German National Reports on the 19th International Congress of Comparative Law

Edited by
MARTIN SCHMIDT-KESSEL

Gesellschaft für Rechtsvergleichung e.V.

Rechtsvergleichung und Rechtsvereinheitlichung
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Mohr Siebeck

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Preface by the editor

The XIXth International Congress of Comparative Law will be organized from July 20 to 27, 2014 at the University of Vienna. The Congress is the internationally leading forum for the discussion of comparative law subjects and takes place every four years.

The more than thirty subjects of the XIXth Congress have its topics in all legal disciplines, starting from legal theory and dealing also with classical questions of civil and commercial law, constitutional and administrative law and criminal law. The German Association for Comparative Law named the national reporter for each of the sessions presented by the academy in Vienna. On behalf of the German Association for Comparative Law this book is presenting most of the German national reports to the Vienna Congress. At the Vienna Congress they will become part of the considerations and will support the General Reporters appointed by the Academy for the respective sessions.

The order of the reports presented in this book refers to the systematic order proposed by the International Academy of Comparative Law, while the internal structure of the several reports is in most cases based on questionnaires sent out from the General Reporters to the National Reporters. Usually National Reporters have organized their reports along the list of questions in these questionnaires.

There is a considerable number of publications concerning the Vienna Congress which not only consists of the several volumes of national reports published on behave of the several national sub-organisations to the Academy, but many of the General Reporters will bring together all the national reports and the general report in a separate volume, to which hereby is made reference. Furthermore, the International Academy of Comparative Law will publish all the general reports in an extra volume to which the reader of this is also referred.

The editor of this book is indebted to Ms. Veronika Thalhammer, who has prepared the various papers collected in this book for publication. He also owes thanks to the team of the publisher who helped to bring about this book in time.

Bayreuth, June 2014 Martin Schmidt-Kessel

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Lothar Michael

I. Constitutional foundation

1. The concept of democracy in German Basic Law according to the executive branch and administration

All state authority is derived from the people. This includes the *judiciary* as one of the three administrative powers. The people exert their democratic rights through election and ballot although in the Federal Republic of Germany, the option of referenda at federal level is not fully developed. In a parliamentary government the constitutional principle of democracy is anchored in Parliament which is elected by the people for a fixed term. The *executive* and the *legislative authority* are shaped by this. Through Parliament the majority principle is realized: laws are passed by majority and the government is borne by majority. The opposition is given the chance to control and criticize the government and to gain majority in the next election itself. The government on the other hand is not only responsible for its own policy but for the executive authority as a whole. The government has the authority to issue directives vis-à-vis its subordinate administrative agencies. This hierarchy is owed to the democratic and parliamentary responsibility of the executive authority. This is of great significance, not only as public servants are usually appointed for life, but the idea of a lifelong service to the state (*Berufsbeamtentum*) is even implemented into Article 33 Para. 5 Basic Law. Not only can all governmental institutions and persons holding office be tracked back to a decision by the people by a "chain of legitimizing acts" (*Legitimationskette*)[1] (*Ernst-Wolfgang Böckenförde*) but all decisions made by the executive authority can be subject to governmental control. Through the obligation of the administration to abide by the law and the caveat of the law to facilitate any infringement of basic rights, Parliament can or rather must define the standards of the way the administrative agencies operate. The

[1] *Böckenförde*, HStR II, 3rd edn. 2004, § 24 margin number 16.

way democracy is understood in Germany is heavily influenced by the mechanisms of a parliamentary government.

These mechanisms of democratic legitimation of the executive and legislative authority cannot wholly be transferred to the German judicature. The principle of judicial independence is literally the opposite to the principle of the administrative agencies being bound to the directives of the government. The Courts are not bound to governmental directives and answer neither directly or indirectly to the government. Judges are not appointed by the people or the government, with the exception of the judges of the Federal Constitutional Court, but appointed by the executive authority for life just as public servants. This combination of being personally irremovable with freedom of directives in factual matters begs the question: How can such a judiciary be reconciled with the constitutional principle of democracy?

Above all there is one argument to justify this discrepancy: The especially strong bond of the judge to the law is seen by many as "compensation"[2] for the release from governmental directives. According to this there is, so to say, a solution to the problem that is intrinsic to the constitutional principle of democracy. It would stay at this: *All* state authority is derived by the people. And indeed Article 97 Para. 1 Basic Law states: "Judges shall be independent *and subject only to the law*." Albeit there can be nothing of the sort in the way of a compensation for governmental directives. On the contrary, the administrative agencies are also bound by the law. It is not evident that the obligation of the administration to abide by the law should be weaker than the one of the judges. Do we want parliamentary responsibility of the higher echelons of the administrative agencies to be purposeless? Because this would surely be the case if administrative agencies could adhere to the law only loosely. Should parliamentary control not also be legal control and should parliamentary control be seen as a process of politicizing and disenfranchising the administrative agencies? What is true is that the obligation which is owed by the executive power, to the law is not relativized by being responsible to Parliament. As opposed to this, judicial independence requires an exceptional constitutional rationale which could only be compensated by the fact that the head of the administrative agencies would be held responsible by parliament for its loose way of adhering to the law. The thesis of compensation of weaker binding to the law by parliamentary control is contradictory because the administrative agencies are subject to control by the judiciary as well as envisioned by the law. The obligation of the ad-

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[2] *Dreier*, in: Dreier, Grundgesetz-Kommentar, vol. II, 2nd edn. 2006, Art. 20 (Demokratie) margin number 144, refers in fn. 428 to: *Rhinow*, Rechtsetzung und Methodik, 1979, p. 184; *Böckenförde*, HStR II, 3rd edn. 2004, § 24 margin number 24; *Jestaedt*, Demokratieprinzip und Kondominialverwaltung, 1993, p. 295; *Dreier*, Jura 1997, 249, 256; *Berlit*, Betrifft Justiz 70 (2002), 319, 319; about the meaning of the judicial obligation to the law: *Tschentscher*, Demokratische Legitimation der dritten Gewalt, 2006, p. 189 et seqq.

ministrative agencies to the law is equally strong as that of the judiciary. In addition but not in amplification to that the agencies are bound by internal guidelines which in turn are subject to court control but bind only the administrative agencies. Furthermore judges have jurisdiction to decry any statutes or decree that is against the law. True, there are decisions by the government which are political in nature and such of the administrative agencies for which they have discretionary power. Those are not or only partially revisable by the courts. The executive authority as the second of the three administrative powers has a wider scope of duties than the judiciary – the third administrative power. In so far the tasks of this second power need a special degree of democratic legitimation. Based on the content of the decisions solely democratic legitimation and control are enacted. The notion of a court only ruling in cases that can be decided by application of the law is an illusion which I will discuss in a short time.

