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Hanna-Mari Kivistö

Debating Right to Asylum

A Conceptual and Rhetorical Reading of the German post-War Deliberations

JYVÄSKYLÄN YLIOPISTO

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ABSTRACT

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Finnish summary

The aim of the doctoral research is to examine debates related to the right to asylum in the post-World War II framework, with the purpose to offer a conceptual and rhetorical reading of the notion and to examine conceptual disputes and shifts related to it. The research analyses asylum debates in three different parliamentary settings and politico-historical contexts with a particular focus on the early political life of West Germany. The 1949 *Grundgesetz* ('Basic Law') of the Federal Republic of Germany was unique in including a constitutional provision conceiving of asylum as an individual right of politically persecuted persons: "P*olitisch Verfolgte genießen Asylrecht*" [Art. 16(2) 2 GG]. This clause, formulated in the West German Parliamentary Council (*Parlamentarischer Rat*), established a right that was without historical precedent, an innovation from the point of view of German legal history and something that remained singular in international context. The study looks at the creation of this unique right and its specific political history by examining how such a right came about and by investigating its conceptual, political and rhetorical origins.

With main focus on the creation of the West German constitutional right to asylum, the study brings a further angle to the post-war asylum deliberations by looking at the creation of the asylum article of the Universal Declaration of Human Rights (1948) in the contemporary diplomatic negotiations of the United Nations. The study discusses the making of these two conceptualisations of asylum—one entering it into the constitution as a right of the individual and the other declaring it as a right of the state. A further perspective is added with an analysis of the asylum debates in the German *Bundestag* in 1993 when the constitutional right to asylum created by politicians in the Parliamentary Council is subject to alteration. The study builds a narrative of how the right to asylum becomes a matter of political struggles and debate in different parliamentary fora in the post-World War II context and and how it is legally recognised and (re)conceptualised in these different political settings.

Keywords: asylum, human rights, Federal Republic of Germany, Parliamentary Council, United Nations, debate, rhetoric, conceptual history

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Hanna-Mari Kivistö

LIST OF ABBREVIATIONS

AfG Ausschuß für Grundsatzfragen
BVerfG Bundesverfassungsgericht
BVP Bayerische Volkspartei
CDU Christlich Demokratische Union
CSU Christlich-Soziale Union
CSVD Christlich-Soziale Volksdienst
DDP Deutsche Demokratische Partei
DNVP Deutschnationale Volkspartei
DP Deutsche Partei
DVP Deutsche Volkspartei
EC European Community
EU European Union
FDP Freie Demokratische Partei
GG Grundgesetz
HA Hauptausschuß
IRO International Refugee Organization
KPD Kommunistische Partei Deutschlands
LPD Liberal-Demokratische Partei Deutschlands
NSDAP Nationalsozialistische Deutsche Arbeiterpartei
PDS Partei des Demokratischen Sozialismus
PR Parlamentarischer Rat
SPD Sozialdemokratische Partei Deutschlands
UN United Nations
UNHCR United Nations High Commissioner on Refugees
WRV Weimarer Verfassung, Weimarer Reichsverfassung

CONTENTS

1 INTRODUCTION

1.1 The politics of asylum

The aim of this doctoral research is to examine debates related to political asylum in the post-World War II framework, with a particular focus on the early political context of West Germany. The 1949 *Grundgesetz* ('Basic Law') of the Federal Republic of Germany was unique in including a constitutional provision conceiving of asylum as an individual right of politically persecuted persons: "P*olitisch Verfolgte genießen Asylrecht*" (Art. 16(2) 2 GG). This clause, as formulated by the authors of the *Grundgesetz*, established a right that was without historical precedent, an innovation from the point of view of German legal history and something that remained singular in the international context. In this study I look at the creation of this unique right and its specific political history by examining how such a right came about and by investigating its conceptual, political and rhetorical origins.

The roots of asylum go back to Antiquity and its history is connected to churches and sanctuaries. Additionally, the right was defended by early authors of international law, such as Hugo Grotius, himself a refugee (cf. Grotius 1925, Book II). Kimminich (1982) names asylum as the oldest of rights, while Kirchheimer (1959, 985), praises asylum's "capacity for institutional survival", calling it "an ancient practice, privilege and a problem".

Right to asylum is an intriguing, complex concept. From a present day perspective, the matter of asylum is often a matter of disagreement and controversy (cf. Grahl-Maden 1980) and several questions remain prevalent: should states grant asylum, or provide asylum in their legislation? If so, to whom should they grant asylum? Who should be left outside the protection of asylum? Is asylum a human right? Or, on the contrary, is it a right subordinate to the

state? Should asylum seekers have rights? What kind of rights should asylum seekers have?

Granting asylum is closely linked with state sovereignty, at the heart of which lies "the competence of the state to regulate the admission of aliens at will" (Morgenstern 1949, 327). Kirchheimer, for instance, describes asylum as "a privilege freely granted or refused", emphasising how it is not a matter of right of the individual (Kirchheimer 1959, 989). States thus have the right to choose to whom they grant asylum or whose claim they decline, while the individual is left to enjoy the privilege only in accordance with the state's discretion, i.e. only when it is granted to her.

García-Mora (1956, 2) holds another, more naturalistic point of view claiming that "states should be under the legal obligation to grant asylum to those fleeing from persecution and oppression". He continues by stating that "asylum is a human right and, as such, belongs to the individual person independently of the state". Thus, by granting asylum a state is merely "enforcing an already existing human right". (ibid.)

Unlike in the *Grundgesetz*, under international law asylum is not understood as a right of the individual but as a right of the state. This conception prevails in the 1948 Universal Declaration of Human Rights (henceforth *Declaration*) of which Article 14(1) proclaims a right *to seek and enjoy asylum* but remains silent on a state's obligation regarding the granting asylum. In a similar manner the frequently cited 1950 definition of the *Institut de Droit International* formulates asylum as a right of the state:

> Le term „asile" désigne la protection qu'un Etat accorde sur son territoire ou dans un autre endoit relevant de certain de ses organes à un individu qui est venu la rechercer.[1]

The West German asylum clause presented the state with a duty to protect politically persecuted non-citizens and thus it went beyond the conceptualisation of the right to asylum in international law. It formulated a right for the politically persecuted against the state. In doing so, it also created the most liberal asylum legislation in Europe. All of this was, of course, prior to 1993 landmark deliberations which resulted in the paragraph on asylum being altered and with this the loss of its "exceptional" status. The paragraph now includes references, for instance, to 'safe third countries' and 'safe countries of origin', at the same time bringing it closer to the framework and language of the European integration in matters of asylum.

While this study aims at offering a rhetorical and conceptual reading of the notion of a right to asylum—examining the debates and conceptualisations, conceptual shifts and changes related to it in the post-World War II period—the main focus of the research is on the creation of the Article 16 (2) 2 GG and in the immediate (West) German post-war political context. Additionally, the study brings a further angle to the post-war asylum deliberations by looking at the creation of a document contemporary with the Basic Law, that is, the asylum

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1 L'asile en droit international public (à l'exclusion de l'asile neutre), 1950.

article of the Universal Declaration of Human Rights. While examining the making of these two formulations of asylum—one entering it into the constitution as a right of the individual and the other declaring it as a right of the state—a further timely perspective is added with an analysis of the final debate on the alteration of the constitutional asylum provision in the *Bundestag* in May 1993. The research thus looks at debates related to the right to asylum in three different parliamentary settings and politico-historical contexts: in the domestic constitutional debates of the post-war West Germany, in contemporary UN debates relating to the drafting of the Declaration in international fora and in the context of re-unified Germany of the early 1990's.

In terms of vocabulary, I use the term *right to asylum* instead of *right of asylum*. This refers to the individual's right to asylum *vis-à-vis* the state, specifically the formulation in the *Grundgesetz* and which was debated in various international fora during the drafting of Universal Declaration of Human Rights.

While this research is focused on asylum, it is also a narrative about rights and about the political beginning of the Federal Republic of Germany. In this study I argue that the asylum paragraph of the *Grundgesetz* had a particular significance for the construction of the post-war state and for the political emergence of the Federal Republic, in relation to the historical experiences behind them and in relation to the constitutional situation.

The different aspects of the study will be outlined what follows (see also section 1.6, below), but first a comment on the literature. In this introductory section, and throughout the study, I make reference to authors drawn primarily from the fields of political thought, law and history. I begin in section 1.2. by looking at the language of post-war rights and the various conceptions to which this language gave form. When referring to asylum seekers and refugees, this part benefits from the political philosophy of Hannah Arendt, herself a political refugee from Germany in 1933. Arendt's writings are also used to offer a perspective on the experiences behind the post-World War II rights developments, of which the German asylum debates should also be understood.

Section 1.3 makes some conceptual remarks and terminological notes relating to the vast range of concepts surrounding asylum-seeking in the post-war period, while section 1.4 approaches the notion of 'beginning anew' and some of its controversies in relation to post-war (West) Germany. The research material, the conceptual and rhetorical reading of the study, and their interrelations are then presented in section 1.5, while the final section presents a general outline of the overall study.

1.2 The politics of rights and the paradoxes of rights language

In this research I look at the politics related to rights from the point of view of analysing the debates connected to the establishment of a particular right. The study therefore touches upon the politics and disputes related to the construction of legal concepts and definitions.

The reading emphasises the political character and political aspects related to rights; 'politics' here being understood as a contingent activity including competing perspectives and alternative courses of action. Accordingly, I consider the notion of 'human rights' not as something "above politics", something depoliticised or beyond disputes but, instead, argue that rights are an outmost political matter.[2] In this research the establishment of rights is seen as the outcome of competing perspectives, debate and conceptual disputes. Further, rights are understood as historically contingent, with the idea that the (legal) acknowledgement of a certain right is a matter of political struggles and a matter of certain political choices, made at a certain time between different possible alternatives. Rights are "local, historically rooted claims", of which recognition and status given to is a political matter (cf. Loughlin 2000, 203).

Regarding terminology, the concept of 'basic rights' refers to the notion of rights in a constitutional form; they are positive rights posing limits on the exercise of state authority (cf. Alexy 1994). The notion of 'human rights', on the other hand, relates to the naturalistic idea that human beings possess rights on the virtue of being human. The rights language starting from the Declarations of the late 18th century uses terms such as 'unalienable', as in the American Declaration of Independence of 1776. The 1789 French Declaration of the Rights of Man and Citizen states how "Men are born and remain free and equal in rights". (cf. Hunt 2007, 17) These documents represented a radical change: the idea that the justification for government was depended upon the guarantee of these pre-existing rights which the authors acknowledged and were defending (ibid. 116). Another crucial turning point happened with the Universal Declaration of Human Rights, which marked as the first time individual became acknowledged as a subject of international law. In the post World War II period human rights became a central concept of political language. The post-war rights discourse echoes its 18th century predecessors, and in addition speaks, for instance, of the 'universality' of human rights, and of 'human dignity' as the justification of the rights claims.[3]

Nevertheless, the language of rights where it refers to 'equality', 'inalienability', or 'universality' contains several well-known paradoxes. One critic of natural rights language at the beginning of the 20th century was Max Weber who argued in relation to his analysis concerning Russia ("*Zur Lage der bürgerlichen Demokratie in Rußland*", 1906) that the idea of the "inalienable rights of man" ('*unveräußerliche Menschenrechte'*) had become trivial for West Europeans (cf. Weber 1988). The famous critique of 'inalienable rights' in relation to refugees and stateless persons which came later, in the aftermath of the horrors of the World War II, was presented by Hannah Arendt. Arendt noted how the emergence of these groups of persons between the 1920's and the 1940's had brought the hitherto 'unproblematic' idea of human rights back to the political agenda. (Arendt 1949, 755)

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2 For a somewhat differing reading on human rights, see e.g. Douzinas 2000.

3 For the concept of 'dignity', see: Sensen 2011; Kivistö 2012.

In her article "*Es gibt nur ein einziges Menschenrecht*" published in the journal *Die Wandlung* in 1949 Arendt wrote about the discrepancy between "well-meaning idealists" proclaiming 'inalienable human rights', and the reality of the displaced and stateless persons, those deprived their rights, placed in internment camps:

> [K]ein Paradox zeitgenössischer Politik ist von einer bittereren Ironie erfüllt als die Diskrepanz zwischen den Bemühungen wohlmeinender Idealisten, welche beharrlich Rechte als unabdingbare Menschenrechte hinstellen, deren sich nur die Bürger der blühendsten und zivilisiertesten Länder erfreuen, und der Situation der Entrechteten selbst, die sich ebenso beharrlich verschlechtert hat, bis das Internierungslager, das vor dem Kriege doch nur eine ausnahmsweise realisierte Drohung für die Staatenlosen war, zur Routine-Lösung des Aufenthaltsproblems der displaced persons geworden ist. (Arendt 1949, 755)

For Arendt, the figure of the refugee or stateless person showed the paradox of [human] rights which by definition should be independent of political status, that is based only on the idea of "being human" ('*Menschsein*') which is prior to and independent of the state. Instead, these 'inalienable' rights were closely connected to nation-states and sovereignty, requiring citizenship of the state; they were rights "which only the citizens of the most prosperous and civilised countries enjoy". Arendt wrote in *The Origins of Totalitarianism* (1951) how

> [t]he Rights of Man, after all, had been defined as "inalienable" because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them (Arendt 1962, 291-292).

Arendt's observations reflect the experience of the denaturalisation of European nation-states (cf. Benhabib 2009): with the Nuremberg laws the Jewish people were deprived of their status as citizens. Arendt wrote how sovereignty was "nowhere more absolute than in matters of 'emigration, naturalization, nationality, and expulsion'" (Arendt 1962, 278) and this held true especially regarding the totalitarian state. The contemporary international regime of the League of Nations focused on the rights of states, and as individuals were not recognised as subjects of international rights and obligations under international law, persons were left without the protection of any state when the protection of the state of origin was severed (cf. Hathaway 1991b, 3). In this context, Arendt's point was that no rights existed without a government that would grant these rights. Arendt spoke about the "right to have rights" (Arendt 1962, 296) and linked the concept to citizenship: the membership of political community was the ultimate basis of rights (cf. Kesby 2012). Alternatively, the loss of community meant the loss of human rights, "a place in the world which makes opinions significant and actions effective" (Arendt 1962, 296).

Arendt's remarks on stateless persons and refugees will be discussed further in section 1.3. Although many changes have taken place in relation to the politicisation of the rights of non-citizens in the post-World War II era—the asylum paragraphs of the *Grundgesetz* and the Universal Declaration of Human

Rights being examples—Arendt's political philosophy nevertheless offers a valuable reading on the experiences behind the post-war developments.

Another point in relation to Arendt is that despite the legislative measures adopted, many of the paradoxes and problems regarding the idea of the 'universality' of human rights still remain. Non-citizens, in particular, are "caught between international principles of universality and exclusionary rules of state sovereignty and national law" as Grant (2011, 26) writes. Of the contemporary authors inspired by Arendt, Seyla Benhabib (2009) further problematises the tension, or contradiction, between the state's claim of sovereign self-determination and claims to universal human rights.[4]

One of the paradoxes related to non-citizens in particular is that the 'universal principles' that belong to 'everyone' are not independent from governments but, rather, depend on being enforced at the national state level (Haddad 2008, 75). The Universal Declaration of Human Rights, for instance, which "sought to define a comprehensive code of conduct for the domestic government of sovereign members of the international community" (ibid. 74) builds strongly on the idea of state sovereignty, as the analysis of the deliberations on asylum in Chapter 4 will show. This is further related to the notion that, while international human rights law is a means through which state sovereignty is limited, it also is created and implemented by these sovereign states (Hathaway 1991a, 113).

Although rights are not only political and legal claims but also moral claims, in order for a certain right to legally exist it needs to be recognised and enforced—it requires a political content (cf. Hunt 2007). To Lauterpacht (1950, 73), behind the creation of the international protection of the rights of individuals in the post-World War II era was exactly "the realisation of the inadequacy of the notion of natural rights as a means for protecting effectively the rights of man".

Nevertheless, despite the paradoxes relating to the idea of natural rights, an appeal to these ideas—this being the language of both the 1949 *Grundgesetz* as well as the Universal Declaration of Human Rights in proclaiming that the dignity of the person is inviolable—makes an appealing and forcible political and rhetorical claim as such. To Lauterpacht, writing in the immediate post-war period, natural rights as an expression of moral claims were "a powerful lever of legal reform". Moreover, Lauterpacht wrote, "[t]he moral claims of today, are often the legal rights of tomorrow" (Lauterpacht 1950, 74).

Concerning rights, this study explores how asylum becomes a matter of political struggle and debate in the post-World War II period. Further, the research builds a narrative of how the right to asylum was legally recognised: in the context of the *Grundgesetz* where it is conceptualised as a constitutional right for the non-members of the polity, where it is given a special constitutional role; and in the Universal Declaration of Human Rights, in regard to which states hold on to their sovereignty and declare asylum as a right of the state. While underlining the historical contingency related to rights, I will show how the

[4] For discussions on human rights and (irregular) migrants, see Dembour & Kelly 2011.

story behind both of these asylum formulations is manifold, including voices in favour of proclaiming asylum as an individual right and those opposed to it. In Chapter 5 a further perspective related to politics and rights is presented via the analysis of the amendment of the asylum paragraph in the *Grundgesetz*. What emerges is an account of how an individual right is altered by political decision making.

1.3 Asylum-seekers, refugees, political exiles, displaced persons

> In the first place, we don't like to be called "refugees". We ourselves call each other "new comers" or "immigrants". [...]
>
> A refugee used to be a person driven to seek refuge because of some act committed or some political opinion held. Well, it is true we have had to seek refuge; but we committed no acts and most of us never dreamt of having any radical political opinion. With us the meaning of the term "refugee" has changed. [...]
>
> We lost our home, which means the familiarity of the daily life. We lost our occupation, which means the confidence that we are some use in this world. We lost our language, which means the naturalness of reactions, the simplicity of gestures, the unaffected expression of feelings. We left our relatives in the Polish ghettos and our best friends have been killed in concentration camps, and that means the rupture of our private lives. (Arendt 1943, 253-254)

While the first part of the Introduction has outlined some of the problematic related to the language of rights—this part looks at the vocabulary and the vast variety of concepts related to asylum, with reference to 'asylum-seekers', 'refugees', 'exiles' and 'displaced persons'. At this point, a more general overview of the terminology is needed as this is the framework in which asylum is discussed in the immediate post-war period. The conceptual shifts and changing notions of asylum hinted at in this section will be discussed in more detail in Chapters 3, 4, and 5 when analysing the research material.

The specific labels and legal definitions, i.e. the terminology, matter a great deal—the distinction between 'asylum-seekers' and 'refugees', or 'refugees' and 'migrants', or '*bona fide*' asylum seekers and 'bogus' ones, or persons who have 'legal' status distinct from those labelled as 'illegal'—as these form the basis defining, for instance, who falls under the sphere of state protection—or who has access to particular legal rights—or who is excluded from it. In international law a paradigmatic differentiation is made, especially, between those who leave their country for political reasons and those whose reasons for fleeing are economical (cf. Goodwin-Gill & McAdam 2007, 15). This is the so called refugee/migrant nexus. In reality the distinctions might not always be so easy to make and in political discourse the concepts frequently overlap, lines are blurred, and conceptual confusions exist. Nevertheless, with legal formulations specific wordings and definitions are constructed and inclusions and exclusions are being made. Rights, likewise, exclude and include, and their definitions and scope are subject to differing interpretations.

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From the post-World War II perspective, asylum seekers and refugees are groups of non-citizens towards which states have some obligations under international law (cf. Schuster 2003). The most important provision in this regard is the so called *non-refoulement* clause of the 1951 *Convention Relating to the Status of Refugees* establishing the principle that no one can be returned to an area where she or he might be subjected to persecution (Art. 33).[5] Even if a positive right to asylum is not acknowledged in international law there is a duty, nevertheless, not to expel or to return a person into the territory of a state where there is a risk of persecution (cf. Stenberg 1989). 'Expulsion' refers to "removal by a state of an alien from its territory either forcibly or under threat of forcible removal" (Pellonpää 1984, 4). Expulsions were an increasingly common practice by European nation states in relation to undesired foreigners in the 1920's and 1930's. Contrary to post-war developments, no distinction was usually made on the question whether the person to be expelled was a refugee or otherwise an alien. (Sternberg 1989, 36) While the act of expulsion is unilateral, 'extradition'—another central concept related to asylum which is discussed more specifically in Chapter 3 of this research—requires international co-operation: extradition means delivering a suspected offender or fugitive from one state to another after the latter has requested the person be handed over (Pellonpää 1984, 4).

From a contemporary point of view as well as from a perspective of post-war legal definitions, 'asylum seeker' can be understood as a person who seeks to be legally acknowledged as a 'refugee'. Asylum seeker is thus an uncertain status, someone who remains in the margins of state discretion, whereas a 'refugee' is a legally acknowledged status, signifying a person whose protection already carries an obligation for states under international law. The contemporary criteria for 'legitimate flight' can be found in the 1951 Convention Relating to the Status of Refugees—sometimes referred to as "the *Magna Carta* of Refugees"—of which Article 1 defines a 'refugee' as a person

> who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Even though the protection of asylum seekers and refugees was renewed as a matter of political debate in the aftermath of World War II, relating to the persecution and displacement of millions of people, attempts to legally define a 'refugee' were not new. In the inter-war years, under the League of Nations, definitions of refugees were made on *ad hoc* basis, with the focus on nationality.

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5 "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." (Art. 33(1) Convention Relating to the Status of Refugees, 1951)

Protection—granted not because of political opinions but on a group basis (cf. Stenberg 1989)—was given, for instance, to Russian and Armenian refugees (1926) and to German refugees (1936) (cf. Melander 1988). Although the League has been criticised for its inadequate measures relating to the protection of refugees in the inter-war years, during the League mandate, refugees were granted some positive rights, such as the right to a passport in the Nansen era of the 1920's (cf. Marrus 2002; Skran 1995).

In the 1951 Convention definition of 'refugee' the focus is on the personal history and grounds of the person fleeing. Furthermore, this definition regards as a refugee someone who is a victim of persecution and not only someone who has engaged in political activity in the country of origin (cf. Van den Wijngaert 1980, 27-28). Asylum-seekers and political refugees in the 19th century were seen as something quite different: Kirchheimer (1959, 986) describes them as individual political rebels—being "a Mazzini or a Marx, a Herzen or a Bakunin". These exiles "had dared to defy the established powers—with the pen, the revolver, or in armed campaign" and continued their political activities against the home government in the country of exile (ibid.).

Political asylum has a revolutionary past (see Chapter 3), but a new group of persons to be protected arose in the context of the 20th century: these persons were "persecuted not because of what they had done or thought, but because of what they unchangeably were—born into the wrong kind of race or the wrong kind of class or drafted by the wrong kind of government" (Arendt 1962, 294). Even if the flight was precipitated by political events and political changes, the majority had themselves not been active in attending political battle against their government: "all these exiles new style ran from the threat of being penalized for what they were, not for what they had done, did, or intended to do" (Kirchheimer 1959, 987).

The politically active asylum-seeker of the 19th century posed political problems to the host state—concerning, in particular, the attitude of the country of origin—would it be diplomatically problematic to admit the refugee, or would it better to deport or surrender the person even back to a government that would be hostile towards that person, or what possible influence could the politically active fugitive have on domestic groups in the host state (Kirchheimer 1959, 987- 988). In the 20th century, in the context of "mass flight", asylum was transformed into "an economic, public-welfare and administrative headache" from the point of view of the host state (ibid. 1015). This also reversed the role of the country of origin and the host country:

> The country of exit will not protest the admission of the rebel and define it as a hostile act. But when the new political refugees appear en masse, it is the country on which they are unloaded that will protest their ejection, or the introduction of policies resulting in the exodus, as an unfriendly act on the part of the country of origin and a threat to the safety and interests of the recipient. (Kirchheimer 1959, 988)

Arendt saw asylum as "the only right that ever figured as a symbol of the Rights of Man in the sphere of international relations" (Arendt 1962, 280). She wrote how:

> Civilized countries did offer the right of asylum to those who, for political reasons, had been persecuted by their governments, and this practice, though never officially incorporated into any constitution, has functioned well enough throughout the nineteenth and even in our century. The trouble arose when it appeared that the new categories of persecuted were far too numerous to be handled by an unofficial practice destined for exceptional cases. (Arendt 1962, 294)

Even if granting asylum in the 19th century was "an unofficial practice destined for exceptional cases", without special judicial treatment needed for the political asylum in the country of refuge (cf. Plaut 1996, 75), Arendt does not note above that asylum became constitutionalised for the first time in revolutionary France in the late 18th century. Nevertheless, the problem Arendt mentions was that the 19th century conceptualisation of asylum, presupposing political or religious convictions, was not enough to protect those escaping in the post-World War I period. Moreover, as asylum lost its exceptionality with "mass flight", states became less willing to grant asylum despite their earlier liberal practices.

The idea of the 'exceptionality' of asylum is worth properly considering. Asylum is in several ways an exceptional right. Firstly, it is a right that is granted not to citizens but to non-citizens. Furthermore, it is a right that is given to the person when the protection of one's own government fails, in this sense to "repair the failure". While asylum touches the issue of state sovereignty, it is thus also essentially international in character. One can also argue that the 'exceptionality' of asylum, that is a right granted to a few rather than to many, has come to be an important factor in its legitimation, as this research will discuss in more detail later (especially in Chapters 4 and 5).

Further, when exploring the complexity of asylum throughout the research narrative, the study will show how asylum has a political purpose as well as a humanitarian one. While the latter dimension of asylum refers to the protection granted to the individual—to ensure her safety—the former reflects the notion that asylum granting is linked with the expression of certain sympathies, antipathies and (political) values. These different dimensions are not mutually exclusive.

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Altogether 400,000 refugees escaped Nazi Germany in the 1930's, most of them Jews. The first to leave the country after the rise to power of the National Socialists in 1933 were, above all, political refugees—political opponents of Hitler—such as Communists, Social Democrats, Liberal politicians, trade-unionists, or, priests, journalists, authors, artists, intellectuals (Benz 2001, 43-44).

Reiter gives an account of the opportunities that the opponents of the Nazi regime had after Hitler's rise to power and the advancement of the Nazi power in Europe:

> Their options were limited. They could try and leave the sphere of the immediate Nazi influence but were often forced to retreat further as the Nazis brought one country after another under control; or they faced what was euphemistically termed *Schutzhaft* and eventually a deportation to the concentration camp. An almost negligible number managed to remain in the country, avoiding detention by keeping a low profile. (Reiter 2011, xv, emphasis in the original)[6]

One of the primary experiential motives behind the writing of the *Grundgesetz* was that of political exile: several of the authors of the Basic Law had themselves sought exile abroad under the Nazi regime (see Chapter 2). France was the main destination for political refugees in Europe in the 1930's. In exile, many politicians continued their resistance to the Hitler regime and planned for a post-Hitler Germany (Benz 2001, 62).

Skran (1995) mentions four waves in which the refugees left Nazi Germany. The first was after Hitler's rise to power in 1933. The second wave came after the introduction of the Nuremberg Laws in 1935 with which Jews and non-Aryans were deprived their German citizenship. The third wave came after the *Anschluss* of Austria and the *Sudetenland* in 1938 and the fourth wave after the *Kristallnacht* in November the same year. (Skran 1995, 49)[7]

The majority of German refugees travelled to neighbouring states, France being the major destination, but also, to Belgium, Holland, Switzerland, Austria, Hungary, Yugoslavia (Marrus 2002, 130).

The legal position of these individuals having escaped Germany remained precarious in the host state (Skran 1995, 51). In the early phase, most persons could leave Germany and enter the new country through regular channels of emigration. Outside Germany, however, the refugees could not depend on the diplomatic protection of the home government, leaving them "subject to exploitation and expulsion by host governments". Towards the end of the decade the number of persons escaping rose drastically and finding refuge became more and more difficult as states closed their borders and adopted measures preventing refugees from entering the country. (ibid. 53)[8]

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A further central concept of the immediate post-war period is that of 'displaced persons', '*Vertriebene*'. The estimated number of displaced persons, including refugees, those freed from the concentrations camps or work camps, and prisoners of war was 6.5 to 7 million people just in the US and UK zones of occupation in Germany (Benz 2009, 98; cf. Wyman 1984; Beer 2011). Many of these new types of refugees did not want to return to their states of origin. The problem of displaced persons also caused disagreement in international fora where the

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6 '*Schutzhaft*', "protective custody" refers to the exercise of police authority without judicial control, allowing the police to arrest persons without any judicial review.

7 For the Nazi policies, see Schleunes 1970.

8 The first comprehensive survey on the refugee problematic and movements since the First World War was completed by Simpson in 1939. For different studies of states responses to those fleeing, see, for instance, Caron 1999; Wasserstein 1999: Marrus 2002; Seeber 2003; Caestecker & Moore 2010.

Communist delegations saw war refugees not willing to return to the country of origin as "traitors" or "quislings"[9] (Geldon 2002, 29; see also Ginsburgs 1957).[10]

Arendt criticised the term 'displaced persons' used in describing 'persons without rights' ('*rechtlos*') instead of calling them 'stateless' which would have better described their situation without, that is, the protection from any government:

> Mit der Benennung "Staatenlose" war zumindestens noch anerkannt, daß sie den Schutz ihrer Regierungen verloren hatten und zur Sicherung ihres legalen Status internationaler Vereinbarungen bedurften". Die Nachkriegsbezeichnung "displaced persons" ist ausdrücklich erfunden worden, um diese störende "Staatenlosigkeit" ein für allemal einfach durch Ignorieren aus der Welt zu schaffen. Nichtanerkennung der Staatenlosigkeit heißt immer Repatriierung, Rückverweisung in ein "Heimatland", das entweder den Repatriierten nicht haben und als Staatsbürger nicht anerkennen will oder das umgekehrt ihn nur allzu dringend zurück wünscht, nämlich zum Zwecke des Strafvollzugs. (Arendt 1949, 755)

Arendt wrote how the response by the international community to the refugee problem had always been that of repatriation, i.e. return to the country of origin. The problem with the stateless persons was, however, that they had no home country that would be willing to receive the person, or acknowledge her citizenship, or the person would be subjected to punishment if they returned to the state of origin.

Stateless persons had lost their home country and their social surroundings. To Arendt, the historical novelty of the situation was, however, not in the loss of the home state but in the impossibility of finding a new one. By losing their home state, those without rights lost the protection of their government and carried this status with them wherever they went (Arendt 1949, 756-757). One of the cruel paradoxes that Arendt described in the *Origins* was how stateless persons could not be expelled or deported to their home state—expulsions belonging to the sphere of state sovereignty and common practice regarding unwanted foreigners in the 1920's and 30's—as there was no state where these persons could be expelled to (Arendt 1962, 283).

1.4 Beginning anew?

> Jede Verfassungsgebung… wird … mitbestimmt von den Erfahrungen der unmittelbaren staatlichen Vergangenheit, und zwar um so stärker, je unglücklicher diese Vergangenheit war (Walter Strauß 1948, representative of the CDU in the Parliamentary Council, cited in Fromme 1960, 10).

While this research examines debates related to the right to asylum in the post-war period and analyses formulations and conceptual shifts regarding the no-

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9 Quisling' refers to collaborators with the Axis forces.

10 Ginburgs' (1957) article analyses the attitudes in Soviet Union as regards to refugees and displaced persons from the First World War through the post World War II period.

tion, the study is also a narrative of the political beginning of the Federal Republic. The idea of a 'beginning anew' can be seen to operate in this research on several levels: in addition to the political (re)organisation of Germany, it refers to the beginning of the UN regime and its human rights framework. While the construction of asylum in the *Grundgesetz* and the Declaration are legal innovations as such, another 'new beginning' can be seen to take place in the 1990's when the German asylum paragraph is reformulated, losing its exceptional status, and is brought closer to the European Union integration framework on matters of asylum.

Both the Universal Declaration of Human Rights and the *Grundgesetz* are born out of exceptional and catastrophic events. Rhetorically, both documents are also very much about constructing a future that would be radically different from the past. The preamble of the Declaration states how "[d]isregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind", and uses this as a legitimation for declaring a list of universal human rights (cf. Hunt 1997, 204).[11] The preamble of the *Grundgesetz* affirms the commitment to world peace and in its first article it proclaims the inviolability of human dignity (see Chapter 2).

In the (West) German context, the past became politicised and gave rise to controversy and debate, not in the immediate post-war period but particularly from the 1960's onwards—this latter forming a part to the notion of '*Vergangenheitsbewältigung*',[12] the question of how to come to terms with the Nazi past. Hannah Arendt, who commented on Germany with the distance of an exile, visited the country in 1950 for the first time since leaving in 1933. Arendt was critical of political developments in (West) Germany and even more so of Germans and their reaction to the past. Arendt argued that "nowhere is this nightmare of destruction and horror less felt and less talked about than in Germany itself. A lack of response in evident." (Arendt 1994, 367) To Arendt, there was indifference, lack of emotion, "refusal to face and to come to terms with what really happened" (ibid. 367). This was to Arendt an escape from responsibility (ibid. 368), but "perhaps the most striking and frightening aspect of the German flight from reality is the habit of treating facts as though they were mere opinions", which to her was part of the Nazi legacy (ibid. 370). One of the aspects of post-war political life Arendt criticised (in addition to others, e.g.: Federalism; the role of the Federal states; and the party system) were the efforts at denazification, despite which several persons who where prominent in Nazi Germany were able to maintain their positions, without ever being caught up in the process (ibid. 376-377). In the pessimistic commentary of Arendt, the very thing lacking in post-war Germany was a 'new beginning', no clear break with the past, with the twelve years of totalitarian rule (cf. Palonen 2012).

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11 On the Declaration and the past, see also Fauré 2011.

12 For the language related, see e.g. Fischer & Lorenz 2007.

Arendt was not alone in her longing for a proper new beginning,[13] as the account of Hacke (2009) on the post-war German political thinkers shows. The *Grundgesetz* was not the result of a revolution or a long-lasting emancipation. Instead, the breaking of undemocratic rule came from outside; the West German state was (re)constructed and (re)organised under occupation with the control and influence of the Allies in the making of the constitution. (Cf. Niclauß 1982, 95) Karl Jaspers wrote in his commentary on the *Bundesrepublik* how the freedom (*'unsere Freiheit'*) was not "*durch einen eigenen kämpfenden Akt der Selbstbegründung erworben, sondern durch ein Geschenk erhalten*". The founding of the Federal Republic as well as the German Democratic Republic were the result of the will of others: "*Beide Staaten sind nicht durch sich, sondern durch anderen Willen begründet*" (Jaspers 1988, 175).

This study looks at the beginning of the Federal Republic and the transition from totalitarian regime to the democratic reorganisation of the state with the focus on the Parliamentary Council (*Parlamentarischer Rat*), to which was given the mandate of writing the *Grundgesetz* for the three Western zones of occupation. It is perhaps worth noting how Arendt does not, in her account of post-war Germany, mention either the Parliamentary Council or the conceptualisation of asylum in the Basic Law. The former might more generally reflect the lack of public interest towards the Council at the time. The latter was, however, a clear constitutional innovation in the *Grundgesetz*.

The beginnings of the Bonn Republic have been of frequent interest for historians, political scientists and legal scholars.[14] The unique dimension that this research aims to bring regarding previous contributions is related, above all, to consideration of the Parliamentary Council, not only as a constitutional forum but as a (quasi-) parliamentary assembly, a forum in which the key questions relating to German post-war political life and state building were deliberated over and decided upon. It is in this framework that I analyse the deliberations on asylum.

In the previous studies relating to the West German asylum provision, the legal perspective has predominated. In this research I benefit from such earlier analyses and, furthermore, bring in the literature from political theory, history, constitutional law, and texts on international law, reflecting the multidisciplinary notion of asylum itself. The aim is to construct a research narrative that places the asylum debates in the larger framework of the political founding of the Federal Republic of Germany, as well as to analyse the asylum debates of the Parliamentary Council with broader reference to post-war asylum and human rights deliberations. It should be noted that in this research I do not ana-

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13 The idea of 'beginning anew' was important for Arendt's conceptualisation of revolution. In her work "On revolution" Arendt wrote about the concept and notion "how history suddenly begins anew, that an entirely new story, story never known or told before, is about to unfold" (Arendt 1965, 28).

14 To name a few: Fromme 1960; Sörgel 1969; Otto 1971; Niclauß 1982 & 1998; Lange 1993; Feldkamp 1997; Möllers 2009; Ullrich 2009, Benz 2010. On post-war political thinkers in Germany, see also Greven 2007.

lyse, for instance, the question of how the concept of 'political persecution' came to be interpreted by the courts.

The conceptual-historical and rhetorical approach of this study relates to the notion that concepts are political, changing, open for constant interpretation and re-interpretation. Concepts are contested and controversial, a matter of debate, or "tools and weapons of debate"(Skinner 1999, 62). Concepts, language and politics are inherently connected: politics is an activity in and through language and concepts do not merely reflect political life but shape and construct it (cf. Koselleck 2006). The search for a new beginning was strongly shaped by the political vocabulary in the immediate post-war period. From a linguistic perspective, Kilian (1997) speaks of 'new democratic language' of the post-war era. This is distinct from the 'Nazi language' of which analysis Dolf Sternberg's "*Aus dem Wörterbuch des Unmenschen*" (1957) is an example. The post-war culture of democratic language with reference to parliamentary speaking will be discussed in more detail in Chapter 2.

The members of the Parliamentary Council were conscious in underlining "the new era" and in distinguishing it from the past via political terminology: Friedrich Wilhelm Wagner, the representative of the Social Democratic Party (SPD), for instance, noted:

> Eine neue Zeit muß imstande sein, ein neues Wort zu bilden, mit dem etwas Neues ausgedrückt wird. Es scheint nicht allzusehr für die Phantasie unserer Zeit zu sprechen, wenn wir an alten Begriffen festhalten, die mit dem, was wir etwas schaffen, nicht identisch sind. (cited in Kilian 1997, 1)

Furthermore, Carlo Schmid's (SPD) notion "[*d]ie Nazis haben eine ganze Menge guter Vokabeln mißbraucht*" in the Council referred to the idea of a need to avoid certain terms, such as '*Reich*', when writing the *Grundgesetz* (see also Schmid 1949).[15]

A central aspect in the post-war constitution making is related to the experiences from the Weimar regime, the first German parliamentary democracy.[16] Konrad Adenauer, the president of the Parliamentary Council and later the first Chancellor of the Federal Republic, wrote in his memoirs:"*[a]llgemeiner Grundsatz unsererseits war, daß wir aus den Fehlern der Weimarer Republik die nötigen Folgerungen ziehen mußten*" (Adenauer 1965, 153). These "lessons from Weimar—mistakes that the authors of the Bonn constitution wanted to avoid—included the diminishing of the role of the *Bundespräsident* (the Federal President) in comparison with the *Reichspräsident* (the President of the *Reich*), the strong constitutional role given to the political parties, the legal status given to the individual rights, and the creation of the *Bundesverfassungsgericht* (the Federal Con-

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15 4th Meeting AfG 23.9.48. *Der Parlamentarische Rat*. Bd. 5/1, p. 64.

16 The role of Weimar in relation to the *Grundgesetz* and the Federal Republic has been discussed broadly in different studies, including Weber's provocative study of 1949, Alleman's 1956 book "*Bonn ist nicht Weimar*", emphasising the discontinuity between the two republics, Fromme's 1960 research on the relation of the two constitutions, and on the influence of the former on the latter. From the more present day research Gusy's (Hrsg.) many-sided work *"Weimar's lange Schatten - 'Weimar' als Argument nach 1945"* (2003) and Ullrich's "*Der Weimar-Komplex*" (2009) should be mentioned.

stitutional Court). Related to these "lessons from the past" was also the second constitutional innovation of the *Grundgesetz*, the notion of '*konstruktives Misstrauensvotum*', constructive vote of no confidence whereby the removal of the Chancellor cannot occur by simple parliamentary majority but requires a positive majority also as regards to the successor. The continuities and discontinuities with Weimar in terms of the political elite (re-)emerging in the post-war era and in the drafting of the individual rights' section of the Basic Law will be discussed in Chapter 2.

1.5 The research material and the reading

The primary research material of this study consists of the debates in the Parliamentary Council. In addition to this, I will analyse the deliberations on the creation of Article 14 of the Universal Declaration of Human Rights in the various UN fora as well as look at the final *Bundestag* debate in May 1993 on the alteration of the asylum paragraph of the *Grundgesetz*. At the centre of this research are three different legal (re)conceptualisations of the right to asylum. Correspondingly, the core analytical material is comprised of asylum deliberations in three different parliamentary settings.

The deliberations of the Parliamentary Council are edited in a 14 part series by the *Bundesarchiv* and *Parlamentsarchiv*, including the documents of the prehistory of the Parliamentary Council, the *Herrenchiemsee* Convention (the expert forum preceding the Council), all the committees, the Main Committee and the plenum. In the analysis, I draw on both the editions—in which the drafting process is comprehensively documented with introduction and commentary—and regarding the asylum deliberations also on the material accessed directly in the *Bundesarchiv* in Koblenz. The creation of the Universal Declaration of Human Rights as well as the *Bundestag* debates are accessible online.

From the point of view of analysing the primary material, I understand the 70 member Parliamentary Council as a particular context—bounded in time, and well defined—in which to analyse debates related to political concepts, how the concepts were used by the politicians themselves, and how the constitutional formulations are shaped in the course of the deliberations and what kind of shifts are related to them. As regards to the creation of the asylum provision, the study will examine the arguments related to the right—how it is initially introduced into the political agenda of the Parliamentary Council, and how it was deliberated over in the different stages of the drafting work; how the right is legitimised and de-legitimised in the deliberations; how it is conceptualised from different perspectives, and argued for and against. Here, then, the Parliamentary Council is considered a forum for the making of a constitution, with emphasis, above all, as a political forum with political disputes and competing perspectives. The Council is further characterised as a deliberative, quasi-parliamentary assembly following certain parliamentary procedures and

procedural rules while deliberating over the key questions related to the West German post-war political life and the organisation of the state.

The idea of considering the Parliamentary Council as a parliamentary forum refers to the conception of parliament as an arena for opposing perspectives. For the parliamentary procedure and will formulation the idea of speaking for and against every proposed motion, "*Rede und Gegenrede*" (Redlich 1905, 587-588) is central. This perspective puts emphasis on parliamentarism from the point of view of parliamentary speaking which understands parliament as an ideal typical arena for deliberative rhetoric (cf. Palonen 2010, 46; see also Soininen & Turkka 2008).

Nevertheless, the perspective outlined above is not without problems when interpreting the Parliamentary Council deliberations. In order to create a constitution in a relatively short time frame, in a situation where one party cannot outvote the others, the political actors have to be more willing to compromise regarding their political goals in comparison with a regular parliament. Additionally, this also refers to the notion that the making of a constitution, one which aims at stability, is as an activity which must involve greater compromise than regular parliamentary politics (cf. Grimm 1998). Further, from the procedural side, the committee work dominated over the plenum debates in the Parliamentary Council. However, there are also aspects of the Parliamentary Council regarding which one could argue that it is actually more deliberative than a regular parliament, such as when the debates exceed party political lines. The immediate post-war political setting, in which the party political lines were perhaps not yet so fixed, is also worth noting from the perspective of the parliamentary culture of the Federal Republic, in regard to which political parties came to have an essential role outlined by the constitution.

What is of note is that in political founding of the Federal Republic, emphasis was placed, not on debating, but rather on the avoidance of conflict (cf. Niclauß 1982; Kilian 1997). This depoliticising notion is connected, on the one hand, with the past under the Nazi rule and to the downfall of the Weimar regime (cf. Niclauß 1982, 77), while it can also be seen to refer to the political situation in which the *Grundgesetz* was drafted under the Allied occupation. Rhetoric, for its part, fundamentally lacked a good reputation in the aftermath of the *Third Reich*. Regarding debating in the Parliamentary Council, Konrad Adenauer, who himself has been described to give an expression as an "unpolitical" character as the president of the Council (cf. Dörr 2007), directly expressed his wishes to avoid "polemical debate" in the deliberations. This idea, which Feldkamp connects to the unfixed party lines inside the Christian Democratic Union, was criticised by both Hugo Paul of the Communist Party and Carlo Schmid of the Social Democrats, both known to be active debaters in the Council. (Cf. Feldkamp 1998, 53)

Although speaking in the Parliamentary Council has been approached previously, especially from linguistic perspective (cf. Kilian 1997 & 2000), as a parliamentary assembly, the Parliamentary Council has been largely neglected. Against this background, this study argues that the Council, which as in the

words of its *Alterspräsident* Adolph Schönfelder (SPD) "*in ihrer Eigenart kein Beispiel und kein Vorbild in der Geschichte hat*",[17] deserves special mention in the analysis of German parliamentary political culture.[18]

The deliberations over the creation of the Universal Declaration of Human Rights, on the other hand, were diplomatic negotiations carried on by the representatives of governments. The representatives are not elected by public vote but follow a certain governmental plan.[19] Although the parties taking part have differing perspectives and, accordingly, speak for and against an issue, these deliberations are more compromise seeking in character than the deliberative debates of a parliament (cf. Palonen 2010, 42). Glendon (2002), when examining the history of the Declaration, speaks of the post-war window of opportunity when major institutions such as the United Nations could be established before the dividing lines between the Cold War blocks became too great. Those who gathered together to draft the Declaration in two years time came from diverse philosophical, cultural, linguistic and political backgrounds (Glendon 2002, xix).

The politics of negotiating, drafting and defining, is richly described by Eleanor Roosevelt, the Chair of the Commission on Human Rights, who wrote, when discussing the preparatory debates of the Declaration:

> Perhaps one of the things that some of us learned was that in international documents you must try to find words that can be accepted by the greatest number of people. Not the words you would choose as the perfect words, but the words that most people can say and that will accomplish the ends you will desire, and will be acceptable to practically everyone sitting around the table, no matter what their background, no matter what their beliefs might be. (Roosevelt 1995, 560)

The formulation of international legal documents is always "imperfect" from a certain perspective, in the sense that they are the product, not of one will, but of many and thus require compromises. The analysis of the creation of the paragraph on asylum in the Declaration will show how during the different stages of drafting there were several formulations and reformulations trying to find a wording that would be acceptable for the majority of the drafters. On the other hand, both the drafting of the Declaration as well as the *Grundgesetz* will show how important the (parliamentary) drafting process was for the outcome of the asylum paragraphs, as the initial drafts written by singular persons were quite different from the final formulations that were eventually accepted.

Both the Commission on Human Rights as well as the Parliamentary Council are considered in this research as historically interesting and specific fora which deliberated upon the core questions relating to post-war political life and made some important decisions regarding the human rights framework of the UN, on the one hand, and regarding (West) German post-war political life, on the other.

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17 1st meeting, Plenum, 1.9.48. *Der Parlamentarische Rat*. Bd. 9, p. 2.

18 For the parliamentary culture in Germany especially from the point of view of speaking, see: Burkhardt & Pape 2000 (Hrsg.); Mergel 2002; Schulz & Wirsching 2013 (Hrsg.).

19 See also Wallin 2005.

Although it might well be that the "origins of documents do not necessarily tell us something significant about their consequences", as Hunt (2007, 18) argues, the point in studying the drafting of the documents from a conceptual and rhetorical perspective is also that such documents are primary sources when examining the complexities, controversies and compromises behind particular concepts or labels. Another aspect to emphasise in relation to the preparatory work is that the drafting debates and negotiations produce a first-hand picture of that specific time, of its political constellations and of the contemporary political language (cf. Ihalainen & Palonen 2009). A further point in relation to studying the preparatory work is that by using such material one can construct a reading that shows the historical contingency related to the concepts, conventions and principles, especially those that might seem normative from today's perspective. Hopefully, such material also allows those voices which have been previously more unheard to be given voice.[20]

The third debate this research analyses is the final 12 hour debate on the alteration of the asylum provision in the *Grundgesetz* on May 26, 1993. The matter of right to asylum became controversial from 1970's onwards in Germany, driven, in particular, by the growing numbers of asylum seekers and the link between asylum and migration. The 1993 debate takes place after the '*Asylkompromiss*' between the Christian Democratic Union, the Free Democrats and Social Democrats—being especially controversial in the SPD, dividing the party lines and resulting in resignations from the party. The analysis of the *Bundestag* debate brings the question of asylum close to more contemporary language and terminology linked with asylum seeking, especially in the framework of the European Union. Furthermore, parliamentarians in the *Bundestag* frequently referred to the Parliamentary Council when speaking for and against the constitutional change. This brings an additional perspective and distancing effect to the post-war debates, to the constitutional role of asylum, and its relation to the past and political culture in West Germany. From a conceptual perspective, the 1993 debates represent a further shift in the conceptualisation of right to asylum.

1.6 Outline of the study

Chapter 2 of this research looks more specifically at (West) German post-war political life from the point of view of the making of the *Grundgesetz*. The chapter discusses the Parliamentary Council as a constitutional and quasi-parliamentary assembly and introduces the authors of the Basic Law. It looks at how some of the central concepts of the post-war construction of the constitution and political life were negotiated between German politicians and the representatives of the Allies. Further, before the actual analysis of the asylum de-

[20] Möllers (2009), for instance, notes how the drafters of the *Grundgesetz* are, with few exceptions surprisingly unknown for many. This also seems to be the case regarding the Declaration.

liberations in Chapter 3, there is a discussion of the rights framework and language of the Basic Law, thus laying down the context for the analysis of the asylum debates in the next chapter.

Chapter 3 then forms the core of the research analysis. This chapter looks at the creation of the asylum paragraph of the Basic Law and questions how the (re)conceptualisation of asylum as an individual right came about. It traces the origins of asylum and its revolutionary past through the notion of extradition and its exception in cases of political offence and looks at the conceptual shifts related to asylum in the post-World War II era. Further, it addresses the role of past experiences as well as the role of the constitutional situation and the East-West divide for the writing of the asylum article in the *Grundgesetz*.

Chapter 4 takes an excursion from the German post-war political scene to the UN context and analyses the making of Article 14 of the Universal Declaration of Human Rights. As in the case of narrating the political history of Article 16(2) 2 GG, the chapter gives an account of the core authors of the Declaration and its asylum article and examines how the different asylum formulations were advocated for and against in the making in the diplomatic negotiations of the UN and what kind of ideological tensions were related to the wordings suggested. The chapter further touches upon the relationship between state sovereignty and rights in the analysis of the asylum debates.

In the Chapter 5, I examine how the exceptionality of the right to asylum in the *Grundgesetz* is called into question and is subject to change. The chapter gives a brief account of the right to asylum after its constitutionalisation in 1949 before moving on to analyse of the *Bundestag* debates, outlining the arguments for and against the constitutional change. The analysis puts special focus to references made to the Parliamentary Council. The chapter further analyses the 1993 debates with reference to the broader framework of European development in matters of asylum, bringing the research close to the language with which the protection of asylum seekers and refugees operate in the present day context.

2 THE POST-WAR POLITICAL SETTING AND THE LANGUAGE OF RIGHTS

Authorised by Western Allied states, the Parliamentary Council gathered at the Pedagogical Academy in Bonn between September 1948 and the following May to draft the Basic Law—the *Grundgesetz*—for the tri-zone of Western occupation. Its history is related to post-war geopolitical contingencies: first among these, the division of Germany and its capital by the victorious Allies into zones of occupation after the unconditional surrender of Germany on May 8, 1945. The principles of the occupation by the Allies were laid down at the Potsdam Conference by the USSR, the USA and the UK between July 17 and August 2, 1945.[21] The prehistory of the Council is further related to the breakdown of co-operation between the Western Allies and the Soviet Union culminating in the winter of 1947-48; the rebuilding of Europe; and, to the creation of a separate state of West Germany.[22]

The guidelines for the West German constitution were agreed upon in the London Six Powers Conference in the spring 1948 by representatives of the three Western Allies, as well as the Benelux states, being neighbouring states to Germany, after the division of Germany had become clear.[23] The guidelines were later prepared in the so-called Frankfurt documents (*Frankfurter Dokumente*) by the military governors, Lucius D. Clay (the USA), Pierre Konig (France) and Sir Brian Robertson (the UK) to be issued to the prime ministers ('*Ministerpräsidenten*') of the Western Federal states, *Länder*.

The immediate post-war context of West Germany is one with manifold political actors and agendas; on the one hand, by the Allies who laid down the original framework for the constitution, each with a different set of political

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21 See Protocol of the Proceedings of the Berlin (Potsdam) Conference August 1, 1945 in *Documents on Germany 1944-1985,* pp 54-64.

22 The documents of the years 1945-49 can be found in the series *Akten zur Vorgeschichte der Bundesrepublik Deutschland 1945-1949*, edited by the *Bundesarchiv* and *Institut für Zeitgeschichte*.

23 The London Six Powers Conference took place on 23 February – 6 March and 20 April and 2 June 1948.

agendas and conceptualisations for the future of (West) Germany: whereas the USA underlined the building of a Western state, the UK favoured a more centralist approach towards state building than the US Federal model, while the priority for France was, above all, the issue of security with neighbouring Germany (cf. Feldkamp 1998, 16-17).[24] From the German side, there was post-war planning by the political elite after the *Third Reich*, many who already had political experience in the Weimar Republic and several who had experience from emigration. A further part was played by the newly (re)organised political parties and the different interest groups that shaped the political landscape. The numerous plans, by individuals in exile and in resistance, in the post-war *Länder*, and by the political parties in post-Hitler Germany are document in Benz 1979.[25]

Before the drafting of the *Grundgesetz*, construction of the constitution had already begun in the *Länder* of the Western zones of occupation with several future authors of the Basic Law taking part in the writing of these constitutions.[26] The first *Land* elections took place in the spring of 1946 (Niclauß 1998, 23). Niclauß (1982, 21) emphasises how the creation of the West German state was about making compromises between the differing interests of the three Allied powers, as well as between the German political parties and state governments. An essential role in immediate post-war political life in Germany belonged to the prime ministers as the leading politicians of the eleven West German Federal states.[27] The role of the prime ministers became emphasised as the elected state parliaments were the only state, and German, political bodies before the *Grundgesetz* came into force. The prime ministers also had an essential role in the negotiations with the Allies; rather than the party leaders, they were seen as the partners in negotiation (cf. Bauer-Kirsch 2005, 13-14; Möllers 2009, 18). The prime ministers further played a central part in interpreting and negotiating certain concepts, such as whether the constitution to be drafted was to be a '*Verfassung*', like the Allies had suggested, or a '*Provisorium*', which was the conception supported by the German side.

