Part 3: Objectivity and Constitutional Law

§ 4 The Law between Objectivity and Power from the Perspective of Constitutional Adjudication

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I. The Judiciary between the Rule of Law and Democracy

Talking about the law between objectivity and power requires some preliminary reflections on the role of law in the political order and the functions it has to fulfill. And it requires some remarks on the state function in which the law is, if not the only, by far the most important precept: the judiciary.

1. Historical overview

In Germany, courts have played a greater role in political life than in all other European countries. Its 'constitution', the ´constitution` of the Holy

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Roman Empire of the German Nation, like in England, has its oldest roots in the 13th century and was gradually shaped by fundamental laws since then.[1] But different from England German courts – due to the complex system of governance – gained power by applying and interpreting those fundamental laws. The two supreme Courts – the *Reichskammergericht* in Wetzlar (est. 1495)[2] and the *Reichshofrat* in Vienna (est. 1497) were supposed to settle conflicts between the Emperor and the princes, independent cities and other entities of the Empire, and they quite often did so successfully . imposing a first step of the freedom of religion in the aftermath of the Augsburg religious peace of 1555 or in banning the persecution of witches in the 17th century in Bamberg. Reflecting these experiences, Immanuel Kant stated in a tiny booklet published in 1797 that '*Right* [i.e. law] *must never be adapted to politics; rather politics must always be adapted to right* [i.e. law]'.[3]

This path was deepened during the 19th century and led to the establishment of the '*Rechtsstaat*', the specific German concept of a state governed by of the rule of law. In spite of the fact that the revolution of 1848/49 failed, the *Rechtsstaat* paved the way for a historic compromise between the bourgeoisie and the monarchy: upholding monarchical supremacy on the one side but binding the monarchical executive to laws that had to be passed by Parliament in which representatives of the bourgeoisie were assembled. Hence infringements of life, liberty, and property required a statutory empowerment, and it was up to the courts to make sure that state measures did not go beyond the respective statutory empowerments. This path has been followed until today. It has even been widened after World War II when courts and academics did their best to optimize this heritage embodied in the idea of the *Rechtsstaat*, which had – like all other legal values – been betrayed by the Nazi regime.

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1 See among others *Statutum in favorem principum* (1231), *Golden Bull* (1356), *Augsburg Religious Peace* (1555) and *Westphalian Peace Treaty* (1648).

2 First seated in Frankfurt, the *Reichskammergericht* was later moved several times (to Worms, Augsburg, Nürnberg, Regensburg, Speyer, Esslingen, and again Speyer) until at last it took up its seat in Wetzlar.

3 Immanuel Kant, 'Über ein vermeintliches Recht, aus Menschenliebe zu lügen' (1797) in Königlich preußische Akademie der Wissenschaften, *Akademieausgabe*, vol VIII (De Gruyter 1923) 423, 429: 'Das Recht muss nie der Politik, wohl aber die Politik jederzeit dem Recht angepasst werden'; translation by James W Ellington, see Immanuel Kant, *Grounding for the Metaphysics of Morals: with On a Supposed Right to Lie Because of Philanthropic Concerns* (James W Ellington tr, 3rd edn, Hackett Publishing 1993) 67.

2. Two pillars of the Constitution

a. General observations

Today, reflections on law, courts and power in Germany must start with art. 20 par. 3 GG (*Grundgesetz*, i.e. Basic Law) which reads: '*Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden.*'

According to the prevailing interpretation of this provision by the *Bundesverfassungsgericht* (Federal Constitutional Court of Germany) and legal doctrine art. 20 par. 3 GG serves as an acronym for the principle of '*Rechtsstaat*' as a whole.[4] The provision (primarily addressing the legislator) establishes the primacy of the Constitution as the supreme law of the land and codifies (with respect to the executive and the judiciary) what has been considered as the core of the principle of *Rechtsstaat* since the 19th century: the '*Gesetzmäßigkeit der Verwaltung*', a legal figure which comprises the principle of legality (*Vorrang des Gesetzes*) and the requirement of a statutory provision or reserve of the law (*Vorbehalt des Gesetzes*), meaning that laws – i.e. statutes – must be obeyed and that any infringement of freedom and property rights by an administrative act or other measures of the executive requires an empowerment by a parliamentary statute.

