The Basic Law at 60 – Politics and the Federal Constitutional Court

By Brigitte Zypries[*]

A. Introduction

I don't usually open my commentary by citing great words spoken by old men. But in this case I will make an exception. Ferdinand Lassalle is not only the grandfather of German social democracy; he is also the author of these words: "Constitutional issues are power issues."[1]

On the occasion of our Constitution's 60th birthday a wise journalist recently came to the reverse conclusion: In Germany, all power issues have become constitutional issues.[2] No matter what the country was fighting about, it has done so with the Constitution in hand.[3] And this is true: whether the issue was rearmament or banning the Communist Party; Eastern Bloc policy or abortion rights; Maastricht or Lisbon; or combating terrorism. All the fighting on these issues has always and still does take place as a matter of constitutional law before the Federal Constitutional Court.

Therefore, the relationship between Berlin and Karlsruhe is somewhat thorny, and the harsh words politicians have for the Court have become the stuff of legend. Konrad Adenauer uttered the verdict in his native dialect: "Dat ham wa uns so nich vorjestellt."[4] In the 1970s the government went so far as to declare that "We won't allow those eight a*** (expletive deleted) in Karlsruhe to ruin *Ostpolitik* for us."[5] Even recently, one of my former Minister colleagues couldn't refrain from making the following recommendation: "If Constitutional Court Justices want to make the laws, then they should just have themselves elected to the *Bundestag*."

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[1] Ferdinand Lassalle, *Über Verfassungswesen: Rede am 16. April 1862 in Berlin* (1993).

[2] Heinrich Wefing, *"Der Bonner Reflex",* DIE ZEIT, Apr. 30, 2009, at 19.

[3] *Id.*

[4] "This isn't the way we imagined it." *See* ROLF LAMPRECHT, ZUR DEMONTAGE DES BUNDESVERFASSUNGSGERICHT 126 (1996).

[5] *Id*., at 128.

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What is the origin of this uneasy relationship? Is this intended by the Constitution or has something gone wrong? Is there something to the persistent accusation that the Court meddles too much in politics? Or is the opposite true? Do politicians dump too many disputes into the laps of the Constitutional Court Justices? Has the Court in Karlsruhe had the job of nullifying ever-more laws thrust upon it because German politicians are doing such shoddy work? How far can criticism of the Court go? And is there a point at which this criticism might damage our country's constitutional culture?

I will endeavour to address all of these questions because they both interest and affect me from three aspects.

First, during my term as the Federal Justice Minister I was the "Minister for Constitutional Matters" as well. Within the federal government my Ministry was responsible for basic rights and for the constitutional rules regarding the Federal Constitutional Court.

Second, I am still affected by this issue as a member of Parliament, especially when the Court in Karlsruhe nullifies a law that I helped adopt as a politician.

Finally, earlier in my career I was a clerk at the Federal Constitutional Court, and I can remember how the Court itself sees its relationship to politics.

B. Constitutional Authorization

Where does the special relationship between politics and constitutional jurisdiction come from? First of all, it comes from the exalted position afforded to the Court by the Constitution.

Strong constitutional jurisdiction in order to protect the Constitution—for the Parliamentary Council this was an important lesson learned from the failure of the Weimar Republic. Therefore, the Court is part of a system of checks and balances that control and limit powers. Here, it ensures a neutral control of state action that is measured against the Constitution. This includes both abstract and concrete judicial review, particularly the review of laws adopted by Parliament.

Interestingly, the constitutional complaint, which today comprises 95% of the Court's proceedings and is praised internationally as a model, was not included in the Constitution until 1968. Before that it had been laid down only in the Federal Constitutional Court Act.

The potential for conflict between politics and law is founded, above all, on this textual authority. The Federal Constitutional Court has the exclusive right to nullify laws passed by a majority of the *Bundestag* (Federal Parliament) if they violate the Constitution. The fact that the Court is the guardian of the restrictions that are imposed even on the democratic majority has a two-fold consequence.

