FUNDAMENTAL RIGHTS AS GUIDELINES AND INSPIRATION: GERMAN CONSTITUTIONALISM IN INTERNATIONAL PERSPECTIVE

BRUN-OTTO BRYDE*

In deciding on a topic for this lecture, I tried to find one that could combine two purposes: On the one hand I wanted to give information about German constitutionalism—when you invite a judge of the German Constitutional Court to speak, you will expect this. On the other hand, in a human rights lecture the subject should be of interest to the international discourse on human rights. I found this topic in the subject of positive functions of human rights.

Basically, human rights create negative obligations for the state—duties not to interfere with our free speech, life, liberty, property, and occupation. On this function of human rights there is general agreement. Much more controversial is the question of the extent to which human rights also create positive obligations for the state, especially obligations to protect and promote human rights. On the international level this discussion is organized around different sets of rights contained in different treaties: the convention on civil and political rights[1] and that of economic, social, and cultural rights.[2] This example is followed in many constitutional systems: they organize different sets of

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* Brun-Otto Bryde, Judge, Federal Constitutional Court of Germany, and Professor, University of Giessen, Mildred Fish-Harnack Human Rights and Democracy Lecture (Oct. 19, 2005). I am extremely honored by the invitation to give the Mildred Harnack-Fish lecture. The courageous woman for whom this lecture is named links not only our two countries in a tragic way but also our two universities: she is not only a graduate of your university but also earned a doctorate in comparative literature in Giessen a short time before she was murdered. But the name of the lecture is at the same time daunting. Confronted with the name of a woman who gave her life fighting Nazism one's own contribution to human rights as a tenured professor and as a judge in a democratic society appears quite insignificant.

1 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368.

2 International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, *reprinted in* 6 I.L.M. 360.

rights, often with different degrees of enforceability.[3] Other countries like the United States restrict themselves in principle to defensive rights.

The German situation is somewhat unique and should therefore be interesting from a comparative perspective. Similar to the United States, the text of the constitution restricts itself to negative rights. Its catalogue of fundamental rights guarantees freedom from state interference. But the German Constitutional Court also interpreted these rights to develop positive functions. This jurisprudence had international influence. In my lecture I will show how this jurisprudence is grounded in the specific conditions of building a constitutional democracy in Germany after the Second World War and how it still might have international significance, especially—but not only—for constitutional transitions.

In the first part I will sketch the historical background. In the second part I will discuss perhaps the most important case in the court's jurisprudence, the *Lüth* case,[4] in which the court establishes that fundamental rights are a "guideline and inspiration" for all branches of government, the very words from which I have taken my title. The third part will describe the consequences this case had for German constitutional law, and the final part will draw some comparative conclusions.

I. HISTORICAL BACKGROUND

German fundamental rights theory can only be understood against the background of history. This history has not been evolutionary but has been marked by radical breaks. This is of great importance for comparative constitutional law. There is a major difference between old democracies, countries like the United States where ordinary law and constitutional law have developed together through the centuries—the Bill of Rights, for example, is clearly influenced by common law doctrines—and countries with a non-democratic past, in which a new democratic constitution is introduced.

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[3] CONSTANCE GREWE & HÉLÈNE RUIZ FABRI, DROITS CONSTITUTIONNELS EUROPÉENS 168 (1995).

[4] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1958, 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 198 (F.R.G.) (English translations in 2 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT 1, 1 (1998); DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 361 (2d ed., 1997)).

In the second situation, conflicts between values and interests protected by old law and the legitimacy of the new constitutional order can arise.[5]

A. CONSTITUTIONALIST ANTECEDENTS IN THE NINETEENTH CENTURY

In the nineteenth century, Germany was a loose confederation of states, mostly monarchies and a few city republics.[6] In these states the campaign for parliamentary government and fundamental rights was very similar to that in other European countries at the time. The German *Sonderweg*, or exceptionalism, responsible for the tragedies of the twentieth century had not yet begun. This campaign had some success with liberal constitutions in southern German monarchies. It culminated in the Revolution of 1848 and the constitution drafted by the constitutional assembly in the Paulskirche in Frankfurt. This constitution was very progressive for its time, but the revolution was defeated.[7] Despite this defeat, the constitution of the Paulskirche remained a constitutionalist ideal and influenced the wording of later constitutions. For example, it was the first constitution to independently guarantee academic freedom rather than as part of free speech, which was taken up almost verbatim in both the Weimar Constitution and the Basic Law.[8]

The liberal movement in the different German states in the following years pursued two aims: German unification and parliamentary government. When national unity was achieved in 1871 not by a democratic process but rather by the military power of the Prussian monarchy, the greater part of the liberal bourgeoisie made its peace with the monarchical system. It no longer fought for political power but was content with the protection of its rights, especially its property rights, under a system of the rule of law (*Rechtsstaat*) and the right to participate on a restricted level in the political system. Initially this

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[5] Brun-Otto Bryde, *Constitutional Courts in Constitutional Transition*, *in* 60 MAAL RECHT EN 1 MAAL WIJN, LIBER AMICORUM 235 (F. Van Loon & K. Van Aeken eds., 1999).

