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The Role of the Federal Constitutional Court

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I. THE REPUTATION OF THE COURT

IN speeches and articles regarding the Basic Law's fiftieth anniversary, the Federal Constitutional Court has been praised sumptuously. It has been claimed that the Court has unfolded and empowered Basic Rights. Very figuratively, one could say: the Federal Constitutional Court has given the Basic Law splendor and radiance while strongly polishing it as well. But the road to a democratic constitutional state has not been easy. Rather, the Germans learned how to read their Basic Law very slowly. They probably never would have succeeded if the Federal Constitutional Court had not tirelessly exercised the constitutional alphabet with them. Part of this process, however, was that the German politicians had to learn what an abundance of competences they had conferred upon the Court.

Indeed, the Federal Constitutional Court has enjoyed notable respect for many years. In a questionnaire about citizens' trust in twelve institutions of public life in the Federal Republic of Germany, the Court has been ranked at the top for many years . Despite strong public criticism in recent years, it currently shares first place with the police. The government and the political parties, by contrast, occupy the bottom places on the scale of trust.[1]

The frequency with which citizens invoke the Court seems to confirm these findings. Using a constitutional complaint, anyone claiming to have had a fundamental right infringed by an act of the authorities may seek protection from the Federal Constitutional Court. The constitutional complaint may be directed against an executive, judicial, or (less commonly) legislative action. In only a few years, the constitutional complaint became an extraordinarily popular cause of action. This popularity still continues. Since reunification, some 5,000 constitutional complaints have been lodged annually. Admittedly, only around two percent are successful. But the low success rate should not make one underestimate this right of appeal. It is the paradigmatic effect of the decisions that is important for the future conduct of politicians, officials, and judges.

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1. *See* Bundesverband Deutscher Banken (ed.), INTER/ESSE, Wirtschaft und Politik in Daten und Zusammenhängen, Nov. 1997 at 2.

II. IMPACT ANALYSIS

Do these survey data and court statistics suffice, though, to draw conclusions as to the Federal Constitutional Court's central role in constitutional practice? Does Germany's pride in the Basic Law already show its people are patriots of the constitution? What about the Court's influence on lower courts and political practice? Has the Federal Constitutional Court managed to bring politics under the law? What has it achieved in the context of political culture in the Federal Republic? All these questions can be answered only by carefully analyzing research regarding the Court's impact. This means analyzing legal sociological studies about the effectiveness of the Court's decisions; however, such studies are still in their infancy.[2]

Initial theoretical studies are dealing with the effectiveness, implementation, and evaluation of the Federal Constitutional Court's case law. These studies are developing parameters or dimensions whereby the effects of the Court's decisions can be described and analyzed. Such parameters include, for instance, knowledge of the case law, how far decisions conform with the Court's objectives, and the decisions' influence on social values and political culture.[3] To date, empirical studies are only fragmentary, especially regarding knowledge of the law, political culture, and change in values. The preferred field for this sort of research is mainly criminal law, sometimes labor law, but only very rarely the Federal Constitutional Court, which has remained primarily an object for studying sociology of the legal profession only.

Accordingly, I cannot base what I have to say about the effects of the Federal Constitutional Court's decisions on empirical studies. In accordance with the state of research, I shall therefore merely select a few aspects of the history of the Federal Constitutional Court's impact and illustrate them. In so doing I shall distinguish between the legal, political, and social effects of the decisions.

III. THE FEDERAL CONSTITUTIONAL COURT AS LEGAL FORCE

What can best be shown is how the Federal Constitutional Court acts as a legal force. Its interpretation of the constitution affects the parliament's lawmaking and the courts' legal practice. A constitutional norm explicitly stipulates that decisions of the Federal Constitutional Court are binding on all constitutional bodies, courts, and authorities.

Allow me to make things specific by showing the effect, reaching far beyond the individual case, of an early decision of the Federal Constitutional Court: the *Lüth* decision.[4] This decision has also contributed in a

2. *See* Thomas Gawron & Ralf Rogowski, *Effektivität, Implementation und Evaluation, Wirkungsanalyse am Beispiel von Entscheidungen des Bundesverfassungsgerichts, in* ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 177, 178 (1996).