First, for the majority, it is very annoying to be reined into the confines of the Constitution and to be shown the limits of its competence by the Court. This applies primarily in cases where the law is a compromise that was achieved with great effort.

Second, for the minority, the Court's monopoly on nullification presents a temptation. With its help the democratic defeat may be corrected with a constitutional law challenge. This calls the legitimacy of the majority into question and it criticizes their decision as incompatible with the Constitution.

Neither of these possibilities bucks the system. The primacy of the Constitution means that even majority decisions must be subject to possible nullification. And, of course, the Constitution also is designed specifically to protect minority positions. As such, in principle it is completely legitimate for the minority to be able to go before the Court to challenge majority decisions.

C. The Living Constitution

In addition to the Court's jurisdiction, there is a second factor that makes the Court's decisions so important politically. This has nothing to do with the Court's formal authority but rather with the characteristics of the legal text applied by the Court.

Disputed decisions by the Constitutional Court often deal with basic rights. For the most part these are formulated in the Constitution in a very concise and brief manner. As a matter of fact, the shortest provision in the part on basic rights requires only three words. Article 14 states simply: "Property entails obligations."[6]

This concise language ensures that the Constitution can be—indeed, must be—interpreted. On the one hand, this creates leeway for parliamentary action. On the other hand, it creates some uncertainties. Interpreting the Constitution is not an exact science. Results cannot be determined and predicted with mathematical precision. This results in a greater potential for disagreement, but there is no feasible alternative to it. Frederick the Great once attempted to create strict rules in Prussia. General regional law was supposed to regulate all life situations in such a way that interpretation of the law became superfluous. In the end, the King received a legal code with 19,000 sections. He wrote in the margin: "But it's very fat and laws must be concise and not verbose." So, here we have the conflicting goals of precision and conciseness.

In any case, I think it's a good thing that our Constitution is flexible enough to be able to master new challenges with a bit of proper interpretation. Because the Federal

[6] GRUNDGESETZ [GG- Constitution] art. 14.

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Constitutional Court continues to aptly develop the Constitution, we are able to effectively master the changes in both societal values technology.

Data protection is a particularly good example of this. This was not yet an issue in 1949; as such, there is not a single word in the Constitution about data and computers. However, with the *Census Case* from 1983, the Federal Constitutional Court ensured that there is no gap in protection of the important human interests in privacy under constitutional law. Relying on the general personality right in Article 2 and the guarantee of human dignity in Article 1, the Court interpreted the Basic Law in such a way that it included the "right to informational self-determination."[7] Last year the Court went a step further in the *Online Search Case*. Also relying on general personality rights the Court formulated the "right to guarantee the confidentiality and integrity of information technology systems."[8]

This was not meddling in the competence of the constitution-amending legislature. Both cases were examples of a legitimate further development of constitutional values and a necessary adaptation to progress. And this is a task for the Constitutional Court.

As an aside let me remark that some people now believe that we should expressly anchor data protection in the Constitution. I can understand this, of course, because constitutional law should be comprehensible to everyone and should thus also be visible in the text. But citizens' rights would not be well served by this. Currently, the Federal Constitutional Court is much friendlier in terms of basic rights than the constitution-amending legislature would likely be. Given the current political conditions and the terrorist threat we are constantly beseeched not to ignore, it seems likely the constitution-amending legislature would formulate restrictions to any new textually anchored basic right concerned with these interests. The textual monstrosities that can result from such interference into the basic rights portion of the Constitution are demonstrated by Articles 16a ("asylum law")[9] and 13 ("surveillance of the home").[10] These articles certainly do not inspire additional amendments to the text of the Constitution.

Nonetheless, the desire to have the text of the Constitution keep pace with the times is proper. I believe, for example, that we should supplement Article 6, which is concerned with "marriage, family and children". This is where the limits of the Federal Constitutional Court's continued development of the Constitution become apparent. The Court in Karlsruhe has defined marriage as the partnership between a man and a woman. But I believe that a registered partnership between two men or two women does not deserve

[7] BverfGE 65, 1.

