Rethinking the rise of the German Constitutional Court: From anti-Nazism to value formalism

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The German Constitutional Court, we often hear, draws its considerable strength from the reaction to the German Nazi past: Because the Nazis abused rights and had been elected by the people, the argument runs, it was necessary to create a strong Court to guard these rights in the future. This contribution proceeds in two steps. First, it sets out to show that this "Nazi thesis" provides an inadequate explanation for the Court's authority and rise. The German framers did not envisage the strong, rights-protecting, counter-majoritarian court it has become today. Even where the Nazi thesis does find some application, during the transitional 1950s and 1960s, its role is more complicated and more limited than its proponents assume. Second, this article offers an alternative way of making sense of the German Court's rise to power. Against a comparative background, I argue that the German Court's success is best understood as a combination between a (weak) version of transformative constitutionalism and a hierarchical legal culture with a strong emphasis on a scientific conception of law and expertise. The Court could tap into the resources of legitimacy available in this culture by formalizing its early transformative decisions, producing its own particular style, "value formalism." Value formalism, however, comes with costs, most notably an interpretive monopoly of lawyers shutting out other voices from constitutional interpretation.

1. Introduction

In 2011, the German Federal Constitutional Court celebrated its Sixtieth Anniversary with much praise. The celebrations captured the contemporary consensus about the German Constitutional Court, often described as one of the most powerful and most admired courts in the world. The Basic Law and many of the Court's jurisprudential innovations have become export models in many foreign countries. For some liberal

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American scholars, the German Constitutional Court has even come to define the positive counter-model to the US Supreme Court.[1]

Only rarely do we ask how the German Court got there. In retrospect, it seems as if the way things turned out was obvious, quite natural, and could not have been any other way. When we need to say more, the story we tell is one of the abuse of power and its taming by law. In Chancellor Merkel's words: ". . . it was the contempt of law which preceded the unspeakable horrors of the national-socialist tyranny. Therefore, those who created our constitution drew two central lessons from history: Law before power and effective control of power by law."[2] In the academic literature, we often find traces of a similar narrative: The German Court's strength is understood as the inevitable reaction to the catastrophic violation of human rights by the Nazi regime, which came to power with the consent of the German people.[3]

This article sets out to examine this narrative more closely. It argues that the Nazi thesis explains much less than its proponents assume. It had some purchase during the transitional postwar years, where the need to respond to the past drove some landmark decisions—albeit as only one imperative alongside others, including the need to affirm Germany's belonging to the West and to mark its distance to Communism. But the contemporary reaction to Nazism did not contemplate the strong counter-majoritarian activism the German Court has come to display. Nor is the Court's jurisprudence particularly concerned with minorities or especially internationalist compared to other courts, contrary to what the thesis would imply. It can therefore only offer a small part of an adequate explanation for why Germans have the kind of court they have today.

If the reference to Nazi history leaves many questions open, how then can we account for the rise of German constitutionalism with the Court in its center? Building on the work of Mirjan Damaska[4] and Bruce Ackerman,[5] I suggest in Section 3 of this paper that the German Court's strength is best understood as a synthesis between an (albeit weak) version of transformative (or activist) constitutionalism and a hierarchical culture of legal authority.[6] The first idea—transformative constitutionalism—is something we know best from states such as South Africa or India and it is, in terms of global constitutional history, a new thing. The second is comparatively old; a culture

[1] *See, e.g.*, Kim Scheppele cited in Maximilian Steinbeis, *The Curious Life of the Grundgesetz in America*, Verfassungsblog (Oct. 28, 2012), http://www.verfassungsblog.de/amerikas-liebe-zum-deutschen-grundgesetz/#.U6G9aI2SxT5 (last accessed July 21, 2014).

[2] Chancellor Angela Merkel, Speech on the occasion of the Constitutional Court's 60th Anniversary, Sept. 29, 2011, *available at* http://www.bundesregierung.de/Content/DE/Bulletin/2011/09/98-1-bk-bundesverfassungsgericht.html (last accessed July 21, 2014).

[3] Douglas P. Kommers & Russell A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany 1 (3d ed. rev. 2012); Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. Rev. 1971, 2003 (2004); Bruce Ackerman, *The Rise of World Constitutionalism*, Virginia L. Rev. 771, 779–780 (1997); Kim Scheppele, *Constitutional Interpretation after Regimes of Horror*, U. Penn. Law School, Public Law Working Paper No. 05 (2000), at 3, *available at* http://ssrn.com/abstract=236219 (last accessed July 23, 2014).

[4] Mirjan Damaska, The Faces of Justice and State Authority: A Comparative Approach to the Legal Process (1986).

[5] Bruce Ackerman, Reconstructing American Law (1984).

[6] Michaela Hailbronner, Tradition and Transformation: Rethinking German Constitutionalism (forthcoming 2015).

of authority that is hierarchically ordered and expertise-based, in other words, a legal culture closely related to traditional continental understandings of law as a science as well as the Weberian model of rational authority.[7] Fitting these two often divergent ideas of transformative justice and hierarchical authority together is the Court's and the legal academy's most remarkable achievement and the key to its strength. It is also what makes German constitutional jurisprudence special (though probably not unique), giving it its own particular style, which I call "value formalism."

If "popular sovereignty" is key to judicial legitimacy in the US, then the German counter paradigm is not its negation, distrust of democratic politics, but rather: legal expertise[8] in the context of transformative constitutionalism. This has a number of consequences for judicial authority, which I shall sketch out briefly in Section 4 of this article.

2. The Nazi thesis

If we want to understand the German Constitutional Court and how it came to exercise its current authority, we are often confronted with the argument that the German Court derives its power from the reaction to the German Nazi past. Following the Nazi era, the argument runs, parliament could no longer be trusted to protect rights and so it was inevitable that a strong court would arise to play this role. This idea is rarely elaborated on in detail, but its traces can be found in passing remarks at many international conferences and sometimes in the academic literature, for example on the first page of Kommers's and Miller's book on German constitutional jurisprudence,[9] and in the writings of Jed Rubenfeld,[10] Bruce Ackerman,[11] as well as Kim Scheppele who argues that the German Court's strength stems from its ability "to participate in shaping the collective memory about the previous regime(s) of horror."[12]

All of these accounts contain important insights. Yet the emphasis on the Nazi past suggests a skewed historical account: it cannot explain the framers' disinterest in constitutional review; nor, ultimately, can it account for the Court's authority and the bulk of its expansive jurisprudence today.

7 Damaska, *supra* note 4, at 18 *et seq*.

8 *See, generally*, for Germany and Europe, Or Bassok, *The Supreme Court's New Source of Legitimacy*, 16 U. of Pennsylvania J. Const. L. 153 (2013).

9 Douglas P. Kommers & Russell A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany 1 (3d ed. rev. 2012).

10 Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. Rev. 1971, 2003 (2004) (arguing that European internationalism constituted a reaction to bad experiences with both nationalism and democracy (since Hitler and Mussolini were both elected leaders) and that current international institutions are for this reason both antinationalist and antidemocratic).

11 Bruce Ackerman, *The Rise of World Constitutionalism*, Virginia L. Rev. 771, 779–780 (1997) (arguing that the Constitutional Court enjoyed special legitimacy because the judges were, unlike other parts of the German government, not former Nazi collaborators).

12 Kim Scheppele, *Constitutional Interpretation after Regimes of Horror*, U. Penn. Law School, Public Law Working Paper No. 05 (2000), 3, *available at* http://ssrn.com/abstract=236219 (last accessed July 23, 2014). For a more recent, modified, and somewhat toned down version, *see* Kim Lane Scheppele, *Jack Balkin Is an American*, 25 Yale J.L. & Hum. 30 (2013).

2.1. The Nazi past

The historical events during the Nazi regime hardly serve as an argument for a strong judiciary and a weak German parliament. The legal profession participated extensively in the administration of Nazi injustice within the administration, the academy, and the judiciary. Nine out of fifteen participants in the infamous Wannsee Conference, which organized the deportation and systematic mass murder of European Jews in Eastern European concentration camps, were lawyers.[13] In the academy, influential scholars like Carl Schmitt and Karl Larenz developed interpretative strategies of "concrete order thinking" (*konkretes Ordnungsdenken*) that allowed lawyers to transgress the boundaries of traditional legal doctrines as a means of adapting existing law to Nazi ideology without any legislative changes.[14] Adopted by the judiciary, they enabled courts to strip Jewish citizens of their rights under the BGB (*Bürgerliches Gesetzbuch*, German Civil Code).[15] If there was one lesson to draw from the legal profession's behavior during the Nazi era, it certainly wasn't that courts would be the institutions that could be trusted with safeguarding individual rights and establishing justice.

