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LAW EVOLUTION

THE CONSTITUTION AS AN OBJECTIVE ORDER OF VALUES

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Abstract

This article examines the interpretation of constitutions in terms of underlying values, focusing on the theory of the German Federal Constitutional Court that the German Basic Law incorporates an "objective order of values'. The article describes the Court's theory as well as its reception by constitutional scholarship. It also provides a critical evaluation. The article argues that the theory — although understandable in light of Germany's particular historical and political circumstances — is both unnecessary and undesirable. The theory is unnecessary because the most salient implications of the Court's assumption of the existence of an objective value order — positive state obligations, third party effect of basic rights and

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entrenchment of the core of the constitution — can also be based on provisions of the written constitution. The theory is undesirable because it has the potential to undermine the democratic nature of the constitution and could lead to the moralisation of constitutional law and constitutional discourse. It is not advisable, therefore, to transplant the Court's theory to other jurisdictions.

Keywords

Constitutional values, constitutional interpretation, objective value order, German Basic Law, German Federal Constitutional Court

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I. INTRODUCTION

Constitutional courts wield enormous power. Their decisions can have profound consequences for citizens' rights and freedoms as well as for the balance of power between state institutions. Constitutional courts have been entrusted with the authority to wield this power under the assumption that they are constrained by the law and by the constitution in particular. At the same time, constitutional courts have the final say on the meaning of the constitution. This might suggest that they can decide as they please. In practice, however, the legitimacy of their decisions depends on the way they interpret the constitution, that

is, the considerations they take into account when adjudicating cases. The interpretative methodology constitutional courts employ directly bears on whether their decisions are seen as a legitimate elaboration of the constitution or, in the worst case, as illegitimate constitutional change.

This article examines one such interpretative methodology: the interpretation of constitutions in terms of underlying values. It focuses on the theory of the German Federal Constitutional Court (hereafter: the Court) that the German Basic Law (*Grundgesetz*) incorporates an "objective order of values" (objektive Wertordnung). The article argues that although the Court's theory is understandable in light of Germany's particular historical and political circumstances, the theory itself is unnecessary and undesirable. The most salient implications of the Court's assumption of the existence of an objective value order — positive state obligations, third party effect of basic rights and entrenchment of the core of the constitution — can also be based on the written provisions of the Basic Law. Moreover, the theory has the potential to undermine the democratic nature of the constitution and could lead to the moralisation of constitutional law and constitutional discourse. Notwithstanding the high standing of the Court, it is not advisable, therefore, to transplant its theory to other jurisdictions.[2]

The structure of this article is as follows. It begins with a short characterisation of the Basic Law (section 2). Next, it describes the Court's theory (section 3) and its reception by German constitutional scholarship (section 4). The subsequent section provides a critical evolution of the theory (section 5). The article finishes with a conclusion (section 6).

II. BACKGROUND

This section provides the background to the discussion of the Court's theory by outlining the most salient features of the Basic Law. The Basic

[2] On the notion of "constitutional transplants", see Vlad Perju, Constitutional Transplants, Borrowing, and Migrations in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012). See also Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2007).

Law was adopted in 1949.[3] In light of the failure of the Weimar Republic and the experiences with the Nazis, the members of the constitutional assembly sought to prevent another failure of parliamentary democracy and to establish effective safeguards against dictatorship and the disregard of human rights. To this end, they made human dignity and human rights the central elements of the constitution.[4] According to Article 1(1), human dignity is inviolable.[5] This implies that infringements are never allowed, not even by constitutional amendment.[6] Article 1(1) also determines that the state is obliged not only to respect but also to protect human dignity.

Article 1 is followed by a catalogue of more specific basic rights. All basic rights are legally binding on the three branches of government.[7] This implies that the legislature is not free to restrict basic rights as it pleases. There is an ultimate limit to legislative measures: in no case may they affect the essence of a basic right.[8] Basic rights have the structure of subjective rights. They are not noncommittal guidelines, but constitute directly applicable law that individuals can effectively enforce against the state.[9] Upon a complaint, the Court can review any act of the state as to its conformity with basic rights, provided that the complainant has exhausted all available means to find relief through

[3] For the text of the Basic Law in English, see https://www.btg-bestellservice.de/pdf/80201000.pdf (all web pages referred to in this article were last accessed on 19 June 2017). For an introduction to German constitutional law in English, see Werner Heun, *The Constitution of Germany: A Contextual Analysis* (Hart 2011). For an introduction to the interpretation of the Basic Law by the Court in English, see Donald P Kommers, Germany: Balancing Rights and Duties in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press 2007).