The following looks at the immediate German post-war politico-historical context by briefly discussing the context preceding the drafting of the *Grundgesetz* and then moving on to discuss the Parliamentary Council as a constitutional and (quasi-) parliamentary forum, the role of the parties in the Council, and to present the authors of the Basic Law. The second part of the chapter focuses on the post-war rights language by commenting on the different conceptualisations of rights by the authors of the *Grundgesetz,* with reference, in particular, to the notion of '*Menschenwürde*', human dignity. The purpose of this part is to set up the larger framework in which the deliberations on asylum take place and which are analysed in Chapter 3.

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24 For the different perspectives of the Allies, see Clay 1950; Krieger 1987; Willis 1962.
25 For the planning in exile, see also Koebner et al. 1987.
26 For the post-war organisation of the *Länder*, see Beutler 1973.
27 For the state prime ministers, see Bucher 1981; Bauer-Kirsch 2005.

2.1 From '*Frankfurter Dokumente*' to *Herrenchiemsee*

A constitutional assembly ('*Verfassungsgebende Versammlung*') was authorised by the Frankfurt documents prepared by the military governors after the Six Powers Conference. The authorisation was to build a democratic constitution with a federal form which would guarantee individual rights and freedoms. The first of the three documents stipulated:

> Die Verfassungsgebende Versammlung wird eine demokratische Verfassung ausarbeiten, die für die beteiligten Länder eine Regierungsform des föderalistischen Typs schafft, die am besten geeignet ist, die gegenwärtig zerrissene deutsche Einheit schließlich wieder herzustellen, und die Rechte der beteiligten Länder schützt, eine angemessene Zentral-Instanz schafft und die Garantien der individuellen Rechte und Freiheiten enthält. (Dokument Nr.1, 1.7.1948)[28]

Following the Frankfurt documents, the 11 prime ministers of the *Länder*, as well as representatives of the German political parties, though without any official role, met in July 1948 first in Koblenz (*Rittersturzkonferenz*, July 8-10) and later in Rüdesheim am Rhein (*Niederwaldkonferenz*, July 15-16 and 21-22) to discuss the documents. Among the representatives at the conferences, and as future members of the Parliamentary Council, were Anton Pfeiffer (Bavaria), Carlo Schmid (Württemberg-Hohenzollern) und Adolf Süsterhenn (Rhineland-Palentinate) (cf. Bauer-Kirsch 2005).

In opposition to the conception put forward by the Allies, German politicians participating in the conferences were against the idea of a constituent assembly creating a constitution for a separate German state, possibly leading to the permanent division of the country. The conferences also rejected the idea of constituting a '*Nationalversammlung*' (national assembly) in the context of a divided Germany. A further opposition related to the idea of a referendum and instead the constitutional document was to be ratified by the state parliaments. (Cf. Feldkamp 1998, 21-28)

Another especially problematic matter for the conferences and state building concerned the situation of Berlin, regarding which there were fears from the German side that the construction of a constitution for a state in the Western zones of occupation might further complicate the situation in the divided former capital now under Soviet blockade. This idea reversed during the second conference of the prime ministers with the idea that delaying constitutional development in the Western zones might, instead, worsen the situation of Berlin. This "*Kernstaat*" thesis was strongly advocated by Ernst Reuter, the *Bürgermeister* of Berlin (SPD). (Cf. Feldkamp 1998, 27; Niclauß 1998, 116-117)

In the final report of the conferences, the prime ministers suggested that instead of a 'constituent assembly' a 'parliamentary council' would convene and the Basic Law would not be called a constitution, '*Verfassung*' but a '*Grundgesetz*' and it would be provisional. The final report stated: "*Das Wort*

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[28] Cf. *Akten zur Vorgeschichte der Bundesrepublik Deutschland 1945-1949*. Bd. 4.

'Verfassung' ist absichtlich nicht gebraucht worden, weil weder ganz Deutschland noch eine endgültige Lösung in Frage kommt. Das gewählte Wort 'Grundgesetz' wäre wohl zutreffender mit 'basic constitutional law' übersetzt worden." [29] The concept of '*Grundgesetz*' was introduced by Max Brauer, the Social Democratic *Bürgermeister* of Hamburg, while the notion of '*Parlamentarischer Rat*' was formulated by Peter Altmeier, the Christian Democratic prime minister of Rhineland-Palentinate (Dörr 2007, 22-23).

As the Frankfurt documents were a compromise between the three Allied states, they were written in an open form, eventually leaving the German politicians more space for interpretation and negotiation in relation to its main concepts (cf. Niclauß 1998, 112; Feldkamp 1998). Möllers (2009, 36) notes how, in the process of the developing the constitution, the geopolitical situation, the deepening of the divides in Cold War, and the need for the Allies to make decisions quickly, further aided German politicians in successfully promoting and negotiating their goals.

After the Allies had accepted the interpretation of the concepts, and before the deliberations of the Parliamentary Council started, a constitutional convention gathered in August 1948 at lake *Chiemsee* in Bavaria with the purpose of delivering a draft constitution to serve as a guideline for the deliberations of the Parliamentary Council. These deliberations, leading to the "*Chiemseer Entwurf*" were conducted over a period of two weeks. In contrast to the Parliamentary Council, which was seen as a clearly political forum, the *Herrenchiemsee* Convention ('*Verfassungskonvent auf Herrenchiemsee*') was regarded as an "expert body", without clear political responsibility. Anton Pfeiffer of the CSU, though not himself participating in the convention, described its work in the Parliamentary Council by noting:

> Die Beratungen in Herrenchiemsee hatten den großen Vorzug, daß 28 Fachleute vereinigt waren, von denen jeder ein oder mehrere Sachgebiete beherrschte, von denen keiner sich in Phrasen erging. So gab es in diesem Kreise keinerlei Diskussionen politischer Art. Solche Auseinandersetzungen wurden vielmehr dem Parlamentarischen Rat vorbehalten. Der Parlamentarische Rat ist nicht nur ein sachliches, sondern auch ein politisches Gremium. Daher werden seine Beratungen notwendigerweise ein anderes Gesicht haben als die Verhandlungen von Herrenchiemsee.[30]

The authors of the *Herrenchiemsee* Constitutional Convention were not seen as members of the political parties but as representatives of their state. Of the 28 participants, "*Fachleute*" as in the description of Pfeiffer, each state had not more than two representatives. Most of the representatives had already taken part in the writing of their respective state constitutions. Some of the representatives were professional politicians like Carlo Schmid, Adolf Süsterhenn and Hermann Fecht (Baden), all future authors of the *Grundgesetz*. Others were state officials, administrators, diplomats, scholars, lawyers. (Cf. Bauer-Kirsch 2005, 22) In his memoirs, Carlo Schmid describes the combination of those participating

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29 „Aide-Mémoire der Ministerpräsidenten zu den Erklärungen der Militärgouverneure", 22.7.1948. *Der Parlamentarische Rat*. Bd. 1, p. 271.

30 2nd Meeting AfG, 16.9.48. *Der Parlamentarische Rat*. Bd. 5/1, p. 4.

in the *Herrenchiemsee* Convention by writing: "*Der Verfassungskonvent stellte ein seltsames Gemisch verschiedenster politischer Richtungen, verfassungsrechtlicher Theorien und "Zugehörigkeiten" dar. Keines der Mitglieder war offizieller Vertreter einer politischen Partei; manche gehörten keiner Partei an, sondern waren als Beamte ihrer Landesregierungen, als Professoren oder als frühere Diplomaten ausgewählt worden, weil man ihnen Sachverstand zutraute*." (Schmid 1979, 334)

In its organisational structure, the *Herrenchiemsee* Convention consisted of a plenum, three sub-committees and an editing committee. It prepared a draft and a memorandum which Schmid later described as an "*Arbeitshilfe*", or "*Diskussionsmaterial*" for the work of the Parliamentary Council, being without official character (cf. Schmid 1949).

The first committee (*Unterausschuß I)* of the *Herrenchiemsee* Convention, with the constitutional scholar and one of the authors of the Bavarian constitution of 1946, Hans Nawiasky[31] in a central role, had the task of writing the fundamental questions section of the draft, including basic rights.[32] The committee included in the constitutional draft a list of individual rights with the idea that these rights would be binding and directly applicable in character.[33] This conceptualisation was also later adopted in the Parliamentary Council.

2.2 *'Provisorium', 'Grundgesetz'*

> Machen wir eine Verfassung? Schaffen wir eine provisorische Verfassung? Was heißt "provisorische Verfassung"? Im Gegensatz zu "Verfassung"? Oder machen wir etwas anderes? Man spricht von einem "Grundgesetz". Soll dieser Begriff nur ein anderes Wort für das sein, was andere "Verfassung" nennen? Oder soll mit diesem Wort zum Ausdruck kommen, daß wir etwas anderes schaffen wollen? Mit anderen Worten: Was soll die Natur des Gebildes sein, das wir hier schaffen wollen? (Carlo Schmid, SPD)[34]

The preamble of the *Grundgesetz* speaks of a 'transitory period', with the purpose "*dem staatlichen Leben für eine Übergangszeit eine neue Ordnung zu geben*". Further, the Basic Law came to include the idea that it would lose its validity on the day it was replaced by a constitution enacted freely by the German people.[35] The Basic Law was also enacted on behalf of those Germans whose participa-

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31 Nawiasky was a professor of law who in the Weimar Republic had been a "*Hausjurist*" for the Bavarian government. Nawiasky was one of the emigrant post-war politicians, having spent the years under the Nazi rule in Switzerland (cf. Benz 2009, 353; 364).

32 The members of the first sub-committee were: Josef Beyerly, Hermann Fecht, Josef Schwalber, Gert Feine, Wilhelm Drexelius, Hermann Brill, Justus Danckwerts, Theo Kordt, Adolf Süsterhenn, Fritz Baade, and Carlo Schmid.

33 Cf. "Bericht über den Verfassungskonvent" in *Der Parlamentarische Rat*. Bd. 2 (p. 511 ff.).

34 2nd Meeting AfG, 16.9.48. *Der Parlamentarische Rat*. Bd. 5/1, p. 7.

35 "*Dieses Grundgesetz, das nach Vollendung der Einheit und Freiheit Deutschlands für das gesamte deutsche Volk gilt, verliert seine Gültigkeit an dem Tage, an dem eine Verfassung in Kraft tritt, die von dem deutschen Volke in freier Entscheidung beschlossen worden ist.*" (Art. 146, GG)

tion was denied. The preamble calls "to achieve in free self-determination the unity and freedom of Germany".[36]

The *Herrenchiemsee* memorandum refers to the *Grundgesetz* as "*zeitliches und räumliches Provisorium*". It is a "*Notlösung*", limited in its duration to the enactment of a constitution constituted by the free will of German people. Geographically it is limited to the 11 *Länder* of the Western zones of occupation.[37]

Carlo Schmid, who was one of the strongest advocates of the notion of '*Provisorium*'—both in the deliberations in the fora preceding the Parliamentary Council as well as in the Council—defined the concept of '*Verfassung*' as "*die Gesamtentscheidung eines freien Volkes über die Formen und die Inhalte seiner politischen Existenz*"; it being "*die Grundnorm des Staates*".[38] Bauer-Kirsch writes in her commentary about the problematic of creating a provisional constitution - one that would be provisional enough not to underline too much the division of Germany, hoped to be short-lived with the aim of unification, yet not too provisional to endanger the constitutional building of the state, the 'constitutional new beginning': "*Wieviel Provisorium mußte sein, um die Zerrissenheit Deutschlands nicht zu manifestieren, wie wenig Provisorium durfte sein, ohne dabei den verfassungsrechtlichen Neubeginn auf zu schwache, instabile Beine zu stellen*" (Bauer-Kirsch 2005, 9).

In Schmid's argument, the concept of '*Provisorium*' was related to the sovereignty of the people ('*Volkssouveränität*'). The idea that the authority of the government derives from the consent of the people who are the source of its political power, could not be accomplished in the context of creating a constitution for just a "*Staatsfragment*". Schmid wrote in his 1949 article how the Parliamentary Council was not in a position to create "*eine deutsche Verfassung im eigentlichen Sinne des Wortes*" (Schmid 1949, 202).[39] This was further related to the idea of a '*Nationalversammlung*' which would in the future, as freely elected, create a '*Verfassung*' for Germany: "*Eine gesamtdeutsche konstitutionelle Lösung wird erst möglich sein, wenn eines Tages eine deutsche Nationalversammlung in voller Freiheit wird gewählt werden können.*"[40]

In the plenum, Schmid did not speak about a "*Vollverfassung*", but about the *Grundgesetz* as a '*Provisorium*' that would be "open" both in its geographical and substantial sense.[41] Heuss of the FDP, in his turn, underlined the geographical aspect of the provisional constitution. Structurally, however, the question was about creating something stable:

> Wir begreifen dieses Wort "provisorisch" natürlich vor allem im geographischen Sinne, da wir uns unserer Teilsituation völlig bewusst sind, geographisch und volkspolitisch. Aber strukturell wollen wir etwas machen, was nicht provisorisch ist und gleich wieder in die Situation gerät: heute machen wir etwas und morgen kann man

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36 *"Es hat auch für jene Deutschen gehandelt, denen mitzuwirken versagt war. Das gesamte Deutsche Volk bleibt aufgefordert, in freier Selbstbestimmung die Einheit und Freiheit Deutschlands zu vollenden."*

37 Cf. "Bericht über den Verfassungskonvent". In *Der Parlamentarische Rat*. Bd. 2, p. 507.

38 2nd Meeting, Plenum, 8.9.48. *Der Parlamentarische Rat*. Bd. 9, p. 21.

39 For the concept of '*Verfassung*', see Grimm 1990; Preuß 1994 (Hrsg.).

40 2nd Meeting Plenum, 8.9.48. *Der Parlamentarische Rat*. Bd. 9, p. 11.

41 Cf. 2nd Meeting Plenum, 8.9.48 *Der Parlamentarische Rat*. Bd. 9.

> es wieder ändern, und übermorgen wird eine neue Auseinandersetzung kommen. Wir müssen vielmehr strukturell schon etwas stabileres hier fertigzubringen versuchen, auch etwas, was eine gewisse Symbolwirkung hat, und wenn auch bloß in der Abschattierung, so daß wir den Besatzungsmächten, daß wir auch den Leuten im deutschen Osten sagen: wir sind nun eben auf einem Weg begriffen, dessen Ende noch nicht erreicht ist.[42]

Heuss underlined the symbolic function of the provision: the idea of a future goal or transition—i.e unification. The question of '*Provisorium*' was, according to Heuss, further related to the form of the individual rights in the *Grundgesetz*. In these debates, Heuss thought that, whereas the Basic Law would be understood as provisional in the geographical sense, individual rights could not be characterised as so, but should instead represent "*das Pathos des Dauernden*", something that would be long-lasting:

> Wir können das Werk in seiner Totalität als provisorisch ansehen, wobei ich den Ausdruck „provisorisch" als eine geographische Angelegenheit betrachten möchte. Aber man kann die Grundrechte nicht als provisorisch ansehen, sondern diese müssen den Ewigkeitsgehalt irgendwie in sich tragen, um überhaupt eine innere Rechtfertigung zu haben.[43]

Schmid, in his turn, linked his argument about the '*Provisorium*' to the question of why the drafters should not attempt to create too broad a list of individual rights, including social and cultural "*Lebensordnungen*".[44] This conceptualisation, which is related to the fact that the SPD did not attempt to promote the inclusion of social rights in the Basic Law, will be discussed in more detail in the analysis of the Council deliberations on rights.

Although the '*Provisorium*' thesis was especially important for the SPD, a further advocate of the idea was Heinrich von Brentano of the CDU. Von Brentano wrote in 1949 about the "disastrous developments from Potsdam to London" which had excluded large numbers of the German population from the developing the constitution. Von Brentano was more critical than Schmid, for instance, about the possibilities of "real political decisions" and the drafting of a constitution under occupation, without the sovereignty of the people, under terms that were decided by the winners of the war. Von Brentano questioned in the article "*ob eine echte, bewusste und organische politische Entwicklung, ob echte politische Entscheidungen überhaupt möglich sind, solange ein Volk nicht im Vollbesitz seiner Souveränität ist, sondern im Zustande der bedingungslosen Kapitulation und unter einem nicht kodifizierten Besatzungsrecht lebt, dessen Inhalt und Reichweite ausschließlich von dem diskretionären Ermessen der Sieger bestimmt wird*" (von Brentano 1949, 498).[45]

In his argument, von Brentano was also sceptical about the legitimacy of the Parliamentary Council and went on to ask whether the Council was a legitimate body for the expression of the political will of the people. Furthermore, its

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42 3rd Meeting Plenum, 9.9.48. *Der Parlamentarische Rat*. Bd. 9, pp. 106-107.
43 3rd Meeting AfG, 21.9.48. *Der Parlamentarische Rat*. Bd. 5/1, pp. 43-44.
44 3rd Meeting AfG, 21.9.48. *Der Parlamentarische Rat*. Bd. 5/1, p. 46.
45 The article was originally published in the journal *Die Wandlung (*1949).

election indirectly by the *Länder* for von Brentano further contributed to the anonymity of the Council among Germans:

> Es erscheint mindestens fraglich, ob die Art der Bildung des Parlamentarischen Rates geeignet war, ein Organ zu schaffen, das die Legitimation für sich in Anspruch nehmen konnte, dem politischen Willen des Volkes Ausdruck zu verleihen. Die indirekte Auswahl, nicht Wahl, der Mitglieder des Parlamentarischen Rates nach den Grundsätzen des Verhältniswahlsystems durch die Abgeordneten der Landtage, die selbst nach dem Verhältnis- und Listenwahlsystem gebildet worden waren, hat sicherlich entscheidend dazu beigetragen, daß der Parlamentarische Rat vom ersten Tage an in einen Nebel der Anonymität gehüllt war, und daß seine Existenz, seine Aufgaben und seine Entscheidungen dem Bewußtsein des deutschen Volkes niemals hinreichend bekannt werden. (von Brentano 1949, 497)

Von Brentano's argument shows that if there were doubts related to the 'political beginning' of the Federal Republic in the commentaries of the post-war political life of Germany, as referenced in the Introduction of this research, there were also doubts about the legitimacy inside the Parliamentary Council among the politicians themselves.

2.3 Parlamentarischer Rat

2.3.1 Parliamentary Council as a constitutional and quasi-parliamentary assembly

The Parliamentary Council was not elected by public vote as the Weimar national assembly (*Weimarer Nationalversammlung*) had been, for example, but the representatives were chosen by the *Länder*.[46] While this led von Brentano, for instance, to question the mandate of the Council as a constitutional forum, more recent commentators such as Grimm, while crediting the "constitutional success" of the *Grundgesetz*, have seen the Basic Law with its "democratic construction mistake" as an example of how the vote of the people is not the guarantee of the legitimacy of a constitution (Grimm 2001, 50; see also Möllers 2009).

Regarding other historical examples of drafting a constitution, the task of writing the original constitutional draft in post-war West Germany was not given to just one person, such as in the case of the *Weimarer Verfassung* and Hugo Preuß, or the Austrian constitution (*Österreichische Bundesverfassung*) of 1920 written by Hans Kelsen. Instead, the first draft was created by the *Herrenchiemsee* Convention.

As noted in the beginning of the research, this study views the Parliamentary Council not only as a constitutional assembly but, above all, as a (quasi-) parliamentary deliberative assembly. Furthermore, the idea is that in discus-

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46 The state Württemberg-Hohenzollern had two mandates for the Parliamentary Council, both belonging originally to the CDU. The party agreed with the SPD to exchange one of the two mandates to an SPD mandate in Hamburg, allowing Carlo Schmid from Württemberg-Hohenzollern to participate in the drafting of the *Grundgesetz*. (Benz 2009, 374)

sions of post-war parliamentarism in Germany, the Parliamentary Council is often overlooked (cf. Lange 1993). This also contradicts the self-understanding of members of the Parliamentary Council: Adolph Schönfelder (SPD), the *Alterspräsident* of the Council, for instance, stated in the beginning of the plenum work, when outlining the procedures of the Council how "*[w]ir wollen uns als Abgeordnete bezeichnen, wie das sonst im Parlament auch üblich ist*". The Council was to follow certain parliamentary practices: Schönfelder made reference to the use of titles which, apart from '*Doktor*', were not encouraged. Further, Schönfelder referred to the parliamentary tradition when asking delegates not to clap their hands when agreeing with the speaker: "*[a]uch da wollen wir zur früheren guten parlamentarischen Übung zurückkehren. Diese gute Sitte ist durch die Nazis verdorben worden*".[47]

As the argument above shows, parliamentary speaking in the post-war Germany was related to the downfall of parliamentary culture during the Nazi era. It was further linked, as Kilian (2000, 173) writes, to the traditions of the *Paulskirche* of 1848-49, the first German parliament, to the opposition of Bismarck towards parliamentarism in the *Kaiserreich* and to the parliamentary speaking culture of the Weimar Republic. The continuity with Weimar is also emphasised in noting how thirty of the authors of the *Grundgesetz* had been representatives of different parliaments in the Weimar era. (ibid.)

The Parliamentary Council was not a parliament per se, as it lacked the divide between government and opposition, for example, but it had many parliamentary procedural features such as multiple readings or the rotation of committee work and the plenum debates. Being authorised to write the *Grundgesetz* in a rather short time frame, the task was to find a compromise for the differing sets of interests. It was thus more oriented towards seeking compromise and negotiating in its rhetoric, although it also had features which made it more deliberative than a regular parliament, such as when the debates exceeded party political lines.

Kilian uses the notion of '*Arbeitsparlament*' when describing the Parliamentary Council (Kilian 2000, 177). This refers to the organisation of the Council regarding the dominant role of the committees. The Council consisted of six committees and a plenum. These committees (*Ausschüsse*)[48] were the Basic Questions Committee (*Grundsatzfragen*), Committee for the Organisation of the Bund and for the Constitutional Court and Administration of Justice (*Organisation des Bundes sowie Verfassungsgerichtshof und Rechtspflege*), Competence Committee (*Zuständigkeitsabgrenzung*), Finance Committee (*Finanzfragen*), Committee on Electoral Matters (*Wahlrechtsfragen*) and Occupation Statute Committee (*Besatzungsstatut*).[49] In addition, there was a Main committee (*Hauptausschuß*), whose task was to co-ordinate the workings of the different committees into a coherent draft to be debated in the plenum. The Main Committee was an essen-

47 2nd Meeting Plenum, 8.9.48. *Der Parlamentarische Rat*. Bd.9, p. 18.
48 For the vocabulary, see Hilgers 1956.
49 For the organisation of the Parliamentary Council, see Ley 1975. For the presentation of the different committees, see Feldkamp 1998.

tial debating forum for the Parliamentary Council which has, as an arena, remained unique to the German parliamentary culture (cf. Kilian 2000). The importance of the Main Committee for the Council becomes obvious when comparing the number of active meetings: the plenum gathered only twelve times, while the Main Committee held fifty-nine meetings altogether (Niclauß 1998, 125). Most of the writing of the *Grundgesetz* took place in the committees; while the asylum clause, for instance, was not debated in the plenum. Apart from the Main Committee, committee deliberations were not open to public.

Of the different committees, the most important for this study is the Basic Questions Committee which, being responsible for drafting the basic rights section of the Basic Law and its preamble, had an important political role. In addition to the Main Committee, it was the forum where the asylum debates took place. These two fora and their special features will therefore be discussed in more detail in Chapter 3.

Konrad Adenauer was unanimously elected as the president of the Parliamentary Council in the first meeting of the plenum with the exception of the two Communist delegates. Adolph Schönfelder (SPD) and Hermann Schäfer (FDP) were chosen as vice-presidents.

The important inter-factional negotiations inside the Parliamentary Council were chaired by Adenauer. Furthermore, there were also additional fora inside the Council which sought to find compromises between the factions as the writing of the *Grundgesetz* proceeded. These were the General Editing Committee (*Allgemeiner Redaktionsausschuß*; see also Chapter 3), the Committee of Five (*Fünferausschuß*) which was later transformed into the Committee of Seven (*Siebenerausschuß*) to include all the factions, with the exception of the KPD and the Bavarian CSU, to find a larger compromise on the *Grundgesetz*.[50] The negotiations of these compromise or co-ordination fora, although playing an important role in quickly devising the constitution, are not documented in their own right as distinct from the other committee deliberations (cf. Niclauß 1998, 124-125).

During the drafting process of the *Grundgesetz*, the articles and principles were first formulated in the respective committees after which followed the first reading in the plenum. The formulations were then further debated after the first reading in the Main Committee, and received comments and recommendations from the Editing Committee, followed by a further round in the committees.[51]

As the drafting process continued, the Allies intervened in the form of a memorandum after which there was a meeting between the Military Governors

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50 Participants taking part in the working of the Committee of Five were primarily Carlo Schmid and Walter Menzel from the SPD; Heinrich von Brentano and Theophil Kaufmann from the CDU; alternatively Hermann Schäfer, Thomas Dehler, Theodor Heuss or Hermann Höpker-Aschoff for the FDP. The Committee of Seven included in addition Johannes Brockmann (*Zentrum*) and Hans-Christoph Seebohm (DP) (cf. Niclauß 1998, 125-128).

51 For an overview of the different stages of drafting, see Niclauß 1998, 128-134. Merkl (1965) discusses comprehensively the controversial questions inside the Council.

and the German delegation. This led to the so called *Frankfurter Affäre*, a controversial episode of the drafting process, in which Adenauer was accused of giving information to the military governors about the drafting without the authorisation of the factions. In response, the SPD, the FDP and *Zentrum* considered a vote of non-confidence against Adenauer. As the conflict was resolved, the drafting and negotiations continued in the Council, the inter-party negotiations, and in the readings of the Main Committee.

As the Allies did not accept all the formulations by the German politicians, the final intensive phase of the drafting consisted of finding compromises inside the Council as well as in relation to Allies' representatives. These controversial questions concerned financial administration, and especially the matter of competences between the *Bund* and the *Länder*, with the SPD originally opposing the federal construction of the state with the strong preference for a federal system inside the Council as proposed by the CDU, in particular, and supported by the Americans and the French (cf. Antoni 1992, 149; Merkl 1965). The Editing Committee worked on the final formulations before the draft was subject to the final reading in the plenum. The *Grundgesetz* was eventually accepted in May 1949 with 53 votes for and 12 against. The votes against came from the KPD, the DP, the *Zentrum* and the CSU (six votes). The representatives of the CDU, SPD, FDP and two representatives of the CSU voted for the *Grundgesetz*. After the Basic Law was approved by the military governors, it was passed to the state parliaments to be ratified, with the exception of Bavaria.

Regarding the freedom of the Council, Carlo Schmid wrote in his memoirs:

> Nach seinem Selbstverständnis war der Parlamentarische Rat bei seinen Beratungen und Entscheidungen frei; seine Abgeordneten waren nur ihrem Gewissen verantwortlich. Allerdings mußte das zu beschließende Grundgesetz gewissen Prinzipen Rechnung tragen. Wir waren nicht völlig frei bei der Auswahl dieser Prinzipen: Die uns ermächtigenden Texte gaben uns auf, bestimmte Grundsätze zu verwirklichen; die Gouverneure hatten uns wissen lassen, daß sie unser Werk genehmigen würden, wenn die Beschlüsse des Parlamentarischen Rates mit "diesen allgemeinen Grundsätzen nicht in Widerspruch stehen." (Schmid 1979, 368)

Adenauer, who in his autobiography described the Six Powers Conference in London, without German participation, as "dictations" ("*Diktate*") (Adenauer 1965, 139), commented in the first meeting of the plenum how the Parliamentary Council was in the assignment given to it "*völlig frei und völlig selbstständig*".[52]

Both Adenauer and Schmid emphasise how the Parliamentary Council was free to operate within the framework set forth. These confines were established by the Allies and part of the work of the drafting of the *Grundgesetz*, as noted, was to negotiate with the Allied representatives. Further, the Basic Law required their final acceptance. Nevertheless, the final wording of the document was a result of compromises from all parties, including the German politicians as well the Allies.

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52 1st Meeting Plenum, 1.9.48. *Der Parlamentarische Rat*. Bd. 9, p. 12.

2.3.2 Political parties in the Parliamentary Council

The Parliamentary Council consisted of 70 representatives, of which the five from Berlin were without the right to vote. There were six parliamentary factions in the Council: the Christian Democratic Union (*Christlich Demokratische Union*, CDU) together with its Bavarian sister party, Christian Social Union (*Christlich-Soziale Union,* CSU), with 27 representatives, of which the CSU had eight, the Social Democratic Party (*Sozialdemokratische Partei Deutschlands*, SPD) also with 27 representatives, the Free Democrats (*Freie Demokratische Partei*, FDP) which had, before the Parliamentary Council, built a faction with the LPD (*Liberal-Demokratische Partei Deutschlands*) and the DVP (*Deutsche Volkspartei*) with 5 representatives. The Communist Party (*Kommunistische Partei Deutschlands*, KPD), the German Party (*Deutsche Partei*, DP) and the Catholic Centre Party (*Zentrum*) had each 2 representatives on the Council. (Cf. Feldkamp 1998, 37)

The party system in Germany went through notable changes in the post-war era, with the number of political parties being significantly lesser than in the Weimar Republic. The Christian Democratic Union, which then later won the first *Bundestag* elections of 1949, was a post-war construction without a precedent in the Weimar era. The 1945 established CDU brought together different formerly divided Protestant and Catholic groups, "*von linken Flügel des katholischen Zentrums bis zum deutschnationalen Protestantismus*" (Niclauß 1982, 41). The members of the CDU were former representatives of the *Zentrum*, the national conservative German National People's Party (*Deutschnationale Volkspartei, DNVP*), the Bavarian People's Party (*Bayerische Volkspartei*, BVP) and the protestant-conservative Christian Social People's Service (*Christlich-Soziale Volksdienst*, CSVD) (Dörr 2007, 26).[53] Common to all these different parties in the immediate post-war era was the idea of Nazism as a '*Sündenfall*' (Niclauß 1982, 41).

The CDU like other parties was organised around different local levels. It elected Konrad Adenauer as its first Chairman. Adenauer had been representative of the Catholic *Zentrum* in the Weimar Republic. In the Parliamentary Council, Adenauer's central role was emphasised in connection with the co-operation and negotiations with the Allies, as in the role of the president of the Council, rather than in shaping the constitutional structures of the new state. Adenauer did not take part in the conferences of the prime ministers nor was he part of the *Herrenchiemsee* Convention (cf. Bauer-Kirsch 2005, 10).[54]

The constitutional questions of the Union parties were discussed in the post-war period, above all, in the so called "*Ellwanger Kreis*", which strongly preferred federalism. To this circle belonged, for instance, Adenauer, Anton Pfeiffer, and Adolf Süsterhenn, the Minister of Justice of Rhineland-Palentine and one of the core designers of its constitution. (Cf. Benz 2009, 355)

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53 For the history of the CDU, see also Kleinmann 1993, although, his account pays surprisingly little amount of attention to the Parliamentary Council. The biographies of the members of the CDU in the Parliamentary Council are presented in Buchstab 2008 (Hrsg.).

54 For Adenauer, see Morsey 2008; Köhler 1994.

With Adenauer as the president of the Parliamentary Council, the position as the Head of the faction was held by Pfeiffer (CSU). Other key names for the CDU in the Council were Heinrich von Brentano, who was one of the party's constitutional experts and the future Foreign Minister of Adenauer's second cabinet (see Chapter 3), Hermann von Mangoldt, a prominent law scholar and Walter Strauß, *Staatssekretär* of Hesse. The CDU is the only party for which party protocols in the Parliamentary Council have been documented and published (cf. Salzmann 1981).

The SPD had been banned by the Nazi regime in 1933. The party was re-established immediately after the downfall of *Third Reich* with Kurt Schumacher as its leader until his death in 1952. Benz (2009, 356) writes that whereas many of the constitutional questions were open inside the CDU, inside the SPD they were even more so. In its constitutional plans, the SPD was influenced by the Weimar constitution which was notable, for instance, in the constitutional draft written by Walter Menzel in June 1948 ("*Westdeutsche Satzung*", *Erster Menzel-Entwurf*; see Benz 1979, 367-383). In the Parliamentary Council, the SPD was not creating a sovereign state but an '*Organisationsstatut*' (Antoni 1991, 211), thus placing emphasis on the hopes of reunification, more so than other parties.

Whereas the CDU had a strong leading figure in Adenauer, the situation of the SPD was more unclear after Kurt Schumacher's role was effected by illness and he could not participate in the work of the Parliamentary Council. Carlo Schmid held the position of the Head of the SPD faction. Schmid was a scholar of public law and joined the SPD in 1946. Dörr (2007) notes that Schmid acted as a constitutional expert rather than as a strong leader of the faction. As opposed to Schumacher's point of view, Schmid was also against the idea of an imperative mandate inside the party. Schumacher argued that as the delegates in the Parliamentary Council were not elected by public vote there did not exist responsibility between the electors and the representatives but instead between the representatives and the party organisation. Schmid, on the contrary, emphasised the responsibility towards the electors in the *Länder*. (Dörr 2007, 57) There were also other tensions between Schumacher and Schmid including, for instance, the matter of federalism where Schmid held a more positive view than Schumacher who was strongly against the idea (cf. Antoni 1992).

Schmid is one of the central names of immediate post-war politics in Germany. Unlike Adenauer, he took part in the central fora where the post-war constitutional questions regarding Germany were being deliberated over, including the conferences of the state prime ministers and the *Herrenchiemsee* Convention. Schmid is also an essential name as regards to the two constitutional innovations of the *Grundgesetz*: the constructive vote of non-confidence, for which Schmid is credited, and the individual right to asylum (see Chapter 3). Apart from Schmid, SPD's politicians and constitutional experts included Walter Menzel, the Minister of Interior of Nordrhein-Westfalen, Ludwig Katz, the Minister of Justice from Schleswig-Holstein and Fritz Eberhard, *Staatssekretär* from Württemberg-Baden.

The Free Democratic Party was founded in 1948, bringing together the previously divided branches of German liberalism (cf. Niclauß 1982). Theodor Heuss, later the first *Bundespräsident* of the Federal Republic was elected as the first Chairman of the FDP in 1948. All the FDP representatives in the Parliamentary Council, Heuss, Thomas Dehler, Hermann Höpker-Aschoff, Hermann Schäfer and Hans Reif from Berlin had been members of the left-liberal German Democratic Party (*Deutsche Demokratische Partei*, DDP) in the Weimar Republic.

The Communist Party (KPD) was outlawed in 1933 along with the SPD. In the re-organisation of the KPD, former (Moscow) exiles played an important role, and the party was re-organised in close relation with the Soviet military government (Niclauß 1982, 37). The two representatives of the KPD in the Parliamentary Council were originally Max Reimann and Hugo Paul, but Paul was replaced by Heinz Renner in October 1948. The Communist representatives were opposed to the *Grundgesetz*, i.e. against the creation of a separate West German state without the mandate from the German people.[55]

The conservative-nationalist *Deutsche Partei* (German Party), which was established as a local party of Lower Saxony (Niedersachsen) was another party that voted against the Basic Law. It was represented in the Parliamentary Council by Hans-Christoph Seebohm and Wilhelm Heile.[56] The Catholic Centre Party (*Zentrum*), another local party (Nordrhein-Westfalen), consisting of representatives that did not join the CDU, was represented by Helene Wessel and Johannes Brockmann. In general, immediate post-war political life the conservative parties, as well as the liberal FDP, had a more difficult task in dealing with their previous relationship to the Nazis than did the Social Democrats and the Communists which were seen as the main political opponents of the Nazi regime (cf. Meyen 1965).

2.3.3 The authors of the *Grundgesetz*

The 70 delegates of the Parliamentary Council were chosen by the factions in the *Länder* which meant in practice that those attending were experienced parliamentarians as well as constitutional experts (Antoni 1992, 18). The five Berlin representatives without a voting right were Jakob Kaiser for the CDU, Paul Löbe, Ernst Reuter and Otto Suhr for the SPD, and Hans Reif representing the FDP. Only four of representatives of the total in the Parliamentary Council were women: Friedrike Nadig and Elisabeth Selbert representing the SPD, Helene Weber the CDU and Helene Wessel of *Zentrum*.[57] Helene Weber had been already part of the *Weimarer Nationalversammlung* in 1919, and then a member of *Zentrum*. Two other authors of the Weimar constitution were also in the Parliamentary Council, the Berlin representative Paul Löbe, and Wilhelm Heile who represented the German Party (DP) although he had been a member of the German Democratic Party (DDP) in 1919. (Cf. Benz 2009, 375) Eleven delegates

55 For the KPD, see Kluth 1959.
56 For the DP, see Meyen 1965.
57 For the representatives of the SPD, see also Notz 2003.

of the Parliamentary Council had been representatives in the *Reichstag* (Feldkamp 1998, 41; cf. Ley 1973).

Although two thirds of the politicians attending to the drafting of the *Grundgesetz* had an academic background, the Parliamentary Council has not been described as a "*Professorenparlament*" as the *Paulskirchenversammlung* had been (cf. Kilian 1997, 50). Among the scholars it was lawyers who were most represented (Benz 2009, 374).

Möllers (2009, 23) mentions the Parliamentary Council as the only state organ in the immediate post-war period—until the *Bundesverfassungsgericht*, the Federal Constitutional Court—in which the political opposition to National Socialism was in the majority. None of the parliamentarians on the Council had been "*allzu tief in den Nationalsozialismus verstrickt*" (ibid.). Instead, several of the politicians on the Parliamentary Council had been forced to emigrate and live in political exile. In addition to Heinz Renner (KPD) and Friedrich Wilhelm Wagner (SPD), whose exile histories are discussed more in Chapter 3 as part of the analysis of the asylum deliberations, Fritz Eberhard (SPD) emigrated to England, Erich Ollenhauer (SPD) fled via Prag and Paris to London. Ernst Reuter left for Turkey. (Feldkamp 1998, 42) Rudolf Katz of the SPD had left in 1933 first to China and the later to the USA. Fritz Löwenthal (SPD), who had been a representative of the KPD in the *Reichstag* found exile in Moscow (Benz 2009, 377-378).

Feldkamp (1998, 41) notes in his account of the members of the Parliamentary Council, how many of the delegates had lost their position and profession because of "political unreliability" during the *Third Reich*. Several had been imprisoned, some had been subjected to *Schutzhaft*, and some representatives of the SPD and KPD had been sent to concentration camps. A few of the representatives had been active in resistance groups, such as Jakob Kaiser (CDU) who had been close to the group planning the *Attentat* of the July 20 against Hitler. (ibid. 41-42)

2.4 On the language of rights in the post-war period

Above I have outlined the post-war political scene with reference to the Parliamentary Council and some of the central concepts of the constitution-making. This section looks at the post-war language of rights with reference to writing of the *Grundgesetz*. This part of the research does not aim to give a comprehensive account on the rights problematic related to the Basic Law but, rather, to constitute a larger framework in which the deliberations over asylum can be analysed and understood. This section starts with some general observations about the language of rights represented in the Basic Law, then moves on to give a short account of the notion of 'subjective rights', before examining conceptualisations in the individual rights section of the Basic Law, with reference to the notion of '*Menschenwürde*', human dignity.

The first part of the *Grundgesetz* (i.e. the first nineteen articles) comprise a list of individual rights. The first article, to Carlo Schmid "*der eigentliche Schlüssel für das Ganze*",[58] proclaims the inviolability of human dignity and sees respecting and protecting it as the duty of all state authority. Further, the basic rights are conceptualised as directly applicable law, binding the legislature, the executive and the judiciary (Art.1(3):

> (1) Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.
>
> (2) Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt.
>
> (3) Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht.

While including the idea of "respecting and protecting" human dignity and while using terms such as "inviolable and inalienable human rights" the *Grundgesetz* uses the language of natural rights. This connects it to contemporary documents such as the Universal Declaration of Human Rights, as well as to the language of the declarations of the revolutions of the 18th century in the context of which individual rights entered constitutions for the first time.[59] As noted at the beginning of this research, these declarations included the idea that the legitimacy of the state power was dependent upon the respect of individual rights which the state does not create but which it acknowledges (cf. Jellinek 1905, 1). The natural rights of individuals were seen to exist prior to the constitutional order; they were not derived from the constitution but, on the contrary, provided the foundation for it (Loughlin 2000, 198).

Schmid wrote in his 1949 article that by placing fundamental rights at the beginning of the constitution, the authors of the Basic Law wanted to underline how the legitimacy of state power derived from the respect of the human dignity (Schmid 1949, 202-203).[60] The individual is thus placed before the state, contrary to the tradition of the 19th century legal thinking in Germany.

Von Mangoldt, the Chair of the Basic Questions Committee, mentioned the *Paulskirche* rights, the rights section of the Weimar constitution and the draft of the Commission on Human Rights ("the Lake Success Draft" in the summer of 1948) as the models for building the rights framework of the *Grundgesetz* (von Mangoldt 1949, 261). Individual rights became constitutionally acknowledged for the first time in German history in the liberal *Paulskirchenverfassung* (*Verfas-*

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58 4th Meeting, AfG, 23.9.48. *Der Parlamentarische Rat*. Bd. 5/1, p. 64.

59 For the 18th century constitutions, see Grimm 1994.

60 "*Dieser Abschnitt wurde im Gegensatz zur Weimarer Verfassung an den Anfang des Ganzen gestellt, weil klar zum Ausdruck kommen sollte, daß die Rechte, deren der Einzelmensch zur Führung eines Lebens in Würde und Selbstachtung bedarf, die Verfassungswirklichkeit bestimmen müssen. Letztlich ist der Staat dazu da, die äußere Ordnung zu schaffen, deren die Menschen zu einem auf der Freiheit und Würde der einzelnen beruhenden Zusammenleben bedürfen. Aus diesem Auftrage stammt die innere Legitimität seiner Machtausübung.*" (Schmid 1949, 202-203)

*sung des Deutschen Reiche*s; Constitution of the German Empire) of 1849 after being debated at the Frankfurt national assembly (*Frankfurter Nationalversammlung*) of 1848-49. The fundamental rights of the German people, '*Die Grundrechte des Deutschen Volkes*', included the idea of equality before the law, and the catalogue of 14 rights further stipulated political and personal liberties such as, for instance, the freedom of person, expression, press, religion, movement. Although the constitution became never implemented, the rights catalogue represented two important changes: it abolished the class privileges of the feudal order, as well as, while granting individual political rights and liberties against the state, it limited the powers of the state (cf. Grimm 1988).[61]

Bismarck's Imperial Constitution of 1871 (*Verfassung des Deutschen Reiches*) represented a break with the development of individual rights in Germany, and was devoid of a section on individual rights. The Weimar constitution of 1919, on the other hand, contained an article that introduced an extensive list of over 50 basic rights and obligations in its second main part (*Zweiter Hauptteil*) "*Grundrechte und Grundpflichten der Deutschen*". The Weimar rights, which Carl Schmitt famously called as "*interfraktionelles Parteiprogramm*" had not been part of the constitutional draft written by Hugo Preuß, but were introduced in the national assembly. (Cf. Pauly 2004; see also Gusy 1997) In the Parliamentary Council, the Weimar rights were frequently referred to while writing the basic rights section of the *Grundgesetz*, and while legitimating its form.

While writing the individual rights section of the *Grundgesetz*, the authors of the Basic Law deliberated, for instance, upon the question of whether the rights were seen as something that the state grants or something that the state merely respected; whether the rights were declamatory or legally binding in character; and the scope of the rights catalogue and whether there should be a separate rights section in the Basic Law:

> Die Frage wird auch sein, ob diese Grundrechte betrachtet werden als Rechte, die der Staat verliehen hat, oder als verstaatlichte Rechte, als Rechte, die der Staat schon antrifft, wenn er entsteht, und die er lediglich zu gewährleisten und zu beachten hat. (Schmid, SPD)[62]

> Sollen die Grundrechte einen deklaratorischen oder aber einen juristisch verbindlichen Charakter haben? (Heuss, FDP)[63]

> Zunächst müssen wir uns über den Umfang der Grundrechte klar werden. Sollen wir uns auf einen kurzgefaßten Katalog beschränken? Sollen wir nur gewisse Grundsätze in die Präambel aufnehmen? Oder sollen wir einen besonderen Grundrechtsteil schaffen? (von Mangoldt, CDU)[64]

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61 For the rights discussions in *Paulskirche*, see Strauss 1947: Dann 1981; Scholler 1982.
62 2nd Meeting Plenum, 8.9.48. *Der Parlamentarische Rat*. Bd. 9, p. 38.
63 2nd Meeting AfG, 16.9.48. *Der Parlamentarische Rat*. Bd. 5/1, p. 9.
64 2nd Meeting AfG, 16.9.48. *Der Parlamentarische Rat*. Bd. 5/1, p. 9.

2.4.1 The notion of 'subjective rights'

Before discussing the making of the individual rights section of the Basic Law, a short reference will be made to the concept of 'subjective rights'. With the notion of 'subjective right' ('*subjektives Recht*') a differentiation is made between objective law—law as a system of binding rules—and individual as a subject of rights.

In sociology of law, Luhmann (1993, 45) describes subjective rights as rights "*die Rechtsqualität haben, weil sie einem Subjekt zustehen, und daher keine weitere Begründung brauchen*". Subjective rights are thus rights that need no further justification; their quality is derived from the idea that they belong to the subject. To Weber, subjective rights are '*Machtquellen*', sources of power: "*Ein jedes subjektive Recht ist eine Machtquelle, welche durch die Existenz des betreffenden Rechtsatzes im Einzelfall auch dem Zufallen kann, der ohne ihn gänzlich machtlos ware*" (Weber 1980, 398). Subjective rights are "*Ermächtigungen*" (ibid.); they thus empower, give the individual power over the actions of others (Menke 2009, 2).

Weber connected the creation of subjective rights to the creation of a modern state: subjective rights describe the connection between citizen and the state. The development of subjective rights was further related to the creation of a societal sphere which was free from state interference (cf. Menke 2009; Weber 1980). In his '*Statuslehre*' (1892), Georg Jellinek, a contemporary of Weber, described this relationship, the individual's position in the state and the different types of individual rights. Jellinek distinguished between four types of rights statuses: *status passivus, status negativus, status positivus* and *status activus* (cf. Jellinek 1905, 86-88). In a situation of passive status an individual has no rights, but only duties. Negative status means having the right to freedom. This is a negative right as it prevents governmental violations and state interference. Positive status is then a condition in which subjects are granted public subjective rights and they can make claims upon the state. Finally, the active status means having political rights. (Jellinek 1905; Kelly 2004, 520)

As opposed to the natural rights position, which saw rights pre-existing the legal system, under the influence of legal positivism in 19th century Germany, Jellinek saw rights as concessions from the state. To Jellinek, subjective rights were only possible through positive state constitution (Kelly 2004, 520); they were dependent on the act of the legislator (Jellinek 1905, 97). Individual rights, which existed only in relation to the legal system, nevertheless, were to Jellinek an essential part of such a system (Caldwell 1997, 34-35).

The idea of subjective rights is related, on the one hand, to the question of what rights are acknowledged as subjective rights and, on the other hand, to the question of who is seen as the subject of the rights. Jellinek, even if not concentrating on the problematic related to non-citizens, nevertheless mentions how citizens and non-citizens have different legal positions and how citizens are privileged ("*Privilegierung der Staatsangehörigen*") (Jellinek 1905, 109). Even if to a certain extent the rights of negative and positive status might not be dependent on the citizenship, Jellinek notes how the active status, i.e. having political rights, usually requires it (ibid. 193). Regarding the *Grundgesetz*, for instance,

constitutionalising the notion of *'Würde'*, dignity, is connected to the idea that being subject to rights does not require the status of citizen (cf. Menke 2009, 3-4).

2.4.2 "Die Grundrechte müssen das Grundgesetz regieren"

In the early meetings of the plenum in the Parliamentary Council, in which the different parties stated their positions as regards to the constitution-making, Carlo Schmid, speaking for the SPD, underlined individual rights as a central aspect belonging to the building of a modern constitution. In Schmid's famous formulation, quoted above in the title of this section, individual rights were to govern the constitution. They were to protect individuals against *Staatsräson*, reason of state, pose limits on state sovereignty, and also limit the legislator. Basic rights were not to be mere declamations, as the rights of the Weimar constitution had been, but directly applicable federal law:

> In den modernen Verfassungen finden wir überall Kataloge von Grundrechten, in denen das Recht der Personen, der Individuen, gegen die Ansprüche der Staatsraison geschützt wird. Der Staat soll nicht alles tun können, was ihm gerade bequem ist, wenn er nur ein willfährigen Gesetzgeber findet, sondern der Mensch soll Rechte haben, über die auch der Staat nicht soll verfügen können. Die Grundrechte müssen das Grundgesetz regieren; sie dürfen nicht nur ein Anhängsel des Grundgesetzes sein, wie der Grundrechtskatalog von Weimar ein Anhängsel der Verfassung gewesen ist. Diese Grundrechte sollen nicht nur bloße Deklamationen, Deklarationen oder Direktiven sein, nicht nur Anforderungen an die Länderverfassungen, nicht nur eine Garantie der Länder-Grundrechte, sondern unmittelbar geltendes Bundesrecht, auf Grund dessen jeder einzelne Deutsche, jeder einzelne Bewohner unsere Landes vor den Gerichten soll Klage erheben können.[65]

The speaker for the CDU, Adolf Süsterhenn, whom Uertz (2008, 355) describes as "*prononcierter Vertreter des Naturrechtsdenkens*" had a Catholic natural law emphasis in terms of constructing the constitution. Accordingly, Süsterhenn also spoke for a pre-political understanding of rights: the "natural, God given" rights set limits to the powers of the state and the state was to protect the rights. There was a need to "turn away from the spirit of legal positivism" and return to the idea that "the human being is not for the state but that the state is for the human being".[66]

> Es gibt [..] vor- und überstaatliche Rechte, die sich aus der Natur und dem Wesen des Menschen und der verschiedenen menschlichen Lebensgemeinschaften ergeben, die der Staat zu respektieren hat. Jede Staatsgewalt findet ihre Begrenzung an diesen natürlichen, gottgewollten Rechten des Einzelnen, der Familien, der Gemeinden, der Heimatlandschaften und der beruflichen Leistungsgemeinschaften. Es ist die Aufgabe des Staates, diese Rechte zu schützen und zu wahren. Nur wenn der Staat und wenn auch sein Grundgesetz und seine Verfassungswirklichkeit sich zu diesen Grundsätzen bekennen und sie befolgen, erscheint uns die Freiheit des Menschen im Staate gesichert.[67]

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65 2nd Meeting, Plenum, 8.9.48. *Der Parlamentariche Rat*. Bd. 9, p. 37.
66 2nd Meeting, Plenum, 8.9.48. *Der Parlamentarische Rat*. Bd. 9, p. 55.
67 2nd Meeting Plenum, 8.9.48.*Der Parlamentarische Rat*. Bd. 9, p. 55.

Although not participating in the work of the Basic Questions Committee, Süsterhenn nevertheless later played an important part in the promotion of Article 6 in the Basic Law, concerning rights related to family and marriage.[68] Süsterhenn was also a strong supporter of the *invocatio Dei* in the preamble.[69] In the rights discussions in the Main Committee, Süsterhenn further spoke for the introduction of a reference to God in the text of Article 1, as the source of rights in the form of "*von Gott gegebenen*".

After the first meetings of the plenum, deliberations on rights continued in the Basic Questions Committee where the authors discussed, in particular, the creation of the list of individual rights. The Committee was chaired by Hermann von Mangoldt (CDU). The different factions in the committee agreed in an early stage to include the Basic Law with a list of individual rights and that would be binding in character, following the idea of the *Herrenchiemsee* Convention. The notion of individual rights, which lies at the core of the Bonn constitutionalism was, however, not given in the development of the constitution in the immediate post-war period. Niclauß notes (1998), for instance, how the SPD draft by Walter Menzel did not include any basic rights. Likewise individual rights were missing from the Bavarian constitutional draft, which served as one of the guidelines for the writing of the *Herrenchiemsee* draft. The *Länder* constitutions drafted during the years of 1946/47 mainly followed the Weimar model as regards to their wide scope for rights. (Niclauß 1998, 251)

The drafters of the *Grundgesetz*, however, chose to limit the list of basic rights, with few exceptions—the right to asylum being one—to what was termed as "classical rights". Thus the list remained more limited than the rights of the 1849 *Paulskirchenverfassung* and the extensive list of rights given in the *Weimarer Verfassung* (von Mangoldt 1949, 261). Heuss made reference to the Weimar constitution and to the Hessian constitution in his support for the 'classical basic rights': "*Man kann in eine Verfassung ganze Parteiprogramme hineinlegen. Die hessische Verfassung ist wunderbar, sie ist eine Rededisposition für Leute, denen selber nichts einfällt. Auf dem Wege kommen wir nicht weiter*."[70] Ludwig Bergsträsser to whom was given the assignment of giving a historical account on the development of individual rights in the beginning of the Basic Questions Committee deliberations, emphasised the rights of the *Weimarer Verfassung* resulted from a compromise between different factions unable to agree on rights, as "*allzu dehnbar und allzu wenig konkret*".[71] In comparison to the Weimar constitution, there was thus a need to "concretise" the rights that had partly been mere declamations as well as keep the list of rights as less extensive.

