminate as soon as the Bonn Republic made necessary provisions for such powers.

It was reported by the New York Times and the London Times, that the three Allied Powers encouraged the Bonn government to enact emergency legislation. Harry Ellis, writing for the Christian Science Monitor, said:

1ibid.

For years the allies have signified their willingness, indeed their desire, to hand over to the West German Government rights which more than 20 years after World War II, should belong to the Germans themselves. ¹

Officially, the three Allied Powers made no policy statement concerning the passage of these laws. ² However, we do know from Article V, paragraph two, that Bonn's emergency legislation could not have been enacted without the approval of the three Allied Powers.

The enactment of this legislation had no effect on Germany's relationship to the North Atlantic Treaty Organization (NATO). ³ The West German armed forces are fully integrated into NATO's military system. This has not been affected by the passage of the emergency

¹Ellis, Harry B., "West German to Assume National Crisis Powers, Christian Science Monitor, May 18, 1968, p. 4.

²In letters received from the French and British information offices and the U.S. Department of State, all three nations said that no official policy statement was made or given. The correspondent from the British information office said they could be of no help, but suggested that I consult the British press of June 1968. The French correspondent said that France was not in a position to declare an official position on the issue because the legislation was a domestic issue. Acting Director of the Office of German Affairs wrote that the United States neither encouraged nor discouraged the passage of the legislation.

³For a full discussion and description of Germany's relationship to NATO one can see, Richardson, James L., Germany and the Atlantic Alliance, (Cambridge: Harvard University Press, 1966).
powers.¹ The full integration of the German Armed Forces in NATO does not preclude the use of the Armed Forces in defense of the government, whether the threat be internal or external. The Bonn Republic is now a sovereign state, except for making a peace treaty resulting from World War II. In essence the emergency laws are of domestic concern. This concern is primarily the preservation of the constitutional system of government. However, we must realize that domestic issues and problems very often have international consequences.

It is also important to note that the passage of emergency legislation will not affect the status of Berlin. The three Allied Powers will continue to function as occupying powers there.²

Prior to the passage of emergency legislation, the Federal Government could act in a limited way to resolve crisis. This authority was granted in Articles 91 and 115 of the Basic Law. According to Article 91:

(1) In order to avert any imminent danger to the existence or the libertarian democratic basic order

¹In a letter from Alexander C. Johnpoll, U.S. Department of State, Acting Director of the Office Of German Affairs, he verified the fact that the passage of this legislation had no affect on the full integration of the German armed forces into NATO.

of the federation or of a Land, a Land may appeal for
the services of the police forces of other Laender.

(2) If the Land in which this danger is im-
minent is not itself prepared or in a position to com-
bet the danger, the Federal Government may place
the police in that Land and the police forces of other
Land under its own instruction. This order
(Anordnung) has to be rescinded after the elimination
of the danger or else at any time on the demand of
the Bundesrat.¹

Under Article 115 the Federal Government may borrow funds only in
the case of extraordinary need and only for expenditures for productive
purposes and only pursuant to a federal law.

Admittedly, these two provisions are deficient in supplying
the Federal Government with the necessary power to overcome a
temporary crisis. Referring to the emergency powers granted in
Articles 91 and 115 Friedrich said, "the Basic Law of the Federal
Republic contains to date only very cautious and inadequate provisions
for emergency powers..."² Many individuals within official circles
in Bonn and the Allied Powers, were of the same opinion as Friedrich.
However, many German citizens were reluctant to allow their govern-
mental leaders greater emergency power than they already possessed.

¹The Basic Law, taken from Merkl, op. cit., p. 234.
²Friedrich, Constitutional Government and Democracy, p. 562.
Politics of Earlier Attempts

Prior to 1968 the Basic Law of the Federal Republic contained no emergency powers. Soon after West Germany had gained sovereignty in 1955 there was some discussion on the need for such legislation which would enable them to take effective action to deal with a serious disturbance of public security and order. But because of the high anti-authoritarian sentiment among the people, no legislative action was attempted.

In 1958, in a speech before the Policeman's Union, Interior Minister Gerhard Schroder publicly advocated the need for emergency powers. He felt that an amendment was needed to enable the country to control grave internal disorder or aggression. Schroder went on to say that the lack of such laws prevented him from effectively carrying out his job. Schroder's speech brought an immediate response from the opposition party in parliament, the Social Democratic Party. They recalled the experiences under Article 48 of the Weimar Constitution and in their opinion Article 91 of the Basic Law was sufficient. The reaction of the Socialists was indicative of many Germans at this time; they distrusted themselves. In the opinion of many Germans,


2"But Can We Trust One Another," Economist, (London), November 1967, CCXXV p. 256.
emergency powers had been abused before and in order to prevent such a reoccurrence, no such powers were to be enacted again.

Two years later, in 1960, the Christian Democratic-controlled government proposed emergency laws in the form of an amendment to the Basic Law.¹ The proposed laws would give the Bundestag the power to declare a state of emergency. If the Bundestag could not meet because of insurmountable obstacles the declaration would be made by the President with the Chancellor's approval. The proposed amendment also stated that during a declared emergency the government would have the power to restrict civil rights and use the armed forces to settle internal conflicts. In order to amend the Basic Law, a two-thirds majority vote of the Bundestag was necessary.

The opposition of the Social Democrats prevented the Christian Democrats from obtaining the necessary two-thirds majority vote.

Again in 1962, another attempt was made to obtain passage of emergency legislation.² The laws approved by the Bonn cabinet were to deal with three kinds of contingencies; external and internal


threats and natural castastrophy. Like previous proposals, the government was given the prerogative of suspending constitutional guarantees during a period of crisis. However, it was specifically stipulated that unions would retain the right to organize and strike. This is an important concession because the strongest opposition within the Socialist party came from the labor unions.

Also under this proposal a special committee made up of members of Parliament would carry out the functions of the Parliament if it could not be assembled. This committee was to be made up of 20 members from the Bundestag and ten members from the Bundesrat. If both houses could not convene, this committee would declare a state of emergency. If the committee could not assemble, then the president, with the assent of the Chancellor, could declare an emergency after consultation with the chairman of both houses.

In the case of external threat, the armed forces would take the role of the police but in the case of an internal threat the Laender governments were competent to act first. Any decrees issued by the Land government would have to lapse after a month. In the event that


The Times, (London), op. cit., p. 9.
the Land government felt unable to meet a threat, the Bundeswehr could be used with the concurrences of the Bundestag, unless this proved quite impossible. The intervention of the armed forces had to cease as soon as Parliament required it.

All decrees issued by the Federal Government during a crisis were to lapse after six months. Moreover, any decree issued by the government during an emergency could be ruled void by the emergency committee or by the Bundestag if in session. Furthermore the Constitutional Court was to retain its full authority during an emergency.¹

The cabinet-approved laws would also allow for the control of the civilian population. Such control would be in the realm of restricted civilian movement, evacuation and in the storage of food and raw materials.

Concerning freedom of the press, Interior Minister Hocherl proposed that only in extreme cases would the press be subject to censorship. The bill proposed a self-censorship carried out by a mixed committee of government and press representatives.

Interior Minister Hocherl claimed that these proposed emergency laws were in fact an addition to Article 115 of the Basic Law, ¹

¹ibid.
which upheld the responsibility and authority of Parliament in any emergency.

Even though many restrictions were added to the proposed emergency legislation, it still was not acceptable to the Social Democratic Party. However, it should be understood that the Christian Democratic Party, the major governmental party since the origin of the Federal Republic until 1969, was doing all the proposing. And the second party, the Social Democratic Party, whose vote was necessary to obtain a two-thirds majority, was expected to do all the accepting.

Again in October, 1964, the proposed emergency legislation was introduced in the Bundestag. But the Bundestag did not hold debates on the bill until the first half of 1965. When the Bundestag did debate the legislation, issues surrounding the bill were so hotly contested that the debates approached physical violence.\(^1\) As before, the opposition was coming from the labor elements in the Socialist Party. The National Trade Union Federation, which is the political underpinning of the Socialist Party, in effect vetoed the legislation. Its main objection to the legislation was the section which gave the Federal Government the right to order men to work or to stay on

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the job during a temporary crisis.

An understanding of the political environment at the time of the debates may help to explain why it became so "heated". The debates took place in June 1965 and in September of that year a national parliamentary election was to be held. According to Olsen of the New York Times, the government leaders had arranged for the debates at this time with the idea of saddling the opposition with the responsibility for continuing a situation in which the United States, Britain and France could, if they deemed it necessary, reoccupy West Germany in times of emergency. ¹

During the parliamentary debates, Majority Leader, Rainer Barzel called upon the opposition to permit passage of the legislation, "such as all free countries have." The Socialist parliamentary party agreed to the issue of the emergency legislation but were bowing to the pressures of the trade unions. Fritz Erler, a leader of the Socialist Party, said that the bill was still faulty in regards to the protection of the rights of workers, of the press and of the individual West German States. Also as before, many of the Social Democrats felt that the legislation was a threat to West German democracy. ²

¹ibid.

²The opposition of the Social Democrats was true to their character. During the 1950s they opposed rearmament and then nuclear weapons.
Moreover, many still had bitter memories of Hitler's coming to power in 1933.

From the very beginning of the Federal Republic of West Germany, Konard Adenauer, leader of the Christian Democratic Party held the chancellorship until his resignation in 1963. Ludwig Erhard, also a member of the Christian Democratic Party succeeded Adenauer. In a national election held in September 1965 Erhard's Christian Democrats won the highest number of votes. However, the number was not high enough to give them a majority and the Christian Democrats formed a coalition government with the Free Democratic Party. This coalition was short-lived. In 1966, Chancellor Erhard resigned and the coalition between the Christian and Free Democrats was dissolved. Following this a Grand Coalition was formed between the Christian Democratic Union (CDU) and the Social Democratic Party. Kurt Kiesinger, a member of the CDU became chancellor and Willy Brandt, a leader of the SPD was named vice chancellor.

Less than two years following the formation of the Grand Coalition, the difference between the two parties concerning emergency legislation were resolved. According to some newspaper commentators, one reason for forming the coalition in 1966 was to work out a broad bi-partisan agreement on emergency legislation.¹

Politics of Passage

In 1967, the Coalition Government proposed an amendment to the Basic Law which would give the Federal Government the right to open letters and tap telephones. This right was formerly held by the three Allied Powers for the purpose of protecting their forces stationed there. The German Federal Government was to make use of this right under the following conditions; when the free democratic order was threatened in West Germany; when the security of the nation or any of its states were in danger; and when the security of any of West German Allies or their troops were imperiled.¹ Supporters of this bill pointed out that all free countries have given their governments the power to open private letters and tap telephones during periods of crisis. This proposal was not adopted at this time but later became part of the proposed emergency legislation.

During the winter of 1967 public hearings were held to consider the emergency legislation which now had been on the agenda for nearly ten years. This was the first time in Bonn's eighteen-year history that public hearings were held.² Lawyers, college professors, judges, union leaders and others came to testify concerning the


proposed emergency amendments to the Basic Law. Most of the witnesses recalled the experience of Article 48 of the Weimar Constitution. The hearings constantly returned again and again to the misfortune of Germany brought about by the transgressions enacted by Hitler. An English legal scholar, Dr. F.C.G. Rohl, testifying before the committee, said the emergency laws were among the most democratic and progressive in the world. Dr. Rohl also noted that the Germans opposed to the laws were opposed on the grounds that it would be the "end" of parliamentary democracy in West Germany. Another professor argued that passing the laws in their present form would help the Germans, "overcome their democratic inferiority complex."¹

During the hearings it was estimated that 300,000 to 400,000 additional people would be needed in an emergency to augment hospital staffs, armed forces, border guards, the police and civil defense personnel. In order to obtain the additional personnel the emergency legislation provided for compulsory service of civilians. On this particular point the unions no longer presented a united front. For example, union leader Waldemar Reuter disagreed with compulsory service and orders prohibiting people from changing jobs,

¹ ibid.
although he said the present bill did not directly conflict with the right to strike. But on the other hand, Gunter Apel, chairman of the salaried staffs union said he was willing to accept compulsory service during times of emergency. The labor unions were divided between two different groups, the pragmatists and the doctrinaires. The pragmatists who were numerically stronger, wanted to take part in writing the emergency legislation in order to protect their interest. The doctrinaire group, which was stronger financially, was against any type of emergency legislation. This difference in viewpoint all but resulted in splitting the Trade Union Federation in 1967.

During the final debate, the Free Democrats along with the strong holdouts of the Socialist Party assailed the passage as unnecessary and dangerous to West German democracy.