2.2. The founding of the Constitutional Court

The framers were very well aware of the role lawyers and courts played during the Nazi era,[16] which was symptomatic of a deeper public distrust of the judiciary in the immediate postwar era.[17] The framers did not plan for the new Constitutional Court to become a strong counter-majoritarian rights-protecting tribunal, either, because they didn't care much about constitutional review in general. For the delegates at the Herrenchiemsee Convention,[18] the new Court constituted at best a matter of secondary importance, and they spent most of their time discussing issues of federal relations, the allocation of taxes, and budgetary authority.[19] In the Parliamentary Council, things got even worse for the Court as the delegates deleted the special title accorded to the Court in the original draft and instead lumped it under a general title "the judiciary" together with all other courts.[20]

[13] They were Josef Bühler, Roland Freisler, Gerhard Klopfer, Friedrich Wilhelm Kritzingen, Rudolf Lange, Alfred Meyer, Erich Neumann, Karl Eberhardt Schöngarth, and Wilhelm Stuckart (see online documentation on and short bios of the participants of the Haus der Wannsee-Konferenz, *available at* http://www.ghwk.de/fileadmin/user_upload/pdf-wannsee/allgemein/viten-dt.pdf) (last accessed July 23, 2014).

[14] Bernd Rüthers, Die unbegrenzte Auslegung 122 *et seq*., 133 *et seq*. (2005); *see also* Oliver Lepsius, Die gegensatzaufhebende Begriffsbildung 219 *et seq*. (1994).

[15] For examples, *see* Recht, Verwaltung und Justiz im Nationalsozialismus 390 *et seq*., 488 *et seq*. (Martin Hirsch et al. eds., 1997).

[16] Deutscher Bundestag und Bundesarchiv under guidance from, Der Parlamentarische Rat 1948–1949. Akten und Protokolle. Band 14: Hauptausschuss, Teilband 1, at 724 (Horst Risse & Hartmut Weber eds., 2009).

[17] Deutscher Bundestag und Bundesarchiv under guidance from *id.* at 1172–1173.

[18] The Herrenchiemsee Convention was responsible for working out the first draft of the new German Constitution, to be presented to the Parliamentary Council afterwards.

[19] Heinz Laufer, Verfassungsgerichtsbarkeit und politischer Prozess: Studien zum Bundesverfassungsgericht der Bundesrepublik Deutschland 38 *et seq*. (1968).

[20] *Id.*, at 57.

Insofar as they did consider the Constitutional Court and its role, legislators in both the Parliamentary Council and later the German Bundestag—responsible for drafting the Court's organizational statute—were mainly concerned with the traditional questions of how to separate law and politics, what kind of institution (judicial or political) would exercise constitutional review (only a specialized court or all courts), and how this new institution should be constituted (lawyers or laymen).[21] Especially Christian Democrats, who constituted about half of the delegates, focused on the Court's competences in adjudicating organizational conflicts between different institutions, as the Weimar Staatsgerichtshof had done, rather than rights. They pushed successfully for a majority of their own nominees in the Court's Second Senate, then mostly charged with organizational and federal questions, instead of the First, charged with rights review, which they accepted would therefore be staffed with a majority of Social Democrat appointees (much to the delight of the Social Democrats, who seemed to have had a better sense of the things to come).[22] Nevertheless, individual rights were important to the drafters who framed them narrowly in order to ensure that courts could realistically enforce them.[23] At the same time, they couldn't agree as to which courts would enforce these rights and refused to provide for an individual complaint mechanism (today responsible for 95 percent of all cases) in the constitution,[24] fearing a "juridification" of politics.[25] Indeed, they generally worried about granting courts too much power.[26]

Mostly, however, they were concerned with questions of institutional design: How to build the new state and its institutions in a way less susceptible to authoritarian take-over than the Weimar Republic? For this purpose, the framers declared in the so-called eternity clause in article 79 of the Basic Law that a number of constitutional principles would not be subject to constitutional amendment. This oft-cited clause contains the basis of what has been described as German foundationalism[27]—the idea that the German state and society are based on a number of key values or principles that are beyond the reach of democratic majorities.

[21] *Id.*, at 52 *et seq.*

[22] Udo Wengst, Staatsaufbau und Regierungspraxis 1948–1953: zur Geschichte der Verfassungsorgane der Bundesrepublik Deutschland 241 (1984).

[23] Deutscher Bundestag und Bundesarchiv under guidance from Der Parlamentarische Rat 1948–1949. Akten und Protokolle. Band 5: Ausschuss für Grundsatzfragen, Teilband 1, at 33, 43 (Rubert Schick & Friedrich Kahlenberg eds., 1993).

[24] The constitutional complaint mechanism was only established subsequently (initially) on a merely statutory basis, mostly with the support of Social Democrats. This was changed later in a constitutional amendment, adding in 1969 art. 93 ¶ 1 No. 4a to Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBL I (Ger.).

[25] Michael Stolleis, Geschichte des öffentlichen Rechts in Deutschland: Bd. 4 Staats-und Verwaltungsrechtswissenschaft in West und Ost: 1945–1990 212 (2012).

[26] Carlo Schmid, in Der Parlamentarische Rat 1948–1949, *supra* note 23, at 67: "... The judge can veto such a law and claim that the legislature has not acted in accordance with the constitution." Georg August Zinn, in Der Parlamentarische Rat 1948–1949, *supra* note 23, at 68: "But this power of constitutional review cannot be without boundaries." (My translation.)

[27] Bruce Ackerman, We the People. Foundations 15 (1991).

Together with a number of other provisions, it provides the legal backbone of German "militant democracy," a concept developed by Karl Loewenstein[28] against the background of the Nazis' rise to power. Article 79 was not, however, primarily concerned with rights, but with the basic structures of the democratic state requiring protection against non-democratic forces: "Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible." It is thus mainly aimed at protecting federalism, democracy, the rule of law, and ultimately human dignity (as the only right).[29] Consequently, it is neither quite correct to say that the "the Basic Law explicitly precludes amending provisions that establish rights (and federalism)"[30] nor that "the new West German Constitution explicitly declared that a long list of fundamental rights cannot constitutionally be revised."[31] Finally, article 79 is largely irrelevant to the contemporary jurisprudence of the German Constitutional Court. In those few cases where non-amendable principles are at stake,[32] such as the Court's recent protection of German sovereignty *vis-à-vis* the European Union,[33] it hardly fits with the kind of idea the Nazi thesis seeks to convey.

If we think about it, this should not surprise us. After all, the framers could not have actually drawn on any positive example of a strong individual rights-oriented court at the time. In the 1940s, the US Supreme Court, the Germans' primary model for rights review, had not even decided *Brown v. Board of Education* (1954) and would only develop its famous civil-rights jurisprudence considerably later, in the 1960s and 1970s. In addition, the *Lochner* jurisprudence, of which the Germans were roughly aware,[34] could have hardly provided a model for the Germans to aspire to, considering that the US Supreme Court had spent much of its time in the late 1930s and 1940s rolling back this jurisprudence. In other words, a strong human rights tribunal along the lines of today's constitutional courts simply did not exist when the Basic Law was drafted.

[28] Karl Loewenstein, *Militant Democracy and Fundamental Rights*, *in* Militant Democracy 231 (András Sájo ed., 2004).

[29] Other rights may possess a substantive core that is protected as part of the right to dignity and thus not be subject to constitutional amendment. However, the Court has taken a narrow view on what might hold up against amendment, *see* BVerfGE 94, 49, ¶¶ 209 *et seq.*; *see* also BVerfGE 84, 90 and BVerfGE 30, 1 (where plaintiffs unsuccessfully raised the art. 79 argument). *See also* Hans D. Jarass, *Art. 79*, *in* Grundgesetz für die Bundesrepublik Deutschland. Kommentar, ¶ 6 (Hans D. Jarass & Bodo Pieroth eds., 2012).

[30] Alec Stone-Sweet, Governing with Judges. Constitutional Politics in Europe 59 (2000).

[31] Ackerman, *supra* note 27, at 15.

[32] *See, e.g.*, BVerfGE 89, 155 and 123, 267. Compare especially with the Czech decision Pl. US 19/08, Nov. 26, 2008 and Pl. US 29/09, Nov. 3, 2009. For a critique of the Maastricht decision, *see* Joseph H. H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 Eur. L.J. 219 (1995), and for the Lisbon ruling, *see* Daniel Halberstam & Christoph Möllers, *The German Constitutional Court says Ja Zu Deutschland*, 10 German L. J. 1241 (2009).

[33] BVerfGE 89, 155 and 123, 267.

[34] Der Parlamentarische Rat 1948–1949, *supra* note 16, at 697 *et seq.*

2.3. Contemporary jurisprudence

Relying on the Nazi thesis, we would also expect to see the Court more often and more strongly play the role of a guardian against what went wrong in the Nazi era, for example by focusing on the rights of minorities or by opposing nationalist policies and favoring internationalism. But this is not what has happened, and that should prompt us to think further.