Bergsträsser, whose conceptualisations will be further discussed in Chapter 3 in relation to asylum, was a historian and political scientist. He had written his dissertation on the rights of the 1849 Frankfurt constitution. In his historical account, Bergsträsser mentioned the *Magna Carta* of 1215, the Petition of Rights

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68 For Süsterhenn's natural law position, see Süsterhenn 1948; see also von Hehl 2012.
69 *"Im Bewußtsein seiner Verantwortun vor Gott und den Menschen"*.
70 3rd Meeting AfG, 21.9.48. *Der Parlamentarische Rat*. Bd. 5/1, p. 45.
71 3rd Meeting AfG, 21.9.48. *Der Parlamentarische Rat*. Bd. 5/1, p. 31.

of England of 1628, the 1776 Bills of Rights of Virginia, and furthermore the ideas of the French Revolution of 1789 in relation to rights. Bergsträsser discussed the Frankfurt constitution and pointed out how the German development had broken down in 1867 (*Norddeutscher Bund*) and 1871.[72]

Georg August Zinn (SPD), who was asked to open the legal problem of individual rights in the committee in connection with Bergsträsser's account, noted that basic rights had not been part of all modern constitutions. Zinn mentioned the Bismarckian constitution of 1871, the French constitutions of 1875 and 1946, and the draft of the Weimar constitution by Hugo Preuß. As regards to Weimar, Zinn referred to Friedrich Naumann of the German Democratic Party who had been the Chair of the commission that re-wrote the Weimar list of rights. Whereas Naumann had promoted the inclusion of social rights in the constitution, to Zinn "*nach den Exzessen der staatlichen Macht in den vergangenen 12 Jahren haben auch die klassischen Grundrechte wieder eine evidente Bedeutung erlangt*".[73] Zinn, thus supported the inclusion of the so called 'classic individual rights', of which he mentioned the right of individual freedom, freedom of thought, freedom of press, freedom of conscience and religion and equality before the law.

As Schmid did not want to include "*Lebensordungen*" in the Basic Law, Zinn was further opposed to the idea of extending the list of individual rights to social rights. Zinn referred to the economic and social "*Ausnahmezustand*", state of exception, in order to legitimise the limitation of the list of individual rights, in distinction from the state constitutions: "*Man sollte es also vermeiden, ein Grundrecht in die Verfassung aufzunehmen, wenn angesichts des gegenwärtigen wirtschaftlichen und sozialen Ausnahmezustandes auf lange Zeit hinaus mit weitgehenden Einschränkungen zu rechnen ist*".[74]

The drafters in the Basic Questions Committee talk about "*Mindestkatalog*" of rights. Whereas, there is an early agreement on the matter of keeping the lists of rights limited, in the latter stages of the drafting the Union parties successfully promote the inclusion of '*Elternrecht*' (Art. 6) to the constitution, including the idea that family and marriage enjoy protection from the state and that care and upbringing of children is the natural right of the parents, as well as it is their duty, with strong supporting role and lobbying from the churches (cf. Sörgel 1969). The SPD does not, in its turn, argue for the inclusion of social rights. (Cf. Niclauß 1998)[75]

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72 3rd Meeting AfG, 21.9.48. *Der Parlamentarische Rat*. Bd. 5/1, pp. 29- 31.

73 3rd Meeting AfG, 21.9.48. *Der Parlamentarische Rat*. Bd. 5/1, p. 34.

74 3rd Meeting AfG, 21.9.48. *Der Parlamentarische Rat*. Bd. 5/1, p. 35.

75 For the debates related to the rights, the position of the SPD and CDU and for the controversiality of the '*Elternrecht*', see also Werner 1992. For the rights conceptualisations of the different parties, see Otto 1971.

2.4.3 'Menschenwürde'

In the Basic Questions Committee, the protection of dignity and securing of the right to freedom were emphasised as a counter reaction to the experiences under the Nazi regime, to the violation of human dignity and violation of the legal personality of individuals.[76] Von Mangoldt wrote how the rights of freedom in the *Grundgesetz* were conceptualised as having a pre-state character, the source of which may be interpreted as deriving from different points of view—stemming either from god or nature, depending on the interpreter. The introduction of classical rights was inspired by politico-historical experiences, but the rights were shaped and re-designed according to the contemporary landscape:

> Nach einer Zeit fortgesetzter Bedrückungen und schwerster Mißachtung der Menschenwürde bestand vor allem anderen das Bedürfnis, die Achtung der Menschenwürde – und als unerläßliche Voraussetzung dafür – die alten Freiheitsrechte zu sichern. Dabei wurden die letzteren als vorstaatliche Rechte betrachtet, und zwar je nach dem weltanschaulichen Standpunkt als von Gott gegebene und angeborene oder als naturgegebene und unveräußerliche Rechte. Diese klassischen Grundrechte sind aber aus den besonderen Verhältnissen der Gegenwart heraus neu gestaltet und geformt worden. (von Mangoldt 1949, 261)

Even if the language of natural rights is used to justify claims to rights in relation to the *Grundgesetz*, and even if the authors do not disagree on the introduction of the idea of '*Menschenwürde*' to the Basic Law, there remained clear differences inside the Parliamentary Council—between Schmid and Süsterhenn, in particular —on what was seen as the origins of the '*Würde*' (cf. Möllers 2009). In the Basic Questions Committee the different authors argued for the idea of not specifying the sources of rights or get into disputes over their philosophical nature or origins. Schmid, for instance, spoke for the need of a "historical natural rights conception" instead of taking a philosophical position about the nature of man:

> Es handelt sich nicht darum, daß wir, von einem philosophischen Naturrechtsdenken ausgehend, sagen: da der Mensch wesensmäßig durch das und das determiniert ist, ergeben sich daraus die und die natürliche Rechte. Vielmehr müssen wir von einem historischen Naturrechtsbegriff, der nur scheinbar eine contradictio in adjecto ist, ausgehen und sagen: In dieser Sphäre der geschichtlichen Entwicklung sind wir Deutsche nicht bereit, unterhalb eines Freiheitsstandards zu leben, der den Menschen die und die und die Freiheiten als von Staate nicht betreffbar garantiert.[77]

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76 Von Mangoldt explained in the Basic Questions Committee: „*Wir wollten mit der Fassung des Art. 1 insbesondere auch den Gegensatz zu dem ausdrücken, was wir in der unmittelbaren Vergangenheit erleben haben. Die Verletzung der Menschenwürde hat unter dem Nazi-Regime eine große Rolle gespielt. Woran hat sie bestanden? Sie hat gelegen in der Verletzung der Rechtspersönlichkeit des Menschen, in der Verletzung des Mindeststandards an Rechten, die Rechtspersönlichkeit ausmachen.*" (von Mangoldt 3rd Meeting AfG, 21.9.48. *Der Parlamentarische R*at. Bd. 5/1, p. 41)

77 4th Meeting, AfG, 23.9.48. *Der Parlamentarische Rat*. Bd. 5/1, p. 67.

Schmid's point was that in the particular historical context, against certain historical experiences, certain rights should be guaranteed: "*Es handelt sich um eine Entscheidung, das staatlichen Leben nach einer gewissen Richtung hin zu formen*".[78]

For Heuss, '*Würde*' was a "*nicht interpretierte These*", i.e. a principle that was not subject to interpretation. Heuss was sceptical about the introduction of ideas on natural rights to constitution in the form of legal obligations. Instead, Heuss saw natural rights as "*Basis und Mittel einer moralischen Überprüfung*", *or* as "*moral-pedagogical thesis*".[79] This was further related to the question of how to make concrete ideas of natural rights in legislation ("*Man kann ein Naturrecht nicht einklagen*") that would appeal to lawyers, legislators, the judiciary, as well as be appealing to citizens. For Heuss, there was a tension between a legal formulation and a moral-political declaration.[80]

Helene Weber of the CDU connected the language of natural rights and its importance as a "foundation" and contrasted it to the socialist positivist concept of rights which did not place the individual prior to the state. Weber underlined the importance of the "historical moment", of placing the notion of human dignity at the beginning of the constitution. The sources of these rights were left to each and everyone to interpret, according to Weber's conceptualisation:

> Man kann nicht alles aus dem Naturrecht ableiten. Aber das Naturrecht ist gleichwohl wichtigste Grundlage. Der Sozialismus, aber auch andere Strömungen der Zeit, gehen nicht von der Würde des Menschen aus, sondern unmittelbar vom Staat und stellen den Menschen unter den Staat, geben ihm keine Rechte vor dem Staat. Daher finde ich den Satz, der von der Würde des Menschen ausgeht, außerordentlich wichtig und richtig. Es bleibt dem Einzelnen unbenommen, ob er von religiösen, philosophischen, ethischen oder geschichtlichen Einsichten ausgeht. Aber daß wir in dieser geschichtlichen Stunde die Würde des Menschen an den Anfang der Verfassung stellen, halte ich für sehr bedeutsam.[81]

Even if the Basic Questions Committee did not want to anchor thinking on natural rights to a specific religious or philosophical tradition, in the Main Committee there were suggestions made to include a reference to the transcendent source of rights in the form of "*von Gott gegebenen*" phrasing. The idea was introduced by Seebohm (DP) and further supported by Süsterhenn. However, it quickly ran into opposition as Heuss and Schmid, for instance, both opposed the idea of bringing theological questions into making of the constitution. (Cf. Starck 1981)

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The strong politico-moral claim that the reference to human dignity makes at the beginning of the Basic Law was further transformed in the legal commentary related to the *Grundgesetz* in the post-war period. '*Würde*' came to be interpreted and emphasised not as a subjective right but as an ethical value, "*sittliche*

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78 4th Meeting, AfG, 23.9.48. *Der Parlamentarische Rat*. Bd. 5/1, p. 66.
79 4th Meeting, AfG, 23.9.48. *Der Parlamentarische Rat*. Bd. 5/1, p. 72.
80 3rd Meeting, AfG, 23.9.48. *Der Parlamentarische Rat*. Bd. 5/1, p. 44.
81 4th Meeting, AfG, 23.9.48. *Der Parlamentarische Rat*. Bd.5/1, 68-69.

Wert" and as "*obersten Konstitutionprinzips allen objektiven Rechts*" in the commentary by Dürig (Dürig 1956, 119).[82] Böckenförde (2006, 380) writes how '*Würde*' came to be conceptualised as a "prepositive foundation", as a "natural law anchor" of positive constitutional law. For Böckenförde, Dürig's commentary was formulated by the generation who themselves experienced the war and the *Third Reich*, much the same as the sentiment expressed in the *Grundgesetz* itself: "*Auf den Trümmern des Jahres 1945 wollte diese Generation, wie das Grundgesetz auch, eine neue und bessere Ordnung bauen, einen Damm gegen jede offene oder verdeckte Wiederkehr dessen errichten, was man selbst erfahren und erlitten hatte"* (Böckenförde 2006, 379).[83]

82 See *Grundgesetz: Kommentar*/Maunz & Dürig.

83 The Federal Constitutional Court has interpreted the asylum paragraph in connection to the '*Menschenwürde*': *"Voraussetzungen und Umfang des politischen Asyls sind wesentlich bestimmt vor der Unverletztlichkeit der Menschenwürde, die als oberstes Verfassungsprinzip nach der geschichtlichen Entwicklung des Asylrechts die Verankerung eines weitreichenden Asylanspruch im Grundgesetz entscheidend beeinflußt hat."* (cited in Hailbronner 1993, 109) The court thus connects asylum to the notion of the constitutional protection of human dignity (ibid.)

3 CREATING A RIGHT TO ASYLUM IN THE PARLIAMENTARY COUNCIL

> Die Einrichtung des Asyls ist in einem schmalen Grenzstreifen beheimatet, in dem sich mancherlei stößt: nationales und internationales Recht, Mitgefühl und egoistisches Interesse, Staatsräson und das dem Menschen eigene Vermögen, Scham zu empfinden. (Kirchheimer 1985, 513)

Regarding the themes debated in the Parliamentary Council about asylum, this quote by Otto Kirchheimer quite aptly describes how the notion of asylum is situated in a narrow framework related to national and international law, to compassion and selfish interests, to *Staatsräson* and to the ability to feel shame, which is characteristic for human beings.

This chapter looks at the debates related to the asylum paragraph of the *Grundgesetz* in the West German Parliamentary Council and examines how the legal conceptualisation of asylum as an individual right came about. The starting point for the analysis of the deliberations over the article is that it was in the quasi-parliamentary assembly of the Council where the creation of this specific right to asylum was first placed on the agenda, where it was debated and finally accepted. The formulation of asylum as an individual right of foreigners suffering from political persecution was not passed without opposing voices and perspectives. This chapter examines the making of a legal concept with a particular focus on the politics of drafting—i.e. the different formulations and reformulations—, conflicting notions and perspectives, and legal definitions and conceptual disputes relating to the paragraph. It will ask what kind of arguments were presented during the debates by the authors of the paragraph, what they appealed to, and where they sought legitimation for the creation of something that was without precedent in German legal history.

While this chapter examines how the asylum clause took shape through the procedural steps of the Parliamentary Council—how it was first introduced into the list of individual rights, and how it was then deliberated over—, I will begin with an introduction to the various fora where drafting took place and authors of the paragraph. What follows is an analysis of the debates divided in three parts: the first looks into the conceptual origins of the asylum paragraph,

its continuities and discontinuities with the earlier legal tradition through the concept of extradition and the problematic related to 'political offences'; the second examines this question in relation the role of the East-West divide and addresses the role of the constitutional situation for the drafting and the eventual outcome of the asylum clause; and, finally, the third discusses the arguments for and against limiting the scope of the right to asylum and how the conditions defining qualification were debated in the Council in relation to definitions of 'political persecution''. Furthermore, the chapter will discuss the role of historical experiences in the creation of the West German asylum clause, its relation to persecution under the National Socialists, and to the states' response to those seeking escape from the Nazi regime. The final part of the chapter (sub-section 3.7) will look at the relation of the asylum clause to the narratives of those members of the Main Committee with personal experience of living in exile. The analysis focuses on the right to asylum, but it should be noted that the first paragraph of Article 16 prohibits deprivation of German citizenship.[84] This constitutional article is therefore particulary strongly shaped by the historical experiences referred to in the introductory part of this research.

3.1 An introducing to the authors and the drafting fora

For the drafting of Article 16(2) 2 GG, two fora in the Parliamentary Council were especially important: the Basic Questions Committee (*Ausschuß für Grundsatzfragen*) and the Main Committee (*Hauptausschuß*). As presented earlier, the Basic Questions Committee was responsible for drafting the basic rights section of the Basic Law as well as the preamble.[85] The committee thus debated some of the core questions in relation to the formation and organisation of the new state.

The Basic Questions Committee had twelve members, of which five were from the Christian Democratic Union and the Social Democratic Party, respectively, with one from the Free Democratic Party. In addition to this, the German Party, the Communist Party and the Center Party had one common vote. The delegates, including Carlo Schmid of the SPD, Hermann von Mangoldt of the CDU and Theodor Heuss of the FDP, were all prominent members of their parties; Schmid and Heuss the heads of their party factions in the Council (cf. Werner 1993, X-XI).[86]

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84 Article 16 of the 1949 GG*: "(1) Die deutsche Staatsangehörigkeit darf nicht entzogen werden. Der Verlust der Staatsangehörigkeit darf nur auf Grund eines Gesetzes und gegen den Willen des Betroffenen nur dann eintreten, wenn der Betroffene dadurch nicht staatenlos wird. (2) Kein Deutscher darf an das Ausland ausgeliefert werden. Politisch Verfolgte genießen Asylrecht."*

85 The name of the committee was originally *Ausschuß für Grundsatzfragen und Grundrechte*.

86 The members of the Basic Questions Committee were: Hermann von Mangoldt, Karl Sigmund Mayr, Anton Pfeiffer, Josef Schrage, Helene Weber (CDU/CSU); Lundwig Bergsträsser, Friedrike Nadig, Carlo Schmid, Hans Wunderlich, Georg August Zinn (SPD); Theodor Heuss (FDP); Wilhelm Heile (DP).

The Basic Questions Committee held 36 meetings, making it the most active committee in the Parliamentary Council (Werner 1993, XXIV). It was also the committee which had the highest number of members with voting rights in the committee. Several of the politicians attending the committee had a background in constitutional law which gave the deliberations a specific quasi-judicial tone as the drafters debated certain legal concepts and their interpretations. To Feldkamp (1998, 60) "*[erhielt] die Ausschußarbeit nahezu den Charakter eines akademisch-wissenschaftlichen Kolloquims*". In emphasising the academic tone of the debates, Feldkamp refers to Bergsträsser, von Mangoldt and Schmid, who were all professors and widely published scholars, and who eventually became noteworthy for their role in writing the Article 16(2). Bergsträsser, as noted, had a background in history and political science, von Mangoldt was a legal scholar whose *Grundgesetz Kommentar* (von Mangoldt/ Klein) later came to play a prominent role in the early legal thinking of the Federal Republic.[87] Schmid's background was firstly as a docent in international law (1930-40) and later as a professor of public law at the University of Tübingen (1946-53).

Although continuing his scholarly activities rather than professional political career after the Parliamentary Council, von Mangoldt described the Council as "the crowning of his life's work" (Vosgerau 2008, 272). During the 1930's von Mangoldt held professorships at several universities, including the University of Königsberg, Tübingen, Jena and Kiel, the latter of which he became the Dean and Rector of in the immediate post-war period. Von Mangoldt maintained his professorships during the *Third Reich* and became a member of the *Bund nationalsozialistischer deutscher Juristen* (BNSDJ) in 1934, although he never actually joined the NSDAP.[88] In the Parliamentary Council, von Mangoldt, in addition to being the Chair of the Basic Questions Committee, was a member of the Main Committee and the Committee for the Constitutional Court and Administration of Justice, thus he was a central figure in shaping the legal concepts related to the *Grundgesetz* (cf. Pommerin 1988).

Schmid was one of the key German politicians in the French occupational zone. In 1945 he became the President of the State Secretariat of South Württemberg-Hohenzollern and later the state's Minister of Justice and Deputy President (*Staatspräsident*). Schmid was one of the members of the Parliamentary Council who took part in the writing of the draft document of the *Herrenchiemsee* Convention. Additionally, Schmid participated in the conferences of the state prime ministers, thus having access to those central fora where the constitutional questions related to Germany were being deliberated and decided up-

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87 See also Stolleis 1999 & 2012.

88 A further controversy relates to von Mangoldt's writing in 1939 in which he gave his support to the race laws (cf. Vosgerau 2008, 267-268). Von Mangoldt was, together with Rudolf Laun, the editor of the *Jahrbuch für internationales und ausländisches öffentliches Recht*, established in 1948. He joined the CDU in 1946. Von Mangoldt was elected to the Parliamentary Council from the *Landtag* of Schleswig-Holstein in the British occupation zone. He was also during a short period of time the Minister of Interior of the state and took part in the drafting of its constitution. Von Mangoldt died in 1953. Cf. Lange 2008; Pommerin 1988; Starck 1996; Vosgerau 2008;. Wolfrum 1990.

on in the immediate post-war period.[89] The British Liaison Officer, Rolland Alfred Aimé Chaput de Saintonge,[90] who followed the drafting of the Basic Law wrote in his commentary how Schmid's "great academic ability and legal training were invaluable in the technical work on the Basic Law and his word carried great weight with members of all parties. In his handling of the Main Committee meetings he showed great tact in the many difficult and complicated situations which arose and his moderate approach to political problems was appreciated by opposing Factions." (Pommerin 1988, 580) In the literature, Schmid is often complimented for his rhetorical debating skills and, as noted, he was one of those who defended the idea of debating in the Council. In describing the work of the Basic Questions Committee, Werner (1993, XXIV) writes: "*[d]er impulsivste Debattenredner war zweifellos Carlo Schmid, der seine Ausführungen mit einer souveränen Fülle von historischen Assoziationen und Beispielen zu illuminieren und mit seinem kulturgeschichtlichen und akademischen Wissen zu brillieren wußte*". In addition to being a member in the Basic Questions Committee, within the Parliamentary Council Schmid was also a member of the Committee of Elders. He held the important position of Chair of the Main Committee, as well as being Chair of the Occupation Statute Committee, making him one of the most influential politicians in the Council. (Cf. Pommerin 1988)

Another central figure in German post-war politics and one of the authors of the constitution of Württemberg-Baden was Theodor Heuss. As noted, Heuss was elected as party leader of the FDP in 1948 and later became the first *Bundespräsident* of the Federal Republic (1949-59).[91] He was a representative of the German Democratic Party (DDP, from 1930 onwards *Deutsche Staatspartei*, DStP) in the *Reichstag* between the years 1924-1928 and 1930-1933. Heuss had a scholarly background in political economy and history, and at the time of the Parliamentary Council he held an honorary professorship at the *Technische Hochschule* in Stuttgart. Apart from his academic publications, Heuss was known for his work as a political journalist. He maintained his journalistic activities during the *Third Reich*, albeit often under pseudonyms after a publication ban.[92] Commentators often regard Heuss as a skilful rhetorician who played an important part in shaping the terminology related to the *Grundgesetz* and the formulation of its different articles.[93] This rings true, also, as regards to

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89 Cf. Lange 2008; Pommerin 1988; Schmid 1979; Stolleis 2012; Werner 1993.

90 For biographical note of Chaput de Saintonge, see Pommerin 1988, 558-589.

91 Heuss was the Minister of Culture of *Württemberg-Baden* between the years 1945-46 and a respresentive of its *Landtag* between the years 1946-49.

92 For Heuss, cf. Pommerin 1988; Werner 1993; Lange 2008; Merseburger 2013.

93 In the description of Chaput de Saintonge "In the technical committee stage of the Basic Law, he [Heuss] was always ready for constructive suggestions regarding word and form, showing an ability to envisage and avoid likely future pitfalls. In the Main Committee, and in the Plenary Session, he had a tendency to make long speeches which were always delivered with a studied grace. These gave an initial impression of being intended to clarify the vagueness of the issues but they tended after a time to become boring, thus defeating their own object. Despite his theatrical style, however, Heuss usually followed the sound FDP line of finding a compromise and, even in his longer perorations, there could be found a large element of sound common sense. He often made reference to the Allies, but his thrusts, unlike those of the communists

the asylum clause, where Heuss made some critical comments on the different wordings of the article under preparation. Heuss was the secretary (*Schriftführer*) of the Basic Questions Committee. In addition to the deliberations in the Basic Questions Committee—where Heuss was one the non-constitutional scholars and, as noted, brought up the liberal tradition related to rights— in the Parliamentary Council Heuss took part in the work of the Main Committee and the Committee of Elders, as well as the Committees of Five and Seven.

Whereas the Basic Questions Committee drafted the list of basic rights and the preamble, the role of the 21 member Main Committee was to co-ordinate the works of the different committees as a coherent whole in order that it be further debated in the plenum.[94] The work of the Main Committee included four readings, and as Feldkamp (1998, 106) writes, it was intertwined with the different committees, factions, intra-factional work, and the negotiations with the Allied representatives. It was also the only committee in the Parliamentary Council meetings of which were open for the press, as initiated by the SPD (cf. Feldkamp 2009). Regarding the debates on asylum, the Main committee—although it did not ultimately make any changes to the wording proposed by the Basic Questions Committee —debated the proposal and opened the asylum debates to a larger number of delegates, including to politicians who had personal experience living in political exile, such as Friedrich Wilhelm Wagner of the SPD and Heinz Renner of the KPD.

The two fora of the Parliamentary Council, the Basic Questions Committee and the Main Committee differed in their style of deliberation. To Werner (1993, XXII) "*[spielten sich] die Verhandlungen des Ausschusses für Grundsatzfragen durchweg in einer guten und konstruktiven Atmosphäre ab: sie waren fast völlig frei von persönlicher und politischer Polemik*". In cases when the Basic Questions Committee could not reach an agreement about a formulation it prepared two alternatives for the wording. In addition to allowing individual speakers on a brief opportunity to take the floor during the deliberations, committee members such as Bergsträsser and Zinn gave short lectures as part of the drafting work. Whereas the tone of the Basic Questions Committee was more discussive and tended to avoid open disagreements—which, however, does not mean that as a forum it was without competing perspectives and conceptual disputes—the Main Committee, on the other hand, was more clearly a venue for disagreement and debate, as will be shown in relation to the asylum deliberations.

Closely related to the Main Committee was the General Editing Committee (*Allgemeiner Redaktionsausschuß*) of the Parliamentary Council. The task of this three-member committee was to prepare the formulations of the different

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were delivered in as charming and polite a manner that they could never give offence." (Pommerin 1988, 570)

94 The representatives in the Main Committee were: Konrad Adenauer, Heinrich von Brentano, Theophil Kaufmann, Wilhelm Laforet, Robert Lehr, Anton Pfeiffer, Heinrich Rönneburg (who was replaced by von Mangoldt), Adolf Süsterhenn (CDU/CSU); Otto Heinrich Greve, Friedrich Meier, Walter Menzel, Carlo Schmid, Adolf Schönfelder, Josef Seifried (replaced by Jean Stock), Friedrich Wolff, Gustav Zimmermann (SPD); Thomas Dehler, Theodor Heuss (FDP); Hans-Christoph Seebohm (DP); Max Reimann (KPD); Johannes Brockmann (*Zentrum*).

sub-committees for deliberations in the Main Committee and to act as a compromise organ inside the Council, also in relation to the representatives of the Allies (cf. Lange 2008). The Editing Committee thus had an influential role in the Parliamentary Council which was not always without criticism when the editors made substantial changes to the proposed wording which had already been thoroughly debated in the different committees.[95] As a result of the controversies related to the work of the Editing Committee, the procedure was changed so that the members of the committees signed off on drafts after changes had been made by the editors and before the documents could be further debated in the Main Committee. (Feldkamp 2009, XIX) Regarding the asylum paragraph, the views of the Editing Committee differed from those of the Basic Questions Committee, it made propositions and spoke in favour of narrowing the scope of the asylum paragraph, as will be discussed later in this chapter.

The General Editing Committee consisted of Georg August Zinn (SPD), Heinrich von Brentano (CDU) and Thomas Dehler (FDP). Zinn and von Brentano had authored the Hessian constitution and, in part, the creation of its constitutional compromise.[96] Zinn was the Hessian Minister of Justice between 1945 and 1949 and later became the prime minister of the state (cf. Lange 2008). In addition to being one of the three editors in the Parliamentary Council, Zinn was a member of the Basic Questions Committee as well as Chair of the Committee for the Constitutional Court and Administration of Justice.[97] Von Brentano was a constitutional expert and, one of the founders of the Christian Democratic Union, and one of the party's key members in the Council. He was the vice Chair of the Main Committee and the Occupation Statute Committee and also took part in the work of the Competence Committee as well as the Committees of Five and Seven. Thus von Brentano took part in those forum deliberations which negotiated the compromise solution between the factions. (Cf. Pommerin 1988; Lange 2008; Agethen 2008)

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95 Von Mangoldt (1953, 13) writes: "*Dieser Redaktionsausschuß machte sich nun mit vorbildlicher Arbeitskraft an die Gesamtredaktion und stellte sich in überraschend kurzer Zeit fertig. Aber er beging dabei einen grundlegenden und unverzeichlichen Fehler. Er hielt sich nicht an die ganz allgemein für jeden Redaktionsausschuß geltenden und hier noch besonders festgelegten Schranken der Redaktionsarbeit, sondern nahm wesentliche und grundsätzliche materielle Änderungen an den in langen Verhandlungen gewachsenen Vorschlägen der Ausschüsse vor. Dabei hatte er bei dem Zeitdrang, unter dem man arbeite, gar keine Möglichkeit, die einzelnen Vorschriften nochmals einer so ausführlichen Beratung wie in den Fachausschüssen zu unterziehen. Ja vielfach waren ihm nicht einmal die Gründe bekannt, die Fachausschüsse zu der vorliegenden Fassung veranlaßt hatten. Das Ergebnis konnte daher, statt zu bessern, nur Verwirrung stiften.*"

96 For the Constitution of Hesse, see Zinn & Stein 1954.

97 To Chaput de Saintonge, "Zinn was characterised by his rapid grasp of a situation or proposition, a genuine desire to seek an agreed solution and the force and clarity with which he expounded his views. His conceptions were by no means narrowly Marxist but reflected the centralist and rather nationalist spirit of Hannover, as for instance in the Berlin question. On subjects on which he felt strongly he was not afraid to oppose the official party line; an example being his outspoken support for the FDP proposal of a strong President with a constitutional position similar to that of the American President." (Pommerin 1988, 588)

Chaput de Saintonge describes von Brentano noting that "[a]lthough a faithful party man, his legal mind was always ready to see the point of view of a lawyer from another party and he was not infrequently in agreement with Zinn (SPD) on points of detail against the views of his own party" (Pommerin 1988, 565). Von Brentano had subsequent disagreements on CDU policy inside the Council which led him to threaten to resign from the Council (cf. Agethen 2008). At a later stage of the drafting process, von Mangoldt replaced von Brentano on the Editing Committee.

Thomas Dehler was one of the founders of the Bavarian FDP and it was his legal expertise, as noted by Chaput de Saintonge, which lay behind many of the motions by the Free Democrats in the Parliamentary Council. In addition to the Main Committee, Dehler was also a member of the Organisation Committee and participated in intra-factional negotiations as well as in the writing of the final version of the Basic Law. In a manner similar to von Brentano, Dehler is also noted for having good working relations and a personal friendship with Zinn. (Cf. Pommerin 1988; Lange 2008)

The asylum clause was first placed on the agenda and formulated by the Basic Questions Committee. During its two readings, the formulation underwent changes and received comments from the factions as well as from the Editing Committee. Following the Basic Questions Committee the paragraph was then debated in the Main Committee. In the plenum of the Parliamentary Council the matter of asylum was debated no further. The right [to asylum] was formally accepted by the majority of the representatives on its third reading in the Plenum on 6 May, 1949.

3.2 Asylum, extradition and 'political offences'

The asylum paragraph of the *Grundgesetz* formulates asylum as an individual right of foreigners suffering from political persecution.[98] Although this right is often expressed as unique, constitutional asylum provisions are well known and widely established also elsewhere.[99] In relation to other contemporary constitutional developments on asylum, for instance, the Constitution of the Fourth Republic of France (1946) and the Italian post-war constitution of 1947, both refer to "freedom' as the legitimation for giving protection. The former grants asylum for those persecuted because of their "acts in favour of freedom"[100] and the latter provides asylum to foreigners denied "democratic freedoms".[101] (Cf.

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98 See, for instance, Reichel (1987, 30): "*Das Asylrecht des Grundgesetzes [..] gewährt dem politisch verfolgten Fremden ein Grundrecht und damit ein subjektiv-öffentliches, vor Gerichten einklagbares Recht auf Zuflucht im Bundesgebiet.*" See also Marx 1984.

99 Von Pollern (1980, 49-82) and Sinha (1971, 54-55) present a broad list of states with a right of asylum written into the constitution or into the aliens law.

100 Preamble of the Constitution de 1946, IVe République: "*Tout homme persécuté en raison de son action en faveur de la liberté a droit d'asile sur les territoires de la République*."

101 Art. 10 of the Constitution of the Italian Republic (1947): "A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed

Kirchheimer 1959) The constitution of the People's Republic of Bulgaria (1947)—similar to those of several other socialist constitutions—includes a clear criteria for those to whom asylum is given by including a provision stating that foreigners enjoy the right of asylum when they are persecuted "for having engaged in fighting for the democratic principles, for the national liberation, rights of the workers or for exercising scholarly or cultural activity" (cf. Kimminich 1968, 77).

Compared with these contemporary notions of asylum, however, during its formulation the West German asylum provision came to be unique in its scope. The wording refrains from giving further definitions to what constitutes ''political persecution', leaving the definition vague and very open for interpretation. Further, the legal construction of asylum as an individual right meant that the matter was moved "above" regular parliamentary politics, removing it from the fluctuations of daily politics (cf. Schuster 2003). Of importance here is related notion that in the Federal Republic constitutional provisions cannot be changed by a simple parliamentary majority—as was possible under the Weimar constitution—but changes require a two-thirds majority both in the *Bundestag* and *Bundesrat* (Glassner 2005, 21). The formulation of asylum as an individual right gave asylum-seekers access to courts to enforce the right to asylum. This also meant that the interpretation of what constitutes 'political persecution' was the responsibility of courts (cf. Quatritsch 1985, 27).

The asylum paragraph of the *Grundgesetz* can be regarded as a constitutional innovation and a historical break in the sense that none of the German constitutions prior to 1949 made any reference to asylum. Germany, distinction from France, for instance, lacked a similar tradition of political asylum prior to the post World War II era.[102] Some relevant historical links with the 1949 asylum paragraph are, however, found in previous legislation relating to the concept of extradition (‚*Auslieferung*') and the principle of non-extradition of political offenders. The link between these two legal concepts of extradition and asylum is as old as criminal law (Hutzenlaub 1976, 4) and the connection remained close in the deliberations by the Parliamentary Council on asylum. The first clause of the Article 16(2) prohibited the extradition of Germans ("*Kein Deutscher darf an das Ausland ausgeliefert werden*"), referring to the old German tradition of non-extradition of nationals, which originates in the tradition of the Roman Law,[103] whereas the second clause proclaims the right to asylum. The link between the concepts is also important regarding the outcome of the asylum paragraph and in relation to the debates on its scope and limits.

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by the Italian constitution shall be entitled to the right of asylum under the conditions established by law."

102 This is discussed more precisely in chapter 3.2.2. Cf. Noiriel 1991; Reiter 1988.

103 Cf. Mettgenberg 1953. The practice of non-extradition of nationals in known especially in the continental legal tradition. Von Mangoldt (1951, 111) writes about the German practice in his 1953 *Grundgesetz* commentary: "*Abs. 2 Satz 1 entspricht alter deutscher Rechtsauffassung, die im Gegensatz insbesondere zum angelsächsischen Rechtsdenken steht, nach dem grundsätzlich gegen die Auslieferung eigener Staatsangehöriger nichts einzuwenden ist.*"

3.2.1 The political offence exception

Extradition means returning a fugitive to another country where that person is accused or convicted of a crime. Oppenheim (1920) outlines the principle in international law:

> Unless a State is restricted by an extradition law, it can grant extradition for any crime it thinks fit. And unless a State is bound by an extradition treaty, it can refuse extradition for any crime. (Oppenheim 1920, 508)

> Political criminals are as a rule not extradited (ibid. 509).

In the above, the notion relating to the protection of "political offenders' refers to the idea that whereas those accused of criminal offences could be extradited, political offenders form an exception to this practice. Van den Wijngaert (1980, 27) defines "political offender' as "a person who violates the criminal law on the grounds of his political and ideological convictions". The notion of 'political offences' relates closely to the origins of political asylum: wheras in early international law asylum was accorded to common criminals and asylum had a more general scope (Weis 1969, 120; Van den Wijngaert 1980), the important change happened when jurists in the 18th century started to make a distinction between granting asylum to those guilty of political crimes but not of those of ordinary crimes (Sinha 1971, 19). This was further related to the growing cooperation among nation states in matters related to criminality and to the idea of international solidarity linked to it (Van den Wijngaert 1980, 69).

The core problematics related to the relation of extradition—and political asylum as protection from extradition—is what constitutes 'political', what is considered as a 'political crime' or 'political offence', and how these concepts are interpreted and what kind of definitions are given to them. In the present day context, the principle of non-extradition for political offences is a well acknowledged principle in extradition treaties between states (Felchlin 1979, 139; Van den Wijngaert 1980, 1).

As Kokott notes (1991, 633), the term 'political' is mentioned frequently in different documents and provisions of international and constitutional law.[104] Although some theorists have attempted to define the notion of 'political'—most famously Carl Schmitt with the friend/enemy conception,[105] which in turn, has also been applied by the *Bundesverfassungsgericht* in relation to the interpretation of the asylum paragraph of the *Grundgesetz*[106]—the term lacks a definition in international law.[107] Similarly, international law provides no defi-

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104 The *Grundgesetz* uses the term 'political' (‚*politisch*') in five provisions: in addition to the asylum paragraph (Art. 16(2) 2 GG in Art. 3(3), Art. 21(1), Art. 59(2) and Art. 65. Cf. Kokott (1991, 604-607) also for a list of international law documents using the term.

105 Cf. Schmitt 1963.

106 Cf. Kokott 1991; Neumann 1985.

107 Another, more neglected definition of 'political' in international law by Hans Morgenthau (1933) is cited in Riila (1993, 93): „*La notion du politique, prise au sens le plus étendu de ce mot, s'applique à des manifestations qui débordent largement le domaine de l'État.*

nition for 'political offences'. States are thus free, despite possible extradition agreements between them, to consider whether some offences are seen as non-extraditable or not. Nevertheless, the criterion 'political' is used to distinguish offences that are extraditable from those that are not (cf. Riila 1993, 97).

The concept of 'political offence' covers a wide variety of acts. The terminology related to political offences uses labels such as 'absolute', 'relative', 'pure', 'mixed', 'connex', 'complex', 'subjective', 'objective', and the interpretation of these terms varies from one author to another (cf. Van den Wijngaert 1980, 105). Garcia-Mora, for instance, defines 'purely political offences' as acts against the security of the state with the motive by the actor to "cause a change in the given political situation thereby injuring an existing political regime" (Garcia-Mora 1956, 76-77). If 'purely political offences' are targeted at the political order of the state, the question of interpretation becomes even more complicated when it concerns 'relative political offences' or 'mixed offences' in which certain aspects of common crimes are connected to a political act (Garcia-Mora 1956, 78).[108]

Another categorisation related to 'absolute' political offences concerns the so called "subjective/objective" criteria. According to the "subjective" approach, in differentiating political offences from common crimes, the political motive of the actor becomes central (Felchlin 1979, 150). The "objective" approach relates to the idea that there can be a criterion according to which an offence can be defined as 'political'. The objective approach towards political offences was common in Germany in the 19th century (cf. Felchlin 1979, 93-99). In a similar manner, the German extradition law of 1929 (Art. 3(2), in contradistinction to many other extradition laws, tried to define a political crime giving it the following definition:

> Politische Taten sind strafbare Angriffe, die sich unmittelbar gegen den Bestand oder die Sicherheit des Staates als solches, gegen eine verfassungsmäßige Körperschaft, gegen die staatsbürgerlichen Rechte bei Wahlen oder Abstimmungen oder gegen die guten Beziehungen zum Ausland richten.

In contrast to the attempt to define 'political offences', there are several advantages in keeping the concept vague and undefined. In his post-war article, Neumann (1951, 502), for instance, suggested that the unwillingness to define political offence, its nature and scope, is "understandable in view of the rapidly changing political picture in the world, and the unforeseeable nature of future political combat methods. Moreover the states, while trying to present a picture of absolute impartiality, actually often differentiate between political regimes which they consider oppressive, and those which they find similar to their own." (ibid.) Since the introduction of the notion of a political offence as an exception there has also been a tendency modify this exception by narrowing the

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On peut parler ainsi de la politique d'une ville, de celle d'un cartel, d'une association, voire même de la politique d'un individu, comme par example de la politique, à l'égard de ses collèques ou de ses clients, d'un homme exercent une profession, de celle d'un débiteur á l'égard de ses créanciers, ou de celle d'une femme à l'égard de son mari, du monde ou à l'égard de ses domestiques."

108 See also Lammasch (1887) for the 19th century conceptualisations.

scope of acts falling under the term 'political offence'. In the 20th century, however, there has also been a tendency to broaden the scope of what is understood as a 'political offence' (cf. Van den Wijngaert 1980), as will be discussed in the latter part of this chapter.

The recognition of political offence as an exception from extradition dates back to the time of the French Revolution (Sinha 1971, 170). The principle of asylum became constitutionalised for the first time in revolutionary France, where the 1793 Jacobean Constitution gave asylum to "any foreigner forced to flee his land for advancing the cause of liberty", refusing it from tyrants (Price 2009, 48).[109] The privileged position of political offences in relation to common crimes was an aspect of revolution against absolutism and to the natural law idea of a moral right to rebellion if the rights or political liberties of individuals were threatened by the ruler. Refuge abroad was offered to those who were unsuccessful in meeting these objectives. (Sinha 1971, 171; Felchlin 1979, 149)

Thus in the protection of 'political fugitives', the French Revolution represents an important change. Before the French Revolution 'political criminals' were extradited, even without existing treaties between the states. Criminal fugitives, on the contrary, were not. (Oppenheim 1920, 512) The prevailing attitude—as instanced by Hugo Grotius, for example[110]—had supported political crimes as the most severe of crimes and the ones from which one deserved to be punished most severely. The new sympathy towards political offenders in the 18th century and the change in perception was further related to the growing support for the idea of a right to resist oppressive rule, a notion that was presented by different writers on political thought and philosophy at the time. (Van den Wijngaert 1980, 9)

The privileged position of political offenders is further linked to the revolutionary history of European nation states. Treaties and declarations regulating extradition of political offenders became more common in the early 19th century. Of special importance was the 1833 Extradition Law of Belgium, proclaiming that "no foreigner may be persecuted or punished for any political crime antecedent to the extradition, or for any act connected with such a crime". This marked the first municipal legislation differentiating political offences from those on the basis of which one could be extradited. (Sinha 1971, 170)[111]

The political offence as exception is also related to the notion of neutrality and non-intervention, that is the idea that *a priori* refusal of extradition of political offenders does not constitute judgement on the policies and practices of the state making such a request (Van de Wijngaert 1980, 3). A further aspect related to impartiality is that the exception does not make a distinction between political acts falling under the scope of political offenders. Van den Wijngaert (1980, 14) therefore suggests that the first provisions related to the protection of politi-

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109 "donne asile aux étrangers bannis de leurs pays pour la cause de la liberté. Il le refuse aux tyrants! (Art. 120) (cf. Van den Wijngaert 1980, 9).

110 Cf. Grotius 1925, Book II, Ch. XXI, V (530ff.).

111 Van den Wijngaert (1980, 13) writes about the political function of the provision: "It was hoped that through this provision the intervention of the mighty neighbour states concerning the extradition of political refugees could be avoided."

cal fugitives had a rather glorified picture of the political offender as a revolutionary fighter without the idea that there might also be fugitives opposing liberal rule in order to benefit from the exception. As a consequence, in the latter part of the 19th century states began to limit the scope of the political offence as exception by withholding it, for instance, from 'anarchists' or 'terrorists' (ibid.).

Price writes that, despite its seeming neutrality, the practice of offering protection for political offences—with its origins in France in the late 18th century—had the effect of supporting "radical democrats oppressed by neighbouring autocracies" (Price 2009, 49). While the practice of sheltering political offenders protected revolutionaries whose goals the government sympathised with, the practice also "furthered a particular political aim and was grounded in particular view about legitimate authority" (ibid.). Protection was thus given to those seen as undertaking legitimate resistance. The purpose of asylum in this context was to "immunize fugitives against unjust punishment" (ibid. 52). The two main justifications for protecting political offenders against extradition thus relate to the natural law conception of a right of rebellion against a tyrant, as well as asylum understood to offer protection against unjust punishment—the latter idea being that the fugitive, considered as a political enemy of the regime, cannot rely on fair treatment and trial in the home country. (Cf. Papadatos 1955, 65)[112]

Although some authors disagree with the idea that political offenders attain a privileged position in relation to common criminals,[113] Oppenheim, for instance, supports the practice by connecting its importance to the protection of individual liberty and freedom against oppression and to the idea that there would not be legal ways for the oppressed to resolve the issues at stake. The example below shows how the notion is connected to the idea of what is seen as rightful authority and how it can be promoted by giving shelter to political offenders:

> I readily admit that every political crime is by no means an honourable deed, which as such deserves protection. Still, political crimes are committed by the best of patriots, and what is of more weight, they are in many cases a consequence of oppression

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112 "*En géneral, un des buts essentiels de l'extradition est la remise du délinquant à ses juges naturels qui, pour plusieurs raisons, paraissent être les mieux qualifiés pour lui rendre justice. Or, en matiére politique, c'est exactement le contraire qui prévaut; le délinquant politique n'aura un pouvoir qui se trouve entre les mains de ses ennemis politiques. L'asile joue donc, dans ce cas, un rôle bienfaisant, en protégeant celui qui est vaincu dans une lutte politique et en l'empêchant de tomber entre les mains de ses ennemis victorieux*." (Papadatos 1955, 65)

113 For the disagreeing voices and their arguments, see Papadatos 1955, 65; Felchlin 1979, 145. From a more present day perspective Kokott (1991, 634) is skeptical about why political offenses should be privileged: "*Aus heutiger Perspektive ist nicht ohne weiteres ersichtlich, warum strafbare Angriffe, die sich gegen die verfassungsmäßigen Organe insbesondere von Rechtsstaaten, oder die staatsbürgerlichen Rechte bei Wahlen oder Abstimmungen u.ä. richten, privilegiert sein sollen. Mit dem Ursprung der Auslieferungsausnahme als Anerkennung des uneigennützigen und heldenhaften Rebellen, der sich gegen Tyrannei wehrt, haben derartige Delikte, zumal wenn in Rechtsstaaten und gegen deren Organe begangen, jedenfalls eher selten etwas zu tun. Auch der Gedanke der Nichteinmischung in die Probleme anderer Staaten überzeugt nicht völlig. Denn indem der ersuchte Staat ein bestimmtes Delikt als politisch einstuft und nicht ausliefert, stellt er sich ja in gewisser Weise doch auf die Seite desjenigen, der die bestehende Ordnung in dem anderen Staat bekämpft.*"

> on the part of the Government concerned. They are comparatively infrequent in free countries, where there is individual liberty, where the nation governs itself, and where, therefore, there are plenty of legal ways of bringing grievances before the authorities. A free country can never agree to surrender foreigners to their prosecuting home State for deeds done in the interest of the same freedom and liberty which the subject of the free country enjoy. For individual liberty and self-government of nations are demanded by modern civilisation, and their gradual realisation over the whole globe is conducive to the welfare of the human race. (Oppenheim 1920, 519)

Whereas the roots of political asylum are connected to the idea of sheltering political fugitives, the post World War I era witnessed another change in the role of asylum. Weis (1969, 121) notes that whereas the period between the 1830's and the outbreak of the First World War saw the matter of asylum mostly in connection to extradition, the mass movement of refugees in the early 20th century moved the question of asylum to a question of admission. In the 19th century persons fled, for instance, in the context of the 1830's and the July Revolution of France and, to an even larger extent, in relation to the revolutions of 1848/49 (Oltmer 2002, 109; cf. Reiter 1992). Asylum, nevertheless, remained a matter of individual resistance and not of mass exodus. As Kirchheimer noted, these individuals posed political problems to the state which received them, although not administrative problems as yet (cf. Kirchheimer 1959). The persons fleeing could be accepted as regular migrants or as an exception to the rule of extradition, asylum in this case being "*ein politisch motivierter Akt der Duldung*" (Oltmer 2002, 112). The shift happened when states started to increase border controls, control over migration and to apply more protectionist policies regarding foreigners (ibid.). In this context, the great fear for those fleeing was the possibility of being expelled and deported. Price (2009, 52) writes how asylum was recast: "from a defence against extradition to a defence against deportation". The criterion of 'political persecution' was used to distinguish asylum seekers from ordinary migrants in relation to those measures restricting immigration (ibid.).

3.2.2 *'Auslieferung'* and *'Asyl'* in Germany

In comparison to other Western European states, Germany was late in introducing protection for political offenders. Whereas Belgium incorporated political offences as an exception into its 1833 legislation, Oltmer (2002, 111) writes how the different states of the German Confederation (*Deutscher Bund*) agreed in 1832 to extradite political offenders between them. Furthermore, Prussia, Austria and Russia had an extradition agreement on political offenders which was agreed in 1834. Reiter (1988, 34) speaks of "*asylfeindlicher Haltung*" when describing the attitudes towards asylum in the first part of the 19th century in Germany.

Neither the constitution of 1871 nor the Weimar constitution of 1919 included a reference to asylum. The latter, however, made reference to extradition

in its sixth article when listing the principles over which the *Reich* had jurisdiction.[114] The constitution also prohibited the extradition of nationals.[115]

It was not until the German *Auslieferungsgesetz* of 1929 when the prohibition of extradition of political offenders (*Auslieferungsverbot für politische Straftäter*) was introduced for the first time in the German legal history, bringing the protection of political fugitives within the framework of the judicial system. The question related to protection of political offenders had been placed on the political agenda in the *Reichstag* as early as 1892, but the initiative did not gain enough popularity at the time (Oltmer 2002, 111).[116] Article 3 of the 1929 Extradition law included the notion of political offence as an exception:

> 1) Die Auslieferung ist nicht zulässig, wenn die Tat, welche die Auslieferung veranlassen soll, eine politische ist oder mit einer politischen Tat derart im Zusammenhange steht, daß sie diese vorbereiten, sichern, decken oder abwehren sollte.
>
> 2) Politische Taten sind strafbare Angriffe, die sich unmittelbar gegen den Bestand oder die Sicherheit des Staates als solches, gegen eine verfassungsmäßige Körperschaft, gegen die staatsbürgerlichen Rechte bei Wahlen oder Abstimmungen oder gegen die guten Beziehungen zum Ausland richten.
>
> 3) Die Auslieferung ist zulässig, wenn sich die Tat als ein vorsätzliches Verbrechen gegen das Leben darstellt, es sei denn, daß sie im offenen Kampf begangen ist.[117]

Whereas Article 3 sets limits for the state's right to extradite, it is important to note that the 1929 law did not yet include a positive right of the individual to asylum (Oltmer 2002, 117). This means that the law on extradition protected the politically persecuted against extradition but did not protect the person from deportation or expulsion. Neither did the law prohibit officials from turning people away at the border. (ibid.)[118]

If the right to asylum stipulated by the 1929 law remained more limited than the rights granted under the laws of other Western European states, Oltmer explains, how the idea of the individuals right to asylum was, nonetheless, placed on the political agenda by the KPD in the Legal Committee of the *Reichstag*, and later in the plenum when the creation of the law on extradition was being debated.[119] The KPD proposed the creation of a "*Gesetz über die Ausübung*

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114 Art. 6(3) WRV "*Das Reich hat die ausschließliche Gesetzgebung über die Staatsangehörigkeit, die Freizügigkeit, die Ein- und Auswanderung und die Auslieferung.*"

115 Art. 112(3) WRV "*Kein Deutscher darf einer ausländischen Regierung zur Verfolgung oder Bestrafung überliefert werden.*"

116 For the Weimar Republic and migration, see also Oltmer 1995.

117 For the 1929 Extradition law and its commentary, see Mettgenberg/Doerner 1953.

118 Kimminich (1968) outlines the protection that the individual, subjective asylum right grants: "*Wenn nun ein Staat in seiner Verfassung den politisch Verfolgten ein subjektives Recht auf Asylgewährung einräumt, so verzichtet er damit gleichzeitig gegenüber diesem Personenkreis auf das Recht der Abweisung an den Staatsgrenzen. Der Inhalt des Art. 16 Abs. 2 Satz 2 GG erschöpft sich daher nicht in dem Verbot der Auslieferung politischer Flüchtlinge, sondern umfasst auch das Verbot der Abweisung dieser Personen.*" (Kimminich 1968, 74)

119 The *Reichstag* debates that Oltmer refers to*: Verhandlungen des Reichstages. Stenographische Berichte Bd. 437, Anlagen (1929); Verhandlungen des Reichstages. Stenographische Berichte Bd:* 426,1929.

des völkerrechtlichen Asyls und die Auslieferung". The central idea of this proposal on asylum and extradition law was that asylum would not only protect persons against extradition but also against expulsion. It would prevent the political refugees from being turned away by the police or the border authority in the absence of personal documents. The KPD argued the protection of political offenders was not enough as the majority of political refugees did not have access to the *Reich* in order to have their claim for protection examined. Further, in the KPD proposal asylum would include the right to remain in the country. In addition, the KPD wanted to limit the definition of 'political offence' to include acts that were targeted towards the Monarchy, Bourgeoisie, or the Fascist order. (Oltmer 2002, 118)

The KPD proposal did not gain support from other parties, although the SPD was not against the principle but supported the creation of a "*Reichs-Fremdenrecht*", legislation related to foreign nationals, which would also frame asylum. (Oltmer 2002, 118-119)

Another step towards the individual right to asylum mentioned by Oltmer took place just before the downfall of the Weimar regime. The "*Polizeiverordnung über die Behandlung der Ausländer*" of July 1932 of the Minister of Interior of Prussia meant that refugees were not to be sent back to persecution in their home country, including foreigners without proper documents to be presented at the border. This represented an important change in the powers of the police who had not previously been subjected to limitation in expelling foreigners. (Oltmer 2002, 120)

In comparison to the practices of the 19th century when in Germany did not grant asylum to political offenders, to the discussions in the *Reichstag* in the late 1920s when the right to asylum was not yet accepted, to the persecutions carried out under the *Third Reich*, the post World War II era and the *Grundgesetz* with its article on asylum represents a major change. Prior to the creation of the *Grundgesetz*, however, three of the Federal states had already drafted constitutions in the immediate post-war period which included reference to the prohibition of extradition of politically persecuted persons and to asylum. Article 105 of the Bavarian constitution (2.12.1946) contained the following wording:

> Ausländer, die unter Nichtbeachtung der in dieser Verfassung niedergelegten Grundrechte im Ausland verfolgt werden und nach Bayern geflüchtet sind, dürfen nicht ausgeliefert und ausgewiesen werden.[120]

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120 In the commentary, one of the authors of the Bavarian constitution, and later an important name for the drafting of the basic rights section of the *Herrenchiemsee* constitutional draft, Hans Nawiasky, explained that the wording granted the politically persecuted an right to asylum:"*Das Verbot der Auslieferung oder Ausweisung von Ausländern die nach Bayern geflüchtet sind, um sich einer Verfolgung zu entziehen, bei der in der Bayerischen Verfassung vorgesehende Grundrechte nicht beachtet werden, gewährt den betroffenden Ausländern nicht nur ein Asyl, sondern ein Asylrecht*" (Nawiasky 1948, 186-87).

