The Effects of Judgments of the German Federal Constitutional Court

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A. Opinion Surveys and Statistics

Citizens of the old Federal Republic have repeatedly been asked which aspects of their country they are most proud of. The choice has included welfare state benefits, economic success, the *Bundestag*, scientific or sporting achievements, art/literature and the Basic Law. The last, i.e. our constitution, has taken first place in recent years. Only in 1991 and 1992 was the constitution put in second place. Germans' pride in their economic successes won out then. The most recent survey ranked welfare state benefits in second place after the Basic Law, followed by the economic successes.[1]

The Federal Constitutional Court has for many years enjoyed notable respect. On the question about citizens' trust in 12 institutions of public life in the Federal Republic of Germany, the Court has for many years ranked top. Despite strong public criticism in recent years, it currently shares first place with the police. The government and the political parties, by contrast, take the bottom places on the scale of trust.[2]

The frequency with which citizens invoke the Court seems to confirm these opinion research findings. Using the constitutional complaint, anyone claiming to have had a fundamental right infringed by an act of the authorities may seek protection through 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 legal remedy. This popularity continues. Since reunification some 5,000 constitutional complaints have been lodged annually. Admittedly only around 2 per cent of the constitutional complaints are successful. But the low success rate should not

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1 Bundesverband Deutscher Banken (ed.), INTER/ESSE, *Wirtschaft und Politik in Daten und Zusammenhängen*, 9/97 at p. 2.

2 Bundesverband Deutscher Banken (ed.), INTER/ESSE, *Wirtschaft und Politik in Daten und Zusammenhängen*, 11/97 at p. 2.

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make one underestimate this right of appeal. For the paradigmatic effect of the decisions is important for the future conduct of politicians, officials and judges. The case law on fundamental rights has not only helped to flesh out the Basic Law and let it take root in our body politic. In addition, this judicial relief has created a sense among the population that they are not being defencelessly exposed to government measures. And not least, the decisions have sharpened the awareness of both public actors and the citizens that the fundamental rights constitute directly applicable law.

B. Impact Analysis

Does this survey data and court statistics suffice though to draw conclusions as to the Federal Constitutional Court's central role in constitutional practice? Does German pride in the Basic Law already show they are patriots of the constitution? Do the repeated acts of violence against aliens not raise doubts as to German sensitivity to human rights? What about the Court's influence on the ordinary courts and on political practice? Has the Federal Constitutional Court managed to bring politics under the law? What does it achieve in the context of political culture in the Federal Republic? These questions can only be answered through careful analysis of research into its impact. This means legal sociological studies of the effectiveness of the Court's decisions. But this type of analysis of the impact of court decisions is still in its infancy.[3]

Initial theoretical studies deal with questions of the effectiveness, implementation and evaluation of the Federal Constitutional Court's case law. They have developed parameters or dimensions whereby the effects of decisions can be described and analysed. Knowledge of the case law, the extent to which recipients of decisions conform with the Court's objectives, and the influence of the decisions on social values and political culture are all treated as such parameters.[4] Empirical studies are to date only occasional, especially on the questions of knowledge of the law, political culture and change in values. The preferred field for this sort of research is mainly the criminal law, sometimes labour law, but only very rarely the Federal Constitutional Court, which has remained, on the whole, an object for sociology of justice 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 pick out a few aspects of the history of the Federal

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[3] Thomas Gawron and Ralf Rogowski, 'Effektivität, Implementation und Evaluation – Wirkungsanalyse am Beispiel von Entscheidungen des Bundesverfassungsgerichts' in (1996) 2 *Zeitschrift für Rechtssoziologie* at pp. 177–220, 178.

[4] Cf. Gawron and Rogowski (1996) note 3, at pp. 179–185.

Constitutional Court's impact and illustrate them. In doing so I shall distinguish between the legal, social and political effects of the decisions.

C. The Federal Constitutional Court as a Legal Force

What can be shown best is how the Federal Constitutional Court acts as a legal force. For its interpretation of the constitution affects the Parliament's law making and the ordinary courts' legal practice. One constitutional norm explicitly stipulates that decisions of the Federal Constitutional Court are binding on all constitutional bodies, courts and authorities.