As an interim result we may state the following: The obligation of the courts to abide by the law is a democratic element which factually binds the third administrative power to the laws passed by Parliament. This is no peculiarity of the judiciary in regard to the administrative authority. The question remains: Is there a lack of democratic legitimation concerning the third power?

2. Accentuation of the problem by a shifting of tasks concerning the third power

The problem with reference to the democratic legitimation of the third administrative power is accentuated when courts start to act beyond their obligation to the law and start to supplement or substitute laws by their verdicts. Judiciary shaped law is an important part of the judicial landscape in Germany. The importance of case law increases through time because the verdicts regarding blanket clauses are getting more and more intricate. Moreover judge-made law gains significance because of the Europeanization of the judiciary. The influence verdicts of the European Court of Justice (ECJ) in Luxemburg and those of the European Court of Human Rights (ECtHR) in Strasburg have as a guide post is well recognized in Germany. This influence of case law increases with the quantitative and qualitative importance of these courts. German courts, especially the Federal Constitutional Court, want to partake in this process in the way of a "cooperative relationship". The line between legislative lawmaking and the development through the courts is not easily drawn.[3]

Let us recap: The origin of the role the three administrative powers play in Germany is the law. This is further enforced linguistically because in German the first power is called "*the giver of law*" (Gesetzgebung) or "*the lawmaker*"

[3] *Schulze-Fielitz*, in: Dreier, Grundgesetz-Kommentar, vol. III, 2nd edn. 2008, Art. 92 margin number 41; opposing *Hillgruber*, JZ 1996, 118 et seqq.

(rechtssetzende Gewalt). The second power is referred to as "*the power which carries out the law*" (die, das Gesetz, vollziehende Gewalt) and the third power is known as "*the speaker of the law*" (Rechtsprechung). The judiciary is not linguistically defined by producing or creating right and justice but by the act of speaking law – jurisdiction. The law is given by Parliament, which makes this act a democratic one.

Since this mechanism is seen as a way of realizing the constitutional principle of democracy phenomena such as a change in the role of the judiciary towards judge made case law is a constitutional problem. Although it would be possible to interpret the Basic Law differently: The obligation of the third power to abide by the law is guaranteed in the Basic Law twice, firstly in Article 20 Para. 3 and secondly in Article 97 Para. 1. In most cases a minor difference between these Articles is easily overlooked. Article 20 Para. 3 states that the judiciary is bound by law and justice (Gesetz und Recht).

"The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice."

Article 97 Par. 1 Basic Law only states that the judge is "subject only to the law" and not to justice – meaning the law which is produced as case law by the courts – which he possibly helped to form. Indeed the courts are bound by case law and cannot disregard it – they are bound by Article 20 Para. 3 and in some cases by Article 3 Para. 1 Basic Law. However lacking a clear subjugation they can form and develop those principles further.

In respect of the obligation the German judiciary owes to the verdicts of the European courts one has to differentiate: There is no strict obligation to adhere to the verdicts of those courts or a force of law as there is to decisions of the Federal Constitutional Court.

Nonetheless, the principle of loyal cooperation with the institutions of the EU stated in Article 4 of the Treaty of the European Union (TEU) can lead to a similar conclusion because the courts of the member states have to interpret the law in accordance with European law.[4]

The binding force of decisions by the ECtHR is classified according the Federal Constitutional Court[5] as follows:

"The obligation to law and justice (Article 20 Par. 3 Basic Law) includes the consideration of the European Convention on Human Rights (ECHR) and the decisions of the ECtHR within the context of a methodical tenable interpretation of the law. The lack of consideration of a decision of the ECtHR as well as the schematic and therefore unlawful execution of said decision can be a violation of basic rights in connection with the due process of law."

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[4] *Jarass*, EuR 1991, 211, 219.

[5] BVerfGE 111, 307 headnote 1.

Following up the controversial question whether the law of the European Union precedes German law the relation between the ECJ and the Federal Constitutional Court is unclear. Over time the two courts have been differing in their opinion concerning supervisory control in case a conflict of laws occurs.

Especially the Federal Constitutional Court changed its point of view several times.[6]

The ECJ always stresses the primacy of European law towards the laws of member states.[7]

The Federal Constitutional Court stated that it is entitled to review European law regarding basic rights, political powers and identity.

"The Federal Constitutional Court examines whether legal instruments of European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral (…). Furthermore, the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law is respected."[8]

The consequences of this are relativized by further decisions of the Federal Constitutional Court. It would only ascertain the inapplicability of a legal act of the European Union if the excess of authority was evident and substantial.

"Ultra vires review by the Federal Constitutional Court can only be considered if a breach of competences on the part of the European bodies is sufficiently qualified."[9]

For its own judiciary the Federal Constitutional Court recognizes a "cooperative relationship"[10] with the ECJ and refrains from subjugating European law to the standards of the Basic Law.[11] This includes the recognition of the ECJ as a lawful judge according to Article 101 Para. 2 Sec 2 Basic Law.[12]

Case law does not violate the constitutional principle of democracy. Article 20 Para. 2 Sec. 2 Basic Law establishes the principle of democracy and the separation of powers in the same breath. A monoism of powers is not desired.[13]

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[6] See BVerfGE 37, 271, 279 – Solange I; E 73, 339, 376 – Solange II; E 89, 155 et seqq. – Maastricht; E 102, 147 et seqq. – Bananenmarktordnung; E 123, 267, 353 et seqq. – Lissabon; E 126, 286, 300 et seqq. – Honeywell.