The answer to the question of how the law has to be located between objectivity and power depends on the institutions addressed. Regarding the legislator, the role of the law is ambivalent. On the one hand, the constitution and – as long as Germany's membership lasts – European Union law bind the legislator and therefore diminish its power. On the other hand the law – i.e. statutes – is first and foremost an emanation of power, in a democracy the power of the respective majority in Parliament. Statutes are by far the most important instrument by which Parliament and its majority try to steer the state and its institutions and which they can use to achieve their political objectives. If we look at the executive branch, i.e. government and administration, legal boundaries multiply, minimizing its scope of action. This is reflected, among others, in art. 80 par. 1 sentence 2 GG and underlines the German concept of law, especially public law, which is primarily understood as a tool with which the power of the (once monarchical) executive is contained and domesticized and

4 See Peter M Huber, 'Rechtsstaat' in Matthias Herdegen, Johannes Masing, Ralf Poscher and Klaus Ferdinand Gärditz (eds), *Handbuch des Verfassungsrechts* (CH Beck 2021), § 6 no 17.

much less as an instrument which is primarily meant to legitimize all sorts of actions by the executive (as in the French doctrine). The idea of limiting power by law more or less also applies to the judiciary.

Nevertheless, the law has two functions also in the German legal order: On the one hand, under the perspective of concept of a state governed by the rule of law (*Rechtsstaat*), it is an instrument for the protection of freedom and equality rights laid down in the constitution from unlawful infringements, on the other hand, from a democratic perspective, law is the most important mechanism with which popular sovereignty and the will of the ruling majority (in Parliament) are put into effect. In this respect it serves to legitimate state measures. In this sense art. 20 par. 3 GG states with regard to the executive as well as the judiciary that both are bound by law and justice (*Gesetz und Recht*) entailing two constitutional dimensions: By binding the exercise of public authority to the rule of law in a formal way, the constitution wants to safeguard liberty and property of the people by the requirements of legality (*Vorrang des Gesetzes*) and a statutory provision (*Vorbehalt des Gesetzes*). At the same time, the principle of legality (*Vorrang des Gesetzes*) provides for democratic legitimation as it obliges government, administration and courts to follow the lines set out in the statutes which have been adopted by the ruling majority (in parliament). Both dimensions of law i.e. statutes – the limiting and the empowering one - have been reflected in the jurisprudence of the *Bundesverfassungsgericht* and provide the basis for the so-called *Wesentlichkeitsdoktrin*.[5]

This is supported by the way democratic legitimation is provided for under the *Grundgesetz* and how accountability of public authorities is secured. In general, the principles of democracy (art. 20 par. 1 and 2 GG) and popular sovereignty (art. 20 par. 2 sentence 1 GG) require that all measures public authorities are responsible for can be traced back to the political will of the people, not only in a mere theoretical but in particular also in a practical sense. Elections are therefore considered as procedures with a strong plebiscitary dimension with regard to persons and the content of politics, and the right to vote under art. 38 par. 1 sentence 1 GG does not only provide for an individual right to cast a ballot under the conditions mentioned in this provision (free, equal, direct, confidential, general) but also as a substantive right to political self-determination.[6]

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5 See in detail BVerfGE 150, 1, 96 ff (no 191 ff) – ZensusG 2011.

6 See BVerfGE 89, 155, 188 – Maastricht; 123, 267, 353 – Lisbon; 126, 286, 302 ff – Honeywell; 134, 366, 382 ff (no 23 ff) – prel req OMT; 142, 123, 203 (no 153) – OMT; 146, 216, 252 f (no 52 f) – temp inj CETA; 151, 202, 275 (no 92) – European Banking Union; BVerfG, Order of 25 April 2021 – 2 BvR 547/21, no 82 – ERatG.