[6] *See generally* THOMAS NIPPERDEY, GERMANY FROM NAPOLEON TO BISMARCK 1800-1866 (Daniel Nolan trans., Princeton Univ. Press 1996) (1983); WOLFGANG J. MOMMSEN, IMPERIAL GERMANY 1867-1918: POLITICS, CULTURE AND SOCIETY IN AN AUTHORITARIAN STATE (Richard Deveson trans., Arnold 1995) (1990).

[7] This defeat brought some of the revolutionaries, the "48ers," to the United States and Wisconsin. The most famous of those was Carl Schurz, who became a United States Senator and Cabinet member.

[8] Editor's Note: "Basic Law" is an English translation of *Grundgesetz für die Bundesrepublik Deutschland*, the name of the German constitution.

situation was accepted only as a next best solution and as a price for German unification, but in the development of Imperial Germany this system of *Konstitutionalismus* gained broad acceptance (of course, not by all: a growing Social Democratic opposition existed, as well as a progressive wing of the liberal movement that remained true to its ideals).

It is in this process that one might try to locate German exceptionalism, though unfortunately the defeat of democracy by nationalism is not that exceptional. When Germany went to war in 1914, leading intellectuals conceptualized this system in the so-called "ideas of 1914" as a genuine German ideology, as a third method distinct both from the democratic pluralism of the West (England, France, and the United States) and the serfdom of the East (Russia).[9] Faithfulness to monarchy rather than democracy, to order rather than liberal freedom, to national legal traditions rather than universal human rights, and to national unity rather than pluralism were supposed to be typical German values.

It is this background of an authoritarian and anti-pluralist society against which those attempting to introduce democracy in the twentieth century had to fight. In Germany, the attempt to introduce a Western constitution into an authoritarian society was made twice: first in 1919 after the end of the First World War and the demise of the empire, and again in 1949 after the Second World War and the defeat of Nazism. The first attempt failed; the second was successful.

I. WEIMAR REPUBLIC

In a typology of constitutional transitions, the Weimar Republic is an example of a case in which an inherited legal culture defeats the new constitutional order.[10]

A professor of administrative law, Otto Meyer, who had written the leading textbook on administrative law in Imperial Germany, published a revised edition shortly after the introduction of the republican constitution. He wrote in the introduction: "No major revisions are necessary since the last edition. Constitutional law

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[9] HEINRICH AUGUST WINKLER, 1 DER LANGE WEG NACH WESTEN 337 (2000); Wolfgang J. Mommsen, *German Artists, Writers and Intellectuals and the Meaning of War, 1914-1918*, *in* STATE, SOCIETY AND MOBILIZATION DURING THE FIRST WORLD WAR 21, 22-23, 29-30 (John Horne ed., 1997).

[10] Bryde, *supra* note 5, at 236.

disappears, administrative law stays."[11] This brilliant and, in Imperial Germany, actually quite liberal lawyer assumed that administrative law, the law governing the relationship between citizen and the state, could be the same in a democratic republic and in an autocratic monarchy. With this opinion he was a very representative figure of the German legal elite. The new constitution was not used to transform the legal system in conformity with the constitution, but the constitution was interpreted in conformity with the inherited law, even though this law was derived from a pre-democratic past.

The constitution contained an innovative catalogue of fundamental rights, but this was not very relevant in practice because it was generally interpreted to be merely programmatic, not enforceable in court.[12] In contrast to the limited relevance of the constitution in practice, the Weimar Republic saw high-level discussions in constitutional theory. The protagonists of this debate—Hans Kelsen, Carl Schmitt, Rudolf Smend, and Herrmann Heller—are internationally renowned even today. In my somewhat unorthodox opinion, the productivity of constitutional thinking in the Weimar republic is linked to the negligible role of the constitution in practice. Exactly because constitutional lawyers did not have to argue their constructions in court, they could build ambitious and coherent theories drawing on philosophy and social science.

These theoretical constructions gained a new importance when Germany made a new attempt at introducing constitutionalist democracy after the Second World War. For the fundamental rights jurisprudence of the Constitutional Court in its defining early stage,[13] Rudolf Smend became the most important theoretician from the Weimar Republic. For Smend, the constitution was not a body of legal rules to be applied in court but a system of values. These values he found especially in the catalogue of fundamental rights. These rights constituted a program. On the basis of this program the citizens were expected to integrate into the republic (he called the catalogue of fundamental rights a professional code of conduct—a deontology—for the citizen); and this program was

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[11] OTTO MEYER, DEUTSCHES VERWALTUNGSRECHT (3d ed., 1924).