Allow me to be specific, by showing the effect, reaching far beyond the individual case, of one early decision of the Federal Constitutional Court: the Lüth decision.[5] This decision articulated the standards and methods for protecting fundamental rights. It set the course for the 'radiative effect' of fundamental rights in all other areas of law.

Let me start by telling you the facts of the Lüth case:[6] 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 re-emergence 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 anti-semitism. And Lüth was concerned that Harlan's re-emergence would 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 to inviolate 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.

In deciding this case, the Federal Constitutional Court laid down, for the first time, the *doctrine of an objective order of values* and clarified the relationship between fundamental rights and private law. We are used to understanding human rights as *negative entitlements* which enable the individual *to defend himself against government intrusions* into his sphere of freedom. In its groundbreaking *Lüth* judgment, the Federal Constitutional Court understood basic rights in our

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[5] BVerfGE 7, 198.

[6] The presentation of the facts and the grounds of judgment below draws on the translation by Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd ed. 1997) at p. 361 et seq.

constitution *not only* as subjective rights, *but also* as objective principles. And in a capacity as an objective order of values *the basic rights penetrate the whole legal and social order.*

The Court stated 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 centres upon the 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.[7]

The decision focused attention on the so-called *radiative 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 45 years of jurisprudence, the Court has drawn several conclusions from the premise that human rights are also objective principles.

This decision leads to an 'omnipresence of the fundamental rights in the process of interpreting and applying ordinary statute law'.[8] This has proved enormously rich in consequences, especially for civil law, for the thinking in private law has changed fundamentally since the beginning of the century. Private autonomy certainly continues to be the guiding principle of the civil law. But alongside this principle, the principle of the Social State is considered one of the main pillars of the civil law. Under the influence of the fundamental rights and the Social State clauses, a social law of obligations has been developed by an interaction between case law and legislation. That is to say a kind of law that takes the power gap or power imbalance between contractual partners into account and protects the economically inferior and the socially weak. Examples of this are socially-just tenancy law and consumer protection law.

The Court's most recent decision concerns the law of suretyship. The case concerned a young woman who had rendered herself hopelessly overindebted through a surety bond. She had stood surety for a large bank loan to her father,

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[7] BVerfGE 7, 198, 204 et seq.; Kommers, note 6, p. 363

[8] Thus Ossenbühl, 'Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit' in *Festschrift für H.P. Ipsen* (1977) at pp. 129–138.

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 there was a structural inferiority of the guarantor and that the suretyship was an unusually heavy burden on him or her.[9]

The Federal Constitutional Court's case law on the 'radiative effect' of the fundamental rights has not been met with universal approval. It has been heavily criticized, especially recently. This is connected on the one hand with the crisis of the Social State and the desire to set bounds on case law seen as paternalistic. On the other hand, the case law on the 'radiative effect' of the fundamental rights favours a great breadth and intensity of supervision by the Federal Constitutional Court, thus curteiling the competencies of the ordinary courts.

D. The Social Impact of the Case Law

Let us now turn our attention to the social impact of the Federal Constitutional Court's case law. An example is family law, an area continuously further developed by Federal Constitutional Court's decisions. The Court's actions have largely been provoked by changed family structures. Particularly since the 1970s, the social reality of the family in the Federal Republic has decisively altered: the inclination to marry has decreased, the divorce rate has risen, and the frequency of extramarital cohabitation has grown steadily. Stepfamilies and adoptive families have become more common. The two-career marriage and family has become firmly established alongside the housewife marriage.

The Court has responded to this social change in the most varied fashion. Sometimes it has proved to be the pacemaker of social change. For example, it has cut back the legal predominance of the husband and father. In the majority of cases it has adjusted the law to new social developments. In particular occasions though – as in the case of families without marriage – it has adapted to new forms only after long hesitation. Let me portray this on the basis of three legal questions.

Let us start with the Court's tendency to inertia. This was displayed in connection with the question whether there could be a family in the legal sense where father and mother lived together unmarried with their child. The Federal Constitutional Court took the view that the child born out of wedlock had a constitutionally protected relationship with each of its parents. It was, however, not willing to treat extramarital cohabitation with a child as a family within the meaning of the constitution.[10] This distinction could hardly be made comprehensible to the legal layman.