It is generally acknowledged that, in a technical sense, there are three major ways to provide for democratic legitimation of measures taken by state authorities: direct elections or appointments by representatives accountable to parliament which provide for democratic legitimation in a personal sense (*organisatorisch-personelle Legitimation*), statutes, regulations, and other instruments by which parliament and its majority can determine or influence the content of measures taken by government or administration (*sachlich-inhaltliche Legitimation*), and constitutional provisions such as art. 88 sentence 2 GG (*Bundesbank*, ECB) or art. 97 par. 1 GG (independence of judges) which are considered to provide a specific sort of institutional legitimation conferred by the *pouvoir constituant* (*institutionelle Legitimation*).[7] Other instruments such as reports to parliament, participation rights or judicial control may also play a role in this respect. In the outcome, it is not decisive through which channels democratic legitimation is provided for but that measures taken by public authorities can effectively be based on a sufficient level of democratic legitimation, i.e. accountability to parliament or the people itself. In its opinion of November 7th 2017 dealing with the democratic legitimation of the *Deutsche Bahn AG*, a privatized company completely owned by the Federal Republic of Germany, the *Bundesverfassungsgericht* has held:

> The relationship of accountability between the people and state authority is established by parliamentary elections, laws enacted by Parliament setting legal standards (…). The notion that 'state authority derives from the people' must be tangible to both the people and state organs, and it must take effect in practice. This requires that a sufficient measure of democratic legitimation – a certain level of democratic legitimation – be achieved (…). Only the Parliament elected by the people can confer democratic legitimation upon the organs and public officials (…) at all levels. In case officials and organs do not receive legitimation by way of direct elections, the democratic legitimacy of exercised state power generally requires that the appointment of public officials be attributable to the sovereign people and that they carry out their functions with sufficient functional-substantive legitimation. In terms of personnel, a sovereign decision is democratically legitimated if the appointment of the responsible public official can be attributed to the sovereign people in an uninterrupted chain of legitimation; functional-substantive legitimation is conferred by the fact that public officials are bound by the law (…).[8]

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7 See Ernst-Wolfgang Böckenförde, 'Demokratie als Verfassungsprinzip', in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol II (3rd ed, CF Müller 2004), § 24 no 9 ff.

8 BVerfGE 147, 50, 127 f (no 198) – DB AG and BaFin.

b. The judiciary between rule of law and democracy

When it comes to the judiciary, however, the accents between the two constitutional dimensions shift. In principle, courts do not infringe individual rights but protect them. Though also courts may make mistakes and under certain conditions – when issuing an arrest or search warrant for example – also affect citizens' liberty or property,[9] they are regarded as the guardians of individual rights, not their menace. Art. 19 par. 4 GG, therefore, guarantees effective legal protection by courts for anyone who claims that his or her individual rights have been violated by public authorities.[10]

Against this background it is obviuous that art. 20 par. 3 GG when subjecting courts under the rule of law – the principle of legality and the requirement of a statutory provision – must aim at something else than the protection of individual rights and interests. The answer can be found in the principle of democracy as described above. It is the main emphasis of art. 20 par. 3 GG with regard to the judiciary. In this respect, binding courts to statutes approved by Parliament is by far the most important instrument to provide for democratic legitimation of decisions, sentences, temporary injunctions, etc. In this perspective, the law, i.e. the statute, is the most important instrument by which popular sovereignty is exercised with regard to independent courts and by which political preferences of the ruling majority (in parliament) can be enacted.

II. Jurisprudence and Power

1. General remarks

This concept would be smashless if judges were – as again *Montesquieu* put it – only '*la bouche qui prononce les paroles de la loi*'.[11] If this were the case court decisions applying the law would lack any subjective dimension,

9 Peter M Huber, 'Art. 19' in Hermann von Mangoldt, Friedrich Klein and Christian Starck (eds), *Grundgesetz. Kommentar*, vol. I (7th ed, CH Beck 2018), no 440 ff; Andreas Voßkuhle, *Rechtsschutz gegen den Richter: Zur Integration der Dritten Gewalt in das verfassungsrechtliche Kontrollsystem vor dem Hintergrund des Art. 19 Abs. 4 GG* (CH Beck 1993) 1 ff, 255 ff.