[8] BverfGE 120, 274.

[9] *See generally* GRUNDGESETZ [GG- Constitution] art. 16a.

[10] *See generally* GRUNDGESETZ [GG- Constitution] art. 13.

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any less respect or protection than marriage between members of the opposite sex. For that reason, we should supplement Article 6 to achieve that equality.

D. Overpolitization of Law . . . ?

But let me return to our original topic: our constitutional text, its need for interpretation, and the fact that the Federal Constitutional Court has the final and definitive word on this interpretation. All these are reasons for the special relationship between politics and the Court. Let's take a more concrete look at the cases. Does the Court engage in too much politics? Is criticism on this point appropriate?

I want to be very clear from the outset. I do not see any structural problems in terms of the interplay between politics and the Constitutional Court. Overall, nobody can deny that the Constitutional Court respects the boundaries of its competence. It is also clear that, in general, it ensures that politics has the decisional freedom to which it is entitled.

In one of its very first decisions, only a few months after it was established, the Court decided that its task was to assess only the lawfulness and not the appropriateness of a law.[11] Consistent with that principle the Court has repeatedly emphasised, in countless decisions on a myriad of legal topics, the legislature's prerogative for decision-making and evaluation.

For instance, the Constitutional Court allows the legislature leeway with regard to the suitability and necessity of a given rule. In these cases Parliament has room for decisional action and a margin of appreciation.[12] What that means in concrete terms can be seen in the security laws that are repeatedly the subject of constitutional disputes. In terms of the suitability of a measure, the Court deems it sufficient if the abstract possibility of attaining its goal exists. As such, it is enough if the legislatively permitted measure *can* promote the desired aims.[13]

Just recently we saw again that the Court allows the legislature some leeway for decision-making. At the beginning of May 2009, the Court decided a case involving a challenge to a law that prohibited lengthy hyphenated or multiple "name chains". The Court allowed the legislature to decide on the issue pursuant to its own estimation and, therefore, did not

[11] *See* BverfGE 1, 15 (guiding principle 3) ("The Federal Constitutional Court is called upon only to assess the lawfulness of a law, and not its appropriateness as well. The question of whether the Basic Law affords discretion to the legislature, and how far that discretion extends, is a legal issue to be evaluated by the Federal Constitutional Court.").

[12] *See, e.g.,* BverfGE 96, 10 (23).

[13] *See, e.g.,* BverfGE 100, 313 (373).

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find objectionable under constitutional law its decision to prohibit triple or multiple names.[14]

The Court repeatedly has recognised this leeway for action with regard to other important points. For example, in the field of election law, when the Court last year declared the so-called "negative vote value" (*negatives Stimmgewicht*) to be unconstitutional, it nonetheless correctly left it to the legislature to find a way to remedy the constitutional infirmity. We can also see how little the Court interferes with the legislature's leeway, particularly in election law, in the Court's consistent emphasis on the legislature's freedom to substitute a majority vote system for our proportional vote system.[15]

There is another point where the Court is also remarkably restrained: In assessing whether the dissolution of Parliament following a vote of no confidence for the chancellor is lawful. This issue deals with nothing less than the intensely political matter of the Parliament's existence. The delineation between the legislative and the judicial branches of government is particularly virulent on this point. The Court was asked to decide upon the premature dissolution of the *Bundestag* in 1983 and 2005. However, it saw the scope of its review as significantly restricted and thus showed how much it respects decisions made by the political branches.[16]

The Court's respect for the legislature also can be seen in the tenor of its decisions. Originally, it was foreseen only that laws would be declared null and void. But the Court has long since developed another option: It merely declares a law incompatible with the Constitution. In this way it limits the legal effects of its decision to the future and can set a deadline for the legislature to create a situation that complies with the Constitution.

However, if it formulates a transition rule, it in fact acts as a legislator—even if only for a transition period. Noteworthy, for example, was the *Abortion Case II* from 1993. In that case, the Court provided four pages of exact details as to how to proceed until a new law took effect.[17] This indeed poses the danger of interference into the realm of the legislature.

