The Difficulty of Leaving:

Freedom of movement and the national security state in Cold War West Germany

On 1 November 1999, the Human Rights Committee of the United Nations (UN) criticized the continuing state practice of withholding the right to leave from individuals. 'Liberty of movement', the commission declared, 'is an indispensable condition for the free development of a person.'[1] This human right extended to the issuance of a passport and other necessary travel documents. The UN legal experts saw the provision of such essential travel documentation as a positive legal duty of the state of nationality. In other words, governments had to provide their citizens with the necessary documents to leave their home countries and return at any point in time. Yet, the committee also acknowledged that state practice had often adversely affected this basic right to leave in the past and states still continue to infringe it today.

When the UN was founded and set out new human rights norms, the nascent ideological battle between the two Cold War blocs immediately undermined many of these norms such as the right to leave. Cold War historiography has for good reasons concentrated on the restrictions placed on citizens of socialist states in leaving their countries; be it for travel or to emigrate. Socialist governments enshrined restrictions to exiting their countries in their citizenship laws and heavily policed their borders to prevent their citizens from leaving.[2] Recent histories of migration, statelessness, and travel regimes, however, have demonstrated that socialist governments were not alone in their desire to control peoples' movement.[3] Especially at the

[1] UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11 [accessed 16 December 2019].

[2] For the Soviet citizenship framework see: E. Lohr, *Russian Citizenship. From Empire to Soviet Union*, Cambridge, MA 2012, 132-76. For the German-German context see: S. Gehrig, "Cold War Identities: Citizenship, Constitutional Reform, and International Law between East and West Germany, 1967–75", in: *Journal of Contemporary History* 49 (2014) 4, 794–814.

[3] For studies of migration in Europe see: P. Gatrell, *The Unsettling of Europe: How Migration Reshaped a Continent*, New York 2019; T. G. Eule, Lisa Marie Borrelli, Annika Lindberg, Anna Wyss, *Migrants Before the Law: Contested Migration Control in Europe*, London 2019; E. Comte, *The History of the European Migration*

frontlines of the Cold War in Europe and Asia, in places such as divided Germany, such restrictions on individuals' ability to move manifested in militarized borders between the ideological blocs.[4] Much less noticed than the harsh restrictions placed on the right to leave by the German Democratic Republic (GDR), at the time and by scholarship, was the impact of Western national security frameworks on freedom of movement and the right to leave. In the tense atmosphere following the Berlin Blockade in 1948-49, the US government gave cover to its allies in mobilising domestic police forces and state institutions against the communist enemy. In the Subversive Activities Control Act of 1950, the US government even legislated to make communist belief an explicit legal reason to withhold a passport. In response, US courts established the right to travel internationally as a citizenship right of Americans in 1951-52. Yet, the Act remained in force until part of it was repealed in 1971.[5] As historian Andrea Friedman has argued in her study on citizenship and the national security state, US attitudes to citizenship rights are a lens into exploring the contradictions of early Cold War Western notions of liberty and the simultaneous curtailing of rights in the name of security.[6]

During the early Cold War, the institutions of the Federal Republic of Germany (FRG) quickly followed the US government's lead to withhold travel permits and curtailed the right to leave as part of the ideological stand-off on German soil. The first amendment to the Criminal Code in 1951 introduced far-reaching definitions of treason against the state, which

Regime. Germany's Strategic Hegemony, London 2018; S. King / A. Winter (eds.), *Migration, Settlement and Belonging in Europe, 1500-1930s*, New York 2013. For the history of statelessness see: T. Bloom / K. Tonkiss / P. Cole (eds.), *Understanding Statelessness*, London 2017; C. Sawyer / B. K. Blit,(eds.), *Statelessness in the European Union: Displaced, Undocumented, Unwanted*, Cambridge 2011.

[4] See: E. Sheffer, *Burned Bridge: How East and West Germans Made the Iron Curtain*, Oxford 2011; H.-H. Hertle / K. H. Jarausch / C. Kleßmann (eds.), *Mauerbau und Mauerfall: Ursachen, Verlauf, Auswirkungen*, Berlin 2002; P. Major, *Behind the Berlin Wall. East Germany and the Frontiers of Power*, Oxford 2009.

[5] See: C. M. Whelan, "Passports and Freedom of Travel: The Conflict of a Rights and a Privilege", in: *The Georgetown Law Journal* 41 (1952), 63-90; P. Lansing, "Freedom to Travel: Is the Issuance of a Passport an Individual Right or a Governmental Privilege?", in: *Denver Journal of International Law and Policy* 11 (1981) 15, 15–35; J. McAdam, "An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty", in: *Melbourne Journal of International Law* 12 (2011), 27–56.

[6] A. Friedman, *Citizenship in Cold War America. The National Security State and the Possibilities of Dissent*, Amherst 2014, 1-15.

also allowed for the restriction of travel for citizens if they seemed to endanger national security.[7] In this article, I take the FRG as an example to show that underneath the Western propaganda of freedom and liberty, conflicts over the right to leave raised the broader question of the legitimacy of withholding basic rights for political or national security reasons in a democracy.[8] In the 1950s, debates around freedom of movement for West Germans suspected of opposing the state are examples of how notions of state power and individual basic rights collided. In these conflicts, we can trace how lawyers and high court judges began to draw on human rights norms to demand more individual rights safeguards against the state in the post-war era.

There had been fleeting signs that citizens would gain more protection after 1945. The international community finally agreed to the need for a human right of exit and return that had long been discussed in the context of freedom of movement. When in 1948 the Universal Declaration of Human Rights (UDHR) proclaimed in Article 13,2 that 'everyone has the right to leave any country, including his own, and to return to his country', it was a response to the catastrophe of the Holocaust and the inability of European Jews in particular to escape from Nazi persecution due to travel and visa restrictions.[9] Western European states, however, did not include the right to leave into the European Convention on Human Rights (ECHR) two years later. This omission suggested a broader shift in the mindset of Western European framers of human rights away from the UDHR's ethos. Their views were already dominated by the communist Cold War threat after the Berlin Crisis of 1948-49 and the escalating confrontation

[7] 'Strafrechtsänderungsgesetz', *Bundesgesetzblatt*, Jg. 1951, Teil I, Nr. 43 (31.08.1951), 739-47. See also: H. R. Hammerich, *'Stets am Feind! Der Militärische Abschirmdienst (MAD) 1956-1990*, Göttingen 2019, 76-77.
[8] For US Cold War rhetoric of libtery and freedom see: B. Stöver, *Die Befreiung vom Kommunismus. Amerikanische Liberation Policy im Kalten Krieg, 1947-1991*, Cologne 2002; L. A. Belmonte, *Selling the American Way. US Propaganda and the Cold War*, Philadelphia 2008.
[9] Universal Declaration of Human Rights (UDHR), Article 13(2). For the discussions surrounding the drafting of the right to leave as part of the UDHR see: McAdam, "An Intellectual History of Freedom of Movement in International Law", 47–55.

in Korea.[10] In this climate, governments henceforth continued to withhold the right to leave citing not just security concerns and crime prevention, but also political opposition as legitimate grounds. Despite the UDHR's new human right provisions, as the example of the early FRG's treatment of political opposition showcases, state practice remained for a long time after 1945 shaped by older national regulations that allowed governments to curtail freedom of movement for political reasons in cases that actually did not threaten national security.