10 The same guarantee derives from art 2 par 1 read in conjunction with art 20 par 3 GG if the infringement is caused by fellow citizens.

11 Montesquieu (n 1). On the context and reception of this statement see again Ogorek (n 1), 288 f); Guttner (n 1), 213 f.

they would merely be an automatic application of decisions taken by others. However, this has never been the idea of judges neither in the common nor in the civil law system. Scholars have always been aware of the fact that every language entails etymological uncertainties and ambiguities, that it is impossible to foresee the variety of life, and that Parliament would be overstrained should we expect that it can settle any conflict that may arise in a society in which millions of people live together in advance. *Hans Kelsen* has therefore rightly identified the work of judges as a sort of concretization of the applicable standards of law in a specific case and that this concretization doesn't differ in a substantive way from what the legislator or the executive branch do as their decisions – statutes, administrative acts – can equally be regarded as a (political) concretization of the legal standards applicable to the respective decision.[12]

Judgments, sentences, and temporary injunctions, therefore, are an exercise of public authority and (individual) power. This is why the judiciary is regarded as the third branch of powers under art. 20 par. 2 sentence 2 GG and it is also the reason why art. 20 par. 1 and 2 sentence 1 GG requires democratic legitimation also for all measures taken by courts. These findings are even worsened if one takes into consideration that – as in a lot of legal systems influenced by German doctrine and especially in Germany – according to the established case law of the *Bundesverfassungsgericht* and ordinary courts as well as to the prevailing opinion among scholars the *Grundgesetz* is considered a 'living instrument' and statutes are interpreted mainly with regard to there objective in a timeless manner. This means that the point of reference is less what the mothers and fathers of the constitution or the drafters of a statute had in mind when drafting a rule, but what the solution they tried to achieve for the circumstances under which they lived would require under the present social, political and economic conditions. Needless to say, this entails a considerable amount of discretion for judges who have to apply the same rule decades or even centuries later.

2. *The* Bundesverfassungsgericht *and Power*

What has been said about courts in general also applies to the *Bundesverfassungsgericht* in particular. Though it is a constitutional organ on the same

12 Hans Kelsen, *Reine Rechtslehre* (first published 1934, Jestaedt 2008) 101 ff; Hans Kelsen, *Reine Rechtslehre* (2nd ed 1960, Jestaedt 2017), 423 ff, 597 ff.

level as the President, Parliament, and Government, it is first and foremost a court (art. 92 GG, § 1 par. 1 BVerfGG) bound by the rule of law and applying the rules and standards common to independent courts all over the Western world. Nevertheless, there are some peculiarities to be observed when it comes to the relationship between law and power concerning the *Bundesverfassungsgericht*:

The law which the *Bundesverfassungsgericht* applies and from which the standards of its jurisprudence derive is, in principle, only the Constitution itself, the *Grundgesetz*. It comprises about 150 articles that provide for the foundation of the entire legal system including the application of European and international law in Germany. Its provisions – with the exception of some recent amendments – fit more or less into the "requirements" in the *Napoleonic* sense: they are short and vague ('*courtes et obscures*').[13] They leave much room for divergent understandings and different methods of interpretation and concretization with the effect that the *Bundesverfassungsgericht* is sometimes perceived rather as a substitute legislator than a court. Three more recent examples out of several hundred in the jurisprudence of the Court may illustrate that:[14]