Another state constitution drafted in the American zone of occupation, the constitution of Hesse (1.12.1946), included an article (Art. 7) stating:

> Kein Deutscher darf einer fremden Macht ausgeliefert werden. Fremde genießen den Schutz vor Auslieferung und Ausweisung, wenn sie unter Verletzung der in dieser Verfassung niedergelegten Grundrechte im Ausland verfolgt werden und nach Hessen geflohen sind.[121]

In the French zone of occupation, Article 16 of the constitution of Rhineland-Palatinate (18.5.1947) had the wording:

> Ein Deutscher darf einer fremden Macht nur bei verbürgter Gegenseitigkeit ausgeliefert werden. Fremde genießen den Schutzt vor Auslieferung und Ausweisung, wenn sie unter Verletzung der in dieser Verfassung niedergelegten Grundrechte im Ausland verfolgt werden und nach Rheinland-Pfalz geflohen sind.[122]

Even if the asylum paragraphs in these post-war *Länder* constitutions had at the time only little legal relevance as it was not attractive to search protection from Germany in the immediate post-war period (Zimmermann 1994, 8), the state constitutions are important to note as the drafting of the *Grundgesetz* was indebted to them. Moreover, as regards to the asylum paragraph, several of those involved in the drafting state constitutions, mentioned above, were also authors of Article 16 of the Basic Law, that is, Bergsträsser, Zinn and von Brentano in Hesse.

All of these state constitutions created protection not only against extradition but also against expulsion. They also created criteria according to which protection is given to those whose basic rights, as laid down in the constitution, were threatened by persecution. These provisions thus remained narrower than the asylum clause of the *Grundgesetz*.

In addition to the three state constitutions, the draft of the *Herrenchiemsee* Convention made reference to extradition and to protection of politically persecuted foreigners in a manner similar paragraphs on asylum in the state constitutions. The First Committee (*Unterausschuß I*) of the convention prepared Article 4 as follows:

> Kein Deutscher darf einer fremden Macht ausgeliefert werden. Wer unter Nichtbeachtung der in dieser Verfassung niedergelegten Grundrechte von einer Stelle außerhalb des Bundes verfolgt wird, wird nicht ausgeliefert.[123]

Even if prior to the *Grundgesetz* different German legislation referred to the prohibition on the extradition of political offenders and to the prohibition on

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121 For the commentary, see Zinn & Stein 1954.

122 For the commentary of the article, see Süsterhenn/ Schäfer 1950, 125-127. The commentators also note how the Art. 16(2) GG goes beyond the protection granted in Art. 16 II of the *Land* constitution.

123 "Verfassungsausschuß der Ministerpräsidentenkonferenz der westlichen Besatzungszonen. Bericht über den Verfassungskonvent auf Herrenchiemsee vom 10. bis 23. August 1948". *Der Parlamentarische Rat* Bd. 2, p. 580.

the expulsion of foreigners it was not, however, before the deliberations of the Parliamentary Council when a specific individual right to asylum was created. This right also took a different path and form in comparison with the state constitutions and the *Herrenchiemsee* draft. The following turns to look more specifically how the paragraph on asylum that acknowledged asylum as a subjective right of politically persecuted foreigners and went beyond the idea of protecting political fugitives from extradition, was debated and created in the fora of the Parliamentary Council.

3.3 Bringing asylum to the political agenda

In the Parliamentary Council deliberations, the matter of asylum was first placed on the agenda by Ludwig Bergsträsser of the Social Democratic Party in the third meeting of the Basic Questions Committee.

Bergsträsser was one of key figures of the Hessian post-war politics. He was the prime minister of Hesse, and as noted, took part in the drafting of the state constitution. During the Weimar era, Bergsträsser had been a member of the German Democratic Party and between the years 1924 and 1928 its representative in the *Reichstag*. In the early 1930's Bergsträsser became a member of the SPD.[124] As was the case for many other scholars, the NSDAP had removed Bergsträsser's title as 'docent' on the basis of "political unreliability" (Feldkamp 1998, 42).[125] Before the actual deliberations on individual rights began, as outlined in the previous chapter, Bergsträsser was assigned to give a historical outline of basic rights for his fellow delegates in the Basic Questions Committee. In addition to this, Bergsträsser drafted a preliminary list of rights to be discussed in the committee, to serve as a guideline, a *'Leitfaden'*, for the deliberations. Bergsträsser's draft list of 34 articles[126] included two articles relating to the prohibition of extradition of politically persecuted foreigners:

> Fremde genießen den Schutz vor Auslieferung und Ausweisung, wenn sie unter Verletzung der in dieser Verfassung niedergelegten Grundrechte im Ausland verfolgt werden und nach dem Geltungsbereich dieses Grundgesetzes geflohen sind. (Art. 14)

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124 Bergsträsser 1987; Lange 2008; Zibell 2006. Bergsträsser was a widely published scholar, his research interests including the history of political parties in Germany and parliamentarism as well as the *Paulskirchenverfassung* of 1848/49. As regards to his political activities, Lange (2008) writes that Bergsträsser was active in keeping in contact with the resistance groups during the Nazi era, among others with Wilhelm Leuschner, the former Hessian minister of interior (SPD) who was sentenced to death in 1944 for his connection to the failed attentat against Hitler. Bergsträsser was a member of the *Bundestag* between the years 1949-1953.

125 Chaput de Saintonge writes how "Bergstraesser gives the impression, perhaps intentionally, of being a typical university professor, both in appearance and manner. He is quite willing to talk on most subjects except politics, although the conversation tends to develop into a lecture." (Pommerin 1988, 563-564)

126 "Katalog der Grundrechte, Anregungen von Dr. Bergsträsser als Berichterstatter 21. September, 1948". *Der Parlamentarische Rat*. Bd 5/1, pp. 15-27.

> Kein Fremder, der gesetzlich in das Gebiet zugelassen würde, darf ausgewiesen werden, außer in Verfolg einer gerichtlichen Entscheidung oder Empfehlung als Strafe für Vergehen, die im Gesetz als solche bezeichnet sind, die diese Maßnahme rechtfertigen. (Art. 15a)

When commenting on article 14, Bergsträsser made reference both to the *Herrenchiemsee* constitutional draft and to the Hessian constitution. Bergrsträsser's formulation followed the idea presented there, that protection against extradition and expulsion should be given to foreigners whose basic rights, as laid down in the constitution, were threatened by persecution. Furthermore, Bergsträsser raised the financial concerns relating to granting asylum by pointing to the experience in Hesse where the military government interpreted the asylum article so that the politicians who had escaped from the political upheavals in Czechoslovakia had been not only offered protection but also financial assistance. As opposed to this practice, Bergsträsser saw that persons offered protection should live under the same conditions as citizens, without extra financial support.[127]

Apart from the references to Hessen, Bergträsser's formulations found their legitimation in recent historical experience: Bergsträsser defended his latter article, prohibiting expulsions of foreigners without the authorisation from court—which was a direct translation of an article in the so called Humphrey draft in the preparations for the Universal Declaration of Human Rights[128]—by stating that experience of German emigrants had shown the degree of pressure on people living in a foreign country with the feeling of constant insecurity caused by arbitrary decisions by the administrative organs. Bergsträsser added that the articles would also make expulsions for purely political reasons at the time of change of government impossible:

> Dieser Art. ist dem Entwurf der UN entnommen. Der Berichtstatter hält es für richtig, ihn zu übernehmen, da die Erfahrung, die viele Emigranten – auch gerade Deutsche – gemacht haben, zeigt, daß nichts mehr auf dem lastet, der in einem fremden Land wohnt, als das Gefühl ständiger Unsicherheit, das dadurch hervorgerufen wird, daß man willkürlichen Entscheidungen der Verwaltungsorgane unterliegt. Eine solche Bestimmung würde auch unmöglich machen, daß bei einem Regierungwechsel etwa Ausweisungen aus rein politischen Gründen vorgenommen werden.[129]

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127 "*Im Chiemsee-Entwurf Art. 4 Abs. 2 heißt es "Nichtbeachtung". "Verletzung" scheint dem Berichterstatter klarer zu sein. Nach den Erfahrungen in Hessen, wo die Militärregierung aus diesem Artikel des Asylrechts folgerte, daß die Regierung die Pflicht habe, aus der Tschechoslowakei nach dem politischen Umsturz geflohene Politiker nicht nur aufzunehmen sondern auch für ihren Unterhalt aufzukommen, wäre vielleicht ein Zusatz richtig, der etwa so lauten könnte: "Das Asylrecht beschränkt sich auf die Möglichkeit des Aufenthalts unter den gleichen äußeren Bedingungen, unter denen die Staatsangehörigen leben". Damit soll gesagt sein, daß solchen Personen Lebensmittelkarten und ein Anspruch auf den entsprechenden Wohnraum zustehen, aber keine Unterstützung.*" (*Katalog der Grundrechte,* p. 21.)

128 "No alien who has been legally admitted to the territory of a State maybe expelled therefrom except in persuance of a judicial decision or recommendation as apunishment for offences laid down by law as warranting expulsion." More about this formulation in Chapter 5.

129 *Katalog der Grundrechte*, p. 21.

As the Basic Questions Committee deliberated over Bergsträsser's list of rights in its third meeting, Heuss pointed to the need for reformulation of Article 15a on the basis that its formulation was too nebulous (3rd Meeting AfG,[130] 48).[131] Von Mangoldt, in his turn, noted that Bergsträsser had left out the provision prohibiting the extradition of Germans, which had been included in the *Herrenchiemsee* draft and which could be combined in the same article as the right to asylum (3rd Meeting AfG, 48).[132]

A shortened wording and, importantly, a specific asylum clause was introduced for the first time when a small editing committee inside the Basic Questions Committee, consisting of Bergsträsser, von Mangoldt and Zinn, was assigned to re-write the list of rights. The re-written list of basic rights included an article with the following wording:

> Kein Deutscher darf ins Ausland ausgeliefert werden. Politisch Verfolgte genießen Asylrecht im Rahmen des allgemeinen Völkerrechts. (Art. 4)

In the first reading of the asylum article—in the fourth meeting of the committee—Zinn spoke on behalf of the editors and explained first the extradition clause by noting that the drafting committee had tried to avoid the terms '*Regierung*' and '*Macht*' ('government' and 'power') when reformulating the wording of the *Herrenchiemsee* draft and the extradition paragraphs in the constitution of Hesse and the Weimar constitution (4th Meeting AfG,133 35).[134]

Zinn further explained that the second clause, i.e. the asylum provision, referred to the problematics related to the extradition of foreigners and outlined the relation between the concepts of asylum and extradition: according to international treaties persons who had violated criminal law could be extradited. Extradition was not possible, however, if the person had been persecuted politically. Asylum, which Zinn emphasized was well-defined by international law, was to be granted to foreigners affected by political persecution:

> Bei Abs. 2 tauchen zwei Probleme auf. Zunächst die Auslieferung von Fremden. Ein Beispiel: Ein Franzose kommt nach Deutschland. Nach den bestehenden internationalen Verträgen sei er vielleicht auszuliefern, wenn er gegen das allgemeine Strafgesetz verstoßen hat. Die Auslieferung soll aber niemals erfolgen, wenn der Mann ein politisch Verfolgter ist. Also: der politisch verfolgte Ausländer soll Asylrecht bei uns haben. Der Begriff des Asylrechts ist fest umrissen durch das allgemeine Völkerrecht. (4th Meeting AfG, 36)

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130 September 21, 1948.

131 "*Ich halte diese Formulierung für sehr nebulös: sie muß von einem Manne stammen, der nichts von den Dingen versteht.*" (3rd Meeting, AfG, 48)

132 "*Nach Art. 4 Abs. 1 des Herrenchiemseer Entwurfs darf kein Deutcher einer fremden Macht ausgeliefert werden. Dieses Grundrecht ist in dem Vorschlag des Herrn Dr. Bergsträsser nicht enthalten. Es entspricht aber durchaus kontinentalem Rechtsdenken. Wir sollten es wieder aufnehmen. Vielleicht bringt man es in dem gleichen Artikel wie das Asylrecht.*" (von Mangoldt, 3rd Meeting AfG, 48)

133 September 23, 1949.

134 "*Art. 1 Abs. 1 spricht aus: Kein Deutscher darf ins Ausland ausgeliefert werden. Der Entwurf von Herrenchiemsee besagt: Kein Deutscher darf einer fremden Macht ausgeliefert werden. Die hessische und die Weimarer Verfassung bestimmen, kein Deutscher darf an eine fremde Regierung ausgeliefert werden. Wir wollen beide Ausdrücke 'Regierung' und 'Macht' vermeiden und einfach sagen: Kein Deutscher darf 'ins Ausland' ausgeliefert werden.*"

The newly formulated asylum clause was worded the "politically persecuted enjoy [the] right to asylum in the frames of international law". The formulation "in the frames of international law" remains vague,[135] as international law does not, as noted, present states with any specific rules or conventions as regards to the granting of asylum, especially at the time of the drafting of the *Grundgesetz*: asylum was understood as a right of a sovereign state to grant or refuse it.[136]

There are at least two ways to understand Zinn's point and the idea that asylum is well-defined in international law. Firstly, it can be understood in relation to extradition and the exception regarding political offences, the idea being that politically persecuted persons are protected from extradition. This means that states have the right to refuse extradition and, on the other hand, that the protection of political persecuted individuals can be seen to limit the sovereignty of the state ("*Die Auslieferung soll aber niemals erfolgen, wenn der Mann ein politisch Verfolgter ist*").

Alternatively, some have interpreted Zinn's argument (cf. Merl 1968; Münch 1992) as an indirect reference to the ongoing deliberations on the Universal Declaration of Human Rights. In the early autumn of 1948 the idea of an individual's right to asylum *vis-à-vis* the state was being debated in international fora and there was an attempt to pose duties on states to grant asylum. In preparing the individual rights section of the *Grundgesetz* the Basic Questions Committee used as their background material the third draft prepared by the Commission on Human Rights (the so called "Lake Success Draft"). In this draft the Human Rights Commission accepted in the summer of 1948 the idea of declaring a duty for the states to grant asylum ("Everyone has the right to seek and be granted, in other countries, asylum from persecution", Art. 12(1).[137] However, this conception was later weakened, in the autumn of 1948, by the states in the Third Committee debates as will be shown in more detail in Chapter 5.

Nevertheless, the phrase "in the frames of international law" has remained problematic for the interpretation of the asylum clause. This is partly related to the question of how to define the political offence exception in relation to the law of asylum. Moreover, it is related to the question of how to interpret a subjective right of the individual, laid down in the constitution, which, at the same time is limited by the "frames of international law".[138]

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135 Heuss made later remark on the formulation and asked what was meant with the phrase "in the frames of international law" and proposed it to be reformulated into "according to the principles of international law" ("*nach den Grundsätzen des allgemeinen Völkerrechts*"). (4th Meeting AfG, 39)

136 Cf. the *non-refoulement* provision of the Geneva Refugee Convention of 1951.

137 Article 12 of the Draft International Declaration of Human Rights: 1. "Everyone has the right to seek and be granted, in other countries, asylum for persecution." 2. Prosecutions genuinely arising from non-political crimes or from any acts contrary to the purposes and principles of the United Nations do not constitute persecution.

138 For the problematic, see Reichel 1987. In the interpretation of the courts "the frames of international law" has been seen to narrow the scope of right to asylum (Van den Wijngaert 1980, 74). On the other hand Kimminich (1982), for instance, has argued against this position.

If asylum is situated "in the crossroads of international and domestic law", as Kirchheimer (1985, 513) writes, it is also a matter of administration of the law, relating to questions such as what kind of judicial institutions are created in relation to the granting of asylum and how the matter is administrated. As the asylum deliberations continued in the Basic Questions Committee, Carlo Schmid underlined the importance of the courts and judicial safeguards in protecting the rights of fugitives by making reference to the legislation of Scandinavian countries where the government could not extradite a person before a court had ruled that the person in question was not a political refugee and hence entitled to asylum. Schmid saw the practice as important in preventing "governmental favours" when extraditing persons:

> In einigen Rechten, z.B. in Skandinavien, ist es so, daß über das Vorliegen der Voraussetzungen für eine Auslieferung ein Gericht entscheidet. Die Regierung kann da nicht sagen, Venuzuela reklamiere Herrn Gomez, ich liefere ihn aus, sondern sie muß sich zuerst an das zuständige Gericht wenden. Erst wenn dieses feststellt, der Mann sei kein politisch Verfolgter, habe also keinen Anspruch auf das Asylrecht, steht es im Ermessen der Regierung, den Mann auszuliefern. Stellt das Gericht fest, der Mann ist von der Auslieferungspflicht nicht betroffen, dann kann die Regierung ihn überhaupt nicht ausliefern. Ich meine, man sollte doch an Zeiten denken, wo man sich von Regierung zu Regierung Gefälligkeiten erweist. (4th Meeting AfG, 36)

On the one hand, Schmid's emphasis on the role of the courts can be seen to reflect the more general notion that instead of the popular institutions of parliaments and governments, the authors of the Basic Law had more faith in the judicial institutions.[139] Further, Schmid's argument about "governmental favours" is, as Bergsträsser's earlier definition, a reference to the arbitrary extraditions of individuals between the totalitarian state and its satellites, and more generally it refers to inter-state power politics related to extraditions. In this sense, courts are seen as a counterforce and safeguard against extraditions that would be motivated by the political interests of states.[140]

The protection of the political offenders has been among the first rights that totalitarian states have sought to abolish (Van den Wijngaert 1980, 102). In the post-war period the concept of extradition was strongly related to the experiences of what Kirchheimer (1959) names as "informal extraditions" or "'interstate amity". Regarding state practices and power politics, in which "informality has been the rule", Kirchheimer makes reference to Soviet policies of returning German citizens to Nazi Germany in accordance with the German-Soviet Treaty of August of 1939. Another example of the extradition of individuals

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139 On the theme see Möllers 2007. For the critique see also Weber 1949.

140 Kirchheimer (1959, 1015) notes that "the fact that decisions on the prerequisites of extradition have as a rule passed into the hands of courts is diminishing both the pressure potential of the country seeking extradition and the susceptibility to pressure of the country in whose courts such requests are decided." Oppenheim (1920, 506) writes about the role of governments in extraditing in the context of the 1920's: "Such States as possess no extradition laws, and whose written constitution does not mention the matter, leave it to their Governments to conclude extradition treaties according to their discretion. And in these countries the Governments are competent to extradite an individual, even if no extradition treaty exists."

between states, here one weaker and the other stronger, were the actions of the Vichy regime *vis-à-vis* Germany under Hitler (Kirchheimer 1959, 997-998).[141]

As the deliberations in the Basic Questions Committee continued, a further voice speaking for keeping asylum "in the frames of international law" was presented by von Mangoldt. Von Mangoldt referred to 'political offences' and noted how controversial the concept was in the sphere of international law. Not going beyond international law was, von Mangoldt underlined, important for a weak nation, which should not commit itself to offering protection it had no resources to ensure:

> Was das Asylrecht der politisch Verfolgten betrifft, so müssen wir uns wohl an den allgemeinen Rahmen des Völkerrechts halten. Was ein politisches Delikt ist, ist in der Völkerrechtslehre sehr umstritten. Ich habe im demnächst erscheinenden Ausführungen über das Kriegsverbrechen eingehend dargelegt, wie umstritten der Begriff des politischen Delikts ist. Wir sind bei unserer Formulierung weiter davon ausgegangen, daß wir nicht mehr vorsehen dürfen, als das allgemeine Völkerrecht vorschreibt. Wir sind eine schwache Nation, und ohne die Mittel, weitergehenden Schutz zu gewähren, können wir nicht etwas tun, wofür wir selbst nicht die entsprechenden Mittel zu Hand haben, um es zu gewährleisten. (4th Meeting AfG, 36)

This argument is related to an article von Mangoldt wrote for the *Jahrbuch für internationales und ausländisches öffentliches Rechts* entitled "*Das Kriegsverbrechen und seine Verfolgung in Vergangenheit und Gegenwart*".[142] The article was written in 1945, one year before the beginning of the Nuremberg trials but was first published in 1948. Regarding the trial and punishment of war criminals, the Moscow Declaration of October 30, 1943—between Great Britain, the United States and the Soviet Union—proclaimed, for instance, how "those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the Free Governments which will be erected therein", demanding that the nationals of their adversaries that were accused of war crimes were to be surrendered (Lauterpacht 1944, 60). The Potsdam agreement of 1945 stipulated further facts in relation to war criminals.

In the article von Mangoldt gave an account of the problematic concerning war crimes since the Treaty of Versailles and developments in the 1940's. As regards to 'political offences', von Mangoldt problematised the definition of the concept, especially in regard to the 'relative political offences', and noted that the controversial question was whether some war crimes could fall under this definition (von Mangoldt 1948, 327-328).[143]

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141 In the Finnish context about the debates related to extraditions during the Second World War, cf. Sana 2003.

142 Cf. von Mangoldt 1948.

143 For war crimes and extraditions, see Lauterpacht 1944 & Neumann 1951. For the discussion on the legal problematic related to the surrendering of persons accused of crimes against humanity if they were on the territory of another state, see also Garcia-Mora 1964. Shearer (1971, 186) notes that generally the post-war international

Relating to the punishment of war criminals and the measures by the Allied states, war crimes were denied a political character under international law.[144] This conception also prevailed in Article 14(2) of the Universal Declaration of Human Rights, which speaks of "non-political crimes" and "acts contrary to the purposes and principles of the United Nations" (cf. Sinha 1971, 183). From the point of view of legal theorists, for instance, Garcia-Mora (1956, 93) argues war crimes and crimes against humanity are offences that cease to be political, even in the relative sense "because of the employment of the methods of barbarity out of proportion to the political end in view". Nevertheless, in practice the extradition of war criminals has frequently not been undertaken (Van den Wijngaert 1980, 144).

Von Mangoldt's comment was the only occasion where war criminals were mentioned directly in the debates on asylum in the Parliamentary Council.[145] As Chapter 5 will show, the question related to war criminals and how they would potentially be protected by asylum was put forward strongly and kept on the agenda by the Soviet bloc in the deliberations surrounding the drafting of the Universal Declaration of Human Rights, arguing that its asylum provision could be used to shelter Nazis and fascists against extradition.

In the Basic Questions Committee Schmid continued with the problem of defining 'political offences' by making reference to the principle of 'attentat clause'. The attentat clause, or the 'Belgian clause', is a principle meaning that a murder or an attempt to take the life of the head of the state cannot be regarded as a 'political offence' (see Sinha 1971, 178).[146] It is the first, and perhaps the best known exception to the notion of the extradition of political offenders, although it has rarely, if ever, been put into actual practice (Van den Wijngaert 1980, 135-137).[147]

The attentat clause originates from very particular historical and political events: from the assault against Napoleon III in 1854 by the French Célestin Jacquin and Jules Jacquin. The Jacquins were successful in avoiding extradition from Belgium to France by appealing to the 1834 extradition agreement between the two states and by claiming that their actions were politically motivated. After the court ruling and its diplomatic and political consequences against

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documents related to war criminal avoided using the term 'extradition' "in order to give States the widest latitude in resorting the measures of rendition".

144 In the aftermath of the World War I, Germany refused the extradition of war criminals to the Allied powers and prosecuted the persons themselves (Van den Wijngaert 1980, 142).

145 As the analysis of the Main Committee will later show, Fecht of the CDU, however, speculated about the possibility that the acceptance of the right to asylum would mean that Germany would have to accept Italian fascists as persons seeking protection.

146 The so called Belgian attentat clause (1856) proclaims that "There shall not be considered as a political crime or as an act connected with such a crime an attack upon the person of the head of a foreign government or of the members of his family, when this attack takes the form of either murder, assassination, or poisoning" (Garcia-Mora 1956, 82).

147 See also Mettgenberg 1906.

the powerful neighbouring state, the Belgian government introduced the clause in 1856. (Felchlin 1979, 194-195)

Although the origins of the attentat clause are highly political, it is an example of those offences which are seen to limit a state's right to refuse extradition and which are considered to be 'non-political'. This clause was the only exception mentioned by Schmid, noting how in other cases there was no obligation for the state to extradite a person.[148] Schmid further pointed out that under international law the refusal to extradite political offenders did not make Germany liable to damages, nor was it a cause for reprisal, referring thus to the principle of non-intervention and the idea that the refusal to extradite did not mean judgement on the policies of the state making the request:

> Nach dem Völkerrecht ist es so: Keine Regierung braucht auszuliefern, es sei denn, daß das politische Delikt mit einem Attentat verbunden ist. Wenn einer nach Deutschland flieht, weil er versucht hat, die Regierung seines Heimatlandes zu stürzen, so braucht er, auch wenn er sich des Hochverrats schuldig gemacht hat, nicht ausgeliefert werden. Deutschland macht sich dann völkerrechtlich weder schadensersatzpflichtig, noch setzt es den Anlaß zu einer Repressalie. Wenn dieser Mann aber geschossen hat, muß man ihn ausliefern. Das ist communis opinio. (4th Meeting AfG, 37)

The commentators have noted how the idea that ’attentat’ would be seen as 'unpolitical' in relation to other political offences raises several questions and critiques.[149] Firstly, it can be seen to ignore the political dimension of the act of assault. Secondly, the attentat clause is too limited as it only applies to the head of the state and that person’s closest advisers leaving other persons outside its application and therefore that the principle of non-extradition could apply to other assassins. Alternatively, the clause can be seen to be too broad as it allows extradition for every attempted assassination, in all circumstances. (Sinha 1971, 178-179; Felchlin 1979, 200) As regards to the latter, Garcia-Mora (1956, 85) writes polemically, "one needs no special effort to see how offences against the head of a totalitarian state may appear as the only alternative to peoples suffering from persecution and oppression and, frankly, there is no justifiable reason why such an act should be excluded from the category of political offences". Garcia-Mora’s argument is further related to the notion that asylum might protect, for instance, totalitarian rulers escaping prosecution in their home country—a situation which has actually occurred (cf. Kirchheimer 1959, 987).[150]

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148 In addition to attentat, for example, the acts of anarchists have often been excluded from political offences, cf. Herboldt 1933; Papadatos 1955. Sinha (1971, 178-188) gives a broad list of offences which have been seen as 'unpolitical' in customary international law. Neumann (1951, 504) mentions the attempts to consider "acts of terrorism„ as non-extraditable since the 1930’s, including the League of Nations' attempt to create a convention, which would have, among others, allowed the extradition of terrorists. The Convention did not, however, come into effect.

149 For the more historical critique towards the principle, see Van den Wijngaert 1980, 136.

150 Garcia-Mora (1956, 85) argues that "if overthrown dictators are entitled to asylum in foreign countries despite the cruelty and inhumanity displayed by their regimes, those who commit offenses against such tyrannical authorities in the interest of the freedom and liberty of their people, certainly deserve asylum with more justice and

While the attentat principle raises questions of political morality, it is nevertheless somewhat surprising against the historical backdrop in which the *Grundgesetz* was drafted and in regard to the political experiences behind it to note that Schmid did not point out any potential difficulties in defining an 'attentat' or whether some aspects related to the act could be regarded as political. The famous example that many authors note in this situation is that if the persons behind the attempt against the life of Hitler in 1944 would have been successful in escaping Germany, the strict following of the principle of the attentat exception would have meant their extradition back to Germany (cf. Felchlin 1979, 202; Van den Wijngaert 1980, 136-137). In the terms in which the *Grundgesetz* was conceived, an attentat clause would have left the July 20th conspirators with no recourse to the right to asylum (cf. Merl 1968).

However, regarding the political uses of legal concepts and legal procedure, Schmid made reference to the prosecutions by General Governor Warren Hastings, in which, instead of accusing the political opponent of high treason ('*Hochverrat*'), the opponent which Warrren Hastings wanted to eliminate was accused of a common crime:

> Nun ist aber ein anderer Fall denkbar. Ich denke da an die berühmten Methoden des Warren Hastings in Indien, der, wenn er einen ihm unbequemen Maharadscha unschädlich machen oder beseitigen wollte, ihn nicht wegen Hochverrats verfolgte, sondern wegen Verführung Minderjähriger. (4th Meeting AfG, 37)

Even if Schmid's example was taken from an earlier period in history—from the 18th century—the use of the criminal procedure for political ends was a common practice of the totalitarian state (cf. Kirchheimer 1985). Problematising the law of extradition, Lange (1953, 357) writes:

> [E]iner der wesentlichsten Zwecke der Justiz totalitärer Staaten ist, politische oder wirtschaftliche Umwälzungen mit dem Mantel des Rechts zu tarnen. Die Methoden aller totalitären Regimes gleichen sich darin vollkommen. Der politische Gegner wird nicht offen als Hoch- oder Landesverräter verfolgt, er wird zum Kriminellen gestempelt, um ihn in der allem Politischen gegenüber mißtrauischen öffentlichen Meinung des eigenen Landes unmöglich zu machen und zu diffamieren. […] Die neueste Perfektion der totalitären Technik besteht in der Zurüstung von Gesetzen, Verordnungen und Prozessen, die den weltanschaulichen Gegner oder den Angehörigen einer unbeliebten Klasse als gemeinen Verbrecher erscheinen lassen.

The discussions about the differences between the concepts of asylum and extradition, their relation to 'political offences', and how these concepts are outlined in international law, point out, on the one hand, the tone of the deliberations of the Basic Questions Committee and its quasi-judicial language. It further shows how the authors used international law as their point of reference when creating the constitutional asylum provision and when debating its limits.

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humanity" and continues by noting how, "overthrown tyrants have been known to have sought asylum in foreign territory, and foreign countries have immediately granted them asylum for exactly the same reasons for which asylum has been given to purely political offenders; namely, the well founded apprehension that that if extradited, they will be exposed to the risk of being unjustly tried and unfairly punished." (ibid.)

Furthermore, the deliberations show how controversial the definitions of 'asylum', 'extradition' and 'political offences' are and, secondly, how these concepts and definitions can be interpreted and used by different actors for different purposes; by depoliticising or politicising, by widening or narrowing their scope, the labels can be used to offer protection to some but exclude it from others. These different aspects gain special meaning in the geopolitical context in which the *Grundgesetz* was drafted, as will be discussed next.

3.4 Extradition, asylum and the East-West divide

The political aspect of granting and providing asylum to someone with sympathetic political motivations during the Cold War has been emphasised by different commentators, but what has been more frequently overlooked is the role of the constitutional situation for the outcome of the asylum paragraph of the *Grundgesetz*: If the drafting of the asylum clause was influenced by the historical experiences of expulsions, inter-state power politics, the practices of the totalitarian state and "informal practices" between states, then its creation was also strongly shaped by the problematics related to the division of Germany. The following, therefore, outlines these discussions in relation to the concepts of extradition, its exception in the case of political offence and asylum, and the latter's relation to the East-West conflict. The argument is that this particular constitutional context played an essential role in the outcome of the asylum paragraph and the open-ended wording regarding the right to asylum.

The problem of extraditing persons to the Eastern zone was approached by Fritz Eberhard[151] of the SPD in the first reading of the asylum paragraph in the Basic Questions Committee, when questioning the prohibition on extraditing German nationals. In particular, Eberhard mentioned the problem of Berlin: the city was divided into four occupational sectors, and in relation to one sector, Eberhard noted, one could hardly speak of extradition "to abroad", referring to the confusion of what was considered as "a foreign country" in the immediate post-war context when Germany and Berlin were divided into different zones of occupation.[152]

Von Mangoldt, in his turn, defended the idea that extradition of Germans could still take place between different federal states in Germany, even if extradition to abroad remained prohibited. This was the reason why the drafting committee included the phrase "to abroad" in the wording ("*Kein Deutscher darf ins Ausland ausgeliefert werden*"). Von Mangoldt pointed out that this principle did not, however, apply to politically persecuted persons. 'Politically persecut-

151 Eberhard was elected to the Parliamentary Council from Württemberg-Baden. He was one of the political exiles in the Council, having fled Germany via Zürich and Paris to London.

152 "*Ich habe gegen die Fassung einige Bedenken, namentlich im Hinblick auf die Situation in Berlin. In Berlin haben wir Sektoren, die den einzelnen Besatzungsmächten unterstellt sind. Bei einem Sektor kann man aber kaum von "Ausland" sprechen*." (4th Meeting AfG, 35-36)

ed' thus remained a special category of persons to be protected. The important question was, however, whether the clause could be used for Germans in the Soviet occupation zone:

> Wir müssen ausgehen davon, daß innerhalb der deutschen Länder weiter ausgeliefert werden muß. Das ist ein unentbehrlicher Grundsatz. Es muß ausgeschlossen sein, daß etwa Bayern einen Verbrecher nach Nordrhein-Westfalen nicht ausliefert. Daher haben wir mit Absicht eingefügt: "ins Ausland". Anderseits soll dieser Grundsatz für politisch Verfolgte nicht gelten. Die Frage ist: Können wir diesen Satz in deutschen Ländern etwa Bewohnern der russischen Zone gegenüber anwenden? (4th Meeting, AfG, 37)

This was further related to the aspect, as Zinn noted, that there still existed mutual assistance in criminal law matters between the Western and the Eastern zones, and this was something that the drafters did not seek to abolish. When there were, however, reasons to believe that the person in question was sought by the authorities for political reasons, even if formally prosecuted for an ordinary offence, a judge could review the situation and avoid immediately sending the person back to the Soviet zone. The American military government, holding the highest authority, could take a position on the case should the Soviet authorities complain about the actions of the German authorities. If the person had been persecuted politically, on the basis of the international legal norms the judge could refer to the right to asylum and not extradite the person:

> Wir stehen auf dem Standpunkt, daß das Reich noch existiert. Das ergibt sich auch daraus, daß die Behörden der Ostzone und der westlichen Zonen einander Rechtshilfe leisten. Diesen Rechtshilfeverkehr wollen wir nicht unterbrechen. Beruft sich einer aber darauf, daß er formell zwar wegen eines gewöhnlichen Vergehens verfolgt, in Wahrheit aber aus politischen Gründen gesucht wird, dann soll der Richter in den Westzonen sagen: hier prüfe ich nach. So wird es auch praktisch gehandhabt. Wenn ein derartiges Ersuchen gestellt wird, sieht der Richter die Akten ein, vernimmt den Mann und vollstreckt keineswegs sofort den Haftbefehl. Um zu vermeiden, daß die russische Besatzungsmacht bei den Amerikanern Beschwerde führt, daß deutsche Behörden die Rechtshilfe verweigern, schaltet sich bei uns die amerikanische Militärregierung ein und entscheidet, ob sie Bedenken habe oder nicht. Handelt es sich um einen politisch Verfolgten, so kann der Richter in sinngemäßer Anwendung der allgemeinen Regeln des Völkerrechts und in Auslegung des Begriffs des Asylrecht sagen: ich liefere nicht aus. (4th Meeting AfG, 37-38)

The above-mentioned is an example of how the concept of asylum is used with the idea of sheltering persons from extradition and possible unjust punishment and against a prosecution feared to be politically motivated. Schmid, in his turn, continued to argue against the extradition of Germans to the Soviet authorities by using the *Maquis* resistance—the *Maquis* referring to French resistance groups—as an example of the activity that could take place in the Soviet zone and an activity which could possibly be interpreted to fall under the attentat clause meaning that the act would be considered as 'unpolitical' and not subject to extradition. A further example mentioned by Schmid was a young man who burned a Soviet flag or threw stones towards the police. The person could, *an sich*, be accused of breach of the peace. Schmid underlined that the wording

drafted by the committee should be formulated so that it would cover also those possible situations to offer protection against extradition:

> Ich sehe die Zeit kommen, wo in der Ostzone Maquis – Erscheinungen auftreten werden. Die Bevölkerung wird dann, um sich Luft zu machen, zu Akten übergehen, die, sagen wir einmal, die Attentatsklausel streifen. Wollen wir einen Deutschen, der so etwas gemacht hat und deswegen zu uns geflohen ist, ausliefern? Ich bringe dieses Beispiel, um anzuregen, daß unsere Formulierung auch solche Dinge decken sollte. Gesetzt, ein junger Mensch hat eine Sowjetfahne heruntergerissen oder einen Markgraf-Polizisten mit Steinen beworfen. An sich müßte gegen ihn das Verfahren wegen Landfriedensbruch eröffnet werden. Der Mann ist hierher geflüchtet. Sollen wir den Mann ausliefern? Das geht doch nicht. (4th Meeting AfG, 38)

Schmid's term '*Markgraf-Polizisten*' refers to Paul Markgraf, the Chief of Police in East Berlin. Schmid used the anticommunist demonstrations which had taken place in East Berlin on September 6 1948 as an example: the demonstrators had thrown stones towards Soviet soldiers as well they had pulled down a Soviet flag near the Brandenburg Gate. (Cf. Werner 1993, 85)

The East-West problematic brings the asylum debates close to the establishment of the "political offence" as exception in the 19th century and the idea of legitimate resistance against unjust authority. The position of the drafters regarding the Soviet authorities and the Soviet rule limiting the individual freedoms was clear, in particular, when Heuss argued that none of the persons arriving from the Eastern zone would claim they had not been persecuted politically: "*Unter den Menschen, die aus der Ostzone zu uns kommen, um hier eine Stellung zu finden, ist keiner, der nicht erklärt, er sei politischer Verfolgter*" (4th Meeting AfG, 40).

Even if the East-West problematic played an important role in the outcome of the asylum paragraph, explicit discussions relating to the matter remained limited due to the authors' unwillingness to discuss the matter publicly: von Mangoldt held the opinion that the topic was so precarious that it should not be considered in public. Instead, he suggested, the committee should use a short formulation that could be used to offer protection to persons in various situations. The article should not, however, lead to an internal German question, which von Mangoldt saw as dangerous:

> Wir sind von der Erwägung ausgegangen, diese Dinge sind so prekär, daß wir sie in der Öffentlichkeit nicht behandeln können. Es empfiehlt sich also eine kurze Formulierung, die aber die Möglichkeit gewährt, solchen Leuten unter allen Umständen Schutz zu gewähren. Andererseits sollten wir vermeiden, daß zu diesem Artikel eine Diskussion über innerdeutsche Fragen entsteht, die gefährlich werden könnte. (4th Meeting, AfG, 39)

Zinn further noted that neither the authorities in the Eastern nor the Western zone could rely on the practice of extradition: the experiences from both sides of the border had shown that instead of extraditing the persons in question that cases had been brought to trial in the respective zones:

> An sich können sich die Stellen der Ostzone nicht auf die Auslieferung berufen, und umgekehrt. Die russischen Behörden können sagen: Bitte, der Mann, den ihr sucht,

> ist hier und wir urteilen ihn ab. Wir haben solche Fälle gehabt. Ein Mann wurde auf Grund Haftbefehls gesucht, und es kam das Ersuchen, ihn auszuliefern. Unsere Antwort war: Schickt uns die Akten ein; wir verhaften ihn und urteilen ihn ab. (4th Meeting, AfG, 39).

In addition to arguments presented above, for Bergsträsser the phrase "in the frames of international law" could also be interpreted such that, as in the case of Hesse under the military government, the refugees from Czechoslovakia were not only to be admitted but they could also be granted living assistance (4th Meeting AfG, 39). Bergsträsser's argument thus concerned the financial cost of offering protection and the issue of how the wording could be interpreted as requiring duties to provide the living for refugees.

Even if the authors had previously emphasised keeping asylum "in the frames of international law", Schmid proposed the deletion of the phrase from the formulation as the drafters of the *Grundgesetz* would later create a provision whereby the principles of international law would become part of the federal law (4th Meeting AfG, 39).[153]

Following the first reading by the Basic Questions Committee the Article 4 stood as follows:

> Kein Deutscher darf ins Ausland ausgeliefert werden. Politisch Verfolgte genießen Asylrecht.

With the deletion of the qualification clause "in the frames of international law", and with its short formulation, the asylum clause was left open-ended and vague enough to cover different possible situations and allowed for a broad interpretation. It further sought to take into consideration the precarious political situation between the Eastern and the Western occupation zones. The exception of a political offence was used to shelter persons from extradition, but the wording was formulated in a manner that would not let the "frames of international law" limit its application so that, for instance, some offences would not be seen as 'unpolitical' and thus extraditable.

The relation between Germans and asylum is vague at this point in the drafting. The authors, while creating a right for non-citizens, also link Germans and asylum and regard persons in the Eastern zone as being in need of protection from persecution. This argument continues in the Main Committee, albeit conceptualised differently.

Even if the asylum clause refrained from defining what constitutes political persecution or to name what kind of political conviction would lead to asylum, the debates show how the matter of asylum was, nevertheless, strongly related and legitimated in relation to the East-West problematic and to the ideological counterpart in the argument presented by the authors of the asylum paragraph.

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153 Art. 25 GG: "*Die allgemeinen Regeln des Völkerrechtes sind Bestandteil des Bundesrechtes. Sie gehen den Gesetzen vor und erzeugen Rechte und Pflichten unmittelbar für die Bewohner des Bundesgebietes.*"

3.5 Debating conditions of access - definitions of 'politically persecuted'

If the concept of extradition and the notion of a 'political offence' as an exception is essential in understanding the political roots of asylum then the matter of asylum is also connected to the question of admission, especially in the 20th century: asylum is linked with inclusions and exclusions, or the question of who is protection and who is left outside its scope, and how the criteria for access are defined. Kirchheimer (1959, 990) describes the documents of post World War II asylum as "polemical assertions". These legal constructions should be read against their ideological background, although some constitutions are more explicit in naming than others. In this context, asylum turns out to be a matter of expressing political morality, linked with sympathy towards certain kinds of ideologies and political regimes while condemning others. The West German asylum clause offers protection to 'politically persecuted' but gives no further criteria or definitions of what constitutes 'political persecution', leaving the definition vague and open for interpretation.[154] In this sense, the definition focuses on the position of the individual seeking asylum, instead of the interests of the state in granting of asylum to, or withholding it from, certain groups of individuals.

Even if the asylum paragraph refrains from naming the political act which leads to asylum, during the different stages of drafting several different suggestions were presented regarding the categorisation of the 'politically persecuted'. These formulations of a concept of asylum build a picture of the contemporary political landscape and construct a view of how the authors understood the creation of the constitutional order and who could potentially oppose these principles, and further, what kind of definitions were given to the 'political' in relation to 'political persecution'.

According to Richard Thoma, who had been one of the prominent constitutional scholars of the Weimar Republic and who was an expert member of the Parliamentary Council, the asylum paragraph was to be drafted so that it would offer asylum to those foreigners who were persecuted because of "their acts for freedom, democracy, social justice or world peace": "*Ausländer, welche wegen ihres Eintretens für Freiheit, Demokratie, soziale Gerechtigkeit und Weltfrieden politisch verfolgt werden, genießen im Bundesgebiet Asylrecht*" (PR Drs. 11.48-244).

Thoma held a position as a professor of public law and political science of the University of Bonn during his participation in the drafting of the *Grundgesetz*.[155] He was in his commentary critical of the asylum article, for its short formulation which the Basic Questions Committee had drafted, as it could lead to situations where asylum would have to be granted to persons who were per-

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154 For the interpretation of the concept of 'political persecution', cf. von Mangoldt/ Klein 1953; Kimminich 1968; Merl 1968; Münch 1992; von Pollern 1980; Schaeffer 1980; Reichel 1987.

155 For Thoma, see Stolleis 1999 & Thoma 2008.

secuted because of their "communist or fascist agitation against a friendly democratic rule" (PR Drs. 11.48-244).[156]

If the definition which Thoma suggested denied asylum from the Communists, the proposition put forward by the Communist Party—with the formulation "*Politisch Verfolgte genießen Asylrecht, wenn sie ihr eigenes oder ein anderes Land wegen antifaschistischer, antimilitäricher usw. Betätigung verlassen müssen*"—granted asylum to those escaping because of their anti-fascist or anti-military activity (PR Drs. 11.48 -294).

A further voice that argued for narrowing the scope of the asylum paragraph came from the General Editing Committee of the Parliamentary Council. According to the committee, the right to asylum was to be afforded only to "Germans who were persecuted for their actions in favour of freedom, democracy, social justice and world peace": "*Jeder Deutsche, der wegen seines Eintretens für Freiheit, Demokratie, soziale Gerechtigkeit oder Weltfrieden verfolgt wird, genießt im Bundesgebiet Asylrecht*".[157] The committee saw that offering the right of asylum to politically persecuted foreigners would be too broad considering the possible obligations it could lead to (PR Drs. 11.48 -282).[158] The Editing Committee further argued for the deletion of the wording "to abroad" to protect politically persecuted foreigners from extradition to the Eastern zone of occupation.[159]

The conception of asylum formed by the authors on the Basic Questions Committee was made clear by von Mangoldt in the second reading of the asylum paragraph in the committee, in its 23rd meeting on November 19, 1948, when answering various counter arguments and suggestions presented regarding the formulation of the asylum article. Von Mangoldt first defended the phrase "to abroad" ("*ans Ausland*") in relation to extradition as it remained possible that persons who had committed criminal acts could still be extradited, including to the Eastern zone. The formulation of the second paragraph, however, protected the politically persecuted with the right to asylum. Von Mangoldt emphasised that, because of international legal principles on extradition, it was clear that no politically persecuted person could be extradited:

> Zu Art. 4 erhoben sich Bedenken gegen die Worte "ans Ausland". Man machte geltend, es verstehe sich von selbst, daß ans Ausland ausgeliefert werde. Wir haben uns gleichwohl entschlossen, die Worte "ans Ausland" stehen zu lassen; denn es muß möglich sein, daß ein Verbrecher auch an die Ostzone ausgeliefert wird. Darüber

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156 "*Gegen den zweiten Satz des Art. 4 spricht das Bedenken, daß danach auch solchen Ausländern Asyl gewährt werden müsste, welche wegen kommunistischer oder faschistischer Wühlereien gegen eine befreundete Demokratie verfolgt werden.*"

157 The formulation of the Editing Committee: "*Kein Deutscher und kein politisch verfolgter Ausländer darf ausgeliefert werden. Jeder Deutsche, der wegen seines Eintretens für Freiheit, Demokratie, soziale Gerechtigkeit oder Weltfrieden verfolgt wird, genießt im Bundesgebiet Asylrecht.*" (PR Drs. 11.48 -282)

158 "*Die Gewährung des Asylrechts für politisch verfolgte Ausländer erscheint als zu weitgehend, da sie möglicherweise die Verpflichtung zur Aufnahme, Versorgung usw. in sich schließt.*"

159 "*Der Ausschuß hält die Streichung der Worte "ins Ausland" für notwendig, um politisch verfolgte Ausländer auch vor der Auslieferung in die Ostzone zu schützen. Der Schutz politisch verfolgter Deutscher wird insoweit bereits durch Abs. 2 gewährleistet.*" (PR Drs. 11.48 -282)

> könnten Zweifel beim Wegfall der Worte "ans Ausland" bestehen. Die Fassung ist unbedenklich, zumal der politisch Verfolgte nach Abs. 2 Asylrecht genießt. Wir haben diese Bestimmung bewußt weit gefaßt, um einem politisch Verfolgten die Möglichkeit des Verbleibs im Bundesgebiet zu belassen. Wir konnten uns nicht entschließen, dem Vorschlag des Redaktionsausschusses zu folgen und zu sagen: Kein Deutscher und kein politisch verfolgter Ausländer darf ausgeliefert werden. Wir halten es nach den völkerrechtlichen Grundsätzen über das Auslieferungsrecht für eine Selbstverständligkeit, daß ein politisch Verfolgter nicht ausgeliefert werden darf. (23rd Meeting AfG, 14)

Against the different suggestions for limiting the right to asylum and for the additional criteria defining what 'political persecution' was, von Mangoldt spoke for the short formulation of the asylum paragraph by underlining that the authors had knowingly formulated the clause broadly, allowing politically persecuted foreigners the chance to access the country. As a legitimation, von Mangoldt referred to the actions of border authorities during the war: the limitations to the definition would allow the border police to decide on asylum matters, rendering the right to asylum completely ineffective:

> Wir haben indes einen besonderen Grund, nach dieser Richtung vorsichtig zu sein. [..] Nimmt man eine solche Beschränkung auf, dann kann die Polizei an der Grenze machen, was sie will. Es ist dann erst die Prüfung notwendig, ob die verfassungsmäßigen Voraussetzungen des Asylrechts vorliegen oder nicht. Diese Prüfung liegt in Händen der Grenzpolizei. Damit wird das Asylrecht vollkommen unwirksam. Wir haben dafür Erfahrungen aus dem letzten Krieg, namentlich von der Schweiz her. Man kann das Asylrecht nur halten, wenn man die Bestimmung ganz einfach und schlicht faßt: Politisch Verfolgte genießen Asylrecht. (23rd Meeting AfG, 14)

If the earlier deliberations in Basic Questions Committee had focused more on the links between asylum and extradition and on the problematic related to the protection of political offenders, von Mangoldt's argument, with reference to the experience from the Swiss borders during the war, linked asylum with mass movements in the 20th century. This is further related to the shift in the role of asylum and in defining political persecution, extending it to offer protection to persons fleeing persecution not simply for their political actions or political convictions but essentially on the basis of who they were. Here, the author's unwillingness to define the conditions of access was related to the experience of nation states closing their borders to refugees and denying access from those seeking protection.

The example given in von Mangoldt's argument was Switzerland which was a destination for many people attempting to escape the *Third Reich*. However, instead of allowing access, many were sent away at the borders. Jewish refugees, above all, came to be regarded in Switzerland as "undesirable foreigners" and so to prevent Jewish immigration the Swiss government introduced measures such as the so-called passport "J-stamps" in order to identify and spot the Jewish refugees directly at the border (Ludi 2010, 93-94). As a response to the growing numbers of those seeking refuge, the Swiss government eventually closed its borders altogether to Jewish refugees in 1942 (ibid. 82).[160]

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160 On the asylum policies of Switzerland during the World War II, see also Häsler 1985; Battel 2001.

3.6 Unconditionality or *Staatsräson*?

After the paragraph on asylum was formulated in the Basic Questions Committee, deliberations moved to the Main Committee. There, the authors continued to debate the limits of the right to asylum, including those who wanted to narrow the scope of the right by referring to the interests of the state, and those who defended a broader scope underlining that it should not be limited. In the case of asylum, arguments based on *Staatsräson* could, for instance, relate to what kinds of questions a politically active refugee could raise in the receiving state or, in relation to newer questions arising in the context of the 20th century, such as what kind of financial or administrative problems accepting asylum seekers bring with it.

In the first reading of the Main Committee, in December 1948, Hermann Fecht—one of the constitutional scholars of the CDU and the Minister of justice from Baden and one of the authors the *Herrenchiemsee* draft[161]—argued in favour of limiting the scope of the asylum provision by speculating about the consequences of a broad right to asylum, stating that it would lead to a duty to accept persons who were against the legal principles of the new state. Fecht referred to the possibility of having to accept "unlimited number" of fascists who were politically persecuted in Italy as an example of undemocratic thinkers coming to Germany to seek asylum:

> Durch Absatz 2: "Politisch Verfolgte genießen Asylrecht" könnten wir genötigt werden, Faschisten, die in Italien politisch verfolgt werden, bei uns in unbegrenzter Zahl aufzunehmen. Das ließe sich auch auf andere Verhältnisse übertragen, wo es sich um Leute handelt, die nach ihren Grundsätzen undemokratisch sind. Wir wären unter Umständen genötigt, in Massen Leute aufzunehmen, die mit unserer Auffassung und mit unserem Gesetz vollständig in Widerspruch stehen. (18th Meeting HA, 13)[162]

In terms of fascists as a group hostile to the new constitutional construction of the state, Fecht's argument sought to make a clear distinction from the Nazi past. Further, the argument related to state security, which the politically active refugee, not conforming to the political order of the new state, may endanger. The argument was challenged by Schmid who responded to Fecht by saying that asylum did not mean that everyone granted asylum would enjoy freedom of movement. Schmid emphasised the double role of the police authority in protecting both the state as well as the person to whom asylum was granted. However, Schmid was sceptical about the idea of limiting asylum in the case of certain groups of asylum seekers. Instead, he linked the dignity of the act of asylum granting ("*die Würde eines solchen Aktes*") to generosity and unconditionality, and argued that the meaning of asylum would be lost if it was to be restricted by the political interests of the state granting it:

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161 Cf. Keller-Kühne 2008.