[4] Human rights in this article refer to rights to which a person is inherently entitled, simply because he or she is a human being. Basic rights, by contrast, refer to rights to which a person is entitled because the constitution has granted him or her these rights.

[5] All references to numbered Articles in this article concern the Basic Law.

[6] Article 79(3).

[7] Article 1(3).

[8] Article 19(2).

[9] Article 1(3).

the ordinary courts.[10] In addition, the Court has the competence to review the constitutionality of any statute.[11] The usual consequence of the finding that a statute is unconstitutional is its annulment.

The basic rights of the Basic Law can be divided in rights to freedom and rights to equality. Most of the basic rights concern freedom rights, for example the right to freedom of religion,[12] the right to freedom of expression[13] and the right to freedom of assembly.[14] These rights guarantee their holders a sphere of freedom in which the state shall not intervene, or only under certain conditions. The equality rights, by contrast, concern equal treatment and protection against discrimination by the state. Examples are the right to equal treatment of children born outside of marriage and those born within marriage[15] and the right to equal eligibility for public office.[16] The Basic Law, in the interpretation of the Court, not only guarantees specific rights like the ones just mentioned, but also a general right to freedom and a general right to equality. Article 2(1) grants to every person the right to the free development of his or her personality. The Court has interpreted this right as a general right that protects any human activity not covered by a special guarantee in the constitution.[17] Everyone has a basic right to do or not to do as he or she pleases. If the state prohibits a particular action, it infringes the general right to freedom; therefore, a constitutional justification is required.[18] In the same way, the Court

[10] Article 93(1) number 4a.

[11] Article 93(1) number 2 (*abstrakte Normenkontrolle*, abstract judicial review), Article 100 (*konkrete Normenkontrolle*, concrete judicial review).

[12] Article 4(1, 2).

[13] Article 5(1).

[14] Article 8(1).

[15] Article 6(5).

[16] Article 33(2).

[17] BVerfGE 6, 32 (*Elfes*), judgment of 16 January 1957, available at http://www.servat.unibe.ch/dfr/bv006032.html.

[18] See in particular BVerfGE 80, 137 (*Horse riding in woods*), judgment of 6 June 1989, available at http://www.servat.unibe.ch/dfr/bv080137.html and BVerfGE 54, 143 (*Feeding pigeons*), judgment of 23 May 1980, available at http://www.servat.unibe.ch/dfr/bv054143.html.

has interpreted Article 3(1) as a general equality clause.[19] Everyone has a right not to be discriminated against.

The unlimited exercise of a basic right by an individual may conflict with public interests or with the interests of other individuals. The Basic Law specifies some conditions under which the exercise of a basic right can justifiably be limited by the state. In general, the limitation of a right is justified if it meets certain formal criteria. The Court has added to these formal criteria a proportionality test: limitations are only allowed if they are proportional.[20] Furthermore, if a collision of two or more basic rights occurs, the state should try to establish a balance that leaves the greatest possible effect to all of them (*praktische Konkordanz*).[21]

The system of basic rights of the Basic Law, as interpreted by the Court, has two important consequences. First, practically any act of the state is open to constitutional challenge. By adopting a general right to freedom and a general right to equality, the Court has established a complete system of basic rights. Most state action will interfere with the freedom of one of more persons or will distinguish in some respect between different groups of persons. In all these cases, state action is subject to judicial review. Second, in this system basic rights do not function as "trumps".[22] The wide interpretation of basic rights has led the Court to a wide interpretation of the possibilities to limit them. The fact that somebody has a basic right does not mean that this right necessarily has priority over countervailing interests and considerations. An infringement of a basic right requires an assessment of the justification of that infringement. This assessment is guided by the proportionality test. Since this test provides little more than a general guideline,

[19] BVerfGE 1, 14 (*Southwest state*), judgment of 23 October 1951, available at http://www.servat.unibe.ch/dfr/bv001014.html.