[7] EuGHE 1970, 1125, 1135 = EuGH, 17th December 1970, case 11/70, margin number 3.

[8] BVerfG, 2 BvE 2/08 of 30th June 2009, headnote 5, http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html; BVerfGE 123, 267.

[9] BVerfG, 2 BvR 2661/06 of 6th July 2010, headnote 1, , http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html; BVerfGE 126, 286.

[10] BVerfGE 89, 155, 175.

[11] *Ehlers*, Allgemeine Lehren der Unionsgrundrechte, in: Ehlers, Europäische Grundrechte und Grundfreiheiten, 3rd edn. 2009, § 14 margin number 18.

[12] Since the Solange II-holding BVerfGE 73, 339, headnote 1; about the consequences, controversial between the two senates BVerfGE 126, 286 on the one hand and BVerfG, 1 BvR 1916/09 of 19th July 2011 on the other hand.

[13] BVerfGE 49, 89, 125.

Not all state authority has to be controlled by Parliament. There exists no parliamentary caveat. The judiciary draws its constitutional legitimacy from its functionality, which cannot solely be attributed to the principle of democracy.[14] The obligation to the law is not the only mechanism to legitimize the judiciary. Attempts to achieve the judiciary's legitimacy through optimizing the principle of democracy are misleading. Though this does not mean that finding a democratic legitimation for the judiciary is without relevance.

3. Independence of judges and democracy – an examination from a German perspective of constitutional development

Judicial independence can be considered constitutional common knowledge. It is guaranteed in Article 97 Para. 1 Basic Law and can be enforced, indirectly[15], by a constitutional complaint. This independence is flanked by any individual's right to its lawful judge as stated in Article 101 Para. 1 Sec. 2 Basic Law, which can also be enforced by a constitutional complaint. The origin of these regulations in Germany can amongst others be found in the so called "Kabinettsjustiz" (cabinet justice). This describes the possibility of an absolutistic monarch claiming exclusive jurisdiction over a case and revising the verdict. Proverbial in Germany is the case of a miller in who's favor Friedrich (Frederick) II. of Prussia revised a controversial judgment and effected the incarceration of the judge.

The Slogan of the Enlightenment towards judicial independence was: "Freedom instead of despotism"[16]. The goal was the *constitutional curtailing of monarchical power.*

Despite the risk of a judicial mistake judicial independence inherently serves the preservation of freedom. Consistently you will find the guarantee of judicial independence as part of the Catalogue of Basic Rights in Article 177 of the Constitution of St. Paul's Church of 1849. Moreover judicial independence is a human right according to Article 6 ECHR.

The *principle of the due course of law* is of particular importance in German constitutional history. It is defining for the development of the constitutional state in Germany and compensates two deficits of German constitutional development: The failed democratization in the 19th century and the experiences of the rogue regimes of National Socialism and the German Democratic Republic (GDR) in the 20th century.

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[14] Similarly *Dreier*, in: Dreier, Grundgesetz-Kommentar, vol. II, 2nd edn. 2006, Art. 20 (Demokratie) margin number 145.

[15] About Art. 33 sect. 5 GG, which is also (analogously) applicable to judges and an appealable right on its own as stated in art. 93 sect. 1 no. 4a GG: BVerfGE 15, 298, 302; *Masing*, in: Dreier, Grundgesetz-Kommentar, vol. II, 2nd edn. 2006, Art. 33 margin number 78.

[16] *Schulze-Fielitz*, in: Dreier, Grundgesetz-Kommentar, vol. III, 2nd edn. 2008, Art. 97 margin number 2.

The principle of the due course of law was developed by leading German jurists of the 19th century in the tradition of Immanuel Kant in order to be able to curtail the power of the undemocratic monarchies to a certain degree. Obligation to the law[17], the principle of proportionality[18] and the prohibition of arbitrary decision-making were in the fore, while demands to subjugate the monarchist state to a jurisdiction and the demand[19] for Basic Rights were neglected and not (more or less) successful until the end of the 19th century.

At first the subjugation of the state to a jurisdiction was contemplated as nonsensical because courts are state institutions themselves.[20]

Judicial independence is therefore a demand that was voiced in connection with democratization but at first prevailed instead of the latter: The constitutional state in Germany qualified the monarchy without democratizing the state "from below". During the 20th century the tradition of the constitutional state was continued, although its starting point was lost with the transition from monarchy to the Weimar Republic in 1919. The monarchy was abolished – the principle of the due course of law stayed while the Weimar Republic became an illegitimate state. The special emphasis on constitutional guarantees in the Basic Law of 1949 is a reaction to National Socialism.

This is firstly associated with a substantive understanding of the constitutional state: Article 1 Para. 3 Basic Law states that all state authority is directly bound to the Basic Laws. According to Article 20 Para. 3 Basic Law the administrative agencies and the judiciary are bound by "law and justice". Connected with this is the question who ultimately decides about the constitution and case law as a reserve of justice ("*quis iudicabit?*"). Article 19 Para. 4 Basic Law states that any person whose rights have been violated by public authority may have recourse to the courts. For violations of Basic Rights the individual constitutional complaint at the Federal Constitutional Court is provided after legal process has been exhausted. Therefore, the substantive constitutional state

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[17] *Stahl*, Die Philosophie des Rechts, vol. 2: Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung, 2nd edn. 1846, p. 446: "Die Regierung des Staates greift mit ihrer Funktion überall in die Rechtssphäre des Unterthanen, in sein Vermögen, in seine Freiheit, in sonst ihm besonders zugestandene Befugnisse, und muss hierbei […] innerhalb der Gesetze verfahren; sonst büßt der Staat seinen Charakter als Rechtsstaat ein […]". (*The government of the state trenches everywhere on the legal sphere of the subjects, on his capital, on his freedom and on other rights of him. Doing so it has to stay inside the laws; otherwise the state would lose, its character as a state under the rule of law.*).