– On July 25th 2012 the *Bundesverfassungsgericht* rendered its second judgment on the Federal Statute on General Elections (*Bundeswahlgesetz* – BWG) within five years[15] declaring § 6 par. 5 BWG, which allowed successful candidates in a constituency to keep their seat in the *Bundestag* no matter what the result of their political party under the proportional vote was, unconstitutional if one (or several) political parties would gain more than 15 seats beyond their respective entitlement under proportional representation. The Court affirmed that the voting system in Germany is a system of proportional representation, which would be spoiled if additional seats won according to a majority vote were above the number of 15 out of 598. Thus, it differed from a decision from April 10th 1997 in which four justices had indicated that adding a number of about 5 percent of the seats beyond proportional representation was tolerable.[16] As the formation of a parliamentary group requires

13 The complete quotation reads: 'Il faut qu'une constitution soit courte et obscure.'

14 See also Peter M Huber, *Grundrechtsschutz durch Organisation und Verfahren als Kompetenzproblem in der Gewaltenteilung und im Bundesstaat* (VVF 1988), dealing with several judgments that were heavily discussed at the time.

15 BVerfGE 131, 316 ff – Überhangmandate III. The preceeding decision mentioned (issued in 2008) was BVerfGE 121, 266 ff – Landeslisten.

16 BVerfGE 95, 335, 365 – Überhangmandate II.

about 5 percent of Members of Parliament, which practically means about 30 seats, the Court decided in 2012 that adding at most 50% of such an additional parliamentary group would leave the electoral system as such untouched. It admitted however that there was no compelling legal argument for this result but regarded its reasoning at least plausible.[17]

– In a judgment of March 5th 2015, the Second Senate derived the requirement to provide an ´adequate` alimentation for judges and public prosecutors is subject to a limited judicial review of the relevant statutory provisions from the constitutional guarantee of the civil service enshrined in art. 33 par. 5 GG. This judicial review comprises a control whether the decisions of the legislator are based on evidently inadequate or inappropriate considerations and entails the necessity of an overall assessment of various criteria taking into account the specific groups that may be compared.[18] To conduct this overall assessment, parameters should be used that are derived from the principle of alimentation and that are economically reasonable to determine a framework with specific numeric values to achieve an alimentation structure and a level of alimentation that are, in principle, constitutional. The Court then found five suitable parameters based on its case-law concerning the principle of alimentation which have indicative value in determining the level of alimentation required under the Constitution: (1) a clear discrepancy between the development of remuneration of judges and public prosecutors on the one hand and the development of collectively agreed wages in the civil service on the other hand, (2) the money wage index as well as (3) the consumer price index; (4) furthermore an internal comparison of remuneration as well as (5) a cross-comparison with remuneration paid by the Federation or, respectively, by other *Länder*. If a majority of these parameters are fulfilled, the alimentation is presumed to be below the constitutional requirements (1st level of review). This presumption may be further corroborated or rejected by taking into account further alimentation-related criteria in order to strike an overall balance (2nd level of review). On a third step, an assessment is needed as to whether this deficiency can be justified under the Constitution by way of exception. The principle that the alimentation must be appropriate to the respective public function is part of the

17 BVerfGE 131, 316, 370 – Überhangmandate III.
18 BVerfGE 139, 64 ff – R-Besoldung I.

institutional guarantee of a professional civil service enshrined in art. 33 par. 5 GG. To the extent that this principle conflicts with other constitutional values or institutions, for example, the prohibition on taking on new debt in art. 109 par. 3 first sentence GG, it must be reconciled with them by striking a careful balance in accordance with the principle of proportionality (*praktische Konkordanz*). In addition, when setting the level of remuneration, the legislature must adhere to certain procedural requirements and give sufficient reasons.

– In its decision of May 19th 2020 on the foreign surveillance of the Federal Intelligence Service (*Bundesnachrichtendienst*)[19] the First Senate held that foreign surveillance in principle does not violate fundamental rights of foreigners under the German constitution. However legal protection requires an effective control – not by courts but by an oversight body such as a parliamentary or governmental commission. From the freedom of telecommunication guaranteed in art. 13 GG and the principle of proportionality the Court derived that the oversight body must be institutionally independent which includes a separate budget, an independent personnel management and procedural autonomy. It must be equipped with the personnel and resources required for an effective accomplishment of its tasks and have all empowerments necessary for an effective oversight over the Federal Intelligence Service. The Court even required that this oversight would not be obstructed by the third-party rule.