162 December 4, 1948.

> Asylrecht bedeutet nicht, daß derjenige, der es in Anspruch nimmt, Freizügigkeit genießt. Gewährung von Asyl ist sehr häufig mit Stellung unter Polizeiaufsicht verbunden, wobei die Polizeiaufsicht die doppelte Funktion hat, einmal den aufnehmenden Staat zu schüzten und weiter den Aufgenommenen zu schützen. Ob man das Asylrecht, wenn man es wirksam machen will, auf bestimmte Gruppen beschränken kann, weiß ich nicht. Die Asylrechtgewährung ist immer eine Frage der Generosität, und wenn man generös sein will, muß man riskieren, sich gegebenenfalls in der Person geirrt zu haben. Das ist die andere Seite davon, und darin liegt vielleicht auch die Würde eines solchen Aktes. Wenn man eine Einschränkung vornimmt, etwa so: Asylrecht ja, aber soweit der Mann uns politisch nahesteht oder sympathisch ist, so nimmt das zuviel weg. (18th Meeting, HA, 13)

To support Schmid's argument, von Mangoldt repeated his earlier argument in the Basic Questions Committee: limitations on the right to asylum would give the border authorities too strong of a role in deciding matters of asylum, rendering the principle meaningless:

> Ich brauche hier nur darauf hinzuweisen, wenn wir irgendeine Einschränkung aufnehmen würden, um die Voraussetzungen für die Gewährung des Asylrechts festzulegen, dann müßte an der Grenze eine Prüfung durch die Grenzorgane vorgenommen werden. Dadurch würde die ganze Vorschrift völlig wertlos. (18th Meeting HA, 14)

Von Mangoldt's point is linked to the idea that certain groups of persons would not even have a chance to enter the country at the border in order to claim protection, and Schmid further noted that it could lead to situations where the person seeking protection could be sent back or from one state border to another: "*Dann beginnt das Spiel: man schickt den Mann zurück oder man schickt ihn an die andere Grenze, und von dort geht es wieder weiter.*" (18th Meeting HA, 14)

Schmid's argument is reference to the "refugees in orbit" situations in which refugees could not find state protection anywhere (see also Pellonpää 1984). This was further followed by von Mangoldt's note „*[w]ir haben unsere Erfahrungen aus dem Krieg*". The reference to war acted as a strong argument after which Fecht stated he made no proposal as regards to the right to asylum but wanted his point to be stated clearly in the protocol. (18th Meeting HA, 14)

Even if Schmid's notion of asylum and the dignity of the act of granting asylum included the risk of making mistaken judgements about someone, Schmid's 'unconditionality' was, however, emphasised as being limited inside within the framework of international law. To Schmid, the idea meant, above all, that those violating the attentat clause could not be granted asylum. Persons guilty of assassination could be extradited and right to asylum right did not belong to them, but to Schmid there was no duty to extradite political offenders, even if extradition agreements existed between the states. Schmid made a further reference to the model of the Scandinavian countries and the role of the courts in deciding who should be extradited. Schmid emphasised that the final decision should not be on the foreign ministry or the ministry of police—it not being a matter of foreign or national politics—but on a court, further emphasising the differences between the 'judicial' and 'political' institutions:

> Es ist klar, daß dieses Asylrecht nur im Rahmen der völkerrechtlichen Bestimmungen ausgeübt werden wird, daß also der Attentatsklausel gegenüber das Asylrecht nicht gilt. Im Völkerrecht besteht Übereinstimmung darüber, daß ein Attentäter sich nicht auf das Asylrecht berufen kann, er darf also ausgeliefert werden; während der "politische Verbrecher", der nicht unter die Attentatsklausel fällt, nicht ausgeliefert zu werden braucht, auch wenn ein Auslieferungsvertrag besteht. Vielleicht könnte man überlegen, ob man nicht, wie die skandinavischen Staaten es getan haben, eine Bestimmung vorsehen könnte, wonach ein Gericht zu prüfen hat, ob der Einzelfall so liegt, daß ausgeliefert werden muß oder ausgeliefert werden kann. Es sollte nicht das Auswärtige Amt oder gar der Polizeiminister sein, die die letzte Entscheidung treffen. (18th Meeting HA, 14-15)

The General Editing Committee of the Parliamentary Council renewed its suggestion for the asylum article, i.e. Article 17:

> Kein Deutscher und kein politisch verfolgter Ausländer darf einer auswärtigen Regierung zur Verfolgung oder Bestrafung ausgeliefert werden. Jeder Deutsche, der wegen seines Eintretens für Freiheit, Demokratie, soziale Gerechtigkeit oder Weltfrieden verfolgt wird, genießt im Bundesgebiet Asylrecht. (PR Drs. 12.48 – 370)

The Editing Committee continued to speak for a narrower scope of the asylum paragraph as well as granting asylum only to Germans, following its earlier draft. The formulation of the editors prohibited the extradition of Germans and politically persecuted foreigners to a foreign government. Asylum was to be granted only to "Germans who had fought for freedom, democracy, social justice or world peace". In the commentary, the committee opposed "the unrestricted right to asylum" to "undesirable foreigners", especially to those having "actively acted against democracy" in their country of origin. Persecuted foreigners were, however, protected against extradition which was seen as the adequate form of protection. The committee thus made a distinction between asylum and the non-extradition of political offenders, noting that the expulsion of foreigners could still be possible. The Editing Committee did not conceptualise the question from the point of view of being a right of the individual, but made reference to the Weimar legislation, which had listed extradition as something the *Reich* had jurisdiction over, and not as a right of the individual to be protected:

> Es empfiehlt sich nicht, das Asylrecht auch auf die politisch verfolgten Ausländer auszudehnen, da kein Anlaß besteht, das unbeschränkte Asylrecht auch unerwünschten Ausländern zu gewähren, insbesondere auch solchen, die aus ihren Heimatstaaten wegen aktiver Betätigung gegen die Demokratie in das Bundesgebiet geflüchtet sind. Dagegen soll – und das dürfte ein völlig ausreichender Schutz sein – jeder Deutsche und politisch verfolgte Ausländer nach dem Vorschlag des Redaktionsausschusses gegen eine Auslieferung an auswärtige Regierungen geschützt werden. Im Übrigen erschien es angebracht, bei der Auslieferung sich der Formulierung der Weimarer Verfassung zu bedienen. Die vorgeschlagene Fassung gibt den Ausländern zwar ausreichenden Schutz gegen Auslieferung, läßt es aber zu, daß gegebenenfalls eine Ausweisung erfolgt. (PR Drs. 12.48 – 370)

The stance of the Editing Committee led to disputes about the concepts of 'asylum' and 'extradition', and how they were to be defined. These arguments also show the difference between the idea of protection of political offenders from extradition and the right to asylum which the Basic Questions Committee had

formulated. In the second reading of the Main Committee (44th meeting), when defending the formulation of the editors, Heinrich von Brentano (CDU) emphasised the clear distinction between the concepts of 'asylum' and 'extradition': every politically persecuted person should be protected against extradition, however, granting "absolute political asylum" would go too far as it would create conditions for, and benefit those who had acted against the "democratic basic order" of their country of origin to remain in Germany and to continue their lives without any punishment for their actions, without the possibility to expel them, underlining thus the negative impact that the politically active fugitive could have for the host country. Asylum would be given to Germans who had "fought for democracy"—referring to the inhabitants of the Eastern zone—but foreigners would not have access to the unlimited right to asylum:

> Wir haben diese Formulierung bewußt gesucht; denn wir waren der Meinung, daß wir trennen müssen zwischen Auslieferung und Asylrecht. Jeder politisch Verfolgte soll von einer Auslieferung geschütz sein. Es geht mir aber zu weit und ich glaube auch nicht, daß der Zweck einer solchen Vorschrift sein kann, daß wir generell dem politisch Verfolgten das absolute Asylrecht geben. Ich sehe keinen Grund dafür ein, daß etwa Ausländer, die aus ihrer Heimat nach Deutschland gekommen sind, weil sie sich in ihrer Heimat aktiv gegen die Demokratie eingesetzt haben, in Deutschland unbedingt ein Asylrecht haben sollen. Sie sollen gegen Auslieferung geschützt sein, aber es soll die Möglichkeit bestehen, sie des Landes zu verweisen. Wenn wir das Asylrecht so weit fassen, dann schaffen wir Voraussetzungen dafür, das alle diejenigen, die sich wegen eines aktiven Einsatzes gegen die demokratische Grundordnung in ihrer eigenen Heimat nicht aufhalten können, in Deutschland ungestraft und unter Berufung auf dieses Asylrecht weiterleben und weiterarbeiten können. Wir haben bewußt die Trennung gesucht und gefunden, in dem wir sagten: Kein Deutscher und kein politisch verfolgter Ausländer darf ausgeliefert werden. Das ist ein Grundsatz, zu dem wir uns sicherlich alle bekennen. Das unbeschränkte Asylrecht soll den Deutschen gegeben werden, die sich wegen ihres Eintretens für die Demokratie auf dieses Asyl zurückziehen. Ein Ausländer, der wegen entgegengesetzter Bestrebungen hierher nach Deutschland kommt, kann dieses unbeschränkte Asylrecht nicht in Anspruch nehmen.[163] (44th Meeting HA, 66-67)[164]

Friedrich Wilhelm Wagner (SPD) in responding to von Brentano asked for clarification of the concepts of 'extradition' and 'asylum' which appeared to have become blurred by the Editing Committee formulation. Wagner noted that Germans could not be extradited ever, for any reason, as an elementary rule relating to state sovereignty: "*Ein solcher Deutscher darf, ganz gleich, aus welchem*

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163 In relation to the argument presented by von Brentano about having to grant asylum to persons "fighting against the democratic basic order", the stance of the *Bundesverfassungsgericht* (1957) should be noted: "*Das Grundgesetz ist nicht wertneutral, sondern stellt eine wertgebundene Ordnung dar, deren Maßstab die freiheitliche demokratische Grundordnung ist, (...) In diesem Wertrahmen ist auch Art. 16 II 2 GG zu sehen, seine Auslegung hieran auszurichten. Hat daher der Asylsuchende im Ausland ein Verhalten an den Tag gelegt, das die dort bestehende freiheitlich demokratische Ordnung gefährdet, so genießt er in der BRD kein Asylrecht. Dieses Recht kann nicht von Personen in Anspruch genommen werden, die in einem anderen Staat die freiheitliche Ordnung mit dem Ziel der Errichtung einer Willkürherrschaft bekämpft haben und vor der Verfolgung durch diesen Staat in die Bundesrepublik geflüchtet sind.*" (BVerwG I C 166.56 v. 17.1.1957 quoted in Lieber 1973, 208-209. Moreover, Article 18 GG stipulates that the right to asylum can be limited if it endangers the "free democratic basic order".

164 January 19, 1949.

Grund immer, nicht ausgeliefert werden. Ich glaube, daß ist ein elementarer Satz, der mit der staatlichen Souveränität des eigenen Landes zusammenhängt." (44th Meeting HA, 67-68) Wagner further underlined that Germans did not need political asylum in Germany; asylum was a right that was to be granted to foreigners who could not remain in their country of origin because the political system threatened their freedom or lives:

> Ein Deutscher braucht doch in Deutschland kein politisches Asylrecht. Asylrecht ist doch das Recht, das dem Ausländer gewährt wird, der in seinem eigenen Land nicht mehr leben kann, weil er durch das politische System seiner Freiheit, seines Lebens oder seiner Güter beraubt würde. (44th Meeting, HA, 68)

Wagner emphasised that conceptually asylum was a right that was granted, not to nationals but to non-nationals. The concept of 'refuge' meant that a person was fleeing from his state of origin and came to Germany to seek for protection and shelter:

> Das Asylrecht setzt voraus – das gehört begrifflich überhaupt dazu – daß es sich nicht um einen Angehörigen der eigenen Nation dreht. Deswegen sucht er ja bei uns Asyl, Zuflucht. Dieser Begriff der Zuflucht heißt doch: Er kommt aus einem anderen Land geflüchtet und sucht bei uns Schutz und Unterkunft. Das ist doch der natürliche Begriff des Asyls und der Zuflucht. (44th Meeting, HA, 68)

Wagner opposed the idea that the offer of asylum should be limited to those whose political convictions the authors of the article shared. Following Schmid's earlier points, Wagner spoke for the idea of an "unconditional right to asylum". In Wagner's view the authors should either grant the right to asylum, or abolish it. Restrictions or conditions would, however, be the beginning of the end of the ancient legal principle of asylum:

> Ich glaube, man sollte da vorsichtig sein mit dem Versuch, dieses Asylrecht einzuschränken und seine Gewährung von unserer eigenen Sympathie oder Antipathie und vor der politischen Gesinnung dessen abhängig zu machen, der zu uns kommt. Das wäre dann kein unbedingtes Asylrecht mehr, das wäre ein Asylrecht mit Voraussetzungen, mit Bedingungen, und eine solche Regelung wäre in meinen Augen der Beginn des Endes des Prinzips des Asylrechts überhaupt. Entweder wir gewähren Asylrecht, ein Recht, das, glaube ich, rechtshistorisch betrachtet, uralt ist, oder aber wir schaffen es ab. (44th Meeting, HA, 68)

Von Mangoldt gave support to Wagner's argument when he further claimed that the Editing Committee had mixed the concepts of 'asylum' and 'extradition', pointing out the difference between political persecution and criminal offences:

> Wenn man sagt, der politisch Verfolgte genießt Asylrecht, so bedeutet das gerade, daß der politisch Verfolgte nicht ausgeliefert wird. Man sagt damit nämlich: Der straftrechtlich Verfolgte wird ausgeliefert. Nur das ist der Sinn des Asylrechts. [...] Aus den Gründe über die wir ja in der ersten Lesung hier im Hauptausshuß sehr eingehend gesprochen haben und zu denen noch Gründe kommen, die Herr Kollege Wagner angeführt hat, sollte man diese Art des Asylrechts nicht einführen, weil man damit eine Prüfung an der Grenze veranlasst, die das Asylrecht als solches überhaupt in Frage stellt. (44th Meeting, HA, 71)

What this shows is that the views of the representatives of CDU differed in regard to the matter of asylum. Whereas von Mangoldt supported the short and open-ended formulation of the asylum paragraph drafted by the Basic Questions Committee, von Brentano—as had Fecht—spoke for the formulation of a criteria according to which those opposing the constitutional rule could be filtered by emphasising that Germany should not be turned into "an oasis of politically persecuted who had fought against democracy in their country of origin and would continue the same fight also in the country of asylum". Von Brentano argued that it should possible that a foreigner not be extradited, but that they may be expelled should they be danger to the state, underlining that such a possibility would be lost within the general wording "politically persecuted enjoy the right to asylum".

> Erstens, es ist eine grundsätzliche Frage – darüber bin ich mir klar -, ob man Asylrecht ganz generell geben soll oder nicht. Aber ich frage mich – und ich bitte Sie, daß sie diese Frage auch vorlegen - ob es richtig und notwendig ist, daß wir das Asylrecht so weit ausdehnen, daß wir etwa in Deutschland zur Oase auch derjenigen politisch Verfolgten werden, die ihre Tätigkeit, die sie zum Abwandern aus ihrer Heimat verlaßt hat, auch hier fortsetzen werden, nämlich den Kampf gegen die Demokratie. Ich glaube nicht, daß eine Verpflichtung besteht, das Asylrecht so weit auszudehnen. Es muß die Möglichkeit gegeben sein, zwar einen Ausländer nicht auszuliefern, aber ihn wegen seiner gesamten staatsgefährlichen Haltung des Landes zu verweisen. Diese Möglichkeit ist nicht mehr gegeben wenn wir generell sagen: Politisch Verfolgte genießen Asylrecht." (44th Meeting, HA, 72)

Von Brentano, who, as noted, strongly advocated for the concept of *'Provisorium'*—as well as underlining the "transitory character" of the Basic Law on several occasions during the Parliamentary Council deliberations (cf. Agethen 2008, 125-126)—defended the Editing Committee' s linking of Germans and asylum by referring to the "tragic constitutional situation" in which no Germany existed: the term 'Germans' meant also those in the Eastern zone to whom, in particular, asylum was to be granted. As long as the partitioning of Germany remained uncertain it was important to state that all Germans enjoyed asylum in the federal territory:

> Er spiegelt letzen Endes die ganze Tragik unserer staatsrechtlichen Situation wider, daß wir kein Deutchland haben. Deswegen haben wir mit Rücksicht auf die Lage, in der wir zur Zeit sind und von der wir nicht wissen, wann sie sich ändern wird, noch obendrein gesagt, daß ein Deutscher innerhalb des Bundesgebietes Asylrecht genießen muß. Das gilt inbesondere für die Deutschen, die heute aus der Ostzone zu uns kommen und denen wir Asylrecht im Bundesgebiet ausdrücklich geben wollen, obwohl sie nicht Bundesangehörige sind. (44th Meeting HA, 72)

Despite the arguments presented by von Brentano, the idea of "absolute right to asylum" also received support from the national conservatives.[165] Hans-

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165 The suggestion of the *Deutsche Partei* was that the articles on citizenship, extradition and asylum were put together with the following formulation: *"Kein Deutscher darf ausgeliefert, des Landes verwiesen oder ausgebürgert werden. Politisch Verfolgte genießen Asylrecht. Der Verlust der Staatsangehörigkeit darf nur durch Gesetz für die Fälle vorgesehen werden, in denen der Betroffene eine andere Staatsangehörigkeit erworben hat."* (PR Drs. 12.48-403)

Christoph Seebohm, a representative of the German Party, however, advocated for a change to the wording concerning the extradition clause. For Seebohm, the formulation should include an additional criteria stating that no Germans who were persecuted because of "their advocacy for democracy, social justice or world peace" could be extradited, not even inside the current federal territory. Further, Seebohm advocated for the deletion of the wording "to abroad" ("*an das Ausland*") ("*Wie soll anders als an das Ausland ausgeliefert werden?*"). To Seebohm, surrendering criminal offenders "to another part of Germany that was currently not part of the federal territory" was not extradition. Seebohm, however, argued that the term 'extradition' could be used and imposed later by the occupation authorities to extradite Germans within the federal territory:

> Ich muß mich grundsätzlich für das absolute Asylrecht aussprechen, trotz der Bedenken, die Herr Kollege Dr. von Brentano vorgetragen hat. Ich bin allerdings der Auffassung, daß man noch eine Bestimmung dahin aufnehmen sollte, daß diejenigen Deutschen, die wegen ihres Eintretens für die freie Demokratie, die soziale Gerechtigkeit oder den Weltfrieden verfolgt werden, auch innerhalb des jetzigen Bundesgebiets nicht ausgeliefert werden dürfen. Gerade das sollten wir hinzusetzen, wenn wir andererseits gemäß meinem Antrag die Worte "an das Ausland" streichen. Diese Streichung halte ich trotz der Ausführungen des Herrn Kollegen Dr. von Mangoldt doch für dringend notwendig. Eine Überstellung strafrechtlich Verfolgter an ein anderes Gebiet Deutschlands, das zur Zeit nicht Bundesgebiet ist, ist keine Auslieferung. Dagegen kann ich mir vorstellen, daß man mit diesem Begriff 'Auslieferung' Vorgänge deckt, die sich auch innerhalb des Bundesgebietes vollziehen, nämlich dann, wenn uns später auf Grund des Besatzungsstatuts unter Umständen die Auflage gemacht wird, deutsche Menschen an die Besatzungsbehörden zu überstellen, die sie ihrerseits ausliefern. Ich möchte das gerade hier ausdrücklich dadurch verhindert wissen, daß die Worte 'an das Ausland' gestrichen werden. Wenn uns im Besatzungsstatut oder auf andere Weise ein solcher Zwang auferlegt werden sollte, dann soll das ein ausdrücklich von der Gegenseite zu verantwortender Eingriff in die menschlichen Grundrechte der Deutschen sein. (44th Meeting HA, 73-74)

Seebohms argument against the occupation authorities received not further comment from the members of the Main Committee, but his suggestion to reformulate the extradition clause (*„Kein Deutscher darf ausgeliefert oder des Landes verwiesen werden")* gained some support in the committee, although it was eventually rejected by a margin of 10 votes to 5. The idea that Germans would need asylum in Germany, as advocated by von Brentano, was eventually answered by Eberhard of the SPD, who noted that Article 11 of the draft *Grundgesetz* granted liberality (*'Freizügigkeit'*) to all Germans in the federal territory.[166] Eberhard noted that the article had been worded to include 'all Germans' (*'Alle Deutschen'*) instead of talking about 'citizens' (*'Bundesangehörigen'*), which meant that there was no need to explain that in addition to foreigners, Germans would also be protected by asylum:

> Nachdem Herr Kollege Dr. von Brentano nochmals auf Absatz 2 in der Fassung des Redaktionsausschusses eingegangen ist, wo für jeden Deutschen im Bundesgebiet ein Asylrecht statuiert wurde, möchte ich darauf hinweisen, daß wir in Artikel 11 allen Deutschen Freizügigkeit im ganzen Bundesgebiet gegeben haben. Dadurch scheint mir diese Notwendigkeit zu entfallen. Wenn es dort weiter geheißen hätte:

166 "*Alle Deutschen genießen Freizügigkeit im ganzen Bundesgebiet*." Art. 11(1) GG

> "Alle Bundesangehörigen genießen Freizügigkeit", dann hätte ich auch erklärt, daß ich nicht nur Ausländer als politisch Verfolgte im Sinne des Artikel 17 Absatz 2 betrachten würde, sondern auch Deutsche die über die Grenze ins Bundesgebiet kommen. Aber da wir ja Artikel 11 in anderer Fassung angenommen haben, scheint mir die Frage erklärt zu sein." (44th Meeting HA, 74)

3.7 "*Ich habe etwas Erfahrung mit solchen Rechten*"[167]

While speaking for the unconditionality of asylum Wagner saw the "situation in between", advocated by von Brentano, as the beginning of the dismantling of the right to asylum. Contrary to von Brentano's argument about the constitutional situation and the need to link Germans and asylum, and limit asylum to Germans only, Wagner saw the "political brokenness" of Germany as a reason why the right to asylum should not be dismantled at all:

> Ich glaube, unsere politisch außerordentlich zerissene und unruhige Zeit ist nicht dazu angetan, dieses Recht auch nur im geringsten irgendwie abbauen zu wollen; denn sehen Sie, ich habe etwas Erfahrung mit solchen Rechten, genau so, wie Herr Kollege Renner. Wir haben ja teils beinahe in der gleichen Stadt, ja beinahe im gleichen Büro unser Asylrecht gemeinsam genossen. (44th Meeting HA, 69)

A lawyer by profession, Wagner was elected to the Parliamentary Council from the *Landtag* of Rhineland-Palentine. He was also one of the members of the Council who had personal experience as political exile, both in France and the later, after Nazi Germany had invaded France, from the USA where he fled in 1941. Wagner had been a member of *Reichstag* between the yeas of 1930-33. He was arrested in 1933 but fled to France via *Saarland* and Switzerland. In France Wagner practiced as a lawyer, working particularly on matters of asylum. He is known to have kept active contact with the exile groups both in France and later in the USA. (Cf. Lange 2008)[168]

Another delegate in the Main Committee who had lived in exile and later under internment was Heinz Renner of the Communist Party. After the Nazi rise to power in early 1933 Renner fled to the *Saargebiet*, governed by the League of Nations, and, in 1935 after the Nazi-Germany took over the region, to Paris where Renner took part in the KPD exile politics. Renner was imprisoned in France in 1939 and interned in the camp of *Le Vernet*. He was extradited to Germany in 1943, handed over to Gestapo and sentenced to death by the *Volks-*

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167 "Of such rights I have some experience".

168 Chaput de Saintonge describes Wagner as follows "Wagner, while not being one of the major personalities of his Fraction was nevertheless a strong character with a mind of his own. In addition to being Chairman of the Competence Committee, he was a member of the Occupation Statute Committee and reserve member of the Organisation and Occupation Statute Committees. His views were very strongly centralist and he frequently had sharp clashes with members of the opposing parties. He was one of the principle advocates of the abolition of the death sentence." (Pommerin 1988, 585-586) Wagner was elected to the *Bundestag* (1949-1961). During the years 1961-67 he was the vice-president of the *Bundesverfassungsgericht*.

gerichtshof[169] in Berlin. Renner was to be sent to *Dachau* when he was released by the French troops in 1945.[170]

Renner was elected to the Parliamentary Council in Nordrhein-Westfalen. He became the *Oberbürgermeister* of Essen in 1946 where he had been active in politics since the 1920's and early 30's. Renner was originally a substitute for Hugo Paul on the Parliamentary Council. He was one of the two Communist Party delegates in the Council, strongly opposing the division of Germany. Renner eventually voted against the acceptance of *Grundgesetz ("Ich unterschreibe nicht die Spaltung Deutschlands")*.[171] He was an active debater, known for his polemical style which gave rise to controversy, but as Lange (2008) writes, did not lead to his isolation by other members of the Parliamentary Council. In the Main Committee, Renner was originally a substitute for Max Reimann, but his arguments and conceptualisations came to form an interesting part of the asylum deliberations in the committee.

Although Wagner and Renner shared some common experiences from exile in Paris—the city being, in addition to Prag, destination for many exile politicians from SPD and KPD and, in general, the centre of the exile politics and debates in Europe—this also caused some controversy between the two delegates in the Main Committee when deliberating on asylum. This issue turned on Renner's imprisonment after the Hitler-Stalin pact of 1939, which to Renner was "*die Preisgabe des Asylrechts der deutschen Kommunistengruppe gegenüber*" (44th Meeting HA, 76).[172] This disagreement also led Schmid to note that the delegates should continue their disputes somewhere else rather than in the public deliberations of the Main Committee.[173]

From 1933 until 1935 Paris was the main destination for the KPD exile politics before the main office was transferred to Moscow. Paris, along with Prague, was also the centre for SPD exiles. (Saint Sauveur-Henn 2002, 24-25) When speaking in the Main committee, both Wagner and Renner legitimated their points and arguments against limiting the right to asylum by referring to their personal experiences from France. Wagner argued, France was a country which had accepted "people from all directions", including the German anti-fascists and before this also the Russian Czarists, without claiming that the Czarists were against the "holy principles" of France:

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169 The *Volksgerichtshof* was an essential part of the political jurisdiction of the *Third Reich* in prosecuting its opponents (cf. Rätsch 1992).

170 During the years 1946-49 Renner was a member of the *Landtag* of Nordrhein-Westfalen, he became the Social Minister of the state in 1946, and he was the Minister of transportation during the years of 1947-48. Renner was a member of *Bundestag* in 1949-1953. After the banning of the Communist Party 1956 Renner faced financial difficulties and left for East Berlin in 1960. See Lange 2008; see also Renner in *Neue Deutsche Biografie* 2003.

171 11th Meeting Plenum, 10.5.1949. *Der Parlamentarische Rat*. Bd. 9, p. 695.

172 Renner stated to Wagner: "*Sie haben so nett wahrheitgemäß von der Tatsache gesprochen, daß wir bis zu einem gewissen Zeitpunkt im gleichen Raum gearbeitet haben. Aber als der Trennungstag kam, da ging ich ins Gefängnis*." (44th Meeting, HA, 76)

173 "*Ich schlage vor, daß die Herren diese Auseinandersetzung auf eine stillere Stunde verschieben*." (44th Meeting, HA, 69)

> Betrachten Sie zum Beispiel Frankreich, das große Land, das Menschen aller Richtungen aufgenommen hat, sowohl uns deutsche Antifaschisten als auch früher die Zaristen. Hätte Frankreich etwa sagen dürfen und sollen, es nehme als französische Demokratie die Zaristen, die Anhänger einer Blutherrschaft der Eindrückung des Russischen Volkes nicht auf, weil das ihren heiligsten Prinzipen widerspreche? Ein danach aufgebautes Recht hätte man nicht mehr als Asylrecht anerkennen können. (44th Meeting, HA, 69)

Renner, in his turn, was critical toward the notion that those coming from the Eastern zone should be in need of political asylum in West Germany. Renner criticised his fellow delegates for failing to note that the *Grundgesetz* provided '*Freizügigkei*t' for all Germans and saw the link to asylum and the Eastern zone and the idea that people there were persecuted politically as the result of political agitation:

> Ist es für Sie denn nicht etwas sehr Eigenartiges, diejenigen, die aus der Ostzone als angeblich politisch Verfolgte nach dem Westen kommen, als Personen anzusehen, die das politische Asylrecht geltend machen? Sie dürften es doch eigentlich gar nicht für notwendig erachten, daß die dann erst noch einmal mit dem Anspruch auf Asyl kommen. Die müßten Sie doch logischerweise, zumal Sie die Freizügigkeit aller Deutschen konzediert haben, ohne weiteres als vollberechtigte Deutsche ansprechen. Bei dieser Personengruppe dürfte überhaupt nicht der Gedanke an die Notwendigkeit des Asyls aufsteigen. Da geht offenbar das politische Agitationsbedürfnis so durch die Köpfe, daß man gar nicht mehr klar zu sein scheint. (44th Meeting HA, 74)

Renner gave his support for the inclusion of the right to asylum right and argued against the narrowing of the scope of the asylum article rather than for the earlier proposal of granting asylum only to certain groups by the KPD. Renner's argument was critical of von Brentano's approach of limiting asylum to those who were forced to leave their countries of origin as a consequence "for their advocacy for democracy" and emphasised that every country in Europe, even Spain, defined itself as democratic, even if the conceptions of democracy between the different states would be completely opposed to each other. Persons who did not share the view-points of the current regimes were considered as "fighters against democracy". In so doing Renner, like Wagner, made reference to France, arguing that France had offered the "absolute right to asylum" before the Vichy rule, meaning that all groups were accepted, including the German communists and anti-fascists. After heckling from the audience with people calling out the name (Hermann) Rauschning, a conservative nationalist politician who had joined the NSDAP but later fled to France, Renner speculated that in addition to Rauschning, Hitler would also have found asylum in France: "*wenn Hitler gekommen wäre, hätte er dort auch Asylrecht bekommen, seien Sie sicher*." (44th Meeting, HA, 76)

> Nun zur Sache selber, zur Einengung des Asylrechts. Herr Dr. von Brentano will das Asylrecht nur denen gewähren, die ihr Heimatland verlassen mußten, weil sie aufrechte Kämpfer für die Demokratie waren. Nun kenne ich kein Land in Europa, das nicht von sich behauptet, daß der Zustand in seinem Land die Demokratie schlechtin ist. Ich kenne kein solches Land. Alle Länder, auch Spanien, behaupten, demokratische Länder zu sein. Die Meinungen darüber gehen natürlich auseinander. Was der eine als Demokratie ansieht, ist dem anderen das Gegenteil. Ich lasse durchhaus offen, welche Meinung richtig ist. Ich rede nur schlechthin von der Tatsache, daß jedes

> Land seine Regierungsform als demokratisch anspricht. Nur diejenigen, die gegen die dort existierende Staatsordnung angehen, verstoßen dann nach Auffassung der dort herrschenden Gewalt gegen die Demokratie. Sie müssen aus diesem Grund das Land verlassen. Sie sind also in jedem Fall vom Standpunkt ihres Heimatlandes aus gesehen, als Kämpfer gegen die Demokratie in dem jeweiligen Land anzusprechen. Daß man aber im 20. Jahrhundert als politisch reifer Mensch und Demokrat überhaupt den Gedanken aussprechen kann, es sei notwendig, das Asylrecht einzuengen, das geht weit über mein Begriffsvermögen hinaus. Es gehört doch hier zum guten Ton, die größten europäischen Länder geradezu als Muster von Demokratien hinzustellen; ich denke an Frankreich und England. Wie steht es damit? Frankreich war das Land, das bis zu einem gewissen Zeitpunkt - nämlich bis zu dem Zeitpunkt, als die Kräfte von Vichy an die Macht kamen – das absolute Asylrecht gewährte. Da wurden aus Deutschland Kommunisten und Antifaschisten jeder Schattierung aufgenommen. Es wurden die Kämpfer für das Zarentum, Weißgardisten usw. aufgenommen, jeder hatte Asylrecht. (44th Meeting, HA, 75)

Speaking for the right to asylum right (above) Renner saw that such a right belonged to the tradition of states that presented themselves as "models for democracy", like England and France. Renner, however, noted that the asylum practices in England had been more careful than in France: the Communists were accepted there only under certain conditions. Renner noted that the Communists were generally not accepted to the USA either, pointing towards the idea of selective policy as regards to which the political activity of certain groups of persons were more undesirable than others or these groups were seen to present a risk in relation to the state: "*England [war] trotz Anerkennung des allgemeinen Asylrechts schon etwas vorsichtiger. Da durfte ein Kommunist nur unter gewissen Kautelen hineinkommen. Die USA schlossen ebenfalls bei genereller Anerkennung des Asylrechts die Kommunisten von vornherein aus*."(44th Meeting HA, 75)[174]

As the arguments presented by these two authors, both with personal experience of exile in France, point out that France accepted political exiles and refugees coming from Germany, although perhaps not always with such open arms (cf. Badia 2002, 29). Nevertheless, the refugee policy of France was "extraordinarily liberal" during the first months after Hitler's seizure of power (Caron 2010, 57). Caron (1999, 1) writes how the country "emerged as the major haven for German and Central European refugees". The refugee policy, however, hardened towards the end of the decade, paving the way for the anti-Semitism of the Vichy regime.[175]

It is worth noting that in relation to France, neither Wagner nor Renner spoke of mass-flight, or Jewish refugees, the refugees *par excellence*, but of politically active individuals, persons fleeing because of their political convictions. Renner, in particular, conceptualised the asylum-seeker as a politically active person who had left the country of origin as a result of opposing the political regime. When deliberating over the citizenship article, Renner saw the asylum-seeker as the enemy of the existing political order:

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174 For the exile politics in Britain, see Edinger 1956 & Grenville & Reiter 2011; for asylum policies in the US and UK see also Kirchheimer 1959.

175 For the Vichy regime and Jews cf. Marrus & Paxton 1981.

> In Art. 17 ist das politische Asylrecht vorgesehen. Wer beansprucht dieses politische Asylrecht? Der Bürger eines anderen Staates, der nach Deutschland geflüchtet ist. Warum ist er nach Deutschland geflüchtet? Weil er in seinem Heimatstaat mit der politischen Ordnung nicht mehr zufrieden war. Er ist ein Gegner der dort bestehenden politischen Ordnung. Ob man diese politische Ordnung für richtig oder für falsch ansieht, lasse ich durchaus offen. Er verläßt jedenfalls sein Heimatland als Feind, als Gegner der dort herrschenden Staatsordnung. (44th Meeting, HA, 63-64)

In the context of the 20th century, the active conceptualisation of the political offender was, however, not enough to cover those persons needing protection. Lange, for instance, wrote in his post-war article about the new passive conceptualisation of political offenders with the notion of 'undesired' groups being targeted by politically motivated prosecutions:

> [A]ls zentrale Figur im Auslieferungs– und Asylrecht an die Stelle des politischen Verbrechers, also eines Täters, der bestimmte Einzeltaten begangen hat, längst der politische Flüchtling getreten ist, an Stelle eines aktivistischen Begriffs ein passivistischer. […] Damit ist zunächst eine gewisse Verlagerung des Schwerpunktes vom Auslieferungsrecht auf das Asylrecht eingetreten, das den Schutz nicht nur vor Auslieferung, sondern auch vor Abweisung und Abschiebung umfaßt. Weiterhin aber wird man dem Begriff des politischen Deliktes eine neue Dimension geben müssen: nicht von den Motiven des Täters her gesehen, auch nicht von der objektiven Richtung gegen politische Güter des verfolgenden Staates her, sondern von dessen subjektiven Absichten, politische Ziele mittels vorgeschobener Strafprozesse an Anhörigen unbeliebter Bevölkerungsgruppen zu vollstrecken. (Lange 1953, 377)

The passive conceptualisation of political refugee can be found, for instance, in the 1951 Convention relating to the status of refugee which determines 'refugee', not as someone (necessarily) committing a political crime, but as someone who cannot return to the country of origin as the person fears persecution on the basis of race, religion, nationality, membership to a social group or because of a political opinion. This conceptualisation means being a victim of persecution without necessarily engaging in a political battle in the country of origin. (Cf. Van den Wijngaert 1980, 27-28)

A further reference made by Renner about political concepts and their political usage concerned the narrowing of the term 'political emigrant', a development which he opposed. Renner made reference to the Nazi authorities which had misused the concepts and charged those emigrating from the country with criminal accusations resulting in the concepts of 'political emigrant' and 'criminal fugitive' becoming mixed. Renner's argument thus relates to the totalitarian state which had used criminal procedural channels for persecuting its political opponents:

> Man soll sich hüten, den Begriff 'politischer Emigrant' irgendwie einzuengen. Die Praxis hat bewiesen, daß ein großer Teil der in der Nazizeit aus Deutschland geflüchteten Emigranten im Asylland von Deutschland her mit irgendeiner kriminellen Beschuldigung belastet wurde. Die Nazibehörden haben sozusagen an einem jedem von uns irgend etwas Kriminelles entdeckt. Sie haben auf Grund dieser Entdeckungen zum Beispiel einem Gewerkschaftler, der dafür gesorgt hat, daß das Geld der Gewerkschaften ins Ausland kam, daß unser ehrliches Geld nach drüben kam und nicht Hitler in den Rachen fiel, einen Prozeß wegen Unterschlagung angehängt. Das müssen Sie doch wissen. Man hat es also in den allermeisten Fällen verstanden, den Begriff politischer Emigrant mit dem Begriff krimineller Flüchtling zu vermengen.

> Deswegen muß man jede Einengung des Begriffs politischer Emigrant vermeiden. Man muß schlechthin von politischer Emigration und politischem Asylrecht sprechen, sonst gerät man in des Teufels Küche. (44th Meeting HA, 77)

Both Renner and Wagner also conceived asylum from from the point of view that asylum seekers should be granted living conditions. Renner supported the idea that asylum seekers should have the right to work (44th Meeting HA, 65): i.e. should be granted some positive rights. Renner noted that in those countries which granted asylum and of which he had knowledge, none of them included the right to work, only a right to reside in the country. This meant that political refugees were dependent on private organisations, for instance, in order to receive support. Renner therefore suggested that the wording relating to asylum should include the right to work within its formulation "*Politisch Verfolgte genießen Asylrecht einschließlich des Rechtes auf Arbeit*". Renner dismissed arguments that political refugees could burden the labour market and pointed out the experiences that the German political emigrants had had as a legitimation of his position on the clause.[176] (44th Meeting, HA, 65) Renner's proposal was, however, opposed by Schmid, as Article 2 of the draft *Grundgesetz* included the right to free development of personality for everyone, not only to German citizens, which to Schmid meant it included Renner's suggestion (44th Meeting HA, 66).[177]

Wagner was, in general, supportive of the basic idea behind Renner's point about the right to work, even if he did not support its inclusion in the formulation of the asylum clause. Wagner referred to the bitter experiences of those who had been lucky enough to escape the Nazi regime but could not work and find a livelihood while living in exile:

> Was er [Renner] gesagt hat, hat seine Begründung in einer zum Teil sehr bitteren Erfahrung, die wir draußen gemacht haben. Wir waren sehr glücklich, daß wir draußen unterkamen und daß wir dadurch Hitler und seinen Henkersknechten entkommen konnten. Aber es war sehr bitter für die Tausende, als sie draußen waren mit Asylrecht, aber ohne Möglichkeit, zu arbeiten und sich dadurch zu ernähren. (44th Meeting HA, 69-70)

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176 *„Das Asylrecht, wie es die Welt im Allgemeinen kennt, beinhaltet nur das Aufenthaltsrecht. Die politischen Flüchtlinge, die vom Asylrecht Gebrauch machen müssen, sind in der Regel angewiesen auf die Unterstützung aus öffentlichen Mitteln bzw. aus Mitteln, die private Organisationen aufbringen, weil das Asylrecht in den meisten mir bekannten Ländern nicht das Recht auf Arbeit einschließt. [...] Die Frage, daß die politischen Flüchtlinge den Arbeitsmarkt belasten könnten, ist meines Erachtens absolut nicht existent. Ich sehe also nicht ein, weshalb man diesen Satz nicht bringen soll. Die Praxis, die wir politischen Emigrierten hinter uns haben, läßt es wünschenwert erscheinen, diesen Zusatz einzufügen."* (44th Meeting HA, 65)

177 *"Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt."* (Art. 2(1) GG)

3.8 The politics of asylum in the Parliamentary Council

The asylum paragraph was accepted by the majority of delegates of the Parliamentary Council in the third reading of the Plenum on 6 May, 1949.

The right to asylum took its initial shape from its introduction to the agenda by Ludwig Bergsträsser through several procedural steps in the Parliamentary Council, in the course of which it was rewritten and reformulated, first in the quasi-judicial deliberations in the Basic Questions Committee and then further defended in the debates of the Main Committee.

Whereas the draft article by Bergsträsser took after the *Länder* constitutions—particularly the asylum paragraph of the constitution of Hesse and the draft article of the *Herrenchiemsee* Constitutional Convention—the drafting of Article 16(2) 2 GG however, followed another path with its emphasis on international law.

Related to the above-mentioned, this chapter has focused on the conceptual roots of the asylum clause by examining its relation to the concept of extradition and its exception in relation to political offenders. The origins of political asylum are connected to the idea of sheltering political fugitives against extradition.

The link between asylum and extradition emphasises the political role of asylum: how asylum is connected, for instance, to regime changes, to the right to rebel against unjust regimes, and to the idea of protecting those who could be seen to be unjustly punished. In this sense the asylum debates of the Parliamentary Council followed many of the ideas related to the 19th century notion of the political offence exception, although with new ideological divides related to the East-West conflict.

Due in part to the constitutional situation, the link between asylum and extradition remained close in the Parliamentary Council. It was also related to the debates on limiting the scope of the right—should the political offence exception in extradition law be enough as the protection given to non-citizens, as argued by von Brentano, or should the right asylum be a subjective right of the individual, an "unconditional" right to asylum, as advocated by Schmid and Wagner.

The debates on asylum in the Parliamentary Council also produced some conceptual confusions, one being the idea that asylum was to be granted to Germans, meaning Germans in the Soviet occupation zone in particular. This conception prevailed already in the Basic Questions Committee and continued to be advocated by von Brentano in the Main Committee.

Another confusing notion related to the phrasing of "in the frames of international law". The authors—legal scholars such as Zinn, von Mangoldt and Schmid—referred to international law as a point of reference for creating the right and when debating and defining its limits. Schmid's usage of the concept of 'attentat' was an example of acts falling outside a political offence as exception, thus also being 'unpolitical'. Yet the right that the authors created eventu-

ally went beyond "the frames of international law". The drafters used international law as an authorisation or, in this sense, as a depoliticising element. Yet, the next chapter on the creation of an international document shows how the principles of international law are disputed and shaped; how they are a matter of contingency and debate. In the context of the late 1940's, the creation of the post-war international legal framework was in essential ways open and under construction.

In the context of the 20th century, a new type of asylum-seeker emerged; persons who were persecuted not necessarily for their active political deeds but, above all, for what they were. Even though most of the conceptualisations of the authors of the asylum article referred to the politically active asylum seeker, it would be misleading to argue, as for instance Quaritsch (1985) and Reichel (1987) have done, that the authors ignored the new, "passive" conceptualisation of refugee. This argument does not pay attention to the references, made by von Mangoldt and Schmid in particular, to the war and to people fleeing across borders. This was an essential motivation for the drafters for keeping the short asylum formulation and for not trying to limit it. However, it is notable that whereas the authors were well-aware of the refugee problematic in the post-war period, "mass flight" as such was not addressed in the debates as something preventing the creation of the asylum paragraph, nor were the more administrative matters related to accepting asylum-seekers, apart from the few references by Bergsrässer in relation to the financial cost of accepting asylum seekers. Additionally, Renner spoke for the idea that asylum seekers should be granted some positive rights, with reference to the right to work.

The constitutional asylum right enjoyed support in the Parliamentary Council across party political lines. Whereas the Social Democrats Schmid and Wagner were strong advocates of the right, inside the CDU/CSU faction differing opinions, however, remained, especially between von Brentano, Fecht and von Mangoldt, the latter changing his earlier more careful stance to support the unconditional right in the course of the deliberations. The voices opposing the individual right to asylum related to the argument that the right goes too far, without posing any criteria for those accepted, allowing conditions of access for persons opposing the constitutional rule to be created, endangering the stability of the state. This is further connected to the idea that the politically active asylum-seeker might have a negative impact to the host state and its security when continuing the political activities in the new host state, in many ways echoing the problematic related to the acceptance of the ideal typical refugee of the 19th century.

On the other hand, the voices speaking for the unconditionality of the right to asylum underlined the dignity of the act of asylum granting in connection to the idea that it should not be limited only to those who are in political sympathy with the receiving state. This conceptualisation underlined not the self-interest of the state in granting asylum only to certain groups of individuals and withholding it from others, such as political opponents, but instead the position of the individual seeking asylum. This notion also links asylum with the

idea of democratic expression including tolerance for differing political opinions and points of views.

The only criterion that the authors created for asylum seekers is 'political persecution'. The responsibility of the interpretation of the concept was left for the courts. The authors of the paragraph emphasised the judicial safeguards related to asylum, the idea that asylum seekers should have access to the courts, in sharp contrast to the decisions made at the border or in contrast to politically motivated decisions made between governments. These debates also show the two-sided relationship the drafters had to the courts. On the one hand there were experiences of the political uses of the legal procedure—of which the courts were essentially a part in Nazi Germany. On the other hand, the authors placed a considerable amount of faith in the judicial system when creating the institutions of the new state and give a central role to the courts in applying and interpreting these concepts.

All of this also makes reference to the changing notion of asylum as a protection against expulsion and deportation. This is further related to the defence of the short formulation against the different suggestions presented in order to limit the scope of the asylum paragraph. The change in the post-war era becomes clear also when considering the asylum debates of the Weimar republic, referred in this chapter, in which many of the notions related to the asylum problematic of the post-war period were already on the political agenda but did not yet gain support from the majority of the politicians. In the Parliamentary Council, asylum was given an exceptional constitutional role, in the form of a binding commitment. This chapter has shown how the acceptance of this unique right, posing a duty for the state to protect persons persecuted for political grounds, was strongly framed by past experiences of persecution and expulsions. Further, several of the drafters had experience from seeking refuge and living in exile, "had experience of such rights" as asylum, and of the importance of the principle of asylum. From this perspective, the idea of including the protection of politically persecuted persons among the constitutional principles of the new state and that the drafters chose to formulate the right particularly from the perspective of the individual is perhaps not so surprising.

The next chapter turns to look at how the notion of right to asylum was debated in the negotiations related to the creation of a document comtemporary of the *Grundgesetz*, the Universal Declaration of Human Rights. The chapter wonders why it proved to be impossible at the international level to accept something that was allowed in the West German Parliamentary Council. Chapter 5 then analyses asylum debates in the context of a re-unified Germany in the early 1990's and looks at how the asylum right construction by the authors of the *Grundgesetz* is being called into question in the *Bundestag*.

4 AN EXCURSION: DECLARING ASYLUM AS A RIGHT OF THE STATE

> I always remember that my husband, after one effort to make me useful since I knew little Italian, relegated me to sightseeing while he did the buying in old bookshops in Italy. He said I had no gift for bargaining! Perhaps that is one of my weaknesses. I am impatient when, once I think the intention of a thing is clear, the details take a long time to work out. Gradually, however, I am coming to realize that the details of words and expressions are important in public documents. (Roosevelt 1995, 550)[178]

This chapter departs from the West German post-war political scene to take an excursion through the early UN context to examine the drafting of the article on asylum in the Universal Declaration of Human Rights. The chapter builds another narrative of the immediate post-war asylum debates and conceptualisations and how the right to asylum became codified into a legal document.

Article 14 of the Declaration was ultimately worded as follows:

> 1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
>
> (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

The Declaration thus proclaims the right to seek and to enjoy asylum, but remains silent on a state's obligation towards granting asylum. As such this article in the Declaration has frequently been the target of criticism for its lack of substance. Hersch Lauterpacht (1950, 422), for instance, criticised the language of the article shortly after its drafting by calling the "formula" that the authors accepted as "artificial to the point of flippancy". Lauterpacht went far enough to argue that the elimination of the question of asylum would have been "more consistent with the dignity of the Declaration" (ibid.).

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178 The article titled "The Russians Are Tough" was first published in *Look* 11 (February 18, 1947), pp. 65-69.

Lauterpacht's criticism related to the broader framework of the Declaration which lacks legally binding force. In this context the asylum formulation remained careful. Instead of having legal force, the Declaration presents a certain "moral authority" (cf. Lauterpacht 1948). It is a "standard-setting document", marking the beginning of the development of human rights norms in various legal measures and the subsequent effects on shaping domestic practices. As Tomuschat (2005, 29) writes, the Declaration in itself was enacted as a resolution of the General Assembly and, therefore, legally classified as a recommendation. It is silent as regards the means through its may reach the goals to which it aspires, but to Tomuschat the "political character" of the Declaration meant that it could "transcend boundary lines which a true legal instrument could not have crossed" (ibid.). The controversy related to the character of the document to be drafted—whether it should be legally binding in the form of a Covenant as promoted by the British delegation, for instance, or whether it should take the form of a Declaration such as the International Bill of Rights, which was strongly advocated by the US—and was not resolved until after the third stage of drafting the Declaration.[179]

For purposes of this research the act of politicising and declaring a certain right can already be understood as a rhetorical and political move in itself, and as noted earlier, the analysis is, above all, interested in the arguments and conceptual disputes relating to the creation of a particular right. While looking at the writing of the asylum paragraph in the Declaration, the idea is also that considering the circumstances in which certain principles were created and the ideological tensions and compromises related to them is important also from the present day perspective with reference to more contemporary disputes and the possible problematic related to the particular principles (cf. Normand & Zaidi 2008, 4).

John Peters Humphrey, Director of the United Nations Division of Human Rights, and the author of the first text of the Declaration, described Article 14 as the one which received the most criticism during the drafting of the Declaration (Humphrey 1984, 70). He referred to the controversy caused in the negotiations by the idea that the Declaration would outline states obligations as regards to asylum seekers. The core problematic relating to granting rights to asylum seekers and its relation to state sovereignty was aptly outlined by the representative of the United Kingdom, Geoffrey Wilson, who during the drafting debates pointed out that, "one of the most jealously guarded rights of a State was the right to prevent foreigners from crossing its border" (E/CN.4/SR.56, 10). In comparison with the domestic constitutional debates in West Germany, for instance, the drafting of the asylum right meant the creation of "an international right", in the words of René Cassin—its application concerned several states and many of the states involved in the drafting did not have the principle of the right of asylum in their own constitutions.

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179 This refers further to the idea that a Declaration is easier and quicker to draft and easier for the states to agree on than a legally binding convention which takes more time to write and to accept. (Cf. Morsink 1999)

Regarding the criticism in the commentary literature directed towards the asylum article in the Declaration, it should be noted that during the drafting process the wording on asylum went through several changes, different alternatives were presented, considered, and also accepted, including the idea of a state's duty to grant asylum, and correspondingly, the individual's right of asylum vis-à-vis the state, before the wording reached its final form in the debates of the Third Committee of the General Assembly in November 1948. This chapter, thus, looks at the politics and historical contingency relating to rights, the right to asylum in particular. Its starting point is that the story behind the creation of Article 14 is manifold, including voices in favour of proclaiming an individual asylum right and those against it.

As in the previous chapter, the analysis begins with a presentation of the authors of the Declaration, and further, with a look at the immediate post World War II rights framework. I will then move on to more comprehensively discuss the deliberations and diplomatic negotiations on the asylum paragraph in the Declaration and examine how the asylum article came about and what kind of arguments and conceptual formulations were took place in relation to the construction of the asylum article.

4.1 The Commission on Human Rights

> For everyone who is tempted to despair of the possibility of crossing today's ideological divides, there is still much to learn from Eleanor Roosevelt's firm but irenic manner of dealing with her Soviet antagonists; and from the serious but respectful philosophical rivalry between Lebanon's Charles Malik and China's Peng-chun Chang. There is much to ponder in the working relationship between Malik, a chief spokesman for the Arab League, and René Cassin, an ardent supporter of a Jewish homeland, who lost twenty-nine relatives in concentration camps. (Glendon 2002, xix-xx)

To García-Mora, the most significant aspect of the Universal Declaration of Human Right is that "rights are conferred upon the individual directly under international law" (1956, 17). Whereas the League contained measures related to the protection of minorities, as well as offering protection to certain groups of refugees, it did not have any provisions related to human rights; rights were regarded as a strictly domestic affair. After the Holocaust and the Second World War the question of how states treated their citizens was no longer an internal matter, and rights became a matter of international concern. (Haddad 2008, 74; Skran 1995, 8)

Before the 1940's when human rights really hit the agenda in international discussions, those advocating human rights ideas were marginal figures in international politics and diplomacy, mostly individuals and non-governmental organizations and without governmental support (Normand & Zaidi 2008, 27-28). The promotion of rights during the war was linked with power politics and strategic interests, the Four Freedoms speech by Franklin D. Roosevelt in 1941,

in particular, being frequently cited as a milestone in inspiring rights discussions.

In the preparatory work at Dumbarton Oaks, human rights were not yet on the political agenda (cf. Hilderbrand 1990). Nevertheless, the UN Charter of 1945 set up a Human Rights Commission which was established in 1946 and which agreed to draft a bill of rights. The Commission ended up having eighteen members, all seen as representatives of governments. Five representatives came from the so-called Great Powers of the United States, the Soviet Union, the United Kingdom, France and China and the thirteen remaining were to be rotated on three-year intervals. (Glendon 2002, 32)[180] The Commission eventually made some important decisions as regards to the UN rights framework: "which ideas to accept, which rights to recognize, and which instruments to draft" (Normand & Zaidi 2008, 23-24).

Eleanor Roosevelt's prestige as the Chair of the Commission of Human Rights is often emphasised as having been invaluable in the process of making the Declaration. The representatives of the Commission included Peng-chun Chang of China, whom Lauren (2003, 212) describes as "a career diplomat and former professor, highly knowledgeable about West, Islam and Arabic culture, yet deeply committed with Confucianism and the values inherent in Asian culture and philosophy". Charles Malik of Lebanon, one of the youngest representatives of the Commission, was a former professor of philosophy who, curiously enough, had studied with Martin Heidegger at Freiburg in the mid 1930's (Glendon 2002, 124-125). While Malik was one of the most an influential characters in the making of the Declaration, another undoubtedly influential author of the document was René Cassin, a lawyer and professor of international law and later the president of the European Court of Human Rights. Cassin had previously been the French representative at the League of Nations and a member of the *Ligue des Droits de l'Homme* (Lauren 2003, 212), and had been deprived of his French citizenship by the Vichy government in 1941 (cf. Glendon 2002, 63).[181] The representative of the Philippines, Carlos Romulo was "an experienced public official and a devoted Catholic", while Charles Dukes (Lord Dukeston), representing Great Britain,[182] was a former Member of Parliament and a trade unionist (Lauren 2003, 212). Hansa Mehta from India became known in particular for her advocacy for equal rights for women. Hernán Santa Cruz of Chile was a Socialist who promoted the inclusion of social-economic rights. (Cf. Glendon 2002)

As the preparation of the document began in earnest, a drafting committee of eight was assigned. This committee, working at the core, consisted of Chang, Malik, William Hodgson of Australia, Santa Cruz, Cassin, Alexander E. Bogomolov of the USSR, Dukes and Roosevelt. John Peters Humphrey was also

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180 The delegates of the first Commission on Human Rights came from Australia, Belgium, Byelorussia, Chile, China, Egypt, France, India, Iran, Lebanon, Panama, Philippines, Ukraine, USSR, United Kingdom, United States, Uruguay and Yugoslavia.

