Conference Impressions: The Persisting Riddle of Fundamental Rights Jurisprudence and the Role of the Constitutional Court in a Democratic State

By Elena Barnert and Natascha Doll

A. Introduction

On January 15th 1958, the German *Bundesverfassungsgericht* (Federal Constitutional Court - FCC) pronounced a judgement deemed to be a prime example for the Court's early jurisprudence concerning the scope of fundamental rights in Germany: The Court's famous "Lüth"-decision resulted from a constitutional complaint brought by *Erich Lüth*, former member of the Hamburg senate.* In the early 1950s, *Lüth* had called upon film distributors and the public to boycott *Veit Harlan's* tearjerker movie *Unsterbliche Geliebte* (Immortal Beloved). Cause for his appeal was *Harlan's* prominent role in the Nazi propaganda machinery as *Goebbels'* protégé and director of the movie *Jud Süss* in 1940, which counts as one of the worst anti-semitic films released during the Nazi regime. After having lost several civil lawsuits, *Lüth* asserted the violation of constitutional rights. Over six years later, he was to be proved correct: The Federal Constitutional Court ruled that *Lüth's* complaint was covered by the right to freedom of speech guaranteed in Art. 5 of the German Basic Law (*Grundgesetz*). The Court stated that the fundamental rights as laid down in the *Grundgesetz* are not only of importance as subjective rights protecting the individual against state intrusions on the private sphere. As a whole they also unfold an *objective dimension* in representing society's crucial values. Therefore, they govern the entire legal order - including civil law and private law relations! This was indeed understood as a staggering conclusion with which the Court went far beyond the issue at stake. Since *Lüth*, German legal discourse characterizes this phenomenon as the *third-party* or *horizontal effect* of basic rights (*Drittwirkung*).

B. The Lüth-Decision as a Starting Point for an interdisclipinary exploration of post-War Germany

* BVerfGE 7, 198. – An English translation of the *Lüth*-decision can be found on-line under *http://www.ucl.ac.uk/laws/global_law/cases/german/bverfg/bverfg_15jan1958.html*.

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Today, the *Lüth*-decision is an inherent part of every legal curriculum and one of the central cases German law students have to study in constitutional law. Despite its illustriousness, the decision has scarcely been picked as a central theme by scholars. While the legal profession has many times shown a vivid interest on the juridical questions raised by the judgement, another very important aspect of *Lüth* has seldom been exposed. While related research has mainly concentrated on the fundamental liberties (*Grundrechte*) in the beginning section of the *Grundgesetz* as an 'objective order of values' ('objektive Wertordnung'), scholars have given little attention to the fact that the *Lüth*-decision must rightly be read as a respectable effort undertaken by the Court to come to terms with the recent German past in which basic rights had been utterly negated. On this account, the Max-Planck-Institute for European Legal History in Frankfurt/Main hosted, on February 20-21, 2003, an interdisciplinary conference on the *Lüth*-decision, eventually focusing primarily on the historical impacts of the case than on the array of juridical subtleties otherwise connected with the judgement. A small group of a little over 44 participants – most of them university professors and postgraduate students in law, history and political science – gathered in Frankfurt to open up new vistas for the historical research on the early fundamental rights judicature. Up-and-coming as well as more senior, established academics in the field of contemporary history (*Zeitgeschichte*) and constitutional law used the *Lüth*-verdict as a peg for a wide-ranging debate on its historical context, concentrating on German legal practice and scholarship in the 1950s.

The conference was formally opened on Thursday, February 20th by *Michael Stolleis*, director of the Max Planck Institute in Frankfurt. After the organizers, *Thomas Henne* (Frankfurt/Berlin) and *Arne Riedlinger* (Freiburg), had outlined the history of the *Harlan*- and *Lüth*-lawsuits, *Wilhelm Hennis* (Freiburg) gave an intriguing insight into the daily life at the *Bundestag* in the early 1950s. *Hennis*, a political scientist, had then been parliamentary assistant to the Member of the *Bundestag Adolf Arndt* who was chairman of the Social Democratic Party and presented the case for *Erich Lüth* before the Constitutional Court. *Hennis* – barely 30 years old at the time – had written the draft of *Lüth's* complaint.