[20] For the first decision that mentions the principle of proportionality, see BVerfGE 3, 383 (*All-German Bloc*), judgment of 3 June 1954, available at http://www.servat.unibe.ch/dfr/bv003383.html. The conditions for restricting equality rights are different.

[21] See e.g. BVerfGE 83, 130 (*Mutzenbacher*), judgment of 27 November 1990, available at http://www.servat.unibe.ch/dfr/bv083130.html.

[22] The metaphor of rights as "trumps" has been introduced by Ronald Dworkin, see Ronald Dworkin, Rights as Trumps in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press 1984).

in practice basic rights adjudication takes the form of general practical reasoning. The focus is on the substantive reasons that could possibly justify the restriction of a basic right.

III. THE COURT'S THEORY

1. POSITIVE STATE OBLIGATIONS

So far, this article has assumed that basic rights protect a sphere of individual liberty against interference by the state. This is the traditional liberal conception of basic rights. An important question is whether and to what extent basic rights also give individuals a claim to positive state action, for example to police protection, social security or internet access. Except for the right of mothers to be entitled to the protection and care of the community,[23] the Basic Law does not contain explicit provisions for positive state action.

Nevertheless, the Court has developed a rich jurisprudence on positive state obligations. The foundation for this jurisprudence has been laid by the landmark *Lüth* decision (1958). The Court considers that "[t]he primary purpose of basic rights is to safeguard the liberties of the individual against interferences by public authority. They are defensive rights of the individual against the state."[24] The Court goes on: "It is equally true, however, that the Basic Law is not a value-neutral document. Its section on basic rights establishes an objective order of values (*objektive Wertordnung*) and this order strongly reinforces the effective power of basic rights. This value system (*Wertsystem*), which centres upon the dignity of the human personality developing freely within the social community, must be looked upon as a fundamental constitutional decision affecting all spheres of law and provides guidelines and impulses for the legislature, the executive and the judiciary."[25]

[23] Article 6(4).

[24] BVerfGE 7, 198 (*Lüth*), judgment of 15 January 1958, available at: http://www.servat.unibe.ch/dfr/bv007198.html. Translation Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University 2012) 363 (slightly modified).

[25] Ibid.

According to the Court, basic rights have two dimensions. As defensive rights, basic rights oblige the state to refrain from certain actions. However, basic rights are also an expression of an objective value order. They concern a common good. The values are objective because they have an independent existence under the constitution. Every state action must respect the values of the constitution, irrespective whether there is an individual who asserts his or her basic rights.

The interpretation of basic rights as objective values is the basis for establishing individual claims to positive state action. The state is under the obligation to take action in order to give the values of the constitution real effect. The Court has drawn at least three important conclusions from this consideration.

First, basic rights may require the institutionalization of certain procedural and organizational safeguards. Some basic rights can only be fully realized if the state provides a procedural and organizational setting. For example, the right to asylum can be exercised only if the state provides for an appropriate procedure.[26] Another example concerns the right to freedom of science. As a defensive right, this right prohibits the state to interfere in scientific research. As an objective value, the freedom of science imposes on the state the duty to establish and organize public research institutions in such a way that the fulfilment of the function of free research is most likely guaranteed.[27]

Second, the value-character of basic rights may lead to an individual claim against the state to provide certain goods or services. In general, the Court is hesitant in acknowledging such claims, bearing in mind the legislature's discretion with regard to budgetary decisions. However, in extreme cases, if without the help of the state a basic right is in danger of becoming completely meaningless for an individual, the Court may recognize an individual claim. This claim, however, can only be a claim to a fair distribution of goods and services. For example, in a case concerning restricted access to medical schools, the Court has ruled that the right to choose a profession cannot lead to the claim that the

[26] BVerfGE 56, 216 (*Asylum*), judgment of 25 February 1981, available at http://www.servat.unibe.ch/dfr/bv056216.html.