To begin with, human dignity, the supposed symbol of the "never-again" theme in the Basic Law, is both a less important and a more ambiguous concept in German constitutional law than the Nazi thesis implies.[35] First, dignity standing alone plays little role as a legal concept in the Court's jurisprudence. Though it provides the basis for the other fundamental rights according to standard constitutional theory, dignity itself is rarely relevant because unlike other rights it cannot be limited, due to article 79(3), and is therefore defined narrowly.[36] Second, even where it does play a role—mostly in conjunction with other rights—this doesn't necessarily mean that anti-Nazi ideas are implicated. Sometimes they are. A good recent example is the Court's decision in the *Aviation Security Act* case, which prohibited the shooting down of a plane in a 9/11 situation due to concerns for the dignity of the captured civilians on the plane.[37] This anti-utilitarian logic reflects the rejection of the Nazi approach, captured in the Hitler Youth Slogan: "You are nothing, your people is everything." But cases like these make up only a small percentage of the Court's caseload. As James Whitman points out, the European concept of dignity is mainly a social status idea.[38] It is thus distinct from the Kantian object-formula, and instead of being a reaction to Nazi ideology, dates much further back to Roman law where it signified honor, social status, and rank of a person (*dignitas*).[39] While such social status was originally not accorded to everyone and not to the same degree—slaves and aliens often did not have any honor—over time, more and more people were accorded social status in a process which Jeremy Waldron describes as an "upwards equalization of rank."[40] Indeed, as Whitman convincingly argues, Nazi ideology, if anything, reinforced this development insofar as it accorded equal honor to every German as a member of the German Volk.[41] The Christian post-war use of dignity officially replaced that basis for equal recognition with God or, in a more secularized version, with the Constitution, thus extending it to all humans.[42]

[35] For the standard account, *see* Kommers & Miller, *supra* note 9, at 57 who are presumably drawing on the equally problematic German literature, notably the commentaries, *see especially* Matthias Herdegen, *Art. 1 GG*, *in* Maunz/Dürig: Grundgesetz Kommentar (Roman Herzog et al. eds., 2013).

[36] Jarass, *see supra* note 29, para. 11 ff.

[37] BVerfG, 1 BvR 357/05 (Feb. 15, 2006). *See also* Scheppele, *Jack Balkin*, *supra* note 12.

[38] James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus liberty*, 113 Yale L.J. 1151, 1166 (2004).

[39] *Id.*, at 1180 *et seq*. *See also*, for an—ultimately not quite persuasive—critique of Whitman's account, Gerald L. Neuman, *On Fascist Honour and Human Dignity: A Sceptical Response*, *in* The Darker Legacies of Law in Europe. The Shadow of National Socialism and Fascism over Europe and its Legal Traditions 267 (Christian Joerges & Navraj S. Ghaleigh eds., 2003).

[40] Jeremy Waldron, *Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley*, New York University Public Law and Legal Theory Working Papers, 229 (Apr. 2009).

[41] Whitman, *supra* note 37, at 1187.

[42] *Id.*, at 1166. I have benefitted from my conversations with Stefan Klingbeil on this point.

The difference between the Nazi era and the postwar conception of dignity is thus not an absolute one, but rather one of scope. Important parts of German dignity jurisprudence, such as privacy rights, thus do not so much reflect anti-Nazi ideas as a more longstanding social status idea.

Nor has the Court really assumed the role of a staunch guardian of politically vulnerable minority rights, which the anti-Nazi idea *would* imply. Of course, the German Court protects politically vulnerable groups, but like other courts, only some of the time. Not infrequently, the Court has denied them protection, whether in relation to the rights of political dissenters (e.g., in the famous *Elfes* case in 1957, accepting a travel ban for a government critic),[43] gay people (by upholding the criminalization of homosexuality in 1957),[44] women (in abortion decisions,[45] especially the 1974 judgment[46] in which the Court prohibited the government from decriminalizing abortion), and foreigners (striking down a state law granting voting rights to foreign citizens in municipal elections as unconstitutional, 1990).[47] While we can counter each of these examples with one where the Court *did* protect politically vulnerable groups, this can hardly be the point. If we really want to claim that the rejection of Nazism has shaped the Court into an especially strong rights-protecting court, we would expect the German Court to be more active in protecting politically vulnerable minorities than other courts. This claim, however, has to my knowledge not been made nor could it plausibly be made.

This mixed pattern of minority rights protection has much to do with the German history of fundamental rights protection that goes further back than the Nazi era. With German democratization failing in the nineteenth century and rights emerging as the only safeguards against an undemocratic state interfering in what came to be thought of as citizens' *private* spaces, German "individual" rights did not protect individuals in their capacity as part of a vulnerable minority. Rather, they protected society at large and existing social spheres in the language of individual rights.[48] Oliver Lepsius has therefore characterized the freedom of profession (*Gewerbefreiheit*) as the German "paradigm right" (*Modellgrundrecht*).[49] And it is in line with this understanding that the Court's initially generous approach to religious freedom has become less

[43] BVerfGE 6, 32.

[44] BVerfGE 6, 389. *See also*, for the more favorable treatment of gay couples in other jurisdictions, Thomas Hertling, Homosexuelle Männlichkeit zwischen Diskriminierung und Emanzipation: eine Studie zum Leben homosexueller Männer heute und Begründung ihrer wahrzunehmenden Vielfalt 73 *et seq.* (2011).

[45] BVerfGE 39, 1; BVerfGE 88, 203.

[46] BVerfGE 39, 1. In BVerfGE 88, 203 the Court allowed abortion to go unpunished but nevertheless preserved its character as a criminal offense.

[47] BVerfGE 83, 27; for a critique, *see* Seyla Benhabib, *Who Can Be A German Citizen, in* Seyla Benhabib, The Rights of Others: Aliens, Residents, and Citizens 202, 202 (2004) with the amendment that the Court does itself not build on the notion of the German people as a *Schicksalsgemeinschaft* ("community of fate") in this case, though it employs this term in other decisions.

[48] Oliver Lepsius, *Die Religionsfreiheit als Minderheitenrecht in Deutschland, Frankreich und den USA*, 34 *Leviathan* 321, 345 *et seq.* (2006).

[49] *Id.*

generous as Muslims bring more cases.[50] But if rights denote primarily protections of majoritarian interests, this is something rather different than the anti-utilitarian or minority-defending paradigm suggested by the Nazi thesis.

If its account of cases about rights and dignity is highly imperfect, the Nazi thesis also has very little to say about many fields of the Court's current jurisprudence, including those where the Court has been most expansive, such as tax law and social welfare where invalidation rates are highest.[51] Nor does it offer a very good explanation of the Court's jurisprudence with regard to European integration or its methodology. Rubenfeld's claim that the Court owes its strength to a particular German propensity towards international law, triggered by Holocaust-induced German postwar anti-nationalism,[52] is therefore unpersuasive. For one, the Court has emerged as the strongest institutional defender of the German nation state *vis-à-vis* European integration.[53] Second, German constitutional jurisprudence has remained comparatively parochial. While the Court sometimes cites other comparative sources, it engages altogether rather little with foreign law, at least as compared to many former Commonwealth courts such as the South African Constitutional Court or the Supreme Court of Canada.[54] The Court is somewhat more receptive to European human rights law, and in fact increasingly treats judgments of the European Court of Human Rights as authoritative; yet even here the Court formally clings to the hierarchical superiority of German constitutional law.[55] In German legal education, comparative law and international human rights law play at best a marginal role. Unsurprisingly then, there are no foreigners teaching in German law schools except at the occasional summer academies and special seminars. All of this would make little sense if international law and international values constituted in fact a major source of authority for the German Court.

This analysis reflects the obvious fact that courts do many things and so the Nazi thesis will almost by definition fail to speak at all to very important aspects of the Court's work. This alone should warn us against placing too much reliance on it. But the cases also show, in line with the more general arguments made in this section, how imperfectly the thesis speaks to the Court's activity even in the cases to whose subject matter it should have some relevance.

[50] *See* Christoph Möllers, *Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts*, *in* Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht 341 (Matthias Jestaedt et al. eds., 2011).

[51] Sascha Kneip, Verfassungsgerichte als demokratische Akteure: Der Beitrag des Bundesverfassungsgerichts zur Qualität der bundesdeutschen Demokratie 302 (2009).

[52] Rubenfeld, *supra* note 10.

[53] *See* Weiler, *supra* note 32, and for the Lisbon-ruling, Halberstam & Möllers, *supra* note 32.

[54] *See* Basil Markesinis & Jörg Fedtke, Engaging with Foreign Law 164 *et seq*. (2009); *see also* Axel Tschentscher, *Dialektische Rechtsvergleichung—Zur Methode der Komparistik im öffentlichen Recht*, JuristenZeitung 807, 808 (2007).