[18] This is the main point of *von Mohl*, Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates, 1832.

[19] Fundamentally *von Gneist*, Der Rechtsstaat, 1872; programmatically he chose the following title of the 2nd edition (1879) of his book: Der Rechtsstaat und die Verwaltungsgerichte in Deutschland.

[20] *Bluntschli*, Allgemeines Staatsrecht, 1852, p. 500: "Die Hoheitsrechte des Staates selbst sind nicht der gerichtlichen Competenz unterworfen." (*The sovereign rights of the state are not subject to the judicial authority*).

in Germany can be understood as a "judiciary state". Hence today, instead of monarchic despotism the decisions of the legislative and the executive authority are curtailed by the principle of the due course of law. Besides written regulations the *self-conception of the judiciary* is of great importance. So it is said that 19th century German judges had a vocation-related authoritarian world view[21] and during the Weimar Republic a distant relation to democracy.[22] The landmark ruling of November 4th, 1925 of the Supreme Court of the German Reich[23] regarding the use of judicial review concerning formal laws has to be seen in this regard.

The Federal Constitutional Court[24] could build on this precedent regarding the explicit rights of judicial review the Basic Law provides.

It is remarkable that the principle of the due course of law entered into European constitutional law as an element with specific German roots. According to Article 2 TEU the principle of due course of law is part of the shared values of the EU. For a third time this emphasizes the compensatory function the principle of the due course of law can have because the EU still struggles for democratization. The European Parliament is elected in direct but not equal elections and it is not the primary but only the secondary legislative organ besides the council, in which the member states are represented. Indeed, the high importance of the legislative (law-making EU) as the equally high importance of the ECJ (obligation to law) which shakes the boundaries of politics in a different way, when it understands itself as the engine of a dynamic process, repeats itself.

It depends on the definition and conception of the terms, if democracy and constitutional state are understood as opposites (see IV.) or as mutually conditional principles (see V.).

4. Democracy and constitutional state as contrastive pairs in a stress ratio

These two principles create an opposite to one another, if we consider democracy as a formal principle and the constitutional state as a material principle. In favor of a formal perception of the democracy principle stands the openness which democracy assumes and keeps and the procedures democracy provides to create generally binding contents. Crucial is not the result but the formal legitimation of the act, e.g. the procedure to find a parliamentary majority. For the

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[21] *Schulze-Fielitz*, in: Dreier, Grundgesetz-Kommentar, vol. III, 2nd edn. 2008, Art. 97 margin number 4 referring to *Kübler*, AcP 162 (1963), 104, 115 et seqq.

[22] *Schulze-Fielitz*, in: Dreier, Grundgesetz-Kommentar, vol. III, 2nd edn. 2008, Art. 97 margin number 5.

[23] RGZ 111, 320, 322 et seq.; on that subject *Schulze-Fielitz*, in: Dreier, Grundgesetz-Kommentar, vol. III, 2nd edn. 2008, Art. 97 margin number 5.

[24] BVerfGE 1, 184, 194.

benefit of public interest individual rights are limited. This is legitimate, if it is done through a democratic procedure.

The Basic Law admits to a *material conception of the principle of the due course of law*. No state is a constitutional one just because it creates legal rules (even so *Hans Kelsen* thinks it is), but when its constitution ensures the freedom and equality of human beings and limits state authority accordingly. Content legitimation is critical. The conflict between these principles becomes apparent through the obligation of the democratically legitimated legislator who passes laws by a majority (Article 1 Par. 3 Basic Law).

This phenomenon of contrast between democracy and constitutionality is further emphasized by a strong constitutional jurisdiction in Germany: The Federal Constitutional Court can declare laws unconstitutional for substantive reasons and overrule them. Individual basic rights can be enforced against the will of the legislative majority. Not every limitation of basic rights that is passed by majority is lawful. It has to be proportionate too. This is ultimately checked by the Federal Constitutional Court. This control mechanism which is defining for the German legal system is exemplary for the democracy problem: Why are eight judges in Karlsruhe able to overrule a law that was passed by majority by hundreds of delegates in Berlin? In this great importance of the Federal Constitutional Court in which a few highly qualified individuals make indicatory decisions lies a certain "aristocratic element"[25] (*Peter Häberle*). This "element" grows ever stronger if more and more problems are not seen as political conflicts but as constitutional questions. There is a tendency in German politics to give in to the temptation to hand off highly political but unpleasant and difficult decisions to the Federal Constitutional Court. We may even speak of a judiciary state which curtails the power of Parliament. This view of a stress ratio between democracy and constitutional state is wide-spread in Germany, if not even defining.

5. Democracy and the constitutional state as complementing and mutually conditional principles

These two principles appear intertwined, if one understands democracy as a substantive principle and the constitutional state as an adjective principle. There are strong arguments for a *substantive understanding of the principle of democracy*. Democracy implies individual freedom and equality and postulates them. A democracy without freedom of expression is inconceivable. The principle of majority rule is only legitimate if it implies equality. Constitutional jurisdiction does not limit democracy but strengthens it regarding its goals and requirements. Democratic, collective freedom is not the opposite but the result of indi-

[25] *Häberle*, Verfassungslehre als Kulturwissenschaft, 2nd edn. 1998, p. 1016.

vidual freedom and equality. Therefore the principle of democracy should not be turned on its point of origin. Infringements of basic rights might be necessary and legitimate. That they cannot be justified randomly and only formally is a conception that is inherent to the principle of democracy, even if it limits the principle of majority rule.