[27] BVerfGE 35, 79 (*Group universities*), judgment of 29 May 1973, available at http://www.servat.unibe.ch/dfr/bv035079.html.

state must admit all applicants who are formally qualified, as this would require the expenditure of enormous amounts of money. Sufficient is that every qualified applicant has an equal chance of access.[28]

Third, basic rights understood as objective values may entail a duty of the state to protect individuals against threats from other individuals or groups. For example, the Court has ruled that the state is under a constitutional duty to tighten up security regulations to protect individuals against the dangers of a nuclear power plant.[29] The most consequential case, however, concerns abortion. In its first judgment concerning this issue, in 1975, the Court ruled that the right to life not only forbids the state itself to destroy life, but, in addition, also obliges the state to protect the value of human life against violations by others.[30] The addressees of this duty include the legislature, which has to pass legislation that criminalizes abortion in order to protect effectively the right to life of the unborn.

2. THIRD PARTY EFFECT OF BASIC RIGHTS

The interpretation by the Court of the basic rights section of the Basic Law as an The interpretation by the Court of the basic rights section of the Basic Law as an expression of an objective order of values not only provides the basis for positive state obligations, but also for what is known as the third party effect of basic rights. In the traditional liberal understanding of basic rights, basic rights only function in the (vertical) relationship between individuals and the state. They do not apply in the (horizontal) relationship between individuals. Third party effect means that basic rights also become relevant in private relationships.[31]

[28] BVerfGE 33, 303 (*Numerus clausus I*), judgment of 18 July 1972, available at http://www.servat.unibe.ch/dfr/bv033303.html.

[29] BVerfGE 53, 30 (*Mülheim-Kärlich*), judgment of 20 December 1979, available at http://www.servat.unibe.ch/dfr/bv053030.html.

[30] BVerfGE 39, 1 (*Abortion I*), judgment of 25 February 1975, available at http://www.servat.unibe.ch/dfr/bv039001.html.

[31] The defendant in a civil lawsuit can be viewed as the third party to the legal relationship between the plaintiff and the court (the state).

In the aforementioned *Lüth* case, the Court held that basic rights do not bind individuals, because this would undermine the purpose of basic rights.[32] No one can directly challenge the constitutionality of an act by a private party. Basic rights do not have direct third party effect (*direkte Drittwirkung*). This does not mean, however, that basic rights are irrelevant in disputes between individuals. For the question may still arise whether the *civil courts*, as part of the state, when deciding such disputes have to apply basic rights to the case at hand. The Court's answer to this question is affirmative. Although basic rights are not directly applicable in disputes between private parties, civil courts are bound by basic rights and thus have to interpret provisions of private law in conformity with basic rights. Basic right have indirect third party effect (*indirekte Drittwirkung*).

The argumentation of the Court revolves around the notion that basic rights embody an objective value order. As objective values, basic rights have a "radiating effect" (*Ausstralungswirkung*) throughout the whole legal order, including private law. "Every provision of private law must be compatible with this system of values, and every such provision must be interpreted in its spirit."[33]

In the *Lüth* judgment, the Court stressed the meaning of constitutional values for the provisions of private law that contain mandatory rules of law. These rules form part of the *ordre public* and are therefore removed from the dominion of private intent. However, the objective value order can also directly influence the domain of private autonomy. When there is a great inequality of power between private parties, contracts can bring about distorted results. In such cases, the civil courts are obliged to take into account as much as possible the basic rights of the weaker party.[34]

In theory, the doctrine of (indirect) third party effect of basic rights has radical consequences. It makes the whole of society — most saliently, of course, economic activities, but also the social, cultural

[32] BVerfGE 7, 198 (*Lüth*), judgment of 15 January 1958, available at http://www.servat.unibe.ch/dfr/bv007198.html.

[33] Ibid. Translation Kommers and Miller 363.