[55] The German Court, however, shares this openness with many other European Courts which have adopted similarly receptive attitudes both towards EU law and the European Convention on Human Rights (ECHR). *See, e.g.*, Katrin Mellech, Die Rezeption der EMRK sowie der Urteile des EGMR in der französischen und deutschen Rechtsprechung (2012); more broadly, *see* A Europe of Rights. The Impact of the ECHR on National Legal Systems (Alec Stone-Sweet & Helen Keller eds., 2008).

2.4. Transitions

Yet the Nazi past does matter for the development of German constitutionalism—albeit in a different and more limited way than its proponents imagine. In the 1950s and 1960s, German elites sought to rebuild a new state and society that would be different not only from the Nazi past but also the Communist regimes to its East.[56] Western Germany was now supposed to have finally closed ranks with other Western states.[57] The Court participated in these efforts. Sometimes explicit and often implicit references to the Nazi past and to Communism provided the Court with the impetus and authority for many of its early landmark judgments. The transitional paradigm therefore, certainly generated judicial activity, but as one institution among others: it did not drive a *counter-majoritarian* judicial "activism"—in contrast to what we can observe after the fall of Communism in some parts of Central and Eastern Europe.[58]

(a) Activism, but not counter-majoritarian

If the Nazi thesis were true, we would expect the Court to have taken bold counter-majoritarian steps in protecting individual rights from the outset, when the memory was still most fresh and the need for social change most urgent. We would expect the German Court to behave very much like its Eastern European counterparts in the 1990s which not only often significantly shaped the transition to a new society but did so by interfering in highly political questions in a counter-majoritarian fashion. This is, however, not the picture we get from the German Court in the 1950s. Proceeding very carefully and slowly, many of the Court's most important cases were organizational disputes rather than addressing rights and never before the 1960s did it declare a major project of the federal government unconstitutional.[59] If—as the Nazi thesis suggests—the German parliament had been discredited by historical events, this caution and deference makes little sense.

Only in the late 1950s and the 1960s did the Court's rights jurisprudence eventually start to take off. When it did, it was but a part of a broader project of transition pushed by the new German elites. Unsurprisingly, the Justices participated in this enterprise of recreating a new, more liberal German society. This new society would be different from its Nazi past, but also from the communist regime to its East. The Court was, however, by no means *specifically* entrusted with the task of preventing a relapse into fascism. Though a majority of the judges at the Court in the 1950s had been

[56] Scheppele, *Constitutional Interpretation after Regimes of Horror*, *supra* note 12 (acknowledging the role of keeping distance to the Communist regimes).

[57] *See, e.g.*, Heinrich August Winkler, Der lange Weg nach Westen. Deutsche Geschichte vom "Dritten Reich" bis zur Wiedervereinigung (2000).

[58] Ruti Teitel, Transitional justice, 204 *et seq.* (2000) and Ruti Teitel, *Post-Communist Constitutionalism: A Transitional Perspective*, 26 Colum. Hum. Rts L. Rev. 167 (1994). *See also*, more critically, Wojciech Sadurski, Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe 223 *et seq.* (2005).

[59] Justin Collings, Democracy's Guardians: Constitutional Justice in Postwar Germany, 1951–1989 (unpublished Ph.D. dissertation, Yale University) (Mar. 12, 2013) (on file with author), at 7.

opponents of the Nazis or even been persecuted and some had emigrated during the war,[60] the same was true for most members of Adenauer's first federal government.[61]

(b) Early landmarks

Between 1957 and 1961, the Court decided three landmark cases that still provide the basis for much of the German Court's expansive rights' jurisprudence until today. However, only one of them, *Lüth*, addressed the past experiences of National Socialism.

Both *Elfes* and the *Pharmacies* case were set against the background of an intensifying Cold War. Both were concerned to make a point about individual freedom—although in different ways. In *Elfes*, the Court adopted a broad and generous reading of individual freedom as a residual right to liberty, thus greatly increasing its own jurisdiction and the justificatory burden on the government.[62] This generous abstract conception, however, did not cash out on the individual level. The Court upheld the government's refusal to provide the plaintiff, Elfes, with a passport to travel outside of Germany where he planned to speak out at a conference against the West German military alliance with the West and for a peaceful solution in dealing with the GDR.[63] Coming as it did shortly after the 1956 Soviet intervention in Hungary, this kind of politics had lost its former attraction for most West Germans.[64] In affirming the government's restrictive stance, the Court continued its tough line on left dissidents following its prohibition of the German Communist party the previous year.[65]

If the Court in *Elfes* demonstrated its support for the fight against communism by upholding repressive measures, it turned fully liberal in the *Pharmacies* case.[66] The plaintiff had originally settled in the GDR where he had managed a pharmacy as a state-appointed tenant. In 1955, he left the GDR and moved to Bavaria, where he applied for a license to open a new pharmacy. The Bavarian authorities, however,

[60] Among the first generation of Justices at the Constitutional Court Ernst Friesenhahn, Georg Fröhlich, Gerhard Leibholz, Bernhard Wolff, Egon Schunck, Julius Federer, Rudolf Katz, Martin Drath, Wilhelm Ellinghaus, Gerhard R. Heiland, Franz Wessel, Erna Scheffler, Erwin Stein were critics of or even persecuted by the Nazis and most of the other Justices had at least kept their distance to National Socialism (*see* Stolleis, *supra* note 25, 148–152). The most prominent exception was probably Willi Geiger who made an impressive Nazi career, acting among other things as a prosecutor at one of the specialist courts and participating in a number of death sentences there (*id.* at 152–153).

[61] The members in Adenauer's first government who had been in opposition to the Nazi Regime were: Gustav Heinemann and Robert Lehr (Interior), Thomas Dehler (Justice), Fritz Schäffer (Finances), Wilhelm Niklas (Agriculture), Hans Schuberth (Telecommunication), Eberhardt Wildermuth (Housing), Hans Lukaschek (Resettlement), Jakob Kaiser (Unification), Heinrich Hellwege (Relations with the Bundesrat). *See* Internationales Biographisches Archiv, http://www.munzinger.de/search/query?query.id=query-00 (last accessed July 23, 2014).

[62] BVerfGE 6, 32.

[63] *See* Gunther Rojahn, Elfes—Mehr als ein Urteil, Aufladung und Entladung eines Politikums 117 *et seq.* (2009) (Ph.D. Dissertation, Freie Universität Berlin), *available at* http://www.diss.fu-berlin.de/diss/servlets/MCRFileNodeServlet/FUDISS_derivate_000000008674/Dissertation_-_ohne_Lebenslauf.pdf;jsessionid=DA083A32675851772A975F5297A571A9?hosts= (last accessed July 23, 2014).

[64] *Id.*, at 184.

[65] BVerfGE 5, 85. This is one of the rare instances where the Court was granted a power directly in response to the Nazi history as part of the Basic Law's conception of militant democracy.

[66] BVerfGE 7, 377.

refused to grant him such a license on the grounds that the geographic area in question was already supplied by one pharmacy and there was no need for another. Arguing on the basis of freedom of profession, the Court found for the pharmacist and struck down the Bavarian law that provided the basis for refusing the license. It argued that the statute's only legitimate purpose was the protection of public health, not protection against economic competition. Though the decision is silent about the political context of the time, elaborating instead on the pre-war German paternalist history of regulation, the discussion about public health was, as in any other field of policy, heavily shaped by the constant need for self-assertion in relation to the GDR and the opposition to "socialism."[67] In light of this context, the irony of the facts at hand is hard to overlook: The plaintiff, after all, had already achieved his aim of having his "own" pharmacy within the limits of the GDR economic system, but had later left and chosen the "free" Germany where he was now being refused a license for a pharmacy on grounds of extensive state planning. Sanctioning this rejection by means of constitutional law would therefore have sent a rather odd political signal.

As important as signaling the distance to Communism was marking the break with the Nazi past. The *Lüth* case had already attracted much attention in the media as it concerned one of the most precarious and sensitive topics of the postwar years:[68] How to deal with the past and those who had been involved in Nazi injustice. Lüth, a politician and administrator in the state of Hamburg, called for a boycott of a movie directed by Veith Harlan who had notoriously collaborated with Goebbels in the making of his anti-Semitic movie *Jud Süß*, which had been used as explicitly anti-Semitic propaganda. Lüth's call to boycott Harlan's movie stirred up a heated public debate about whether the time was right to draw a line (*einen "Schlussstrich"*) on discussions of the uncomfortable past.[69] Harlan's production company sought and won an injunction against Lüth based on the established German doctrine that the incitement of boycotts constituted an act against public morale and was thus illegal under the German civil code. With the help of Social Democrat parliamentarian and jurist Adolf Arndt, Lüth eventually turned to the Constitutional Court. He argued that the civil courts had infringed on his right to free speech under the Basic Law—thus raising the question for the Court if fundamental rights would be applicable in disputes between two private individuals. The Court answered "yes" and justified its decision by reading the Basic Law as an "objective order of values" that had to be taken into account when interpreting statutory general clauses.