Support for the restriction of the right to leave within the government increased after the foundation of the FRG in 1949 as national division galvanised anti-communist mobilisation. The government imposed visa restrictions on and withheld passports from peace activists, opponents of rearmament, and communists. Employing administrative regulations, the security agencies and judiciary made it difficult for suspected opponents of the state to establish international links and form transnational networks of opposition.[11] These restrictions on people's constitutional rights, not to speak of recently proclaimed human rights, curtailed individual rights under the pretence of national security concerns and eventually prompted calls for more safeguards for the individual.[12]

So far, scholarship has shed light on the political and intellectual roots of internal security frameworks of the early FRG.[13] Beyond statistical data of how many communists fell

[10] See: M. R. Madsen, "'Legal Diplomacy' – Law, Politics and the Genesis of Postwar European Human Rights", in: S.-L. Hoffmann (ed.), *Human Right in the Twentieth Century*, Cambridge 2011, 62-81.
[11] For the anti-communist mobilisation of the legal sphere see: A. v. Brünneck, *Politische Justiz gegen Kommunisten in der Bundesrepublik Deutschland, 1949-1968*, Frankfurt/M. 1978; J. Foschepoth, *Verfassungswidrig! Das KPD-Verbot im Kalten Bürgerkrieg*, Göttingen 2017.
[12] In the early Federal Republic, human rights language remained a firm part of Cold War mobilisation. See: L. Wildenthal, *The Language of Human Rights in West Germany*, Philadelphia 2013, 17-62.
[13] The legal Cold War mobilisation centred on the protection of the civil service from "radicals". See: G. Braunthal, *Political Loyalty and Public Service in West Germany. The 1972 Decree against Radicals and Its Consequences*, Amherst 1990, 3-21; D. Rigoll, *Staatschutz in Westdeutschland*: *von der Entnazifizierung zur Extremistenabwehr*, Göttingen 2013. For the influence of former Nazi bureaucrats in setting up the public security architecture of the early FRG see: F. Bösch / A. Wirsching (eds.), *Hüter der Ordnung. Die Innenministerien in Bonn und Ost-Berlin nach dem Nationalsozialismus*, Göttingen 2018; D. Schenk, *Die braunen Wurzeln des BKA*, Frankfurt/M. 2001. The early Cold War also saw the rise of unconstitutional mass surveillance. See: J. Foschepoth, *Überwachtes Deutschland. Post- und Telefonüberwachung in der alten Bundesrepublik*, Göttingen 2013.

victim to *Staatsschutz* (the protection of the state) prosecution, however, we still know comparatively little about the laws applied in court to drive opponents of the government out of the political arena. This is also a problem of access to sources. Court files, particularly those of the *Bundesgerichtshof's* (BGH, Federal Court of Justice) criminal senates that were empowered to federalise *Staatsschutz* cases immediately after the amendment to the criminal code in 1951, are still extremely difficult to access.[14] Local passport offices or the police also handled cases in which freedom of movement was withheld. If at all, complaints against such measures only reached local higher courts. Alexander von Brünneck's work provides us with some statistical data about the number of police investigations and court cases against communists in the early Federal Republic, a group frequently confronted with new restrictions on their basic rights due to their political belief and activities.[15] Yet, the problems surrounding the access to such local case files mirror ongoing debates about rules for the further historical examination of high court archives as part of legal contemporary history writing.[16]

The treatment of leading communists by West German courts, the restrictions placed on them before and during trials, and the archival documentation around the federal court cases discussed in this article suggests that infringements on the right of free movement were not uncommon in the early 1950s.[17] This article discusses a local case that stands representative for the treatment of many communists and peace activists by the state during the early 1950s as well as the case of Wilhelm Elfes, a member of the conservative party who was expelled

[14] These new powers fof the BGH are stipulated in Artikel 3, §134. See: 'Strafrechtsänderungsgesetz', *Bundesgesetzblatt*, Jg. 1951, Teil I, Nr. 43 (31.08.1951), 746.
[15] For statistics of police investigations and court cases against communists see: Brünneck, *Politische Justiz gegen Kommunisten in der Bundesrepublik Deutschland, 1949-1968*, 236–43. These cases that were mostly only tried in local courts still await detailed historical examination.
[16] For a recent discussion of the difficulties of working with court files to explore the legacies of the Third Reich and with a special focus on the Federal Constitutional Court see: D. Deiseroth / A. Weinke (eds.), *Zwischen Aufarbeitung und Geheimhaltung: Justiz- und Behördenakten in der Zeitgeschichtsforschung*, Berlin 2021.
[17] The Constitutional Court's detailed evidence documentation supplied by the police and internal security service during the KPD trial reveals how widespread police, administrative, and legal action against communists were including restrictions on the freedom of movement by local and regional authorities. See: Bundesarchiv (BArch), B237/215.651–215.786; 215.788–215.789.

from the party in 1951 over his opposition to rearmament. These cases are distinctive as they both reached federal high courts other than the BGH. Supported by a high-profile legal team, Elfes' case eventually triggered an influential ruling by the Federal Constitutional Court in Karlsruhe in 1957 that alerted the public to the state's infringement on basic rights and pushed back against state overreach on a normative legal level, but upheld the withholding of a passport from Elfes in the name of national security.[18] These federal court cases about the right to leave took place in an era in which the West German state monitored not just the movement of people for security purposes, but actively promoted restrictive travel regimes for its own citizens if they were considered politically inconvenient.[19] In response, lawyers and judges began to contemplate and use human rights norms in their judicial work and go beyond the Basic Law's basic rights catalogue in the 1950s to overcome this state practice and push back against the 'national security state'.[20]

Staatsschutz in the early Federal Republic

In the midst of the codification of human rights on an international and European level, West Germans faced restrictions on their rights that the allied occupation authorities placed on them in the immediate years after the war. This was especially true for freedom of movement between the allied zones, let alone travels abroad. When the Basic Law was enacted on 23 May

[18] The archive of the Constitutional Court has only been opened in 2013. Historical scholarship has only begun to revisit the history of the court based on these internal files. Access to the BGH files and especially the Sixth/Third Criminal Senate that exclusively tried *Staatsschutz* cases remains restricted.

[19] For the Federal Republic's use of first the Allied Powers and later NATO to curtail the travel of East German officials to the West see: S. Gehrig, *Legal Entanglements. Law, Rights and the Battle for Legitimacy in Divided Germany 1945-1989*, New York 2021, 142-79.

[20] For unintended consequences of state repression that also resulted in legal pushback and the safeguarding of rights over time in the US case see: Friedman, *Citizenship in Cold War America*, 5. While Samuel Moyn has argued that human rights only played a marginal role until the 1970s, recent studies have drawn attention to the law propaganda of socialist states as well as human rights language used by anti-colonial movements after 1945. See: S. Moyn, *Last Utopia. Human Rights in History*, Cambridge, MA 2010; P. Betts, "Socialism, Solidarity and Decolonization: An Alternative Geography of Human Rights", in: P. Betts / J. Mark, *When Socialism Went Global: Eastern Europe and the Global South, 1945-1990*, Oxford forthcoming. Against Moyn's argument, Eric Weitz has recently argued that the history of nationhood, citizenship rights, and human rights is intrinsically connected. See: E. Weitz, *A World Divided. The Global Struggle for Human Rights in the Age of Nation-States*, Princeton 2019, 7.