[34] See e.g. BVerGE 81, 242 (*Salesman*), judgment of 7 February 1990, available at http://www.servat.unibe.ch/dfr/bv081242.html.

and religious domain — subject to the constitution.[35] The Basic Law is understood as the codification of a set of values that should penetrate in all spheres of social life. Civil society no longer consists of a pre-political sphere of individual liberty protected by basic rights. Instead, it is also constituted and guaranteed by the constitution. On the institutional level, the doctrine brings the whole legal order, and in particular private law, within the jurisdiction of the Court. All decisions of the civil courts, insofar as they affect basic rights, become the potential subject of constitutional review by the Court. In practice, however, the Court accords much discretion to the civil courts. How much influence the objective values of the constitution should have in a particular dispute is to be determined by the civil courts themselves. Only when a civil court has completely neglected a relevant value will the Court conclude that the civil court has violated a party's basic right.[36]

3. ENTRENCHMENT OF THE CORE OF THE CONSTITUTION

Positive state obligations and indirect third party effect are made possible by understanding basic rights as values. According to the Court, the objective value order of the Basic Law covers not only basic rights in the strict sense, but also the more institutional features of the constitution, like democracy and the rule of law. The Basic Law in its totality — not only the catalogue of basic rights — incorporates the substantive value decisions of the founders of the constitution. This view has two important consequences. First, it requires that the constitution must be defended against political forces that run counter to these values. Second, it gives rise to the doctrine of unconstitutional constitutional amendments. Both consequences will be discussed in succession.

If the constitution is not a neutral procedural order but the embodiment of certain substantive values, political liberty cannot be

[35] Cf. Preuss, U. K., The German Drittwirkung Doctrine and Its Socio-Political Background in András Sajó and Renáta Uitz (eds), *The Constitution in Private Relations* (Eleven International Publishing 2005).

[36] Cf. Christian Starck, Verfassungsgerichtsbarkeit und Fachgerichte (1996) 51 Juristen Zeitung 1033.

unconditional. This idea clearly underlies the Basic Law. Article 21(1) states: "Parties that by reason of their aims or the behaviour of their adherents seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional". Furthermore, Article 18 determines that individuals who abuse certain basic rights in order to combat the free democratic basic order shall forfeit these basic rights. Article 20(4) even states that all Germans have the right to resist any person seeking to abolish the German constitutional order if no other remedy is available.

In its jurisprudence, the Court has reinforced the idea that political parties threating the German constitutional order should be prohibited. According to the Court, political freedom exists only within the limits of the value system of the Basic Law. In its first decision about the prohibition of a political party, the *Socialist Reich Party* (*Sozialistische Reichspartei Deutschlands*, SRP) (1952), the Court explicitly argued in terms of values. The freedom of political parties allows them to fight legally against constitutional institutions. Nevertheless, "the Court is justified in eliminating them from the political scene if, but only if, they seek to topple supreme fundamental values (*oberste Grundwerte*) of the free democratic order that are embodied in the Basic Law".[37] The constitution is a "value-oriented order" (*wert-gebunde Ordnung*).[38] These values include freedom and equality. As the SRP seeks to impair these values, the party must be banned, the Court concluded. Four years later, in 1956, the *German Communist Party* (*Kommunistische Partei Deutschlands*, KPD) suffered the same fate as the SRP.[39] In this case the Court stated that the Basic Law embodies certain "absolute values" (*absolute Werte*) that should resolutely be defended against all attacks.

The idea that the constitution is not value-neutral, but oriented towards certain substantive values, like human dignity and human rights, together with the idea that these values should be protected

[37] BVerfGE 2, 1 (*Socialist Reich Party*), judgment of 23 October 1952, available at http://www.servat.unibe.ch/dfr/bv002001.html. Translation Kommers and Miller 287.

[38] Ibid.

[39] BVerfGE 5, 85 (*German Communist Party*), judgment of 17 August 1956, available at http://www.servat.unibe.ch/dfr/bv005085.html.

and defended, also has consequences for the extent to which the Basic Law can be amended. The Basic Law contains a so called "eternity clause" (*Ewigkeitsklausel*) that determines that the basic principles of the German state can never be changed, not even by constitutional amendment.[40] These principles include the duty of the state to respect human dignity and basic rights, and the principles according to which Germany is a democratic, social and federal republic.