3. *Cf.* Gawron, *supra* note 2, at 179-85.

4. *See* BVerfGE 7, 198.

major way to refining the machinery and articulating the standards and methods of protecting fundamental rights.[5] It set the course for the radiating effect of fundamental rights in all other areas of law.

According to this decision, Basic Rights are not merely defensive rights of individuals against the state. Furthermore, they influence the relations between the citizens amongst themselves. For the constitution has, so the Court ruled, created an objective value system through the catalogue of Basic Rights. They are not only subjective rights, but also objective principles. This objective value system spreads to all sections of the law. Thus, no statute may be in discordance with the value system of the Basic Rights, but must be interpreted in its spirit.[6]

The *Lüth* decision focused attention on the so-called *radiating effect* of fundamental rights. The Court thus developed a variety of *affirmative or protective duties*, which oblige the State, especially the legislature, *to protect human rights against threats from private individuals or groups*. In the course of more than forty-eight years of jurisprudence, the Court has drawn several conclusions from the premise that human rights are also objective principles.

This fundamental finding has not been welcomed by everybody, because the borderline between constitutional law and ordinary law blurs when the Basic Rights penetrate the whole legal and social order. In fact, this decision has led to an "omnipresence of the fundamental rights in the

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5. The facts of the *Lüth* case: Veit Harlan was a popular film director under the Nazi regime and the producer of the notoriously anti-Semitic film *Jud Süss*. In 1950 he directed a new movie entitled *Immortal Lover*. Erich Lüth, Hamburg's director of information and an active member of a group seeking to heal the wounds between Christians and Jews, was outraged by Harlan's reemergence as a film director. Speaking before an audience of motion picture producers and distributors, he urged his listeners to boycott the movie *Immortal Lover*. In his view, the boycott was necessary because of Harlan's Nazi past: he was one of the important exponents of antisemitism. And Lüth was concerned that Harlan's reemergence would strongly renew the distrust against Germany. The film's producer and distributor secured an order from the Superior Court of Hamburg forbidding Lüth to call for a boycott. The Court regarded Lüth's action as an incitement in violating the law of torts. Lüth successfully filed a constitutional complaint asserting a violation of his basic right to free speech by the Superior Court of Hamburg.

6. The Court said in the *Lüth* decision:

> The primary purpose of the basic rights is to safeguard the liberties of the individual against interferences by public authority. They are defensive rights of the individual against the state .... It is equally true, however, that the Basic Law is not a value-neutral document. Its section on basic rights establishes an objective order of values, and this order strongly reinforces the effective power of basic rights. This value system, which centers upon dignity of the human personality developing freely within the social community, must be looked upon as a fundamental constitutional decision affecting all spheres of law (public and private). It serves as a yardstick for measuring and assessing all actions in the areas of legislation, public administration, and adjudication. Thus it is clear that basic rights also influence the development of private Law. Every provision of private law must be compatible with this system of values, and every such provision must be interpreted in its spirit.

BVerfGE 7, 198 (204); *see* THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 363 (Donald P. Kommers trans., Duke University Press 2d ed. 1997).

process of interpreting and applying ordinary statute law."[7] The consequences of this result have been enormously broad, especially for civil law, because the thinking in private law has changed fundamentally since the beginning of the century. Certainly, private autonomy continues to be the guiding principle of civil law, that of Social State has also become one of the main pillars of civil law. Under the influence of the fundamental rights and the Social State clauses, a social law of obligations has developed through an interaction between case law and legislation. What this means is a kind of law that takes the power gap or power imbalance between contractual partners into account and protects the economically inferior, the socially weak. Examples of this are socially just tenancy law and consumer protection laws.