1949, the FRG's new state order proclaimed constitutional rights and guarantees for the individual. Dominik Rigoll has shown how state practice nonetheless continued in much more restrictive traditions of prioritising the security of the state over individual rights.[21] After 1949, former Nazi bureaucrats resumed their work within West German ministries, the police, and judiciary. Their bureaucratic practice often went against the new constitutional rights guaranteed in the Basic Law.[22] As with the new human rights declarations, the ethos of basic rights guaranteed in the new constitution and legal realities would diverge for years to come.

West Germans who questioned policies of Western military integration and rearmament or supported the communist party and its affiliate organisations became the prime targets of restrictions on the right to leave. Historians have researched the ideological anti-communist mobilisation in the early FRG in detail. These studies have highlighted continuities in personnel from the Third Reich to the FRG, which shaped political justice frameworks, policing, and legislative actions against communists in particular in the 1950s.[23] If we see this mobilisation of the West German state apparatus against suspected opponents of the state through the lens of conflicts surrounding the right to leave, we discover that state institutions cast a wide net to secure the building of a firm Cold War home front against the Eastern bloc.

Restricting people's freedom of movement became an administrative way of curtailing political opposition while the government was anticipating a ban of the *Kommunistische Partei Deutschlands* (KPD; Communist Party of Germany) by the Constitutional Court. Until 1956, the year when the court banned the KPD, a wide range of people came into opposition with the

[21] Rigoll, *Staatschutz in Westdeutschland*. See also: Foschepoth, *Verfassungswidrig!*; R. Schiffers, "Grundlegung des strafrechtlichen Staatschutzes in der Bundesrepublik Deutschland 1949-1951", in: *Vierteljahrshefte für Zeitgeschichte* 38 (1990) 4, 589-607; S. Creuzberger / D. Hoffmann (eds.), *"Geistige Gefahr" und "Immunisierung der Gesellschaft." Antikommunismus und politische Kultur in der frühen Bundesrepublik*, Munich 2014.

[22] For a study on continuities within the Federal Ministry of the Interior, that was also responsible for domestic *Staatsschutz* measures, from National Socialism into the Federal Republic see: Bösch and Wirsching (eds.), *Hüter der Ordnung*.

[23] See: Brünneck, *Politische Justiz gegen Kommunisten in der Bundesrepublik Deutschland, 1949-1968*; Foschepoth, *Verfassungswidrig!*, 83–105; Bösch and Wirsching, eds., *Hüter der Ordnung*.

government. When chancellor Konrad Adenauer announced plans for a European Defence Community (EDC), which was to include West German soldiers, an alliance spanning from members of the churches to peace activists, Social Democrats, union members, and communists opposed rearmament.[24] The future Federal President Gustav Heinemann became the most prominent member of Adenauer's *Christlich Demokratische Union* (CDU, Christian Democratic Union) to leave the conservative party after falling out with the chancellor. Together with Heinemann, the CDU member and former mayor of Mönchengladbach Wilhelm Elfes faced the wrath of his own party. In 1951, Elfes was expelled from the CDU because he fundamentally disagreed with Adenauer's policy of Western integration.[25] Elfes soon became the most outspoken conservative who faced restrictions on his freedom to leave.

While Heinemann gravitated towards the political left and eventually joined the *Sozialdemokratische Partei Deutschlands* (SPD), Elfes supported the work of the *Arbeitskreis für deutsche Verständigung* (Working Group for German Reconciliation) and soon became a leading member. In 1952, he first faced restrictions in his freedom of movement within divided Germany. During this year, Elfes applied three times for a so-called *Interzonenpass* (interzonal passport). The Allied Control Council had introduced this interzonal passport on 30 June 1946. All Germans had to apply for a permit valid for a period of thirty days if they wanted to move over zonal borders. On 14 November 1953, the Bonn government with agreement of the three Western powers stopped issuing the interzonal passport and the West German passport replaced it. Each time Elfes applied for an interzonal passport, the local authorities in his home town first granted his request, but the state-level passport office overruled them citing national security concerns. Elfes first applied for a private visit to West Berlin in June 1952, then for

[24] D. C. Large, *Germans to the Front: West German Rearmament in the Adenauer Era*, Chapel Hill 1996), 31-61.
[25] For the conflict over the nature of Western integration within the CDU see: T. Geiger, *Atlantiker gegen Gaullisten. Außenpolitischer Konflikt und innerparteilicher Machtkampf in der CDU/CSU 1958-1969*, Munich 2008.

attendance of the East German CDU party congress in October, and a third time again for a private visit of a friend in West Berlin in spring 1953. He planned to travel by plane each time. The North Rhine-Westphalian state authorities alleged that Elfes would use these travels to diminish the reputation of chancellor Adenauer and the FRG by criticising rearmament and advocating for a referendum on German unity.[26] The federal government viewed such demands as being in line with policies of the East German ruling party *Sozialistische Einheitspartei Deutschlands* (SED, Socialist Unity Party) and communist propaganda that culminated in the famous Stalin Note from 10 March 1952, in which the Soviet leader offered German unity as long as the country would remain militarily neutral in the Cold War.[27] Tensions at the border between the GDR and FRG ran high during this period when the process of fortifying the German-German border spiralled out of control from both sides until the SED moved to closing the border from the East German side.[28]

Travel restrictions extended to destinations beyond the two German states in this period. Take the case of Karl Schmidt[29] living in Baden close to the Swiss border. He had applied for a border card to travel to Switzerland in 1952. On 29 December 1952, the state of Baden-Württemberg—just formed some months earlier as a new federal state—withheld this permit. Schmidt was a well-known activist against rearmament in the south of Baden. In February 1952, he was elected to the South Baden presidium of the association for the preparation of a plebiscite on German unity and against rearmament. State authorities suspected that the SED controlled all political organisations in favour of a referendum on German unity and opposed to West German rearmament from East Berlin. This included the groups Schmidt was a member

[26] G. Rojahn, "Elfes—mehr als ein Urteil", PhD diss., Free University Berlin, 2009, 109-12.
[27] For the larger Cold War context and Stalin's offer of unification in 1952 see: G. Wettig, *Stalin and the Cold War in Europe. The Emergence and Development of the East-West Conflict 1939-1953*, Lanham 2008; P. Ruggenthaler, *The Concept of Neutrality in Stalin's Foreign Policy, 1945-1953*, Lanham 2015); W. Loth / H. Graml / G. Wettig (eds.), *Die Stalin-Note vom 10. März 1952: Neue Quellen und Analysen*, Munich 2002; D. Spilker, *The East German Leadership and the Division of Germany: Patriotism and Propaganda 1945-1953*, Oxford 2006.
[28] For the process of border fortification from both sides see: Sheffer, *Burned Bridge*, 97-117.
[29] This name is a pseudonym to protect the defendant's privacy rights.

of. The GDR government used these groups, the West German government alleged, to undermine the free and democratic order of the FRG. The Bonn government consequently had declared a ban on all such organisations under Article 9 of the Basic Law on 24 April 1951. This ban gave federal, state-led, and local administrations some leeway in determining countermeasures such as the withholding of the right to leave. Despite this ban, Schmidt continued his activism. In January 1952, he took part in a rally against rearmament across the border in Nancy in France. His participation in a demonstration abroad was deemed a threat to national security and part of the international communist threat.[30] This was enough to cancel his border card.

