

The Contribution of the Federal Constitutional Court to Democracy and Post-Democracy¹

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The accolades for the German Federal Constitutional Court (*Bundesverfassungsgericht*) on the occasion of its 60th anniversary in 2011 not only concurred that the Court had contributed decisively to the success of Germany's postwar democracy but also confirmed that the Constitutional Court is the most popular political institution in Germany today. "The Federal Constitutional Court became the midwife of the second German democracy. That remains its central achievement. It uncompromisingly distanced itself from the poisoned heritage of the Nazi period early on, worked toward a fundamental liberalization of the German legal order, and corrected rigidities of the traditional justice system." (Schönberger 2011, 27) This general finding will be portrayed in somewhat more detail in the following and then contextualized in terms of theory of democracy. Taking Christoph Schönberger's and Christoph Möllers's critical appraisals of the Federal Constitutional Court as a starting point, I will make clear that its success is closely linked to the implementation of a post-totalitarian model of democracy that precisely cannot be understood as the accomplishment of a strong democracy. In terms of democratic theory it means a significant shift in the understanding of the relation between popular sovereignty and fundamental rights that weakens the role of the democratic legislature. On the basis of the Court's specific way of functioning, I will then pinpoint its contribution to currently diagnosed post-democracy. Following Colin Crouch (2004), I consider post-democracy to be informal disempowerment of the legislature and erosion of political equality in favor of economically powerful private actors. Against this background, the Court's successes

1 I am grateful for comments by my German and Brazilian colleagues and the participants of the two sessions in Brasília and Fortaleza in the program of the Rede Brasil-Alemanha de Direitos Sociais e Globalização.

appear in an opposite light: what initially seemed to be a strengthening of individual fundamental rights and new democratic institutions can thus be recognized as an intensification of the post-democratic tendency. Thus, the success story of the Federal Constitutional Court has become an element of post-democracy that makes it more difficult to enforce social demands.

I – THE CONTRIBUTION OF THE FEDERAL CONSTITUTIONAL COURT TO THE ESTABLISHMENT OF WEST GERMAN DEMOCRACY

Even the Court's success story, which has made it Germany's most popular political organ, receiving the highest trust ratings for decades (see Rath 2013, 11), has ambiguous preconditions. As Schönberger states, the Court's success was founded upon on the "situation of indeterminate openness" in the early development of German postwar democracy in which authoritarian trust in the justice system and "traditional antiparliamentary resentment" came together (Schönberger 2011, 41f.) and prepared the ground for the Federal Constitutional Court's success. The Court was able to self-confidently claim this ground when it accorded itself the rank of a constitutional organ. This act of self-authorization by the Court's 1952 status report was ratified post facto and has since then determined the Court's dual position as a political and juridical organ (Schönberger 2011, 20, Möllers 2011, 357). In connection with the conflictual relationship to the German Federal Court of Justice (*Bundesgerichtshof*), whose judges were conservative and held traditional views, for example of the family, the Federal Constitutional Court really did appear to be an institution unencumbered by the past and a guarantor of democratic values, in particular because opponents of the Nazi regime served on it and it was thus able to act as a counterweight to the judicial authorities fraught by the Nazi past.

Nonetheless, the Court was conceived of as an expertocratic body. The stipulation that members of the Federal Constitutional Court had to have the qualifications to act as judges (Schönberger 2011, 17) made the Court an instrument of the judiciary from the beginning and simultaneously removed it from democratic influences. From the perspective of sociology and theory of democracy, the traditionally privileged judiciary had achieved an increase in power relative to the legislature by placing itself, through the Constitutional Court, at the same and at a higher level than the legislature². The German Federal Constitutional Court functions primarily as a court of fundamental rights, thereby relying on human dignity, which was introduced in the Basic

2 See also the article by Fabian Wittreck in this issue.

Law, as its highest norm. The fundamental rights are also valid with respect to the legislature (Art. 1 Section 3 Basic Law). Its primary means is to review laws on the basis of constitutional complaints. For this reason, individual constitutional complaints account for the overwhelming part of the Court's work; every bearer of fundamental rights may file such complaints.