181 For Cassin, see also Antoine & Winter 2011.

182 For the UK and the immediate post-war human rights documents, see also Simpson 2001.

closely involved with the drafting process as the Director of the United Nations Division of Human Rights and in writing the first draft of the Declaration.

Glendon (2002, 53) describes the difficulties relating to the drafting process by noting the Cold War ideological divides between the representatives of the US, USSR and China. Further tensions related, for instance, to the Palestinian question between the representatives of the UK, which ended its mandate in the Palestinian territory in 1947, Malik who was the spokesman for the Arab League, and Cassin who supported the idea of Jewish homeland (ibid.).

Eleanor Roosevelt in her autobiography (1992) gives an account on the work of the Commission on Human Rights and some of the tensions related to its work, especially with reference to the Soviet bloc and in her *Foreign Affairs* article of 1948. The drafting process of the Declaration is outlined comprehensively by Morsink (1999). The intellectual history of the UN with reference to human rights is approached in the work of Zaidi & Normand (2008). Glendon (2002) puts emphasis especially on the role of Roosevelt in drafting of the Declaration. Lauren (2003) further discusses the evolution of the human rights framework with reference also to the UN.

The drafting of the Universal Declaration of Human Rights between January 1947 and the autumn of 1948 included many procedural steps during which the document and its various articles were formulated and reformulated. The drafting process consisted of several stages and took place in multiple fora including three sessions of the full eighteen member Commission on Human Rights, eight member drafting committee and smaller ad hoc drafting committees. The different drafts were circulated among the member states for comments and the Third Committee debated the draft Declaration extensively before the Declaration was proclaimed by the General Assembly on 10 December 1948.[183] The following looks at the writing of the document from the point of view of the creation of its paragraph on asylum.

4.2 Politics of drafting and negotiating

An asylum clause was first placed on the agenda in the first draft written by John P. Humphrey.[184] The Commission on Human Rights first decided to set up a small drafting group consisting of Roosevelt, Malik and Chang, who asked the Secretariat to prepare an initial draft list of rights for further discussion. Humphrey wrote his 48 article "outline" including civil and political as well as socio-economical rights after studying different national constitutions and legal instruments, primarily Western rights documents (Hobbins 2009, 504). The "Humphrey Draft" included an article (Art. 34) stating how "Every State shall

183 The Declaration was proclaimed with no votes against it but with eight abstentions, including six from the Soviet bloc, and abstentions from South-Africa and Saudi-Arabia (cf. Morsink 1999).

184 A Draft Outline of an International Bill of Rights (Prepared by the Division of Human Rights of the Secretariat) E/CN.4/AC.1/3.

have the right to grant asylum to political refugees" (E/CN.4/AC.1/3). Regarding asylum, the addenda of Humphrey's draft refers to 13 national constitutions in which political asylum was mentioned and to the draft declaration by the American Federation of Labor which promoted the introduction of the principle of asylum in the Declaration (E/CN.4/AC.1/3/Add.1, 281-284).[185]

Humphrey's asylum article gained support from both Chang of China and Malik of Lebanon during the discussions in the first session of the Drafting Committee in June 1947, although Malik noted that he did not support the text as such, but "only the principle that political asylum is something sacred and ought to be preserved in the community of nations" (E/CN.4/AC.1/SR.4, 9).

Later in the enlarged Drafting committee of eight, the authors disagreed on the question whether the asylum article's place was in the Declaration. Both Wilson and Eleanor Roosevelt saw that the asylum article could be dealt with better in a convention (E/CN.4/AC.l/SR.9, 7-8). For Koretsky the definition of the article should not cover political refugees alone but also those seeking asylum on religious and scientific grounds. Apart from Cassin, Malik, Santa Cruz of Chile and Chang supported the inclusion of an asylum article. Malik noted how the principle should be stated in the Declaration with the wording "States are at liberty to grant asylum to refugees", whereas the modality and application of asylum were to be left to a convention. Minorities and refugees should, Malik underlined, be able to find refuge. Santa Cruz emphasised how "the principle of asylum had always guided his country". Chang spoke for the idea that individual's right to asylum, as well as a state's right to grant asylum, should be included in the Declaration. Finally, Harry noted "the Article should be formulated from the point of view of human rights rather than the rights of the State" (E/CN.4/AC.l/SR.9, 8).

Linked to the matter of asylum, Humphrey's draft further included an article prohibiting the arbitrary expulsion of aliens.[186] This article, reflecting past experiences of state expulsions—which Ludwig Bergsträsser had included in his list of rights, as shown in the previous chapter—was deleted from the later drafts. Cassin did, however, give his support to the provision by noting that there were persons expelled from country to country who should be protected. A contrary position was presented by Wilson who saw that the provisions of the article went beyond the provisions of any constitution he knew of and if aliens were to be given too many privileges by the international organization, they might experience difficulty entering the given country. (E/CN.4/AC.1/SR.9, 9)

The draft Rene Cassin was asked to write on the basis of the Humphrey text, and on the basis of the discussions in the Drafting Committee, had an identical asylum clause of that of the Humphrey draft ("Every State has the right to

185 Article 6: "The right of asylum is to be guaranteed by all nations. No human being who is a refugee from any political regime he disapproves is to be forced to return to territory under the sovereignty of that regime."

186 Art. 33: "No alien who has been legally admitted to the territory of a State may be expelled therefrom except in pursuance of a judicial decision or recommendation as a punishment for offences laid down by law as warranting expulsion."

grant asylum to political refugees", Art. 33) (Cf. E/CN.4/21).[187] The importance of these initial drafts by both Humphrey and Cassin for the latter drafting is particularly noteworthy because, as Morsink (1999, 6) writes, once an article is included in a draft its inclusion becomes more difficult for the states to pose an objection, or at least the objections or wish to remove a particular article would require greater substantiation. On the other hand, it should also be noted that the initial drafts do not by any means determine the outcome of the wording which is subject to debate and being shaped in the course of the drafting process.

In addition to asylum, the Declaration included other articles connected closely to state sovereignty, the application of which concerned several states. These rights related to immigration, expatriation and nationality.[188] In the first session of the Drafting Committee, Cassin acknowledged the difficulty for states to accept these "international rights" (E.CN.4/AC.1/SR.5, 3), echoing the controversy that would follow in the different stages of the drafting. The idea that that "matters for national legislations" were to be part of an International Bill of Human Rights was criticised, especially by representatives of the USSR following the understanding of the subordinate position of the individual in relation to the state within the Russian tradition.[189] When the argument was presented by Valentin Tepliakov of the USSR (E/CN.4/SR.13, 6-7) in the first session of the Commission on Human Rights in winter 1947, Cassin answered by saying, that "certain national laws were very badly co-ordinated in the international field, and thus large masses of humanity were obliged to live without properly defined rules". Cassin regarded settling the question that "concerned millions of human beings as the duty of the community in the International Field" (E/CN.4/SR.13, 8). Regarding the Soviet critique related to the interference to national matters and state sovereignty, Cassin had earlier noted that "we do not want a repetition of what happened in 1933, where Germany began to massacre its own nationals, and everybody […] bowed, saying 'Thou art sovereign and master in thine own house'", with reference to the League.[190]

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187 In the course of the drafting, there were some changes. Document E/CN.4/AC.1/W.2/Rev.2 outlines the suggestions by the French representative as regards to asylum including two articles; "Every State has the right to grant asylum to political refugees", (Art. 18), and further an article proclaiming that "Everyone has the right to escape persecution by seeking refuge on the territory of the State which would consent to grant him asylum" (Art. 14).

188 Article 13: "1) Everyone has the right to leave any country, including his own, and to return to his country. 2) Everyone has the right to freedom of movement and residence within the borders of each state." Article 15: "1) Everyone has the right to a nationality. 2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

189 For different human rights conceptualisations, see e.g. Shestack 1998.

190 Verbatim Record, June 12, 1947 Drafting Committee Meeting (cited in Glendon 2002, 60).

4.3 Right to be granted asylum becomes introduced

After the first session of the Drafting Committee, the asylum clause was phrased as follows: "Everyone has the right to escape persecution on grounds of political or other beliefs or on grounds of racial prejudice by taking refuge on the territory of any State willing to grant him asylum" (Art. 14) (cf. E/CN.4/21). The idea of a duty of the state to grant asylum was introduced for the first time in the so called "Geneva Draft" by the second session of the Commission on Human Rights in December 1947 with the formulation "Everyone shall have the right to seek and to be granted asylum from persecution" (E/600). As on many other occasions during the writing of the Declaration, non-governmental organizations taking part in the drafting as observers and consultants played an important role in the advocacy for rights (cf. Glendon 2002, 15 & Lauren 1998, 230), and in case of the asylum paragraph, in defending the "be granted" wording.[191]

One of the central advocacy organizations was the International Refugee Organization (IRO). The IRO was established in 1946 as an answer to the refugee problem caused by the Second World War. It was a specialised UN agency which preceded the UNHCR (cf. Melander 1988, 8-9). The organization submitted a statement to the Commission on Human Rights where it emphasised that "no group of human individuals can be more interested in an International Bill of Human Rights than the large number of persons who are the concern of the International Refugee Organization—the refugees and displaced persons" (E.CN.4/41, 1). Although the IRO was "aware of the considerations of national policy and of security which may render difficult the granting to the individual of an unconditional right of asylum", it hoped, however, that the Commission on Human Rights would "deem it possible to consider the embodiment of the principle of the right of asylum of certain classes of individuals". The IRO definition granted asylum to "religious, racial or political refugees", but left out "political refugees whose opinions are inconsistent with the aims and objects of the United Nations". (E.CN.4/41, 4)

In the second session working group discussions, Paul Weis, as the representative of IRO, saw the wording focusing on state's right to grant asylum as "very imperfect" and hoped that "the Committee would reconsider the wording with a view to sponsoring more positive action" (E.CN.4/AC.2/SR.5, 4). The report by the IRO gained further support from the representative of the World Jewish Congress, A.L. Easterman, noting that the proposed asylum article "afforded a right of escape with no corollary of a right of access to the country of reception", pointing towards the idea that wording was silent as regards to the obligations of the state or how the person seeking refuge would be allowed access to claim the protection. Easterman continued by making reference to past experience by saying that "many refugees from Germany had been denied this right which had resulted in the death of thousands". The draft of arti-

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191 These organizations included the representatives of Catholic, Jewish and Protestant as well as legal, labour and peace organizations (cf. Glendon 2002, 15).

cle 14 also "failed to implement Article 7 [right to life] since persons who were denied the right of asylum frequently died and thus were denied the right to life". (E.CN.4/AC.2/SR.5, 4) The representative of the International Union of Women's Catholic Organizations further supported the views of both Weis and Easterman (E.CN.4/AC.2/SR.5, 5).

In comparison to the stance of the organizations, Eleanor Roosevelt was much more sceptical about imposing a duty of asylum on states and argued, that "it would be dangerous to raise any false hopes in the Declaration". Roosevelt referred to the US immigration laws and "doubted whether it was within the province of the United Nations to tell Member States that they must grant asylum". She suggested, however, that a statement would be placed on the record "expressing the hope of the Commission that states would take steps to receive persons seeking asylum from persecution."(E.CN.4/AC.2/SR.5, 5)

Cassin supported the inclusion of an asylum clause in the Declaration and saw the question of asylum as an illustration of the difference between the nature of a declaration and a convention. To Cassin, "it was appropriate that the subject be expounded in a Declaration in order that the necessary steps for implementation could be secured in a Convention which would be binding to all nations where such a right was not granted under the Constitution". (E.CN.4/AC.2/SR.5, 5)

The position of the Soviet bloc throughout the drafting of the asylum paragraph was, on the one hand, to clearly define the groups to whom asylum should be granted, and, on the other hand, to state who should fall outside the scope of its protection, making especially sure that war criminals were not to be granted asylum. This was further linked to the Soviet rhetoric of condemning the actions of Nazis and fascists from their position in relation to the drafting (cf. Morsink 1999). Consequently, Alexandre Bogomolov of the USSR argued that if an asylum article was included, "great care should be taken to define the type of individual entitled to that right". In his categorisation, asylum was granted only "to persons persecuted on racial or religious grounds". The argument was further linked with war criminals when Bogomolov stated that "many supporters of the Hitler regime had posed as refugees in order to escape from their own countries and intrigue against them". (E.CN.4/AC.2/SR.5, 5)

Roosevelt answered Bogomolov by noting that the right of asylum did not belong to criminals. To her, the object of the working group was "to prepare a document which would be of value over a period of time and in which it would be unwise to attempt too definitive a text". (E.CN.4/AC.2/SR.5, 5-6) Cassin further pointed that the asylum article "could not be invoked in favour of criminals or of persons subject to extradition proceedings" (E.CN.4/AC.2/SR.5, 6). The representative of Panama, M. Amado, in his turn also spoke against the USSR's suggestion by referring to the experiences from his government concerning several cases "where refugees had been charged with the commission of a criminal offence, in order that they should be prevented from obtaining asylum", which was something that the text under preparation was to guard against (E.CN.4/AC.2/SR.5, 6).

Roosevelt suggested that a footnote should be put in placed clarifying that criminals did not qualify for asylum, and with the sentiment that at the time "the right of asylum did not exist in any real measure", but that the Committee expressed its hope that "it would be more literally granted in the future". Easterman of the World Jewish Congress was against a wording proposing obligations on the individuals seeking asylum. He noted that he was aware of the "judicial difficulties of the question", but stated that he "did not suggest any alteration of laws nor a right to permanent residence, but only for temporary asylum", referring to the "right to be freed from danger as the 'elemental human right'". (E.CN.4/AC.2/SR.5, 7)

An important base of support for the wording that had been suggested by the organizations was Carlos P. Romulo of the Philippines. In response to Roosevelt's doubts, Romulo emphasised that the matter "was not so much a question of raising false hopes as of establishing a principle to be followed by all" (E.CN.4/AC.2/SR.5, 6). Romulo's suggestion was to draft the article so that "all refugees from religious, racial and political persecution shall have the right to seek and be granted asylum, provided however, that the right of asylum shall not be granted to political refugees whose acts or opinions are inconsistent with the aims and objects of the United Nations" (E.CN.4/AC.2/SR.5, 7). Romulo's criteria for 'persecution' was voted down after Cassin noted that "it was unwise to attempt to qualify the word". To Cassin, the Committee should instead "stress the necessity for a Convention and point out the difficulties imposed on bona fide persons seeking asylum". (E.CN.4/AC.2/SR.5, 7)

4.4 ...And gets removed... before being accepted, again!

If the organizations addressed asylum from the point of view of the individual and played an essential part in lobbying for a form of words that would impose on states a duty to grant asylum, this latter idea adopted by the Commission on Human Rights received significant opposition from some of the representatives as the drafting continued. Lord Dukeston of the United Kingdom, in particular, spoke against the idea of asylum as an obligation in the second session of the Commission in December 1947, as "some countries might be incapable of absorbing large numbers of refugees" and "the State should have the right, for any reason considered right and proper, to refuse to grant asylum" (E/CN.4/SR.37, 9). Cassin, on the contrary, continued his support for the article, underling that the granting of asylum to refugees was a "humanitarian duty" and argued that it was "for the Members of the Commission to give an example in that respect to the rest of the world" (E/CN.4/SR.37, 10).

In the second session of the Drafting Committee, in May 1948, Cassin noted in response to the doubts presented by several delegates that it was "unreasonable to expect individual countries to assume responsibility for refugees", and as a result "it should be the duty of the United Nations to find asylum for refugees". Cassin hence introduced the idea of a clearly defined role of the UN

which became central for his argument in later debates. In practice, the role of the UN meant that "the United Nations could carry on negotiations with specialized agencies and individual states" (E/CN.4/AC.1/SR.36, 13). Cassin underlined that the declaration should be based on the rights of individuals and not of states. The duty of the UN would be "to guarantee that asylum granted by its Members to refugees would be temporary; knowing thus that they would not carry the burden alone, countries hesitate less to grant asylum". (E/CN.4/AC.1/SR.36, 15)

After the criticism which the notion of asylum as a duty had received a sub-committee consisting of the representatives of China, France and the United Kingdom, was assigned to reformulate the paragraph. The sub-committee rewrote the "be granted" wording into a more careful "may be granted" alternative.[192]

The role of the UN in securing asylum was explicated in the reformulated wording: "the United Nations is bound to secure this asylum in agreement with Member States" (E/CN.4/AC, l/39). Cassin explained the UN reference in the second session of the Drafting Committee by noting that "the wording had been inspired by the fact that it was impossible to recognize a right [...], if no one was bound to respect it". In cases where the states had difficulties bearing the financial cost of granting asylum, the United Nations would provide material assistance. (E.CN.4/AC.1/SR.37, 8) As all states did not accept asylum unconditionally, the right would be ineffective without the support from the UN. Cassin noted that "the State nearest to the one where persecution had taken place, might not have the necessary funds to take in those who were persecuted and, [...] the influx of refugees might have a disturbing effect on the national life of that country" (E.CN.4/AC.1/SR.37, 9-10). The wording thus sought to better take into consideration the unwillingness of states to grant asylum, as well as, for instance, the financial and administrative cost of accepting refugees.

Cassin noted that the phrasing "prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations do not constitute persecution" was necessary for the acceptance of asylum as an obligation by the General Assembly (ibid.). However, Pavlov of the USSR wanted that the text of the article specify more particularly those who were denied asylum and directly name the groups not entitled to protection. To the text of the second clause was added the wording: "in particular, the right of asylum shall not be granted to Fascists and Nazis prosecuted for their activities" (E.CN.4/AC.1/SR.37, 11). Wilson and Cassin noted that the acts of Nazis and fascists were included in the wording as "acts contrary to the purposes and principles of the United Nations". Santa Cruz, in his turn, pointed out that the wording concerned all acts, not only the acts Nazis and fascists as in the Soviet proposal (E.CN.4/AC.1/SR.37, 11).

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192 The wording prepared by the sub-committee: "Everyone shall have the right to seek and may be granted asylum from persecution. The United Nations is bound to secure this asylum in agreement with Member States. Prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and Principles of the United Nations do not constitute persecution." (E/CN.4/AC, l/39)

The Drafting Committee voted down the reference to the UN tightly. To Roosevelt, the idea that the UN would have an obligation to grant asylum was to be in a form of resolution of the General Assembly and not as a part of the Declaration. Karim Azkoul of Lebanon wanted the principle of asylum to be stated "clearly and explicitly" and therefore suggested wording that proclaimed how "[e]veryone has the right to seek and to be granted asylum during persecution".[193] Azkoul, thus supported an unconditional right of asylum, but although later changing his position in favour of the UN reference and the role of the UN in sharing the burden, and was of the opinion that measures implementing the exercise of asylum were to be in the form of a resolution and not as a clause in the Declaration. (E.CN.4/AC.1/SR.37, 9) Wu of China, as well as E.J.R. Heyward of Australia (E.CN.4/AC.1/SR.37, 11), supported Azkoul in noting that the question of implementation should not be mentioned in the text. Wu emphasised that the asylum article should be "so worded as to be understood by the greatest possible number of people, more particularly by those not versed in the law" (E.CN.4/AC.1/SR.37, 9).

Wilson argued for weakening the clause asylum in the draft by the subcommittee by stating that not all states would accept a duty to grant asylum (E.CN.4/AC.1/SR.37, 10). Eleanor Roosevelt, in her turn, suggested the idea that the protection of asylum would be temporary so that the receiving state would not have to guarantee permanent residence for asylum seekers (E.CN.4/AC.1/SR.37, 10). The idea of the temporality of asylum protection was later voted down, as was Azkoul's phrase "during persecution", which also hinted at a limitation on the time frame of the protection (E.CN.4/AC.1/SR.37, 14).

After voting and the removal of the UN reference, the Drafting Committee thus ended with the wording "Everyone has the right to seek and may be granted asylum from persecution." However, in the third session of Commission on Human Rights the wording was once again reformulated to provide a duty for the states to grant asylum as well as an individual's right to be granted asylum (cf. E/800 art. 12). Once again it is worth noting the successful organizational lobby in defence of this right. The representative of the American Federation of Labor, Tony Sender, saw the wording of the Drafting Committee as "highly unsatisfactory" and stated that "the permissive character of the phrase 'may be granted asylum' deprived the asylum article of any real value". She saw the right to asylum from persecution as "a natural corollary to the right to hold or change ones beliefs which was mentioned more than once in the draft Declaration" (E/CN.4/SR.56, 7). Sender, a former SPD politician and a representative of *Reichstag* (1920-1933) had herself escaped Germany in 1933.

The representative of the World Jewish Congress, F.R. Bienenfeld, emphasised that the right to asylum was "implicit in the concept of the right to life", and continued by saying that "in demanding the right to asylum, refugees were

193 Azkoul later withdrew the amendment after noting that "the discussion had shown that the Committee was not prepared to proclaim unconditionally the right to asylum" (E.CN.4/AC.1/SR.37, 13).

not asking for permanent homes but for temporary safety from persecution". Bienenfeld noted how "the Governments of the United Kingdom, the United States, France and the USSR had been generous in providing homes for many Jewish refugees before and during the last war. Therefore, he argued, "it was difficult to believe that their representatives in the Commission would oppose the inclusion of the right to asylum". Bienenfeld noted how the right of asylum "had been observed in Europe in the Middle Ages and was being observed now in the Mohammedan countries". To Bienenfeld "the Bill of Human Rights would mean little to those who most eagerly awaited it, if the right to asylum, in principle, was not included." (E/CN.4/SR.56, 7) Roosevelt later answered Bienenfeld by referring to US immigration laws: because of the existing laws, there were difficulties which had to be addressed in the Congress before the Jewish refugees persecuted by the Nazi government were allowed access to the United States (E/CN.4/SR.56, 9).

Cassin, in his turn, gave his support for the organization by underlining the importance of the principle of asylum. Cassin noted that the principle had been included in the constitutions of most states. Its implementation had, however, proved to be difficult. To Cassin, "the responsibility rested with the whole world and not just with the State which happened to be in close geographical proximity to another in which persecution was being practised". Cassin continued to advocate for the role of the UN, as "it would be useless merely to state the principle, however magnificent", if the question of who should ensure the granting of asylum was not solved. (E/CN.4/SR.56, 8) Cassin's position, which "introduced the idea of international responsibility with respect to the right to asylum" gained support from Ronald Lebeau of Belgium and Azkoul of Lebanon, to whom the French proposal "proclaimed the right to asylum and at the same time safeguarded the interests of States who would have to receive refugees" (E/CN.4/SR.56, 9).

Whereas the Soviet bloc continued to support asylum as a duty of the state, although only for certain groups of persons, outside the Soviet sphere restrictions and qualifications to the wording were proposed. Lopez of the Philippines spoke for asylum as a duty of states and favoured the expression of a broad principle of asylum (E.CN.4/SR.56, 10). To Chang, whose formulation included the idea of asylum being temporary ("Everyone has a right to seek and shall be granted temporary asylum from persecution in other countries"), the Commission attempted to draft "a declaration of aspirations and therefore no qualifications should be introduced into the text". As a result of the debate on the matter, Roosevelt stated that she was "even more convinced of the fact that the Declaration should be made up of general principles". More complicated matters were to take the form of, for instance, a convention on asylum or extradition. (E.CN.4/SR.56, 11)

After the fifty-sixth meeting of the full Commission on Human Rights, a drafting sub-committee was once more assigned, this time consisting of the representatives of France, United Kingdom, China, India and the US, to find a compromise formulation on asylum which would fit all the differing points of

views together. This was once again at the suggestion of the UK, whose representative stated he was impressed by arguments in favour of asylum as a duty, but noted that "one of the most jealously guarded rights of a State was the right to prevent foreigners from crossing its border" (E.CN.4/SR.56, 10).

The sub-committee prepared two versions of the asylum article for the next meeting, both including the idea of a duty to grant asylum in the form of a "be granted wording" and, in addition to this, a new qualification clause with the wording "as humanity requires/required".[194] Roosevelt explained that the phrase had been chosen because of its "all-inclusiveness" (E.CN.4/SR.57, 3). One reason for the introduction of the qualification clause was the concern of the representative of China over the unqualified right of asylum in relation to which many states may find it difficult to commit (E.CN.4/SR.57, 5). For Wilson of the UK, the discussions on the asylum article had shown how controversial the topic indeed was. He explained that the newly formulated wording was an attempt to combine the right of the state to control migration and a person's right to seek asylum. (E.CN.4/SR.57, 3)

The phrase "as humanity requires" was criticised as being broad and vague by Malik, among others. Malik, therefore, was ready to ask for a reconsideration of the French proposal[195] "to entrust the United Nations with the problem of asylum" (E.CN.4/SR.57, 3). This was supported by the representative of Belgium, Ronald Lebeau, and further by Joaquin Larrain of Chile. Lebau was also the delegate who suggested the wording "Everyone has the right to seek and be granted in other countries asylum from persecution" (E.CN.4/SR.57, 4), which was later accepted by the Commission.

The question of asylum and state sovereignty continued to be problematic for the Commission. To Chang of China, the Commission was to "state clearly and frankly whether states had the control over the granting of asylum" (E.CN.4/SR.57, 5). Hansa Mehta of India did not support the idea that the UN would have an instrumental role in providing permanent asylum only. For her, to seek and be granted temporary asylum was a human right. Roosevelt also further elaborated the idea of asylum being temporary and noted, in line with her earlier argument, that "without the word 'temporary' the right to be granted asylum might come into conflict with the immigration laws of various countries" (E.CN.4/SR.57, 6).

To Pavlov of the USSR the French proposal meant interfering in the domestic affairs of the countries concerned. The UN lacked a common territory on which to grant asylum. Consequently, the UN reference would mean that protection should be given on the territory of the Member States. (E.CN.4/SR.57, 6) Cassin clarified that his suggestion had been for the UN to act in agreement with the governments, which meant that "the United Nations should take pre-

194 "1. Everyone has the right to seek and be granted in other countries asylum from persecution as humanity required." 2. "Everyone has the right to seek and be granted in other countries such asylum from persecution as humanity requires". (E.CN.4/SR.57, 2)

195 Cassin later noted that the Commission had not voted on the proposal of the French Government but on his own amendment (E.CN.4/SR.57, 7).

liminary steps and provide to Member States material aid to facilitate their acceptance of persons seeking asylum". Cassin noted that he had not meant that "the United Nations could interfere in the internal affairs of States", nor did he mean "that nations' rights should be infringed upon in any way". Cassin, however, spoke against the idea of asylum being temporary, as the matter of asylum should not be dealt only on the basis of emergency but, instead, "the agreement on the whole problem should be reached at the earliest possible time". (E.CN.4/SR.57, 7)

The question of implementation was critiqued by the representative of Uruguay, Roberto Fontaina, for whom "it was essential to separate a statement of principle from its implementation". The Commission drafted principles and, therefore, its sole concern for the time being "was to lay down the principle that a person persecuted for political reasons had a right to asylum". The matter of implementation, the question of how asylum was to be granted, was to be discussed when deciding upon the Covenant. (E.CN.4/SR.57, 7-8)

For Salvador P. Lopez of Philippines, who continued his support for asylum, the asylum paragraph was to "guarantee the right of asylum in the broadest possible terms". Lopez was against the idea that "the right of asylum should be granted only to the persecuted persons who were deemed desirable from the point of view of the recipient state". Because the reasons for granting asylum differed between the states and states therefore granted asylum for different, perhaps, opposing reasons—persons disagreeing with the Soviet regime in Latvia or Estonia might find asylum in Sweden or in the United States, while those in Greece with Communist sympathies might get protection from Ukraine or Yugoslavia—it was not advisable to identify the persons to whom asylum was to be granted. (E.CN.4/SR.57, 8)

Lopez, when asked by the representative of the state that most vocally had advocated for clear admittance categories, Pavlov of the USSR, stated that the Philippines would not grant asylum to Japanese or Nazi war criminals (E.CN.4/SR.57, 9). The delegate of Ukraine, Michael Klekovkin, saw a link between war criminals and the phrase "as humanity requires" as in the Nuremberg trials "clemency towards war criminals had been asked for in the name of humanity". The phrase was to be rejected as it implied the possibility of escape for war criminals and as the United Nations itself "was based on the defeat of fascism and nazism". (E.CN.4/SR.57, 9)

The Commission on Human Rights also voted down the qualification clause as well as the resubmission of the French proposal. The wording "Everyone has the right to seek and be granted in other countries asylum from persecution" was adopted by twelve votes to one with four abstentions (E.CN.4/SR.57, 11), and the draft that was submitted to the Third Committee to consider thus included a right of the individual to be granted asylum and, correspondingly, a duty for the states to grant asylum.

4.5 The Third Committee has its say

From the Commission on Human Rights the draft bill of rights was moved for debate in the fifty-eight member states in the eighty-five meetings of Third Committee of the General Assembly where the paragraph was rewritten in its final form when the "nations had their say" in the autumn of 1948. The participating states thus also included among those with no representation in the Commission on Human Rights. Roosevelt (1992, 320) writes in her autobiography about the lengthy drafting process in the Third Committee:

> As the session opened I was full of confidence that we could quickly get the Declaration through the formal hearings before Committee Three and have it approved by the Assembly. My confidence was soon gone. We worked for three months, often until late at night, debating every single word of that draft Declaration over and over again before Committee Three would approve its transmission to the General Assembly.

The Third Committee debates were chaired by Malik. In these debates the principle of asylum was, as a rule, emphasised as important, but the idea of outlining and declaring the actual responsibility for granting asylum as proposed in the draft by the Commission on Human Rights proved to be impossible to support for the majority of states. The wording that was eventually accepted was introduced by the United Kingdom: "Everyone has the right to seek and to enjoy in other countries asylum from persecution" (A/C.3/253).[196] In addition to the UK amendment, the Third Committee received amendments from the USSR (E/800), [197] Bolivia (A/C.3/227), [198] Cuba (A/C.3/232), Saudi-Arabia (A/C.3/241), [199] France (A/C.3/244), [200] Egypt (A/C.3/264) [201] and Uruguay (A/C.3/268)[202] and New Zealand[203] (later dropped) wishing to make changes to the draft proposed by the Commission on Human Rights.

The Third Committee deliberations on asylum began with Pavlov of the USSR who continued to use the UN as a platform in which to condemn the actions of Nazis and fascists. Pavlov underlined that it should be explained in the

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196 The UK amendment was for the first paragraph to read: "Everyone has the right to seek and to enjoy in other countries, asylum from persecution" (A/C.3/253).

197 The USSR amendment was to replace the paragraph 1 of the wording suggested by the Commission on Human Rights with the following wording: "The right of asylum is guaranteed to all persons persecuted in connection with their activity in defense of the interests of democracy or for their scientific activity or for their participation in the struggle for national liberation." (E/800)

198 The Bolivian amendment was to add the first paragraph with a second phrase "This right shall extend to asylum in embassies or legations" (A/C.3/227).

199 The Saudi-Arabian amendment was to delete the phrase "and be granted" in the first paragraph (A/C.3/241).

200 The French amendment was to add the sentence "The United Nations, in concert with countries concerned, is required to secure such asylum for him" (A/C.3/244).

201 The amendment of Egypt was to add the paragraph 1 with the words "in accordance with the rules of international law" (A/C.3/264).

202 The amendment from Uruguay was to add the paragraph 1 with the sentence: "This right includes diplomatic asylum in embassies and legations" (A/C.3/268).

203 "Everyone is entitled to seek asylum from persecution" (A/C.3/267).

Declaration what was meant by the right of asylum "so that war criminals, fascists, and nazis hiding abroad and particularly in occupied Germany, could not claim to be persecuted persons". Those groups of people were to be left without asylum "responsible as they were for the massacre of millions of innocent victims, those traitors to their countries whose misdeeds during the war years were known to all". (A/C.3/SR.121, 327)

Consequently, Pavlov regarded the word "everyone" as too comprehensive and wanted to suggest three main categories of persons to whom asylum should be granted. The categorisation followed the asylum article of the Soviet constitution of 1936. According to the Soviet delegation, asylum was given to persons persecuted because of "their activity in defence of the interests of democracy", or "for their scientific activity" or "for their participation in the struggle for national liberation". This meant, that those escaping the Franco regime were granted asylum, "as were those who had fought to free their country from foreign oppression and all those who, in colonial or semi-colonial territories, were carried on the wave of growing national feeling to revolt against a humiliating regime". (A/C.3/SR.121, 328)

The representative of Yugoslavia Ljuba Radevanovic, even though the country was at the time breaking from the Soviet bloc, saw the right of asylum as belonging to the list of fundamental human rights and therefore it was to be recognised and established. However, even if the right of asylum was a "legitimate right", it "could not be an absolute right, either from the point of view of justice or of morality" and, hence, it was "necessary to define it and to limit its application". Therefore, Radevanovic, argued, asylum should not be extended to "war criminals and traitors", persons who had been morally condemned by the conscience of the world". Radevanovic believed that "there were still many war criminals, former German and Italian officers and nationals of occupied countries guilty of dealing with the enemy, who had found asylum in certain countries, particularly in the Western occupation zones of Germany and Austria", and the Yugoslav Government "had met with numerous difficulties" when trying to "secure their extradition". These violations were "contrary to the "interests of democracy and of international solidarity", the USSR amendment being more closely in "agreement with the requirements of justice and the interests of peace". (A/C.3/SR.121, 339) The representative of Poland, Fryderika Kalinowska, continued in a similar vein by stating that Poland "had perhaps suffered more than most countries from the activities of the war criminals", and "Nazis were still at large in certain Latin American countries and elsewhere, while asylum had been refused to democrats such as the Spanish Republicans". (A/C.3/SR.122, 341)[204]

The Soviet amendment was voted down by clear numbers with support coming only from their own bloc. The representative of Venezuela, Eduardo Plaza, for example, opposed the sharply defined categories as suggested by the USSR, advocating that the article should have a wide scope, and as regards to

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204 In the Spanish civil war 1936-39 the Republicans had the Soviet support against Franco.

the concept of 'persecution' "the declaration should not only attempt to palliate the effects of existing persecution but provide everyone with the opportunity to defend himself against imminent persecution" (A/C.3/SR.121, 332). The representative of Chile, Santa Cruz, was against the USSR proposal as, when preventing asylum for fascists and Nazis, it also left outside for example the victims of religious and racial persecution and "the basic text covered all cases including that of warmongers". (A/C.3/SR.121, 333) The representative of the US, Durward V. Sandifer, in his turn, expressed his surprise that the USSR, which "fought against discrimination in all its forms, should seek to restrict the benefits of article 12 to certain groups of persons" (A/C.3/SR.121, 334).

Karim Azkoul of Lebanon spoke against the USSR proposal by arguing that if the amendment were applied literally, "it would result in practice in the right of asylum being granted only to heroes or scientists". To Azkoul, "even the least distinguished person, merely by reason of the fact that he was a human being had, however, a right to escape from persecution and it was the duty of the international community to help him do so". (A/C.3/SR.121, 336) The representative of Pakistan, Agha Shahi, argued that paragraph 2 of the asylum clause drafted by the Commission on Human Rights ipso facto denied asylum from fascists and Nazis (A/C.3/SR.121, 338).

Several of the Latin American states gave their support for the text written by the Commission on Human Rights. The amendments presented by the delegations of Bolivia and Uruguay included the idea that asylum was to be extended to embassies, referring to the old Latin American tradition of diplomatic asylum.[205] The representative of Bolivia, Eduardo Anze Matienzo, for instance, stated that "a country which gave asylum to a refugee should also open to him the doors of its embassy, as the latter also represented the country of refuge" (A/C.3/SR.121, 329).

Although the idea of diplomatic asylum gained support from the Latin American states where diplomatic asylum was a practice, such as Venezuela and Mexico, its inclusion in the Declaration was generally opposed as being outside the scope of the Declaration and, as Sandifer of the US argued, it "should be embodied in separate conventions on diplomatic privileges and immunities" (A/C.3/SR.121, 334). In a similar manner, the delegate from Belgium argued that "the proper place for the right of extra-territoriality was in a convention regarding application, and not in a declaration of human rights" (A/C.3/SR.121, 334).

Cassin continued to argue for the idea that the role of the UN should be clearly stated in the asylum article in the Third Committee debates. Cassin was ready to support the asylum formulation by the Commission on Human Rights, but defended the French amendment by criticising the draft article by the Commission on Human Rights "for failing to indicate whose duty it would be to give effect to the right of asylum affirmed in the declaration". Cassin repeated the argument of the "international character" of right of asylum, arguing that it was therefore "necessary to specify who would ensure the enjoyment of

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205 For diplomatic asylum and its usage in the Latin American states, see Ronning 1965.

that right". Cassin referred to the French constitution which granted asylum "to persons persecuted for the defence of liberty", and stated that "the supreme responsibility should rest with the human community as a whole, represented by the United Nations acting in concert with countries concerned". Cassin regarded other solutions as "illusory and unsatisfactory". The French proposal was according to him "submitted in the interests of the victims of persecution as well as of the States called upon to offer refuge". (A/C.3/SR.121, 328)

To Margary Corbett, the representative of the UK, whose proposal was eventually accepted in the Third Committee, the asylum article "revealed a certain defeatism" and was "out of place in the Declaration". She saw it as contradictory that the declaration "envisaged an ideal life for all members of society", and in spite of this, the asylum article "admitted the existence of persecution within that society". (A/C.3/SR.121, 329) To Corbett, by declaring an asylum right the ideals of the Declarations were, thus, to be broken.

Corbett explained that the right of asylum went beyond the rights of asylum expressed in certain constitutions. She referred to the constitutions of Uruguay and Mexico, where "foreigners were assured free entry into those countries only if they conformed to the immigration laws". (A/C.3/SR.121, 329) The representative of Uruguay, Eduardo Jiménez de Aréchaga, later criticised Corbett for confusion by noting that "immigration and right of asylum were two quite different things". The constitution of Uruguay restricted the former but not the latter. Pablo Campos Ortiz of Mexico further noted that whereas immigration was restricted in Mexico, the country "had a very broad conception of the right of asylum". (A/C.3/SR.121, 333)

Corbett stated that "the Government of the United Kingdom was ready to guarantee that any person asking for refugee status would be treated with sympathy". She, however, saw that "no state could accept the responsibility imposed by the asylum article of the draft Declaration". Corbett referred to the occasions when the UK had offered asylum to political refugees—for example to Garibaldi, Mazzini, Kossuth, Marx and Lenin—but emphasized that it had not granted asylum under obligation: "it had always made use of its right to admit any particular person, and intended to continue to do so in the future". (A/C.3/SR.121, 330)

The meaning of the expression in the UK draft "to enjoy asylum" was, according to Corbett, that "no foreigner could claim the right of entry into any State unless that right were granted by treaty". Right of asylum was "the right of every State to offer refuge and to resist all demands for extradition". (A/C.3/SR.121, 330) While the formulation underlined asylum as a right of the state, Corbett saw the wording which the Commission on Human Rights had formulated standing "contrary to almost all existing immigration laws". Its application, she argued, "might actually lead to persecution by encouraging States to take action against an undesirable minority and then to invite it to make us of the right of asylum". (A/C.3/SR.121, 330-331)

Corbett later clarified that the purpose was not "to grant to a person fleeing persecution the right to enter any and every country but to ensure for him

the enjoyment of the right of asylum once that right had been granted him". The amendment proposed by the United Kingdom "limited the obligation of the State, but gave the individual an assurance that he would continue to enjoy the right of asylum after his entry into the country of refuge". (A/C.3/SR.121, 330-331)

The UK delegation opposed the French proposal as it "seemed to give the United Nations the right to invite Member States to grant asylum". Instead, she argued for the distinction between the concepts of 'asylum' and 're-establishment', stating that "if the United Nations was unable to secure immediate asylum, it should concern itself with the re-establishment of refugees and co-ordinate the efforts of all States wishing to act towards that end". (A/C.3/SR.121, 331)

The Saudi-Arabian amendment presented for consideration to the Third Committee, in its turn, went beyond the UK proposal: it was to delete the phrase "and be granted" asylum from the draft Declaration (A/C. 3/241). According to Jamil M. Baroody, the draft article by the Commission on Human Rights "promised more than it should". To Baroody, "it would not be advisable to recommend the adoption of an article granting to persecuted persons the right to demand asylum in the country of their choice without first establishing whether that country was in a position to receive them". (A/C.3/SR.121, 331)

Baroody noted that the asylum article did not suggest any consultation with the states that should offer refuge or whose responsibility it was to "direct a persecuted person to any particular country". Baroody further explained that every persecuted person should be able to enjoy the right of asylum. He saw the right as "indisputable, both from the humanitarian point of view and because denying it would mean the abandonment of the essential principles of the declaration". It however did not mean "that everyone had the right to obtain asylum in the country of his choice"; according to Baroody "such a principle would be a flagrant violation of the sovereignty of the State concerned". (A/C.3/SR.121, 331)

The debates in the Third Committee overlapped with the Arab-Israeli war and its fourth wave of refugees in October and November of 1948 (cf. Morsink 1999, 78). To Morsink, this was the reason why, eventually, the "teeth were taken out of the [asylum] article" and why "the lesson learned from the Holocaust was lost" (ibid.). The influence of the war and the concrete situation of fleeing refugees were reflected especially in the stance of the Saudi-Arabia, emphasising that before any responsibility could be accepted, the ability of states to receive refugees should be first established. Further, the amendment of Egypt, another neighbouring state, was to grant asylum "in accordance with the rules of international law" (A/C.3/264). Hassan Bagadi of Egypt had in an earlier meeting in the Third Committee raised the question of repatriation as a solution for the refugee problematic, as giving asylum to refugees could not constitute a permanent solution to the problem (Morsink 1999, 78).

Although Morsink rightfully addresses the role of the Arab-Israeli war in relation to the outcome of the asylum paragraph, this view, nevertheless, ne-

glects the point that claims relating to state sovereignty as something that poses limits to granting asylum were frequent from the beginning of the drafting process, including, for instance, the strictly legal positivist perspective of the USSR delegation and the positions of the UK and the US delegations which during the different stages of the drafting consistently spoke against formulations outlining a duty for states as regards to accepting asylum seekers.

The Arab-Israeli war was the first international crisis that the United Nations had to deal with and where it was also was heavily involved (cf. Morris 1998). The question related to the Palestinian refugees was discussed in the earlier meetings of the Third Committee. Cassin referred to these discussions when continuing his defence of the French proposal that the role of the UN should be mentioned in the asylum paragraph, stating that "the responsibility by the community of nations would not, therefore, be a theoretical abstraction without factual precedent" (A/C.3/SR.121, 328).

If the arguments in the Third Committee were influenced by the contemporary situation of the Palestinian refugees, references to the refugee problem during and between the two world wars were also made. The representative of the Netherlands, L.J.C. Beaufort[206] saw the right of asylum as "a symbol of international solidarity" and noted that the Netherlands had in the past given refuge to many refugees. According to Beaufort, the wording of the Commission on Human Rights was possible to implement "in normal times", but "the existing conditions were far from normal". He continued by saying that "in 1938 the Netherlands had admitted thousands of German Jews driven out of their own country; however, it had not found it possible to receive all of them". As a result, Beaufort "thought it preferable to add the words 'to the extent that this is possible' after the words 'to seek and be granted' in paragraph one". He regarded the French amendment concerning a measure of implementation as "out of place in the Declaration", but if the committee decided to accept the amendment, Beaufort argued that "the words 'where necessary' should be added after the words 'is required'", meaning "that the United Nations would undertake to ensure the application of the right of asylum only in the event of States being unwilling or unable to do so", thus remaining careful in his stance as regards to imposing on states any duty to grant asylum. (A/C.3/SR.121, 331)

The UK proposal was supported by the representative of Venezuela, Eduardo Plaza, "as it did not imply an obligation on the part of the State". Plaza noted that the constitution of Venezuela granted asylum to political refugees, however, he saw asylum not as a right but as "a humanitarian practice which the State concerned was free to accept or to reject". Plaza underlined that "the Committee was discussing human rights and not the obligations of governments". (A/C.3/SR.121, 331-332) Plaza thus left the question of implementation outside his conceptualisation of 'human rights', referring also to the idea that the Declaration did not have a legally binding character.

Another supporter for the UK proposal was the representative of the United States. Sandifer argued against the French amendment, stating it amounted

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206 Beaufort was a Catholic priest and professor (cf. Simpson 2001, 452).

to "a measure of implementation". Without thorough investigation of the matter "it was impossible to agree to the United Nations becoming the trustee for securing the right of asylum", and hence the Third Committee was not qualified to deal with the matter. (A/C.3/SR.121, 334) In his turn the representative of India, Mohammed Habib, acknowledged the "value of the principle underlying the French amendment", considering, however, that it was more preferable as a resolution of the General Assembly. In his support for the UK proposal, Habib emphasised that asylum was not a moral duty. The UK suggestion, hence, corrected the view of the Commission that "a request made by a foreigner to enter a country was a categorical moral right, whether the country in which asylum was being sought was willing to grant it or not". When the entry was granted, the person was, however, free to enjoy asylum. (A/C.3/SR.121, 334-335)

Even if in the early debates on the Commission on Human Rights the representative from Australia had supported asylum from a human rights point of view, in the deliberations of the Third Committee Alan S. Watt spoke for the Saudi-Arabian proposal, following the Australian position that "formulas implying obligation must be avoided in the text of the declaration of human rights". According to Watt, the text of the declaration was to be "a straightforward, clear and precise statement of the fundamental rights of man and must make no reference to the corresponding obligations of the State". Watt underlined that every state should freely decide the form in which the right of asylum was to be applied, considering "circumstances, the possibilities which a State had to grant asylum, and the size of the groups making application". The Australian delegation underlined that going further than the UK proposition "would be to run the risk of serious complications". It further opposed the French proposal which "imposed upon the United Nations an obligation which was not clearly defined and which might lead to unforeseen difficulties". According to Watt, the questions related to the duty of the United Nations deserved a more careful consideration outside the Third Committee. (A/C.3/SR.121, 338)

In contrast to other representatives of the Third Committee, Azkoul of Lebanon held a more natural rights point of view on asylum. Azkoul continued his earlier support to asylum in the Third Committee discussions, and noted how "the conception of the right of the individual had been replaced to a certain extent by that of the obligation of the State". To him, "the statement of a right should not, however, depend on the possibility of States to comply with that right". According to Azkoul "if it were part of the birthright of man, it should be established even if, for accidental reasons, it did not seem possible to ensure immediate implementation". (A/C.3/SR.121, 335)

Azkoul argued "that particular difficulties of each State should be dealt within the covenant which was to be drawn up", while the declaration "should limit itself to setting forth the rights inherent in the human person". The Lebanese delegation expressed its support for the wording by the Commission on Human Rights, "which ensured the individual not only the right of seeking asylum, but also the right of being granted asylum". However, because of the "se-

rious considerations brought forward by several other delegations", the delegation of Lebanon was ready to support the UK amendment. Azkoul, however, noted that by the wording "and to enjoy asylum", the delegation "understood that the individual should be guaranteed the right of being granted asylum, and not merely the right of enjoying asylum in the country which had received him, once that right had been acquired". (A/C.3/SR.121, 336)

Regarding the French amendment, Azkoul was not of the view that it "brought up the question of implementation, as it merely stated who should be responsible for upholding that right but did not deal with the actual problem of measures of implementation". However, the Lebanese delegation saw the French wording as dangerous "as it placed on the United Nations all the responsibility of granting protection to victims of persecution". Azkoul argued that "the respect for the declaration of human rights and the implementation of its principles should not depend on the existence of the United Nations. Even if the United Nations were to disappear, the principles set forth in the declaration would retain all their moral force". (A/C.3/SR.121, 336)

Another representative of a freshly independent state and a further supporter of the text proposed by the Commission on Human Rights was Agha Shahi of Pakistan. Agha Shahi saw that the "recognition of the right of everyone to seek and be granted asylum was a welcome step forward". Shahi noted that "in the past, international law had regarded the right of asylum as accruing to a State by virtue of its sovereign independent status rather than as one of the fundamental rights of man", and further saw that "the inclusion of that right in an international declaration would establish as a principle what was then current international practice". (A/C.3/SR.121, 336) Shahi gave his support also to the French proposal, arguing that "when a right was proclaimed the party whose duty it was to give effect to that right should also be stated" (A/C.3/SR.121, 338).

In his argument, Shahi condemned the Nazi and fascist ideologies and the ideas of absolute state. He connected asylum with the freedom of thought and expression, both mentioned in the draft declaration, and argued that the right of asylum should be included among the fundamental rights of man, claiming that "if everyone had the right of freedom of thought and expression, a person could obviously preserve his intellectual and moral integrity only by seeking refuge abroad, should his own country deny him the enjoyment of those essential liberties". (A/C.3/SR.121, 337)

Shahi understood "the reluctance of certain delegations to impose upon States obligations which would prevent them from exercising their freedom of choice, and might conflict with their immigration laws", but saw that "by granting the right of asylum to the persons covered by article 12, a country would seriously endanger its immigration policy, since the number of refugees fleeing from political persecution was seldom so great as to destroy the ethnical balance in that country". Shahi noted that "there was no reason why a State should not enforce such restrictions upon the entry of refugees as might be considered necessary for national security and public welfare". (A/C.3/SR.121, 336-337)

The Egyptian amendment was, as noted, to add to Paragraph 1 of the Commission on Human Rights draft the words "in accordance with the rules of international law" (A/C.3/264). The reference to 'international law' resembles the draft wording that was under debate in the Basic Questions Committee of the Parliamentary Council. Shahi argued against the formulation, as to him the amendment "might change the very meaning of article 12, reducing it to a static formula". This was because "the right to claim asylum was not admitted by the rules of international law, then to make the exercise of that right subject to such rules, as proposed by the Egyptian delegation, would be tantamount to preventing it from coming into existence until international law had developed sufficiently to include that principle". Agha Shahi made also reference to the case of the extradition of *Kaiser Willhem II*, and argued that as regards to such cases "the rules of international law could not serve as a guide". (A/C.3/SR.121, 337)

The case of Willhem II, in which the Dutch government refused to extradite the *Kaiser* to the Allies in 1920, was also referred to by the representative of Belgium, Count Carton de Wiart, who noted how the second clause of the asylum article, denying asylum from certain groups of persons, represented a "retrogression" to the liberal practices of certain states. It was actually more limited than the extradition tradition and jurisprudence in Belgium, for instance, "which had refused the requests of several states for the extradition of persons who were nevertheless undesirable". (A/C.3/SR.121, 334-335)

The reference to international law was also made Corbett of the UK who argued against the Egyptian amendment by claiming that it invoked the rules of international law, as "the only relevant rule was that of the free will of the State and of its right to refuse extradition" (A/C.3/SR.121, 330). The representative of Haiti, Emile Saint-Lot, favoured the UK as well as the Saudi Arabian proposals which made no imposition upon states, as "such an obligation was contrary to international law" (A/C.3/SR.121, 344-345). This kind of view of was opposite to the argument by Agha Shahi who argued for the idea the right to asylum in relation to promoting change, that is, a new principle of international law.

When it came to voting, the Saudi-Arabian amendment to delete the "to be granted" wording was first adopted by 18 votes to 14, with 8 abstentions by the Third Committee. Whereas the vote was relatively tight, the amendment of the United Kingdom "to enjoy asylum" was in its turn later adopted by clear numbers, by 30 votes to 1 with 12 abstentions.[207]

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207 In favour: Pakistan, Peru, Philippines, Saudi Arabia, Sweden, Syria, Turkey, United Kingdom, United States of America, Uruguay, Venezuela, Australia, Belgium, Canada, Chile, China, Costa Rica, Denmark, Dominican Republic, Ethiopia, Greece, Haiti, Honduras, India, Iraq, Luxembourg, Mexico, Netherlands, New Zealand, Norway. Against: Bolivia. Abstaining: Poland, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, Yugoslavia, Afghanistan, Argentina, Byelorussian Soviet Socialist Republic, Czechoslovakia, Ecuador, France, Iran. (A/C.3/SR.122, 344)

Anze Matienzo of Bolivia, the only representative who had voted against the UK amendment, said he had done so as he "preferred the stronger and more comprehensive text of the basic draft" (A/C.3/SR.122, 345).

The acceptance of the UK suggestion was emphasised as a compromise for some of the states that had opposed the Saudi-Arabian draft as too restrictive. Delegates from the Netherlands and Pakistan noted that they had opposed the Saudi-Arabian proposal and voted in favour of the UK amendment because "in the circumstances it made article 12 somewhat more liberal than it otherwise had been" (A/C.3/SR.122, 345). Cassin stated that he had been unable to vote for the UK amendment as it "unduly weakened the article", but had not wished to vote against it "inasmuch as it represented certain improvement over the original text as amended by Saudi-Arabia" (A/C.3/SR.122, 345).