The Federal Government's argument for emergency powers was quite straightforward. In its opinion, the "law permits only


measures that most democratic government's take for granted during a crisis."\(^1\) Speaking in parliament just hours before passage Foreign Minister Willy Brandt said:

> We are replacing outmoded occupation law with measures that are necessary and normal among our partner-nations. All our NATO allies have emergency provisions to permit quick action in critical situations as a self-understood element of their legal and constitutional system. One cannot see why what is true for others should not also apply to us.\(^2\)

Interior Minister Ernst Benda voiced the same opinion as Foreign Minister Brandt when he said earlier, "although none of us is for an emergency... we must do our duty. That is to defend the free democratic order from outside or within."\(^3\) Published in the German Press was a list of Eastern and Western countries that have emergency legislation, in support of the Federal Government's argument. The countries listed in the press were Great Britain, United States, Canada, Switzerland, Soviet Union and East Germany.\(^4\)

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\(^3\) Vetter, *op. cit.*, p. 4.

As the time for the parliamentary vote on the emergency legislation approached, the extra-parliamentary opposition began to increase. The extra-parliamentary opposition was coming from trade unionists, left-wing students, intellectuals and some clergymen. In order to apply pressure on the members of the Bundestag, the students union at Frankfurt University drew up a "University Manifesto" against emergency legislation and got 30,000 students and professors to sign it.¹

The greatest amount of extra-parliamentary opposition came in May 1968, during the second reading of the bill when 30,000 people from all parts of Germany came to Bonn to demonstrate against the bill. The demonstrators consisted mainly of students and workers. They listened to speakers "denounce the proposed emergency powers as a danger to democracy and reminiscent of decree laws misused by Adolf Hitler."² The Federation of Trade Unions held a similar protest meeting in Dortmund, Germany.³ Part of the cause for concern among demonstrators was stimulated by recent election gains


³ibid.
of the right wing National Democratic Party, (NPD), headed by Adolf von Thadden. The NPD was very often referred to as a Neo-Nazi party. Many demonstrators expressed their opposition to the emergency legislation by carrying banners which read, "one Adolf was enough."

At a meeting of judges near Bad Godesberg, a few of the judges charged that West German political leaders were "still acting and thinking along totalitarian lines." Judge Hans Guttges of the West German High Court expressed the fear that the need for emergency laws was an "out-dated attitude" which might prevent democracy from taking firm root in the hearts of West German youth.¹

The League of Socialist German Students at Frankfurt University set up a blockade around the university in protest against the emergency legislation. Most students respected the blockade. Teach-ins and sit-ins were conducted by students in at least ten other West German colleges and universities. Factory workers in Frankfurt staged brief strikes to demonstrate their solidarity with the students. In many cases, however, the workers refused to go along with the students' call for strikes. For example, in one particular incident about 60 students stormed into a Krupp steel mill in Bochum and tried to persuade the workers to

join the strike, but the workers refused to participate. The Federal Association of German Employees warned that any strikes to protest emergency laws would be regarded as a misuse of freedom of expression and could lead to lawsuits against unions. As the time for parliament to vote on the legislation approached, union opposition greatly subsided due to the fact that they had won many concessions. It was now stated in the legislation that no action could be taken in labor disputes that are aimed at preserving and promoting the country's labor and economic conditions.¹

The East German government also became involved in the protest movement against Bonn's emergency legislation. Several hundred radical students from West Berlin and a few communists from East Germany left East Berlin by special train to take part in the demonstrations in Bonn. The East Germans decided to run the train to Bonn to underscore their support and involvement with leftist students activities in West Germany.²

The Allied Powers objected to the "alliance clause" put into the emergency legislation. According to The Times (London) British military planners said the Allies would have liked the "alliance clause"


omitted from the emergency legislation. Under this clause Bonn's emergency powers could be applied by virtue of an agreement between the Federal Government and an international organization such as the North Atlantic Treaty Organization, or by other international organs within the framework of a treaty of alliance. However, the Bundestag could revoke such agreements when a majority of its members make such a request. This clause was not struck from the legislation even though the Allies opposed it. Nevertheless, during May 1968 the three Allied Powers, France, Great Britain, and the United States gave their approval to the West German government's proposed emergency legislation. With this approval, the legislation was set before parliament for a vote. On May 31, 1968 the Bundestag approved the proposed amendments to the Basic Law by a vote of 384 to 100 with one abstention. On June 14, 1968 the Bundesrat unanimously approved the emergency legislation. The unanimous approval by the Bundesrat was somewhat surprising because the five representatives of North Rhine-Westphalia and four from Hesse were previously opposed to the bill. Evidently they felt that the bill had been substantially improved during its passage through parliament.

1 "Bonn Puts New Law to the Allies," The Times (London), May 18, 1968, p. 5b.

On June 24, 1968, President Heinrich Luebke signed the bill and on June 27, 1968 the laws were promulgated in the Federal Law Gazette. The Bonn Republic was now sovereign in all spheres of its affairs.

The Emergency Powers

Bonn's newly-acquired emergency powers are recorded in the Basic Law in the new section entitled "State Of Defense." It is in this section that the legal limitations of power are established. This section consists of 11 articles numbered from 115a to 1151. For the sake of clarity we will list and give the powers of each article separately rather than presenting them collectively.\(^1\)

**Article 115a:** In this article it is stipulated that the determination of an emergency will be made by the Bundestag with the consent of the Bundesrat. This determination "shall be made at the request of the Federal Government and shall require a two-thirds majority of the votes cast, which shall include at least the majority of the members of the Bundestag." It further states that if the Bundestag cannot be assembled, or if there is no quorum in the Bundesrat, the Joint Committee shall make the determination with a two-thirds

\(^1\)For a full text of Bonn's emergency legislation see Appendix A.
majority of the votes cast. It also states that if the Federal territory is attacked by armed forces and the organs of the Federal Government are not in a position to proclaim a state of defense, it will be understood that it exists. The President shall then announce as soon as is appropriate that a state of defense is in effect.

Article 115b: During normal periods of peace the armed forces are under the command of the Minister of Defense but under emergency conditions the Federal Chancellor will assume command of the armed forces.

Article 115c: The Federation has the right to exercise concurrent legislation even in matters normally reserved for the states by enacting laws to be applicable upon the occurrence of a state of defense. Such laws must be approved by the Bundesrat. The concurrent legislative laws, with the consent of the Bundesrat, may regulate the administrative and the financial system of the Federation and the Laender.

Article 115d: During a temporary crisis the Federal Government may designate legislation as urgent which must then be forwarded to the Bundesrat at the same time as the Bundestag. Both houses must debate such bills in common without delay. And for

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1 The legal structure of the Joint Committee is defined in Article 53a.
any bill to become law a majority of the Bundesrat's votes are necessary.

**Article 115e:** If during a state of defense, the Joint Committee decides that the Bundestag is unable to meet and there is no quorum in the Bundesrat, the Joint Committee shall then have the status of both the Bundestag and the Bundesrat and shall exercise their rights as one body. It is also stated clearly in this article that the Joint Committee cannot enact any law to amend the Basic Law or to cause it to have no effect or application either in whole or in part.

**Article 115f:** The Federal Government, during a state of defense, can make use of the Federal Border Police throughout the federal territory if circumstances warrant such action. Under the authority of this article the Federal Government may issue instructions to the Land governments. The Bundestag, the Bundesrat and the Joint Committee must be informed of these actions.

**Article 115g:** The Federal Constitutional Court will continue to exercise its function during a state of defense. The Joint Committee cannot amend the Law on the Federal Constitutional Court, except that an amendment be required, also in the opinion of the Court, to maintain the capability of the Court to function. Furthermore, the decisions of the Court requires a two-thirds majority of the judges present.
**Article 115h:** The legislative terms of the Bundestag or of the Land diets due to expire during the state of defense will end six months after the termination of the state of defense. The term of office of the Federal President or the exercise of his function by the President of the Bundesrat in case of the premature vacancy of the Federal president's office, shall end nine months following the termination of a state of defense. Judges of the Constitutional Court, whose term of office expires during a state of defense, shall end six months following the termination of a state of defense.

Should it be necessary to elect a new Federal Chancellor, the Joint Committee must do so with a majority of its members. A Joint Committee may express its lack of confidence in the Federal Chancellor only by electing a successor with a two-thirds majority of its members.

During a state of defense the Bundestag cannot be dissolved.

**Article 115i:** If conditions are such that the Federal Government is unable to act in an emergency then the Land Governments will have the right to act in their respective spheres of competence.

Any measures taken by Land authorities under the provisions of this article may be revoked at anytime by the Federal Government.

**Article 115k:** Laws that are contrary to laws and ordinances enacted for reasons of a state of defense will be temporary suspended.
All laws and ordinances adopted by the Joint Committee will cease to have effect six months after the termination of a state of defense. But laws containing provisions in derogation of Articles 106 and 107 (financial), with the consent of the Bundesrat, may be amended by federal legislation "so as to arrive at the settlement provided for in Section X." Unless this condition is met, laws and ordinances pertaining to financial matters must end at the second fiscal year following the termination of the state of defense.

**Article 1151:** Under the authority of this article the Bundestag with the consent of the Bundesrat, may repeal, at any time, laws enacted by the Joint Committee. Furthermore, it is the prerogative of the Bundestag with the consent of the Bundesrat to terminate the state of defense. Moreover, the end of the state of defense must be declared as soon as the prerequisites for the determination of the state of defense no longer exist.

In addition to Section Xa, State of Defense, three new articles were added to the Basic Law which are also concerned with emergencies. They are Articles 12a, 53a and 80a.

**Article 12a:** Under the authority of this article, men who have reached the age of eighteen may be required to serve in the Armed Forces, in the Federal Border Police or in a Civil Defense organization. Those who refuse, on the grounds of conscience, to render
war service involving the use of arms can be required to serve in substitute service. Individuals in both of these classifications can also be assigned to specific occupations involving civilian services for defense purposes, including the protection of the civilian population.

Also, during a state of defense, women between the ages of eighteen and fifty-five may be assigned to such services as civilian public health and medical system or in the stationary military organization.

This article also gives the Federal Government the right to restrict individuals from giving up the practice of their trade or occupation or profession or their place of work, during a state of defense.

**Article 53a:** The legal structure of the Joint Committee is stipulated in this article. Two thirds of the Joint Committee members must come from the Bundestag and one third from the Bundesrat. The procedures governing the Joint Committee must be adopted by the Bundestag with the consent of the Bundesrat. It is also stated here that the Federal Government must inform the Joint Committee about its plans in respect to a state of defense.

**Article 80a:** According to this article, any legal provisions dealing with the defense of the civilian population can only be applied
after the Bundestag has determined that a "state of tension" exist.

Such legal provisions can be put into force by virtue of an agreement between the Federal Government and an international organ within the framework of a treaty of alliance. However, the Bundestag reserves the right to revoke such agreements, whenever a majority of its members make such a request.

Several other articles of the Basic Law have been amended so that they would be in agreement with the new articles concerning a state of defense. They are Articles 9, 10, 11, 12, 19, 20, 35, 87a and 91. Articles 10 and 35 received changes important enough to be reported here. Article 10 gives the Federal Government the authority to open private letters and to tap telephones. This action may only be taken pursuant to a law with the express purpose of protecting the free democratic basic order or its existence or the security of the federation or a federal state. It is not necessary that persons in question be informed of a law giving the Federal Government such authority. In paragraph two a federal state can make use of the police forces of other federal states, forces and facilities of other administrations as well as the Federal Border Police and the armed forces in cases of natural catastrophe or in a particularly serious accident. Paragraph three gives the Federal Government the right to issue orders to the states should a natural catastrophe or accident
endanger an area larger than a single state. Measures taken by the Federal Government must be lifted at any time at the demand of the Bundesrat.

The passage of this emergency legislation gives the Bonn Republic extensive powers; however, a careful reading of this legislation will reveal many checks against the abuse of its power.

The evaluation of this text from the point of view of theory is treated in Chapter V.
CHAPTER IV

ENVIRONMENT OF THE
FEDERAL REPUBLIC OF GERMANY

An examination of West Germany's emergency legislation is not sufficient, though it may meet the requirements of many standards. The environmental conditions of a country greatly affect its political course, consequently it is possible that carefully constructed emergency laws might be abused. Therefore it is necessary to examine the political, social and economic environment of the Bonn Republic. Such an examination has special significance because the opponents to Bonn's emergency legislation used the example of Article 48 as an argument against passage. They inferred that the Bonn Republic might follow the pattern of Weimar and become a totalitarian state. In order to adequately assess this argument we must examine the environmental conditions of West Germany. A detailed evaluation of this question is beyond the scope of this paper. Thus for our purpose we are only concerned with a general view of West Germany's environment.

Comparison of Bonn and Weimar

Both of Germany's Republics were established following mil-
itary defeat, yet their origins are quite different. With the pro-
mulgation of the Basic Law in 1949, Germany's second attempt at
democracy was initiated. The future of the Bonn Republic looked
bleak, although it was not faced with the strains and chaotic condi-
tions which confronted the Weimar Republic in 1919. In 1949 the
problem of boundaries had been determined (for all practical pur-
poses) at the Potsdam conference without first consulting the German
people.\(^1\) The Bonn Republic was not faced with the agonizing choice
of whether or not to accept a burdensome peace, as did the Weimar
Republic. The occupying powers, in 1948, initiated drastic currency
reforms in order to reduce inflation whereas the Weimar govern-
ment fought inflation from 1920 to 1923 before it was controlled.
Furthermore, democracy in Bonn was facilitated by a growing homo-
geneity of the country. Some consequences of Nazism and war, such
as the partition of Germany, evacuations from bombed cities and the
refugee inundation of 1945 all helped to diminish the regional dif-
fferences which were so prominent during the Weimar Republic.\(^2\)

The formerly Junker-dominated East which was a liability to democ-

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\(^1\) Pinson, *Modern Germany*, Chapter XXIII written by Klaus
Epstein, p. 563.