Therefore, the Court can also use the instrument of case law concerning fundamental rights to influence society; according to Schönberger, this instrument "contributed to a *fundamental liberalization of German society*" (2011, 29, emphasis in the original). This can be understood against the background that the legal system was still based on the law of the German Empire in many ways. This circumstance was the background against which the conflict between the conservative Federal Court of Justice and the liberal Federal Constitutional Court unfolded. The Federal Constitutional Court strengthened freedom of expression, the position of women in the family, and the rights of the parliamentary opposition. In this way, it ensured that majority rule was accepted at all (Schönberger 2011, 38), which was by no means broadly recognized at the time. It seems that constitutional courts have similar functions in young democracies as the case of Brazil shows (da Silva 2012).

This gives rise to the paradox that the Court contributed to the liberalization of society, but in so doing, "benefited from a *pre-democratic political culture trusting in authority*" (Schönberger 2011, 43, emphasis in the original). Where "history, nation, and culture" were lacking as integrating factors, the Basic Law filled the gap, and the Federal Constitutional Court was able to become "the symbol of breaking with the Nazi past and returning to the circle of civilized peoples" (Schönberger 2011, 47). The fact that this break was not symbolized by the parliament, but by the Court, suggests that in this case, precisely that expertocratic, paternalistic variant of the path relating to the law of democracy was taken that the democrats had actually been expected to abandon. Möllers sees the reason for the Court's high popularity in the "yearning for conflict-free forms of political decision-making" (Möllers 2011, 297), which are easier to accept than decision-making procedures characteristic of representative democracy. Overly strong trust in experts and an antidemocratic mistrust of parliamentarism, which complement each other and provide the societal foundation of the success of the Federal Constitutional Court, are expressed here. Ingeborg has spoken in this context about a substitution of the authority of the absent father (also Maus 1989). Christian Rath sees in this lasting belief in authority still a reason for the Court's actual high acceptance and sees the contribution

to the democratic stability in the absorption of populist and anti-pluralistic positions (Rath 2013, 71). It is rather worrying that the court's contribution to democracy is seen in neutralizing populist positions, since this means that these positions have a channel to articulate against the legislature. At the same time the court had to struggle for its role and had also to argue for its competencies not only in public debate but also against the rival institutions.

Its success is always precarious because of the Court's dual role. "As a court, the Federal Constitutional Court operates within the context of the judicial authorities with their legal obligations and social expectations of behavior. As a constitutional organ, it has a place in the concert of the other constitutional organs and struggles with them for power and influence." (Schönberger 2011, 51) The court must justify its existence with every decision, it must reinvent its acceptance time and again. That is the reason why it expends such great time and effort on providing reasons for its rulings (Schönberger 2011, 54), which at the same time are difficult for the general public to comprehend. The court's dual character as a legal and a political actor results in tensions. For example, judges are precisely not held accountable for their decisions; in contrast to parliamentary procedures, reasons given by the Court cannot simply rest on a majority "without calling their own decision logic into question" (Möllers 2011, 320); it functions to "preserve its own history of case law" (Maus 1989, 132). Yet the Court does not only examine lower-court decisions, but also takes on legislative functions itself (Möllers 2011, 324). In other words, by granting itself greater powers as a constitutional organ, the Court has put itself in a complicated position. It has to justify and distinguish itself as opposed to the legislature, but must do so as a court and cannot simply argue politically. Because of its specific function, it usually does so in the context of individual constitutional complaints.

Legally speaking, this is the reason for the success of the Federal Constitutional Court: constitutional complaints open up direct access to the Court for citizens who must present their concerns in the role of holders of rights whose fundamental rights have been violated. The Court has made constitutional complaints much easier. If Europe is concerned, citizens have no longer be personally affected, every citizen can complain against the transfer of sovereignty to the European Union (Rath 2013, 20). The Court has responded to this general openness by "objectifying legal protection by means of a way of selecting cases that is difficult to understand and hardly governed by rules as well as a generous way of applying patterns of weighing abstract principles" (Möllers 2011, 407). Objectifying means that the Court

seeks out cases that are to be accorded general significance transcending the individual case. Then the Court balances the various legal principles. To this day, and especially in its early cases, its methodology in so doing has been similar to that of Nazi jurisdiction, namely orienting “statutory law to textually vague provisions that are hierarchically superior” (Schönberger 2011, 42, see also the seminal work Rüthers 2012). In this way, Möllers also disproves the assumption that the Federal Constitutional Court successfully protects minorities. Using the example of freedom of religion, it is easy to discern that on the contrary, “Christian majority milieu” always enjoy protection. “When Muslims began to invoke religious freedom more and more, limits were placed on this protection.” (Möllers 2011, 342f.). This assessment is paradoxically confirmed by authors who claim the protection of minorities as a special achievement, when they state the court’s “impressive development as a basic rights court” from the anti-homosexual-decision of the 1950 to the later liberal decision (Rath 2013, 47). Exactly this “development” proofs the court’s dependency of the societal developments, since the constitution in 1950 and 2000 was the same!