There is a formal side to the principle of the due course of law. Even and especially when state authority is exerted democratically such formalization is needed to be enforced effectively. For example the obligation of the administration to abide by the law or the judicial obligation to the law is formal, but serves the enforcement of democratically legitimated laws. The same is true for the guarantee of legal protection. Furthermore it should be pointed out that specifically the Federal Constitutional Court has always strengthened and protected the rights of Parliament. This can also be said about the protection of democratic structures which is one of the main priorities of the Federal Constitutional Court. To countermand erosions of parliamentarianism the protection of Parliament by the Federal Constitutional Court's jurisdiction is continuously updated and developed further – among other factors by the unwritten prerogative of Parliament, namely the prerogative of a Parliamentary law for considerable regulation[26] regarding basic rights, foreign assignment of the "Bundeswehr"[27] and European integration.[28] The principle of the due course of law and its institutionalization by the Federal Constitutional Court does therefore not only protect citizens against democratically enacted but disproportionate laws but also politics against self-abandonment in times of privatization, europeanization and internationalization.

6. Consequences: The need for and the limits of democratization of the judiciary and judicial independence as a gain in legitimacy

There are compelling reasons for not applying the same criteria or mechanisms which democratize the administrative agencies to the judiciary. The very independence of the judiciary prohibits it from being subject to parliamentary control or to executive guidelines. Judicial independence is in itself a principle that is guaranteed explicitly by the Basic Law. Its *raison d'etre* originates from the separation of powers. If the judiciary should be able to control the administrative agencies and review laws the principle of the due course of law limits such formal democratization (see IV.). This is in no case a lack of legitimation but constitutional law in a pan-European sense.

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[26] BVerfGE 47, 46, 79.
[27] BVerfGE 90, 286, 381 et seqq.
[28] BVerfGE 123, 267; recently BVerfG, 2 BvE 4/11 of 19th June 2012.

However, there is a deeper reason for its existence than the mere delineation of judicial independence to the other powers. It is not only about judicial control of the executive and judicial review. Civil procedure achieves its legitimacy primarily because an unbiased, impartial and independent institution reviews every single case. The principle of fair trial can only be ensured if a fair hearing is conducted in court proceedings, before a limited panel. This prohibits any potential influence from outside the judiciary or through any other federal power. The possibility of a supervisor taking charge of the situation or taking up the matter with him, as in an administrative proceeding shall be ruled out. Above all it shall not be possible to turn to the government. Judicial independence is therefore not only essential for controlling the administrative agencies but for conducting any judicial proceeding. Because of his independence the judge gains the additional authority which is necessary for state authority to work effectively. A trial is about the rights of individuals, about pacification, about the promotion of insights and mediating conflicts (fair hearing) and about achieving legal certainty while upholding of state authority.

This does not mean that the question of the legitimacy of the third power is not asked and not that the principle of democracy does not play a role in this. This should be discussed in the following.

II. The personal legitimation of the judge

1. Output-legitimation of judges appointed for life by the state versus input-legitimation by judges elected by the people

In Germany, the judiciary is characterized by the existence of professional judges who are, after a novitiate, appointed for life. To have "the competence to become a judge" is traditionally not only the goal of those who aspire to a career in the judiciary but it is the standard and consequence for everyone who passes the second state examination, as stated in Article 5 Para. 1 of the Law regarding German judges. The competence to become a judge is also required in order to practice as a lawyer (Article 4 of the Federal Lawyers Act) and common for a career as an upper-level civil servant. Moreover it is traditionally required in order to become a university professor or start a legal career in a corporation. Although the Basic Law states this principle of professionalism directly only in case of civil servants, there is a tradition of this predating the Basic Law so that the principle of professionalism is applied analogously to judges. If this system is even constitutionally valid and imperative should be doubted. Nonetheless, the election of judges without legal training, as practiced in Switzerland, is possible and has indisputable advantages, but also obvious disadvantages. Legal history dates back to Germanic tribal law, from which it derived the tradition of

a jurisdiction by the people (so-called "thing"), while the idea of a professional judge was received from Northern Italy.[29]

In the end we are arguing input-legitimation versus output-legitimation. In actuality one has to admit that so broadly developed and highly specialized a jurisdiction as in Germany can only be run effectively by professional judges. Only in specific parts of the justice system it would be possible to use lay people effectively. Of course it might be conceivable to assign professional aides or assessors to judges who are elected by the people. It is also not unusual in Germany that lay judges have the majority in a panel of judges. Likewise eligibility could be tied to certain requirements. In the rare case that a lay judge acts as chief judge of a Committee on Standards of Attorney Conduct, it is necessary for him to have the competence to become a judge. The appointment for life needs a justification, especially since democracy is sovereignty on time. It serves as a save guard of judicial independence because otherwise a judge could try to enhance his chances to step up the job ladder by adjusting his verdicts, e.g. in an employer friendly way. On the other side it guarantees the competence of judges because it makes the vocation as a judge attractive. Actually the criterion of a regular income should not be underestimated, even though some employers offer higher salaries. The jurisdiction needs to stay in competition with other employers to be able to employ good jurists.

2. The role of lay judges in relation to the principle of democracy

There are lay judges only in certain sections of the German justice system: Civil jurisdiction employs them at the commercial court of the first instance on Regional Court level. They are also used at agricultural tribunals and at labor court but not for regular civil law disputes. Criminal jurisdiction employs lay judges on Lower Regional and Regional Court level, but only if a certain sentence is to be imposed. There are no lay judges on Higher Regional Court level and with the German Federal Court. Both labor courts and social jurisdiction employ lay judges through all instances up to the federal level. Administrative jurisdiction and finance jurisdiction use lay judges only at first instance, with rare exceptions at second instance but not at the Federal Administrative Court and the Federal Finance Court. In each case the panel of judges has two lay judges. They are regarded as equal to the one or three professional judges. If the chambers consist of three judges, the lay judges have majority. This is the case at labor courts of the first and second instance, at social courts of first instance and in criminal courts, e.g. the court of lay assessors, small criminal divisions and the juvenile court with lay assessors. Special cases are Committees on Standards

[29] *Achterberg*, in: Bonner Kommentar zum Grundgesetz, Art. 92 (second editing 1981) margin number 6.

of Attorney Conduct, a kind of honor courts for attorneys (Article 92 et sqq. Federal Lawyers Act). Although this court is formed at a lower regional court and operates by the rules that apply to a regular court it does not consist of professional judges but only of attorneys. Professionalism is guaranteed by the fact that the chief judge and at least one other member need to have the "competence to become a judge". The Federal Constitutional Court confirmed that these regulations are in accordance with the Basic Law.[30]

Doubts are voiced concerning the selection of lay judges by local communities because the selection would be aleatoric. The candidates are mostly unknown to the voters because there is only a written application for the candidacy.[31] The use of lay judges in Germany serves two purposes, sometimes amended by a third.[32]

Firstly, all lay judges contribute life experience to the process. Being a judge is not only about legal training but also requires a certain maturity. This is important in the consideration of evidence and in weighing the interests at stake. With the contributions of "grown" people from the community common sense is accounted for. This helps to avoid verdicts which are legally sound but out of touch with real life.