The Court's most recent decision concerns the law of suretyship. The case concerned a young woman who had become hopelessly over-indebted through a surety bond. She had stood surety for a high bank credit to her father, although she had only a small income (DM 1,150 per month). The Federal Constitutional Court decided that the civil courts ought to monitor the content of such contracts, and, where necessary, declare them void, provided that the guarantor is structually inferior and the suretyship is an unusually heavy burden on him or her.[8]

The Federal Constitutional Court's case law on the radiating effect of fundamental rights has not only been applauded, but also heavily criticized. The crisis of the Social State promotes the desire to set bounds on case law that is seen as paternalistic. On the other hand, the case law on the radiating effect of fundamental rights favors a great breadth and intensity of supervision. It enlarges the Federal Constitutional Court's potential for control, thus curtailing the ordinary courts' competencies. In addition, it leads to a loss of parliamentary power and a gain of court power, all in the name of human rights.

IV. THE POLITICAL INFLUENCE

That brings me to the political impact of the Federal Constitutional Court's case law. There is no doubt that the Federal Constitutional Court is an outstanding factor in the political process. The Court adjudicates in the name of the Basic Law. Its operation extends into the political sphere, because its criterion is the constitution of a political community. As we all know, the checking of power is necessarily a power in itself.[9]

I am interested in the influence the Court's decisions have on political debate and decision-making. By looking at the political debates inside and outside parliament, it becomes apparent that during the legislative

7. Thus Ossenbühl, *Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit, in* FESTSCHRIFT FÜR H.P. IPSEN 129-38 (1977).

8. *See* BVerfGE 89, 214.

9. As he tellingly puts it in relation to judging in general, see Adolf Arndt, *Das Bild des Richers: Vortag geralfen vor der Juristicschen Stediengesellschaft in* 2 KARLSRUHNEAM 15 (1957).

procedure, participants in the debate already orient themselves on future and likely forthcoming decisions of the Federal Constitutional Court. MPs mostly engage lawyers to interpret the relevant decisions right down to the details. The experts then sometimes play the part of the Delphic Oracle if they have to foresee coming decisions of the Court. Especially in the political debate on parity codetermination (equal representation for management and labor on supervisory boards of firms), politicians and lawyers alike refer not just to the Basic Law, but primarily to the Federal Constitutional Court's case law. Rarely has a threatened or intimidatingly aired action before the Federal Constitutional Court had such far-reaching pre-emptive effects in terms of anticipated reactions and adjustments on the legislative process.[10] When Federal Chancellor Helmut Schmidt was asked by workers in 1974 when the Codetermination Act was finally going to be passed, he answered: "The question is whether that damned pettifogging CSU lot aren't going to drag it all before the Federal Constitutional Court again."[11]

This tendency towards anticipatory obedience has, if anything, gotten stronger over the years. We, as judges, can be proud if this omnipresence of the Federal Constitutional Court in the political debate points towards a sensitivity regarding fundamental rights by politicians. But that is only true to a limited extent. In the upper and lower House, and among the public, political argument is seasoned daily by using the accusation of the alleged unconstitutionality of a planned decision. The threat of taking the road to Karlsruhe is now part of the ritual stock-in-trade of politics in Germany. This anticipation of a constitutional risk, or a risk from the Federal Constitutional Court, leads to risk-aversion and hostility towards innovation. Hence, anticipatory obedience is harmful to the social imagination and tends to cripple the legislator's delight in deciding.

A. THE LIMITS OF JUDICIAL REVIEW

Such obedience, which hurries ahead, does not come about without cause. Federal Constitutional Court's critics would instantly point out that it is the consequence of judicial activism. They reproach the judges for knitting the net of constitutional preconditions tighter and thus restricting the scope of action for politics. As a member of the scolded Court, I will not discuss this reproach. Rather, I would focus on whether adjudication can be separated from political action. Despite contradictory views, it is still readily held that *judging means finding, not shaping.* That is, there is a qualitative difference between adjudication and lawmaking: ideally, finding the law is a matter for adjudication, while making the law is a task for politics.

10. *See* CHRISTINE LANDFRIED, BUNDESVERFASSUNGSGERICHT UND GESETZGEBER, WIRKUNGEN DER VERFASSUNGSRECHTSPRECHUNG AUF PARLAMENTARISCHE WILLENSBILDUNG UND SOZIALE REALITÄT 52 (1984) (discussing the "pre-emptive effect" of Federal Constitutional Court decisions).