Both Elfes and Schmidt called on the courts to reinstate their right to leave the FRG. The ensuing court battles that ended before the Federal Constitutional Court in Elfes's case and the Federal Administrative Court in Schmidt's case showcase how legal realities, administrative practice, and attitudes of lower and appeal courts were seriously out of step in the 1950s with the civil rights guaranteed in the Basic Law and international human rights declarations. Bureaucratic and judicial attitudes prioritised *Staatsschutz* over the rights of individuals. Recent studies on the history of federal and state-level ministries have shown that anti-Bolshevik attitudes stemming from the Third Reich shaped the outlook of many bureaucrats and institutional practice in the 1950s.[31] The ensuing legal conflicts surrounding the Elfes and Schmidt case stand representative for many other similar cases that showed the protection of the state ranked much higher in the early FRG than basic rights.[32]

[30] The man's activism is detailed in: BArch, B237/89884, BVerwG I C 155.54.
[31] For the leading accounts on bureaucratic continuities from the Third Reich into the FRG see: Bösch / Wirsching (eds.), *Hüter der Ordnung*; M. Görtemaker / C. Safferling, *Die Akte Rosenburg. Das Bundesministerium der Justiz und die NS-Zeit*, Munich 2016; E. Conze et al., *Das Amt und die Vergangenheit. Deutsche Diplomaten im Dritten Reich und der Bundesrepublik*, Munich 2010; N. Frei, *Vergangenheitspolitik. Die Anfänge der Bundesrepublik und die NS-Vergangenheit*, Munich 2003; N. Frei, *Karrieren im Zwielicht. Hitlers Eliten nach 1945*, Frankfurt/M. 2001.
[32] For statistical information on case numbers see: Brünneck, *Politische Justiz gegen Kommunisten in der Bundesrepublik Deutschland, 1949-1968*, 236-43.

The transition from the Allied interzonal passport regime and the provisional system policed by West German authorities to a passport-based system in December 1953 laid bare that the West German state continued to withhold the right to leave. Before 1953, the public often attributed these restrictions to Allied occupation. Elfes had not fought the refusal of his interzonal passport, but when his West German passport was withheld on 6 June 1953, he called on the courts.[33] Federal and state-level authorities had stopped the issuing of Elfes's passport at the last minute. As a member of the Working Group for German Reconciliation, Elfes tirelessly called for peace negotiations at home and abroad. This marked him as a communist supporter in the eyes of the government. The at the time of events newly-appointed Minister of the Interior of North Rhine-Westphalia Franz Meyers (CDU) would also with hindsight not soften his evaluation of Elfes as 'a left-leaning former politician' of the Catholic *Zentrumspartei* (Centre Party) who had 'drifted ever more to the left.' According to Meyers, Elfes's only difference from a 'real communist (*waschechter Kommunist*)' was his Christian faith.[34] The local authorities cited Elfes's recent activism as sufficient reason to deny him a new passport. He had attended the Congress of the People for Peace in Vienna, at which delegates from East and West Germany signed the All-German Declaration in which they called for German unity and harshly criticised Adenauer's agenda of Western military and political integration. Elfes read this declaration to the congress. The Bonn government viewed the congress as part of communist international propaganda against the FRG. This was enough to charge Elfes with damaging national security. Under pressure from the federal and state governments, the local passport office claimed that it was the responsibility of local officials to prevent peril from the FRG as outlined in regulations governing passport applications.[35] The

[33] Rojahn, "Elfes—mehr als ein Urteil", 109-12.
[34] F. Meyers, *gez. Dr. Meyers. Summe eines Lebens*, Düsseldorf 1982, 50.
[35] Paßgesetz (Passport law), § 7 Abs. 1 lit a, 4 March 1952.

local officials thus argued that they simply abided by the existing law, but later admitted to Elfes that their superiors had pressured them to withhold his passport.[36]

State and judicial practice thus infringed basic and human rights for political reasons in the 1950s. The decisions of lower and appeal courts in both cases discussed above upheld the decisions to withhold the right to leave. After the closure of the German-German border in 1952, the East German uprising on 17 June 1953 further accelerated Cold War tensions within divided Germany. Once the federal government had submitted its requests for the bans of the KPD and the *Sozialistische Reichspartei* (SRP, Socialist Reich Party)—the successor party of the Nazi party—in 1951, the state apparatus stepped up repressive measures against the KPD and groups with suspected or open ties to the communist party and the SED.[37] In this tense political atmosphere, Schmidt turned to the Federal Administrative Court in 1954. After he had exhausted all administrative legal appeals, Elfes called on the Federal Constitutional Court and submitted a *Verfassungsbeschwerde* (constitutional appeal) on 14 May 1956. With both cases having reached the highest courts in the land, restrictions of the right to leave and freedom of movement now were a matter of the federal judiciary.

National security versus individual rights

After the death of Joseph Stalin on 5 March 1953 and first signs of de-Stalinisation across Eastern Europe, the aggressive police and administrative measures against West German opponents of the Adenauer government began to cause unease among some members of the judicial elite. The repeated attempts of the Constitutional Court's president Josef Wintrich to convince Adenauer to drop the party ban case against the KPD were a testament to the growing opposition to the political justice of the federal government and the infamous Sixth Criminal

[36] Rojahn, "Elfes—mehr als ein Urteil", 116f.
[37] See: Brünneck, *Politische Justiz gegen Kommunisten in der Bundesrepublik Deutschland, 1949-1968,* 141-213.

Senate of the BGH. The Sixth Penal Senate, renamed into Third Penal Senate in 1956, exclusively prosecuted political justice cases. Led by Friedrich-Wilhelm Geyer who had served as a *Wehrmacht* judge in occupied Poland during the war, the Senate also acted as appeal court for its own cases which gave it sweeping powers during the 1950s.[38] While the ideological division of Germany deepened, critics began to ask questions about the democratic nature and stability of the FRG. Such criticism compelled the Swiss journalist Fritz Allemann, for example, to point out that 'Bonn is not Weimar' in defence of the young republic.[39] Yet, the lack of application of basic and human right norms in everyday legal culture remained and the SED attacked basic rights violations within West Germany whenever there was an opportunity.[40]

Lower and appeal court judges made no effort to conceal their political motivations in denying the right to leave. When Schmidt stated in court that he had no intention of threatening the political order, but was only expressing his support for the immediate unification of Germany and his disagreement with rearmament policies, the judge was not impressed by this defence. Nor did the fact that Schmidt needed the border card to carry out academic work in Switzerland as part of his job carry any weight in court. In his ruling, the local judge explicitly stated that his decision in this case was political. The judge argued that all Germans had the right to leave the country, but the passport law included wide-ranging provisions to prevent them from doing so if it seemed 'politically prudent'. This was a complicated statement as the Basic Law only explicitly guaranteed freedom of movement within the FRG. Administrative law, the local court declared, was insufficient to decide this case. This was ironic as the passport

[38] Foschepoth, *Verfassungswidrig!*, 92.
[39] F. Allemann, *Bonn ist nicht Weimar*, Cologne 1956. See also: S. Ullrich, *Der Weimar-Komplex. Das Scheitern der ersten deutschen Demokratie und die politische Kultur der Bundesrepublik*, Göttingen: Wallstein, 2009.
[40] The KPD trial became one of the prime legal propaganda battlegrounds between East and West Germany. See: S. Gehrig, "Recht im Kalten Krieg. Das Bundesverfassungsgericht, die deutsche Teilung und die politische Kultur der frühen Bundesrepublik", in: *Historische Zeitschrift* 303 (2016) 1, 64-97, 81-90; Foschepoth, *Verfassungswidrig!*, 235-313.

law squarely fell into this legal category. In fact, the judge decided in step with the anti-communist principles that governed West German politics and public opinion at the time. The appeal court sustained this decision, but took more care in explaining its ruling. The judges specified that active political participation in organisations, which the federal government had deemed a threat to national security in 1951, gave ample ground to withhold a border card.[41] For the appeal court, these governmental orders carried more weight than basic rights provisions.