This turn to values reflects a widespread conviction at the time that the moral catastrophe of the Third Reich had been brought about by a lack of (Christian and humanist) values in the German society. The fact that value jurisprudence

[67] Philip Manow, *Entwicklungslinien ost-und westdeutscher Gesundheitspolitik zwischen doppelter Staatsgründung, deutscher Einigung und europäischer Integration*, 43 Zeitschrift für Sozialreform 101 (1997).

[68] At the time, the media hardly reported the decision at all, and it certainly did not stir much public interest. *See* Collings, *supra* note 58, at 121, 131.

[69] Thomas Henne, *Erich Lüth vs. Veit Harlan—Sechs Göttinger Beiträge zum Lüth-Urteil des Bundesverfassungsgerichts von 1958* in Kontinuitäten und Zäsuren. Rechtswissenschaft und Justiz im "Dritten Reich" und in der Nachkriegszeit, 213 *et seq*. (Eva Schumann ed., 2008).

methodologically resembled the techniques of the Nazi jurists was initially only noticed by few.[70] In any case, it was different values that were now being rediscovered, be it in the writings of Goethe or Lessing or in Christian theology. Not only the concrete context—i.e., how to deal with this past—but also the deeper conceptual framework of *Lüth* hence contributed in important ways to the transition to a new state and society that would be different from the Nazi past. None of this, however, implied counter-majoritarian activism. On the contrary, in evaluating whether Lüth's call for a boycott constituted an act against public morale, the Court explicitly referred for guidance to a similar statement made in the federal parliament calling the showing of Harlan's movie a "disgrace" and the fact that the statement had received applause both from the government parties and the Social Democrats.[71] Moreover, *Lüth* fitted in nicely not only with the prevalent value-talk, but also with an emerging willingness among political leaders to take past injustice and its perpetrators more seriously, reflected for example, in the founding of a central prosecutorial agency for Nazi crimes in *Ludwigsburg* in 1958.[72] This second dimension, how to grapple with the past, was also what caught the judges' primary attention rather than the implications of the new concept of values. As a participant in the case later admitted, the judges were not fully aware of the scope of the decision they had taken at the time.[73]

2.5. Summary

Nazism and Communism, the past and present "regimes of evil,"[74] hence helped the Court to develop an expansive reading of fundamental rights and the concept of the Basic Law as an objective order of values. The transition away from them did not, however, entail a robust idea of counter-majoritarian judicial activism, as the Nazi thesis implies. This may at first be counter-intuitive. After all, a large part of the West German population in the 1950s showed little interest in or enthusiasm for politics[75]—as it has similarly been observed for the Eastern European transitions,[76] as well as on a more global scale in relation to the rise of international human rights.[77] This anti-political sentiment is usually seen as beneficial to the rise of new institutions such as courts that may fill the legitimacy gaps arising from the distrust of traditional party politics. But this is not what happened in the German case. Not only was the German judiciary largely discredited in the eyes of the public due to its involvement with the Nazis, but the emphasis on the public's disenchantment with politics also risks overlooking what was going on among the new political elites. These emerging

[70] Stolleis, *supra* note 25, at 243.
[71] BVerfGE 7, 198 ¶ 78.
[72] Henne, *supra* note 68, at 225.
[73] Uwe Kranepohl, Hinter dem Schleier des Beratungsgeheimnisses: Der Willensbildungs- und Entscheidungsprozess des Bundesverfassungsgerichts, 345 (2010).
[74] Scheppele, *Constitutional Interpretation after Regimes of Horror*, *supra* note 12.
[75] Hans-Peter Schwarz, Die Ära Adenauer: Geschichte der Bundesrepublik Deutschland/Gründerjahre der Republik 1949–1957, at 379 (1981).
[76] Teitel, *supra* note 57.
[77] Samuel Moyn, The Last Utopia (2011).

elites had often been critical towards the Nazi regime and were passionately committed to building a new democratic society.[78] Their vision included rights review, but not the idea of a strong counter-majoritarian court. In turn, the first Justices at the Constitutional Court shared with the emerging elites the experience of opposition to the Nazi regime and sometimes persecution or exile. A number had personal ties to them (such as the Court's president Höpker-Aschoff). If there was a general sentiment of anti-politics in the larger German public, the Justices hence were not likely to share it. Rather, they, too, wanted to contribute to the building of a new Germany state and society—together with the government and legislators. Here, then, is the riddle: What was it that ultimately led the German Court to develop the strong and often counter-majoritarian rights jurisprudence it is so famous for today?

3. Comparisons

The beginnings of an answer lie in examining the deeper legal culture in which the German Constitutional Court found itself operating. Such a project requires careful analysis and I can only offer a first sketch here.[79] For this, we need to take a step back and look at the German Court from some distance. From further away, we will begin to see the contours of a new picture emerging. To get a better sense of it, our inquiry must be both wide-ranging and deep. How citizens understand the state and law—whether they think that any government is inherently oppressive, or believe that the state is a good thing and law is its best and most important tool to realize a better world—will influence the role of courts in a society. Nor should we confine ourselves to looking at constitutional courts merely as strategic actors seeking to carve out a maximum of power for themselves in a larger institutional context, thus isolating them from their legal tradition and their broader cultural context. Justices at constitutional courts have been first and foremost educated, worked, and socialized for decades in a legal system before their appointment to the court. Unsurprisingly, they will be influenced by their specific legal culture, and by the more general attitudes towards authority in society.

Against this broader backdrop, we can start to recognize similarities between the constitutional jurisprudence of Germany and other countries where we might not have suspected them, such as in India or South Africa. Germans share with countries like these the idea that the state has to play an important role in shaping society. Moreover, all of these states understand their constitutions as giving expression to some greater, comprehensive idea of justice. Conversely, other jurisdictions, which Germans assume to be familiar, such as the United States, suddenly appear strange, their constitutional law oddly outdated. We discover another group of family resemblances among many of Germany's European neighbors. Like Germans, they organize the exercise of state authority in hierarchical structures and entrust highly specialized

[78] Schwarz, *supra* note 74, at 412 *et seq*. For a concrete example, *see Transcript of Radio Interview with Ernst Benda (a former Chief Justice)*, Bayerischer Rundfunk (Sept. 24, 1999) (on file with author).

[79] See for a more detailed version Hailbronner, *supra* note 6.

administrative tasks to professionals who will usually be career bureaucrats. In such systems, law is treated as a science and the performance of legal tasks requires long and intensive periods of study and training. As a result, the division between law and other disciplines is a self-evident truth and a key tenet of the professional self-understanding of lawyers.

The explanatory framework emerging from this enquiry comprises two binary variables, which build on the work of Mirjan Damaska[80] and Bruce Ackerman.[81] The first variable is a concept of transformative/activist constitutionalism, which I contrast to a more traditional (US) model of reactive constitutionalism. While the latter is first and foremost concerned with safeguarding individual rights and preventing concentrations of power in state institutions, activist constitutions set out a vision of a just society. The second variable concerns the way authority is conceived within the broader political and legal culture: Is it exercised by hierarchically ordered bureaucracies staffed with professional experts, or is it—in the coordinate model—typically shared between different offices that derive their legitimacy from their connection with the public or social elite?[82]

3.1. Transformative and reactive constitutionalism[83]

Activist (or transformative) law is a relatively new thing in the history of constitutionalism. It is aspirational because it seeks to change and improve the state and society. In contrast, reactive constitutions seek to protect society and individuals against state intervention. They understand social practices as manifestations of individuals exercising their freedom. Reactive constitutions are therefore first and foremost concerned with safeguarding negative rights and preventing the state or any one institution from holding too much power. In other words, they mainly seek to keep government out. In contrast, activist constitutions seek to bring government in and make use of its powers for the greater good. They guide and regulate governmental action.

Activist constitutionalism depends *firstly* on the existence of an activist state, concerned with enhancing public welfare and constructing a just society.[84] To understand what I mean, we need to take a look at its opposite: the reactive state. A reactive state confines itself to preserving peace and order by settling individual conflicts with a minimum of interference with individual rights and existing social structures.[85] The characteristic legal form of the reactive state is the contract: As individuals know what is best for them, the state does not usually intervene in private interactions. Only when disputes arise is state intervention required. Ideally, state intervention is minimal even there—a classic example is the practice of the private prosecution of criminal offenses

[80] Damaska, *supra* note 4.

[81] Ackerman, *supra* note 5.

[82] For a more detailed account of this framework, *see* Hailbronner, *supra* note 6.

[83] The concept of activist constitutional law builds on Damaska's concept of the reactive and activist state, Damaska, *supra* note 4, 71 ff. It has been complemented with some Ackermanian ideas from Ackerman, *supra* note 5 and then further developed to accommodate some of the more recent trends in global constitutional law.

[84] For the concept of the activist state here and below *see* Damaska, *supra* note 4, at 80 *et seq*.