11. FRANKFURTER RUNDSCHAU Oct. 21, 1974 at 2.

The debate on judges' creative relationship to the law is older than the Federal Constitutional Court's jurisdiction. Montesquieu's saying that the judge is the mouth that utters the words of the law is still often quoted, but only to fix a cheap point of attack for doubts. Over a century ago, enlightened jurists were already rejecting the view of the judge's task as a purely intellectual operation, like any other judgement. That is, like a logical operation with the statutory provision as the major term and the facts to be adjudicated the minor term. If that were so, the judge would need nothing but "a reliable edition of the law, the art of reading, care, and sound, clear human reason."[12] Yet the legal order is neither without lacunae, free of contradiction, linguistically unambiguous nor above social change.[13] This is particularly true of constitutional law, which is marked by a low density of regulation and vague wordings.[14]

Not just general clauses, but a multiplicity of undefined legal concepts delegate actual norm making to the judge. They open up semantic room for maneuvers, allowing for not just one correct decision. Judicial decision is not only finding, but always also law-making. "In every act of judicial application of law . . . cognitive and volitional elements form an indissoluble combination."[15] The judge creates law in the process of finding a decision. Accordingly, adjudication always has a political dimension too.

This is certainly true of constitutional jurisdiction; the Basic Law's articles are marked by a low degree of definiteness. They are norms with great openness and margins of interpretation that are hard to delimit.[16] The Basic Law essentially contains, apart from the law on the organization of the State, principles that must first be spelled out before they can be applied.[17] One example is the constitutional principle that the Federal Republic is a social state.[18] But also in the fundamental rights context too, terms are used whose content can be made definite only by interpretation or even evaluation, sometimes through recourse to extra-legal notions and historical experience.[19] Consider the dignity of the person protected by Article 1 of the Basic Law, or that of the family, which by Article 6 of the Basic Law enjoys the special protection of the State. The openness and breadth of the Basic Law should not be pointed to as defects. On the contrary, a constitution can generally be regarded as suc-

12. OSKAR BÜLOW, GESETZ UND RICHTERARMT 14 (1885).

13. *See* Dieter Grimm, *Politik und Recht*, *in* GRUNDRECHTE, SOZIALE ORDNUNG UND VERFASSUNGSGERICHTSBARKEIT: FESTSCHRIFT FÜR ERNST BENDA 91, 99 (1995).

14. *See* KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 11 (20th ed. 1995).

15. *See* Grimm, *supra* note 13, at 100.

16. *See* Hesse, *supra* note 14, at 20; WOLFGANG ZEIDLER, VERFASSUNGSGERICHTSBARKEIT, GESETZGEBUNG UND POLITISCHE FÜHRUNG, EIN CAPPENBERGER GESPRÄCH 46 (1980).

17. *See* Ernst-Wolfgang Böckenförde, *Die Methoden der Verfassungsinterpretation*, *in* STAAT, VERFASSUNG, DEMOKRATIE 53, 58 (2d ed. 1992); WILLI GEIGER, VERFASSUNGSENTWICKLUNG DURCH VERFASSUNGSGERICHTSBARKEIT 4.

18. GRUNDGESETZ [Constitution] [GG] art. 20(1) (F.R.G.).

19. *See* Geiger, *supra* note 17, at 4.

cessful if it is couched tersely and vaguely. If a constitution is not open and therefore "to some extent capable of ever-new interpretation" it will, as Willy Geiger rightly says, "inevitably soon come into hopeless contradiction with its object, and reach the critical point where the only choice left open would be to break it, i.e., to disregard it, or else continually and very quickly adapt it formally to changing needs."[20]