Basic rights and human rights considerations only began to play a part in weighing national security against individual rights at high court level. The Federal Administrative Court had doubts when Schmidt's case reached the judges. Under the leadership of their new president Hans Egidi, the judges Werner Ernst, Wolfgang Ritgen, Erich Eue, and Eugen Hering heard the case. In their eyes, the way in which the lower courts had assessed the application of existing passport regulations against Schmidt had been inadequate. Yet, turning to constitutional law to decide the case was complicated as the Basic Law remained silent on the specific issue of the right to leave. Article 11 directly recognised only half of the UDHR's right to leave with the provision that all citizens had a right to return to the FRG. The framers of the Basic Law had not explicitly addressed the right to exit when the constitution was drafted in 1948-49. However, legal scholarship interpreting the Basic Law for judicial practice strongly suggested by the mid-1950s that a constitutional right to leave existed. Prominent scholars including Ulrich Scheuner, Hermann von Mangoldt, Friedrich Klein, Friedrich Giese, and Günter Dürig had argued that a right to exit was implicit in Article 11 of the Basic Law.[42] Yet, it remained unclear how such a constitutional basic right exactly related to the treaty between the FRG and Switzerland on border cards in the specific case at hand. While legal scholarship

[41] BArch B237/89884, BVerwG I C 155.54.
[42] The work of these scholars is cited in the verdict of the Federal Administrative Court on the South Baden case. See: BArch B237/89884, BVerwG I C 155.54.

suggested that Schmidt had a constitutional right to leave the country, the West German-Swiss treaty contained specific provisions for the withholding of border cards. Article 5 of the treaty stipulated that only persons without police records should be issued a border card. As a suspected communist, Schmidt was on record. International treaty law thus collided with constitutional rights scholarship and human rights norms. Ultimately, the courtdecided that this spoke for upholding the denial of Schmidt's right to leave based on the West German-Swiss treaty.[43]

The government's anti-communist agenda nonetheless came under pressure. The federal administrative judges had misgivings about the arguments of the federal prosecutor. He argued that administrative bodies such as passport offices could interpret the legal meaning and scope of the existing passport regulations independently. The federal court emphasised the importance of judicial review in such matters. The passport law stipulated that a passport could be withheld if 'the internal or external security or other serious interests (*erhebliche Belange*) of the FRG or a German state are threatened'.[44] This regulation provided ample scope for interpretation, which only administrative courts could appropriately evaluate. The state prosecutor's premise that civil servants could determine if the right to leave should be withheld entirely on their own by applying the passport law therefore came under scrutiny. This criticism was a step towards strengthening the judiciary against state authorities that germinated among high court judges in the 1950s.[45]

When a judicial review eventually had taken place on the appeal court stage, the federal judges went on to criticise, Schmidt's case had not received a proper and full legal evaluation. The review had consisted of the appeal court's reference to the government's decree from 1951,

[43] BArch B237/89884, BVerwG I C 155.54.
[44] Paßgesetz (Passport law), § 7 Abs. 1 lit a, 4 March 1952.
[45] See: U. Wesel, *Der Gang nach Karlsruhe. Das Bundesverfassungsgericht in der Geschichte der Bundesrepublik*, Munich 2004), 109-48; J. Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951-2001*, Oxford 2015, 1-62.

in which certain organisations had been presented as a threat to state security. Schmidt's membership and close affiliation with some of these groups had been enough to conclude that the lower court had acted in accordance with the law. The appeal court had too readily accepted that this federal decree was excluded from judicial review and needed no further judicial assessment. The federal court concluded that the appeal court had failed to scrutinise the actual political nature of the organisations by engaging with their agendas before deeming the government's actions legal and upholding the withdrawal of the border card. The accused deserved a full judicial evaluation of his case. On 2 February 1956, the Federal Administrative Court ruled that the case was to be returned to the lower courts for retrial.[46]

Both the Schmidt and Elfes case converged at the Federal Administrative Court. On 22 February 1956, the court handed down its verdict on Elfes's case.[47] Interestingly, the court ruled differently in Elfes's case as he and his lawyers advanced a human rights argument in defence of the right to leave. In front of the court, Elfes's lawyers explicitly referenced Article 13,2 of the UDHR and argued that the federal government denied him a fundamental right that the international community had recognised as a human right. While Schmidt's case had been returned for retrial on the grounds of a sloppily conducted judicial review, the federal court declined Elfes's appeal. Neither Article 11 of the Basic Law, which only guaranteed the freedom of movement within the FRG in the eyes of the court, nor Article 13,2 of the UDHR would secure Elfes's right to leave. The judges pointed out in their verdict that the UDHR merely represented a declaration of 'programmatic' character, but had no legal quality in West German law.[48] Schmidt's case had been decided by reviewing the application of West German administrative law. Now, the court was up against Elfes's high-profile legal team. Elfes's defence touched on much more than the right to leave. In essence, the defence team asked the

[46] BArch, B237/89884, BVerwG I C 155.54.
[47] BVerwG I C 51.77.
[48] Ibid.

court to rule on the question to what extent international rights norms affected West German domestic law. The judges shied away from answering this question, which would return when Elfes turned to the Constitutional Court as the ultimate arbiter of constitutional law questions. But the case also had an obvious Cold War dimension. The legal scholar Dürig quipped in response to the verdict that it would be detrimental to the FRG's claim to be the only democratic German state 'if we had to accept the accusation that our support for freedom and liberty (*Bekenntnis zur Freiheit*) would suffer at crucial points from a lack of credibility'.[49] With all appeal options exhausted, Elfes now turned to the Constitutional Court.