[12] *See* MICHAEL STOLLEIS, A HISTORY OF PUBLIC LAW IN GERMANY 1914-1945, at 87-89, 91 (Thomas Dunlap trans., 2004) (1999) (providing background on the controversial discussion).

[13] *See generally* Thomas Henne, *Von 0 auf, Lüth' in 6 ½ Jahren*, *in* DAS LÜTH-URTEIL AUS (RECHTS-)HISTORISCHER SICHT 197 (Thomas Henne & Arne Riedinger eds., 2005).

to be a guide and inspiration for all state institutions.[14] This might appear to be very idealistic and theoretical, and in the Weimar republic it certainly was; it was not meant to be a theory applied in the courts. But it became very practical in the hands of the Constitutional Court in 1958.

II. THE BASIC LAW

When German politicians drafted the Basic Law in 1949, their main inspiration was a negative one. They were not codifying the ideas of a successful revolution, but instead were reacting to the experience of totalitarian dictatorship.

In reaction to the horrors of Nazi Germany, they based the new constitution on the principle of human dignity and the recognition of human rights, recognized in Article 1. In reaction to the abuse of state power, they were careful in drafting judicial safeguards against the abuse of state power, most notably creating an elaborate multi-tiered system of judicial review with a powerful Constitutional Court at the apex. When I was a student, one of my constitutional law professors once remarked critically that the Basic Law was constructed like a car in which the brakes are the part that functions best. Actually, both in constitutions and cars, brakes are very important.

The drafters of the Basic Law reacted not only against dictatorship but also against what were seen to be the weaknesses of the Weimar Constitution. In addition to a new institutional arrangement, the position of fundamental rights was changed. In clear opposition to the most common reading of the Weimar Constitution, Article 1(3) states that "[t]he following fundamental rights shall bind the legislature, the executive, and the judiciary as directly enforceable law."

Even with these safeguards, the success of Germany's democracy after the Second World War was less assured than it might appear today. There was little democratic experience and a fascist indoctrination of a whole generation. Germans were, in large part, cured of Nazism. But as we have seen, authoritarian traditions in Germany existed long before 1933. German democracy had to begin again with few learned democrats both in the population and in the judicial and administrative elites. Empirical public opinion research in the late 1940s

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[14] RUDOLF SMEND, VERFASSUNG UND VERFASSUNGSRECHT (1928); STOLLEIS, *supra* note 12, at 164-65.

and early 1950s showed a strong authoritarian and especially anti-pluralist orientation.[15] The ideas of 1914 were still very much alive.

Readiness to follow authority, however, is not incompatible with a powerful constitutional court. Pre-democratic forms of government before the First World War were combined with a strong commitment to the rule of law (*Rechtsstaat*).[16] Therefore, the new German Constitutional Court was in a unique position. It could draw on an authority it had, to a certain extent, borrowed from authoritarian traditions and used this authority to enforce the new constitution. The court was ready to use its authority for this purpose. This was aided by the fact that it was the only institution in the new Germany where the electing bodies were careful not to include anybody tainted by Nazism, quite in contrast to the other courts, which were forced to function with the old personnel. While the role of emigrants and members of the resistance in government and parliament were marginal, the Constitutional Court had very high-profile opponents of the Nazis on its bench.[17] While the administrative and judicial elites were again in danger of bringing the new constitution into line with an old legal culture (to avoid misunderstandings I repeat: authoritarian and anti-pluralist, not fascist legal culture!), the Constitutional Court readily assumed the task of educating courts and society towards a pluralist democracy.

II. LÜTH CASE

One could illustrate this push for pluralism in various fields (for example, the insistence of the second senate[18] on the importance of

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[15] Hans Peter Schwarz, *Die Ära Adenauer*, *in* 2 GESCHICHTE DER BUNDESREPUBLIK DEUTSCHLAND 432 (1981).

[16] STOLLEIS, *supra* note 12, at 7-8.

[17] KOMMERS, *supra* note 4, at 123. Some of the law faculty visitors to Giessen know the name of Erwin Stein because they stayed in a house that he bequeathed to our university to be used as a guesthouse. Stein was closely connected with our university. He was one of the first judges on the Constitutional Court and had lost not only his position as judge in 1933 but was even more tragically affected by Nazi terror, because his Jewish wife committed suicide rather than go to a concentration camp.