On occasion, the Court has interpreted the prohibition to change the core of the constitution in terms of values. Any constitutional amendment that would undermine or corrode the basic values of the constitution is substantively unconstitutional. The Court already suggested the possibility of an unconstitutional constitutional amendment in the *Southwest State* case (1951), where it argued that "the constitution reflects certain overarching principles and fundamental decisions to which individual provisions of the Basic Law are subordinate."[41] The Court acknowledged the possibility of unconstitutional constitutional amendments also *obitur dictum* in the *Article 117* case of two years later (1953), where it explicitly rejected value-free positivism.[42] In the *Klass* case (1970), the Court considered the constitutionality of a constitutional amendment that permitted infringement of communication privacy for the purpose of protecting national security.[43] Although the Court decided that the amendment was constitutional, three dissenting judges argued that the amendment violated the value of human dignity.

IV. THE ACADEMIC RECEPTION

1. THE NEGATIVE RECEPTION

German constitutional scholars have assessed the Court's jurisprudence on the objective value order very differently. Although the positive reception has been dominant, the jurisprudence of the

[40] Article 79(3).

[41] BVerfGE 1, 14 (*Southwest state*), judgment of 23 October 1951, available at http://www.servat.unibe.ch/dfr/bv001014.html. Translation Kommers and Miller 63.

[42] BVerfGE 3, 225 (*Article 117*), judgment of 18 December 1953, available at http://www.servat.unibe.ch/dfr/bv003225.html.

[43] BVerfGE 30, 1 (*Klass*), judgment of 15 December 1970, available at http://www.servat.unibe.ch/dfr/bv030001.html.

Court has also been rejected — or at least has been heavily criticized — by a number of constitutional scholars. They include Carl Schmitt and some of his students, in particular Ernst Forsthoff and Ernst-Wolfgang Böckenförde.

Schmitt points out that the concept of values emerged at the end of the nineteenth century as a response to nihilism.[44] The philosophy of values is an answer to the disenchantment of the world by value-neutral science. Values function as the substitute for traditional metaphysical concepts. They have three characteristic features. First, their mode of being is "having validity" (*gelten*), in contrast to things which "are" (*sein*). Because values are valid, they aspire to be actualized. Second, values are subjective; they are the product of human will. Every value is the result of an act of valuing. Third, whoever sets a value takes position against a "disvalue" (*Unwert*). Every valuation implies a devaluation. Adopting values as the foundation of law will lead to an illegitimate "tyranny of values" over German society, Schmitt feared. The aggressiveness of values and the fact that different persons believe in different values makes injecting values into law very dangerous. Each legal conflict will be seen as a battle about the realization of values. If their realization is carried out in earnest, conflicts and violence are inevitable. Against introducing values into law, Schmitt defends the autonomy of the law. The law itself is already sufficiently moral. By providing a clear framework of rules and principles, the law makes possible peaceful coexistence.

The criticism of Schmitt is mainly philosophical. The criticism of Forsthoff, by contrast, focuses on constitutional interpretation.[45] According to Forsthoff, the Court has adopted the method of constitutional interpretation of Rudolf Smend. Smend viewed the constitution as a living entity that embodies the values of the German people, but also functions to further integrate the people around

[44] Carl Schmitt, *Die Tyrannei der Werte* (Duncker & Humblot 2011).

[45] See in particular Ernst Forsthoff, Die Umbildung des Verfassungsgesetzes, *Rechtsstaat im Wandel. Verfassungsrechtliche Abhandlungen 1954–1973* (CH Beck 1976).

these values.[46] As a consequence, constitutional interpretation cannot restrict itself to the exposition of the text of the constitution, but has to bring in its historical, social and political background. In opposition to this view, Forsthoff argues that the constitution is not a system of values, but a body of norms. The legal method, put simply, amounts to applying legal norms to facts. If legal norms are replaced by values, the process of interpretation is substituted by value realization. The constitution loses its character as law. Grasping the meaning of the constitution will no longer be a legal matter; it becomes a matter of uncritical philosophy. Constitutional interpretation loses its rationality and becomes unpredictable. This jeopardizes legality and the rule of law (*Rechtsstaat*).