[85] For this and the following, *see id*. at 73 *et seq*.

in England that only gradually became state-centered during the nineteenth century. In contrast, the activist state is not content to leave the realization of justice to social forces, individual action, or the "market," and certainly does not assume that existing social structures are necessarily valuable as such. Realizing a better world entails not only changing the state, but also individual behavior and society itself. There are thus no social or individual spheres that are above state intervention. State planning and the administration of governmental programs extend potentially to all aspects of citizens' lives.

Second, we need a constitution and also a court with the power of judicial review, that is, the power to declare statutes unconstitutional. In order to realize the constitutional imperative of change, this court must moreover have a sizeable docket and hence a sufficiently broad jurisdiction.

Third, an activist constitution is understood as the fundamental legal and ethical program of the state that lays out the state's transformative vision. This marks a sharp break with the traditional reactive type of constitution. Because activist constitutions need the state in order to realize their aspirations for change, there is a tendency to allow for constitutional adjudication beyond the violation of negative rights. They also routinely have a number of non-traditional features, the first two of which are anathema to reactive constitutions. One is enforceable state duties and/or positive rights.[86] Another is that activist constitutions characteristically provide for a direct or indirect application of constitutional rights between private persons. If society is to change, so must the relationships between private parties. Finally, the interpretation of an activist constitution will usually be substance-driven and require considerable flexibility. Since its most important goal is to realize its vision of justice, it matters little who or what institution carries out the relevant tasks as long as the envisaged goal is ultimately achieved in a satisfying and efficient way.

3.2. Hierarchical and coordinate authority[87]

Our second variable is concerned with the reasons why citizens accept the authority of state institutions and of the judiciary in particular. In a hierarchical system, authority is organized in hierarchical structures and exercised by a professional—in Weberian terms, rational—bureaucracy.[88] While there may exist some higher source of legitimacy at the very top (god, the king, the people), official institutions' primary claim to authority rests on their professionalism and expertise guaranteeing efficiency and thus ultimately good results. The principle of separation of powers operates in this system not as a safeguard against concentrations of power, but rather as a tool for

[86] Note that Damaska's original conception of activist statehood does not encompass the concept of individual rights, for more *see id.* at 32.

[87] The following two paragraphs provide a rough summary of Damaska's concept of hierarchical and coordinate authority, *see* Damaska *supra* note 4, at 16 *et seq.* with some illustrations added by the present author.

[88] Max Weber, *Wirtschaft und Gesellschaft. Die Wirtschaft und die gesellschaftlichen Ordnungen und Mächte. Nachlaß, in* Max Weber, Gesamtausgabe, Teilband 4, at 157 *et seq.* (Edith Hanke ed., 2005) (1922).

the rational ordering of the state in order to increase efficiency. When trained bureaucrats perform their functions, they act in the name of the institution, not their own individual personalities. Courts, too, will deliberate secretly, dissents will be prohibited and decisions will be presented to the public as those of the court rather than mere majority opinions. Specialization and the division of functions will furthermore produce more technical rules of decision-making divorced from the common-sense pragmatism of the well-socialized layman prevalent in common law systems. Law is considered a science whose mastery requires considerable effort. Arbitrariness and inconsistencies threaten the claim to judicial authority. In order to avoid them, lawyers, scholars and judges work towards constructing law as a logically consistent, gapless system of norms. The imperative of upholding its integrity prevails over case-to-case considerations of what seems right in individual disputes.

In contrast, in a coordinate system, authority is not exercised on the basis of a strict separation of functions, but instead often shared among several officials or institutions whose functions are not strictly delimited. In an ideal form of the coordinate model, state officials are not specialized professionals, but rather generalists and sometimes laymen drawn from social elites, such as the Justices of the Peace in Victorian England, or directly elected by the people, as is the case with many US prosecutors, judges, sheriffs, etc. If professional expertise is indispensable to fulfilling particular state functions, such as in the federal agencies of the post-New-Deal period in the US, their competences tend to be subjected to some mechanism of surveillance, preferably one that brings the society and the people back into the administrative process, such as the notice and comment procedure for rulemaking. Consequently, the idea that decision-makers give up their social/private personality when they become part of the administration of justice is seen as undesirable and contrary to the dignity of officials. Standards for decision-making cannot be separated from the prevailing social norms and expectations or—in some cases—the elites' idea of justice.

4. Beyond anti-Nazism

4.1. Transformations

Transformative constitutionalism, originally developed in the South African context, is often considered a typical hallmark of the Global South. The reader might find it startling to have German constitutionalism described as transformative. But at the core of transformative constitutionalism is the idea that we must change.[89] This is, by no means, a vision unique to the Global South. The idea of change entails that government must be a main agent in this change, but also that the constitution itself must guide and steer our efforts to change. Transformative constitutionalism is often present in transitions, but it can outlast them. The more utopian our vision of change, the more we have to do in order to get there and indeed, we may never get there.

[89] Karl E. Klare, *Legal Cultura and Transformative Constitutionalism*, S. Afr. J. on Hum. Rts 146 (1998); Pius Langa, *Transformative Constitutionalism*, 17 Stell. L. Rev. 351 (2006).

With their early landmark decisions, the German Justices introduced a new paradigm of transformative constitutionalism. Though German constitutional law was less enthusiastic and utopian about the necessary change than its current South African counterpart, it nevertheless showed many typical features of transformative constitutional regimes that persist today: (1) the application of constitutional law to disputes between private parties, (2) the development of state duties and corresponding positive rights, (3) the strong focus on substantive rather than procedural and organizational law.

The application of constitutional law to disputes between private parties has not only greatly expanded the Court's jurisprudence but also led to the "constitutionalization" of many important fields of law. Even though the language of values has become more rare in German law in recent years,[90] value jurisprudence has led to the creation of governmental duties to protect rights that have by now found different doctrinal shapes but are, if anything, more prevalent. Corresponding positive rights often require the government to take certain organizational steps and sometimes even to provide certain services, as in the case of welfare. The typical emphasis on questions of substantive law rather than procedural or institutional themes is evident from the prolific writings on substantive law and the widespread neglect of other questions.[91] In addition, restrictions on the withdrawal of cases,[92] abstract review and most importantly the Court's frequent tendency to build up both deep and broad constitutional standards not directly relevant to solving the concrete case at hand (*Maßstäbe*)[93] all share one thing: They demonstrate that the protection and realization of the Basic Law is seen as a good in itself, independent of any concrete violations of either individual or institutional rights.

This new constitutional paradigm also had initially at its core the idea of change as both a legal and moral imperative. From the mid-1950s through much of the 1960s, the discrepancies between the Basic Law's normative claims and their realization in much of German law and society were a frequent cause for complaint—quite similar to current South African discourse, for example.[94] In these first decades, the Court contributed significantly to the liberalization of German society. However, the emerging student movement and then the first Social Democrat government under Willie Brandt, however, relegated the Court to a back seat. Pointing to the continuities

[90] *Compare* Stolleis, *supra* note 25, at 548. Instead, the Court and scholars increasingly describe rights as objective principles and have insofar preserved the major attributes of value jurisprudence, *see* Hans D. Jarass, *Vorb. vor Art. 1*, *in* Grundgesetz für die Bundesrepublik Deutschland, *supra* note 29, ¶ 3.

[91] *See, e.g.*, Oliver Lepsius, *Rezension von: Frieder Günther: Denken vom Staat her. Die bundesdeutsche Staatsrechtslehre zwischen Dezision und Integration 1949–1970*, 4 sehepunkte (2004), *available at* http://www.sehepunkte.de/2004/05/5714.html (last accessed July 23, 2014), offering a different explanation for this phenomenon, though not necessarily one in conflict with the account provided here.

[92] *See, e.g.*, BVerfGE 98, 218—Rechtschreibreform; for a critique and a more detailed account with further decisions, *see* Christoph Möllers, Gewaltengliederung, 151 (2005).

[93] Oliver Lepsius, *Die maßstabsetzende Gewalt*, *in* Das entgrenzte Gericht, *supra* note 49.

[94] *See, e.g.*, Jackie Dugard, *Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa's Transformation*, 20 Leiden J. Int'l L. 965 (2007); David Bilchitz, *Giving Socio-economic Rights Teeth: The Minimum Core and its Importance*, 119 S. African L.J. 484 (2002).

between the authoritarian and materialist postwar society and the Nazi era, many students called for a more radical change involving a democratization of German society and the abolishment of established hierarchical structures. Brandt's Social Democrat government, running with the slogan "dare more democracy," took up some of its demands and initiated a series of reforms. As the Court couldn't or wouldn't follow this reformist line, it found itself quickly on the conservative side, invalidating a number of the government's reform projects. And today, celebrations of the Basic Law usually show a certain satisfaction with what has been achieved rather than concentrating on what still needs to be done.[95]

Nevertheless, the Court's early landmark decisions had by then became entrenched in legal doctrine and would provide the basis for much of the Court's expansive jurisprudence up to the present. Their continuing influence justifies speaking about German constitutionalism as transformative—even though much of its initial ideological clout has faded.