B. Judicial Self-Restraint

Judicial self-restraint, the maxim often recommended to the Court, is, if taken literally, more misleading than persuasive. The call for judicial self-restraint serves neither to locate grey areas of law and politics, nor to clear them up. Moreover, judicial self-restraint cannot be a general strategy for a court whose primary duty is to check power and assert the protection of fundamental rights. The latter task may, as Konrad Hesse rightly stresses, call for resolute intervention rather than restraint, even at the risk of affronting some other constitutional organ.[21] As for the formula of judicial self-restraint, Benda rightly calls it an attitude or a virtue: the Court cannot limit its own power and function, but has to carry out its tasks.[22] Of course, the Court may not extend its own power or function either, due to the principle of separation of powers that must be respected.[23] The slogan of judicial self-restraint is just as correct in practice as the contrary call on lawmakers to display more "political self-confidence."[24] Neither maxim serves an informative function: they merely formulate a problem, but do not offer any criteria for solving it.

C. The Case Law of the Federal Constitutional Court

The Federal Constitutional Court must follow a precisely formulated catalogue of competences. Once an application is admissible, it must be decided on by the Court. As for the decision themselves, it may be important that issues are not decided on the basis of legal criteria and considerations, or concern responsibilities of other constitutional bodies than the Federal Constitutional Court.

This sort of conflict situation has repeatedly been discussed in decisions of the Federal Constitutional Court. Constitutional theorists have sought, on the basis of these self-restraining judicial utterances, to derive normative guidelines. But in an attempt to mark the boundaries of the judicial areas of responsibility, they have not managed to demonstrate a system of criteria and methods, but only to name some groups of problematic

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20. *Id.* at 5.

21. *See* Konrad Hesse, *Funktionelle Grenzen der Verfassungsgerichtsbarkeit*, *in* Recht als Prozeß und Gefüge, Festschrift für Hans Huber 261, 264 (1981).

22. *See* Ernst Benda, *Constitutional Jurisdiction in West Germany*, 19 Colum. J. Transnat'l L. 1, 11 (1981).

23. *See id.*

24. *See* Landfried, *supra* note 10, at 175.

cases.[25] These relate either to particular decisional structures or to subject areas. Thus, the Court is expected to and in fact does exercise restraint in cases involving forecast decisions or expediency considerations. The same limitation applies to reviewing legislative and executive acts in the foreign and economic policy spheres.

The most prominent example of a forecast decision is the Federal Constitutional Court's Kalkar decision on the Nuclear Act.[26] This regulates the peaceful use of nuclear energy and protection against its hazards. The background to the decision was the protest by a citizen against the building of a nuclear power station. The Federal Constitutional Court was presented with the question of whether Parliament had precisely regulated the permit procedure. Was it enough to hold the authority, in relation to the dangers, only to the given state of scientific and technical progress? Or should the legislators set more precise standards to mark the boundary of the bearable residual risk unambiguously?

The Federal Constitutional Court answered the second question negatively, and found that the basic decision for or against the legal admissibility of the peaceful utilization of nuclear energy was a matter for the legislature alone. Its primacy resulted not just from the far-reaching repercussions of the decisions for the citizens, but also from the limits to human cognitive capacity. In such a "situation necessarily loaded with uncertainty," it lay "primarily in the political responsibility of the legislature and the government . . . to take the decisions they saw fit. Given this position, it is not the Court's task to stand in for the appointed political institutions with their own assessment. There are no legal criteria for that."[27] Of course, uncertainty as to the side-effects of a law "in an uncertain future" does not require refraining from enacting the law. The Court points to practical reason, for assessing the hazards of nuclear energy, which it evidently sees as better left to the legislature.[28]

The non-binding nature of the criteria postulated in the codetermination judgement can readily be shown on the basis of other case law examples listed there. Take the area of foreign policy, often cited as an example of judicial self-restraint. Thus, in the judgment on the Basic Treaty with the German Democratic Republic, the Court wished neither to exercise criticism nor to express its views on the prospects for the then federal government's reunification policy. Responsibility for choosing the political ways and means towards this State objective of the Basic Law lay with the political bodies alone.[29] By contrast, in the *Maastricht* judgment, the Court discussed the political ways and means chosen by the

25. *Cf., e.g.*, Gunnar Folke Schuppert, *Self-restraints der Rechtsprechung*, *in* DVBL 1191, 1194 (1988) (illustrating a weather attempt at classification).