Schmidt and Elfes's cases centred on the same legal issue, but differed in the public profile and defence strategies of the defendants. While Schmidt's case never made national headlines, Elfes could enlist the help of Gustav Heinemann and his assistant Diether Posser in his legal defence. Heinemann and Elfes shared the experience of having fallen out with their party and chancellor Adenauer over rearmament and the question of German national unity. In front of the Constitutional Court, Heinemann and Posser turned the case into a litmus test for the political culture of the young republic. They asserted that it was in the public's interest that the court decided whether a citizen without a criminal record could be withheld a passport for purely political reasons as a pre-emptive measure. They also pointed to the personal grievances that the loss of Elfes's passport had caused. Elfes had family connections in three foreign countries, which he had been unable to attend to without a passport. At the age of 72, he was unable to visit his son in Rio de Janeiro. His second son had been murdered by the Nazis in Denmark during the war. Elfes hoped to visit his grave and discover some more information about his son's last days before his murder. The widow of his second son and her three children lived in the Netherlands. Elfes's application to serve as the children's guardian was denied after

[49] T. Rensmann, *Wertordnung und Verfassung: das Grundgesetz im Kontext grenzüberschreitender Konstitutionalisierung*, Tübingen 2007, 130fn523.

his passport had been withheld. Pointing to this emotional distress and humanising the case, Heinemann and Posser pleaded with the judges to put Elfes's basic rights above anti-communist governmental policies and national security concerns.[50]

Heinemann and Posser attacked the legal bias against Elfes that lower courts had expressed. Essential elements of the All-German Declaration, that Elfes had read out at the Vienna peace congress, had been misquoted and interpreted without proper contextualisation in court. In the eyes of the defence team, this evidence could by no means merit such a fundamental restriction of basic rights as the denial of a passport. Even the federal state prosecutor at the BGH, a notorious court for its anti-communist credentials at the time, had to admit that no case could be made against Elfes. On 22 June 1956, the BGH decided against admitting Elfes's case. The evidence was simply too thin.[51]

In light of these judicial shortcomings, the Constitutional Court hoped to resolve the case outside the courtroom. When Elfes's brief arrived at Karlsruhe, the senior civil servant Echterhölter was tasked with testing informal administrative avenues to settle the case outside of court.[52] Posser clearly indicated to the court that Franz Meyers, then Minister of the Interior of North-Rhine Westphalia had instigated the initial rejection of the passport with support of the federal government. With the change in government from the conservatives to the Social Democrats in North-Rhine Westphalia, the judges hoped that the new Minister of the Interior Hubert Biernath might simply order the renewal of Elfes's passport.[53] Yet these clandestine negotiations failed. Biernath submitted his state government's legal position to the court on 5 October 1956. The new state government upheld the opinion that basic rights could be restricted if individuals endangered the 'community of citizens'.[54] Social Democrats did not

[50] BArch B237/89884, legal brief Heinemann/Posser, 16 July 1956.
[51] Ibid.
[52] See: Rojahn, "Elfes—mehr als ein Urteil", 152-55.
[53] BArch 237/89884, "Vermerk zur Verfassungsbeschwerde Elfes", 5 July 1956.
[54] BArch B237/89884, "Innenminister des Landes Nordrhein-Westfalen, betr.: Verfassungsbeschwerde des Oberstadtdirektors i.R. Wilhelm Elfes", 5 October 1956.

want to be seen weak on national security issues only months after the Constitutional Court had finally banned the KPD under immense governmental pressure.[55]

By 1956, after the KPD ban, the government's anti-communist agenda had pushed some federal judges to a breaking point. The immense pressure on the Constitutional Court to ban the KPD had upset many on the bench of the Karlsruhe court.[56] This was especially true for the First Senate of the court. By 1955, Adenauer and the federal government had lost patience with the judges' careful attempt to find a solid legal basis for the KPD ban that would not damage democratic principles. The government threatened to legislate to be able to transfer the case from the First to the Second Senate of the court. The Second Senate had the reputation of leaning more towards conservative and thus government policies.[57] To avoid this infringement of the court's powers, the First Senate finally produced a verdict declaring the ban of the KPD on 17 August 1956. Although the court had successfully managed to gain control over its own budget by the mid-1950s, which had elevated the Constitutional Court over the other federal high courts as demanded by the Basic Law, the judges felt immense political pressures in cases such as the Elfes case at that time.[58] Constitutional juridical independence and the guiding impact of basic rights on jurisprudence was by no means secured in the 1950s.

Internal discussions of the judges show that many had serious misgivings about the curtailing of basic rights. In the context of the frequent conflicts between the court and government as well as the BGH and many conservative legal scholars over the judicial reach of basic rights and thus the Constitutional Court's mandate as the highest court in the land, the Elfes case marked an opportunity to mark out the constitutional judges' legal influence and

[55] Gehrig, "Recht im Kalten Krieg", 81-90; Foschepoth, *Verfassungswidrig!*, 235-78.
[56] Wesel, *Der Gang nach Karlsruhe*; Gehrig, "Recht im Kalten Krieg", 81-90.
[57] H. Dreier, "Das Bundesministerium der Justiz und die Verfassungsentwicklung in der frühen Bundesrepublik", in: M. Görtemaker / C. Safferling (eds.), *Die Rosenburg. Das Bundesministerium der Justiz und die NS-Vergangenheit. Eine Bestandsaufnahme*, Göttingen 2013, 88-118, 104f.
[58] Gehrig, "Recht im Kalten Krieg," 77-81.

powers.[59] The rapporteur for the First Senate which heard the case, Gerhard Heiland, argued in no uncertain terms for the constitutional protection of free movement across national borders. In his draft verdict for consideration by the Senate members, Heiland maintained that free movement had always been guaranteed in 'free societies'. In fact, the Weimar constitution had explicitly granted it in Article 112. In this internal draft, Heiland was more explicit than the legal scholar Dürig had been in his more diplomatic response to the Federal Administrative Court's treatment of Elfes. Heiland unequivocally stated that it was 'a characteristic of totalitarian and semi-totalitarian regimes that they especially deny their subjects contact with free foreign countries'.[60] If the FRG wanted to develop a democratic political culture, Heiland insinuated, the judges had to rule in favour of Elfes's appeal.

In the court's internal deliberations, international human rights standards played a significant role. The UN draft commission, Heiland stressed, had included domestic and international freedom of movement based on the UDHR's Article 13,2 into drafts for the human rights conventions. But this was not simply a matter of law. The Federal Administrative Court had pondered the tensions between domestic and international law in Elfes's case and clearly voted against the direct influence of human rights norms on domestic West German jurisprudence. This decision was in accordance of most West German legal scholars and experts' opinion at the time that *Staatsrecht* framed basic rights of citizens and international legal norms did not penetrate national legal sovereignty.[61] Acknowledging this hegemonic view on the relationship of human rights norms and national constitutional sovereignty, Heiland went another way. He accused the government of using the passport regulations to prevent unwanted political activity and thus shut down democratic debate. Heiland saw citizens 'who

[59] J. Requate, *Der Kampf um die Demokratisierung der Justiz. Richter, Politik und Öffentlichkeit in der Bundesrepublik*, Frankfurt/M. 2008, 39-43.
[60] BArch B237/89884, "Entwurf Votum".
[61] See: M. Stolleis, *Geschichte des Öffentlichen Rechts in Deutschland. Vierter Band: 1945-1990*, Munich 2012, 194-210.

posed no threat to the security of the FRG, but remained politically inconvenient' for the government as being at an unconstitutional disadvantage. In short, he concluded, 'the actions of the plaintiff and his acting fellow-travellers may have been an annoyance for the federal government and the Federal Republic, because they supplied the leaders of the "GDR" with cheap propaganda material. But there never existed any actual danger to the domestic or international security of the FRG.'[62] Heiland thus concluded that Elfes's basic rights had been violated.