Though all this reasoning may sound plausible, in some respect it rather resembles a legislative setting than a mere interpretation of constitutional provisions.

III. Objectivity and Dogmatics

Against this backdrop, it becomes clear that there is a tension between the requirements of the principle of democracy and popular sovereignty on the one hand and the practical capacity of the legislator to bind and steer the judiciary on the other. Though some sort of discretion for judges is inevitable, especially if it comes to procedural questions, it is – under the perspective of the principles of democracy and the rule of law – rather a

19 BVerfGE 154, 152 ff – BND-Auslandsaufklärung.

necessary evil than a constitutional value. The constitution aims at a situation in which people can rely on the objectivity of the judiciary. Discretion and space for (individual) political (micro-)decisions are detrimental to the predictability of court decisions, the principle of legal certainty, the reliability of the respective jurisprudence, and to the law itself. It therefore must be contained as far as possible.

1. *Dogmatics as a tool to reduce judicial power*

One of the functions of law therefore is to reduce the scope of maneuver of judges, their discretion, and the risk that they cross borders into the realm of mere politics. The most important device with which overreaching judicial power can be avoided is dogmatics.[20]

Dogmatics forces judges to interpret the law in a methodical way with traditional tools such as wording, context, telos, history and in conformity with the constitution (*verfassungskonforme Auslegung*) and the law of the European Union (*unionsrechtskonforme Auslegung*) and to observe the interpretation that higher courts have delivered.

Dogmatics, at least in a civil law system like the German, thus provides for predictability, reasonableness, and coherence of the jurisprudence and thus reduces the impact of (individual) preferences, political convictions, and beliefs that a judge may have. Thereby, it secures a certain extent of objectivity. Dogmatics helps to maintain a coherent legal order and to avoid contradictions within it. At the same time, it reduces the risk of (arbitrary) discretion of judges.[21]

Thirdly, in the way it is applied at least in legal orders influenced by the German legal thinking, dogmatics is an established and to a large extent reliable technique by which judgments, sentences, etc. can be bound to the will of the legislator and the will of the constitution. It thus provides for the democratic legitimation of the jurisprudence (*sachlich-inhaltliche Legitimation*)[22] – a circumstance which some common law lawyers who

20 See Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (Athenäum Fischer 1970) 116 ff; Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (2nd ed, Springer 1991), 3 ff; Jannis Lennartz, *Dogmatik als Methode* (Mohr Siebeck 2017).

21 See Peter M. Huber, Rechtsprechung und Rechtswissenschaft, JZ 2022,1, 4 f.

22 See Andreas Voßkuhle and Gernot Sydow, 'Die demokratische Legitimation des Richters' [2002] JZ 673, 678 ff; Axel Tschentscher, *Demokratische Legitimation der dritten Gewalt* (Mohr Siebeck 2006), 193; Guttner (n 1), 302 ff.

tend to despise dogmatics and to make fun of it haven't thought about seriously enough.

2. *Constitutional adjudication, special techniques, and case law*

As has been shown above, democratic legitimation of the jurisprudence of the *Bundesverfassungsgericht* via the content of the constitution and the statutes the Court has to apply (*sachlich-inhaltliche Legitimation*) is evidently lower compared with ordinary courts. The interpretation of the constitution is a quite complex challenge that normally goes far beyond the task of applying a statute. However its power is far reaching. Decisions of the *Bundesverfassungsgericht* to a large extent rank as federal statutes (§ 31 par. 2 BVerfGG) and are binding for all German authorities (§ 31 par. 1 BVerfGG).