26. *See* BverfGE 49, 89 (127).

27. *Id.* at 131.

28. The Court stresses that in view of the limited empirical knowledge, one could not demand of the legislature a regulation that would rule out endangerment of fundamental rights with absolute certainty. *Cf.* BVerfGE 49, 89 (143).

29. *See* BVerfGE 36, 1 (18).

federal government towards the goal of European integration entirely critically.[30] The *Maastricht* decision is a good example, as a voice in the academic sphere put it, "of how the Federal Constitutional Court copes with the German tendency to constitutionalize foreign policy questions."[31] As a prominent example where the importance of the object of legal protection at issue demanded intensive judicial review, the protection of nascent life intended by the abortion law is readily cited.[32] By contrast, in the *Kalkar* decision the Court, despite the far-reaching repercussions of the option in favor of the peaceful use of nuclear energy for the life and limb of citizens,[33] saw no occasion for an intensive review of the Nuclear Act.

We need not go into whether other viewpoints have justified judicial self-restraint or activeness in this or that case. We wish only to show that the principle of judicial self-restraint which the Court strove for in the codetermination judgement has indeed been properly described in its generality. It "is aimed at keeping open for the other constitutional organs the room for free political action guaranteed them by the constitution."[34] Yet it has not been possible to give this precept shape against the background of the leading cases with a catalogue of criteria. The formula of judicial self-restraint offers nothing more than a rhetorical structure of argument that only gives information about the problem to be solved and the intellectual effort proposed.

D. Functional Limits to Constitutional Jurisdiction

Even the Court's most passionate critics have not managed to draw a line between the overlapping competencies of legislation and jurisdiction. This is not a consequence of intellectual laziness, but rather has to do with the amalgamation of law and politics, which cannot be puristically dissolved. Increasingly, more attention is being paid to constitutional principles whose infringement is continually alleged in cases of boundary disputes, mainly the principle of separation of powers and the democratic principle. Of course, this approach does not offer a simple answer either.

1. The Principle of Separation of Powers

Attention should be directed first to the principle of separation of powers, which is not to be understood in the sense of a strict separation of legislature, executive, and judiciary. Rather, it distributes power and responsibility by putting bearers of power under control. Surely, the freedom-guaranteeing aspect of separation of powers, aimed at moderating the use of power and protecting citizens against government interference,

30. *See* BVerfGE 89, 155.
31. Juliane Kokott, *German Constitutional Jurisprudence and European Integration, in* 2 European Public L. 413, 416.
32. *See* BVerfGE 39, 1 (51); *cf.* BVerfGE 88, 203 (340).
33. *See* BVerfGE 49, 89 (127).
34. BVerfGE 50, 1 sub 2.

is of particular importance. But for our problem, the functional aspect is more helpful. The principle of separation of powers is primarily aimed at having government decisions taken as correctly as possible. To be sure, by having the bodies best suited make decisions because of their organization, composition, function and procedures. This allocation of tasks is made according to priority areas, but without any claim to exclusivity. Functional overlaps, for instance, in creative legal interpretation by courts, are part of this allocation from the outset. Creative and therefore social-patterning elements in constitutional case law are not illegitimate per se either. Nonetheless, the Court must always bear in mind that the Basic Law has made the legislature the "central actor" in shaping the political community. Its autonomy of action is comprehensive and it can, by contrast to the Federal Constitutional Court, act of its own volition. On the basis of an external impetus, the Court can only act reactively to review decisions already taken. While the legislature can observe the effects of its decisions and, should these be undesirable, make corrections if necessary, the method of trial and error is not open to the Court. Unlike the legislature, the Court cannot revise its judicial pronouncements by itself.

2. The Democratic Principle

This principle requires respect, notwithstanding its separation of powers aspect, particularly when legislative measures come onto the test-bench of the Federal Constitutional Court. It is not the Federal Constitutional Court's business to decree a detailed regulatory program qua Basic Law. The narrower the Court weaves the net of constitutional postulates and requirements, the more it restricts the legislature's possible actions and cripples its political imagination.