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[14] *See* Bundesverfassungsgericht [BVerfG- Federal Constitutional Court], Case No. 1 BvR 1155/03, para. 1 (May 5, 2009), http://www.bundesverfassungsgericht.de.

[15] *See., e.g,.* BverfGE 121, 266 (267) (discussing so-called negative voting values).

[16] *See., e.g.,* BVerfGE 114, 121 (123) (upholding the President's dissolution of the Bundestag and denying the claims of members of the German Parliament that their rights had been infringed).

[17] *See generally* BVerfGE 88, 203 (providing detailed interim rules until the new law on termination of pregnancy took effect).

These days, however, the Court in Karlsruhe is receiving criticism for exactly the opposite reason. The criticism is that the Court is leaving the legislature too much leeway, in terms of time, in election law. It has given Parliament until 2011 to solve the problem of negative vote values.[18] Of course, this means that the 2009 federal election was conducted according to rules that have been declared unconstitutional. This is not pretty. But it is also clear that election law involves the roots of our democracy, and changes need time. After all, just preparing candidacies and elections takes time. If the Court had been of the opinion that the law needed to be changed in time for the fall-2009 election, then it would surely have made its decision earlier or formulated the deadline for the change differently. In any case, we can see here very clearly that the Court in Karlsruhe is sometimes also criticized for giving either too few or too many instructions to the legislature.

E. . . . Or Strengthening Democracy?

The impression that the Constitutional Court is increasingly meddling in the law-making process is in part fuelled by the impression that more and more laws are being nullified.

But for the most part, this is not considered to be a criticism of the Federal Constitutional Court. Rather, it is seen as evidence of the sinking quality of the laws that have been adopted. The only problem is that it is not true. A multi-year comparison shows that, on average, the Federal Constitutional Court nullifies federal law eight times per year. Often, the dispute involves only a single provision or even only portions of a sentence contained in a law. Some of the challenged laws have been in effect for decades, but their problems have only just become apparent. For example, the provisions of the Federal Election Act that are responsible for negative vote values have been in effect since 1956 and only now has a critical view been taken of them.

An average of eight decisions per year, in relation to the many thousands of pages that annually fill the Federal Law Gazette, doesn't strike me as cause for concern.

Nonetheless, sometimes the opposite impression is created in the public, especially when controversial security laws are at issue. But it is definitely not the case that the Court in Karlsruhe—based on political considerations—is increasingly meddling in the work of the Federal Parliament or is being forced to defend citizens' rights against it.

Many judgments that have caused headlines actually dealt with laws passed at the *Länder* (federal state) level. For example, the *Online Search Case* dealt with the constitutionality of a law enacted by North Rhine-Westphalia; the case on preventive telephone interception examined the police law of Lower Saxony; and the dispute over scanning automobile license plates involved laws from Hesse and Schleswig-Holstein.

[18] *See* BverfGE 121, 266 (267) (allowing application of the challenged law for the next election to the *Bundestag*).

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But these types of disputes gain much more attention in the media than, for example, the federal law dealing with how hoofed animals should be shoed. In that case the Federal Constitutional Court invalidated a law; but as far as I can see, nobody has criticized this as meddling by the judges into the work of Parliament.

I would also like to underscore the fact that the Federal Constitutional Court has many times strengthened Parliamentary rights and the parliamentary process of opinion formation.

For example, it has determined that foreign deployments of the *Bundeswehr*, the German army, are permissible only with the consent of the *Bundstag*.[19] It has thereby considerably strengthened the position of the Parliament *vis-à-vis* the government, and ensured that our *Bundeswehr* remains a parliamentary armed force.