\(^2\) ibid.
The international situation in Europe was also favorable to the development of West German democracy. Nationalism was on the decline in Europe with the renewal of a common European consciousness, and there was widespread willingness to accept "reformed" Germans as good Europeans. Furthermore, the Cold War was beginning to intensify and the Russians were transforming the East German zone into a Russian colony. These conditions made the West Germans increasingly attractive as an alliance partner for the United States. Policy-makers in the United States were of the opinion that Germany was needed to make the Marshall Plan successful.

Klaus Epstein said there was one additional factor which contributed to the democratic success of the Bonn Republic. He said the Germans had tried every possible form of government in the previous half century and none were a ringing success. But of all the governments tried, liberal democracy was found to be the least wanting. In reviewing Germany's past political experience, Epstein summed it up this way:

The authoritarian monarchy of William II had led Germany into World War I; the incompetence of Ludendorff's military dictatorship had led to Germany's defeat in 1918; the presidential dictatorship of the years 1930-1933 had failed to master the

1 loc. cit., p. 562.
2 ibid.
3 ibid.
economic depression and paved the way for Nazism; and Nazism had resulted in the greatest catastrophe in German history. Communism was discredited by the aftermath of Nazi propaganda, the misconduct of the Russian troops in 1945, and its imposition upon the East Zone by Russian Military Government. The liberal democracy of the Weimar Republic also lacked, to be sure, a brilliant record; but its sins had been those of omission rather than commission. Democracy stood a little bit less discredited than all possible competing systems; its establishment was now, moreover, for the first time in German history, an imperative of foreign policy. The return of Germany into the community of nations required American friendship, and American friendship was unthinkable unless Germany foreswore its authoritarian and Nazi past and become a functioning liberal democracy.¹

The origin of the Bonn Republic was the result of the foreign policy objectives of the United States and its European allies. The Soviets had refused to make a settlement concerning Germany except one that would give them control over Germany. Thus it can be said that the creation of the West German state was one of the first products of the Cold War.

Constitutionally there is a considerable difference between Bonn and Weimar. In the following sections a comparison is made of the major constitutional differences between the two German Republics.

**Federalism:** During the Weimar Republic the Reich (central

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¹ibid.
government), dominated by the state of Prussia held most of the power in governing Germany. The Reich could legislate in most all fields if it so desired. To the states (Laender) was left the administration of the federal laws. But even here many Reich administrations were set up to perform such functions. Furthermore, the federal constitution prescribed the internal structure of the state governments. The Reichsrat was the organ through which the states interests were to be safeguarded on the federal level. Rather than sharing in the governing of Germany the Reichsrat acted as a body preparing legislation, cooperating with the federal government on bills and after enactment, as coordinator between the central government and state administration.¹

On the other hand, the Bonn Republic is no longer dominated by the state of Prussia. The Bundesrat, the organ through which the states are represented, shares in the governing of West Germany. Unlike its predecessor, the Bundesrat can initiate bills, scrutinize government bills, has a suspensive veto over laws, can approve constitutional amendments and certain financial laws. Moreover, the Basic Law, unlike the Weimar Constitution, does not prescribe the internal structure of the Land governments. The Land governments

¹Carter and Herz, Major Foreign Powers, p. 372.
are free to adopt their own election system and their own constitutions. The federalism of Bonn is more pronounced than it was during the days of Weimar. Thus there is a greater decentralization of power in Bonn than there was in Weimar.

Presidency: The president of the Bonn Republic is a figure-head office. He is a symbol of national unity, elected by a special federal convention consisting of members of the Bundestag and the same number of representatives elected by the state parliaments. But on the other hand, the popularly elected president of the Weimar Republic was the most powerful governmental official.

The duties of the Bonn president are quite perfunctory. He appoints important civil servants and military officers upon the recommendation of the government. He signs all laws passed by the Federal Parliament. However, all formal acts of the president must be countersigned by the chancellor or the respective minister except that of nominating a chancellor. Following general elections, the Federal president proposes a chancellor to the Bundestag. If the person proposed is not elected the Bundestag may elect another person. In comparison, the duties of the Weimar president were extensive. The Weimar president appointed and dismissed the chancellor

and cabinet ministers without the consent of parliament. The
Weimar president also had extensive emergency powers stemming
from Article 48. The Bonn constitution, on the other hand, allows
no direct emergency powers for the president other than to promulgate
in the Federal Law Gazette that an emergency exists. Lastly, the
Bonn president is not the head of the armed forces as was the case
under the Weimar constitution.

**Parliament:** The Bonn parliament is a much more responsible
political body than the Weimar parliament. During the Weimar Re-
public temporary majorities could easily overthrow the executive,
which they often did. But under the Basic Law the parliament must
elect a new chancellor before removing the current one. This pro-
cedure is called a constructive censure vote. Such a requirement
gives extraordinary stability and continuity to the executive branch.¹
Moreover, the Bonn parliament cannot be dissolved at will by the
president, whereas Article 25 of the Weimar constitution gave the
president such power.

The Basic Law gives parliament the authority to hold public
hearings, with legal and administrative assistance, and to maintain
watchdog committees during the interval between legislative terms.

¹Erler, Fritz, Democracy In Germany, (Cambridge: Harvard
The Weimar constitution did not allow its parliament such authority.

**Chancellor:** The Bonn chancellor stands in a different relationship to the Bundestag than the chancellor under the Weimar constitution. Under the Weimar Republic the chancellor was appointed by the president and could be dismissed by him. During the latter years of Weimar the chancellor remained in office even though he did not command a majority in parliament. Under the Bonn constitution this cannot happen. The chancellor is elected by the Bundestag and is responsible to them. As we have mentioned above, the legislature cannot overthrow the executive without first electing his successor. Furthermore, the Bonn chancellor names his own cabinet members who are then appointed by the Federal President.

It is clear from the changes in the position of the chancellor to the parliament, that the chancellor is directly responsible to it. This is an improvement over the Weimar experience where the president who was not responsible to parliament possessed the executive powers of the government. This improvement assures the Federal Republic of Germany a parliamentary democracy and not a presidential regime experienced by Weimar.

**The Electoral System:** The improved electoral system of the Bonn Republic greatly affects the composition of the Bundestag. The Bonn Republic still maintains, in part, the system of proportional
representation which is a carryover from Weimar. Since 1945 a mixed system has been adopted for Bundestag and most regional elections. This system combines the advantages of proportional representation with those of the single-member district. Therefore half of the deputies are elected from single-member districts, the other half from Land lists set up by the parties. Thus the voter cast two votes, one for a candidate in his district and a second for a party list. In addition to this change there is an added restriction. In order for a party to be represented in Bonn's parliament, it must first obtain at least five per cent of the total popular vote or win at least three constituencies by a relative majority. This restriction had much to do with the disappearance of most minority parties from the federal parliament. Presently in West Germany only three parties are represented in the Bundestag, the Christian Democratic Union (CDU), the Social Democratic Party (SPD) and the Free Democratic Party (FDP). This is a considerable change over Weimar's parliament which at one time consisted of more than twenty parties. The five per cent requirement has contributed to a concentration of the electorate behind the two large parties, the CDU and the SPD.\(^1\)

\(^{1}\)Erler, loc. cit., p. 7.

Constitutional Courts: The constitutional courts are an innovation
of the Bonn Republic. They were designed to strengthen the new political order by introducing a third branch of government, coequal with the other two branches of government.¹ There is one Federal Constitutional Court with other constitutional courts in the states. The Federal Constitutional Court is solely bound by the Basic Law and may overrule the verdict of any other court, including the constitutional courts in the Laender.

According to Edinger in his book, Politics In Germany, "the constitutional courts are not, nor were they ever intended to be neutral, nonpolitical instruments of the state in the sense of the positivist tradition in German jurisprudence." In essence he says the constitutional courts and particularly the Federal Constitutional Court performs the function of legitimating and preserving the present political system.

The Federal Constitutional Court has come to be an influential force in politics and has clearly established itself as the effective guardian and authoritative interpreter of the principles of the Basic Law.² The court has come to be regarded as such because federal and state authorities, parties and interest groups and ordinary


²loc. cit., p. 324.
Germans who have been before the court for reasons of violated constitutional rights have learned to look to the court and to respect its decisions.¹

The creators of the Federal Republic of West Germany learned several lessons from the bad experiences of the Weimar Republic. Many of the lessons learned are reflected in the political structure of the Bonn Republic. The powerful presidential position of the Weimar Republic has been replaced by the chancellor of the Bonn Republic as the main spokesman of the Federal Government. The chancellor is now directly responsible to parliament because he is elected by parliament rather than appointed by the president as was the case in Weimar. The Bundestag can no longer dispose of chancellors without first electing his successor, thus giving greater stability to the Federal Government. The enactment of the five percent clause has greatly reduced the number of minority parties represented in the Bundestag. The change in the constitutional structure from Weimar to Bonn is considerable when one compares the two systems.

Political Environment

The party system in West Germany since 1949 has centered

¹loc. cit., p. 323.
around two major parties, the Christian Democrats and the Social Democrats with the Free Democrats being a third party.

The political party system of West Germany is actually a multi-party system. However, the number of parties represented in the Bundestag since 1949 has greatly declined. In 1949 there were 10 political parties represented in the Bundestag, in 1953 there were 6 parties represented, in 1957 there were 4 parties represented and since 1961 only 3 parties have been able to obtain more than the required five per cent of the popular vote, the CDU, SPD and the FDP. (see Table 4).

**TABLE 4**

**ELECTION RESULTS 1949-1969**

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<td>31</td>
<td>35</td>
<td>37</td>
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<tr>
<td>Minor parties</td>
<td>15</td>
<td>4</td>
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<td>2</td>
<td>4</td>
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*a* Pinson, op. cit., p. 606.

*b* Data taken from New York Times, October 5, 1969, Section IV, p. 3.
The Bonn Republic has a party system which, in principle, gives the voters a meaningful choice between prospective governmental leaders. But in reality, leading political actors as well as most German voters at least for the first two decades were unwilling "to institute a truly competitive party system providing for alternating party governments and a constant public confrontation between the 'ins' and the 'outs'." The leaders of both parties were inclined to avoid confrontations between government and opposition parties because they considered it more important, to institutionalize the legitimacy of a comparatively new republic and its supporting party system. Many German citizens are not yet convinced that the political functions performed by the present party system might just as well, if not more efficiently be performed by other structures. Consequently, principal party leaders of the CDU and SPD devote a great deal of effort to asserting party control over important decisions affecting national policy.

The Christian Democratic Union (CDU) has been the leading governmental party since the beginning of the Bonn Republic until the national election of September 1969. The CDU is an alliance of heterogenous groups, united by a common desire to control public

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1loc. cit., p. 287.

2loc. cit., p. 289.
policy-making. The party claims members and leaders of the Roman Catholic Church as well as prominent Protestants. It also has a right-wing element with close ties to conservative business and agricultural interest and a left wing associated with trade unions. Also among its members are spokesmen for the expellees and refugees from areas under Communist control and groups representing the interest of various occupational and socio-economic subsectors of German society.¹

The broad policy objectives of the CDU has been responsible for the large appeal it has to the German electorate. The CDU gave its assurances that it would "meet demands for modernizing innovations without sacrificing cherished cultural traditions, and it fused popular demands for security and stability through strong governmental leadership with demands for freedom from governmental intervention in the "private" affairs of the citizen.‖² In the area of foreign policy the CDU has always been pro-Western.

Up until 1966 the Social Democratic Party (SPD) has been the major party in opposition. The SPD, a far more homogeneous party than the CDU, is made-up primarily of industrial workers, low-ranking civil servants, and other salaried employees.

¹loc. cit., p. 240.
²loc. cit., p. 250.
The heritage of the SPD goes back more than a century. The party had a large and loyal following during the Hohenzollern and Weimar eras. From 1949 until the national election of September 1969 the SPD has been able to command the support of about 40 percent of the West German electorate.

The main and general problem of the SPD in failing to become the majority party nationally was due to its doctrinaire approach in solving political, social and economic problems. Rather than transforming the party into an externally oriented "catch all" party like the CDU, the SPD has considered party membership an article of faith rather than a matter of instrumental utility. Not until 1959 under the guidance and direction of the Willy Brandt team did the SPD adopt a new party program. In general the new program proclaimed that the party was a democratic, anti-communist, and progressive reform party and no longer a working class movement. Under its new program the party adheres to the policy of "competition so far as possible, planning so far as necessary."