The programme continued on Friday 21st with a lecture on the historical conditions that determined the Constitutional Court's early judicature. Giving an overview of the social and economic situation in the young Federal Republic, the historian *Ulrich Herbert* (Freiburg) underlined the degree to which only from the late 1950s on the widespread scepticism against liberal democracy of western imprint as well as the commonly shared, yet vague sentiment of uneasiness in the general German public with "modernity", did slowly vanish. *Herbert's* very illuminating survey was followed by Thomas Henne, who presented an analysis of the formative factors underlying the *Lüth*-decision. The following presentations were dedicated to other juridical efforts to cope with the totalitarian past such as the *Gestapo*-decision from

1957 (as printed in *BVerfGE* 6, p. 132). These lectures were followed by a lively discussion which, like so many debates on this period, revealed a clear focus on the impact of two conflicting doctrines of the 1950s: the legal theory of *Rudolf Smend* and the ideology of *Carl Schmitt* and his devotees.

C. Democracy at a Crossroads: *Smend v. Schmitt* and Abendroth/Ridder

In the afternoon *Michael Stolleis* gave a report on the different constitutional doctrines and their representatives in the 1950s. Professor *Stolleis* stated that especially *Smend's* value-orientated *Integrationslehre* (Integration theory) of 1928 – with its inherent openness towards liberalism and pluralism – had been a great success in the early Federal Republic, a political and legal order facing the Nazi legacy and the task of integration into the West. *Frieder Günther* (Stuttgart) aptly called the 1950s "a decade of recollection". Yet, in a process of rather ignoring than critically reviewing the Nazi period, the unsettled German society made various attempts to return to the traditional, pre-War *Weltanschauung* (view of the world). In a parallel movement, many constitutional lawyers sought to continue where they and others had stopped in Weimar, hereby closing their eyes to their disgraceful past. Throughout the conference, both *Smend* and *Schmitt* as well as their respective influence on the legal debate in Germany were omnipresent. However, *Ilse Staff* (Frankfurt) emphasized that German jurisprudence also contained a "third", less state-oriented line of thought in constitutional law and political science, pointing in particular to the problems of the Nazi heritage in post-war Germany. The main representatives of this movement were *Wolfgang Abendroth* and *Helmut Ridder*.

D. Back to the Future: The Role of the Constitutional Court in the Rule of Law

According to *André Brodocz* (Dresden), the Federal Constitutional Court and the German Basic Law together form an "institutional cascade": The Constitutional Court, while being institutionalized by the *Grundgesetz* and operating under its regulations, is in fact the instance with the authority of *construeing, reconsidering and rethinking* them in case of conflict. Against this background, the outrage caused by the Court's *Lüth*-decision among observers is easy to grasp, as many critics fervently protested against the Constitutional Court allegedly having exceeded its authority by inventing a rather vague – but equally adaptable and pluralistic – "value order" (*Wertordnung*), supposedly underlying the fundamental liberties in the *Grundgesetz.* At a later moment during the conference, a participant argued that the Court had not only been driven by an anti-totalitarian impetus. Another – and maybe the decisive – motive should be seen in the Court's subliminal demarcation disputes with other potent institutions at the time. In a spellbinding lecture *Manfred Baldus* (Hamburg) illustrated the Constitutional Court's struggle for power. Its op-

ponents were the Ministry of Justice willing to keep the Court and its judges under close surveillance on the one hand and both the rivaling *Bundesarbeitsgericht* (Federal Labour Court) and the *Bundesgerichtshof* (Federal Court of Justice) on the other. The latter disapproved the Constitutional Court's jurisprudence, especially its decision concerning civil servants taken over from the Nazi administration (as printed in *BVerfGE* 3, 58). *Michael Stolleis* emphasized the importance of the denominational differences between the (protestant) Constitutional Court and the (catholic) Federal Court of Justice. *Torsten Hollstein* (Frankfurt) lectured very informatively on *Hans Carl Nipperdey*, who had been the first president of the Federal Labour Court and a prominent advocate of a conflicting view concerning the effect of basic rights on civil law.

The meeting was concluded with a closing discussion in which the organizers expressed their intent to publish the conference proceedings. All things considered, the participants agreed that the symposium had been an initial point for further interdisciplinary research on the early constitutional case law and doctrine. As regards a possible *conclusio* with regard to the role of the *Lüth*-decision: Should it be seen as a milestone in German fundamental rights jurisprudence or as a shift towards a "tyranny of values" (*Carl Schmitt*)? As lawyers are known to say: That depends.