And only last year, the Court in Karlsruhe strengthened Parliament's lawmaking powers at the juncture where a proposed law lands in the conference committee of the *Bundesrat* and the *Bundestag*. That committee meets behind closed doors and the product of its negotiations cannot subsequently be changed by the *Bundestag*—its proposals can be only accepted or rejected as a whole. The Court in Karlsruhe held that the conference committee could not take up completely new material in a proposed law, thus ensuring that the rights of parliamentarians and the democratic control of legislation are not given short shrift. The committee, the Court ruled, must focus only on the material that it is called upon to address.[20]

A third example is the case law on parliamentary investigation committees. These are one of the strongest means at the opposition's disposal to control the government in a way that garners public attention. The Court has expressly emphasized the protection of the parliamentary minority in the committee and thereby significantly enhanced the controlling function of these committees.[21]

All of this shows that the Federal Constitutional Court is able not only to decrease Parliament's authority but that it also can strengthen it, something it clearly has done specifically in recent months and years.

[19] *See* BverfGE 90, 286.

[20] *See* BverfGE 120, 56 (74).

[21] *See* BverfGE 113, 113 (114) (discussing the visa investigation committee).

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F. The Real Danger to Constitutional Culture

There is one thing that we should not forget when looking at the relationship between the Constitutional Court and the other political actors. The Court does not have any right to promote its own initiatives. It takes action only when called upon to do so. Therefore, the question is justified whether political institutions too often take resort to appealing to the Court in Karlsruhe.

There might be something to this impression. Some of my parliamentary colleagues are all too eager to allege that a law is unconstitutional. The Left Party's group in Parliament, for example, has filed a series of constitutional complaints and applications for abstract judicial review. But the Constitutional Court is not here to salvage a parliamentary policy that did not find a majority. The Court in Karlsruhe also is not here to facilitate the work of indecisive politicians or to take over their responsibilities. One example of this is the *AWACS Case* from the early 1990s. The issue in that case was the distribution of competence between the federal government and the *Bundestag* for foreign deployments of the *Bundeswehr*.[22] The federal government had resolved the deployment of reconnaissance aircraft with the participation of the Ministers from the Free Democrats—the FDP—and the FDP group in Parliament nonetheless sought review of the decision before the Federal Constitutional Court alleging a violation of parliamentary rights.

The impression might indeed be gained that, in this case, the Court in Karlsruhe was to provide an expert opinion and that a need for legal protection did not even exist.

I believe that this all makes it clear that there are no fundamental problems in the relationship between politics and the Constitutional Court. In my opinion, the Federal Constitutional Court has always judiciously dealt with its authority, and continues to do so today. I cannot discern any excessive interference with the work of Parliament and the Federal Government. Therefore, I believe that political polemics against the Court in Karlsruhe and its justices is unfounded. Even more than that, it is dangerous. It damages the most important precondition for the success of our constitution and constitutional jurisdiction: our constitutional culture.

The Federal Constitutional Court does not have the power to force compliance with its judgments. The Court must rely on political actors' acceptance that only the Court has the last word when it comes to interpreting the Constitution. If the Federal Republic is considered to be particularly successful in comparison with the Weimar Republic, this is not because the text and content of the Constitution are so much better than that of the Weimar Republic. Rather, the guarantor of that success is primarily a culture that includes

[22] *See* BverfGE 90, 286 (302) (regarding the enforcement by military means of the flight ban in Bosnia-Herzegovina).

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the willingness on the part of powerful people in politics and government to comply with the Constitution, and to respect the monitoring of that compliance by the Federal Constitutional Court.

This culture has slowly grown. In the 1950s the Court had to struggle for its status as an independent constitutional body. And there were also times when German Chancellor Adenauer came before Parliament and declared that his cabinet agreed that a decision by the Federal Constitutional Court had been incorrect.[23]

The situation is different today. The Constitutional Court is held in high esteem by citizens and political actors alike. Of course, differing opinions are possible with regard to some judgments from the Court. There is rarely only one single "correct" result. This is shown by the occasional concurring or dissenting votes published by individual judges.