Heiland felt very strongly about the Elfes case. On 29 October 1956, he submitted additional material to his colleagues for consideration.[63] He wanted to turn the Elfes verdict into a major judicial intervention on the reach of basic rights in everyday legal culture. Heiland demanded that the Constitutional Court ought to have the authority of evaluating the compliance of all legal codes with the basic rights guaranteed in the Basic Law. He proposed that his court had to be capable of scrutinising the work of administrative courts and government administrations. Many jurists, especially leading judges serving on other high courts, saw this as an attack on their authority.[64] To calm his fellow judges, Heiland played down concerns that the court could morph into a 'super revision court'. However, he insisted that the judges had to be able to examine whether 'general regulations' such as passport law were in accordance with 'the general structure of the political system (*Gesamtbild der staatlichen Ordnung*)'.[65] The Basic Law's provisions determined this general nature of the West German *Rechtsstaat* and thus made the Constitutional Court the natural place to conduct such judicial reviews. Yet, Heiland had also clearly drawn on the UDHR's human rights norms in

[62] BArch B237/89884, "Entwurf Votum".
[63] BArch B237/89884, "Nachtrag zum Votum vom 11. Oktober 1956", 29 October 1956.
[64] For the regular clashes between the BGH and Constitutional Court see: Requate, *Der Kampf um die Demokratisierung der Justiz*, 39-43.
[65] BArch B237/89884, "Nachtrag zum Votum vom 11. Oktober 1956", 29 October 1956.

calling for more judicial review powers of his court in the name of protecting basic rights constitutional norms.

The majority of his fellow judges saw the matter somewhat differently. In light of the evidence obtained for the KPD trial, the judges knew that the Working Group for German Reconciliation had intimate ties to the KPD and SED. In 1952, judge Erwin Stein had clandestinely interviewed the former East German cadre Gerhard-Wilhelm Jost in breach of the court's own procedural rules. This interview was part of the KPD trial that the First Senate was deliberating on at the time. Jost had testified that the East German *Nationale Front* (National Front) controlled the working group. This suggested that the East Germans might have also had a hand in Elfes's high-profile appearances not just at the Vienna congress in 1952, but also in Paris, Budapest, and East Berlin. However, Jost refused to incriminate Elfes directly. He 'would not want to say that all leading personalities of the organisation were aware of the fact that decisions were in the end made by the KPD-SED', but he maintained in his conversation with Stein that the East German government would certainly control the working group.[66] For the majority of judges, this was evidence enough to dismiss Elfes's case. The verdict outlined that state authorities had applied the existing passport regulations correctly in the case at hand. Heiland's daring draft verdict thus failed to find a majority in the Senate and the court rejected Elfes's appeal on 16 January 1957.[67] Governmental supremacy in matters deemed to touch upon national security was once more maintained over basic and human rights concerns.

The prerogative of national security

[66] BArch B237/215.681–685.
[67] 1 BvR 253/56.

In legal scholarship, the Elfes case is often cited as a landmark verdict. This is due to the fact that Heiland's demand for an extension of the reach of basic rights and judicial review powers of his court actually entered the verdict. The case is thus seen as an important step in the solidification of the Constitutional Court's wide-ranging judicial powers within the West German legal sphere. In 2011, to mark the court's sixtieth anniversary, the fact that Elfes nonetheless lost his case has been described as an oddity.[68] Yet, if we see the case not only in the lineage of Constitutional Court decisions that strengthened the court's powers of judicial review and the wide application of basic rights that secured more and more legal safeguards for citizens over time, but as part of developing national security frameworks in the early FRG, the ruling against Elfes appears less surprising. The Constitutional Court was at loggerheads with the government in many fundamental political questions in the 1950s—including rearmament in the EDC case, the court's constitutional status, the KPD trial and the Lüth decision.[69] But it mattered whether these cases only concerned basic rights in a domestic setting or if and how they touched on national security for the court's decision to uphold or question governmental policies.

Exploring the development of the legal implementation of the right to leave through Schmidt and Elfes's cases opens up a history of national security frameworks and travel regimes that runs counter to a linear expansion of basic rights guarantees in the FRG's history during the Cold War. While federal high courts refrained from drawing on the UDHR or ECHR publicly for a long time and emphasised the rights explicitly guaranteed in the Basic Law—which did not include the right to leave—as their judicial framework, the Constitutional Court moved to secure the freedom of expression in the Lüth case only a year after the Elfes decision.

[68] In context of the "activation of basic rights" through court action, Christoph Schönberger remarked that it was odd that in one of the quintessential verdicts of the court, that is often cited as evidence for an expansion of individual basic freedom rights, the defendant ended up having his basic rights curtailed. See: C. Schönberger, "Anmerkungen zu Karlsruhe", in: M. Jestaedt / O. Lepsius / C. Möllers / C. Schönberger, *Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht*, Berlin 2011, 9-76, 35.
[69] See: Gehrig, "Recht im Kalten Krieg".

This verdict did not resolve the problematic outcome of the Elfes case, but fundamentally reinforced the right of expressing dissenting or confrontational political opinions in domestic politics. This is one of the reasons why the Lüth decision from 15 January 1958 is regarded as one of the Constitutional Court's most influential verdicts. It also formed another important step in securing the Constitutional Court's supreme position within the judicial system and paved the way for a focus on constitutional rights in the decades to come.[70]

In the cases against the KPD and Elfes, the judges referenced and further developed the legal framework of *streitbare Demokratie* (militant democracy). Dominik Rigoll and Udi Greenberg have pointed to the problematic Cold War roots of this concept. The idea would eventually embody a democratic ethos, but it first developed as an instrument to exclude enemies of the state from the political process after 1945. As such, despite the advocacy of many victims of National Socialism for the establishment of militant democracies after 1945, this framework was open to subversion in the name of the democratic state. While German exiles in the US infused their ideas of militant democracy in early Cold War American debates on national security based on their experiences of the Weimar Republic's failure, former Nazi bureaucrats and politicians used the term *streitbare* or *wehrhafte Demokratie* in the 1950s for their anti-communist agendas.[71] Securing the state against potential opponents thus dominated ideas of democracy in national security questions both on the left and right in this period.

In the midst of first steps of securing freedom of movement within the emerging European Economic Community (EEC) after the signature of the Treaty of Rome in 1957, West

[70] For a thorough legal and historical contextualisation see: T. Henne, "Von 0 auf 'Lüth' in 6 Jahren. Zu den prägenden Faktoren der Grundsatzentscheidung", in: T. Henne / A. Riedlinger (eds.), *Das Lüth-Urteil aus (rechts-)histroischer Sicht. Die Konflikte um Veit Harlan und die Grundrechtsjudikatur des Bundesverfassungsgerichts*, Berlin 2005, 197-224.

[71] For its Weimar roots and the influence on the US debate see: U. Greenberg, *Weimar Century. German Émigrés and the Ideological Foundations of the Cold War*, Princeton 2014. For the West German context see: A. Doering-Manteuffel, "Freiheitlich demokratische Grundordnung und Gewaltdiskurs. Überlegungen zur 'streitbaren Demokratie' und politischen Kultur der Bundesrepublik", in: F. Becker (ed.), *Politische Gewalt in der Moderne. Festschrift für Ulrich Thamer*, Münster 2003, 269-84; H. G. Jaschke, *Streitbare Demokratie und Innere Sicherheit. Grundlagen, Praxis und Kritik*, Opladen 1991; Rigoll, *Staatsschutz in Westdeutschland*, 94-140.