Nevertheless, dogmatics, i.e. constitutional doctrine, and the Statute on the *Bundesverfassungsgericht* (*Bundesverfassungsgerichtsgesetz* – BVerfGG) also provide for a certain degree of predictability. Traditional instruments of interpretation such as wording, context, telos, and history also apply to the interpretation of constitutional law, and special techniques such as the coherence of the constitution (*Einheit der Verfassung*), the optimization of constitutional values, constitutional comparison, international and European standards, the idea of a due process of law, rules like '*in dubio pro libertate*', general principles of the legal order, proportionality as a remedy for conflicting constitutional principles (*praktische Konkordanz*) etc. have been developed by the Court as well as the academia to provide for more objectivity in constitutional adjudication. Though the *Bundesverfassungsgericht* has never stuck to only one theory or understanding of the constitution it has acknowledged different concepts that can be found in its jurisprudence over the decades. This especially applies to fundamental rights which are first and foremost considered guarantees against infringements by public authorities but also as values, the basis of differentiated duties to protect, entitlements to subsidies, participation, etc.

From a procedural point of view, criteria have been developed to demarcate the competence of the *Bundesverfassungsgericht* from the responsibility of ordinary courts or the Court of Justice of the European Union. The *Bundesverfassungsgericht* refrains from adjudicating civil, criminal, or administrative law but limits its control to the standard of arbitrariness or

a violation of specific constitutional values (*Heck'sche Formel*).[23] The same applies with regard to the European Court of Justices which according to art. 19 par. 1 sentence 2 TEU is first and foremost responsible for interpreting Union Law (however not in an arbitrary way).[24]

Finally, objectivity is also provided for by the established case law of the Court which prevents opinions of individual justices from becoming dominant at least in a short period of time.

Though there is no '*stare decisis* doctrine' in Germany's civil law system, the 158 (official) volumes in which the jurisprudence of the *Bundesverfassungsgericht* has been published since its establishment in 1951 provide a legal framework that reduces the Court's enormously wide scope of discretion and – together with dogmatic tools as mentioned above – helps to prevent it from crossing the line to 'mere' politics. To a certain extent, the decisions of the Court are binding for itself as a plenary decision of both Senates is required if one Senate wants to differ from the interpretation of a constitutional provision by the other (§ 16 par. 1 BVerfGG).

Moreover, the established case law of the Court also has a guiding effect on other cases. Though the Court is free to change its opinion – and the prescriptions in the statute on the *Bundesverfassungsgericht* dealing with its composition show that the legislator may even want continuous adjustments – the members of the Court show great reluctance to give up an established interpretation, a dogmatic figure or institution their predecessors have developed without good reason. As a rule, jurisprudence that has been established once is upheld unless arguments for a change outweigh. If a justice can refer to a prior decision of the Court or – even more important – the proper Senate, this is an argument in itself and a sort of presumption that the argument is right and doesn't need a broader debate. On the other hand, if justices want to change an existing line of jurisprudence they have to put forward strong arguments to convince their colleagues and have to prepare them in a differentiated and deliberated way.[25] In this respect, court deliberations are conservative under a struc-

23 Established jurisprudence since BVerfGE 18, 85, 92 f – Spezifisches Verfassungsrecht; see Klaus Schlaich and Stefan Korioth, *Das Bundesverfassungsgericht* (11th ed, CH Beck 2018), no 280 ff.

24 BVerfGE 154, 17, 91 ff (no 112 f) – PSPP.

25 On the *Bundesverfassungsgerichts's* culture of deliberation see Gertrude Lübbe-Wolff, *Wie funktioniert das Bundesverfassungsgericht?* (Universitätsverlag Osnabrück 2015), 23 ff.

tural point of view.[26] This can to some extent be regarded as a little equivalent to the *stare decisis* doctrine in common law. Though this practice of legal reasoning has not been reflected very thoroughly in the case law of the *Bundesverfassungsgericht* – different from the *Bundesgerichtshof*, the *Bundesarbeitsgericht*, the *Bundessozialgericht*, and the *Bundesfinanzhof*[27] – this provides for some objectivity and effectively limits the scope of discretion the Court has when interpreting the constitution. In addition, it helps to protect legitimate expectations of the parties, politics, and the public.

