

# Guarantee of Asylum (February 17, 1989)

## Abstract

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This article from the weekly newspaper *Die Zeit* describes the constitutional debate surrounding the right to asylum, as enshrined in the Basic Law, which included a surprisingly liberal provision to which persecuted people could appeal. For a long time, this provision served as a substitute for a regular immigration policy in West Germany.

## Source

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### **“Persons Persecuted on Political Grounds Shall Have the Right to Asylum”**

#### **How Article 16 Became Part of the Basic Law – The Discussions in the Parliamentary Council**

Only three weeks after the Parliamentary Council was established in Bonn on September 1, 1948, the SPD deputy [Ludwig] Bergsträsser submitted a catalogue of basic rights that envisaged a right to asylum. This right to asylum was to apply generally to all “foreigners” persecuted in violation of one of the basic rights that were to be incorporated into the Basic Law. The first clarifications were made at the fourth session of the Council on September 23, 1948; the committee was guided in the process by the 1948 Declaration of Human Rights. One thing in particular that was discussed and adopted was the formulation of an assassination proviso, whereby political assassins would *not* be able to invoke the right to asylum. Finally, Carlo Schmid proposed a right-to-asylum formulation that is found today [1989] in the Basic Law as section 2 of Article 16: “Persons persecuted on political grounds shall have the right to asylum.” The proposal was endorsed by the Committee on Fundamental Issues and was then passed for deliberation to the so-called General Editorial Committee.

That committee opposed Carlo Schmid’s broad formulation and initially wanted to grant the right to asylum only to Germans, especially to refugees from what was then the Soviet Occupation Zone (SOZ). The discussion, therefore, began with a rather narrow proposal: “Any German who is persecuted for standing up for freedom, democracy, social justice, or world peace, enjoys the right to asylum within the federal territory.” The idea of granting asylum only to Germans from the SOZ was already motivated by financial concerns, as the justification reveals: What kind of support should be extended to asylum seekers, and how will it be financed? The Editorial Committee considered a right to asylum for politically persecuted foreigners with the obligation of acceptance and support as “too broad.” However, it was clear to the members of the committee that such restrictions on a broadly conceived right to asylum would not stand a chance in the other committees. An alternative formulation therefore expanded the right to asylum to include foreigners once again, though now it defined the reasons for persecution and thereby narrowed the possibilities for asylum being granted. It read as follows: “Foreigners who are politically persecuted for standing up for freedom, democracy, social justice, and world peace enjoy the right to asylum within federal territory.” That was the formulation the Editorial Committee agreed upon and justified it with its concerns about “fascist and communist agitation.” This was already aimed at two groups of undesirable refugees, namely, fascist refugees from Italy (which was highly unlikely) and socialist refugees from Franco’s Spain.

With these recommendations, the discussion went back to the Committee on Fundamental Issues, which summarily dismissed all restrictions. In the 23<sup>rd</sup> session on November 19, 1948, Hermann von Mangoldt (CDU) asserted that a definition-driven specification of the right to asylum would invariably lead to

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difficult and uncertain decisions about whether the conditions for asylum were (or were not) being met. How was one to decide whether a foreigner was standing up for world peace? Mangoldt was afraid of developments similar to those in Switzerland during the Second World War. There, border police at the time decided immediately and independently whether someone qualified as politically persecuted or would be sent back to sometimes certain death in Germany. Mangoldt summarized the opinion within the Committee on Fundamental Issues by saying that it was imperative to retain the simple statement proposed by Carlo Schmid, “Persons persecuted on political grounds shall have the right to asylum.”

After that, the most important committee within the Parliamentary Council, the so-called Main Committee, took up the right to asylum. Its 19<sup>th</sup> session on December 4, 1948, witnessed a suspenseful but clarifying discussion, the particulars of which can contribute fundamentally to our understanding of asylum. For the skeptics, Hermann Fecht (CDU) opposed a simple (and therefore open) right to asylum by asserting that it would allow Italian fascists, for example, to find shelter in the future Federal Republic. Carlo Schmid countered that argument very vehemently by stating that the right to asylum applied within the framework of a consensus within international law, according to which political assassins and murderers had to be extradited at all times. Moreover, the granting of asylum was always also a question of generosity, and anyone who wanted to be generous had to take the risk “of possibly having been wrong about a person.” Carlo Schmid went on: “If you impose a restriction, such as: right to asylum, yes, but only to the extent that that person is close to us politically or likable, then that takes away too much.” That argumentation was thoroughly supported by Mangoldt: “I only need to point out that if we were to adopt any kind of restriction, if we were to exclude anything, in order to specify the preconditions for granting the right to asylum, an examination would have to be carried out at the border by the border officials. That would render the whole directive worthless.” Again, Carlo Schmid: “And so the game begins: you send the man back, or you send him to the other border, and from there it keeps going.” Who would not recognize in these words the odyssey of those seeking asylum today?

Carlo Schmid therefore recommended that courts should decide in doubtful cases and that his original proposal should be retained. The other politicians followed his lead; the formulation “Persons persecuted on political grounds shall have the right to asylum” was unanimously adopted by the Main Committee on December 4, 1948. The outcome of these negotiations reveals two key considerations:

- The dispute makes clear that, at the time, segments of the CDU were already skeptical about a broadly conceived right to asylum, but that it was precisely CDU politicians with legal expertise – such as the constitutional scholar Mangoldt – who vigorously advocated an unrestricted right to asylum.
- The skeptics within the CDU, too, were open to arguments and accepted the positions spelled out by Carlo Schmid. Those skeptical about asylum set aside their own concerns in favor of a democratic consensus but also because they evidently respected the expertise of other politicians.

With the decision by the Main Committee, the way had been paved for a liberal right to asylum in the Parliamentary Council. [...] Still, CDU deputy Heinrich von Brentano once again questioned the entire process by which the policy had been forged. On behalf of the SPD, deputy Friedrich Wilhelm Wagner, the future Vice President of the Federal Constitutional Court, responded with a few fundamental arguments in favor of an unrestricted formulation: “Either we grant the right to asylum, a right which, I believe, is age-old in terms of legal history, or we abolish it. . . . Look at France, for example, that great country, which has taken in people of every orientation, including us German anti-fascists as well the Czarists earlier on. Should France have said that, as the French democracy, it would not take in the Czarists, the supporters of a bloody regime oppressing the Russian people, because that went against its sacred principles? A right built upon such a foundation is not something that could have been recognized any longer as a right to asylum. We were very happy that we found refuge outside and that we were thus able to escape Hitler and his executioners . . . I think that one should be very careful in attempting to restrict this right to asylum and in making the granting of asylum dependent on our own sympathy or antipathy,

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and on the political disposition of the person who is coming to us.”

Once again, the entire asylum regulation was put to a vote; and, once again, it was possible to achieve cross-party consensus. The broadly conceived right to asylum was approved, any restriction was rejected, though with three “no” votes. The right to asylum along with the entire Article 16 of the Basic Law was put to a vote on May 6, 1949, in the ninth session of the plenum of the Parliamentary Council. The precise tally in favor Carlo Schmid’s formulation was not recorded, but Konrad Adenauer, as president of the Parliamentary Council, noted: “This is the overwhelming majority.”

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Translation: Thomas Dunlap

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