[18] The court consists of two senates or panels, each of which has eight elected judges. Bundesverfassungsgerichts-Gesetz [Federal Constitutional Court Act] Mar. 12, 1951 BGBl I. at 243, *amended* July 16, 1998, art. 2, §§ 1, 2 (F.R.G.), *available at* http://www.iuscomp.org/gla/statutes/BVerfGG.htm (Inter Nationes, trans.) (last visited Aug. 15, 2007).

political parties[19] in a political culture that considered parties to be divisive dangers to national unity), but a central case in this development is the *Lüth* case of the first senate.[20] This case did not only establish the importance of free speech for a democratic society (actually citing Cardozo, to make a small contribution to a current strange American debate about whether courts are allowed to cite foreign sources),[21] but will also be the starting point for my analysis of the positive functions of human rights.

Lüth, director of the press office of the city-state of Hamburg and a victim of the Nazis, criticized as a private citizen the decision of the organizers of German Film Week in 1951 for including in their program a film by Veit Harlan, who had directed violently anti-Semitic films during the Third Reich. Lüth called for a boycott of Harlan's films by cinema owners and the public. Under German private law (§ 826 of the Civil Code-BGB), calling for a boycott of a business can be considered an actionable unethical infringement of commercial interests. Therefore the distributors of Harlan's films got an injunction against Lüth in the private law courts. Against these decisions Lüth brought a constitutional complaint to the new Federal Constitutional Court.

The court had to chart unknown territory. Fundamental rights at that time were considered to have only the function to defend citizens against the state. Therefore it was unclear what role they could play in a conflict between private citizens. To solve this question, the Constitutional Court drew on Rudolf Smend's theory of the constitution as a system of values.

After restating the doctrine that fundamental rights are primarily intended to guarantee the individual's sphere of freedom against interference by public power, the court goes on to write:

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[19] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1951, 1 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 208 (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1955, 4 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 27 (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1958, 8 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 51 (F.R.G.); KOMMERS, *supra* note 4, at 200-08.

[20] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1958, 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 198 (F.R.G.) (English translation in 2 Decisions of the Bundesverfassungsgericht 1, 1 (1998)) (English translation also in (Donald P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 361 (2nd ed., 1997)). *See also* NIPPERDEY, *supra* note 7; MOMMSEN, *supra* note 7; Henne, *supra* note 14; DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 181-82 (1994).

[21] *See generally* Brun-Otto Bryde, *The Constitutional Judge and the International Constitutionalist Dialogue*, *in* JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION? (Basil Markesinis & Dr. Jörg Fedtke eds., 2006).

> It is equally true, however, that the Basic Law . . . has set up an objective value system . . . . This value system centred round the human personality developing freely in the social community, and its dignity must be regarded as the basic constitutional decision for all spheres of law. Legislation, administration, and the judiciary are given guidelines and inspiration (*Richtlinien und Impulse*) by it. Accordingly, it also manifestly influences the civil law: no provision of civil law may be in contradiction with it; each one must be interpreted in its spirit.[22]

In this way the case could be solved: when interpreting what constitutes "unethical behavior" in a commercial context in § 826 of the Civil Code, the civil courts should have taken the value of free speech, guaranteed in Article 5 of the Basic Law, as a "guideline and inspiration." Had they done so, they could not have found Lüth's behaviour to be unethical. Failing to take the constitution into proper account, the civil law courts had violated Lüth's fundamental rights and therefore his constitutional complaint was successful.

I would like to call your attention to the combination of rejection and reception of Weimar. It is this combination that gives Germany its unique form of constitutionalism and a special role in comparative constitutional law. We can see a rejection of Weimar because fundamental rights are no longer symbolic but enforceable in courts. And the Constitutional Court is ready to do the enforcing. But we also find a reception of Weimar constitutional theory. Sociologically, this is not astonishing, as the judges had learned this theory in school. The combination of the new legal quality of rights enforceable in court with an idealist conception of fundamental rights that had been developed for a constitutional system without judicial review (and most likely would never have been invented in a country with judicial review, where constitutional law doctrine tends to be much less theoretical and more pragmatic) is a powerful one and has far-reaching consequences. In contrast to a conception of fundamental rights that stresses their negative function—forbidding state action—this program asks for positive state action in the service of fundamental rights. The Constitutional Court requires other state actors—especially other courts and lawmakers—to realize the principles enshrined in the fundamental rights provisions. From this starting point, in the following years, the court ordered the transformation of an inherited legal culture, the protection of

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[22] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1958, 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 198 (205) (F.R.G.) (English translation in 2 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT 1, 5 (1998)).

fundamental rights against other citizens, legislative arrangements for the effective functioning of rights, and provisions that allow citizens to enjoy such rights.