IV. The Bundesverfassungsgericht *as a Constitutional Organ*

It has been cleared already in the 1950s that the *Bundesverfassungsgericht* is not only a Federal court but also a constitutional organ ranking on the same level as the Federal President, *Bundestag* and *Bundesrat*, and the Federal Government.[28] As such it disposes of considerable power. The list of procedures in art. 93 GG proves that almost every political question can be shaped as a constitutional issue and thus become a case in Karlsruhe. History shows that from the dissolution of the *Bundestag*[29] and the deployment of German troops abroad,[30] the use of nuclear energy[31] to details of European integration[32] there is scarcely any topic that does not fall under the jurisdiction of the *Bundesverfassungsgericht*. Moreover, the consti-

26 In this vein Martin Kriele, *Theorie der Rechtsgewinnung* (2nd ed, Duncker & Humblot 1976), 258 ff, 330 f.

27 BAGE 12, 278, 284; BSGE 40, 292, 295 f; BFHE 78, 315, 320; BGHZ 85, 64, 66. For an analysis of these and other decisions with regard to the problem of *stare decisis* in the German legal system see Guttner (n 1), 21 ff.

28 Bundesverfassungsgericht, 'Denkschrift des Bundesverfassungsgerichts vom 27. Juni 1952' (1957) 6 JöR 144 ff (so-called *Statusdenkschrift*).

29 BVerfGE 62, 1 ff – Vertrauensfrage I; 114, 121 ff – Vertrauensfrage II.

30 BVerfGE 89, 38 ff – Somalia; 90, 286 ff – Out-of-area-Einsätze; 104, 151 ff – NATO-Konzept; 108, 34 ff – Bewaffnete Bundeswehreinsätze; 117, 359 ff – Tornadoeinsatz Afghanistan; 118, 244 ff – Afghanistan-Einsatz; 121, 135 ff – Luftraumüberwachung Türkei; 140, 160 ff – Evakuierung aus Libyen.

31 BVerfGE 47, 146 ff – Schneller Brüter; 49, 89 ff – Kalkar I; 53, 30 ff – Mülheim-Kärlich; 81, 310 ff – Kalkar II; 104, 249 ff – Biblis A.

32 BVerfGE 37, 271 ff – Solange I; 73, 339 ff – Solange II; 89, 155 ff – Maastricht; 97, 350 ff – Euro; 102, 147 ff – Bananenmarktordnung; 113, 273 ff – Europäischer Haftbefehl; 123, 267 ff – Lisbon; 126, 286 ff – Honeywell; 129, 124 ff – EFS; 132, 195 ff – temp inj ESM; 134, 366 ff – prel req OMT; 135, 317 ff – ESM; 140, 317 ff – Identitätskontrolle; 142, 123 ff – OMT; 146, 216 ff – prel req PSPP; 151, 202 ff – European Banking Union; BVerfGE 154, 17 ff – PSPP.

tutionalization of the legal order since the 1950s[33] has made it possible to construe almost every issue under the point of view of the constitution.

The lack of strong democratic legitimation provided by the content of the constitution therefore has to be compensated via other tools: the election of the justices by Parliament with a 2/3 majority for a single period of 12 years according to § 6 par. 1 sentence 2, § 7 BVerfGG (*personelle Legitimation*) and by the expressive role the *Grundgesetz* itself attributes to the *Bundesverfassungsgericht* as one of five constitutional organs (*institutionelle Legitimation*).

70 years of state practice show that despite inevitable differences and mistakes the *Bundesverfassungsgericht* has found a convincing balance between the necessary obedience to the law, i.e. the constitution, a partially self-imposed objectivity, and a responsible exercise of its power. It has thus promoted individual justice, the stability of the constitutional order, and the welfare of the nation.

33 Huber (n 5), § 6 no 12 ff.