II – THE FEDERAL CONSTITUTIONAL COURT IN THE CONTEXT OF A POST-TOTALITARIAN DEMOCRACY

It has become clear that the success of the Federal Constitutional Court, which makes it the political institution held in the highest esteem, rests on premises of the totalitarian past and present. This concerns the authoritarian, expertocratic stance of the elites, the mistrust of the parliament, and the situation of institutional openness.

Here, we are considering the development of democracy in the history of ideas, and in this context, it becomes apparent that the success of the Federal Constitutional Court was based on a Europe-wide trend of placing limitations on democracy. Constitutional courts are typical of post-totalitarian democracies (Möllers 2011, 285). They were introduced after World War II in Japan and Italy, too, and later also in Spain and Portugal. This holds true also for Brazil, although Brazil has a long tradition of highest courts (Barreto Lima 1999, Schmidt/da Silva 2012). “A central element of the post-war constitutional settlement, then, was that outside Britain, the idea of unlimited parliamentary supremacy ceased to be seen as legitimate.” (Müller 2011, 149) This went along with a “demonization” of the idea of sovereignty of the people, which had its roots in the revolutions of the 18th century (Maus 2011, 7). “Stability” was sought and the strengthening of governments was found. Paradoxically, people concluded from the excesses of the executive

branches of the fascist systems, which after all amounted to abolishing parliaments and unleashing the executive branches, that the parliaments had to be “disciplined” if a stable political order was to be created. This goes hand in hand with the success of the Christian Democratic parties after the war, as Müller emphasizes (2013, 223ff.). However, since the Christian Democrats accepted human rights as indispensable – and thus paved the way for the new constitutional order to be accepted (Müller 2011, 135), a coalition of liberal and traditional ideas emerged. “In concrete terms the imperative of constraining peoples translated into weakening parliaments [...]. [T]he danger of ‘parliamentary absolutism’ was to be banished once and for all” (Müller 2011, 148). In the process, the constitutional courts took on the function of guaranteeing the protection of individual rights, which the eternity clause had removed from the reach of the parliament. It was not by chance that in the Weimar Republic, too, conservative jurists called for judicial review of the legislature, which had just recently become democratic, and had pointed to judges’ strong personalities as a guarantor of these rights (Maus 1989, 123).

This strong fixation on the protection of basic rights is linked to a reorientation in the theory of democracy, however. If a court protects the rights of individuals in relation to the parliament, but not the rights of individuals in relation to the government and the administration, this establishes a form of separation of powers that defines the purpose of human rights in a fundamentally different way. In post-totalitarian systems, human rights no longer function as protection against the state, but are instead guaranteed by the state. According to the revolutionary interpretation, which fascism sought to abolish, basic rights guarantee protection against violations committed by the executive, and the basic rights themselves become effective only if couched in terms of law (Möllers 2011, 345, also Schönberger 2011, 27).

This interpretation of human rights as a resource for argumentation available solely to the bearers of these rights has been asserted by Ingeborg Maus’s reconstruction of the sovereignty of the people (Maus 2011). Maus also differentiates between two understandings of fundamental rights: the liberal, excluding, defensive concept is contrasted with the republican, participatory exercising of fundamental rights in the formation of political will (Maus 1994, 238f., 299). Human rights are characterized by a dual character as extralegal natural rights and as positive fundamental rights. Fundamental rights can become effective only as positive rights and must be cast in the form of laws by parliament to enable this. In this context, egalitarian participation is the basic prerequisite for the laws’ democratic

legitimation. Then, any violation of the fundamental rights guaranteed by the law is always committed by the executive, not by the parliament itself, which is the place where these rights were formulated in detail. However, the possibility to file suit against violations of basic rights on the part of the government and the administration must exist. Here, judicial review in administrative courts is definitely appropriate. It is not judicial review, but the resolution of court proceedings between governmental bodies, which would then be the task of a constitutional court that would be obliged to protect the equality of proceedings and the rights of the parliament. When the Federal Constitutional Court acts as the interpreter of fundamental rights, the legislature and the electorate that legitimizes it lose their capacity to make decisions. The societal process of discussion then becomes unnecessary, as does discursive political decision-making in parliament if the significance of basic rights emerges not from the will of the legislature, but from objective values of the constitution (Maus 1989, 131). Democratic decision-making is thus subordinated under the Federal Constitutional Court, not preserved by it.