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[9] BVerfGE 89, 214.
[10] BVerfGE 56, 363, 386.

Gradually the insight dawned on the Court that the constitutionally required protection of the family could not be made dependent on whether the parents had found their way to the registry office. For what deserves protection is the fact that people live together and collaborate in order to raise and bring up children. The Court gradually adjusted its legal concept of the family to the social reality. The legislator too then renewed family law accordingly. Among other things, unmarried parents living together today have the possibility of joint custody.

Let us now come to the law's function as a pacemaker. The German Civil Code of 1900 was typified by a patriarchal structure. The husband had the right of decision in all matters of the marriage. As father, he was, at the same time, the holder of the *patria potestas*. The mother was entitled and obliged merely to look after the children and bring them up. Should the parents' opinions differ, the father's prevailed.

The husband's right of decision in matrimonial matters was removed by the Equal Rights Act in 1958. The Act also followed the case law that parental care and custody go to both father and mother. But in the event the parents were unable to agree, the father was to have the last word. Only the paternal casting vote was held suitable to safeguard family peace and marriage in its Christian Western form.

This Act was interpreted by legal sociologists as an attempt to intervene, with conservative intent, in the forthcoming shift in family power relationships.[11] Survey findings from the 1950s show that at the time there were no clear majorities on the question among the public. The paternal right of final decision still had numerous supporters – especially among men.[12] The Federal Constitutional Court, however, repealed the paternal right of final decision as unconstitutional, a year after the Act came into force. It did so irrespective of the fact that the model of an equal footing for men and women had not yet fully been established in the legal reality. The Court was unable to see how objective biological or functional differences or the special nature of women could justify the paternal prerogative.[13] For the young generation today the concept of the paternal casting vote is now quite beyond their comprehension. They are at best amused, and young women often indignant, when one tells them about this now historical male privilege.

Allow me to go into a third body of law where the Federal Constitutional Court has acted as pacemaker. In several decisions the Federal Constitutional Court was engaged in the legal position of the illegitimate child (child born outside marriage). The Court has repeatedly brought about reforms by the legislator. In the meantime, Parliament has largely set the rights of illegitimate children equal to those of legitimate ones. In particular, the provision whereby father and child were not

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[11] Voegeli and Willenbacher, *Die Ausgestaltung des Gleichberechtigungssatzes im Eherecht, Zeitschrift für Rechtssoziologie 5* (1984) at pp. 235–259, 247 et seq.

[12] R. König, 'Familie und Autorität: Der deutsche Vater im Jahre 1955' in ibid., *Materialien zur Soziologie der Familie* (2nd ed. Köln 1974) at p. 224 et seq., and Fröhner, Hackelberg and Eser, *Familie und Ehe* (Bielefeld 1956).

[13] BVerfGE 10, 59, 69.

regarded as related was repealed. Today both the child and the father are entitled to inherit. Paternity may be recognized by a simplified procedure. The child's entitlement to maintenance has been expanded in that he or she can sue for the amount necessary for a simple living by a simplified procedure using officially set standard rates. Compulsory official guardianship has been set aside. The mother obtains parental custody by law.

It is interesting to discover whether the reformed law has also brought about a social change. After all, at the start of this century the illegitimate child was the poorest of the poor. Has the changed legal position gone hand in hand with improved conditions of life for illegitimate children and unmarried mothers? The question is hard to answer. How are such improvements in life chances to be measured? Among the starting points might be the social valuation of mother and child, the frequency of births out of wedlock, and the health and welfare of illegitimate children.