The new party program of the SPD greatly improved their electoral proportion. In 1965 parliamentary election the CDU obtained

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1 loc. cit., p. 257.
2 loc. cit., p. 259.
3 Carter and Herz, op. cit., p. 412.
only 9 per cent more votes than the SPD, whereas in 1957 the CDU had eighteen per cent more votes than the SPD. The SPD also gained in state elections. And in 1966, for the first time since 1930 the SPD participated in the national government by forming the Grand Coalition with the CDU. And in the September 1969 national election the SPD won enough votes which made it possible for them to form a coalition with the Free Democratic Party and currently they are governing West Germany.

The Free Democratic Party is the only other party that has been able to obtain more than the required five per cent in all national elections since the origin of the Bonn Republic. The FDP has maintained nationwide backing and at times played an influential role in national policy-making. They have been at times the "holder of the balance of power" between the two major parties.¹

The program of the FDP is economically conservation, favoring a undiluted free-enterprise system. The party stands for the separation of church and state and favors inter-denominational education. On the question of national unity the party is strongly in favor of a strong central government.

The membership of the party is drawn from those voters from

¹loc. cit., p. 413.
business circles to whom the CDU seems oriented towards too much welfare. It also draws from small traders and members of the professions who consider the CDU dominated by big business. Protestants who are fearful of CDU clericalism also support the FDP. Last of all, there are those who are nationalistic and feel that the Federal Government depends too much on foreign influence, especially American influence.

The political future of the FDP at this time is uncertain. There have been suggestions for changing the electoral system from proportional representation to an exclusive single member district system. It is expected that this would create a two party system thereby eliminating the FDP because it lacks the popular backing necessary to compete with the CDU and SPD. Presently, all the seats won by the FDP are won on the proportional representative side of the ballot.

A recent development in the West German political scene was the creation of a new right-wing party called the National Democratic Party (NPD), which many people believe to be the work of former Nazis party members. This party was founded in 1964 in an effort to unite the various right-wing splinter groups in preparation for the
1965 elections. The party is a combination of the German Reich Party and the German Party.

The NPD's program is negative and somewhat ambiguous. The party is against more things than it is for any positive program. They are against extravagant public spending on prestigious projects and buildings. They protest foreign films which they regard as one of the agents of corruption in the society. The party calls for a moral clean-up of mass society, which involves a healthier education of mind and body. They oppose the employment of foreign workers who they claim are taking away opportunities from German workers. The party is also against foreign capital investments and overseas development aid or "contributions" to Israel. They disapprove of NATO and praised President Charles De Gaulle for taking his troops out of NATO and call for Germany to do the same. Moreover, they demand that all foreign troops be withdrawn from German soil. The party also feels that Germany should be recognized as the major obstacle to communism in Western Europe. Furthermore, they demand an end to the condemnation of Germany. Along with this, the party demands that a general amnesty should be declared for all former Nazis. They argue that countless war criminals on

the Allied side have never been brought to justice and never will be. The party feels that the "lie" that Germany started the war must be done away with and it also condemns the idea that military service is, or has been dishonorable.¹ And of course, like all West German political parties they call for the unification of Germany.

The typical member of the NPD is found to be Protestant, between the age of 45 to 59, lower middle class and living in a small town somewhere in Northwest Germany. The proportion of refugees and expellees is only slightly higher in the NPD than the West German average. The younger generation is underrepresented. They comprise twenty eight per cent of the total population of Germany whereas only twenty three per cent of the NPD membership consist of young people. Catholics represent twenty four per cent of NPD membership, while forty three per cent of the total German population is Catholic.²

The current leader of the NPD is Adolf von Thadden who was never a member of the Nazi party. In fact, von Thadden's half sister was executed as a traitor by the Nazi regime. However, other NPD party executives were former Nazi party members, although

¹loc. cit., p. 390.

none were very prominent during the Nazi era.\textsuperscript{1}

The National Democratic Party received national and international attention because of its electoral success in state elections in 1966. In the state of Hesse the party won 7.8 per cent of the popular vote and in the state of Bavaria 7.4 per cent. The electoral success in Bavaria resulted in the FDP being replaced by the NPD in the state legislature. The successes of the NPD brought an immediate response from the foreign press. For example, the \textit{London Daily Express} headline read, "New Nazis Win Again."\textsuperscript{2} Many other British papers voiced the same sentiment. Other European newspapers including ones in West Germany expressed surprise and "shock". In response to this Epstein wrote, "Foreign commentators have forgotten too easily that in both provinces more than 92 per cent of the voters supported democratic parties, and that a crackpot fringe of less than 8 per cent is by no means unusual in democratic communities."\textsuperscript{3}

Again, in April 1968, the NPD was successful in the state election of Baden-Wurttemberg winning 9.8 per cent.\textsuperscript{4} Following this

\footnotesize
\textsuperscript{1}ibid.
\textsuperscript{2}Laqueur, op. cit., p. 34.
\textsuperscript{3}Epstein, Klaus, "The Current West German Scene," \textit{Modern Age}, XI, (Spring 1967) 97.

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election, chairman von Thadden predicted that his party would win forty to fifty seats in the national election of September 1969. Later in 1968, during October, the party received 8.8 per cent of the popular vote in the state of Bremen.\(^1\) Moreover, in June 1969 the NPD participated in the convention to elect West Germany's next President.

Because of the successes of the NPD doubt comes to the mind of many concerning the strength of West German democracy. Professor Preece assesses this problem quite well when he wrote in the *Contemporary Review*:

> Indeed, if the non-German press and public opinion will allow the Germans to be democratic and govern themselves, they have shown themselves most capable of it. The National Democrats must not be taken lightly and most of their policies must be fought at every step, but this is no reason for abusing the Germans in toto. Italy has its neo-fascists and its monarchists. France had its Poujadistes until they were swallowed up by Gaullism, the U.S.A. has its Goldwaters and its Wallaces. In such circumstances we are inclined to talk of the danger to democracy in Italy, France or the U.S.A., but when it occurs in Germany we talk of the German danger to democracy. If anything is to make the NPD a major force in German politics it will be our continued refusal to consider the Germans as capable of self-government and responsibility.\(^2\)

The Federal Government considered but decided against out-

\(^1\)ibid.

lawing the NPD feeling such action would make them martyrs.

Furthermore, it was also one of the reasons why Federal Government decided against changing the electoral law. The decision to allow the NPD to function in the open rather than ruling it unconstitutional was a sign of democratic strength rather than weakness.

The government's decision proved to be a positive one because in the September 1969 national election the NPD was unable to break the 5 per cent barrier and failed to gain any seats in the new Bundestag.

West Germany also had a functioning Communist Party from 1949 to 1956. According to Hiscocks, the Communist Party's prestige and position was enhanced following the war due to the fighting record of the Soviet armies and the disgrace brought upon National Socialism. In the first West German elections following the war the Communists obtained from 8 to 9 per cent of the votes in the American and British sectors. And in the first general election held in 1949 the Communists gained 5.7 per cent of the votes and held 15 seats in the Bundestag. However, in 1953 they were only able to obtain 2.2 per cent of the votes and because of the 5 per cent clause they were eliminated from the Bundestag. During the earlier

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years of the Republic the Communists also held many seats in West German state legislatures but by 1954 they had declined in popularity and were represented in the legislatures of 3 states.

The decline in popularity of the Communist Party was due to the behavior of the Soviet occupying forces and the Soviets policy of virtual annexation of the Eastern provinces. Furthermore, the Germans were weary of totalitarian governments and communism was seen as another form of totalitarianism. Moreover, the danger of any compromise with the Communists had been demonstrated by the fate of the Social Democrats in forming an alliance with the Communists in the Soviet zone.

Because of the Communists' camouflaged operations, mass demonstrations and youth movements the party gained the disrespect of the Federal Government. In 1951 the Federal Government filed a suit with the Constitutional Court to have the Communist Party declared unconstitutional. Finally in August 1956 the Federal Government won its case.

In addition to the parties described above West Germany had a number of small parties that have been absorbed into other parties or that have formed alliances in order to survive nationally. The Refugee Party which was made up of ten million expellees and refugees

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1loc. cit., p. 109.
existed until 1955 but since that time most of its members have been absorbed by the CDU and the SPD. The German Party and the German Reich Party formed an alliance which is now the National Democratic Party. In 1953 the All German Party and the German League joined together in attempt to win seats in the Bundestag but failed to do so. Other small parties, significant only in the states in which they are found, are the Center Party that has a following among Catholic industrial workers in the Ruhr area and the regional Bavarian Party. Last of all the Socialist Reich Party, one that was strongly reminiscent of the Hitler era, was ruled unconstitutional in 1952.¹

Since 1961 none of the minor parties have been able to gain seats in the Bundestag; this is primarily the result of the 5 per cent clause.

Thus we see that the political party situation in West Germany today is much different than it was in the days of Weimar. During the Weimar Republic the Reichstag contained many political parties making it very difficult at times to form majority government and in the last few months of its existence it became impossible to do. Currently in West Germany this condition does not exist. In fact with each passing national election the political party system takes

¹loc. cit., p. 103-112.
on the appearance of a two party system. The results of the September 1969 national election supports this conclusion. The only minor party still holding seats in the Bundestag is the Free Democratic Party which only won 5.8 per cent of the popular vote. This is a loss of 3.7 per cent from the 1965 national election results. The absence of many small parties in Bonn's Parliament adds greatly to the stability of the Federal Government.

**Governing The Bonn Republic:** West Germany's two major political parties were established before the creation of the Bonn Republic in 1949. The leaders of the CDU and the SPD were able to consolidate their pre-eminent positions within the political parties (often with blessings of the Western military governments) by the time the Allied Powers called for the creation of a new German state. By virtue of their position in the political parties the leaders of these two parties could dominate the proceedings of the parliamentary council and jointly create a constitutional system which would formalize their control over the political system. Hence we see that these two parties greatly influenced the shaping of the new patterns of government. And thus the principles and practices of the CDU and the SPD are reflected in the Bonn Government. In this respect, it can be said that West Germany is governed by party

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1Edinger, op. cit., p. 267.
Article 21 of the Basic Law helps to maintain and expand the dominant role of the party elites. The sentence in Article 21 reinforcing the role of the dominant elites, reads, "The political parties shall participate in forming of the political will of the people." Thus it assigns to parties supporting the government, and them alone, the para-constitutional status as intermediaries between citizenry and government.¹

The parties have derived many benefits based on Article 21. For example, the governing party and the party in opposition are provided with free and extensive use of publicly owned media of political communication. Furthermore they are allowed to use funds from the public treasury to help finance their activities both directly and indirectly.²

The party leaders who drafted the Basic Law and the constitutions of the states purposely established a form of government in "which the interplay between ruling and opposition parties in German politics would be regulated through institutional arrangements that separated as well as fused the functions of the executive and the legislature."³ In this way they hoped the Bonn Republic would not

¹ibid.

²loc. cit., p. 268.

³loc. cit., p. 270.
be plagued with governmental instability found in the Weimar Republic.

To best illustrate the governing of Germany by party elites we can briefly look at the chancellors of the Bonn Republic. Chancellor Konrad Adenauer, who was Bonn's chancellor from 1949 to 1963 and CDU party chairman until 1965, was very paternalistic in his approach to governing. Adenauer held tight the reins of the government by skillfully combining his roles as leader of the executive branch, chairman of the CDU and leader of an inter-party parliamentary coalition. Most major policy decisions were made by Adenauer alone or in consultation with a small group of trusted ministers.¹ Moreover, Adenauer always maintained the role of supreme arbitrator between the legislative and administrative elites and between party and interest group leaders.

On the other hand, Adenauer's successor, Ludwig Erhard allowed much of the decision-making to shift to party leaders in the state and the federal parliament. Erhard's philosophy toward governing, permitting contending groups greater autonomy in promoting their own interest, proved unsuited to the prevailing political culture and to the evolving process of elite alignment.²

¹loc. cit., p. 274.
²loc. cit., p. 275.
The party government under Chancellor Kurt Georg Kiesinger, Erhard's successor, took a different form than of both Adenauer and Erhard. Kiesinger seemed to follow a pattern of collegial leadership.\(^1\) Being the leader of the Grand Coalition Kiesinger was restrained in the exercise of his power by the need to maintain stability among the elites in the two parties. Consequently Chancellor Kiesinger's role was one of mediator. However, with the major leaders from both parties in one government the focus of decision-making once again shifted to the executive branch.\(^2\)

**Political Integration:** The two major parties of West Germany have been successful in integrating elites into the political process through the party system. But on the other hand, the political parties can only claim limited success in integrating the masses into the political system.

Today in West Germany it is understood that those who aspire to a career in politics must join either the CDU or the SPD. Both political parties offer opportunities for upward social and economic mobility into highly paid and prestigious positions of public authority for those desiring a political career. Moreover, both

\(^1\)ibid.

\(^2\)loc. cit., p. 276.
Parties provide protection against loss of income and status.\(^1\)

However, the average German does not view the political parties in the same way that elites do. Mass support for the political system by way of voting is not a demonstration of emotional involvement. Rather, most Germans view voting as a duty. In the opinion of Edinger this is due to the legacy of the past.\(^2\) There are still many memories of the debilitating party conflicts from the Weimar era.