German controversies surrounding the right to leave highlight that the FRG retained crucial powers to restrict the freedom of movement of its citizens against this reform tendency on the European level. During the anti-communist mobilisation of West German society in the early 1950s, the curtailing of the right to leave of suspected opponents of the state took place much more frequently in an unchecked fashion than legal stipulations and basic and human rights norms suggested. The nature of these local cases as well as laws and legal reasoning applied in court still await detailed historical study.[72] Federal high courts would only regulate the state's power to withhold the right to leave more tightly following the restrictions imposed on the state set out in the Fourth Protocol of the ECHR signed in 1963. Following this protocol, the right to leave can only be restricted based on laws that safeguard national security, public security and order, to prevent crime, protect public health, or the rights and freedoms of others.[73] While specifying policy areas that can lead to the curtailing of human rights, this definition leaves member states a wide range of measures open to legally restrict citizen rights. The European Court of Justice (ECJ) later upheld the right of member states to restrict the right to leave and freedom of movement based on a similar framework.[74] When the UN opened the International Covenant on Civil and Political Rights for signature in 1966, Article 12,3 replicated the restrictions on the right to leave that existed in many Western states and in the European human rights regime.[75] The UDHR's original legal norms which stated that there should exist an unrestricted right to leave and return thus had been superseded by the maintenance of state

[72] For case numbers see: Brünneck, *Politische Justiz gegen Kommunisten in der Bundesrepublik Deutschland, 1949-1968*, 236-309.
[73] Council of Europe, European Treaty Series-No. 46, "Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto," Strasbourg, 16 September 1963, available at: https://rm.coe.int/168006b65c [accessed 5 May 2020].
[74] Lansing, "Freedom to Travel", 33.
[75] United Nations, International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

power and territorial sovereignty and the evolution of Cold War travel regimes on both sides of the Iron Curtain.[76]

Conclusion

The conscious exclusion of the right to leave from the basic right catalogue in the FRG in 1949 and the limitations set out in the European human rights framework retained a crucial territorial right of the state to control and curtail the movement of citizens on security grounds. After the 1950s, conflicts around the right to leave subsided. The ever-growing influence of the Constitutional Court on the application of law within the FRG, crucial shifts in the public's perspective on the freedom of speech in the 1960s, and legal reform efforts beginning under the first Grand Coalition and accelerating after the Social-Liberal coalition took office in 1969 enlarged the rights of citizens in the following decades. At the same time, the militarised border between the two German states cemented the public notion that West Germans were free to travel anywhere they pleased while East Germans were kept from leaving their country after the building of the Berlin Wall.

The history of the right to leave and how restrictions placed on it impacted the lives of ordinary Germans after 1945 add to and complicate histories of post-war West German liberalisation and democratisation.[77] On the one hand, the public criticism surrounding the

[76] While Eastern bloc states severely restricted the right to travel of their citizens, NATO also established a visa control system that controlled and restricted the travels of East Germans in particular in NATO states. For the origins of this framework in the Allied Travel Office (ATO) set up in Berlin after 1945 see: M. Thomas, "'Aggression in Felt Slippers': Normalisation and the Ideological Struggle in the Context of Détente and Ostpolitik", in: M. Fulbrook (ed.), *Power and Society in the GDR, 1961-1979. The "Normalisation of Rule"?*, New York 2008, 33-51.

[77] For leading accounts on liberalisation and Westernisation see: U. Herbert, "Liberalisierung als Lernprozess. Die Bundesrepublik in der deutschen Geschichte—eine Skizze", in: U. Herbert (ed.), *Wandlungsprozesse in Westdeutschland. Belastung—Integration—Liberalisierung*, Göttingen 2002, 7-49; A. Doering-Manteuffel, *Wie westlich sind die Deutschen? Amerikanisierung und Westernisierung im 20. Jahrhundert*, Göttingen 1999; Doering-Manteuffel, "Freiheitlich demokratische Grundordnung und Gewaltdiskurs", 269-84; A. Bauerkämper / K. H. Jarausch / M. M. Payk (eds.), *Demokratiewunder. Transatlantische Mittler und die kulturelle Öffnung Westdeutschlands 1945-1970*, Göttingen 2005; H.-A. Winkler, *Die lange Weg nach Westen*, 2 vols, Munich 2000.

Elfes case in particular resulted in more judicial checks on the state's restrictions of the right to leave. Many legal scholars and federal judges, such as Heiland, viewed the state as too intrusive here. On the other hand, demand for national and public security during the Cold War and after sustained support for restrictions of this human right. When human rights began to have more and more bearing on national jurisprudence from the 1960s onwards, the restrictions on the right to leave by additional legal protocols such as the Fourth Protocol of the ECHR in 1963 and the Human Rights Convention on Civil and Political Rights in 1966 showed that governments across the world were not willing to abdicate their power to forbid people their freedom of moving internationally when national security was concerned as had been originally envisaged in the UDHR.[78]

The conflicts surrounding freedom of movement in context of the ideological confrontation of the Cold War also call narratives of an ever-increasing democratisation of West German law through the influence of constitutional jurisprudence into question. The Constitutional Court undoubtedly played a key role in translating basic rights for citizens into legal realities in the FRG. The Elfes decision is one of the cornerstones of the court's reputation as 'guardian of the constitution'.[79] In this narrative, it is often overlooked that the court simultaneously drew on international human rights debates and also maintained crucial powers of the state, and in fact, upheld the decision to withhold Elfes' passport. If we put Elfes' case in wider Cold War contexts beyond West German legal controversies, his case can be seen as part of early Cold War national security regimes that restricted free movement for political

[78] While Article 2,2 of Protocol No. 4 echoed the UDHR in stating that 'everyone shall be free to leave any country, including his own', Article 2,3 immediately permitted restrictions if they are 'in accordance with the law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'. See: Council of Europe, "Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto."

[79] See: Collings, *Democracy's Guardians*; Wesel, *Der Gang nach Karlsruhe*; M. Jestaedt / O. Lepsius / C. Möllers / C. Schönberger (eds.), *Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht*, Berlin 2011; M. Detjen / S. Detjen / M. Steinbeis, *Die Deutschen und das Grundgesetz: Geschichte und Grenzen der Verfassung*, Munich 2009.

reasons. Further investigation of court files into the judicial practice on the local level as well as the BGH's Criminal Senates might shed more light on the judiciaries role in the national security efforts of the early Federal Republic if more archival access were granted in the future.

Concerns over restrictions of the right to leave resurfaced again after German unification in 1989. When the *Bundeskriminalamt* (BKA, Office of the Federal Police) launched a so-called *Gewalttäterdatei* (violent offender database) in 2001, the former Federal Minister of Justice Burkhard Hirsch (FDP) noted sarcastically that he was reminded of the 'good old GDR'.[80] After excessive violence around football world cup matches in France in 1998, during which German hooligans brutally beat a French policeman and almost killed him, the federal police began to use its new database and passport regulations to stop registered persons at the German border. In the following years, big sporting events and political summits of the G8 triggered restrictions on citizens' right to leave the FRG.[81] These events returned the right to leave to legal and public debates even before the Covid-19 pandemic and debates surrounding 'vaccination passports' have once again shown that states all over the world still impose severe restrictions on the right to leave and return, now in the name of public health.

[80] B. Hirsch, "Fast wie in der guten, alten DDR", *Die Zeit*, 13 September 2001.
[81] M. Rossi, "Beschränkungen der Ausreisefreiheit im Lichte des Verfassungs- und Europarechts", in: *Archiv des Öffentlichen Rechts* 127 (2002) 4, 612-54.