After the final vote on the asylum article, in which it was adopted by 40 votes to 0 with one abstention, Cassin stated that he had voted for the article "imperfect as it was, because it was essential for the declaration to contain an article dealing with the right of asylum". For Cassin, however, it was mistake "to recognize the individual's right to seek asylum while neither imposing upon States the obligation to grant it nor invoking the support of the United Nations". (A/C.3/SR.122, 347)

4.6 Sympathy but no obligations

During the drafting of the Universal Declaration of Human Rights, the wording on asylum went through several changes: it was formulated and reformulated, formulations, especially those that included "impositions upon states", ran into opposition and smaller sub-committees were assigned to rewrite the paragraph to find a wording that could accommodate all the differing perspectives. The matter of asylum was placed on the agenda in the drafts of both Humphrey and Cassin. Both of these original drafts conceptualised asylum as a right of the state. There were already voices speaking for the conceptualisation of asylum as an individual right in the Drafting Committee but the idea became properly included on the agenda in the second session of the Commission on Human Rights as a result of the successful lobby from the organisations in speaking for the right. It is noteworthy that the Commission on Human Rights voted for asylum as a duty twice during drafting, despite the opposition met inside the Commission. The asylum paragraph reached its final form in the debates of the Third Committee, where it was conceptualised, as in the proposal of the UK, as a right of sovereign state to grant asylum and to refuse extradition.

A common criticism related to the article on asylum is that it does not go far enough (see e.g. García-Mora 1956). Although the Universal Declaration represents the first time asylum was introduced in a document declaring the rights of individuals, in proclaiming the right to seek and enjoy asylum it did not substantially declare anything new. In terms of the Declaration being without legal force and containing 'moral rights', it did not proclaim asylum as a

right of the individual, but declared a moral right of the individual to enjoy asylum once a state willing to receive the person had been found. It is paradoxical, and also quite telling, that a declaration of human rights did not conceptualise asylum a human right but, instead, proclaimed a right of the state. As (1950) Lauterpacht noted, conceptualising asylum as an individual right would have required an innovation in international law.

Garcia-Mora (1956, 151) criticised the Third Committee debates that eventually weakened the article by stating that "the primary concern was not to safeguard the rights of the individual but rather the powers of the state". The Third Committee debates, in particular, viewed asylum not from the point of view of the individual, as Karim Azkoul noted, but from the point of view of states. A central concept in relation to creating a document that sets standards and aspirations as regards to state policies was hence that of the state sovereignty: in creating principles for themselves in the form of declaring a list of rights, the states held on to their sovereign rights to control the entry of non-citizens. Declaring a (non-binding) duty to accept responsibility as regards to asylum-seekers was conceptualised as a violation as regards to the principle of state sovereignty among some of the representatives, such as in the proposal put forth by Saudi-Arabia.

As noted at the beginning of the chapter, the historical narrative of the drafting of the asylum paragraph is manifold, also including several voices defending the individual right to asylum. The organizations which successfully lobbied for the right argued for asylum by connecting it to the right to life, right to be freed from danger—with the idea that when all other protection fails, asylum becomes the ultimate human right (cf. Grahl-Madsen 1980), with the historical spaces of experiences as a strong legitimation for doing so.

René Cassin, perhaps the most outspoken advocate of the right in the Commission on Human Rights, in its Drafting Committee and in the Third Committee, saw asylum as a "humanitarian duty" and tried to negotiate the role of state sovereignty and state interests in relation to the rights of asylum seekers by advocating for the idea that the role of the UN should be stated in the wording of the asylum paragraph. To Cassin, there was no point in proclaiming a right without naming who should take the responsibility of the granting of such a right. Cassin's argument gained support and the matter was brought to the agenda for reconsideration along the drafting, but "measures on implementation" were eventually objected by the majority of the state representatives. France, represented mainly by Cassin in matters of asylum, was also a state with a long (liberal) tradition of asylum. It was also a state that had been subjected to large numbers of refugees fleeing after the Nazi regime took over in Germany, as well as experiencing its own anti-Semitist policies under the Vichy rule.

However, a further supporter of the individual asylum right was the Soviet bloc by sponsoring a selective policy with clearly defined categories for those to whom asylum was to be granted and who could not be afforded its protection. As regards to the latter, the Soviet bloc was quite clear. This was further

connected to the post-war politics and rhetoric of condemning the acts of Nazis and fascists, and in proclaiming that the right of asylum could be used in order to protect and shelter those groups.

Whereas states such as the UK and the US opposed obligations upon states, the wording proposed by the Commission on Human Rights gained support from Latin American states, as well as from states such as the Philippines, Lebanon and Pakistan. Karim Azkoul spoke for asylum from a more naturalistic perspective and Agha Shahi argued for constructing an innovation in international law, in distinction to representatives who conceptualised 'international law' as something static, posing limits and not being something subject to change and interpretation. Further, in addition to international law, national legislations, especially as regards to immigration, were also seen as limiting the right of asylum—as in the argument made by Eleanor Roosevelt, for instance, or Margary Corbett who saw the asylum right being against most existing laws of immigration.

Germany, as a non-sovereign state, naturally did not participate in the drafting of the Universal Declaration of Human Rights but, instead, especially as relation to its history of Nazism, became the subject matter of debate.

In the asylum debates of the Parliamentary Council, the matter of asylum was thoroughly shaped by the experiences of the past, by the persecution of the Nazi regime which forced persons to seek refuge abroad. In the Council, asylum *also* had a clearly political role; it was, for instance, conceptualised in relation to the idea of legitimate political resistance against unjust authority. In the drafting of the Universal Declaration, this aspect of asylum became overshadowed by the question of refugee "masses". Whereas in the Parliamentary Council the question of *Staatsräson* was connected, in particular, to the question of what kind of consequences might be related to accepting of a politically active refugee as regards to the security and stability of the state, the debates on the drafting of the Declaration connected the matter, above all, to the question of what might happen if the state was under the obligation to accept a large number of escaping refugees. In several ways, the UN debates reflected the notion by Kirchheimer (1959), mentioned at the beginning of this research, about the shifting notions of asylum: in the context of the masses fleeing, it is not the state of origin that protests, but above all the state that is receiving the refugees.

In relation to refugees escaping, it should be noted, however, that the ideal typical conceptualisation of asylum seeker of the 19th century, as a politically active individual, was emphasised by Margary Corbett who noted that the UK would continue to grant asylum to individuals—mentioning, for instance, Lenin—but would not accept any duties as regards to the granting of asylum. This ideal typical political exile was an exceptional figure, only one of a few—in contrast to people moving *en masse*. Asylum was conceptualised by Corbett as "a right to admit a particular person" but it could not be a right granted to everyone.

As a rule, the representatives in the Third Committee spoke for the importance of the principle of asylum, although refusing legal obligations and re-

sponsibility as regards to its granting. An interesting notion raised by Corbett was that asylum's place was not in a Declaration that promoted "ideal life". While Corbett's idea might be criticised by noting that the argument would apply to other articles as well (cf. García-Mora 1956), it also pointed out how asylum, in particular, is in many ways a right of an "imperfect world", one that is needed only in a world where someone's rights are essentially threatened.

In the UN debates the question of asylum was related, on the one hand, to the experiences of the refugee problematic caused by the two World Wars, and on the other hand, to the concrete situation of those escaping refugees caused by the Arab-Israeli war. These experiences from the point of view of states having received refugees did not translate into the idea of accepting a duty as regards to asylum-seekers but, instead, into having a careful stance on the matter, retaining state sovereignty, and the sovereign right to control the entry of non-citizens.

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Several authors of the Declaration, especially in the Third Committee, opposed "measures of implementation" in regard to asylum. When looking at the question of how "moral claims" are transferred into legal documents, it should be noted how asylum has remained as a problematic matter for the international community also after the acceptance of the Universal Declaration of Human Rights. Regarding the Conventions that were accepted in relation to the Declaration, neither the *International Covenant on Civil and Political Rights* (1966) nor the *International Covenant on Economic, Social and Cultural Rights* (1966) make any reference to the right of asylum. Further, what has been characterised as the "Magna Carta of refugees", the 1951 *Convention Relating to the Status of Refugees* does not mention asylum, nor does its 1967 protocol. (Boed 1994, 10-11)[208]

Regarding the documents there were nonetheless attempts to include asylum among the principles stated. Boed (1994, 10) writes how in the drafting of the Covenant of Civil and Political Rights, the representative of Yugoslavia proposed the inclusion of the right to asylum to the list of rights. However, the states participating in the drafting could not agree on the question whether asylum should be on the list of fundamental rights and, if so, who would fall under the scope of the right (ibid.).

Another failed attempt to include a duty to grant asylum was the drafting of the *United Nations Convention on Territorial Asylum* (1977) which was ultimately not accepted. The duty to grant asylum was on the agenda, proposed by (West) Germany, and, although gaining support from the representatives of Austria, Columbia, Costa Rica, France and Italy, the majority of the state representatives did not support it. As a result of other disagreements related to the document draft, the Convention was never ratified. (Cf. Boed 1994, 12-14;

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208 For the Refugee Convention, see Zimmermann 2011.

Grahl-Madsen 1980)[209] Asylum has thus continued to be understood as a right of the state and any attempts to try to conceptualise it as a right of the individual at the international level have failed, thus far.

[209] The United Nations Declaration on Territorial Asylum of 1967 mentions asylum granting in the form of exercise of sovereignty and further conceptualises asylum as "right to seek and enjoy" (cf. Weis 1969).

5 WHEN EXCEPTIONALITY GETS INTO TROUBLE - AMENDING THE CONSTITUTIONAL RIGHT TO ASYLUM IN THE *BUNDESTAG* (1993)

> Wir tun das aus Verantwortung für die politisch Verfolgten. Wir tun es aus Verantwortung für die Sicherung des Rechtsstaates. Wir tun es aus Verantwortung für die Stabilität der demokratischen Ordnung. Wir tun es nicht zuletzt aus Verantwortung für ein Zusammenwachsen in Europa. (Hermann Otto Solms, FDP, 1993:13512)[210]

> Richtig ist, meine Damen und Herren, daß jedem Verfolgten Schutz gewährt werden muß, aber nicht notwendigerweise in Deutschland. (Erwin Marschewski, CDU/CSU, 1993: 13533)

> Meine Damen und Herren, das Asylrecht ist Menschenrecht. (Konrad Weiß, Bündnis 90/ Die Grünen, 1993: 13519)

> Sagen Sie nein zur Abschaffung des Asylrechts! Sagen Sie nein zur Liquidierung einer der wichtigsten Konsequenzen aus dem mörderischen Naziregime! (Gregor Gysi PDS/Linke Liste, 1993: 13577)

With the right to asylum created in the Parliamentary Council, asylum was given a special, constitutional role. Even though the authors of the *Grundgesetz* did not elaborate on the uniqueness of their creation, or argue that they were creating something exceptional, nonetheless, on an international basis the right to asylum came to be unique and exceptional.

As the right of an individual *vis-à-vis* the state, asylum placed limitations on the unrestricted prerogative of the sovereign state to refuse entry to non-citizens claiming their individual right to asylum. It bound all state authority to respect the right, as well as granting asylum seekers access to the courts to enforce the right.

This chapter forms the third and final exploratory narrative related to the right to asylum in this research. It brings a third example of asylum's "institutional survival" and offers a further perspective related to the politics of rights.

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210 The debate referred here is: *Deutscher Bundestag. Stenographischer Bericht, 12. Wahlperiode, 160. Sitzung, den 26. Mai 1993.*

In this chapter I look at the alteration of the individual right to asylum by analysing the debate in the *Bundestag* on May 26, 1993 when the final deliberations and the vote on the constitutional change took place.

The final debate lasted 12 hours and took place with 10,000 demonstrators and several thousand police officers outside the parliamentary building in Bonn. The deliberations continued the polarised and heated debates on the question of the right to asylum and whether it should be subjected to change and if so, to what changes. The constitutional change was finally accepted with the *Asylkompromiss* between the governmental coalition of the CDU and the FDP together with the majority of the SPD in December 1992, later reaching the required two-thirds majority for the constitutional change in the *Bundestag* and in the *Bundesrat*.

Whereas Article 16(2) 2 GG is quite concise in proclaiming the right to asylum, its successor 16a is forty times longer (cf. Grimm 2001).[211] The initial phrase remains the same as in the 1949 original, but what follows is a long list of conditions for the right, containing references, for instance, to 'safe third countries' and 'safe countries of origin'.[212]

This chapter looks at the arguments related to the constitutional change in the *Bundestag* in May 1993 and examines how the debate unfolded. It discusses arguments made with reference to the Parliamentary Council and looks at the question of how the change was grounded in relation to European integration in particular. I will further discuss the conceptualisations related to the excep-

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211 Art. 16a GG:
"*(1) Politisch Verfolgte genießen Asylrecht.*
(2) Auf Absatz 1 kann sich nicht berufen, wer aus einem Mitgliedstaat der Europäischen Gemeinschaften oder aus einem anderen Drittstaat einreist, in dem die Anwendung des Abkommens über die Rechtsstellung der Flüchtlinge und der Konvention zum Schutze der Menschenrechte und Grundfreiheiten sichergestellt ist. Die Staaten außerhalb der Europäischen Gemeinschaften, auf die die Voraussetzungen des Satzes 1 zutreffen, werden durch Gesetz, das der Zustimmung des Bundesrates bedarf, bestimmt. In den Fällen des Satzes 1 können aufenthaltsbeendende Maßnahmen unabhängig von einem hiergegen eingelegten Rechtsbehelf vollzogen werden.
(3) Durch Gesetz, das der Zustimmung des Bundesrates bedarf, können Staaten bestimmt werden, bei denen auf Grund der Rechtslage, der Rechtsanwendung und der allgemeinen politischen Verhältnisse gewährleistet erscheint, daß dort weder politische Verfolgung noch unmenschliche oder erniedrigende Bestrafung oder Behandlung stattfindet. Es wird vermutet, daß ein Ausländer aus einem solchen Staat nicht verfolgt wird, solange er nicht Tatsachen vorträgt, die die Annahme begründen, daß er entgegen dieser Vermutung politisch verfolgt wird.
(4) Die Vollziehung aufenthaltsbeendender Maßnahmen wird in den Fällen des Absatzes 3 und in anderen Fällen, die offensichtlich unbegründet sind oder als offensichtlich unbegründet gelten, durch das Gericht nur ausgesetzt, wenn ernstliche Zweifel an der Rechtmäßigkeit der Maßnahme bestehen; der Prüfungsumfang kann eingeschränkt werden und verspätetes Vorbringen unberücksichtigt bleiben. Das Nähere ist durch Gesetz zu bestimmen.
(5) Die Absätze 1 bis 4 stehen völkerrechtlichen Verträgen von Mitgliedstaaten der Europäischen Gemeinschaften untereinander und mit dritten Staaten nicht entgegen, die unter Beachtung der Verpflichtungen aus dem Abkommen über die Rechtsstellung der Flüchtlinge und der Konvention zum Schutze der Menschenrechte und Grundfreiheiten, deren Anwendung in den Vertragsstaaten sichergestellt sein muß, Zuständigkeitsregelungen für die Prüfung von Asylbegehren einschließlich der gegenseitigen Anerkennung von Asylentscheidungen treffen."

212 For commentary on Article 16a GG, see Maunz/Dürig 2012.

tional nature of the individual right, whether it was seen as something troublesome or rather as something worth keeping. While analysing the shifting notions related to asylum in the debates of the 1993, the purpose of this chapter is also to offer a timely distance and a perspective to the debates in the Parliamentary Council and to the construction of asylum by the authors of the *Grundgesetz*.

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When looking at the deliberations around the alterations which took place to the asylum paragraph this chapter also sheds light on a further dimension of the politics related to rights and the relations between rights and politics, more generally.

In his article 1998 in *Frankfurter Allgemeine Zeitung* titled "*Parteiinteressen und Punktsiege*" Grimm writes how no previous German constitution has been changed as many times as the *Grundgesetz*. The individual rights section of the Basic Law was, however, largely spared substantial changes. The right to asylum is one of the very few individual rights in regard to which restrictions were made, from an originally unconditional right to a right with highly circumscribed conditions.

As already noted, individual rights constitute, by definition, the basic principles of political order and all state authority is accordingly bound to respect those rights. Nonetheless, they can be subject to significant restriction and change, as in the case of the asylum debates and the decisions ultimately reached in 1993.

In Germany, constitutional changes require a two-thirds majority both in the *Bundestag* and in the *Bundesrat* which means that to achieve such a change a wider consensus is required—compared with regular parliamentary decisions, for example— and often results from a compromise between the government and the opposition. While constitutions provide the framework for the political system and "regulate the relationship between continuity and change" they are thus also more resistant to change than regular political procedures. (Cf. Grimm 1998)

Before discussing the asylum debates in May 1993, it is useful to make brief reference to the political developments regarding the right to asylum after its acceptance in 1949, its politicisation beginning in the 1970's, and finally the further escalation of the asylum problematic in the 1990's.

5.1 From something almost unforgotten to something highly troublesome

In her research, Wolken has analysed political asylum in the domestic political discourse in (West) Germany in the post 1949 era. From the point of view of not being subject to extensive political debate, she calls asylum an "unforgotten right" during the period between 1949 and 1973. In the 1950's, the matter of asy-

lum came to be understood, above all, in relation to the problem of displaced persons and Soviet refugees. In 1953, West Germany ratified the Geneva Convention and adopted its definition of 'political refugee' (Art. 1). During the 1950's, the bulk of political refugees arriving in Germany came from Eastern Europe, a consequence of the Uprising of Hungary in 1956, for instance. (Wolken 1988, 32-33)

It was not before the year 1965, sixteen years after the ratification of the *Grundgesetz* when the administrative process (*Anerkennungsverfahren*) for asylum-seeking was established in the Aliens Act (*Ausländergesetz*) of 1965. This procedure was to guarantee the administration of the constitutional asylum guarantee. (Wolken 1988, 36)

In (West) Germany, asylum became closely linked with immigration, seen as a *de facto* migration path, in the absence of a comprehensive immigration policy (cf. Schuster 2003). Joppke (1999) writes how (West) Germany began receiving large numbers of immigrants, more than many other states, between the years of 1950 and 1993. Particularly important role belonged to 'guest workers'. Despite a total number of 12.6 million migrants, the official governmental policy remained based on the argument that Germany was not a country of immigration ("*kein Einwanderungsland*"). (ibid. 62)[213] This argument was also heard in the *Bundestag* in 1993 in relation to the asylum debates by a representative of the CDU/CSU.[214] Altogether, as regards to migration, the 1993 debates form a curious mix of frequently recurring themes related to the (mis)use of the right to asylum for migratory purposes, or to the notion of altering the right as a means of limiting unwanted immigration ('*Steuerung der Zuwanderung*') all in connection to the idea that Germany is not a country of immigration. Conceptually, the distinction between the terms '*Einwanderung*' und '*Zuwanderung*' should be noted; the first one has an active, positive connotation, whereas the latter refers to '*in*migration' that is not wanted but is "tolerated for constitutional and moral-political reasons", being used particularly in arguments by those speaking for the more restrictionist asylum policies (cf. Joppke 1999, 97).

From the 1970's onwards, with the growing numbers of asylum seekers and the changes relating to the originating countries—from the East bloc states to the states of the "Third World"—Wolken identifies the beginning of the discourse related to the "misuse" or "abuse" of asylum (*Asylmißbrauch*) and the need to "fight it" (Wolken 1988, 39). The misuse argument, which became prominent in the debates related to the West German right to asylum is linked to the idea that majority of the asylum applicants are not bona fide refugees, i.e. genuinely in need of protection, but "bogus applicants", '*Asylanten*' or even '*Scheinasylanten*'. The point here is that the person claiming the right to asylum does not have legitimate grounds for it but uses the right as a means of access, for instance, and in order to remain in the country. The rhetoric related to "asy-

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213 For migration in a more historical perspective, see also Bade 2002.

214 "*Deutschland ist kein Einwanderungsland und kann als dichtbesiedeltes Gebiet auch kein Einwanderungsland werden. Die Aufnahmekapazität unseres Landes und unserer Bevölkerung darf nicht überfordert werden. Wer dies tut, fördert Fremdenfeindlichkeit.*" (Michael Glos CDU/CSU, 1993: 13529)

lum abuse" further increased in relation to oil crisis of the 1970's when Germany stopped recruiting guest workers with the effective result that seeking asylum became in practice the only legal path into Germany. This, combined with the system of family reunification, lead to a surge in the number of asylum applications. (Cf. Joppke 1999)[215]

Nevertheless, Joppke (1999) writes how the change of the constitutional right of asylum remained a matter that subjected to little debate during the 1970's and up until the mid 1980's. In the analysis of Münch (1992, 196) constitutional change remained "a taboo" until as late as the early 1990s.

This situation, as outlined above, is linked to the notion that the West German right to asylum of 1949 has frequently been conceptualised in historico-ethical terms, with strong reference to the past. In the commentary literature, asylum is related to '*Vergangenheitsbewältigung*', "coming to terms with the past"; it signifies something that is "*großartig*" after a sorrowful past; something magnificent that could come as a consequence of it and something that has a larger meaning to the self-understanding and to the ethical standards of the post-war state. For instance, in one of the commentaries that was published in the 1980's defending the right, Schmid (1982, 9) writes: "*Der Parlamentarische Rat [...] hat aus dem Erlebnis des Dritten Reiches die großartige Konsequenz gezogen, ein persönliches, subjektives Recht des politisch Verfolgten auf Asyl zu begründen und diesem Recht als Grundrecht Verfassungsrang zu geben*". This basic right had "*seine Wurzel in dem ethischen Anspruch des neuen freiheitlichen Staates*" (ibid).

Kimminich (1968) further argues that by creating the asylum provision—which eventually became a constitutional commitment towards asylum-seekers—the politicians of the Parliamentary Council knowingly chose a "great humanitarian tradition" with their broad asylum formulation with which the protection of the politically persecuted could not be easily eliminated, also in reference to their own experiences from emigration: "*Viele der Mitglieder des Parlamentarischen Rates, die selbst das Schicksal der Emigration erfahren hatten und sich darüber im klaren waren, daß eine kleinliche Gestaltung des Asylrechts den Schutz des Verfolgten allzu leicht vollständig beseitigen kann, bewußt die großzügige Formulierung wählten und damit in eine große humanitäre Tradition eintraten.*" (Kimminich 1968, 79)

The asylum provision of the *Grundgesetz* has even been called a 'confessional right' in its link with the Nazi past (cf. Joppke 1999, 86). Consequently, Joppke writes how the first ones to advocate for the change as regards to the constitutional provision linked their arguments to the idea of representing a generation who was free of the guilt of the past.[216] The political Left, in particular, supported the constitutional asylum provision with reference to the history

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215 For the asylum discussions in Germany, see also: Spaich 1982; Klausmeier 1984; Kauffmann 1986; for the vocabulary and the concepts related, cf. Wengeler 1995. For the debates related to the constitutional change, see also Bade 1994; Barwig 1994 (Hrsg.).

216 Joppke refers to the CDU politician Heinrich Lummer in the magazine *Der Spiegel* in 1986 (cf. Joppke 1999, 290).

of Nazi persecution and with reference to the self-imposed humanitarian obligation in connection to the right, whereas the political Right, on the contrary, began to argue for the change with reference to political stability in particular (ibid. 86-87).

Even if in the late 1970's and early 1980's discussions over the need for constitutional change had not yet begun there were, however, several legislative measures adopted in relation to the asylum procedure which, in practice, tightened German asylum policy remarkably. The most restrictive measures were pushed for particularly at the local level. The *Länder*, which were responsible for the social welfare and housing for the asylum seekers promoted a more restrictive policy in the *Bundesrat*. Furthermore, there was a difference between the policies and practices of Southern and Northern federal states in relation to asylum applicants and administrating asylum, eventually leading to the acceptance of more restricted policies also in the more liberal Northern states. (Joppke 1999, 86)

During the 1970's and the 1980's, with the liberal constitutional right of asylum providing the overall framework, the legislative measures adopted led to a clear difference between the constitutional provision—which, for example, prohibited the turning away of the asylum seekers at the border—and the legislative practices adopted. In 1982, the Asylum Procedures Law (*Asylverfahrensgesetz*) was passed, which for Joppke had two important consequences: firstly, "it put on a legal basis for social deterrence measures then practised *ad hoc* by some *Länder*". This meant worsening conditions for asylum seekers such as, for instance, housing (to camp-like conditions) with local municipalities being at the same time reluctant to bear the growing costs associated with asylum-seekers. Further, the law allowed the refugee concept to be interpreted based on the objective concept of the *Grundgesetz*, instead of the subjective Geneva Convention concept, meaning that the courts adopted a more restrictive and narrow conception of 'political persecution', with the consequence that only five percent of persons applying for asylum were acknowledged to have the legal status of a 'political refugee'. Despite the narrow interpretation, the majority of asylum applicants were permitted to remain in Germany as *de facto* refugees based on the *non-refoulement* provision in international law. Another example of the more restrictive measures that resulted from the 1982 Law was the notion of 'manifestly unfounded' applications which meant that some asylum applications could be examined via an accelerated procedure. (Joppke 1999, 88-89; see also Münch 1992; Knopp 1994)[217]

In the earIy 1990's the CDU/CSU continued to push and campaign for stricter measures regarding asylum. In 1991 a new, stricter Asylum Procedures Law was negotiated between CDU, SPD and FDP (cf. Lauter et al 2011, 171). Despite the legislative measures adopted, the number of asylum applicants arriving during the 1980's had increased still further, from just over 100 000 applicants to a record number of almost 440 000 asylum applicants in 1992. The per-

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217 Münch (1992) in particular outlines the different legislative developments regarding asylum in (West) Germany.

sons arriving in Germany during these years were not only asylum applicants but also ethnic Germans to whom the Basic Law (Art. 116) granted citizenship, and further *Übersiedler* from the DDR. Joppke argues that the situation with the rising numbers of asylum applicants "triggered the most serious domestic crisis that the Federal Republic had ever gone through". (Joppke 1999, 91) Asylum seekers and other foreigners were targeted with xenophobic right wing violence, for instance in Rostock-Lichtenhagen in August 1992. This violence towards foreigners, the worst since the end of Nazi regime, led to the death of 40 persons in total. In the autumn of 1992, Chancellor Helmut Kohl described the escalated situation in the years 1991/1992 as a 'state of emergency'. (Joppke 1999; see also Schuster 2003)

The CDU/CSU started to argue for the need of a constitutional change in 1980's. The FDP and SPD were originally against touching the Basic Law. Both parties, however, changed their positions as regards to the constitutional change in 1992. Inside both parties there remained strongly differing opinions in regard to the matter, lines being particularly dividing inside the Social Democratic Party. SPD party executives published their "*Petersberger Beschlüsse*" (the so called "*Petersberger Wende*") in early autumn of 1992 in which the need to limit the right the asylum and a change of course in relation to the constitutional asylum right was established. (Cf. Lauter et al. 2011; Knopp 1994; Schuster 2003)

In December 1992 the SPD, CDU/CSU and FDP reached their *Asylkompromiss* regarding constitutional change.[218] The organisation *Pro Asyl* called the compromise 20 years later as "*Sieg der Straße*" and as "*Niederlage des Rechtsstaates*" (cf. Pro Asyl 2012). SPD party members who did not agree with the compromise subsequently published their "*Hamburger Manifest*" in December 1992 in which they outlined their arguments against narrowing the individual right to asylum. For instance, the manifesto argued that the right to asylum—protecting politically persecuted citizens of the world after the Nazi ravages—carried the "aura of the Basic Law" for the post-war generation: "*Wenn es etwas wie eine Aura der Verfassung gibt, dann ist es für die deutsche Nachkriegsgeneration das Asylrecht des Artikels 16 Grundgesetz, das einzige Grundrecht, das sich nach den weltweiten Verheerungen der Nazis an alle politisch verfolgten Weltbürger wendet*". In the manifesto, SPD politicians further referred to the origins of the right and the experience of those who escaped the Nazi regime, noting how: "*Wir in der Bundesrepublik waren stolz darauf, daß die Verfassung historische Schuld in positive Zukunft transportierte, ein Versprechen an die Weltgemeinschaft*", thus being proud of the "historical guilt" which had translated into something good in the form of the individual right to asylum. SPD politicians concluded their manifesto by noting that "a panic driven approach" to an individual right does not solve any problems but means the constitutional legitimation for right wing politics instead of trying to fight them politically: "*Ein panikartiger Zugriff auf Grundrechte löst kein Problem, sondern gerät nur zu leicht zum ersten Schritt einer*

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218 As put forward by the SPD the compromise gave special status to '*Bürgerkriegsflüchtlinge*', persons fleeing because of civil wars.

fortgreifenden Aushöhlung unserer Verfassung und – nicht weniger gefährlich – legitimiert wie ein Irrwitz den Schlachtruf der neuen Rechtsbewegung 'Deutschland den Deutschen' konstitutionell, statt sie politisch zu bekämpfen." (Cf. *Die Zeit* 1992)

5.2 Creating conditions for access

When speaking for constitutional change and when defending the asylum compromise in the *Bundestag* on May 26 1993 in the second and third reading of the constitutional amendment, the arguments set forth by the representatives of the CDU, FDP or SPD defend and protect the constitutional right. Consequently, Wolfgang Schäuble of the CDU/CSU, one of the strongest advocates for the change, argues: "*Wer hier in diesem Saal oder außerhalb sagt, Gegenstand der Debatte sei die Abschaffung des Asylrechts in der Bundesrepublik Deutschland, der sagt nicht die Wahrheit: er redet falsch Zeugnis*" (1993: 13504).

Hans-Ulrich Klose (SPD) refers to the controversy inside the Social Democratic Party surrounding the asylum compromise, asking for the opinions of those changed their points of view to support the compromise to be respected, also noting that the people who agree with the change want to protect and keep the right:

> Noch vor zwei Jahren habe ich ähnlich argumentiert wie jene knapp hundert Kolleginnen und Kollegen der SPD-Fraktion, die dem Asylkompromiß heute nicht zustimmen werden. Ich bitte aber auch um Respekt für die anderen, für die Mehrheit der Fraktion, die wie ich angesichts der tatsächlichen Entwicklung ihre Position geändert haben und heute für eine Änderung des Grundgesetzes stimmen werden. Auch wir wollen das Asylrecht für politisch Verfolgte erhalten. (1993: 13509)

For Hermann Otto Solms of the FDP, maintaining the right of asylum as is, wanting to stick with the "perfect provision", would mean endangering the right itself and that, on the contrary, the change is required to ensure the constitutional existence of the right to asylum:

> Ich habe schon einmal an dieser Stelle gesagt, in typisch deutschem Drang nach perfekter Regelung und größter Einzelfallgerechtigkeit laufen wir Gefahr, das Asylrecht, das wir eigentlich schützen wollen, selbst zu gefährden. (1993: 13511) [..] Gerade weil wir das Asylrecht sichern wollen, sind wir bereit, die notwendigen Änderungen zu beschließen. (1993: 13512)

Among the voices opposed to constitutional change, to Konrad Weiß of the *Bündnis 90/Die Grünen*, the new compromise formulation was almost equal to the abolition of the right to asylum (1993: 13517)—or, translated into German, that politically persecuted could still enjoy asylum, but not in Germany: "*Politisch Verfolgte genießen Asylrecht, aber nicht in Deutschland*" (1993: 13519). Gregor Gysi (PDS/Linke Liste) calls the formulation a "deception" ("*Täuschung*") as, even if the right of asylum exists, the doors to asylum for the politically persecuted are almost closed. For Gysi, the formulation of the asylum compromise states: "*Fremder, du wirst politisch verfolgt; deshalb hast du Anspruch*

auf Asyl; wir haben dir aber fast alle Wege zu uns versperrt" (1993: 13517). Burkhard Hirsch of the FDP further notes how the asylum clause is formally included in the new formulation, but in reality the right is almost abolished: "*Er bleibt formal erhalten; in Wirklichkeit wird er fast völlig beseitigt*" (1993: 13545).

The references to 'safe third countries' and 'safe countries of origin' in the text of the newly formulated asylum article are part of a broader vocabulary of safety and administrative policies related to European development regarding asylum from the 1980's onwards. The introduction of the legal concepts linked to 'safety' is connected to other more strict policies regarding asylum-seekers—such as stronger visa requirements, and sanctions for airline carriers—which aimed at reducing the "administrative burden" of asylum applications and to speed up asylum procedures (cf. Costello 2005). The notion of "safetiness" is thus a rhetorical innovation, a metanomy, which from the administrative side means that some asylum applications do not have to be individually examined in the country where the application is lodged. Germany did not invent these safety policies but adopted and incorporated practices and language in the *Grundgesetz* that were already in use in several other European states. An important part of the European development were the so called London Resolutions of November 1992 which outlined common criteria for rejecting 'unfounded' asylum applications. The resolutions covered 'manifestly unfounded applications', a harmonised approached towards 'third countries' and countries 'in which there is generally no serious risk of persecution'.[219]

The notion of a 'safe third country' in Article 16a GG refers to countries through which the asylum seeker has travelled before arriving in Germany. Formulated in this way, the asylum applicant may be sent back, to that 'safe third country' without substantial examination of the asylum application. For Germany in 1993 these countries included the states of the European Community and states that had ratified the Geneva Convention and *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR). Outside the European Community, Finland, Norway, Austria, Poland, Sweden, Switzerland and the Czech Republic were defined as 'safe third countries' (cf. Selk 1994, 59).[220] All the neighbours of Germany were thus defined as 'safe'.

Persons coming from states that are defined as 'safe countries of origin', on the other hand, faced an accelerated procedure. The notion implicit in this idea—i.e. *a priori* refusal—is that persons coming from certain states are not politically persecuted and, consequently, there are states that are not engaged in persecution. Accordingly, all reasons provided by such persons in applying for asylum can be regarded as *de facto* 'non-political'. Germany is one of the states that began using country lists defining 'safe countries of origin'. These states in the 1993 Asylum Procedure Act included, for instance, Bulgaria and Romania.

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219 Resolution of 30 November 1992 on manifestly unfounded applications for asylum; Resolution of 30 November 1992 on a harmonised approach to questions concerning host third countries; Conclusions of 30 November 1992 on countries in which there is generally no serious risk of persecution.

220 See also Lassen 1997; for the EU developments generally, see e.g., Boccardi 2002; Noll 2000.

Both of these states were countries of origin for large numbers of asylum seekers coming to Germany. Since late 1992, Germany already had a "take back agreement" with Romania (cf. Bade 1994, 131).

A further notion included in the new asylum article 16a is 'airport regulation' which means that persons applying for asylum without a valid passport or persons who are coming from safe countries of origin are subjected "to a quick recognition procedure in the extraterritorial airport space" before allowing them to enter any space which is technically Germany (cf. Joppke 1999, 94).

Thus, under the new conditions asylum is essentially difficult to claim in the Federal Republic. Nevertheless, it is still possible to legally enter Germany to claim asylum by coming by sea or by air with valid documents, or when coming from a 'non-safe country of origin', without travelling via any 'safe third countries'.

5.3 The "overused" and "abused" right

When debating the change of the individual right in the *Bundestag* in May 1993, asylum becomes intertwined with the question of maintaining "the internal security of the liberal constitutional state"; "*wir müssen die innere Stabilität unseres freiheitlichen Rechtsstaats bewahren*" (1993: 13506). It was the argument of Wolfgang Schäuble from the CDU/CSU which most strongly advocated the change on this basis. Such a conception used to promote the change based on notions of conflict and crisis also ultimately puts the stability of the state first, before the right of the individual. With reference to increased violence towards asylum seekers and increasingly negative public opinion regarding asylums applicants, Schäuble underlines how the asylum decision is important not only for the inner security of the country but also from the point of view of peaceful relations among Germans and the 6.5 million foreigners living in Germany. Further, Schäuble's argument promotes a change in the right of asylum with reference to the capacity of Germany to offer future protection to persecuted persons:

> Die Entscheidung, die wir zu treffen haben, ist wichtig für den inneren Frieden in unserem Land, für das friedliche, gute Miteinander von deutschen und ausländischen Mitbürgern und für unsere Fähigkeit, auch in Zukunft Verfolgten Schutz, Zuflucht, Aufnahme zu bieten. Es leben in der Bundesrepublik Deutschland 6,5 Millionen Ausländer. Sie leben ganz überwiegend — das muß auch so bleiben oder höchstens noch besser werden — friedlich und freundlich mitten unter uns. Es wird auch nach der Entscheidung des heutigen Tages keine Abschottung der Bundesrepublik Deutschland gegenüber ausländischen Mitbürgern, solchen, die zu uns kommen wollen und zu uns kommen werden, geben. (1993: 13504)

Schäuble argues, as do several other parliamentarians speaking for the asylum compromise, with numbers and draws a picture of the situation in which Germany is as a net recipient country and noting, for instance, how Germany had received 300,000 refugees from the former Yugoslavia during previous years, more than any other state in Europe. Additionally, more than 200,000 ethnic

Germans have been received every year in accordance with the obligations under the '*Landsleute*':

> Es werden in den nächsten Jahren — völlig unabhängig von dem, was wir entscheiden — 200 000 bis 250 000 zusätzliche ausländische Mitbürger jedes Jahr allein im Wege des Familiennachzugs auf Grund bestehender Regelungen unseres Ausländerrechtes zu uns kommen. Wir haben in den letzten Jahren über 300 000 Flüchtlinge aus dem Bürgerkriegsgebiet im ehemaligen Jugoslawien in Deutschland aufgenommen, mehr als jedes andere europäische Land. Wir haben uns im Bewußtsein unserer Verpflichtung gegenüber denjenigen unserer Landsleute, die durch Diktatur und Krieg in diesem Jahrhundert mehr zu leiden hatten als die meisten von uns, verabredet, daß wir auch in Zukunft Aussiedler, die zu uns kommen wollen, in einer Größenordnung wie in den letzten Jahren, zwischen 200 000 und 230 000 Jahr für Jahr, aufnehmen werden. (1993: 13504)

Schäuble moves on to describe the excessive use of the asylum provision and note how in the escalation in 1992 Germany received a total of almost 440,000 asylum applications with the majority of the persons arriving being regarded as not politically persecuted and thus without legitimate grounds to claim protection. Yet these persons had access to the country and were able to remain in Germany for a long time:

> Vor diesem Hintergrund können wir der Tatsache nicht ausweichen, daß im vergangenen Jahr zusätzlich 440 000 Menschen unter Berufung auf das Recht auf Asyl zu uns nach Deutschland gekommen sind, von denen die allermeisten nicht tatsächlich politisch verfolgt sind. Vor dem Hintergrund dieser Zahlen müssen wir der Tatsache ins Auge sehen, daß Monat für Monat in diesem Jahr 1993 50 000 unter Berufung auf das Recht auf Asyl, obwohl sie ganz überwiegend nicht politisch verfolgt sind, Aufnahme in der Bundesrepublik Deutschland suchen und für einen zu langen Zeitraum finden. (1993: 13504)

Schäuble notes how the CDU had pushed for a constitutional change as a solution to the problem since the 1980's. The underlying notion in Schäuble's argument is that the provision for asylum in the constitution limits the ultimate state control over the situation and, furthermore, that such control would not be regained without the constitutional change. Schäuble argues that the politicians, both at the *Bund* and *Länder* levels, had tried all other measures which were possible without changing the constitutional right to asylum. Thus, for Schäuble, change is a long overdue solution: "*Es ist eher zu spät als zu früh*"(1993: 13506).

> Wir wissen aus den anderthalb Jahrzehnten, in denen wir um dieses Problem und mit diesem Problem ringen, daß es ohne eine Ergänzung unseres Grundgesetzes eine zureichende Steuerungsmöglichkeit nicht gibt. Wir, die Verantwortlichen von Bund und Ländern, haben in diesen anderthalb Jahrzehnten alles versucht, was ohne Änderung des Grundgesetzes möglich war. (1993: 13505)

Schäuble's argument about all the legal measures that have been exhausted before the constitutional change is targeted, above all, at those SPD politicians opposing the asylum compromise, who despite the "warnings and requests" still remain in opposition as regards to the change (1993: 13507). To emphasise the point, Schäuble quotes Herbert Wehner, the Head of the SPD faction in the 1982 debates in the *Bundestag* who already at that time argued that if the politicians

did not take action regarding the "control of the asylum problem", they would find themselves equally responsible for the rise of the Fascist organisations (1993: 13506). According to Wehner's argument, the matter of asylum, and limiting it, was also connected to addressing the root causes of hostility towards foreigners. Following this line of thinking, Schäuble is, at least indirectly, making those politicians not willing to take action partly responsible for the escalation of the situation.[221]

Schäuble goes on to argue, speaking for the constitutional amendment and for respecting the different perspectives of the parliamentarians in the debate, that politicians have a duty to fulfill, responsibility to take, regarding the "peaceful co-existence between Germans and the foreign citizens", and in relation to the liberal constitutional state. Preserving inner peace requires a change in the asylum provision:

> Ich sage noch einmal: Wir sollten diese Debatte in Respekt auch vor den Argumenten des jeweils Andersdenkenden führen. Aber das gilt auch für diejenigen, die seit langem überzeugt sind, daß ohne eine Änderung des Grundgesetzes der innere Frieden in diesem Lande nicht zu bewahren ist. Wenn wir im gegenseitigen Respekt und im Bewußtsein um unsere Verantwortung diese Debatte heute führen und entscheiden, dann dienen wir dem inneren Frieden, dann dienen wir dem friedlichen Zusammenleben von deutschen und ausländischen Mitbürgern, dann dienen wir unserem freiheitlichen Rechtsstaat. Darum möchte ich Sie bitten. Tun wir unsere Pflicht! (1993: 13507)

Hans-Ulrich Klose, speaking for the asylum compromise from the point of view of the SPD, mentions his support for the original asylum formulation of 1949. However, connected to "massive inmigration" there is a fear that the right to asylum will be lost and cannot be guaranteed when so excessively (over)used: *Wir fürchten aber, daß es am Ende in der Massenhaftigkeit der Zuwanderung verlorengeht, weil es wegen Überlastung und Überforderung weder rechtlich noch tatsächlich gewährleistet werden kann*" (1993: 13509).

Klose argues in financial terms, mentioning the costs of the re-unification of Germany and the financial costs of asylum-seekers for the municipalities: Hamburg alone receives as many asylum seekers annually as Great Britain which is further related, for instance, to the problematic of providing housing for the asylum seekers (1993: 13509). Klose draws a distinction between citizens and non-citizens when describing the consequences "*für die eigene Bevölkerung*": "*Die Menschen dort sind nicht etwa ausländerfeindlich, aber ihre Lebensverhältnisse verschlechtern sich oft in bedrückender Weise; sie fühlen sich bedroht, persönlich und sozial*" (1993: 13509).

Klose speaks of "fighting the root causes of flight" ("*Fluchtursachen bekämpfen*") as an important theme for politics, but notes that "'*Hilfe für Menschen' kann nicht bedeuten, daß wir alle, die in Not sind, bei uns aufnehmen*"—Germany cannot receive all people suffering from hardship. Klose further argues for constitutional change on the basis of public opinion by noting how 70 percent of

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221 In the *Bundestag* debate of May 26, 1993 several references were made to the right-wing party *Republikaner* which strongly supported abolishing the constitutional right to asylum and which had gained some support at the local level.

the German population desires such a change. For Klose, there was "fear regarding the stability of democracy" in relation to the right to asylum that is overloaded and cannot be guaranteed (1993: 13509).

The problem, for Klose, regarding the right to asylum is those persons who "misuse the right". Further, there is a need to stop "uncontrollable unwanted migration". Nevertheless, there is also public support and desire to keep the right to asylum to protect persons who are "genuinely politically persecuted":

> Dennoch gibt es bei vielen Menschen eine zunehmende Angst vor Überforderung und Wohlstandsverlusten durch die massenhafte mißbräuchliche Inanspruchnahme des Asylrechts. Und wer wollte bestreiten, daß es die gibt? Die Menschen hier wollen, daß wir dies und die ungebremste Zuwanderung stoppen. Sie wollen ganz überwiegend aber auch, daß wir das Asylrecht für wirklich politisch Verfolgte sichern. (1993: 13508)

The reference to the "abuse of the asylum system" as a basis for constitutional change is a recurring theme in the debate. There is a distinction made between "genuine refugees" and "economical refugees" ('*Wirtschaftsflüchtlinge*'),[222] "*Fehlasylanten*" and "*Scheinasylanten*".[223] Behind this line of argument lies the idea that the change and stricter measures will hinder abuses and help and benefit those who are "genuinely in need of protection". The polarised language of the German asylum debate is also targeted criticisms in the *Bundestag*, in particular by the politicians speaking against the compromise with reference to terms such as "*Asylantenschwemme*" or arguments relating to the notion of "*überfülltes Boot*",[224] the idea that the German boat was full.[225]

Klose refers to the compromise formulation between the factions regarding Article 16a. This article which "*unter verfassungsästhetischen Gesichtspunkten nicht eben ein Meisterwerk geworden ist*" (1993: 13508), nevertheless, still declares in its first clause that "politically persecuted enjoy the right to asylum". Klose emphasises that it means that asylum remains an individual right: "*Daraus folgt nämlich, daß wir politisch Verfolgten das individuelle Asylrecht sichern müssen, entweder bei uns oder bei anderen, mit denen wir in Asylfragen zusammenarbeiten*" (1993: 13508), thus not necessarily a right in Germany but in countries with which Germany co-operates in matters of asylum.

Similarly, Hermann Otto Solms, leader of the FDP faction, also refers to public opinion as a legitimation for the change of the asylum provision, albeit quoting different numbers. Solms argues that a failure to make a decision on the matter of changing the asylum provision would have serious consequences: it would disrupt citizens' trust in politics, political parties and in the whole political system:

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222 For this kind of argument see, e.g. Klaus-Heiner Lehne (CDU/CSU) (1993: 13573).
223 E.g. Joachim Graf von Schönburg-Glauchau (CDU/CSU) (1993: 13591).
224 E.g. Petra Bläss (*PDS/Linke Liste*) (1993: 13562).
225 The metaphor refers also to the Swiss asylum policies during the World War II (see Chapter 3).

> 90% der Bevölkerung erwarten von uns eine Änderung des Grundgesetzes. Ein Scheitern an dieser Stelle hätte dramatische Auswirkungen. Das Vertrauen in die Politik würde dadurch tiefgreifend gestört. Das Vertrauen in die demokratischen Parteien nähme zunehmend Schaden. Nicht nur die demokratischen Parteien, das ganze demokratische System würde ins Wanken geraten. (1993: 13512)

Although defending the change with reference to popular opinion, Solms notes that the Free Democrats had to carefully consider whether constitutional change was needed: "*Wir hatten gewissenhaft zu prüfen und haben gewissenhaft geprüft, ob die Änderung des Art. 16 des Grundgesetzes zwingend geboten ist*" (1993: 13511). This was further related to the guiding idea of the party that fundamental rights were to remain untouched. The point was, however, to support the amendment to the asylum provision so that its "genuine meaning" could be further accomplished. The votes of the FDP were divided on the right to asylum, with a minority of the representatives voting against the change.

> Wir sind immer davon ausgegangen, daß die Grundrechte so, wie sie im Grundgesetz formuliert sind, nicht angetastet werden sollten. Aber auch die F.D.P. als Rechtsstaatspartei muß nun nach einem tiefgreifenden und bewegenden Diskussionsprozeß erkennen, daß wir uns nicht verschließen dürfen, diese Verfassungsbestimmung so zu ändern, daß der eigentliche Sinngehalt des Art. 16 wieder erfüllt werden kann. (1993: 13512)

Konrad Weiß of *Bündnis 90/Die Grünen* argues against references to public opinion as a legitimation for altering the constitutional provision and, instead, asks what will become of Germany when a fundamental right, a human right is thrown in the "*Waagschale*" for the election, hinting towards the *Bundestag* elections of 1994. Altering the asylum paragraph is for Weiß a sign of unwillingness to take political action and find solutions other than constitutional change. Further, for Weiß, who emphasises the need and the ability of finding of a "humanitarian and solidarity solution" (1993; 13517), to refuse to help and to guarantee the protection of the poor and persecuted is profane:

> Was soll aus Deutschland werden, wenn ein Grundrecht, ein Menschenrecht so leichtfertig für eine Wahl in die Waagschale geworfen wird? Dabei ist die Stimmung gegen das Asylrecht doch erst das Ergebnis der Handlungsunwilligkeit der Politik, verquickt mit einer Desinformationskampagne sondergleichen. Verfolgten und Armen Hilfe und Zuflucht zu verwehren ist gotteslästerlich, Herr Schäuble, nicht das stärkende Gebet von besorgten Bürgerinnen und Bürgern, die zudem Verfassungstreue üben. (1993: 13518)

While criticising the *Asylkompromiss*, Weiß argues that the representatives of *Bündnis 90/Die Grünen* have not made their decision dependent upon the voters or "party salvation" but, instead, remain loyal to the Basic Law, "*stehen treu und unerschütterlich zum Grundgesetz*" (1993: 13518). Consequently, the faction argues that the constitutional amendment is "*verfassungswidrig*", unconstitutional.[226] With reference to this argument, it should be noted that the Federal Con-

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226 E.g. Wolfgang Ullman (*Bündnis 90/Die Grünen*) (1993: 13556). Additionally, similar arguments were presented by several SPD parliamentarians.

stitutional Court ruled in 1996 that the 'safe third country' concept was constitutional (cf. Aida 2013).

Weiß, nevertheless, believes that the majority of Germans are ready to help the persecuted and refugees and to "prioritise humanity over comfortable, hard-hearted solutions" (1993: 13518). Initially, the faction *Bündnis90/Die Grünen* conceptualised the right to asylum as an inalienable and inviolable human right, as "*unverzichtbar*" and "*unantastbar*".[227]

Instead of constitutional change, the *Bündnis 90/Die Grünen* faction argues for political action and for the creation of an immigration law (*Einwanderungsgesetz*) which would take into consideration the notion that "*Deutschland de facto ein Einwanderungsland ist und bleiben wird*". The faction further proposed a law on refugees with the goal to guarantee the legal status of refugees under the Geneva Convention as well as to take action towards a common European refugee policy. (1993: 13519)

5.4 References to the Parliamentary Council

Parties across the political spectrum, whether speaking for or against altering the individual right to asylum, refer to the Parliamentary Council in their arguments. For instance, Klose (SPD) declares himself to take seriously, understanding and respecting the "good historical, politico-moral grounds" that were behind the creation of the asylum provision:

> Der alte Art. 16 ist doch nicht zufällig in unser Grundgesetz geraten. Dafür gab und gibt es gute historische und politisch-moralische Gründe. Ich nehme diese Gründe ernst, ich verstehe sie und respektiere sie. (1993: 13509)

To Solms (FDP) the asylum guarantee is irreconcilably connected to German history and to the "historical identity" of Germans. The right was created from the experiences of the dictatorship and from the experiences of those who had to leave their homes and seek refuge from the *Third Reich* and to suffer through difficult experiences within the borders of the Western democracies. The constitutional protection of politically persecuted was essentially related to the new constitutional beginning after the years under dictatorship:

> Die Aufnahme der Asylrechtsgarantie in unser Grundgesetz ist unlösbar mit unserer Geschichte und unserer historischen Identität verbunden. Unzählige Menschen mußten im Dritten Reich ihre Heimat verlassen und Zuflucht in fremden Ländern suchen. Nicht immer waren es gute Erfahrungen, die die Menschen auf ihrer Flucht vor Diktatur und Unrecht auch an den Grenzen durchaus gefestigter westlicher Demokratien machen mußten. Die Verfasser des Grundgesetzes waren 1949 auch auf Grund dieser Erfahrungen von dem Leitmotiv bewegt, nach den schrecklichen Jahren der Gewaltherrschaft, nach Krieg und Zerstörung, auf deutschem Boden einen rechtsstaatlichen Neuanfang zu ermöglichen. Dazu gehörte auch der verfassungsrechtlich garantierte Schutz vor politischer Verfolgung. „PolitischVerfolgte genießen Asylrecht" — das war der schlichte, prägnante Satz, der sich schließlich in Art. 16 des

[227] Cf. Drucksachen 12/3235.