The openness of the political process is essential to democracy. In all areas not adequately provided for in constitutional law, as Grimm says, "the democratic principle requires that only those who can be held accountable through the vote may decide."[35]

Response by the citizens in regular elections does not apply to the members of the Federal Constitutional Court. The judges stand outside the day-to-day political struggle. Their personal and material independence, guaranteed in the Basic Law, is intended to make them immune specifically to political requirements, and guarantee that the law alone counts. Judgment as to the optimum realization of the common welfare is by contrast a matter for politics.

3. Value Conflicts in the Pluralist Social Order

If conflicts between values are made the object of abstract constitutional review, then account must also be taken of the fact that the Basic Law has opted for a pluralist social order. In conflict situations where

35. Grimm, *supra* note 13.

fundamental rights positions clash, the verdict on the constitutionality of a law is not a matter purely of judicial acuity or the art of constitutional interpretation. Instead, what is called for is a weighing, an evaluation.

As an example, we may take the conflict on abortion law, which occupied the Federal Constitutional Court in 1993. Here, the constitutionally protected right to life of the unborn and the mother's fundamental rights position had to be weighed against each other. The legislature had resolved this value conflict in 1992 with a time-limit concept. According to this, termination of pregnancy within twelve weeks of conception was not unlawful and, therefore, exempt from punishment. Hardly any statute has been so thoroughly debated in the *Bundestag*, or so massively underpinned academically by the securing of expert opinions as this one. The final text of the act was a hard-fought compromise in the Federal Parliament based on many competing preliminary drafts.

The Federal Constitutional Court, invoked by the defeated minority in Parliament, nonetheless quashed the law and decided that termination of pregnancy is to be treated as wrong for the whole duration of the pregnancy. It declared admissible a consultative model that combined the time-limit solution with compulsory counseling. The parliamentary majority, defeated in court, responded—it could hardly do otherwise—with the accusation that the Court in Karlsruhe was once again presuming to do the legislators' job.

Certainly it is the task of the Federal Constitutional Court to decide authoritatively on the constitutionality of provisions brought before it; however, it must be mindful that such determinations are the outcome of a multi-layered process of evaluation. There is no absolute correctness to such decisions; or at least it is not attainable for us here on earth. The dissenting opinions of judges on many such decisions are proof of this perception.

Differences of opinion among judges are not just random. Historical, cultural, and socially divergent views as to values held by those adjudicating play a part. We all know that there is a prior understanding that also, more or less consciously, influences the acquisition of law. This has nothing to do with bias or prejudice. Instead, we are all marked by this sort of basic attitude preceding any legal cognition, which is more experienced with intuitive conviction than acquired rationally. It is a mixture of moral, legal, philosophical, and political convictions, that include a particular conception of reality.

Accordingly, the Court has to bear in mind that the election of parliamentary representatives has ensured a particularly broad spectrum of such interpretations. This compels reticence in relation to the products of parliamentary work. Therefore, in a case of conflicting value judgements, the Federal Constitutional Court should pay attention to the procedure of lawmaking rather than the outcome; that is, the process of political opinion-forming and decision-making that led up to the statute that is under examination.

Intellectual honesty compels us to state that there is no usable catalogue of criteria which could serve as a signpost in the ridge-walking between law and politics. The two fields of action partly overlap and cannot be separated from one other unambiguously. As the constitutional review body, the Court has a share in politics. The problem to be considered is the scope of the Court's responsibility. The test criteria, or maxims, are the structural principles of the Basic Law, which have as their object the interplay and contrary motion of judicial review and political activity. These are necessarily very abstract, and denote only stages in a thought process. The horizon of reflection marked by the principle of separation of powers and the democratic principle must be paced off in thought for *every* decision. Although these principles are only types of reflection, they should not be misinterpreted as being more or less nonbinding appeals to constitutional judges. What is at stake here is not voluntary self-restraint, but the fulfillment of a constitutional precept. The sensitive definition of its own sphere of responsibility is a self-evident duty for an organ of government, which according to the Constitution must, through the separation of governmental powers, watch over their balanced exercise.