III – FEDERAL CONSTITUTIONAL COURT AND POST-DEMOCRACY

Now, if one considers the position of courts as stable institutions in stable democracies, the strong position of the Federal Constitutional Court can be seen as the expression of an effort to shape the post-totalitarian democracies of the postwar period as “disciplined” democracies that accord parliaments in particular a weaker position. They were subordinated under a jurisdiction regarding fundamental rights that can expertocratically invoke the constitution and the “values” it allegedly comprises. In other words, the Federal Constitutional Court is part of a movement to institutionally weaken the democratic parliaments that are ensnared in a kind of balance of powers instead of being at the pinnacle of the hierarchy of powers. But this does not yet result in a contribution to the current process of post-democratization, and it cannot be defined in terms of content alone.

If the Court influenced politics in different ways as political majorities changed – in the conservative phase of restoration, it had a liberalizing effect, and in the social-liberal reform phase a limiting one (see Rath 2013, 11-2) – then its effect in terms of the substance of its decisions is not the actual topic of this consideration of the contribution of the Constitutional Court to post-democracy. If such a contribution existed, it would have to be determined by employing the theory of democracy. It must be found in the

significance of fundamental rights for the political process and the court's methodology for dealing with political questions.

To this end, the significance of the diagnosis of post-democracy must first be formulated more precisely. Crouch writes about post-democracy: "Under this model, while elections certainly exist and can change governments, public electoral debate is a tightly controlled spectacle, managed by rival teams of professionals expert in the techniques of persuasion, and considering a small range of issues selected by those teams. The mass of citizens plays a passive, quiescent, even apathetic part, responding only to the signals given them. Behind this spectacle of the electoral game, politics is really shaped in private by interactions between elected governments and elites that overwhelmingly represent business interests." (Crouch 2004, 4). Although Crouch emphasizes that this is an exaggeration, he also calls attention to the fact that in this model, political equality is suspended in a fundamental way, benefiting economic actors. Problems selected by experts are discussed, the citizens play a passive role, and elites settle politics behind closed doors, favoring the interests of economically strong actors.

Crouch's analysis of post-democracy lacks consideration of jurisdiction because he is concerned with the question of the paralysis and reinvigoration of political movements and parties, in particular with social concerns. These are traditionally presented on the street and fed into the political process from there. If these paths are blocked, or if no significant movements come into being, the option of resorting to the Court still remains. This does not require a political movement. This path could thus be considered as a strengthening of a movement or a substitute movement; activists specialized in legal disputes could represent, as advocates, the concerns of a movement too small. However, this is linked to the fundamental problem that democratic power to shape policy is translated into juridical power to block developments. After all, one can only file suit against laws that have been passed, but one cannot file suit with the goal of having laws adopted that have not yet been passed. Democratic activity is thus refashioned into a right to resistance directed against the authorities and consequently falls back to a pre-democratic level (Maus 1994, 32ff.).

Besides this transformation of democracy into pre-democracy, the translation of political questions into the code of fundamental rights generally results in a depoliticization and thus post-democratization of politics. Political questions that are negotiated as questions of fundamental rights are not only removed from the political process and transferred to the Court for decision-making, in this way they are also rendered unrecognizable as