That's why the following adage is true: You might want to take off your hat out of respect for the Constitutional Court, but don't take your head off along with it. Reflection, debate and criticism are both permitted and encouraged. But when polemics call the Court's legitimacy into question and along with it compliance with its judgments, it becomes dangerous because this damages our constitutional culture. All actors should take care to avoid this. And for that reason as well, I have little understanding for some of the sharp words in the more recent debates.

G. Judicious Selection

When we speak of politics and constitutional jurisdiction, this includes much more than merely criticism of the perceived interference into politics by judges. Just as common is the accusation that politicians attempt to influence case law by whom they appoint as Constitutional Court justices.

This accusation is actually something of a paradox. The justices and their decisions overall are held in high esteem. In hindsight, the personnel decisions made in staffing the Court have been considered very successful as well. No judge has ever exposed himself or herself as a party soldier. If his or her basic political attitudes are addressed at all, it is usually to say that a justice made a given decision *although* he or she is considered either conservative or progressive and/or *although* they belong to this or that party.

So, as we can see, there is nothing wrong with the results of the personnel selection, and yet the procedure for selecting justices is again and again criticized and called into question. We hear demands for more transparency and a recent legislative initiative from

[23] Federal Chancellor Adenauer in 1961, commenting on the first judgment on radio broadcasts (Deutschlandfunk).

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the Alliance 90/The Greens called for subjecting future judicial candidates to a public hearing before their selection.

Let me be very clear: I don't think that is a good idea at all. It seems to me that here procedural changes are being created for their own sake. But procedure is not an end in itself. It is justified because it leads to a good result. The current procedure achieves this, but I have great doubts as to whether public hearings would lead to better results.

Instead, I see the danger that this type of hearing might be used to attempt to discredit people with allegedly unsuitable values. Sometimes this occurs even without a hearing. We experienced this in the selection of the last Vice President of the Court. A completely untarnished constitutional jurist who until then had been respected and admired by all became the object of a political campaign. In the end, we were nonetheless able to make a good choice, but that controversy was injurious to the Court.

I believe that the only sensible way is to have the *Bundestag* and *Bundesrat* hold the responsibility for selecting justices.

Having the election require a two-thirds majority is appropriate as well. Candidates with extreme positions thereby do not have a chance of being selected. But because this majority quorum requires the political actors to come to an understanding, confidential consultations must be possible. Anything else would lead to a blockade of the justices' selection.

Every candidate nominated to be a justice has earned the necessary qualifications with their previous work—as a judge, scholar or professor. Even today, those who play a role in the selection of the Court's justices can look at the candidate's previous work to inform themselves about his or her basic attitudes. I cannot see what added value a public hearing would have. I fear that this kind of showmanship would turn into an eloquence competition. The only focus would be on giving the candidates nominated by the other political side a hard time rhetorically. And the candidate most skilled at evading such attempts would do the best. I have grave doubts as to whether this would be a good way to get wiser and more independent judicial personalities. I think it would behove us to keep the nominated individuals as much as possible out of party politics in the public perception. This enhances their authority, which in turn benefits the reputation of the Federal Constitutional Court.

H. The Road Ahead

Sixty years of the German Constitution does not mean sixty years of the Federal Constitutional Court. The Court was not established until 1951. Since then, it has made a significant contribution toward breathing life into our Constitution. The Court has

promoted basic rights, protected the rights of individuals and when necessary, restricted the power of the State.

The Court has ensured that the government complies with democratic rules, that the political process has remained open, and that equal opportunity exists.

The Federal Constitutional Court has interpreted and continued to develop the Constitution. Without these decisions, the text of the document would likely have been amended more often.

Finally, the Federal Constitutional Court has not shied away from conflicts with politics when necessary. Indeed, it would be worrisome if there were absolutely no friction between the Court and political institutions and actors. In such a case, the Court would apparently be too weak to be able to exercise its supervisory function in a serious manner. Therefore, controversy is a good sign. It shows that our system of checks and balances works well. For this, justices and politicians must encounter one another at the same level: with mutual respect and recognition of the office and tasks of the other. This is the case today, and I believe it should remain this way as we go forward.

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