III. POSITIVE FUNCTIONS OF FUNDAMENTAL RIGHTS

A. THE CONSTITUTIONALIZATION OF GERMAN LAW

By decreeing that all fields of law had to be interpreted in line with the constitution, and, more importantly, by assuming judicial control over this process, the Constitutional Court transformed the German legal system.

In the 1950s there was a real danger that again, like in Weimar, the traditions of the pre-democratic legal culture would curtail the role of the new constitution.[23] But this time the danger was successfully fended off under the guardianship of the Constitutional Court. All fields of law were now restructured under the influence of the constitution. While Otto Meyer had thought that authoritarian administrative law could survive the arrival of a democratic constitution, administrative law now came to be conceptualized as concretized constitutional law—constitutional law for everyday use—by the president of the highest administrative court.[24] Criminal law was overhauled on the basis of the constitutional principle that sanctions have to be appropriate to the guilt,[25] and the penal system was based on the concept that inmates of penal institutions are citizens with rights.[26] In private law, the most important developments were the enforcement of equal rights for women against the private law's and the civil courts' traditional patriarchal views

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[23] *Cf.* ADOLF ARNDT, DAS NICHT ERFÜLLTE GRUNDGESETZ (1960), for a contemporary complaint about the unwillingness of ordinary judges to obey the new constitution.

[24] FRITZ WERNER, VERWALTUNGSRECHT ALS KONKRETISIERTES VERFASSUNGSRECHT 527 (1959).

[25] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1986, 20 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 323 (331) (F.R.G).

[26] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1972, 33 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G).

of the role of women[27] and the introduction of social justice principles into contract law.[28]

This process is not without problems. The Constitutional Court is no ordinary court of law; it is not a supreme court but a specialized constitutional court whose jurisdiction is restricted to constitutional law.[29] In theory it does not have the power to decide whether the judgment of another court is correct under ordinary law such as private, labor, or criminal law.

But under the principles developed in the *Lüth* decision, cases from all areas of law may be brought to the Constitutional Court with the claim that the ordinary courts have not given sufficient consideration to the guidelines and inspiration of the constitution. When a party has lost his case in the courts, the loser will often try to find an argument that allows him to lodge a constitutional complaint. The Constitutional Court is flooded with more than five thousand complaints a year. Most of them are unsuccessful attempts to transform an ordinary law case into a constitutional one.

This not only creates a tremendous workload for the court but also has initiated a sociological process that has transformed the German legal culture. In this system, lawyers and academics have an incentive to detect constitutional questions in all areas of the law. The boundaries between constitutional law and ordinary law become blurred; German law becomes constitutionalized,[30] that is, many rules of ordinary law are interpreted as being directly derived from the constitution.

B. DUTY TO PROTECT

When fundamental rights enshrine principles that are guidelines and inspiration for the state, it is not sufficient that the state does not violate them. In addition, the state has the duty to actively promote and

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[27] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1953, 3 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 225 (F.R.G)

[28] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1990, 81 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 242 (F.R.G); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1993, 89 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 214 (F.R.G).

[29] *See* Brun-Otto Bryde, *Constitutional Courts*, *in* 4 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 2637, 2637 (Neil J. Smelser & Paul B. Baltes eds., 2001) (discussing the distinction between the American system and constitutional court systems); ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 33-34 (2000).

[30] Mattias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GERMAN L. J. 341, 343-44, 355 (2006).

protect them. Therefore, the Constitutional Court has deduced from defensive fundamental rights duties for the state to protect these rights against infringements by other citizens.

This doctrine was first developed in a very controversial decision: the first abortion case. A split court developed from the fundamental right to life a state duty to fight abortion by criminal sanctions if necessary (but allowing a rather symbolic system of penalization, which for many years did not lead to actual prosecutions).[31] The court reaffirmed this protective duty in the second abortion case, though with more restraint this time, by still demanding effective protection of unborn life but no longer requiring penal sanctions.[32]

Meanwhile, the doctrine of the protective function of fundamental rights has been generally accepted. Progressive critics of the first abortion decision were reconciled because the main field of application of this doctrine has moved, figuratively speaking, from right to left: from abortion to the environment and to the protection of the weaker party in private law. Thus, in a series of decisions the court established on the basis of the right to life and physical integrity—which historically was directed against the physical abuse of citizens by state organs—the duty of the state to protect its citizens against the dangers of atomic energy[33] or the noise of airports.[34]

In confrontation with the private law's traditional concept of freedom of contract, the court recognized that freedom of contract serves the freedom of both parties only to the extent that they have a comparable capacity to influence the content of the contract. If one party is structurally disadvantaged, her freedom can easily transform itself into subjugation under the other party's dictate. In the view of the Constitutional Court, it is the duty of lawmakers and courts to protect the weaker party against this danger.[35]

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[31] *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.) (English translation in KOMMERS, *supra* note 4, at 335-48).