political questions because the Court must place them within the logic of its case law. Martin Nettesheim has called this “postpolitics” (Nettesheim 2014). His descriptions confirms in a different way the diagnosis of post-democratic tendencies. According to Nettesheim, the Court has – after the successful liberalization of the society – developed a “postpolitical understanding of its business” (Nettesheim 2014, 483) that lies especially in the idea, to find “best solutions” without political dispute. This idea is based on a shift from a liberal understanding of fundamental rights to what Nettesheim calls the “dogma of a duty to protect” positions of basic rights which the court first invents and sees them then threatened. This depoliticizes the court’s decisions further and reduces lawmaking finally to a way of finding efficient and appropriate solutions to self-defined threats (Nettesheim 2014, 484). This increases the scope of the Court’s responsibility further because it can now declare a certain threat and then take the decision about the appropriate reaction over. According to this post-political understanding there is no room for political dispute in this constitutional order (Nettesheim 2014, 486). The role of the Court as experts stimulates the disenchantment with politics further (Nettesheim 2014, 489). It is a different way to describe the same tendency: Nettesheim sees a post-politicization of politics where others see this effect resulting from the political role of the Court. Taking away the decisions from politics and handing it over to a Constitutional Court in any case strengthens the post-democratic tendencies that dispossesses the parliaments. In other words, complaints against violations of fundamental rights are often an opportunity to achieve the repeal of an undesired law, outside of parliamentary discussion and decision-making. Individualized complaints against a violation of human rights are then an attempt to influence policy by other means. The methodology of the Constitutional Court strengthens the expertocratic effects of fundamental rights and practically demands people to articulate their concerns as being violations of fundamental rights. If they refer to human dignity, then the proceedings will be particularly promising and far-reaching, since reference to human dignity is the Court’s terrain par excellence.

An impressive example of dealing with questions of human dignity is to be found in the context of social legislation. When the complaint was filed that the standard Hartz IV benefits (social welfare payments) were too low and therefore violated human dignity, the Court did not respond by specifying a concrete monetary value, as the complainants had hoped, but by examining the calculation procedure that had “not ascertained the [standard benefits] in a constitutional manner” because it had deviated from

the “structural principles of the statistical model” selected by the legislature (BVerfGE 125, 175, quoted in Möllers 2011, 385).

According to Möllers, the Court thus “considered the legislature to be like a government agency that is to be bound to rules” (Möllers 2011, 385). However, it also changed the interpretation of the purpose of the complaint: “In this case, the acknowledged right to a social minimum means of subsistence became the right to a rational legislative procedure.” (Möllers 2011, 385) This decision results from the Court’s orientation toward its own case law. “In this manner, a type of logic unfolds in which standards take on a life of their own, retaining the consistency of case law without helping the parties or the political process.” (Möllers 2011, 386)

Möllers elaborates in particular how a problem relevant to theory of democracy emerges from the call to respect standards of legislative rationality. For this demand treats the parliament like an administrative body whose actions are to be measured according to rational standards, even though politics also includes a “voluntaristic element” “that virtually requires inconsistency.” (Möllers 2011, 398) In other words, where political compromise and legislative asynchronisms may be expressed, the Court considers the rational standard to be violated. The consequences of this are not insignificant: after all, “this privileges the status quo in relation to new rules, and in some fields of law, for example, tax law, it results in a redistribution from the bottom up” (Möllers 2011, 399).

In the case where a plaintiff sought to have the 345-euro standard welfare benefit raised and therefore filed suit because of a violation of human dignity, he was given a requirement for the Bundestag to adhere to the statistical methods selected. The Court sought to find the standard benefit unlawful, but was unable to do so precisely on the basis of the clause regarding human dignity, which simply does not permit it to determine from which amount on human dignity is or is not violated. Instead, the Court fell back on its own logic for orientation. In so doing, it secured the coherence of its decisions and simultaneously achieved the effect of a pseudo-decision. The legislature now had to determine the rates of benefits anew. Politically speaking, however, nothing changed, and Hartz IV remains controversial. If post-democracy amounts to experts and elites depriving the parliament of its right of decision and upholding the formal democratic procedures, then this decision reflects a large degree of post-democracy. The Court maintained the impression of formal procedures and decisions, but defended its own competence and instructed the legislature as if it (the legislature) were simply an administrative body. From a political point of view, the plaintiff

was unsuccessful. Thus, the Court contributed to depriving the parliament of its right of decision and pacifying political disputes that it (the Court) ostensibly resolved.

The translation of political questions into questions of fundamental rights that are to be solved expertocratically using terms as vague as human dignity further deprives the legislature of its right of decision, but is democratically correct. Decision-making is further removed from the political process, thus strengthening the post-democratic tendency. An alternative could lie only in the Court placing radical limits on itself. But this is hardly to be expected in a situation in which it is threatened by transnationalization and European courts³. It is precisely the Court's success story that could thus result in it continuing to work unflaggingly, which will, however, in the end only maintain the Court's post-democratic appearance.

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3 See the article by Markus Kotzur in this issue.

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