

## A Certain Constitutional History of the Federal Republic of Germany

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**(Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft, Vol. 83, No. 3-4 – Winter 2000) I. [1]**

For many years now, *KritV*, a small, bright red law journal that is published four times a year by Frankfurt University Law Professors together with a number of Professors of other Law faculties - among them former or current Justices of Germany's Federal Constitutional Court - has been providing an active forum for state-of-the-art legal criticism and legal policy analysis. Besides its regular publication of essays concerning various fields of law, time and again, the editors dedicate a complete issue to a specific topic or debate. It should be no surprise that *KritV* has dedicated an entire issue to the Federal Constitutional Court. But what must be, if not surprising, at least very intriguing, is the fact that *KritV*'s Winter 2000 double issue is not just concerned with the Federal Constitutional Court, including doctrine, constitutional theory, or the role of the Court, but exclusively with the Court's case law in a period that spans almost the whole length of the Court's existence. Since the foundation of the Court in 1951, its Justices have not merely been rendering constitutional law in their decisions; they have formed, influenced, shaped and designed a great part of Germany's legal and political infrastructure. It is this case law that the authors in *KritV*'s last issue are concerned with. The editors - sometimes contributors to the issue themselves - meant to give as much discretion to the authors, in their role as legal scholars, to revisit a case even if it is very old, and to ask him or her [there is one female contributor] to sketch a decision's importance against the background of the then existing legal, political, economic and even cultural environment, but also in light of conflicting perceptions of the law today. [2] The authors have all chosen what they consider to be eminent Federal Constitutional Court decisions, decisions that reach out of the to-do realm and into the *to-imagine* realm of legal conceptual work. What we see in articles on cases involving the muddy zone between the rules about the competences of the police and the law of criminal procedure or the law of privacy as a fundamental liberty of the prison inmate towards the state (at times when it was still the state that ran the prison!) we can begin to imagine the arch that holds the case law, but also these short and provocative commentaries and essays together. The timely moment to publish this special issue was the publication in 1999 of the 100th volume of the Court's selected decisions, followed now by the Court's 50th anniversary. Indeed, as the Editors of this *KritV* issue suggest, the small volume which contains eleven articles on eleven (indeed many more) Federal Constitutional Court decisions turns out to be a kind of a constitutional history of the Federal Republic of Germany. [3] In very concise reflections on specific decisions, the pre-trial history of the cases, the stakes of the judicial truth-finding process as well as the aftermath of the cases become visible and are submitted to analysis and critique. The cases serve as starting points from which the authors reflect on the history of pressing questions such as Germany's relationship with the European Union, Germany's "right" to put guards of the former Berlin wall on trial for killings committed under the GDR regime, the issue of corporate co-determination or the state's right to put signs of religious (Christian) worship into public schools' classrooms. Beyond the specifics of the disputes at issue in each case, the authors also examine the role of the Court in deciding the cases. II. [4] For the reader with little time, it might be advisable to turn to the references indicating which cases the authors found of such importance as to merit commentary, exploration and *perspectivization*. However, the reader with more time to devote to the collection ought to be provoked by the prospect of sharing with a number of well-known (even if we know how relative that always is) scholars, over a couple of pages, a conversation over what is probably the author's favorite Federal Constitutional Court opinion. In fact, the interested reader might stop to think for a moment why anybody would have a "favorite" case in the first place. What is it, really, with cases that we would remember some but yet constantly keep forgetting others? Why would we dismiss a whole complex of decisions but still find ourselves, again and again, returning to a special case which speaks to us like an oracle, a case in which we believe we see - as in a drop of water - all that has meaning in law? [5] Reading the short essays contained in the journal we might also want to ask ourselves whether we (would) have had similar insights, comparable sensitivity with regard to the cases on which the authors comment. It seems more important, however, to reflect for a moment on the question of how we assess jurisprudence, that is to say, case law in general. For those trained in the common law tradition this question obviously seems pointless, but if we consider the question from the perspective of a lawyer trained in a civil law context, the question attains a much more persuasive thrust. The civil lawyer, especially a German, will - if she has not spent the last decades underneath a blanket - be apt, even keen, to meet with others for a discussion of the meaning, the impact and the importance of certain judgments, especially with regard to High Court rulings such as those rendered by the Federal Court of Justice (BGH - Bundesgerichtshof), the Federal Employment Court (BAG - Bundesarbeitsgericht) or the Bundesverfassungsgericht (BVerfG: Federal Constitutional Court). It will not have escaped most German lawyers' observation that much of what she relies on during a pleading, a commentary, the preparation of a suit or of her work as a judge, is being probed and put under such scrutiny by German Courts, that to deny the eminent role of case law for German legal culture would simply be poorly thought-out. [6] Yet, traditional legal education in Germany remains centrally focused on the interpretation of statutes and legislative texts. This gives the law student little opportunity to extensively dwell on case law in order to launch deeper research into a particular field. Instead, legal studies in Germany - almost exclusively organized in Public Universities, the exception being Bucerius Law School in Hamburg - direct the student to a hard boiled and crudely disciplinary learning and memorization of the provisions. The factual

role of the Courts in making law is hardly reflected or even problematized in the ordinary German Law School class room. What is almost entirely neglected is the striking quality of case law, especially with regard to the Courts' reasoning and methodology. [7] The selected articles often reflect the author's life-long (professionally, that is) interest and engagement with a certain topic. The articles also constitute sharp and illuminative points of integration. Indeed, like a *Momentaufnahme*, i.e. an instant that something is registered or understood, texts like Klaus Günther's on the Federal Constitutional Court's constitutionalizing imprisonment procedures (eventually leading as it did to a comprehensive legislative regime) or that by Friedrich Kübler on the Federal Constitutional Court's avantgarde role in shaping free speech law as early in its tenure as 1958 with its "Lüth"-decision (which, if it did not introduce, at least celebrated the idea of a horizontal effect of constitutional law in private law [see here the article by Gunther Teubner]) allow us to reflect on the intellectual and spiritual stepping stones over which we are likely to pass, which we may have to roll aside, over which we may have to climb in order to clearly see how much is at stake when the court file reads "*Verfassungsbeschwerde gegen den Beschluss des ...*" (Constitutional Complaint against the decision of ...)"