[32] *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1993, 88 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 203 (F.R.G.) (English translation in KOMMERS, *supra* note 4, at 349-56).

[33] *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1978, 49 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 89 (140) (F.R.G.) (English translation in KOMMERS, *supra* note 4, at 139-45).

[34] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1981, 56 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 54 (73) (F.R.G.).

[35] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1993, 89 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 214 (234) (F.R.G.).

In consequence, the core of the statutory protection against unfair dismissal in labor law is constitutionally guaranteed.[36] More generally, fundamental rights may require courts to invalidate one-sided contracts. In two recent important decisions of our Senate—in which I could not take part because I had brought the cases to the court myself as counsel for a consumer group before I was elected to the court—it ordered lawmakers to completely reform the law of life insurance because current law gives no adequate protection to the rights of policy holders against insurance companies.[37]

C. ORGANIZATION OF FREEDOM

When basic rights are not just defensive rights but principles that must be realized in practice, the state may also have to create the conditions necessary for their exercise. In modern society many rights are difficult for the individual to enjoy without proper organization of the social structures in which the right is exercised.

In its first television judgment of 1961—which was historically and politically important because the court took on the powerful Adenauer government of the day and thereby established its reputation of independence—the court developed the constitutional basis for a public television system. The court held that under the economic and technological conditions prevalent at that time, freedom of information for the citizens and freedom of radio could not be guaranteed if television was either in the hands of the state, as the Adenauer government had planned, or in the hands of powerful economic interests. Therefore the constitution, in guaranteeing freedom of information, requires a pluralistically organized public television system.[38] On this basis the court developed a differentiated jurisprudence about organization, financing, and programming of television in the following years.[39]

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[36] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1997, 97 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 169 (F.R.G.).

[37] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2005, 114 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.); *see also* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2005, 114 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 73 (F.R.G.).

[38] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1961, 12 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 205 (F.R.G.) (English translation in KOMMERS, *supra* note 4, at 404); *see also* DECISIONS OF THE BUNDESVERFASSUNGSGERICHT, *supra* note 4, at 31.

[39] *See* KOMMERS, *supra* note 4, at 411.

Similarly, the court deduced from the right of academic freedom rules about the correct organization of state universities. It is not sufficient that there is no state censorship of academic activities; universities must also be organized in a way that is conducive to free academic research and teaching.[40]

D. SOCIAL RIGHTS (ENTITLEMENTS)

A very controversial question in German jurisprudence is to what extent a conceptualization of rights as principles must also lead to the recognition of social rights and claims for public services.

On the one hand, in contrast to the Weimar Constitution, there was a conscious decision by the drafters of the Basic Law not to include such rights. The main reason was the insistence on the new quality of fundamental rights as being directly enforceable in court. The drafters were afraid that the inclusion of rights less suitable for judicial enforcement might dilute this new concept.[41] This does not mean that the constituent assembly was not concerned with social justice. It defined the new state as a social state and balanced the guarantee of property rights with a constitutional duty to use property in the interest of the public welfare in Article 14.II. It refrained from guaranteeing specific social rights with one important exception: Article 6 requires the state to give special protection and support to marriage and family.

On the other hand, this decision of the drafters might have been overtaken by the recognition that fundamental rights contain "guidelines and inspiration." A social dimension of fundamental rights is a logical conclusion of such a concept. When fundamental rights are principles whose realization is important for people and society, the constitutional system cannot be neutral as to the question of whether people are able to enjoy such rights in practice. In its leading case on freedom of occupation (Article 12), the *Pharmacy Case*—in which the court struck down traditional prohibitions to opening a pharmacy and along the way invented the proportionality principle—the court established a relationship between work and the human personality: "It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence, through

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[40] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1973, 35 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 79 (F.R.G.).

[41] *Cf.* CARLO SCHMID, ERINNERUNGEN 373 (1979).

which that person also contributes to society."[42] Given such an idealized if not lyrical view of work, one can hardly argue that there is no constitutional dimension to unemployment. While the court, given the clear decision of the Basic Law to the contrary, could not invent a right to work, it did use the value attached to work as a guiding principle in balancing state interventions in economic freedoms against the need to fight unemployment.[43] Even more daringly, the court established a duty of the state to provide for university places for students (of course, with due consideration for the financially possible) on the basis of the right to freely choose one's place of training contained in the same article of the Basic Law.[44]

An absolute exclusion of a social dimension of fundamental rights is no longer possible. While being reluctant to grant outright claims for public services based on fundamental rights, the Constitutional Court, along with other courts, has developed this social dimension.