Secondly, the integration of lay judges generates a down-to-earth feeling in a contradictory lawsuit, i.e. there are parties concerned. This might help them to accept judicial decisions. By this institutions, such as courts, which are in need of a certain kind of stately distance and authority, are protected from becoming estranged from common people. The principle of public access complements that, though it is limited to the hearing. Judicial deliberations are done in secret and are protected by the secrecy of judicial deliberation. By letting laymen participate the court opens itself to representatives of the people who carry out a custodial capacity. Realistically speaking a layman's role is rather a controlling and observing one than one of active involvement in the decision-making process. If at all, the layman has a reactive influence. This does not exclude the opportunity that lay judges vote against professional judges and sometimes outvote them.

At labor and social courts lay judges often represent opposite interests besides their usual role. Each one of them represents the employer one side and the employee or insurant on the other side. This helps to balance the consideration of the case. So the lay judges can act as a corrective measure, if the professional

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[30] BVerfGE 48, 300.

[31] *Dreier*, in: Dreier, Grundgesetz-Kommentar, vol. II, 2nd edn. 2006, Art. 20 (Demokratie) margin number 143; also skeptically *Wittreck*, Die Verwaltung der dritten Gewalt, 2006, p. 427 et seq.; from an empirical point of view: *Klausa*, Ehrenamtliche Richter. Ihre Auswahl und Funktion, empirisch untersucht, 1972; *F. C. Grube*, Richter ohne Robe, 2005.

[32] *Schulze-Fielitz*, in: Dreier, Grundgesetz-Kommentar, vol. III, 2nd edn. 2008, Art. 92 margin number 54.

judge leans to one side of the dispute. This does not mean though that lay judges are mere stakeholders. They rather act in their other two duties.

3. The executive's choice and selection committees

Courts are, with the exception of the federal courts, institutions of the federal states. The governments of those states have autonomy in personnel matters regarding the judges and answer themselves to the "Landtag", i.e. the parliament of the federal state. Usually judges are appointed by offices of the state. There is also the possibility of committees for the selection of judges as stated in Article 98 Para. 4 Basic Law. These committees draw up lists of possible candidates for which the office will take responsibility.[33] The composition of the committee may prove problematic in the majority of cases, because it does not solely consist of delegates but of members of the judiciary and advocacy which are not legitimized democratically. This is unconstitutional, if the latter have the majority in the committee.[34]

4. The election of the judges of the Federal Constitutional Court

An exception is the election of the judges of the Federal Constitutional Court. According to Article 94 Para. 1 Sec. 2 Basic Law one half of the judges shall be elected by Parliament (Bundestag) and the other half by the Federal Assembly (Bundesrat). This shows that not even the Basic Law deems a personal democratic legitimization necessary, because Parliament is neither elected directly by the people nor does it represent the German people in a way that conforms to the principle of political equality. The Federal Assembly is a federal organ whose members between the states are indirectly legitimized by the parliaments of the federal states. In order to maintain a balance between the federal states smaller states are represented disproportionately compared to more populous states though. There is no direct election by Parliament; rather an election committee consisting of 12 delegates is formed (stated in Article 6 of the Law regarding the Federal Constitutional Court (BVerfGG)). Legal science criticizes this as being unconstitutional.[35] Articles 6 sqq. BVerfGG, which state that a two-third majority is needed for every election of a judge, are also worthy of discussion. These regulations favor larger parties and may lead to a blockade in the byelection, as it happened in the earlier times of the court, which can severely

[33] *Schulze-Fielitz*, in: Dreier, Grundgesetz-Kommentar, vol. III, 2nd edn. 2008, Art. 98 margin number 43.

[34] *Dreier*, in: Dreier, Grundgesetz-Kommentar, vol. II, 2nd edn. 2006, Art. 20 (Demokratie) margin number 143.

[35] *Kischel*, HStR III, 3rd edn., § 69 margin number 52; *Wieland*, in: Dreier, Grundgesetz-Kommentar, vol. III, 2nd edn. 2008, Art. 94 margin number 14.

damage the court's ability to act. The procedure has proved its worth though, because the elected judges neither hold to extreme positions nor feel obligated to the party that got them elected. Therefore, the Federal Constitutional Court is greatly renowned by the German people.

III. The substantive legitimation of the judiciary

1. Administrative jurisdiction

There has to be a *control of administrative acts of state*, as demanded by Article 19 Para. 4 Basic Law, to enforce individual rights, even so this acts of state might be democratically legitimized by Article 20 Para. 2 Basic Law. This implies a reversibility of acts of state. Firstly, a democratic reversibility by hierarchy, if necessary an internal and parliamentary control and secondly, should the need arise, judges can be voted out of office and their actions corrected by future actions of state authority. Thirdly, the administrative authority is bound by instruction, as implied by the former and the courts are independent, as implied by the latter.

2. Stages of appeal and unification of the law

Stages of appeal and the possibility of a constitutional complaint after exhausting legal process add to the factual legitimation of the judiciary. With this false judgments can be rectified and jurisdiction can be unified. The Federal Constitutional Court is no super-court of appeal. It is possible though to challenge arbitrary judgments by lodging a constitutional complaint.