To a certain extent the two major parties have become electoral organizations for the purpose of recruiting governmental policy-makers. Consequently the CDU and SPD have become increasingly remote quasi-official structures in the eyes of many citizens of the Bonn Republic, including a few of its own members.\(^3\)

The Grand Coalition: It would be improper to discuss West German democracy without making reference to the Grand Coalition and its impact on the political system.

The CDU-SPD coalition was formed following the dissolution of the CDU-FDP coalition in 1966, headed by Chancellor Erhard. The FDP withdrew its support from the Erhard administration due to the disagreement over financial matters. Moreover, many

\(^{1}\) loc. cit., p. 279.

\(^{2}\) loc. cit., p. 285.

\(^{3}\) loc. cit., p. 266.
members of the CDU were dissatisfied with Erhard's leadership. He was blamed for indecision and lack of leadership in foreign affairs, particularly with East Germany. Furthermore, Erhard was unable to cope with the "fiscal mess" left by former Chancellor Adenauer.¹

Kurt Kiesinger, a member of the CDU, was elected Chancellor and Willy Brandt, a leader of the SPD was appointed Vice Chancellor and Foreign Minister. With the formation of the Coalition the government now controlled 447 seats of the 496 in the Bundestag.

It was generally agreed that a coalition between the two major parties might be necessary to help solve some of the important problems facing the Bonn Government in 1966. First there was the need for a security system to replace the one provided by the Allied Powers in the Paris agreements of 1954. Then there was also the need for establishing a proper balance between Bonn's ties with France and the European community on one end, and its relations with the U.S. and NATO on the other. Thirdly, there was the need for tax reform, one which would enable the Federal Government to retain a larger portion of tax revenues shared with the states. Lastly, there was the need for electoral reform to do away

¹Epstein, op. cit., p. 166.
with the complicated system of proportional representation combined
with a single member district system.¹

A number of arguments, however, were raised in opposition
to the formation of the Grand Coalition. First and foremost, the
opponents pointed out that Germany's parliamentary system would
be without an effective opposition. Secondly, it was feared that the
government would become complacent and incompetent. Many
opponents also claimed that the electoral gains in state elections
by the National Democratic Party was a result of the coalition.
Epstein was of the opinion that the coalition was dangerous because
it added fuel to the intransigent left wing element of the SPD and the
discontented nationalist rallying behind the NPD.²

There was also a negative political implication resulting
from the coalition. Both major parties stood to lose some political
identification. This was especially true for the SPD, for it meant
they were "bailing out" the CDU from its fiscal and economic policy
which had become bankrupt.

At the time of the creation of the Grand Coalition, its leaders
and supporters expressed the hope that the coalition would be a

²Epstein, op. cit., p. 166.
temporary alliance. The desires expressed by the supporters and advocates of the Grand Coalition were fulfilled following the national election of September 1969, when the Social Democrats gained a sufficient number of seats in the Bundestag to enable them to form a majority government in coalition with the Free Democratic Party. Thus the Grand Coalition has been replaced with a coalition government which again creates a parliamentary system with a sizeable opposition—the CDU. Moreover, it is an important fact to note that there has been a change in political leadership, from one party to another (first time since 1949) which has taken place smoothly and without any negative political consequences. During the later years of the Weimar Republic national elections which involved a change in political leadership from one party to another did not go by without experiencing a considerable amount of violence. Furthermore, the gain in popular votes by the SPD, which has always been the party in opposition until 1966, is a demonstration of faith by the West German electorate in a political system that is based on competing political parties.

The Spiegel Affair: The Spiegel Affair concerns an incident involving Der Spiegel a prominent weekly news magazine in West Germany. An examination of this incident is valuable for two reasons. First, it indicates that there are remnants of Germany's
authoritarian past still present. Secondly, it shows the changes in attitude on the part of the public towards governmental authorities.

In October 1962 Der Spiegel published an editorial entitled "Conditionally Prepared to Defend." In the weeks prior to this publication NATO was conducting war manoeuvres called "Fallex 62." The main thesis of this editorial concerned the Fallex manoeuvres and West Germany's performance and degree of military readiness. It revealed that the NATO inspectors gave the German Bundeswehr the lowest rating, called "conditionally prepared to defend." Not only was this article concerned with West Germany's military status but it was also personally aimed at Defense Minister Franz Josef Strauss and his military policy. Many military defense plans were revealed in this article. Consequently, the Defense Minister felt that the exposure of many so-called military secrets was an act of treason against the Federal Republic of West Germany.

At midnight on October 26, 1962, two weeks after this article appeared on the newsstands, the police armed with warrants

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2 loc. cit., pp. 29-32.
raided and searched the offices of Der Spiegel. Editors at the offices were arrested on suspicion of treason. Editors not found in the offices were awakened from their sleep at home and arrested. At the homes of the editors the children were awakened and taken from their bedrooms so the rooms could be searched for evidence. Another editor traveling in Hungary at the time was offered political asylum by the Kadar government but he refused and returned voluntarily. The publisher, Rudolf Augstein, hearing of the warrant for his arrest voluntarily surrendered to the police the next day. For two weeks following the midnight raid the offices of Der Spiegel were occupied by the West German police.

The reaction of the public sector in West Germany towards the midnight raid and arrests was rather great. The first ones to voice their opposition were elements of the intellectual and student communities. Students conducted sit-ins and demonstrations. Some of the slogans appearing on placards carried by demonstrators told the initial reaction of many; they read, "Der Spiegel is dead--freedom is dead," "Head in the sand, dear Fatherland," "On to the total state," and "It concerns not Der Spiegel--it concerns press freedom." In addition to sit-ins and demonstrations, petitions were signed by

1 loc. cit., pp. 42-57.
2 loc. cit., p. 59.
the protestors as a means of expressing their support for the jailed editors.

The association called "Group 47", a loose union of artists, writers and intellectuals, released a manifesto expressing loyalty to Rudolf Augstein and demanding Franz Strauss' resignation. Prior to the Spiegel incident many members of Group 47 criticized Der Spiegel for appealing to sensationalism, but now they came out in support of its editors in defense of freedom of the press.

Most West German newspapers vehemently opposed the action taken by the Federal Government. An editorial in the Frankfurter Rundschau recalled the days of Hitler. The paper said that because of the Spiegel Affair Germans can no longer be sure that a knock on the door in the early morning means nothing more than the milkman or the delivery boy with breakfast rolls. Or, that a knock on the door at midnight is not more than a drunk staggering home that has come to the wrong door. In concluding the editorial it was said, "there is hardly a schoolchild who can really be persuaded that because of this article the Federal Republic has been placed in danger."

Not all newspapers came out in opposition to the Federal

Government's action towards the Spiegel magazine. A few of them withheld criticism until more information could be obtained concerning the affair. And there were others that defended the action of the Federal Government.¹ By and large, however the overwhelming amount of opinion was against the action taken by the Federal Government.

In a public survey taken in 1962, asking this question, "In your opinion, how did the government deal with the Spiegel Affair," an average of 22 per cent answered "correctly," 48 per cent said "not altogether correctly," and 29 per cent said "largely incorrectly."²

The action on part of the Federal Government clearly indicated that at this particular time in 1962 there was still authoritarian tendencies among some of the governing elites of West Germany. This can be seen in the action taken by Defense Minister Strauss. Thinking that his political career was being threatened by Der Spiegel magazine, Strauss struck back in an authoritarian manner. However, it is also important to note that due to the adverse opinion toward his action, Strauss eventually resigned and left the government. And a few months after the Spiegel incident the editors were

¹loc. cit., pp. 70-71.

released from jail. Although, it wasn't until 1965 that the editors were cleared by the Constitutional Court of all charges of treason.\footnote{For a discussion on the proceeding of the Spiegel Affair before the Constitutional Court see Schoenbaun, Chapter VIII, loc. cit., pp. 199-224.}

On the other hand, the reaction on part of the West German society demonstrates that the people will defend their constitutional rights. This is especially important in light of German's authoritarian past where governmental action was nearly always accepted as being final.

**West German Society**

The Germans of the Bonn Republic are experiencing the dynamic forces of a free economy which is changing their lives and character. The influences of a free economy have spawned a new and this time independent entrepreneurial and managerial class with a vested interest in parliamentary democracy.\footnote{Merkl, Peter H., *Germany Yesterday And Tomorrow*, (New York: Oxford University Press, 1956), pp. 126-7.} Twenty years of free competition has bought about a new society in Western Germany.

Traditionally, however, the Germans have been characterized as being idealistic and authoritarian. Their religious convictions of Catholicism and Lutheranism and the state system of education have contributed to strengthening the Germans idealistic and
authoritarian patterns. This has, to a large extent, resulted in making the German unpolitical and at times causing him to have an actual disdain for politics. Pre-World War I Germans felt that politics and governing "was a matter for the emperor, his ministers, and the civil service, in fact, for those in authority."\(^1\)

The development of German industrialization under the control of the old feudal elites and under the tutelage of the Kaiser's state also greatly affected the German's attitude toward government. Germany never developed a bourgeoisie class, like that of England and France. Consequently, Western style development was smothered under Prussian domination with feudal and state control. Under the control of this class all problems were handled with state-imposed solutions.\(^2\) However, with the destruction and economic dislocation brought on by World War II and its aftermath and especially the expulsion of millions of East Germans, and the division of Germany, the former ruling classes no longer maintains an influence in West German society today.

The landed aristocracy of pre-World War II Germany is no longer an important factor in the political life of the Bonn Republic. This class has been replaced by, what Merkl calls, a "money

\(^1\)Hiscocks, op. cit., p. 225.

aristocracy. Merkl feels that this upper stratum has a vested interest in the political and economic status-quo and has therefore lent its support either to the CDU or the FDP. According to Merkl, they are not like their predecessors who plotted for the return of the monarchy, nor is this new class looking for a Hitler to help subdue organized labor and the overthrow of parliamentary democracy as in the days of Weimar.

Post World War II West Germans are turning away from such values as national grandeur or the well-being of the group or community and the new stress is on individual effort and rewards. The Germans of the Federal Republic have discovered the challenge, the opportunities and the satisfaction of individual existence. Germans in the past put public before private needs but in the Bonn Republic the opposite appears to be true. For example, the emphasis on private rather than public needs can be seen in the demand for more and better hospitals and the opposition to the archaic educational system. Likewise with roads, Germany has autobahns but the secondary roads hardly meet the needs of a society that is abandoning their motorbikes for cars. The West German emphasis is on individual consumer goods rather than public needs.

Even though the average German is not politically integrated

1loc. cit., p. 134.
to the extent that we find in Britain and the United States, he has demonstrated his support for democracy by voting and a changed attitude. The changed attitude toward his government is clearly shown in some of the opinion polls taken since 1949. In a survey taken in 1949 the following question was asked, "Are you in favor of the president holding a strong position, as in the United States, or would you prefer to see parliament exerting as much influence as possible?"\(^1\) Of those polled, 41 per cent favored a strong president, 23 per cent favored a strong parliament, 6 per cent said neither and 30 per cent were undecided. Thirteen years later, in 1962, in another survey concerning attitudes towards the president, the following question was asked; "Do you think the Federal President should exert more, or less, influence on political life than hitherto, or would you say that the influence he has at present is just right? In response, 56 per cent said just right, 17 per cent said more, 3 per cent said less and 24 per cent had no opinion. In 1949, 41 per cent were still for a strong authoritarian president and 13 years later we see a change in attitude where 56 per cent were satisfied with a president with very little power. Such a trend appears favorable

to democracy in West Germany.

In yet another survey taken in 1962 the German people were asked to express their attitude towards parliament. They were asked: "If seen from the practical point of view, do you think we need a parliament and deputies, or could we manage without?"¹ In this survey, 60 per cent felt that a parliament was needed, 13 per cent said Germany could manage without, 10 per cent were undecided and 8 per cent did not know.

Two years later, in 1964, in another poll the people expressed dissatisfaction with parliament's performance but still considered it to be important. In this opinion poll, 30 per cent had a favorable impression, 21 per cent had an unfavorable impression, 25 per cent were undecided and 24 per cent had no opinion.² In this same survey individuals were asked if they felt a person had to have great ability to be a Bundestag deputy, 54 per cent answered yes, 28 per cent said no and 18 per cent were undecided.

According to a survey taken in 1961 the German people preferred a multiparty system. In a question put to them concerning this, 52 per cent favored several parties, 21 per cent said several parties, but not more than two or three, 10 per cent said one party,

¹loc. cit., p. 230.
²loc. cit., p. 231.
1 per cent said no parties at all and 16 per cent had no opinion.¹

The society of the Bonn Republic appears to be more conducive to democracy than the Weimar society of 1919-1933. The Junker class, which was more interested in reviving the monarchy dominated the class structure of the Weimar Republic. In Bonn, however, it is a "monied" class that is more interested in the continuation of a free competitive society. Furthermore, based upon the opinion polls reviewed we see that generally the people approve of and support the democratic political institutions of Bonn whereas in Weimar there was a certain portion of society that wanted to overthrow the democratic political institutions. It can be generally said that the "new society" of the Bonn Republic identifies its future with democracy.