In a very early decision, the Federal Supreme Administrative Court held on the basis of the constitution's guarantee of human dignity that welfare payments are not a discretionary benevolent gift by the state but a legal entitlement.[45] Today it is generally recognized that the state is under a duty to provide for the minimal needs of existence to every inhabitant of Germany and that this claim is enforceable in court.

The Constitutional Court strengthened statutory welfare rights to pensions, unemployment benefits, and health insurance by giving them an interesting, perhaps even astonishing, constitutional basis. In a rather revolutionary jurisprudence it included social security rights under the concept of property in the German constitution, thus expanding this concept from private law to new property.[46]

This transformation of freedoms into positive social rights was not necessary in the one case where the constitution itself provides for a social right: the protection of the family. In this field, the court deduced

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[42] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1958, 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 377 (397) (F.R.G.).

[43] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2001, 103 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 293 (307) (F.R.G.).

[44] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1972, 33 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 303 (F.R.G.).

[45] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1951, 1 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 159 (F.R.G.).

[46] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1980, 53 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 257 (289) (F.R.G.).

consequences in social security and tax law that proved to be extremely costly to the state treasury.[47]

In sum, the traditional concept of basic rights as defensive rights has been replaced by a concept of basic rights as principles with many different functions.

E. JUDICIAL RESTRAINT

For an American audience accustomed to discussions about judicial activism, this panorama of judicial mobilization of fundamental rights for positive action might appear almost shocking. It has given the court an armory with which it can assume broad powers of judicial policy making, and, in a few areas, it has done so.

While there is much less criticism of an activist court than in the United States—in Germany, where there is doubt in a conflict between the court and political powers, German public opinion sides with the court[48]—the basic democratic principle that parliament should promulgate rules, rather than judges, also applies in Germany. Despite its expansion of the functions of fundamental rights, in general, the German Constitutional Court is not over-activist. The answer lies in judicial restraint. While this word is rarely employed literally and there is no political question doctrine, the court gives the lawmaker a broad margin of appreciation.

This is even true for the defensive function of fundamental rights, which remains the most important function even though I do not dwell on it here. One of the best-known judicial inventions of the German Constitutional Court, which has influenced European and international constitutional jurisprudence, is the principle of proportionality.[49] In regulating behavior protected by the right, lawmakers have to take the value of the right as their starting point, which means—and this is the principle of proportionality—they may not

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[47] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1957, 6 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 55 (F.R.G.) (the seminal decision in this area of law); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1999, 99 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 216 (F.R.G.) (a more recent decision in the area of tax law); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2001, 103 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 242 (F.R.G.) (a more recent decision in the area of social security).

[48] *See* KOMMERS, *supra* note 4, at 55.

[49] EVELYN ELLIS, THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE (1999); CURRIE, *supra* note 20, at 307.

restrict the protected freedom more than necessary. Taken literally and combined with a neo-liberal ideology, this principle could easily be used to question most economic regulation. The court avoids such interference by deferring to the judgment of lawmakers in their evaluation of economic and social conditions in determining what kind of public action is necessary and suitable.[50]

This is even more the case with the positive functions of fundamental rights described here, and it cannot be otherwise. When the court finds a duty to protect fundamental rights, lawmakers must be given broad discretion in fulfilling this duty because there are usually different ways to reach the desired goal. In most cases the court has done so. A major exception is the abortion decisions, but in most jurisdictions one should not generalize from abortion cases because a rational discourse appears to be more difficult here than in other fields of the law. Similarly, with respect to the court's effort, in principle laudable, to strengthen the protection of the family, there is some valid criticism that it has overburdened the treasury and that its benevolence mainly benefits a certain type of family, the one-breadwinner middle-class family, at the expense of others. But in general, the court attempts to balance a general restraint with necessary intervention when lawmakers overstep its margin of appreciation. One might also define it differently: the guidelines for lawmakers are wider as standards for legislative behavior than as standards of control for the Constitutional Court.

Restraint is necessary not only vis-à-vis the lawmaker but also vis-à-vis the other courts. The Constitutional Court has jurisdiction only in constitutional law; interpretation and development of other fields of law is the province of the other courts. Therefore, the degree to which the Constitutional Court has set in motion the constitutionalization of German law has not gone without criticism. When the king of England claimed he was also the king of France, he was not popular in Paris. Other lawyers rebel against the imperialism of constitutional law—and constitutional lawyers—claiming to control the principles of all areas of law. Ideologically, the new ascendancy of constitutional law appears to be most difficult to accept for private lawyers. For centuries in civil law countries, private law was the crown of jurisprudence. The basic principles of law and justice were contained in its basic principles of contract, torts, and property relations. Therefore, whenever the

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[50] *See* KOMMERS, *supra* note 4, at 273.