To unify jurisdiction there is even a system of referral proceedings to federal courts. A similar system was established between the senates of federal courts and Great or Common Senates of the Federal Supreme Courts of Justice. Even the jurisdiction between the senates of the Federal Constitutional Court can be unified by plenary decisions.

Judicial independence might apply to every judge, but not every independent judge can make irreversible decisions. Even jurisdiction of the Federal Constitutional Court is relativized by the ECtHR and a statutory breach of *res judicata*. The risk of arbitrariness is minimized. It might also be pointed out that German courts are not bound by precedent, even though decisions of higher regional courts and federal courts have a considerable effect on the jurisdiction of all courts. If a lower instance deviates from a higher instance's ruling, it has to take into account that this decision might very well be reversed. A deliberate deviation should therefore only be attempted with arguments that might convince the higher instances.

3. Judicial review of the constitutionality of an act

Courts facilitate the enforcement of legal rules and resolve legal disputes by these rules. They interpret legal rules and apply them to the case at hand. What role does a judicial review have in this system? Does it even fit in with the principle of judicial obligation to the law? If a court reviews an act of law and possibly even resolves it, does the court not exceed its authority? At the beginning of the 20th century these questions were highly controversial and the topic of debates on principles of the Weimar Republic. After the horrors of National Socialism the perception grew that laws and statues were not only the foundation of the constitutional state, but that their contents might very well corrupt the constitutional state itself. *Hans Kelsens* dictum, that every state is a constitutional state[36], was too formal for the authors of the Basic Law. The Basic Law has a material conception of the principle of the due course of law. The core of the principle is the validity claim of the written law, even so this is also relativized at the same time. This kind of ambivalence becomes palpable in the phrasing of Article 20 Para. 3 Basic Law, which binds executive and judiciary to "law and justice" and the legislative to the constitutional order. Acts of law are therefore forbidden to violate constitutional law. The Basic Law also ensures the enforcement of this constitutional bond of the legislator. Procedures to control a law's constitutionality are explicitly regulated in the Basic Law (Article 100 Para. 1; Article 93 Para. 1, Nrs. 2, 2a, 4a Basic Law). The dilemma of the legislators bond to the constitution on the one hand and the judiciaries bond to law and constitution on the other is solved by appointing the Federal Constitutional Court as a special court that can even overrule Parliament Acts as unconstitutional. Legal uncertainties can be ended by constitutional legal review. Their purpose is to effectively curtail the authority of the first power. A judicial review by the Federal Constitutional Court also prevents all public authorities and citizens from accepting unconstitutional acts of law, as far as the rejection of a law is reserved to the constitutional jurisdiction, one can speak of a monopoly of rejection. By this Parliament is protected against specialized courts detaching themselves from their bond to democratically legitimized acts of law by the pretext of this acts unconstitutionality. So, legal review is nothing less than the consequence of a highly advanced constitutional state under the rule of law. The judiciary has to accept that the legislative has political leeway and needs it, too. The control density of legal review cannot be intensified in such a way that constitutional law becomes politicized in an unduly way and politics become legalized in an unduly way.

It is the goal of legal review to settle doubts concerning the consistency of laws with higher-ranking law. Through this, normative legal certainty is achieved.

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[36] *Kelsen*, Allgemeine Staatslehre, 1925, p. 91.

As opposed to legal protection, which is usually granted for individual cases, legal review has significance even beyond individual cases per se. The reason for this lies in the topic of legal review: Laws are applied in an absolute and abstract way and not only, as it is with administrative actions or contracts, in individual cases. Like other higher-regional or constitutional court decisions, not only the reasons of a rejection can be of fundamental significance, but the operative provisions of the judgment have the same significance and become a precedent. The operational provisions of the judgment are significant to every potential recipient or beneficiary of the act concerned. A Federal Constitutional Court ruling concerning an act of law is even given force of law as stated in Article 31 Para 2 of the Law regarding the Federal Constitutional Court and has to be published in the Federal Law Gazette. A state of legal uncertainty or delay in relief can be resolved by a legal review (not only the legal review by judicial referral of Article 100 Para. 1 Basic Law).

Please note that in the legal framework determined by individual legal protection the objective function of judicial review takes on special status. It is derived from Article 19 Para. 4 Basic Law and the basic rights which grant effective legal protection and states that the courts should firstly and foremost strife to enforce individual rights. Article 6 Para. 1 ECHR with its right to a fair trial intensifies these requirements. Because of its constant work overload the Federal Constitutional Court is faced with a dilemma: On the one hand an abstract legal review, such as the annulment of the criminal liability for abortion, has to be considered urgent because of its overall significance, while on the other hand proceedings regarding individual legal protection cannot be delayed because of the right to a fair trial.[37]

There are legal reviews which directly serve individual legal protection. This includes legal review of the Higher Administrative Courts according to Article 47 Code of administrative Court Procedure, if it is initiated by an individual person. A private applicant has to claim a violation of individual rights (Article 47 Para. 2 Code of administrative Court Proceedings). The legal review of the Higher Administrative Court is no collective action. This is also true for constitutional complaints which, if they are filed against a legal rule, can be legal reviews in disguise. A constitutional complaint can only be exploited as a legal review, if the complainant asserts a violation of basic rights as stated in Article 90 of the Law regarding the Federal Constitutional Court.

Only at first sight it seems as if the existence of legal reviews breaches the separation of powers as the third power the courts are in fact obliged to apply the

[37] Exemplarily on the complaint about overly long duration of a lawsuit, also in the case of a constitutional complaint: ECHR no. 397/07 und 2322/07, Judgement of 13th January 2011, Case of Hoffer and Annen v. Germany. To be found online in full lengt: http://www.bmj.de/SharedDocs/EGMR/DE/20110113_397–04_2322–07.html (german version); http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001–102804 (english version).

law. They are bound by law and justice and shall not elevate themselves above the legislation as the first power. Judges are subject to the law. If this is true, how can they rule over the laws they have to apply?