West German Economy

In no other sphere than in the field of economics is it clearer that Bonn is not Weimar. Since the currency reform of 1948 the country has continued to grow economically.

Whereas the Weimar Republic was beset constantly with financial problems, high inflation, high unemployment rates and many

¹loc. cit., p. 395.
strikes, the Bonn Republic on the other hand has experienced an almost continued economic boom since its origin.

A good measurement of prosperity and growth is the gross national product. West Germany's GNP since 1962 has been increasing at more than 6 per cent a year except for 1967 when the rate was 0.6 per cent. In 1962 the percentage of increase of the GNP over the previous year, at the current prices, was 8.7 per cent; in 1963 it was 6.5 per cent; in 1964 it was 9.6 per cent; in 1965 it was 9.4 per cent and in 1966 it was 6.2 per cent. In September 1968 it was predicted that the 1968 GNP would be an increase of 5.5 per cent over 1967. The GNP in terms of Marks has gone from 354.5 Billion in 1962 to 483.6 Billion in 1967. This amounts to a 129.1 Billion increase over a five year period.

Another indicator of economic stability and prosperity is the unemployment rate. The highest unemployment rate since 1962 came in January 1968, when it was recorded at 3.2 per cent. However, by September 1968 the unemployment rate had dropped down

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to 0.8 per cent. During the period December 1966 to March 1968, was the only time since 1962 that unemployment ran higher than job openings. During this period of time job openings fell as low as 250 thousand and unemployment reached approximately 650 thousand workers. However, the United States Department of Commerce in its September 1, 1968 report, said that unemployment had gone down to one per cent and that job vacancies were approaching a level of almost three vacancies for every job seeker.

Wages too, have been on the increase during the 1960's. In 1963 the average gross weekly earnings was at 158 DM and in July 1968 it was reported that the average worker was making 217 DM per week.

The standard of living, has continued to improve which is evident from consumer buying. For example in 1960, there were 81.3 passenger cars per 1000 population and by 1968 this had increased to 194 cars per 1000 population. As we mentioned above, the West German is exchanging his motorcycle for an automobile. In 1960 there were 35.0 motorcycles per 1000 of population and by 1968 this

1 loc. cit., p. 44.

2 loc. cit., p. 41.

3 loc. cit., p. 46.
proportion had gone down to 5 motorcycles per 1000 of population.
Another indicator of an improved standard of living is the number
of TV sets purchased. In 1960 there were 72.4 TV sets per 1000 of
population and in 1968 there were 240 TV sets per 1000 of population.¹

In its semiannual report on economic trends in West Germany
the U.S. Department of Commerce predicted that the economy
would continue on its upward swing.² The Department of Commerce
reported capital goods for the domestic market were increasing
at an extraordinary pace. Raw material output of iron and steel
were at record levels. The export of commodities was 62.61 billion
(DM) from January to August of 1968 where the total for 1967 was
87.45 billion (DM). To cite a few examples, by August 1968, 28.4
billion (DM) worth of machinery and transportation equipment had
been exported, 13.76 billion (DM) of machinery other than electric
and 9.8 billion (DM) of transport equipment.³ The construction
industry had also been increasing, particularly in heavy construction
which had been stimulated by governmental programs such as road

¹ibid.

²Economic Trends, op. cit., pp. 4-6.

³The Europa Year Book, (London: Europa Publication Lim-
building and infrastructure projects.\(^1\)

The report went on to say that retail trade had increased, which was due to the increase in consumption. It was then estimated that private consumer consumption would increase by about 5 per cent in 1968 due to expanded employment and working hours. It was also predicted that because of recent labor settlements the annual rate of increase in hourly wage rates would go from 2.3 per cent to nearly 6 per cent.\(^2\)

On the monetary scene the outlook was excellent. Lending was high while at the same time interest rates were on the decline. It was reported that the money supply was growing at the annual rate of 8 per cent. In fact, with the monetary problems facing Western Europe the West German Mark is presently the most sought after European currency. In recent months other European countries were hoping and the Federal Government of West Germany was considering the possibility of revaluing the Mark up-wards.\(^3\) However, it was doubtful that the Mark would be revalued up-ward until

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\(^1\)Economic Trends, loc. cit., pp. 4-6.

\(^2\)ibid.

after the national election of September 1969.

From the economic facts presented the reader can immediately see that economically Bonn is not Weimar. The economic growth and prosperity greatly enhances the political stability of the Bonn Republic, something the Weimar Republic never enjoyed. In comparison to Weimar, we may conclude that the economic environment of Bonn is more conducive to the growth of democracy.

Conclusion

The structural improvements of Bonn over Weimar are quite significant. The most obvious is the symbolic position of the Bonn president in contrast to the powerful president of Weimar. In Bonn the chancellor is elected and directly responsible to parliament whereas in Weimar the chancellor was appointed by the president. Furthermore, the Bonn Republic is not faced with the political party rivalries and conflicts so prevalent during the Weimar Republic. Rather, Bonn's political parties conduct themselves in such a manner so as to legitimatize the Republic. There has also been a real change in the social composition of West German society in comparison to the social structure of Weimar. Post World War II Germany has a society which supports and desires to maintain a republican form of government whereas during the days of Weimar
the upper class (landed aristocracy) did not support but worked for the demise of the republican form of government. Finally, there is an unquestionable difference between the economic stability of Bonn in comparison to Weimar. This becomes especially clear when we reflect upon Weimar's problems of inflation and unemployment which are not serious problems confronting the Bonn Republic.

The favorable political, social and economic environment of the Bonn Republic is an important fact in evaluating West Germany's emergency legislation. Unlike Weimar the Bonn Republic does not have conditions which demand the often or continued use of emergency powers. Moreover, with the popular general support enjoyed by the Bonn Republic, misuse of emergency powers to destroy the republic is greatly diminished.
CHAPTER V

ANALYSIS OF BONN’S EMERGENCY POWERS

Much time, care and deliberation has gone into the writing of West Germany’s emergency laws. The framers of the present law could draw many lessons from Germany’s past experience with emergency powers under the Weimar Constitution. As the reader may recall from Chapter II, it was pointed out that Article 48 received surprisingly little opposition at the time of its writing, and the scope of its power was very broad with few limitations. In contrast to this, Bonn’s emergency legislation received tremendous opposition which resulted in a meticulously written emergency law that contains many limitations. Such a law, therefore, can legitimately be subjected to a textual evaluation.

Bonn’s emergency powers have been in force a little more than one year. Within this short period of time they were never used. Our analysis, then can only cover the written law itself and not the good or bad effects the law could have had on West German constitutionalism had they been implemented. Therefore, it is the purpose of this chapter to analyze theoretically the present law based on the standards developed in Chapter I. The conclusion of this chapter
is used to show that Bonn's emergency legislation is safe and poses no threat to democracy in West Germany.

The passage of emergency legislation by the Bonn Republic effected a change in the status of West Germany in its relationship to the three Allied Powers. Previous to the passage of this legislation the three Allied Powers reserved the right to act in case of an emergency situation. Since Bonn's newly acquired emergency powers have met the requirements established in the Paris Protocol of 1954, the Allies have relinquished the right to act in such situations. The responsibilities transferred from the Allies to the West German authorities concern the security of Allied troops stationed there, taking emergency action in case of a possible invasion or attack, suppressing insurrections, initiating emergency measures in case of natural catastrophies and in case of a grave accident. Fulfilling the requirements set down by the Allied Powers makes Bonn's sovereignty complete.

Evaluation of the Emergency Legislation

In Chapter I we have listed four standards drawn from the ancient Roman dictatorship and four given by Clinton Rossiter. These eight standards will be used to evaluate West Germany's emergency legislation.
The first standard drawn from the Roman experience states that the appointment of the dictator must take place according to precise constitutional form. West Germany's Basic Law, like many modern constitutions, does not name a precise dictator. Rather it states that the Bundestag with the consent of the Bundesrat shall determine and declare a state of defense, but the chancellor is not named as the dictator. However, Article 115b indirectly speaks of the Federal Chancellor as being the constitutional dictator, this article says that, "upon the promulgation of a state of defense, the power of command over the armed forces shall pass to the Federal Chancellor." Moreover, in many places in the emergency legislation reference is made to the rights and authorities of the Federal Government and of course we know that the Chancellor heads the Federal Government. From this we may conclude that the chancellor will become the constitutional dictator. But on the other hand, it is important to note that the emergency legislation reserves most of the power for the Federal Parliament. The parliament has the authority to legislate during periods of crisis and to revoke all action taken by the Federal Government. In fact, the parliament even has the power to remove the chancellor during an emergency whereas the Bundestag cannot be dissolved during an emergency.

In a literal sense West Germany's emergency legislation
does not meet the first criterion because no distinct dictator is named, rather it reads as though parliament will be the ultimate authority. However, as we argued above the chancellor would become the dictator even though this is not designated directly in the Basic Law. Hence, we may say that indirectly and theoretically the emergency law meets the criterion of the first Roman standard.

Why does West Germany omit naming a precise dictator?

We can suggest they did so because of their prior experience under Article 48. The authority of Article 48 gave all the powers to the Weimar President and very little to the parliament. Today the opposite is true. The West German Parliament retains most of the authority under the present emergency law. The chancellor will retain his leadership position during a state of defense only as long as he remains in the good graces of Bonn's parliament. Thus the writers of the present law have created a much safer legal instrument than its predecessor—Article 48.

The second Roman standard states that the dictatorship must be instituted by others than the dictator himself. It is clearly stated in Article 115a that the determination of a state of defense must be made by the West German Bundestag with the consent of the Bundesrat. The chancellor can make a request that an emergency be declared but the employment of emergency articles cannot be authorized unless
it is so designated by parliament. Accepting the rationale given above, that is, that the chancellor because of his leadership position will become the constitutional dictator, we can then conclude that Bonn's emergency legislation fully meets the requirement under the second criterion.

The third Roman criterion states that an exact time limit be fixed on how long emergency powers may remain in force. Bonn's emergency legislation does not require such a limit. In fact, with the complexities of a modern industrial society it would be unreasonable to set a fixed time limit. During the ancient Roman era emergencies were normally of a military nature which were readily terminated by military victory. But emergencies during the Twentieth Century can also be caused by social or economic disruptions and in such cases solutions are not as easily determined as a victory on the battlefield. However, Bonn's emergency legislation does in a sense provide for a fixed limit on the use of emergency powers. The legislation which is enacted during a crisis period is limited in time by the stipulations found in Article 115h, paragraph two when it states that laws adopted by the Joint Committee, and ordinances having the force of law must cease to have effect not later than six

1 For a more detailed discussion of this subject see the argument made in Chapter I.
months following the termination of an emergency. It further states in paragraph 3 that laws in derogation of Articles 106 and 107 (taxation) can apply no longer than the end of the second fiscal year following the termination of an emergency. Thus we may conclude that Bonn's emergency law meets the requirement of the third criterion.

The last Roman standard states that a dictatorship must always be instituted in defense of the existing constitutional order, never with a view to destroying it. This standard is best used for measuring the effect emergency powers had on a constitutional system, while in force. However, in the case of Bonn's emergency powers, legislative provisions were made to ensure that a temporary dictatorship does not alter or change the constitutional structure. The West Germans have built in such a safeguard in paragraph 2 of Article 115e where it is written that the Joint Committee may not enact any law to amend the Basic Law or to deprive it of effect or application in any way. Furthermore, the Joint Committee cannot use any other articles, such as Articles 24 or 29, for the purpose of altering the Basic Law. Moreover, as we mentioned in our discussion of the third standard, all laws enacted during a state of defense must cease within a specified time period following the termination of a state of defense. Theoretically, then, Bonn's emergency legislation.
also meets the requirements of the fourth criterion.

In the first standard suggested by Rossiter he states that a dictatorship should be representative of the citizenry interested in the defense of the existing constitutional order. The West German Bundestag, a representative body, determines the beginning and end of a state of defense. And in such a case where the Bundestag cannot meet a Joint Committee made up of Bundestag and Bundesrat members will act in its place. Article 53a ensures that this committee will also be representative of the people when it requires the Bundestag delegates on the committee be in proportion to the size of its parliamentary groups. The question that may immediately arise is, what about the possibility of anti-democratic groups winning seats in the Bundestag? First of all it should be noted that political parties which by their actions seek to impair or abolish the free democratic basic order or endanger the existence of the Federal Republic may be ruled unconstitutional by authority of Article 21 of the Basic Law. Two political parties have met such a fate since the birth of the West German Federal Republic in 1949. Moreover, for a radical party to have a great amount of influence during a crisis it would need a large number of Bundestag seats. Nevertheless today this is rather unlikely considering the current West German political environment.
The second standard drawn from Rossiter's work, states that those in authority during an emergency should maintain ultimate responsibility for every action taken. West Germany's emergency law also provides for this safeguard. West Germany, adhering to civil law tradition makes provisions for the legislature to determine whether or not emergency conditions exist. In addition to this they have added a feature from the common law tradition.\(^1\) To a judicial body is delegated the ultimate jurisdiction concerning the proper use of emergency power during a crisis. According to Article 115g the Federal Constitutional Court will continue to function during a state of defense. This may be interpreted to mean that the Court will protect and uphold the democratic way of life even during a state of defense. Consequently persons who feel the authorities are exceeding the bounds of necessity and restricting their rights during an emergency can appeal to the Court for relief. The Constitutional Court has already established a precedent in regards to the use of arbitrary power by federal authorities. In the final ruling on the Spiegel Affair the court came out in defense of the editors of Der Spiegel. They were acquitted due to the "lack of evidence", consequently no treason had been committed as accused

\(^1\) For the distinction between civil and common law tradition see Chapter I pages 16-20.
by some members of the Federal Government. Therefore, we conclude that Bonn's emergency law also meets the standards of the second criterion suggested by Rossiter.