Constitutional Court intervenes in the dogma of freedom of contracts, it draws sharp criticism from the private law establishment.[51]

The Constitutional Court is not insensitive to this criticism. I tried to show that the expansive control of ordinary laws, which started in the *Lüth* case, was important for a transformation of German legal culture and to help avoid a repetition of the mistakes of Weimar. But today there is no longer the confrontation of the 1950s between a modernizing Constitutional Court and conservative ordinary courts. All levels of the judiciary are filled with judges socialized under the constitutionalist values of the Basic Law. The tutelary role of the Constitutional Court can be reduced, and we in the Constitutional Court are, of course, of the opinion that we have done so, while the other courts still consider us to be too interventionist.

IV. COMPARATIVE REMARKS

I will close with some comparative remarks that are not self-evident. Since I have tried to explain the jurisprudence of the Constitutional Court on positive functions of human rights from the perspective of German constitutional history, one might doubt that other countries and human rights theory in international law can benefit from this discussion. The model of a constitutional court that borrows legitimacy from an authoritarian political culture to promote pluralist democracy might be uniquely German. Similarly, the combination of enforceable rights with a theory that was developed for a constitutional system without judicial review, a kind of marriage between Kelsen and Smend, is a unique coincidence. Yet, at the University of Wisconsin Law School, with its strong tradition in law, development, and transition studies, it should be accepted that one can benefit from the experience of other countries without having to go through the same historical processes.

Obviously, such lessons are of special relevance to other countries in a similar transitional situation as Germany was in after the Second World War. The role of the German Constitutional Court in constitutional transition is especially instructive.[52] One important socio-

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[51] *See, e.g.*, Uwe Diederichsen, *Das Bundesverfassungsgericht als oberstes Zivilgericht—ein Lehrstück der juristischen Methodenlehre*, 198 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 171 (1998); *see also* Kumm, *supra* note 30, at 360.

[52] Bryde, *supra* note 5, at 236-38.

legal fact explaining the role of constitutional courts is so mundane it is easily overlooked: they are very small. So in a new constitutional order in which it is extremely difficult to fill the whole judiciary with lawyers ready and able to break with their inherited legal culture, one can find a small group of people both legally qualified, with prestige in the profession, and at the same time completely devoted to the new order, to staff a constitutional court. Equally important is the institutional loyalty of a constitutional court to the new constitution, in contrast to the loyalty of other courts to their ordinary law traditions, which are thoroughly influenced by pre-constitutional values, for example, in private or criminal law. Therefore, in constitutional transition processes, a constitutional court has obvious advantages. While it is extremely difficult to transform legal cultures completely just by introducing a new constitution, a specialized court composed specifically for this task and with an institutional commitment to the new constitution can play a decisive role in changing the inherited legal culture towards the new model. It is therefore no coincidence that in the friendly competition in the constitution-drafting business in reform countries in the 1980s and 1990s between the American model of judicial review through the ordinary courts and the Kelsenian model of a specialized constitutional court, a competition often fought on the ground between American and German foundations and their legal missionaries, the constitutional court model regularly won.

This transformation function of the constitution in relationship to the ordinary law is of special importance only for countries where the constitution is introduced into a society with a pre-democratic legal inheritance. The other conclusions drawn from this inspiration do not react to specific German conditions but to conditions prevalent in all contemporary societies.

Increasingly, human rights are endangered not only by the state but also by other private actors. Therefore, a comprehensive protection of human rights must also protect them against private actors. This becomes even more important with an increased privatization of public services. Academic freedom must not only be protected against the state but also against sponsors and donors.

Equally, the realization of human rights in modern societies often depends on conditions beyond the power of the individual. Freedoms are exercised in institutional settings, which have to be organized in a way conducive to freedom. Human rights must therefore be standards for the control of organizations like universities or public

television. Here, German case law is less easy to transfer internationally as it depends on specific guarantees in the constitution. Since the Paulskirche, German constitutions have guaranteed academic freedoms distinct from free speech. The same is true for a specific guarantee of freedom of radio in the Basic Law. This makes it easier to understand such freedom as guarantees of an institution and to deduce positive functions. But the problem of the exercise of human rights in an organizational setting appears to be an international one.

Finally, human dignity requires that we are not mere objects of not only state control but also social conditions and market powers. For human beings to live their lives in dignity, the social dimension of human rights has to be recognized. In their positive function, human rights are an important impediment against a purely market- and profit-oriented view of social organization. If one concentrates only on the negative function of human rights, one tends to protect established interests. Human rights become part of a legal arrangement where "the haves come out ahead."[53] An adequate consideration of positive functions of human rights here strikes a necessary balance. That may be an unfashionable idea in the current ideological ascendancy of laissez-faire capitalism, which insists on repeating all the mistakes of the nineteenth century, but this does not make it any less important.

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[53] Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 95 (1974).