At second glance it is not the nature or consequence of a legal review to shift the powers in favor of the judiciary. Because of the separation of powers courts can review laws only in regard to legal and not to political issues. This includes constitutional jurisdiction. It is not about whether or not a law is more or less successful, but whether it violates higher-ranking law. The standard for legal review is a purely legal one. Disciplining the legislator and the enforcement of higher-ranking law is the purpose of legal review. It is the role of the courts to enforce the law and in particular higher-ranking law. If one understands the separation of power as a principle of reciprocal curtailment of power, it is only consistent that the judiciary is bound by higher-ranking law and is controlled by the judiciary. With this the separation of powers is differentiated even further by the existence of a constitutional jurisdiction. It is the privilege of this constitutional jurisdiction to overrule Parliament Acts. For this control of the first power it needs a special constitutional legitimation. The courts can either apply the law as it is or submit it to the Federal Constitutional Court for concrete legal review (Article 100 Para. 1 Basic Law). Since there is no legal process regarding Parliament Acts (Article 19 Para. 4 Basic Law does not apply), there might be the possibility of a constitutional complaint as stated in Article 93 Para. 1 Nr. 4a Basic Law. So both paths eventually lead to the Federal Constitutional Court.

It is part of the separation of power that sublegislative acts, i.e. acts of executive law-making, can be overruled by the administrative jurisdiction. In that way the obligation of the executive power to the law can be controlled. As mentioned above the dimension of control is a purely legal one. The courts may overrule sublegislative acts, if those violate higher-ranking law. If these acts are in accordance with higher-ranking law, the judiciary is bound by it.

Of course it should not be omitted that the line between constitutional and political standards is blurry and at times hard to draw. The judiciary is supposed to control the legislative and if necessary put it in its place. But while doing so the courts cannot interfere with the latter's core task of shaping politics. This is a question of control density which is defined by the separation of powers and also binds the judiciary. Legal reviews can be seen as a corrective for politics exceeding its leeway. But even if such corrections are made, the leeway is not to be filled compensatory by the courts and the constitutional jurisdiction. The political decisions, necessarily connected to law-making, have to be returned to the legislator. Occasionally the goal of individual legal protection collides with the limitation of power. Sometimes the Federal Constitutional Court comments on the topic of how a constitutional law should look like and has sporadically even passed transitional rules. If the guidelines of the Federal Constitutional Court,

which only ever serve as suggestions, are adopted by the legislator without the latter making use of its full creative leeway, there is a problematic shift in the role of law-making.

4. Constitutional change

The decision to what degree the constitution is open to dynamic interpretation and in what way constitutional change by interpretation[38] might be realized[39] is determined by the courts and especially by the Federal Constitutional Court. Regarding the Basic Law, the Federal Constitutional Court rigorously pursues a dynamic concept of interpretation. For instance it developed new basic rights such as "*informational self-determination*"[40] and "*the fundamental right to guarantee the confidentiality and integrity of information technology systems*"[41]. Furthermore it established a parliamentary prerogative regarding foreign assignments of the German Armed Forces ("Bundeswehr")[42] , by such initiatives, the Federal Constitutional cuts short a formal campaign to change the constitution this is often seen as a confirmation of its jurisdiction.[43] On the

[38] *Hesse*, in: FS Scheuner, p. 123 et seqq.; *Häberle*, ZfP 21 (1974), 129 et seq., does not consider the term to be necessary; opposing *Böckenförde*, Staat, Nation, Europa, 155 et seq.; conciliating: *Walter*, AöR 125 (2000), 529, and *Voßkuhle*, Der Staat 43 (2004), 450 et seqq.; *Michael/Morlok*, Grundrechte, margin numbers 32 et seqq.

[39] About the interaction with art. 79 sect. 3 GG *Steiner*, p. 213.

[40] BVerfGE 65, 1.

[41] BVerfG, 1 BvR 370/07 of 27th February 2008, headnote 1, http://www.bverfg.de/entscheidungen/rs20080227_1bvr037007.html; BVerfGE 120, 274 et seqq.; *Michael/Morlok*, Grundrechte, 3rd edn. 2012, margin numbers 427 et seqq.

[42] BVerfGE 90, 286.

[43] Thus the BVerfG is defending its strict jurisdiction regarding the general principle of equality on the subject of discrimination due to sexual orientation: BVerfG, 2 BvR 1397/09 of 19th June 2012, sect.-no. 59: "Ein entgegenstehender Wille des verfassungsändernden Gesetzgebers lässt sich nicht feststellen. Zwar ist es richtig, dass noch im Jahr 1993 die nach der Wiedervereinigung eingesetzte Gemeinsame Verfassungskommission eine Erweiterung des Art. 3 Abs. 3 GG hinsichtlich des (die Unterkategorie der sexuellen Orientierung mitumfassenden) Merkmals der sexuellen Identität unter anderem mit der Begründung verwarf, eine weitere Ausdifferenzierung des Art. 3 Abs. 3 GG müsse vermieden werden, da durch die Atomisierung nach Gruppen die Verfassung Schaden nehmen könne (siehe BTDrucks 12/6000, p. 54). Zuletzt wurde die Einfügung des Merkmals der sexuellen Identität (vgl. die Gesetzesentwürfe der Oppositionsfraktionen BTDrucks 17/88, 17/254 und 17/472) jedoch von der Bundestagsmehrheit mit dem Argument abgelehnt, eine Erweiterung sei nicht erforderlich, weil der Schutz vor Diskriminierungen wegen der sexuellen Identität durch Art. 3 Abs. 1 GG sich nach der Rechtsprechung des BVerfGs mittlerweile mit dem Schutz nach Art. 3 Abs. 3 GG decke und eine Erweiterung des Art. 3 Abs. 3 GG daher (überflüssige) "Symbolpolitik" darstelle (siehe BTDrucks 17/4775, p. 5)." (*An opposing intention of the legislator, that amended the constitution, is not to be found. Admittedly it is true, that the common constitutional commission, which was installed after the reunification, discarded an expansion of art. 3 sect. 3 GG regarding the sexual identity (also containing the subitem of sexual orientation) in 1993. The commission justified that by saying, a further differentiation of*