> Grundgesetzes niederschlug. Besser kann man es eigentlich auch nicht formulieren. (1993: 13511)

Another important consideration is that the authors of the *Grundgesetz*—deliberating and writing when Germany was in ashes—could not have predicted the situation of reunified Germany in 1993 while creating the asylum paragraph. Neither could the authors have foreseen how the courts and the administrators would come to interpret the constitutional asylum clause. Solms, thus, refers in his argument to the continuity with the Basic Law and its "value system" but also to the necessity of change, with reference to the unexpected consequences of the right to asylum and inability to maintain the provision under changed conditions:

> Niemand konnte sich in jener Zeit jedoch die Situation ausmalen, wie wir sie heute bei der Asylgewährung im wiedervereinigten Deutschland vorfinden. Der Parlamentarische Rat hat bei seinen Beratungen zur Formulierung des Grundgesetzes durchaus Überlegungen angestellt, ob Deutschland, das damals in Schutt und Asche lag, überhaupt imstande sein würde, politisches Asyl zu gewähren. Das ist den Protokollen zu entnehmen. Das zeigt uns, daß dem Parlamentarischen Rat 1949 bei der Formulierung des Art. 16 eine gänzlich andere Situation vor dem geistigen Auge stand, als sie sich uns heute darstellt. Die heutige Situation war 1949 nicht vorhersehbar. Sie war eigentlich auch nicht vorstellbar. Und schon gar nicht vorhersehbar war, was Gerichte und Verwaltungen aus diesem eindeutig formulierten Verfassungsgebot in den Jahren danach gemacht haben. (1993: 13511)

A similar point is made by Michael Glos of the CDU/CSU in relation to consequences which the authors of the *Grundgesetz* could possible not have imagined. Glos first gives an account of the asylum problematic, describing what had become of the right created by the authors in the Parliamentary Council:

> Allein in den ersten vier Monaten dieses Jahres waren es erneut 161 324 Asylbewerber. Hochgerechnet wären dies im Jahr 1993 650 000 Zuwanderer, die wir zu erwarten hätten, wenn wir nicht handeln. Nur der allergeringste Teil dieser Asylbewerber wird in seinen Heimatländern tatsächlich aus politischen, religiösen und ethnischen Gründen verfolgt, wie die niedrige Anerkennungsquote von unter 5 % sichtbar belegt. Das bestehende Asylrecht wird aus wirtschaftlichen Günden als Instrument einer unkontrollierten Zuwanderung mißbraucht — wenigstens versucht man, ein Bleiberecht für möglichst lange Zeit zu erlangen. Wie ein starker Magnet auf kleine Metallsplitter wirkt dabei das bisherige individuelle Grundrecht auf Asyl in unserem Grundgesetz, mit einer absoluten Rechtsweggarantie und einem daraus resultierenden Bleiberecht. Die lange Verfahrensdauer und die auch im Vergleich zu anderen europäischen Ländern hohen Sozialleistungen machten Deutschland zu einem gelobten Land. Dieser gewaltige Mißbrauch schadet den wirklich politisch Verfolgten und widerspricht völlig dem Sinn des Asylrechts. (1993: 13527)

To Glos, the right to asylum had become an instrument of "uncontrollable immigration"; it was used as a "right to stay", misused for financial and social purposes, while most of the asylum seekers were not persecuted in their home countries for political, religious or ethnical reasons. In describing the relation between asylum seekers and Germany, Glos argues that the individual right to asylum was working like "a powerful magnet in relation to metal fragments", being thus a strong "pull factor" attracting asylum seekers to Germany. The misuse of the right to asylum harmed the genuinely politically persecuted and

was completely against the meaning of the right. Consequently, Glos argues that the individual right to asylum drafted in the Parliamentary Council was never meant to serve the conditions that existed in the 1990's:

> Damals, 1949, als die Väter und die wenigen Mütter des Grundgesetzes nach langen und tiefgebenden Diskussionen aus den Erfahrungen der deutschen Geschichte dieses weltweit einmalige Grundrecht schufen, konnten sie in keiner Weise voraussehen und abschätzen, welche Folgen hieraus 30 oder 40 Jahre später auch durch eine andere Rechtsprechung entstehen würden. Dafür war das Asylgrundrecht nie gedacht. (1993: 13527)

Hans de With of the SPD further supports the compromise on asylum with reference to the Parliamentary Council and unforeseen changes in circumstances since 1949. De With acknowledges the historical experiences behind the right but argues that in the conditions of the 1990's there is a necessity for even unpleasant reductions and compromises regarding the right to asylum. With reference to the "three years of refugee flows of previously unknown extent", de With does not, however, note that the refugee problematic, and 'displaced persons' in particular, was a well-known documented reality in the immediate post-war period, although Germany was not a refugee destination country during the Second World War.

> Unsere Welt hat sich seit 1949 gravierend verändert. Insbesondere seit drei Jahren bewegen uns Flüchtlingsströme bisher nicht gekannten Ausmaßes. Damit hat sich die Notwendigkeit ergeben, auch Regelungen anzupassen, die damals in Erinnerung an die Emigration in der Nazizeit Errungenschaften darstellten und auch heute noch sind: den für jederman einklagbaren Rechtsanspruch auf Asylgewährung und die ebenso einmalige wie großzügige Rechtswegegarantie. Gerade bei diesen Grundrechten haben wir Abstriche machen müssen, Abstriche, die uns weh tun und weh getan haben, die aber auch nötig sind. (1993: 13551)

If there are arguments that the right to asylum cannot be legitimised on the basis of the early political history of the right—even if that history shows something closely related to "German historical identity", as referenced by Solms (above)—historical experience is, nevertheless, used in order to legitimate the arguments of those defending the asylum provision when speaking from the point of view of maintaining the individual right untouched.

Weiß of the faction *Bündnis 90/Die Grünen* is one of the politicians who refer to the Parliamentary Council when arguing against constitutional change. Weiß notes how the perspective of the right to asylum in the *Grundgesetz* is that of the individual's and not the state's, contrary to comparable contemporary documents such as the Universal Declaration of Human Rights and the Geneva Convention. The former declares the right to seek and enjoy asylum, while the latter goes a step further in granting refugees some rights against the state. To Weiß, the West German asylum paragraph, born out of "German egoism and nationalism", represented "great progress" for the European legal system: "*Diese neue Sicht, dieser großartige Fortschritt im europäischen Rechtssystem, ist erlitten und erstritten worden von denen, die als Flüchtlinge Rettung gesucht hatten vor deutschem Egoismus und Nationalismus.*" (1993: 13518)

Weiß goes on to provide a list of names, all former asylum-seekers escaping Nazi Germany, to whom the politicians in the *Bundestag* are responsible for when deciding upon the constitutional asylum right:

> Thomas Mann und Albert Einstein, Bertold Brecht und Marlene Dietrich, Friedrich Wolf und Kurt Tucholsky, Anna Seghers und Willy Brandt, die Reichstagsabgeordneten Siegfried Aufhäuser und Georg Bernhard, Friedrich Dessauer und Rudolf Hilferding, Ludwig Quidde und Ernst Reuter, Johannes Schauff und Luise Schiffgens, Joseph Wirth und Clara Zetkin sowie noch viele andere Asylanten, ihnen allen sind wir bei der heutigen Entscheidung verpflichtet. (1993: 13518)

Weiß' argument is an example of the "historico-ethical narrative" related to the German right to asylum. Weiß emphasises asylum as a "humanitarian duty" born out of the experiences of the Nazi persecution. To Weiß the *Bundestag* debate is not only about altering the asylum right, it is also about the fundamental values and self-imposed duties of the re-unified Germany: "*Es geht hier und heute um mehr als um die Novellierung eines Verfassungssatzes; es geht um die Grundfesten dieses Staates, um die Grundwerte und um die selbstauferlegten Pflichten des wiedervereinigten Deutschland*". It is further related to the idea of not offering the fundamental values of democracy to nationalism or to violence: "*Wir dürfen es nicht zulassen, daß den dumpfen Wahn der Nationalisten, ihrem Gebrüll und ihrer Gewalt Grundwerte unserer Demokratie geopfert werden.*" (1993: 13519)

To Gregor Gysi (*PDS/Linke Liste*) "abolishing Article 16" means that history is being worked off. Gysi refers to the "lessons of the Nazi regime" which were behind the introduction of the asylum provision. Many persons were saved because of being granted asylum while several states also refused asylum according to their economic and political interests. That was, for Gysi, the reason why the authors of the *Grundgesetz* granted the politically persecuted the right to asylum without making it conditional upon the discretion of the state. Gysi thus hints at the idea that with the criteria related to the new asylum formulation, parliamentarians in the *Bundestag* are creating conditions for access which were exactly the opposite of those intended by the authors of the original paragraph:

> Mit der Abschaffung des Artikels 16 wird auch Geschichte auf eigenwillige Art und Weise aufgearbeitet. Es war die Lehre aus der Zeit des Naziregimes, die zur Einführung dieses Artikels führte. Millionen Menschen, die aus Deutschland flüchten wollten, insbesondere Juden, hätten gerettet werden können, wenn es in anderen Staaten ein individuelles Recht auf Asyl gegeben hätte. Es ist bekannt, wie viele Staaten sich damals gegen Flüchtlinge verweigerten. Es ist bekannt, daß Staaten während des Faschismus Flüchtlinge nur nach Gutdünken aufnahmen, nach eigenen politischen und ökonomischen Interessen. Deshalb haben die Mütter und Väter des Grundgesetzes beschlossen, politisch Verfolgten einen Anspruch auf Asyl zu gewähren und es nicht in das Belieben des Staates zu stellen, ob er Asyl gewährt oder nicht. (1993: 13515)

Gysi further argues, and causes some controversy, by stating that the right to asylum became instrumentalised during the Cold War, which meant that everyone coming from the states of the Eastern bloc were granted asylum and that the *Bundesverfassungsgericht* applied the broadest possible interpretation as regards to those asylum applicants. For Gysi, as asylum lost its value as a "means

to an end" in the Cold War, it could now reach its "truly humanitarian function". Parliamentarians in the *Bundestag* are, however, not willing to see this to happen. Gysi thus makes a clear distinction between the 'political' and 'humanitarian' dimensions of asylum:

> Während des Kalten Krieges wurde Art. 16 im Rahmen der Ost-West-Auseinandersetzungen instrumentalisiert. Jeder und jede, die aus einem Ostblockstaat kam, galt als politisch verfolgt und genoß Asyl. Damals stimmten Bundesverfassungsgericht und offizielle Politik überein, daß Art. 16 des Grundgesetzes im Hinblick auf die sich sozialistisch nennenden Staaten möglichst weit interpretiert werden muß. Aber diesen Zweck hatte Art. 16 des Grundgesetzes 1989 erfüllt. Seitdem wird deshalb mit allen Mitteln gegen ihn gearbeitet. Er dient nicht mehr zur Auseinandersetzung im Ost-West-Konflikt. Er könnte jetzt seiner wirklich humanitären Intention gerecht werden, und genau das soll nicht geschehen. (1993: 13515)

Both Weiß and Gysi argue against constitutional change in relation to the experiences behind the original construction of the right. With reference to the "fundamental values" of the Federal Republic (Weiß), or the "humanitarian function" of the right (Gysi), there is also an attempt to conceptualise the meaning, or the "dignity" of the act of asylum granting in the context of the 1990's and the reunified Germany, not to see the right only with reference to the past, but also to consider its legitimation in the contemporary context, even if these aspects might not be mutually exclusive.

Another argument made with reference to history is presented by Carl Ewen (SPD). When explaining his vote in the protocol of the debate Ewen mentions as one of the reasons for opposing the constitutional change and the SPD's *Asylkompromiss*, the notion that many opponents of the Nazi regime, including Social Democrats, could not always find safety in other states, even if the Nazi persecution was well-known (1993: 13672).[228] While the argument makes reference to the history of the SPD, it is further connected, as were the arguments of Weiß and Gysi, to the idea that Germany's response towards persons fleeing should not be similar to those states that closed their borders to people fleeing the *Third Reich*. A further SPD politician voting against the majority of the party is Berthold Wittich, who argues that the substance of the right to asylum should not be compromised in a necessary reform. Wittich makes a reference to the Nazi violence towards the Jews, political opponents and foreigners when addressing violence targeted towards foreigners in the *Bundesrepublik* of the 1990's. To Wittich, the answer by German democracy to the violence and hate should be that of solidarity towards those in weaker position and not the amendment to the individual right, which would signal an inappropriate response to an "attack against humanity and human dignity":

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228 "*Ich bitte aber auch deshalb um Verständnis für mein Abstimmungsverhalten, weil ich mich erinnere, daß viele Gegner der nationalsozialistischen Gewaltherrschaft – darunter viele Sozialdemokraten – nach 1933 darunter leiden mußten, daß es eben damals nicht überall im nichtfaschistischen Ausland möglich war, Schutz zu finden. Besonders schlimm war das für unsere jüdischen Mitbürger. Ihnen verweigerte man im westlichen Ausland trotz der weltweit bekannten Verfolgung in Nazi-Deutschland die schützende Aufnahme. Nur in beschämend kleiner Zahl wurden sie diesseits und jenseits des Atlantiks aufgenommen.*" (1993: 13672-13673)

> Mord und Totschlag in allen Regionen; Molotow-Cocktails gegen Frauen, Kinder und alte Menschen; Pflastersteine gegen Polizisten und Brandsätze gegen Asylbewerberheime — das gibt es wieder in Deutschland! Die geplante Änderung des Artikels 16 ist das falsche Signal auf diesen Anschlag gegen Humanität und Menschenwürde. Alle Menschen guten Willens sind jetzt in die Pflicht genommen, ein breites Bündnis gegen den Fremdenhaß zu organisieren und unsere ausländischen Bürgerinnen und Bürger vor gewalttätigen Ausschreitungen zu schützen. Absage an die Terroristen und Solidarität mit den Schwachen — das ist das Gebot der Stunde und die überzeugende Antwort der Demokraten auf diesen Akt der Barbarei. Ja, wir dürfen nicht vergessen: Der fanatische Haß der Nazis gegen Juden, Ausländer, politische Gegner sowie Männer und Frauen der Kirchen führte direkt in den Zweiten Weltkrieg, in den Kessel von Stalingrad und in die Hölle von Auschwitz! (1993: 13668)

Wittich names the constitutional right to asylum as a "monument of the memory of the persecution, torture and murder of Germans during the Nazi period". While being rooted in the historical experiences, the right had come to protect numerous persons from persecution and saved them from torture and should further be kept in the interest of the persecuted:

> Das Asylrecht ist ein Mahnmal der Erinnerung an die Verfolgung, Folterung und Ermordung von Deutschen während der Nazizeit. Dieses Asylrecht hat in vier Jahrzehnten über hunderttausend Flüchtlingen Schutz gewährt und zehntausende vor Folter bewahrt. Deshalb sollte die Substanz dieses Menschenrechtes auch im Zuge einer notwendigen Reform nicht zur Disposition stehen — im Interesse derer, die ohne Heimat und in Not sind, um der Menschen willen, die gequält, vertrieben und verfolgt werden. (1993: 13668)

5.5 The European integration framework

The analysis of this chapter puts emphasis on the question of how the legitimation of the constitutional change was linked to the European integration framework. It was in this context in particular in which the German exceptionality in asylum became problematised from the 1980's onwards. Joppke (1999, 85), for instance, notes how national sovereignty in matters of asylum, being seen to be limited by the constitutional provision on asylum, was paradoxically regained with refrence to the supranational level of the European integration.

The process of harmonisation of asylum policies started in Europe at the community level in the 1980s. This was related both to the creation of the internal market which abolished border controls, as well as to the rise of the numbers of asylum seekers arriving in Western Europe and which increased further with the end of the Cold War, the break down of the Berlin Wall, and with the conflicts in the Former Yugoslavia and the Caucasus in the 1990s (cf. Vevstad 1998, 224; see also Boccardi 2002).

The core of the asylum integration is the so called *Dublin system* which is designed to allocate responsibility for asylum applications in Europe. While this idea was initially part of the intergovernmental Schengen Convention, originally signed between West Germany, France, the Netherlands, Luxemburg and Belgium in 1985, the Dublin Convention was agreed upon in 1990 and became

effective in 1997.[229] The difference between the Schengen Agreement and the Dublin Convention is that, whereas the former stipulates terms for dealing with matters such as abolishing border controls or creating common visa policies, the latter focuses on the question of determining state responsibility in asylum applications.

The Dublin Convention includes the idea that asylum can be sought only once inside the area of the European Community. The system revolves around the idea of state responsibility and the process of determining a responsible state for assessing the asylum application. Responsibility is determined by a hierarchy of criteria, with the idea that asylum should be sought in the first country in which the applicant arrives. The language of safety, also incorporated in Article 16a of the *Grundgesetz*, is central to the Dublin system; the system relies heavily on the notion of 'safe third countries' where the applicant can be sent to without any substantial evaluation of the grounds for asylum. The legitimation of the Dublin system is that it should, on the one hand, guarantee that asylum applicant's claims are examined somewhere and, on the other hand, should prevent the same applicant from lodging multiple asylum applications, the so called "venue shopping" or "asylum-shopping", closely related to the notion of "misuse of the asylum system".

The central idea of the Dublin Convention was asylum applicants to be referred to a third country—which the German constitutional provision on asylum prohibited—and thus it was impossible for Germany to wholly apply the Schengen and Dublin Conventions prior to a constitutional change (cf. Joppke 1999). In relation to the European Community, Germany initially tried to negotiate the idea of burden-sharing among European states. Hailbronner writes that the states of the European Community, however, saw Germany's asylum problematic—that the great majority of asylum applicants in Europe came to Germany—as a German problem and were not predisposed to the idea of common European solution, or the idea of a distribution of asylum applications in Europe. The Maastricht treaty of 1992 mentioned for the first time the idea of "common action to harmonize aspects" of the Member States asylum policies. (Cf. Hailbronner 1993, 107)

The problem related to German 'exceptionality' and 'singularity' in the European framework, from the point of view of promoting the change, is outlined by Schäuble in the *Bundestag* debates of May 1993:

> Anders ist auch an dem Tatbestand nichts zu ändern, daß bis zum heutigen Tag zwei Drittel aller Asylbewerber, die nach Europa kommen, in die Bundesrepublik Deutschland kommen. Der Grund dafür, rechtlich jedenfalls, liegt ganz einfach darin — damit sind wir beim Kern unserer Beratung und Entscheidung —, daß unser Grundgesetz in Art. 16 seiner noch geltenden Fassung einen weiterreichenden Schutz für politisch Verfolgte bietet als die Genfer Flüchtlingskonvention, deren Mitglied wir wie alle anderen zivilisierten Staaten dieser Erde sind. Wenn nur ein einziges Land, die Bundesrepublik Deutschland, in seiner verfassungsrechtlichen Schutz-

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229 Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities—Dublin Convention (97/C 254/01). The Dublin Convention was replaced by a community instrument, the so called Dublin II regulation in 2003.

> gewähr über die Schutzgewähr der Genfer Konvention hinausgeht — es gibt keine zweite Verfassung auf dieser Erde, die dies tut —, dann braucht man sich hinterher nicht zu wundern, wenn zwei Drittel aller Asylbewerber in Europa nach Deutschland kommen. Das ist der Grund, warum ohne eine Grundgesetzänderung dieses nicht zu erreichen ist. Wer die Singularisierung der Bundesrepublik Deutschland beseitigen will, der muß unseren grundrechtlichen Schutz für politisch Verfolgte an das Niveau der Schutzgewähr der internationalen Staatengemeinschaft, wie es in der Genfer Konvention seinen Ausdruck findet, anpassen. Nichts anderes ist der Gegenstand der heutigen Beratung und Entscheidung. Wer dies als Abschaffung des Schutzes für Verfolgte bezeichnet, der behauptet, daß der Rest der zivilisierten Staaten dieser Erde politisch Verfolgte nicht schützt. (1993: 13507)

Schäuble notes above how the German asylum provision went beyond the protection granted anywhere else, in any other national constitution. It also went beyond the Geneva Convention, which was applied "in the rest of the civilised world". With the idea that asylum seekers choose the country where they have the best chance of receiving protection, it was no wonder for Schäuble why in 1992 eighty percent, two thirds of applicants arriving in Europe, came to Germany. The core of the argument is that Germany should not have to do more than other states, be more exceptional in granting protection than others. Michael Glos (CDU/CSU) further notes that among those seeking asylum in Germany were persons who had already been rejected in some other European states, meaning that Germany had turned into a "reserve asylum country" in Europe:

> Deutschland nimmt seit Jahren zwei Drittel aller Asylbewerber auf, die sich in den Staaten der Europäischen Gemeinschaft melden. Die Bundesrepublik muß dabei bislang auch Bewerber aufnehmen, deren Anträge von anderen Staaten der EG bereits abgelehnt worden sind. In den zurückliegenden Jahren ist deshalb Deutschland quasi zu einem Reserveasylland in Europa geworden — ein untragbarer und unhaltbarer Zustand. (1993: 13527)

For Schäuble, abolishing internal borders in Europe made harmonisation of asylum "urgently necessary" and this harmonisation was not possible without altering the *Grundgesetz*:

> Wir, die CDU/CSU und die F.D.P., die Koalition, haben immer gesagt — und zwar schon vor dem Wegfall des Eisernen Vorhangs, als wir noch gar nicht zu hoffen gewagt haben, daß 1989 so Glückliches in Deutschland und Europa stattfinden werde —, daß mit der Abschaffung der Binnengrenzen in Europa eine Harmonisierung des Asylrechts in Europa zwingend notwendig werden wird, die ebenfalls nicht ohne eine Grundgesetzänderung möglich ist. Auch dieses haben wir schon Mitte der 80er Jahre gewußt und gesagt. Offene Grenzen in Europa ohne Kontrollen erzwingen eine gemeinsame Asyl- und Zuwanderungspolitik in der Europäischen Gemeinschaft. (1993: 13505)

In the European context and in comparison to other European states—which do not grant asylum as liberally as Germany was obliged to do under its constitutional asylum guarantee—the area without internal borders which eventually allows not only 'citizens' of the Community but also 'third country nationals' to move freely within it, becomes problematic from the point of view of a state that receives more asylum applicants than the rest of the European states together and is situated at the border of the EC. As the German standards are

higher, and there is no willingness from the other states to adjust their standards to meet those of Germany, the idea is rather that Germany should adjust its level to that of other civilised states—which in practice means adjustment downwards.[230] Such an adjustment, Schäuble (CDU/CSU) argues, is also a matter of fair burden-sharing between the states which can be accomplished by no longer granting more protection than all the other states:

> Wir wollen mit unserer Regelung, mit der wir uns anpassen an das Niveau der Schutzgewähr aller anderen zivilisierten Staaten, insbesondere der europäischen Staaten, ja nichts anderes als eine faire Lastenverteilung in Europa erreichen, die wir aber erst erreichen können, wenn wir eben nicht mehr Schutz gewähren als alle anderen. (1993: 13505)

The argument related to those promoting the change is that the 'burden' of asylum seekers is unfairly distributed in Europe and, instead, all countries should have similar rights and duties. Solms (FDP) emphasises how the politically persecuted will also be protected in the future, but they do not have the right to choose their country of protection:

> Meine Damen und Herren, wir haben immer wieder gesagt: Wir wollen ein europäisches Asylrecht schaffen, an dem alle Länder mit gleichen Rechten und Pflichten teilnehmen können. Wenn Europa auf Dauer Bestand haben will, können wir die Lasten nicht so ungleich verteilt lassen, wie sie heute verteilt sind. Es muß in Europa zu einer gerechteren Lastenverteilung kommen. Wer tatsächlich in seiner Heimat politische Verfolgung befürchten muß, soll weiterhin auf Zuflucht hoffen können. Allerdings kann er nicht die freie Wahl haben, in welchem Land er diese Zuflucht erhält. (1993: 13512)

The idea presented above is that protection should be sought and guaranteed in the first country the asylum seeker arrives in. Thus, under this conception asylum is not a matter of choice on the part of the applicant. On the contrary, should the applicant be in need of international protection, protection should be sought—and guaranteed—in the first country in which the asylum seeker arrives (see also Kloth 2001). From the state perspective, the request for safety—which is situated at core of the Geneva Convention definition of 'refugee'—does not coincide with the notion of choice on the part of the applicant (cf. Zimmermann 2009, 75).

Solms argues that all European states must carry the responsibility for asylum seekers, not only Germany, an idea that is embedded in the notion of a 'safe third country': "*Mit der sogenannten Drittstaatenregelung nehmen wir daher auch unsere Nachbarn in die Pflicht*" (1993: 13512). Third country rules are thus a way to distribute responsibility. A similar argument is made by Friedbert Pflüger (CDU/CSU) who defends the "legitimate narrowing of a basic right" with reference to the idea of common responsibility in "managing the migratory movements":

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230 The idea of "downwards harmonisation" is a common critique related to the European Union asylum harmonisation between the states; see Kivistö 2013.

> Was wir heute beschließen, ist nicht die Abschaffung, sondern die legitime Einschränkung eines Grundrechtes. Eines der Hauptargumente von Teilen der Opposition gegen den Asylkompromiß besteht in der „Drittstaatenregelung". Sie mache es, so lautet das Argument, de facto unmöglich, das Grundrecht auf Asyl wahrzunehmen, da die Bundesrepublik von sicheren Drittstaaten umgeben ist. In Wahrheit aber ist diese Regelung nur ein Versuch, die anderen Staaten Europas mit in die Verantwortung bei der Bewältigung der Wanderungsbewegung einzubinden. (1993: 13653)

If different human rights organisations have been very critical towards the 'safety' policies in managing asylum seeking, European Council on Refugees and Exiles (ECRE) arguing in 1995 that the 'safety' measures represent "one of the main threats to the institution of asylum in countries of Western Europe" (cf. ECRE 1995), the safe country language is also the target of strong criticism in the *Bundestag*. For Bernd Reuter of the SPD, another opposing voice to be found in the protocol, the third country rules mean for "the genuinely politically persecuted" "*eine Abschottung unseres Landes*"; they mean creating barriers, as politically persecuted would not have access to the German territory within the new rules. This is contrary to the arguments that claim that those "genuinely politically persecuted" benefit from the new constitutional formulation as it ends the "abuse of the asylum system". Reuter further notes that these regulations have negative impacts for neighbouring states, as a wealthy Germany transfers its problems to its economically weaker neighbours: "*[d]ie reiche Bundesrepublik Deutschland wälzt mit der Drittstaatenregelung ihre Probleme auf wirtschaftlich wesentlich schwächere Staaten ab*". Reuter argues against the SPD compromise on asylum by claiming that instead of abolishing a basic right, and rather than amending the constitution, the existing legal instruments should be used meaningfully to "fight the misuse": "*Anstatt den Mißbrauch nachhaltig zu bekämpfen und die vorhandenen gesetzlichen Instrumentarien sinnvoll anzuwenden, soll nun ein Grundrecht faktisch abgeschafft werden. Unser Grundgesetz wird zum Steinbruch!*" (1993: 13654-13655)

Even if the system relying on the idea of 'first countries' or 'third countries' would mean that those situated at the borders would have to carry more responsibility in relation asylum seekers arriving than those situated in the centre, transferring the burden to neighbouring states is, however, not part of the German agenda, according to Solms (FDP). In the *Bundestag* debates, the situation of Poland is emphasised as especially problematic for those speaking against the compromise formulation. However, with the naming of Poland and the Czech Republic as 'safe third countries', Solms argues the question is not about turning these countries into 'buffer zones' for Germany, but about bringing these states closer to the European co-operation:

> Wir wollen diese Nachbarländer nicht als Pufferzone gegen Zuwanderung für Deutschland mißbrauchen. Im Gegenteil: Wir sehen darin ein Element der Annäherung dieser Staaten an die Europäische Gemeinschaft, einen wichtigen Schritt zur Europäischen Gemeinschaft. Mit der Beteiligung von Polen und der Tschechischen Republik binden wir diese Länder enger an Europa mit dem Ziel, das Tor zur Vollmitgliedschaft ein Stück weiter aufzumachen. (1993: 13513)

Gysi (*PDS/ Linke Liste*) connects the creation of country lists with the making of foreign politics and the idea that instead of the interest of the individuals seeking asylum, the interests of the states in maintaining good diplomatic or economic relations are prioritised (1993: 13517). Weiß (*Bündnis 90 /Die Grünen*) further argues against the idea of 'persecution free' countries by referring to country reports by Amnesty International, for instance, which point out that despite the willingness to name the states as 'safe', groups of persons still face persecution in these particular states (1993: 13520).

As outlined above, whereas representatives of CDU/CSU and FPD argue that the European harmonisation means adjusting German standards to the level of other civilised states, the faction *Bündnis 90/Die Grünen* in its conceptualisation of asylum as a 'human right' claims that the necessary European harmonisation must take the human right of asylum into consideration, and not *vice versa*:

> Meine Damen und Herren, das Asylrecht ist Menschenrecht. Eine notwendige europäische Harmonisierung des Asylrechts muß dieses Menschenrecht zum Maßstab nehmen. Die beabsichtigte Änderung des Grundgesetzes und die Folgegesetze werden an den tatsächlichen Problemen nichts ändern. (Konrad Weiß, 1993: 13519)

Some of the arguments opposing constitutional change with reference to the European integration mention the idea of '*Festung Europa*' (fortress Europe)[231] linked with the notion that wheras the borders inside Europe are being abolished following greater European integration, the borders outside Europe—regarding "third country nationals"—are being strengthened. This is further related to the notion that in the creation of the inner market and in introducing the free movement of goods, persons, services and capital (Single European Act, 1986) asylum seekers and refugees were left out of the framework (Guild 2006, 634). They have thus remained as categories of persons for whom national borders still matter in a strict sense, for whom external borders have become even stronger. This is the core of the argument presented, for instance by Gysi (*PDS/Linke Liste*), in noting that when the legal access of asylum seekers becomes more difficult, the number of illegal entries to Germany will increase (1993: 13514).

One of the representatives opening up the problematic aspcts related to the European integration in matters of asylum —from the perspective of arguing that the constitutional asylum provision should remain untouched—is Burkhard Hirsch of the Free Democrats.

Hirsch opposes the compromise proposal on asylum with reference to "humanitarian principles" and by arguing that the compromise does not take the Geneva Convention into consideration, and thus not being in accordance with the principles of international law. To Hirsch, the clause "politically persecuted enjoy the right to asylum" belongs to the core of the *Grundgesetz*. Even if the clause formally remains the same also after the constitutional change, in practice, the right becomes almost completely eliminated (1993: 13545). For

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231 E.g. Marliese Dobberthien (SPD) (1993: 13639).

Hirsch the borders of the *Bundesrepublik* become almost entirely closed for those seeking asylum under the new asylum article: "*Durch die vorgesehene gesetzliche Regelung werden die Grenzen der Bundesrepublik für diejenigen fast vollständig geschlossen, die sich auf das Asylrecht berufen. Wer mit dem Flugzeug kommt, wird im Flughafen in einem wirklich nachlesenswerten Verfahren abgefertigt*." Hirsch criticises the procedure at the airport and further notes how every refugee arriving to Germany could in the future be sent back without any hearing of the application, regardless of the whether a person is persecuted politically, or not. Additionally, as long as there is no substantial harmonisation regarding neighbouring states, the legal situation of the refugee is worrying (1993: 13545).

> Ein Flüchtling, der sich bei uns meldet, vertraut sich uns und unserer Rechtsordnung an und nicht irgendeinem anderen Staat. Wir haben uns verpflichtet, ihm zu helfen, und nicht, darauf zu vertrauen, daß unser Nachbar ihm helfen wird. Es kann auf Dauer nicht verborgen bleiben, daß diese Gesetze das verfassungsrechtliche Asylrecht nur um den Preis seiner praktischen Bedeutungslosigkeit erhalten. Sie führen politisch nicht zu einer Lastenteilung, sondern dazu, daß unsere Nachbarn ihrerseits ihre Grenzen ebenfalls gegen Flüchtlinge abschotten. Ob wir wollen oder nicht, wir bekämpfen auf diese Weise nicht die Fluchtursachen, sondern wir wehren Flüchtlinge ab. Wir verändern damit im Bewußtsein vieler Mitbürger die freiheitliche Substanz unseres Staates, deretwegen sie sich ihm in besonderer Weise verbunden fühlen. (1993: 13546)

Hirsch argues the planned measures in regard to the constitutional change do not lead to a sharing of the burden of asylum seekers but, on the contrary, lead to the point where neighbouring states are also closing their borders. By doing so, the politicians are not tackling the root causes of the flight of refugees but, on the contrary, fend off refugees. For Hirsch, this is against the "*freiheitliche Substanz*" of the state of Germany. Instead of the planned measures, there should be an aspiration for 'real European refugee policies' (1993: 13546). Thus Hirsch argues for the need for substantial measures of harmonisation inside Europe instead of measures with which asylum seekers can merely be turned away to other states.

5.6 Altering an individual right

The constitutional change which narrowed the scope the individual right to asylum was accepted by 521 votes for and 132 against. All the representatives of the CDU/CSU voted for the change, as did the majority of representatives from the SPD and the FDP. The opposing votes were distributed across the various factions: the SPD, FDP, *PDS/Linke Liste* and *Bündnis 90/Die Grünen*.

In the 1990's the right to asylum in the *Grundgesetz* was changed from the liberal conceptualisation drafted in the Parliamentary Council into a right that still is a constitutional asylum right but one that is exceedingly difficult to access. Further, with this change German asylum legislation was transformed

from being singular and exceptional in an international context into the framework given by European integration.

In the Parliamentary Council, the drafters of the *Grundgesetz* debated the possible difficulties relating to the right, including the idea that the authority in deciding on matters of asylum could be transferred to the border. The authors were, however, careful not to create such conditions as the basis for access to asylum, making specific reference to the idea that persons could be denied access at the border. Instead, everyone claiming to be politically persecuted was allowed to enter Germany and as a subjective right—the asylum provision limiting the powers of the state—allowed for judicial review. The self-subjected limitation on state sovereignty and the generosity by the authors of the *Grundgesetz* was called into question in the 1993 debates from the perspective of a state receiving a large amount of asylum-seekers in connection with its constitutional duty. Those advocating for the change argued with the support of numerical data, large numbers of asylum seekers arriving together with the low recognition rate of the courts in acknowledging persons as 'political refugees'.

Thus, the Christian Democratic Minister of the Interior Rudolf Seiters outlined the goal of the new provision: "*Ziel der neuen Asylgesetze ist es, die Zahl der unberechtigten Asylanträge auf Dauer wesentlich zu verringern. Durch schnelle Verfahren und schnelle Rückführungen in sichere Dritt- und Herkunftsstaaten soll deutlich gemacht werden, daß mit einem Asylantrag nicht mehr – quasi automatisch – ein längerer Aufenthalt in der Bundesrepublik zu erreichen ist.*" (1993: 13524) The purpose was thus to diminish the number of "unauthorised asylum applications" and abolish the idea that lodging an application for asylum would automatically mean a longer stay in Germany.

These debates, in the context of the escalated and polarised situation were, furthermore, connected to the argument that the generous right to asylum in Germany was being wrongly claimed. It was a right that was overused, exceeding the capacity of Germany to offer protection, and abused, claimed by persons who did not have legitimate grounds for it. In the German context this was also related to the broader framework concerning immigration and the notion that while there existed a liberal constitutional asylum provision, the legislation related to immigration was, on the contrary, very limited.

The limitations on the right to asylum were based, on the one hand, on the idea that it benefits persons who are politically persecuted. Those criticising the new formulation argued, on the contrary, that politically persecuted persons no longer had (legal) access to the area of Germany, under the strict conditions related to asylum. The new provision would not abolish all previous problems but create new ones, for instance, adding to the numbers of those arriving in the country illegally. The right remains in the individual rights section of the Basic Law—which is a further example of asylum's institutional survival as such—but is very difficult to claim. As Klose argued in the *Bundestag*, the right is not necessarily to be enjoyed in Germany but exceedingly outside its borders.

Thus, the duties of the state in relation to asylum seekers have been significantly narrowed with the new provision. Similarly, the status of the asylum

seeker has changed. Whereas the 1949 paragraph created a subjective right and, eventually, a case for individual treatment related to the examination of grounds for asylum, within the new formulation an asylum seeker becomes increasingly an object of state practices as regards to, for instance, sending the asylum applicants from one state to another according to the framework of European asylum policies. Thus the constitutional conceptualisation of asylum in Germany changed in the 1990's into something that becomes subject to conditions: it becomes a matter of creating administrative categories, terminology and measures with which to manage and control asylum-seeking better. With the invention of the 'safety' vocabulary the possibility of claiming asylum on individual basis becomes significantly narrower. From the administrative side, the focus of asylum seeking moves from 'political persecution' towards the question of the country of origin or the travel route of the applicant.

The debates and controversy related to the constitutional change of the asylum paragraph—analysed, here, with reference to the final readings in the *Bundestag*—are an example of the role that the right to asylum came to have with reference to the *Grundgesetz* and post-war political life. The 1949 right to asylum has been emphasised as something important regarding the narrative related to the post-war state, and regarding the political culture of post-war Germany, "*Bestandteil der politischen Kultur in Deutschland*", as Eckart Kulhwein of the SPD argued (1993: 13544). In the *Bundestag* debate in May 1993 no politician denied the importance of the principle of asylum which the authors of the Basic Law had created. However, the arguments presented by those advocating change regarding the Parliamentary Council were, above all, related to the changed conditions in which the constitutional asylum right could no longer be maintained as it was. The idea was that the original authors could not have foreseen the unexpected consequences of the right, with specific reference made to the administrative machinery created around asylum granting. The constitutional change further related to the notion that the historical experience behind the creation of the right and its meaning were not, as important as they were emphasised being, enough to maintain the right untouched for the majority of the parliamentarians in the debates in the early 1990's. In this sense, the politicians speaking against the change were not successful enough in translating and in rethinking the legitimacy of the individual right to asylum in the changed conditions of the 1990's, or in trying to outline more comprehensively the possible negative consequences of accepting the reformulated provision. Those who defended the original right remained largely at the level of principles, without being able to successfully promote their alternative courses of actions for changes in immigration policies, for instance.

The perspective of the 1993 debates is frequently that of the state, instead that of the individual. In the *Bundestag* debates, asylum connected, for instance, with the notion of the internal security of the state, or with the question of the legitimacy of the political and parliamentary system, or with the financial cost of maintaining the asylum system as it was. Those speaking against the change, for their part, spoke of asylum as a 'human right' and referred to arguments

such as that measures other than constitutional change should first be exhausted, or argued that the values related to the political system are sacrificed to violence and nationalism with the change. Asylum was linked to solidarity and was conceptualised, for instance, as humanitarian duty offering protection to the persecuted. While those advocating for the constitutional change saw the German singularity as highly troublesome, for the minority speaking against the change the German exceptionality in the matter of asylum was still seen as something to be proud of and worth keeping.

The German asylum debates in the 1990's are a further example of how the (legal) recognition of a right is a matter of political decisions and choices made at a particular time between different possible alternatives. If rights are understood as context-bound and historically contingent, then ultimately, there is also the possibility of subjecting an individual right to change. In the case of the constitutional asylum right this question is ultimately connected also to the distinction between citizen and non-citizen, asylum being a right belonging to the latter. In regard to political decision-making asylum seekers are without access to similar democratic channels and political rights to influence their situation and defend their rights if the rights are being called upon question.

6 CONCLUDING REMARKS

In this study I have analysed debates related to the right to asylum in three different parliamentary settings and politico-historical contexts: in the West German Parliamentary Council of 1948-49, in the various UN fora related to the drafting of the Universal Declaration of Human Rights (1948), and in the German *Bundestag* of 1993. The study has discussed different conceptualisations and conceptual shifts related to the right to asylum in the post-World War II period. It has examined how the right has been subject to debate, differing perspectives, conceptual disputes, shifts and changes, and how it has been constructed into different legal formulations and (re)conceptualisations.

While constructing a rhetorical and conceptual reading of post-war asylum deliberations, the main emphasis of this study has been in the asylum debates of the West German *Parlamentaricher Rat* and in the arguments related to the creation of its unique right to asylum. The constitutional and quasi-parliamentary assembly of the Parliamentary Council has been emphasised in this study as a historically specific context in which to analyse debates related to a particular political and legal concept by the contemporary political actors.

A central notion intertwined through the different debates analysed in the research is that of state sovereignty. In the Parliamentary Council, while West Germany was still a non-sovereign state, the authors of the Basic Law created something unique and something without historical precedent by conceptualising asylum as an individual right. Asylum was understood as a right against the state, thus also setting limits to state's sovereign right to control the entry of non-citizens. The point of view of the Parliamentary Council regarding asylum was primarily, and quite exceptionally, that of the individual seeking protection. In the diplomatic negotiations surrounding the writing of the Universal Declaration of Human Rights the matter of right to asylum was subjected to debate in an international setting before and partly simultaneously with the Parliamentary Council deliberations. Although the Commission on Human Rights voted twice on the matter, asylum was not declared as a right of the individual but, rather, as a right of the sovereign state to grant and the individual to enjoy when being granted. It is nevertheless somewhat paradoxical that in West Ger-

many the right to asylum was conceptualised as a constitutionally binding provision whereas in the international UN level the states did not accept the idea of asylum as a right of the individual in a document that is legally non-binding. In a document of human rights, asylum thus remained as a right of the state.

A further perspective on the notion of state sovereignty is found in the debates of the *Bundestag* in 1993 when the individual right to asylum created by the authors in the Parliamentary Council was amended. A frequent argument presented by those speaking for the change was that the constitutional right to asylum and the duty it posed on the state meant the loss of control in managing asylum seeking in the context of the escalated situation in Germany in the early 1990's. This is also connected with the need to adjust the German 'exceptionality' in the matter of asylum to the level of other states within the larger framework of the supranational European integration. Asylum was not debated with reference to the German context alone but within the framework of European co-operation.

While this research has focused on asylum, it has also been a narrative about German immediate post-war political life and the political beginning of the Federal Republic. I have argued that the right to asylum and the acceptance of asylum on the rather short list of individual rights of the Basic Law had a particular significance for the construction of the post-war state and to the politico-ethical narrative related to the post-Hitler Germany. In this research this aspect becomes highlighted in particular when looking at the asylum debates in 1993 in which the past is interpreted with frequent reference to the Parliamentary Council. In the *Bundestag* debates, asylum is linked to the political culture of the Federal Republic across the political spectrum. While in the *Bundestag* of 1993 no one speaks against the importance of the principle of asylum or doubts the sentiment behind the creation of the individual asylum right in the Parliamentary Council, the question of whether the right can be kept as it is in the context of the 1990's becomes a matter polarised debate.

With reference to asylum, I have argued in this research that rights are an utterly political matter; not something above politics, or something depoliticised but something subject to debate, to differing perspectives and differing interpretations. This argument is connected to the idea that the (legal) status given to a particular right is a matter of politics and political decision-making in a certain time and historical context among different alternatives. Consequently, another side of the argument is, as this study has shown, how a constitutional right can also be subjected to change and alteration. The question of what kind of rights asylum seekers are granted, or how the right to asylum is conceptualised, remains ultimately political.

A further issue in relation to politics and rights is the question of who is subject to rights and what kind of definitions are related to legal concepts. Legal definitions and labels, as I have argued, exclude and include, and generally matter a great deal. A central point of differentiation, especially in the analysis of Chapters 4 and 5 of this research, relates to the distinction between 'asylum seekers', 'refugees' and 'migrants'. While these concepts frequently overlap in

the discourse related to asylum, the idea is that asylum seekers and refugees are particular groups of non-citizens, in distinction from other aliens, towards which states—from the post World War II perspective—have some duties under international law. In the specific (West) German case there also existed a constitutionally binding duty to admit political refugees. In practice the distinctions between labels and categories might not always be so easy to make, the conceptual lines blur, with political and economic motivations for fleeing not actually excluding each other. In the German context, the question of asylum became especially closely intertwined with immigration: while there existed a generous constitutional commitment towards the admittance of politically persecuted persons, legislation regarding immigration remained very limited.

Asylum is a right that has been conceptualised in debates—analysed for this research—relating, for instance, to legitimate rebellion against unjust authority, closely linked to the origins of political asylum, or as a protection against unjust punishment in the country of origin. Further, asylum has been connected to regime changes and to the persecution of political opponents and particular groups of people. The advocacy for the right has been connected to personal experiences from living in exile. Asylum has been linked to politically rebellious individuals as well as it has been connected with people fleeing *en masse*. It has been related to the protection of political fugitives as well as it has been a question of admission. Further, asylum has been in this research linked to freedom of speech, with the idea of political and democratic expression, including the right to disagree. Asylum has been connected to the right to life, with the idea that when all other rights fail, asylum in other countries provides shelter, saves lives and becomes the ultimate human right.

The right to asylum has also been formulated, especially in Chapter 5, by arguments related to misuse and abuse, linked to the notion of asylum being used for wrong reasons, or with reference to overuse and the idea that the right to asylum is being used too extensively, exceeding the capacity of state to offer protection.

The complexity of the right to asylum unfolds in the course of the research narrative. While asylum granting has a humanitarian purpose in protecting the individual seeking shelter, it has also a political dimension in expressing political sympathies, antipathies and certain (political) values. These dimensions are, as noted, not mutually exclusive and are connected also in the Parliamentary Council asylum deliberations. While the authors of the *Grundgesetz* created an unconditional right to protect politically persecuted persons with a particular humanitarian sentiment behind it, the creation of the right was also shaped and legitimated with reference to the contemporary ideological divides. The possibility to create such a generous right was connected both to the historical experiences as well as to the constitutional situation. Further, the interest of the state and the interest of the individual were closely linked in the Parliamentary Council as the authors of the *Grundgesetz* were building a state of which political legitimacy derived from the respect of individual rights, including the right to asylum.

This research has also shown how asylum is a matter of internal politics—in the at times polemical debates related to it at the national level—as well as it has been accused of being a question of foreign politics, meaning that, in reality, asylum might be less likely to be granted to persons coming from states with which there exist close diplomatic relations.

In the debates analysed, the right to asylum has been linked to the question of access, with the idea of allowing access, and with the idea creating conditions for it. In writing of the asylum article of the Universal Declaration of Human Rights the representatives of states held onto their sovereign authority to decide over the access and entry of non-citizens. The Parliamentary Council debated the idea of creating specific conditions but the authors of the asylum article chose to create a right that would not be subject to conditions. The opposite is the case in the *Bundestag* debates in the 1993 when the right to asylum was subject to restrictions and procedural rules that eventually turned asylum into a right that was exceedingly difficult to claim in Germany. The analysis of the *Bundestag* debates brings the matter of asylum close to the European framework and the present day asylum problematic and its 'safety' language, presenting an early phase of the integration that has moved towards the idea of a common asylum system for the European Union.

Right to asylum continues to be a highly actual issue. This research has shown how many of the topics that are debated in the present day context, relating, for instance, to the notion of state responsibility towards asylum seekers—a controversial matter for the present EU developments on asylum—are by no means new, even if these questions take different shapes varying from one historical context to another. The problem of illegality, the question of access and borders are very well known today, as they were well known also in the immediate post-World War II framework. I would therefore suggest that the analysis of contemporary problematic relating to asylum largely benefits from a more historical perspective. Moreover, the reading of this study has underlined the importance of understanding the historical contingency related to concepts and their possible limitations, the political and ideological disputes and compromises behind their construction, with reference, in particular, to those concepts that seem normative from today's perspective.

Asylum raises politico-moral questions and is ultimately connected to the notion of what the state's response should be towards non-citizens asking for protection. This research has shown that while the right to asylum is clearly a problematic right, one that causes controversy and is matter of disagreement and debate, there are still very few voices, if any, in the debates analysed for this research, speaking against the principle of asylum as such. Asylum thus has a particular meaning, importance and legitimacy in all the debates analysed, although each of them results a different (re)conceptualisation of the matter of the right to asylum.

TIIVISTELMÄ

Väitöstutkimuksessani tarkastelen turvapaikkaoikeuteen liittyviä debatteja toisen maailmansodan jälkeisessä kontekstissa käsitteellisen ja retorisen luennan kautta. Tarkemmin tutkimukseni linkittyy Saksan liittotasavallan poliittisen alkuun ja liittotasavallan sodanjälkeiseen vuoden 1949 perustuslakiin (*'Grundgesetz'*) kirjattuun monessa mielessä ainutlaatuiseen turvapaikka-artiklaan, joka tuli sisältämään ajatuksen turvapaikasta yksilön oikeutena.

Liittotasavallan perustuslakiin kirjattiin lauseke ″poliittisesti vainotut henkilöt ansaitsevat turvapaikan″ (″*Politisch Verfolgte genießen Asylrecht*″). Siinä missä kansainvälisoikeudelliset dokumentit, kuten vuoden 1948 Yhdistyneiden Kansakuntien Ihmisoikeuksien julistus, tunnustavat turvapaikan suvereniteettiin linkittyvänä valtion oikeutena, liittotasavallan turvapaikkakonstruktio myönsi poliittisista syistä vainotuille ei-kansalaisille subjektiivisen oikeuden turvapaikkaan. Tutkimuksessani olen kiinnostunut kyseisen oikeuden poliittisista, käsitteellisistä ja retorisista alkuperistä. Tarkastelen analyysissäni sitä, kuinka ainutlaatuinen turvapaikka-artikla luodaan ja millaista debattia sen synnyttämisestä käydään.

Paitsi Länsi-Saksan perustuslaillisen turvapaikkaoikeuden poliittista syntyhistoriaa, tutkimuksessani analysoin myös YK:n ihmisoikeuksien julistuksen laatimiseen liittyneitä diplomaattisia neuvotteluja, sekä Saksan 90-luvun alun kontekstissa sitä, kuinka perustuslain turvapaikka-artiklan erityisyydestä tulee poleemisen debatin ja muutoksen kohde Liittopäivillä. Tutkimuksessani analysoin turvapaikkaoikeuteen liittyviä debatteja kolmessa erilaisessa poliittishistoriallisessa kontekstissa ja erilaisilla parlamentaarisilla areenoilla, tarkastellen turvapaikkaoikeuteen liittyviä käsitteellisiä kiistoja ja muutoksista toisen maailmansodan jälkeisenä aikana.

Primääriaineistona hyödynnän tutkimuksessani Liittotasavallan sodanjälkeisen perustuslain laatineen parlamentaarisen neuvoston (*'Parlamentarischer Rat'*) debatteja. 70-jäseninen neuvosto kokoontui liittoutuneiden valtuuttamana Bonniin laatimaan perustuslain kolmelle läntiselle miehitysvyöhykkeelle syyskuusta 1948 toukokuuhun 1949. Tutkimukseni omaleimaisuus suhteessa tutkimusmateriaalin analyysiin ja aikaisempaan tutkimukseen liittyy siihen, että tarkastelen parlamentaarista neuvostoa nimenomaisesti (kvasi-) parlamentaarisena foorumina. Parlamenttidebattien analyysi liittyy edelleen tutkimuksen käsitteelliseen ja retoriseen lukutapaan: lähtökohtana on että parlamentaarinen neuvosto toimii tiettynä, ajallisesti rajattuna kontekstina, jonka puitteissa tarkastella tiettyyn käsitteeseen, tässä tapauksessa tiettyyn oikeuteen liittyviä kiistoja.

Lähtökohtana tutkimukselleni on se, että parlamentaarinen neuvosto on foorumi, jossa liittotasavallan turvapaikkaoikeus luodaan: jossa se ensin nostetaan poliittiselle agendalle, jossa siitä käydään debattia argumentoiden artiklan puolesta ja sitä vastaan ja jossa se lopulta hyväksytään. Tutkimukseni korostaa oikeuksiin liittyvää poliittisuutta: oikeuksia ei tutkimuksessani ymmärretä ″ei-poliitttisina″ tai ″politiikan yläpuolella″ olevina, vaan tietyn oikeuden tunnustaminen tarkoittaa, että lopputulema on tiettyjen poliittisten valintojen tulos eri

vaihtoehtojen väliltä. Tutkimusasetelmassani oikeudet ovat kiistelyn ja eriävien näkökulmien kohde, samoin kuin ne ovat vahvasti sidoksissa poliittishistoriallliseen kontekstiinsa. Tutkimus myös kytkee turvapaikkakeskustelut osaksi laajempaa toisen maailmansodan jälkeistä oikeuskehitystä ja ihmisoikeuksiin liittyvää problematiikkaa

Väitöstutkimukseni tarkastelee turvapaikkadebattien kautta Saksan liittotasavallan poliittista alkua, perustuslain synnyttämisen poliittista kontekstia ja poliittisia toimijoita. Osoitan tutkimuksessani, kuinka turvapaikka-artikla on paitsi menneisyytensä myös perustuslaillisen kontekstinsa muokkaama. Oikeus kytkeytyy kokemuksiin natsi-Saksan poliittisesta vainosta ja valtioiden käytänteistä suojelua hakevia pakolaisia kohtaan. Turvapaikkaoikeus myös linkittyy Saksan itä-länsi – jaon ideologisiin jännitteisiin.

YK-debattien analyysi puolestaan osoittaa kuinka turvapaikkaoikeus liittyy läheisesti kysymykseen valtion suvereniteetistä. Ihmisoikeuksien julistusta luotaessa valtion velvollisuus myöntää turvapaikka oli debatin kohteena, mutta suurin osa valtioiden edustajista ei hyväksynyt julistukseen (moraalista) velvollisuutta turvapaikanhakijoiden hyväksymistä kohtaan. Ihmisoikeusdokumentissa turvapaikka julistetaan siten valtion oikeutena. Tutkimukseni kuitenkin havoinnollistaa oikeuksien kontingenttia luonnetta osoittamalla, kuinka useita eri vaihtoehtoja puntaroitiin julistusta laadittaessa.

Tutkimukseni kappale viisi analysoi sitä, kuinka Saksan perustuslain turvapaikkaoikeutta rajattiin Liittopäivillä vuonna 1993. Turvapaikkaoikeudesta tuli (Länsi-) Saksassa poliittisesti kiistanalainen kysymys 70-luvulta lähtien kasvavien turvapaikanhakijamäärien myötä. 90-luvun alun kontekstissa hallituskoalitio CDU/CSU ja FDP sekä oppositiopuolue SPD pääsivät yhteisymmärrykseen ”turvapaikkakompromissista”, jolla perustusslaillista turvapaikkaoikeutta muutettiin. Muutos liittyi erityisesti ajatukseen oikeuden väärinkäytöstä sekä laajemmin maahanmuuttotematiikkaan. Suhteessa jälkimmäiseen Saksa oli erityinen, sillä siinä missä perustuslaillinen turvapaikka-artikla takasi turvapaikkaoikeuteen vetoaville henkilöille pääsyn maahan, muu maahanmuuttolainsäädäntö oli hyvin rajoitettua. Perustuslain muutos kytkeytyi myös osaksi Euroopan integraatiota. Tästä ovat esimerkkinä uuteen turvapaikka-artiklaan sisältyneet ”turvallisuuskategoriat”, toisin sanoen viitteet ’turvallisiin kolmansiin maihin’ ja ’turvallisiin alkuperämaihin’, joiden avulla turvapaikanhakijamääriä pystyttiin alentamaan. Turvapaikkakompromissin jälkeen turvapaikka säilyi perustuslaissa, mutta muuttui oikeudeksi, johon on huomattavasti vaikeampi vedota. 90-luvun debatin analyysi tuo myös näkökulman siihen, kuinka turvapaikkaoikeus tultiin ymmärtämään osana Saksan poliittista kulttuuria erityisesti suhteessa menneisyyteensä.

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