V. THE SOCIAL IMPACT OF PROTECTING FUNDAMENTAL FREEDOMS

Let me draw your attention to the theory that the Court's jurisdiction concerning fundamental rights has promoted the development of a civic society in Germany. By this, I mean a society of participating citizens who know their constitutional rights and defend them against infringements by the State. Individuals may file a constitutional complaint claiming that a public authority has violated one or more of their constitutionally guaranteed rights. In these cases, the primary object of review is usually the decision of a lower court. But, if necessary, the original government act and the law on which the decisions are based may also be evaluated, since no act or court decision can be constitutional when the underlying law is unconstitutional. The complaint may be lodged against any official action, including judicial decisions or administration regulations.

A constitutional complaint requires acceptance for adjudication. A complaint must be accepted if: (i) it is of fundamental constitutional importance; (ii) the claimed infringement of fundamental rights is of special severity; or (iii) the complainant would suffer particularly severe detriment from failure to decide the issue.[36] The Federal Constitutional Court must determine whether a complaint satisfies the prerequisites for acceptance before actually deciding a constitutional complaint.

The Federal Constitutional Court has certainly been active in terms of unfolding and developing fundamental rights. Through a series of indi-

36. *See* § 93a BVerfGG.

vidual cases, it has developed, for example, a law of privacy, especially the right of informational self-determination, and principles of fair trial. The Court's case law concerning the basic rights of freedom of speech contributed significantly to the shape of the Basic Law and to the development of the free, democratic, rule-of-law state of the Federal Republic of Germany. Furthermore, it attests to the readiness of the German people to learn from the failure of the Weimar Republic and the reign of terror which existed between 1933 and 1945. This historical jurisdiction, starting with the *Lüth* case (1958) and concluding with the Auschwitz Denial case (1994), clearly illustrates how the Court has tried to grapple with a disastrous past.

I am convinced that the German citizens have understood that they are being called upon to be the guardians of the Constitution by way of the right to file constitutional complaints. Due to their attention, their sense of law, and, last but not least, their mind to oppose, the Federal Constitutional Court was able to act as the guardian of the Basic Rights. With its jurisdiction on the Basic Rights, the Court broke with authoritarian traditions and outlined the principles of the free and democratic rule-of-law state. On the one hand, the decisions on freedom of speech and the press have to be mentioned. These decisions rendered the Basic Rights of communication to be essentially constitutive for a free and democratic stately order, because it is through them that the constant intellectual debate is possible, which is the characteristic element of democracy. On the other hand, the jurisdiction regarding the principles of due process and fair trial have to be mentioned. These rule-of-law principles are to guarantee that all the decisive facts and aspects of a case come up, and that the accused, or the person seeking justice, is not degraded as an object of procedure. Last, but not least, these decisions also intend to show to the citizens as well as to the public persons involved that the Basic Rights are directly applicable law.

The history of the Federal Constitutional Court's impact is a story of success. This is true irrespective of the fact that it has repeatedly unleashed a barrage of critical fire with its decisions. Even these decisions have never been able to shake the people's trust in the Court permanently. It may be said without exaggerating that the Federal Constitutional Court has become a citizens' court par excellence.[37] Such popularity is not raised up above all doubt. This is true especially when the other institutions that guarantee pluralism (the variety of opinion) suffer from a decline in public trust. For instance, the press, the trade unions, employer associations, churches, the federal government, and parliament as well as the political parties are all primarily in the negative zone of the trust scale for public institutions in the Federal Republic of Germany.

37. *See* Peter Häberle, *Verfassungsgerichtsbarkeit als politische Kraft*, *in* VERFASSUNGSGERICHTSBARKEIT ZWISCHEN POLITIK UND RECHTSWISSENSCHAFT 59, 79 (1980).

Does the unbroken great trust in the authority of constitutional jurisdiction point to some political mistrust of democracy? As Häberle rightly warns, "[t]he German faith in constitutional jurisdiction must not be allowed to turn into lack of faith in democracy."[38]

38. *Id.*