Today social ostracism of an unwed mother and child is extremely rare. But we are unable to say exactly how far the changed social views have been influenced by the case law. Assuredly there is a mutual interaction here between law and reality that does not run with one-dimensional goal-directness. As far as the other parameters, or starting points are concerned one might say the following: the number of births out of wedlock has risen steadily since 1970 (5.4 per cent), running in the old Länder of the Federal Republic at around 10 per cent since the mid-1980s. Since the 1980s, illegitimate children have no longer been over-represented among the stillborn or deaths in infancy.[14] This would suggest that today the stigma of having an illegitimate child has been largely removed. The figures regarding support payments are less pleasing. In the group of all one-parent families, it is the illegitimate children that most often receive irregular, incomplete or no support payments.[15] This fact shows that favourable maintenance regulations are not enough by themselves to improve the material position of illegitimate children substantially. It remains to be seen whether the improvement in the legal position of fathers of illegitimate children will also raise their payment ethics. The *Bundestag* passed an Act late last year to reform childhood law. In the explanatory statement introducing the Act the Parliament states the occasion for the reform. The first paragraph of the statement refers six times to various decisions of the highest German court, which have called into being these manifold changes in the law relating to children.[16]

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[14] Statistisches Jahrbuch 1997 für die Bundesrepublik Deutschland (1997) at p. 69.

[15] J. Behr, *Junge Kinder in Einelternfamilien. Auswirkungen der sozialen und wirtschaftlichen Lage von Einelternfamilien auf die Aufstiegschancen der Kinder.* Bundesfamilienministerium (ed.) (1981) at p. 24 et seq. Bien (ed.), *Familie an der Schwelle zum neuen Jahrtausend, Wandel und Entwicklung familialer Lebensformen* (1996) at p. 147.

[16] BTDrucks 13/4899, 13 June 1996, p. 29.

E. 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 itself power.[17]

What I am interested in here is the question of the influence the decisions have on political debate and decision making. Let us take a look at the political debates inside and outside Parliament. It has already become apparent that during the legislative procedure participants in the debate familiarize 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 last detail. The experts then sometimes play the part of the Delphi oracle, if they have to foresee coming decisions of the Court. Especially in the political debate on parity, co-determination (equal representation for management and labour on supervisory boards of firms), politicians and lawyers alike referred 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.[18]

When Federal Chancellor Helmut Schmidt was asked by workers in 1974 when the Co-determination Act was finally going to be passed, he answered: 'The question is whether that damned Christian Social Union Party (CSU) isn't going to bring the matter before the Federal Constitutional Court again.'[19]

This tendency towards anticipatory obedience has become stronger over the years. We judges could be proud if this omnipresence of the Federal Constitutional Court in the political debate indicated a sensitivity towards fundamental rights on the part of politicians. But that is only true to a limited extent. In the upper and lower Houses and among the public, political argument is spiced up 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 leads to risk-aversion and lack of innovation. Anticipatory obedience is harmful to the social imagination and tends to cripple the legislator's delight in deciding.

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[17] As Adolf Arndt puts it in relation to judging in general: *Das Bild des Richers* (Karlsruhe 1957) at p. 15.

[18] On the 'pre-emptive effect' of Federal Constitutional Court decisions, cf. Christine Landfried, *Bundesverfassungsgericht als Gesetzgeber, Wirkungen der Verfassungsrechtsprechung auf parlamentarische Willensbildung und soziale Realität* (Baden-Baden 1984) at p. 52 et seq.

[19] Cited from the Frankfurter Rundschau, 21 October 1974, p. 2.

F. A Negative Aspect of Reputation

This history of the Federal Constitutional Court's impact is a successful one. This is true, irrespective of the fact that it has repeatedly unleashed a barrage of criticism with its decisions. This has never managed to lastingly shake the people's trust in the Court. It may be said without exaggerating that the Federal Constitutional Court has become a citizens' court *par excellence*.[20] Such popularity does not pace the Court beyond all reproach. This is true especially when the other institutions that guarantee pluralism (the variety of opinion) suffer from a falling-off of trust. For instance, the press, the trade unions, employer associations, the churches, the Federal Government and the political parties are all mainly in the negative zone of the scale of trust in public institutions in the Federal Republic of Germany.

Does the unbroken great trust in the authority of constitutional jurisdiction indicate a political mistrust of democracy? As Häberle rightly warns, 'The German faith in constitutional jurisdiction must not be allowed to turn into lack of faith in democracy'.[21]

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[20] Häberle, 'Verfassungsgerichtsbarkeit als politische Kraft' in ibid., *Verfassungsgerichtsbarkeit zwischen Politik und Rechtswissenschaft* (1980) at pp. 59, 79.

[21] Ibid.