4.2. Consolidation

Once the Court had lost its public image as progressive frontrunner, it could no longer credibly invoke the need for change to justify the expansion of its authority. Its increasingly counter-majoritarian jurisprudence led to conflicts with the government during the 1970s. Over time, however, the Court had built itself a different kind of authority: the authority of experts operating in a hierarchical setting. This the Court could do by linking itself to a deeper German legal culture. Rather than building its legitimacy on work done to produce social change—as the Indian Supreme Court, for example, in many ways does—it chose to establish itself firmly as a legal body charged with the task of legal interpretation, and no more. That way, it could draw on the resources of legitimacy available within this culture. This required the Court and legal academics, however, first of all to reconcile their transformative conception of constitutional law along with the established hierarchical legal culture. That they succeeded in this task is the great achievement of German lawyers. The result of their efforts is a particular style of jurisprudence, which I call value formalism.

This legal culture, with its emphasis on expertise and its scientific conception of law, did not easily fit with the Court's turn to transformative constitutionalism. No one understood this more quickly than Ernst Forsthoff, a former student of Schmitt[96] who sharply criticized the Court's new activist paradigms.[97] This was hardly surprising: historically, most legal systems, including the German one, started out with a more or less liberal/reactive conception of (negative) individual rights as devices to secure individual freedom against the state (even though the German state itself has traditionally been

[95] *Compare* Stolleis, *supra* note 25, at 659.

[96] *See, similarly*, Carl Schmitt, Die Tyrannei der Werte (Duncker & Humblot, 2011) (1961).

[97] *See, e.g.*, Ernst Forsthoff, *Die Umbildung des Verfassungsgesetzes*, *in* Rechtsstaat im Wandel 134 (1976). For an account of the central debate about the meaning of the *Sozialstaat* principle, *see* Philipp Thurn, Welcher Sozialstaat? Ideologie Und Wissenschaftsverständnis in Den Debatten Der Bundesdeutschen Staatsrechtslehre 1949–1990, at 23 *et seq.* (2013).

more activist than reactive).[98] Since this liberal understanding became entrenched, it appeared and still appears to some as the only "legal" conception—merely because it is familiar and already elaborated by doctrinal scholars and courts.[99] It thus provided the basis for an enduring misunderstanding that led scholars to denounce activist law as "political" and "non-legal." As with most myths, this one has a kernel of truth in it, too. Transformative constitutionalism constantly produces many new questions: compared to a social utopia, real society will necessarily always appear lacking and therefore change indispensable. This is perhaps best illustrated by India, where law has become more than anywhere else a tool for social upliftment—an idea hard to reconcile with legal certainty and determinacy. There is always so much new work to be done in order to realize the unreachable constitutional ideal, so it is difficult to establish consistent a priori standards of what should be done in a given case. Indian judges have consequently spent little time and effort developing more consistent standards of decision-making.[100]

Not so in Germany. The big achievement of German constitutionalism, and the basis of the Court's legitimacy, is its synthesis of transformative constitutionalism and a hierarchical idea of authority. By formalizing value jurisprudence, the Court could make it into something sufficiently legal. Scholars played a big role in this development. While the Court set out its transformative paradigms, scholars provided the necessary doctrinal support for the Court's jurisprudential creations, which built them into an overarching structure and concretized them. The political context and the need many scholars had for political rehabilitation helped. Fundamental opposition to the new constitution or the Court was strategically unwise, especially for those who had compromised themselves in their writings during the Nazi era. Many quietly worked their way back to academic recognition and social standing by providing the necessary doctrinal support to the new Court.[101] Their work provided the Court both with the necessary professional credibility and guidance[102] with its orientation towards practical application and neat categorization in "*herrschende*" (ruling) and minority opinions. By no means uncritical, this scholarship nevertheless accepted the basic premises of the Court's jurisprudence—thus attracting its later description as "Constitutional Court positivism."[103]

This process of value formalization did not go unchallenged. Some scholars put forward less formal and more political ideas of the constitutional law. They were, however,

[98] By a liberal concept of rights I do not mean a reactive concept, even though, on their face, the two can be hard to distinguish. For details of the relationship between these two terms, *see* Hailbronner, *supra* note 6, Chapter 2.

[99] I have benefitted here from my conversations with James Fowkes.

[100] *See, e.g.*, Upendra Baxi, The Indian Supreme Court and Politics 16 (1980); Pratap Bhanu Mehta, *The Rise of Indian Judicial Sovereignty*, 18 J. of Democracy 70, 75 (2007).

[101] Michael Stolleis, The Law under the Swastika, Studies on Legal History in Nazi Germany, Part III, at 186 (Thomas Dunlap trans., 1998). *See also, generally*, Christoph Möllers, Der vermisste Leviathan: Staatstheorie in der Bundesrepublik 42 *et seq.* (2008)

[102] For the importance of legal science in continental European scholarship more generally, *see* Armin von Bogdandy, *The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe*, 7(3) Int. J. Const. L. 364 (2009).

[103] Bernhard Schlink, *Die Enthronung der Staatsrechtswissenschaft durch die Verfassungsgerichtsbarkeit*, 28 Der Staat 161, 163 (1989).

ultimately not successful in changing the perception of constitutional law.[104] The call for democratization and the outcry against hierarchical structures in the seventies posed a challenge to traditional self-understandings. When the Constitutional Court introduced dissenting votes in 1971, this reflected a break with the traditional model of hierarchical authority. It remained, however, an isolated instance. When the political attacks on the Court in the 1970s for its conservative resistance against Social Democrat reform projects had passed, the Court emerged stronger than before. By the late 1980s and 1990s, mainstream scholarship was increasingly dominated by the demands of legal education with an expanding market for teaching materials that would present legal doctrine in an "objective" way, distilled from the prevailing "*herrschende Meinung*," and purged of anything not directly relevant to "solving" cases in law exams.[105] Though no German scholar actually believed that law presented one right answer, books for the teaching market were increasingly written as if there was one. Moreover, this answer would appear as purely legal, thus often disregarding the historical context of its genesis and its interdisciplinary roots and disguising the author's ideological stance.

Other developments complemented this trend towards purer and more doctrinal legal scholarship. The Court's writing style largely conformed to continental tradition, deductive and dry without the rhetorical flourish of many common law opinions. If possible, the Justices presented their decisions as unanimous rulings of the Court, only sometimes publishing the voting results within the Court. Dissents were kept to a minimum, with only 7 percent of all cases between 1971 and 2012 accompanied by dissenting opinions.[106] Even the selection of Justices has increasingly become more expert-centered, with law professors now forming the majority of the Justices as the only real experts in constitutional law.[107]

4.3. Value formalism

The result of the successful synthesis of transformative constitutionalism with a hierarchical paradigm of authority is value formalism.[108] Though ultimately successful,

[104] *See esp.* Martin Drath, *Die Grenzen der Verfassungsgerichtsbarkeit*, 9 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 17 (1950).

[105] Christoph Möllers & Hannah Birkenkötter, *Towards a New Conceptualism in Comparative Constitutional Law or: Reviving the German Tradition of the* Lehrbuch, 12(3) Int'l J. Const. L. 603 (2014).

[106] See official Court statistics, *Entscheidungen mit oder ohne Sondervotum in der amtlichen Sammlung (BVerfGE)—Bände 30–130 (1971–2012)*, http://www.bundesverfassungsgericht.de/organisation/gb2012/A-I-7.html (last accessed July 23, 2014).

[107] Outside the academy, specializing in constitutional law is usually not feasible for practitioners because of the relatively low number of available cases, the fact that these cases first have to be argued in ordinary courts, and the frequent use of law professors as lawyers in constitutional litigation. Note, however, that three (out of eight) justices in each Senate at the Court must be recruited from the respective federal supreme courts according to § 2 ¶ 3 BVerfGG.

[108] "Value formalism" also describes a concept employed in quantum physics. In legal literature, it has to my knowledge only been used in two publications. First, with a somewhat unclear meaning, referring especially to the US Supreme Court's trust in Social Darwinism in the Lochner era, by James G. Wilson, *The Morality of Formalism*, 33 U.C.L.A. L. Rev. 431, 431 (1985); and, second, not in any defined way by Ralph David Grillo et al., Legal Practice and Cultural Diversity 166 (2009). My understanding of value formalism has no relationship to these.

value formalism is not free of tensions. Conceptualizing rights as values—or even as optimization principles, following Alexy[109]—breaks with traditional formalist approaches to legal interpretation. Their teleological character calls for their greatest possible realization, confined only by other values, and hence eschews fixed a priori rules for their application.[110] Hierarchical systems of authority, by contrast, favor clear and a priori delineated rules of decision-making, which ill fits this sort of dependence on facts and context. One of the big challenges of value formalism, and one of the key conditions for its success, is how to allow for the necessary flexibility while simultaneously being and/or appearing to be sufficiently legal and predictable. We should not therefore be confused if some observers describe German constitutional jurisprudence as pragmatic and open to policy arguments (political) and others simultaneously as formalist, dry and technical (legal). It is indeed all of these things—and it must be in order to strike the balance between the conflicting demands of hierarchical authority and an activist paradigm of constitutional law. This style, though not necessarily unique, distinguishes German Court from many other renowned courts around the world, such as the South African Constitutional Court, the Indian, and—perhaps most clearly—the US Supreme Court.