In his third standard Rossiter states that the termination of a constitutional dictatorship, like the decision to institute one, should never be left to the discretion of the man or men who constitute the dictator. As we stated above no distinct dictator is explicitly defined but we came to the conclusion that the chancellor being head of the Federal Government would become the constitutional dictator. The authority to terminate a state of defense rests with the parliament as stated in Article 1151 paragraph 2. Thus West Germany's emergency law meets the standard of Rossiter's third criterion.

The fourth standard adapted from Rossiter's work states that the termination of a crisis must be followed by as complete a return as possible to the political and governmental conditions prior to the declared emergency. Here too, the meeting of this standard can best be judged following a crisis. However, provisions found in West Germany's emergency law indicates that the framers were concerned about the aftermath of a crisis because Article 115k stipulates that laws enacted during a state of defense must terminate within a specified time period following a crisis. Legally then,

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the formal structure of government must return to its original state
prior to the crisis. However, we must be reasonable and admit
that a government cannot go through a severe crisis without effecting
some change in the political order. Nevertheless the attempt by
West Germany's lawmakers to put a legal requirement, in the
emergency legislation assuring a return to normalcy makes this
safeguard measure up to Rossiter's fourth standard.

We find that West Germany's emergency legislation meets
the requirements of the four standards drawn from the ancient
Roman experience with constitutional dictatorship and the four
taken from Rossiter's classic work entitled Constitutional Dicta-
torship. Based on these finds we can conclude that West German's
emergency legislation contains sufficient safeguards against abuse
and poses no immediate threat to democracy in the Bonn Republic.

Conclusion

The writers of West Germany's emergency law built into
the legislation many safeguards and checks against abuse, but they
also retained language that is somewhat vague and susceptible to
broad interpretation. For example, in Article 87a paragraph three
the term "state of tension" is used. What is meant by a "state of
tension" is not given or explained. It merely states that during
such conditions the Armed Forces shall have the power to protect civilian property and discharge functions of traffic control pertinent to the performance of their defense mission. It is conceivable that the term state of tension could be used for partisan reasons. For example, popular dissatisfaction with the party in power expressed by means of demonstrations or civil disobedience could be construed as creating a state of tension, thus giving the party in power the impetus for employing emergency powers for partisan purposes. The term "imminent danger" used in paragraph four, also of Article 87a, carries the same connotation as the term "state of tension." However, we may conclude that such broad terms as these found in West Germany's emergency legislation cause greater alarm than if they were found in emergency laws of other Western democratic nations. There are several arguments to be made which demonstrate that Bonn's emergency legislation is a good legal instrument and poses no threat to democracy in West Germany.

First, in some countries but not in all, emergency legislation is passed in the form of statutes and ordinances whereas in the case of West Germany the emergency law was passed in the form of an amendment to the Basic Law. It is much easier to pass statutes and ordinances which only requires a simple majority than to amend a constitution which requires a two thirds majority. Furthermore,
it can be reasoned that legislators will be more cautious and thorough in amending a constitution which takes on an air of permanency than passing ordinary laws that can be easily revoked or superseded. Since the emergency provisions came in the form of an amendment to the Basic Law they are less likely to be changed in the future because it requires a two thirds majority to change the constitution. Amending the constitution required the participation of the opposition which was not only more difficult but more in line with democratic principles. Last of all, one might conclude that abuses of the constitution are a good deal more obvious than violations of simple legislative enactments.

Furthermore, Bonn's emergency law has been noted as one of the most moderate and democratic in the world. For example, an editorial of the New York Times stated that Bonn's emergency legislation was one of the mildest of any western country.¹ Dr. J.C.G. Rohl, Lecturer in Modern History at the University of Sussex in England, said a year before the law was passed, that the West German emergency laws would be the most up to date and in many respects the most democratic in the world.² The most striking


democratic element of Bonn's emergency legislation is the fact that parliament retains most of the power. A rather interesting fact is that it takes a two thirds vote by parliament to declare a state of defense and only a simple majority to terminate the use of emergency powers. Furthermore, any emergency measures taken by the Federal Government can be revoked by the Bundestag and in some cases by the Bundesrat. Reflecting upon Germany's past one can say with certainty that Germany's present emergency law is a considerable improvement over Article 48.

Returning to our discussion in Chapter I, we stated that it is not emergency laws that are the final defender of democracy but the desires of the people. As early as 1962 the West Germans demonstrated their desire for democratic order by overwhelmingly opposing the Federal Government's arbitrary use of power to arrest and jail the Editors of Der Spiegel magazine.¹ And again most recently in West German national elections (September 29, 1969) the West German voters demonstrated their commitment to democracy by not seating extremist party members in parliament. The right-wing National Democratic Party (NDP), which made some gains in state elections, was defeated at the polls by the West German

¹For a more detailed discussion of the Spiegel Affair see Chapter IV.
people. The NDP received only 4.3 per cent of the vote whereas their leaders predicted the party would win approximately 10 per cent of the popular vote. The West German people also did not vote to seat any elements of the extreme left; these elements also met strong defeat by receiving only 1.1 per cent of the total votes. This meant, then, that 94 per cent of all West Germans going to the polls voted for democratic parties.¹ What better indication of democratic tendencies could one ask for than the outcome of the West German national election of 1969? The West Germans have again re-affirmed their faith in a democratic way of life rather than shifting to the right as some feared and predicted would happen.

And for those who still doubt West German democracy, they can take stock in the fact that several divisions of Allied troops remain on West German soil. We can confidently say that a West Germany moving to the extreme right would cause grave concern within the Western Alliance, while unlike before, would result in some kind of action to discourage any West German desire for territorial expansion. At this point in West German history it seems

¹Ellis, Harry B., "Two-party system in West Germany," Christian Science Monitor, September 15, 1969, p. 1 and 5. The Christian Democratic Party won 46.1%, up 2.7% from 1965, the Social Democratic Party won 42.7%, up 3.3% from 1965, the Free Democratic Party won 5.8%, down 3.7% from 1965.
unlikely that Germany would again take up the goals of the Nazis regime.

Last of all we turn our attention to the argument made by those who felt that the Bonn Republic might fall prey to the abuses of emergency powers like Weimar and become a totalitarian state.

West Germany's emergency legislation underwent many changes before it was acceptable to parliament. The Socialist party wanted greater safeguards and the labor unions wanted to maintain the right to strike. Both of these areas of disagreement were settled satisfactorily before passage. However, there still remains one general area of opposition, the fear of abuse which some felt would eventually lead Germany back to a totalitarian form of government. We have concluded that the emergency legislation meets the requirements of the eight standards selected for evaluating emergency powers. Yet it must be remembered that the environmental conditions of a country can have a determining effect on its political course. And even carefully constructed emergency legislation is subject to abuse. The tendency for abuse, however, is greatly diminished by favorable environmental conditions. Such are the environmental conditions of the Bonn Republic both before and since its enactment of the emergency powers. We have shown in Chapter IV that there has been a considerable change in the
environmental conditions from Weimar to Bonn. It was noted that the Federal Republic of Bonn has greater political stability than was evident in the Weimar Republic. The legal political parties of the Bonn Republic support the government whereas some political parties of the Weimar Republic were working for its downfall. The Bonn Republic does not have a dominant social class desiring its downfall as was the case with the Junker class in the Weimar Republic. Lastly, the Bonn Republic is experiencing continued economic growth and prosperity, something the Weimar Republic never enjoyed. Thus the favorable environmental conditions of the Bonn Republic seem to refute the argument that Bonn might return to totalitarianism as experienced by the Weimar Republic. Moreover, the critics of Bonn's emergency legislation fail to admit that Article 48 was used successfully to maintain the Weimar Republic during its early years. West Germany's emergency legislation, carefully written and containing many limitations and safeguards, exist in a favorable political, social, and economic environment. Therefore, the emergency power poses no threat to West Germany's republican form of government as suggested by its critics.

The passage of the emergency law was the minimum requirement to give the Bonn Republic full sovereignty twenty years
after its birth. However, the important fact is not sovereignty but the fact that the Germans who so recently (1919-1933) were willing to give the Weimar president an almost blank check of emergency power have written into their constitution an emergency law that places most of the power in the hands of the people's representatives. Harry Ellis writing for the Christian Science Monitor said:

It is an irony of history that the French people, with their democratic tradition, gave to President de Gaulle powers which the West German, heirs of a totalitarian history, would not give their leaders today.¹

We often speak about the West German economic miracle but it is equally as important to take notice of and to give the West Germans credit for their continued democratic growth since the origin of the Republic in 1949.

APPENDIX A

Bonn's Emergency Legislation

The Bundestag passed the following law with the subsequent approval of the Bundesrat during May and June of 1968. The emergency legislation amended the Basic Law. The main text of Bonn's emergency law is recorded in the new section entitled State Of Defense and is given as follows:

Article 115a: (1) The determination that the federal territory is being attached by armed force or that such an attack is directly imminent (state of defense) shall be made by the Bundestag with the consent of Bundesrat. Such determination shall be made at the request of the Federal Government and shall require a two-thirds majority of the votes cast, which shall include at least the majority of the members of the Bundestag.
(2) If the situation imperatively calls for immediate action and if insurmountable obstacles prevent the timely meeting of the Bundestag, or if there is no quorum in the Bundestag, the Joint Committee shall make this determination with a two thirds majority of the votes cast, which shall include at least the majority of its members.
(3) The determination shall be promulgated in the Federal Law Gazette by the Federal President pursuant to Article 82. If this cannot be done in time, the promulgation shall be effected in another manner; it shall subsequently be printed in the Federal Law Gazette as soon as circumstances permit.

1The emergency law was taken from, The Basic Law for the Federal Republic of Germany, (New York: German Information Center, Amendments as of November 15, 1968).
(4) If the Federal territory is being attacked by armed force and if the competent organs of the Federation are not in a position at once to make the determination provided for in the first sentence of paragraph (1) of this Article, such determination shall be deemed to have been made and promulgated at the time the attack began. The Federal President shall announce such time as soon as circumstances permit.

(5) When the determination of the existence of a state of defense has been promulgated and if the federal territory is being attacked by armed force, the Federal President may, with the consent of the Bundestag, issue internationally valid declarations regarding the existence of such state of defense. Subject to the conditions mentioned in paragraph (2) of this Article, the Joint Committee shall thereupon deputize for the Bundestag.

Article 115b: Upon the promulgation of a state of defense, the power of command over the armed forces shall pass to the Federal Chancellor.

Article 115c: (1) The Federation shall have the right to exercise concurrent legislation even in matters belonging to the legislative competence of the Laender by enacting laws to be applicable upon the occurrence of a state of defense. Such laws shall require the consent of the Bundesrat.

(2) Federal legislation to be applicable upon the occurrence of a state of defense to the extent required by conditions obtaining while such state of defense exists, may make provision for:

1. preliminary compensation to be made in the event of expropriations, thus derogating from the second sentence of paragraph (3) of Article 14;

2. deprivations of liberty for a period not exceeding four days, if no judge has been able to act within the period applying in normal times; thus derogating from the third sentence of paragraph (2) and the first sentence of paragraph (3) of Article 104.

(3) Federal legislation to be applicable upon the occurrence of a state of defense to the extent required for
averting an existing or directly imminent attack, may, subject to the consent of the Bundesrat, regulate the administration and the financial system of the Federation and the Laender in derogation of Section VIII and Articles 106 to 115, provided that the viability of the Laender, communes and associations of communes is safeguarded, including in particular such matters as relate to their finances.

(4) Federal laws enacted pursuant to paragraph (1) or subparagraph (1) of paragraph (2) of this Article may, for the purpose of preparing for their execution, be applied even prior to the occurrence of a state of defense.

**Article 115d:** (1) While a state of defense exists, the provisions of paragraphs (2) and (3) of this Article shall apply in respect to federal legislation, notwithstanding the provisions of paragraph (2) of Article 76, the second sentence of paragraph (1) and paragraphs (2) to (4) of Article 77, Article 78, and paragraph (1) of Article 82.