One of the most important doctrinal tools allowing the German Court to tackle the challenge of reconciling transformative constitutionalism with a hierarchical culture of authority is proportionality analysis. Though by now widespread, it is no accident that proportionality emerged first in German constitutional law. One of the first times the Court employed balancing, one of proportionality's steps, was in *Lüth*, where it balanced Lüth's freedom of speech and the economic and professional interests of Harlan and his film producers. Not only did proportionality analysis develop in Germany, but it also has a distinctive, often more formal structure than proportionality analysis elsewhere. This structure is congenial to its German double purpose. On the one hand, proportionality allows courts to address the concrete facts of a case in a more explicit and detailed way in the legal analysis, thus opening it up to a variety of different considerations and providing the necessary flexibility to deal with a wide range of questions. But at the same time, it conveys an illusion of legal certainty and judicial determinacy, suggesting that "it is not the law that varies from case to case, but the facts or decision-making context."[111] These are valuable properties for any court—hence proportionality's global popularity—but they take on an especially valuable complexion against the backdrop of German legal culture. The individual steps of its framework have in Germany been filled in with rights-specific doctrinalization, and sometimes even been accompanied by a set of sub-rules, that re-formalize the legal analysis.[112]

[109] Robert Alexy, A Theory of Constitutional Rights 47 (2002).

[110] Jürgen Habermas, Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy 255 *et seq.* (1996).

[111] Alec Stone-Sweet, *All Things in Proportion? American Rights Doctrine and the Problem of Balancing*, 60 Emory L.J. 101, 111 (2011). *See also* Bassok, *supra* note 8, at 24 for the different perceptions of proportionality in Germany and the US.

[112] Alexy, *supra* note 109, 84.

The formalization of value jurisprudence also meant that constitutional law remained part of the continental scientific approach to law and its own discipline, distinct from politics. Protecting this legal autonomy implies first of all the protection of legal boundaries. While German law is relatively open to a wide variety of arguments through its method of objective (teleological) interpretation or within the proportionality framework, it remains key to keep law distinct from other disciplines as well as politics. Even though German lawyers are well aware of the indeterminacy of law, German scholars nevertheless tend to remain constructive in their approach to legal scholarship, as Joseph Weiler noted at the end of the German Public Law Symposium at NYU this paper was a part of. And indeed, rather than investigate extra-legal influences on law, the German participants focused on improving the legal system. They integrated empirical,[113] economic,[114] philosophical,[115] or legal theory[116] insights into doctrinal work or sought to revive German methods by infusing them with a shot of historical context and theory[117]—they did not, however, set out to radically deconstruct German law.

The trust in legal science has benefits,[118] but it also has costs. Most importantly, it comes with its own interpretive monopoly. If law remains a science, lawyers will preserve the monopoly of legal interpretation in practice. This interpretive monopoly is widely accepted by political elites as a study of parliamentary debates shows: open court criticism is rare.[119] It also closes legal interpretation to the participation of a wider public. This in turn makes it easier for the German Constitutional Court to avoid open self-reflection about its function *vis-à-vis* the legislature and government. While the Supreme Court explicitly discusses its own role and function in decisions such as *Casey*,[120] *Frontiero*,[121] or the recent litigation over gay marriage,[122] the German Court

[113] Emanuel V. Towfigh, *Empirical Arguments in Public Law Doctrine: Should Empirical Legal Studies Make a "Doctrinal Turn"?*, 12(3) Int'l J. Const. L. 670 (2014).

[114] Niels Petersen, *The German Constitutional Court and Legislative Capture*, 12(3) Int'l J. Const. L. 650 (2014).

[115] See the following papers presented at the NYU Symposium: *The Changing German Landscape of Theorizing Public Law*, New York, Apr. 14–15, 2013: Dana Schmalz, *Analyzing Refugee Law with regard to the Right to Membership: The Technique of Normative Reconstruction Applied in a Transnational Context*; Matthias Goldmann, *A Matter of Perspective: Global Governance and the Distinction between Public and Private Authority (and Not Law)*; Jasper Finke, *Law Beyond the Dichotomy of Normality and Exception* (on file with author).

[116] Roman Guski, *Law Formation as a Discovery Process–Standard of Review, Rule of Law, and Procedurality in EU Competition Law*, Paper presented at the NYU Symposium: *The Changing German Landscape of Theorizing Public Law*, New York, Apr. 14–15, 2013 (on file with author).

[117] Oliver Lepsius, *The Quest for Middle Range Theories in German Public Law*, 12(3) Int'l J. Const. L. 692 (2014); Möllers & Birkenkötter, *supra* note 105.

[118] In reaction to this workshop, *see* Or Bassok, *Showing Germans the Light*, Int'l J. Const. L. Blog (May 22, 2013), http://www.iconnectblog.com/2013/05/showing-germans-the-light (last accessed July 23, 2014).

[119] Michaela Hailbronner, *Zu viel Vertrauen, zu wenig Kritik? Das Bundesverfassungsgericht im parlamentarischen Diskurs*, *in* Festschrift Kay Hailbronner (Wolfgang Fritzemeyer, Georg Jochum & Marcel Kau eds. 2013).

[120] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

[121] Frontiero v. Richardson, 411 U.S. 677 (1973), see the concurring opinion of Justice Powell.

[122] See oral arguments in Hollingsworth v. Perry, Sess. 12–144 (Mar. 26, 2013), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144_5if6.pdf (last accessed July 23, 2014), *see esp*. at 11–12, 56 for the question whether the Court should not leave the question of gay marriage to the people in light of ongoing public debates.

is reluctant to do so, as any such discussion of its role might call into question its hierarchical position based on its expertise in interpreting the constitutional text.[123] From the internal legal perspective the Court inhabits, no more can be said than that the Court is interpreting a text as it is being called upon to do. This lack of institutionalized self-reflection contributes to its expansive jurisprudence.

5. Conclusion

Why does it matter what basis the German Court's authority really relies on? The answer is that any evaluation or critique presupposes that we understand what is going on. If the Nazi thesis were correct, then we might for example simply point out that Germany democracy has matured and generally takes rights quite seriously and so there is no need for a Court as a strong guardian anymore. This argument is, however, likely to fall flat as the Court's current strength has little to do with the Nazi past anymore—as we have seen, this past mostly mattered during the first years of transition and did not serve even then to produce a counter-majoritarian kind of judicial activism. Understanding that the deeper basis of the German Court's legitimacy lies in the German hierarchical legal culture is therefore a condition for a more nuanced and realistic assessment. And there are indeed costs attached to the German model of constitutionalism that do not always receive the attention they deserve in current discourse. While the Court's increasing popularity and importance means that today every citizen knows that she can appeal to the Court (the famous "walk to Karlsruhe")[124] and assert her rights against a once mighty state—unthinkable a hundred years ago—this does not mean that she as a citizen can validly participate in giving meaning to the Basic Law. By strengthening legal autonomy and making constitutional interpretation a business of experts, the constitution is taken away from the people to a significant degree. In contrast to the US, we might even say that German Constitutional Faith is Catholic rather than Protestant.[125] Yet like most constitutions the German Basic Law entails many deep and important national commitments. We need to discuss if giving meaning to these should really be first and foremost a task for lawyers. Value formalism disguises this reality; indeed, it is predicated on declining to ask, let alone address, this question at all.

[123] As to why this kind of argument is rare, *see* for a Luhmannian perspective Moritz Renner, *Kontingenz, Redundanz, Transzendenz? Zum Gerechtigkeitsbegriff Niklas Luhmanns*, Ancilla Juris 62 (2008).

[124] This expression has become standard in contemporary political discourse about the Court and also features in the title of two recent books about the Court, Rolf Lamprecht, Ich gehe bis nach Karlsruhe: Eine Geschichte des Bundesverfassungsgerichts (2011) and Uwe Wesel, Der Gang nach Karlsruhe. Das Bundesverfassungsgericht in der Geschichte der Bundesrepublik (2004).

[125] For this distinction, *see* Sanford Levinson, Constitutional Faith 28 (2011), with the qualification that German constitutionalism accords a greater role to legal scholars. For a more detailed comparative analysis of interpretive communities in Germany and the US, *see* Michaela Hailbronner, *We the Experts. Die geschlossene Gesellschaft der Verfassungsinterpreten*, Der Staat (forthcoming).