(2) Bills submitted as urgent by the Federal Government shall be forwarded to the Bundesrat at the same time as they are submitted to the Bundestag. The Bundestag and the Bundesrat shall debate such bills in common without delay. In so far as the consent of the Bundesrat is necessary, the majority of its votes shall be required for any such bill to become a law. Details shall be regulated by rules of procedure adopted by the Bundestag and requiring the consent of the Bundesrat.

(3) The second sentence of paragraph (3) of Article 115a shall apply mutatis mutandis in respect to the promulgation of such laws.

**Article 115e:** (1) If, while a state of defense exists, the Joint Committee determines with a two-thirds majority of the votes cast, which shall include at least the majority of its members, that insurmountable obstacles prevent the timely meeting of the Bundestag, or that there is no quorum in the Bundestag, the Joint Committee shall have the status of both the Bundestag and the Bundesrat and shall exercise their rights as one
body.

(2) The Joint Committee may not enact any law to amend this Basic Law or to deprive it of effect or application either in whole or in part. The Joint Committee shall not be authorized to enact laws pursuant to paragraph (1) of Article 24 or to Article 29.

Article 115f: (1) While a state of defense exists, the Federal Government may to the extent necessitated by circumstances:

1. commit the Federal Border Police throughout the federal territory:

2. issue instructions not only to federal administrative authorities but also to Land governments and, if it deems the matter urgent, to Land authorities, and may delegate this power to members of Land governments to be designated by it.

(2) The Bundestag, the Bundesrat, and the Joint Committee, shall be informed without delay of the measures taken in accordance with paragraph (1) of this Article.

Article 115g: The constitutional status and the exercise of the constitutional functions of the Federal Constitutional Court and its judges must not be impaired. The Law on the Federal Constitutional Court may not be amended by a law enacted by the Joint Committee except in so far as such amendment is required, also in the opinion of the Federal Constitutional Court, to maintain the capability of the Court to function. Pending the enactment of such a law, the Federal Constitutional Court, may take such measures as are necessary to maintain the capability of the Court to carry out its work. Any decisions by the Federal Constitutional Court in pursuance of the second and third sentences of this Article shall require a two-thirds majority of the judges present.

Article 115h: (1) Any legislative terms of the Bundestag or of Land diets due to expire while a state of defense exists shall end six months after the
termination of such state of defense. A term of office of the Federal President due to expire while a state of defense exists, and the exercise of his functions by the President of the Bundesrat in case of the premature vacancy of the Federal President's office, shall end nine months after the termination of such state of defense. The term of office of a member of the Federal Constitutional Court due to expire while a state of defense exists shall end six months after the termination of such state of defense.

(2) Should the necessity arise for the Joint Committee to elect a new Federal Chancellor, the Committee shall do so with the majority of its members; the Federal President shall propose a candidate to the Joint Committee. The Joint Committee can express its lack of confidence in the Federal Chancellor only by electing a successor with a two-thirds majority of its members.

(3) The Bundestag shall not be dissolved while a state of defense exists.

Article 115i: (1) If the competent federal organs are incapable of taking the measures necessary to avert the danger, and if the situation imperatively calls for immediate independent action in individual parts of the federal territory, the Land governments or the authorities or commissioners designated by them shall be authorized to take, with their respective spheres of competence, the measures provided for in paragraph (1) of Article 115f.

(2) Any measures taken in accordance with paragraph (1) of this Article may be revoked at any time by the Federal Government, or in the case of Land authorities and subordinate federal authorities, by Land Prime Ministers.

Article 115k: (1) Laws enacted in accordance with Articles 115c, 115e, and 115g, as well as ordinances having the force of law issued by virtue of such laws, shall, for the duration of their applicability, suspend legislation contrary to such laws or ordinances. This shall not apply to earlier legislation enacted by virtue
of Articles 115c, 115e, or 115g.

(2) Laws adopted by the Joint Committee, and ordinances having the force of law issued by virtue of such laws, shall cease to have effect not later than six months after the termination of a state of defense.

(3) Laws containing provisions in derogation of Articles 106 and 107 shall apply no longer than the end of the second fiscal year following upon the termination of the state of defense. After such termination of the state of defense they may, with the consent of the Bundesrat, be amended by the federal legislation so as to arrive at the settlement provided for in Section X.

**Article 1151:** (1) The Bundestag with the consent of the Bundesrat, may at any time repeal laws enacted by the Joint Committee. The Bundesrat may request the Bundestag to make a decision in any such matter. Any measures taken by the Joint Committee or the Federal Government to avert a danger shall be revoked if the Bundestag and the Bundesrat so decide.

(2) The Bundestag, with the consent of the Bundesrat, may at any time declare the state of defense terminated by a decision to be promulgated by the Federal President. The Bundesrat may request the Bundestag to make a decision in any such matter. The state of defense must be declared terminated without delay when the prerequisites for the determination thereof no longer exist.

(3) The conclusion of peace shall be the subject of a federal law.

In addition to the new section State of Defense, 3 new articles were added which also concern emergencies. They are as follows:

**Article 12a:** (1) Men who have attained the age of eighteen years may be required to serve in the Armed Forces, in the Federal Border Police or in a Civil Defense organization.

(2) A person who refuses, on grounds of conscience, to render war service involving the use of arms may
them for the performance of such services in accordance with paragraph (3) of this Article as presuppose special knowledge or skills. To this extent, the first sentence of this paragraph shall not apply.

(6) If, while a state of defense exists, the labor requirements for the purposes referred to in the second sentence of paragraph (3) of this Article cannot be met on a voluntary basis, the right of a German to give up the practice of his trade or occupation or profession, or his place of work, may be restricted by or pursuant to a law in order to meet these requirements. The first sentence of paragraph (5) of this Article shall apply mutatis mutandis prior to the existence of a state of defense.

**Article 53a:** (1) Two thirds of the members of the Joint Committee shall be deputies of the Bundestag and one third shall be members of the Bundesrat. The Bundestag shall delegate its deputies in proportion to the sizes of its parliamentary groups; such deputies must not be members of the Federal Government. Each Land shall be represented by a Bundesrat member of its choice; these members shall not be bound by instructions. The establishment of the Joint Committee and its procedures shall be regulated by rules of procedure to be adopted by the Bundestag and requiring the consent of the Bundesrat.

(2) The Federal Government must inform the Joint Committee about its plans in respect to a state of defense. The rights of the Bundestag and its committees under paragraph (1) of Article 43 shall not be affected by the provision of this paragraph.

**Article 80a:** (1) Where this Basic Law or a federal law on defense, including the protection of the civilian population, stipulates that legal provisions may only be applied in accordance with this Article, their application shall, except when
be required to render a substitute service. The duration of such substitute service shall not exceed the duration of military service. Details shall be regulated by a law which shall not interfere with the freedom of conscience and must also provide for the possibility of a substitute service not connected with units of the Armed Forces or of the Federal Border Police.

(3) Persons liable to military service who are not required to render service pursuant to paragraphs (1) or (2) of this Article may, when a state of defense (Verteidigungsfall) exists, be assigned by or pursuant to a law to specific occupations involving civilian services for defense purposes, including the protection of the civilian population; it shall, however, not be permissible to assign persons to an occupation subject to public law except for the purpose of discharging police functions or such other functions of public administration as can only be discharged by persons employed under public law. Persons may be assigned to occupations—as referred to in the first sentence of this paragraph—with the Armed Forces, including the supplying and servicing of the latter, or with public administrative authorities; assignments to occupations connected with supplying and servicing the civilian population shall not be permissible except in order to meet their vital requirements or to guarantee their safety.

(4) If, while a state of defense exists, civilian service requirements in the civilian public health and medical system or in the stationary military hospital organization cannot be met on a voluntary basis, women between eighteen and fifty-five years of age may be assigned to such services by or pursuant to a law. They may on no account render service involving the use of arms.

(5) During the time prior to the existence of any such state of defense, assignments under paragraph (3) of this Article may be effected only if the requirements of paragraph (1) of Article 80a are satisfied. It shall be admissible to require persons by or pursuant to a law to attend training courses in order to prepare
a state of defense exists, be admissible only after the Bundestag has determined that a state of tension (Spannungsfall) exists or if it has specifically approved such application. In respect to the cases mentioned in the first sentence of a paragraph (5) and the second sentence of paragraph (6) of Article 12a, such determination of a state of tension and such specific approval shall require a two-thirds majority of the votes cast.

(2) Any measures taken by virtue of legal provisions enacted under paragraph (1) of this Article shall be revoked whenever the Bundestag so requests.

(3) Under section of paragraph (1) of this Article, the application of such legal provisions shall also be admissible by virtue of, and in accordance with, a decision taken with the consent of the Federal Government by an international organ within the framework of a treaty of alliance. Any measures taken pursuant to this paragraph shall be revoked whenever the Bundestag so requests with the majority of its members.

Several articles of the Basic Law have been amended so that they would be in agreement with the new articles concerning a state of defense. The amended phrases, sentences and paragraphs of each article are in quotation marks. They are as follows:

**Article 9:**

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

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

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

**Article 10:** "(1) Secrecy of mail, post and telecommunication shall be inviolable. (2) This right may be restricted only pursuant to a law. Such law may lay down that the person affected shall not be informed of any such restriction if it serves to protect the free democratic basic order or the existence or security of the Federation or a Land, and that recourse to the courts shall be replaced by a review of the case by bodies and auxiliary bodies appointed by Parliament."

**Article 11:** (1) All Germans shall enjoy freedom of movement throughout the federal territory. "(2) This right may be restricted only by or pursuant to a law and only in cases in which an adequate basis of existence is lacking and special burdens would arise to the community as a result thereof, or in which such restriction is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or a Land, to combat the danger of epidemics, to deal with natural disasters or particularly grave accidents, to protect young people from neglect or to prevent crime."

**Article 12:** "(1) All Germans shall have the right freely to choose their trade, occupation, or profession, their place of work and their place of training. The practice of trades, occupations, and professions may be regulated by or pursuant to a law. (2) No specific occupation may be imposed on any
person except within the framework of a traditional compulsory public service that applies generally and equally to all.

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

**Article 19:** (1) In so far as a basic right may, under this Basic Law, be restricted by or pursuant to a law, such law must apply generally and not solely to an individual case. Furthermore, such a law must name the basic right, indicating the Article concerned.

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

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

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

**Article 20:** (1) The Federal Republic of Germany is a democratic and social federal state.

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

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

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

**Article 35:** (1) All federal and Land authorities shall render each other legal and administrative assistance.

"(2) In order to deal with a natural disaster or an especially grave accident, a Land may request the
assistance of the police forces of other Länder or of forces and facilities of other administrative authorities or of the Federal Border Police or the Armed Forces.

(3) If the natural disaster or the accident endangers a region larger than a Land, the Federal Government may, in so far as this is necessary effectively to deal with such danger, instruct the Land governments to place their police forces at the disposal of other Länder, and may commit units of the Federal Border Police or the Armed Forces to support the police forces. Measures taken by the Federal Government pursuant to the first sentence of this paragraph must be revoked at any time upon the request of the Bandesrat, and in any case without delay upon removal of the danger."

Article 87a: "(1) The Federation shall establish Armed Forces for defense purposes. Their numerical strength and general organizational structure shall be shown in the budget.

(2) Apart from defense, the Armed Forces may only be committed to the extent explicitly permitted by this Basic Law.

(3) While a state of defense or a state of tension exists the Armed Forces shall have the power to protect civilian property and discharge functions of traffic control in so far as this is necessary for the performance of their defense mission. Moreover, the Armed Forces may, when a state of defense or a state of tension exists, be entrusted with the protection of civilian property in support of police measures; in this event the Armed Forces shall co-operate with the competent authorities.

(4) In order to avert any imminent danger to the existence or to the free democratic basic order of the Federation or a Land, the Federal Government may, should conditions as envisaged in paragraph (2) of Article 91 obtain and the police forces and the Federal Border Police be inadequate, commit the Armed Forces to support the police and the Federal Border Police in the protection of civilian property and in
combatting organized and militarily armed insurgents. Any such committal of Armed Forces must be discontinued whenever the Bundestag or the Bundesrat so requests."

Article 91: (1) In order to avert any imminent danger to the existence or to the free democratic basic order of the Federation or a Land, a Land may request the services of the police forces of other Laender, or of the forces "and facilities of other administrative authorities and of the Federal Border Police.

(2) If the Land where such danger is imminent is not itself willing or able to combat the danger, the Federal Government may place the police in that Land and the police forces of other Laender under its own instructions and commit units of the Federal Border Police. The order for this shall be rescinded after the removal of the danger or else at any time upon the request of the Bundesrat. If the danger extends to a region larger than a Land, the Federal Government may, in so far as is necessary for effectively combatting such danger, issue instructions to the Land governments; the first and second sentences of this paragraph shall not be affected by this provision."


II. PERIODICALS


Rogers, Lindsay and Others, "German Political Institutions, II Article 48," Political Science Quarterly, XLVII, (1932), 576-601.


III. BULLETINS AND MONOGRAPHS


IV. DOCUMENTS