Böckenförde concurs with the criticism of Schmitt and Forsthoff and intensifies it. He distinguishes between three different types of value theories.[47] First, subjective theories, which see values as individual preferences (Max Weber represents this type). Second, objective theories, which conceive of values as having their existence independent of subjects (for example, the theories of Max Scheler and Nicolai Hartmann). Third, theories that understand values as embedded in culture (theories related to the *Lebensphilosophie* as developed by Wilhelm Dilthey). According to Böckenförde, in all three types of theories values have an aggressive character. They are "valid" and demand realisation. Likewise, for all three types of theories the relationship among values poses a serious problem. None of the theories offers rational criteria on the basis of which the position of a value within the broader system of values can be determined. It remains unclear how values can be weighed and how they can be balanced against each other.

This criticism concerns value theories as such. Böckenförde is critical in particular of attempts to use values as the foundation of a positive legal order. He has two main objections. First, if the law were based on values, this relativizes the separation of law and morality. Values have

[46] Rudolf Smend, Verfassung und Verfassungsrecht in Rudolf Smend (ed), *Staatsrechtliche Abhandlungen und andere Aufsätze* (Duncker & Humblot 1994).

[47] Ernst-Wolfgang Böckenförde, Zur Kritik der Wertbegründung des Recht in Ernst-Wolfgang Böckenförde (ed), *Recht, Staat, Freiheit. Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte* (Suhrkamp 1991).

their origin in the domain of morality. They provide orientation for the moral subject. Legal norms, however, are not directed at what is morally good, but function as conditions of possibility for individual freedom. Morality demands an inner conviction. The law, by contrast, merely requires that its addressees abide by the rules. The moralisation of the law, which is the consequence of adopting values as the foundation of the law, threatens individual freedom. Second, values cannot constitute a rational and objective foundation of the law. Subjective value theories necessarily lead to legal relativism since these theories see values as nothing more than subjective preferences. Objective theories lead to dogmatism, as the validity of values is apodictically stated. Those who fail to "see" their validity are accused of "blindness". Theories that understand values as embedded in culture make the validity of the law dependent on culture. In fact, all three types of theories reduce the normativity of the law to convictions about values that are present in society. This establishes a new form of positivism, the positivism of "daily valuations" (*Tageswertungen*). As soon as society's values change, the law has to change accordingly lest it loses its normative force.

Böckenförde also criticizes injecting values into law from the perspective of basic rights theory.[48] His own understanding of basic rights is liberal. The purpose of basic rights is to protect individual liberty against the state. Individual liberty is not constituted by the state, but is prior to the state. From a legal point of view, individual liberty is not directed toward substantive values (conceptions of the good; "positive" freedom); it is freedom as such ("negative" freedom). Interpreting basic rights in terms of values implies that individual liberty becomes subservient to the realization of values which are set by the state. However, in a free society it is up to individuals to develop initiatives and to exercise freedom in meaningful ways.

The transformation of basic rights into values enables the development of positive state obligations and third party effect of basic rights. Böckenförde also criticizes the openness and indeterminacy of

[48] Ernst-Wolfgang Böckenförde, Grundrechtstheorie und Grundrechtsinterpretation in Ernst-Wolfgang Böckenförde, *Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht* (Suhrkamp 1991).

this process.[49] By adopting values as the foundation of the constitution, the Court has created the structural possibility of unlimited radiation of values. This radiation lacks any internal limits. The only constraint on extending positive state obligations and intensifying third party effect lies in pragmatic considerations. The proportionality test hardly provides direction here.

The enormous leeway the Court has created for itself by interpreting the constitution in terms of an objective value order also has important institutional consequences, Böckenförde warns.[50] In fact, the Court has become a constitutional legislator. The constitution no longer is a "formal framework" (*Rahmenordnung*) within which the legislature is free to pursue its own political objectives. Rather, the constitution has been transformed into a substantive programme (*Werteordnung*) that must be implemented by the legislature and the executive, under the supervision of the Court. This seriously threatens the democratic nature of the constitution. The democratically legitimized legislature has lost its primacy in favour of the unelected judiciary.[51]

2. THE POSITIVE RECEPTION

Notwithstanding the foregoing criticism, most German constitutional scholars have appraised the jurisprudence of the Court positively. Positive state obligations, (indirect) third party effect of basic rights and entrenchment of the core of the constitution are

[49] See in particular Ernst-Wolfgang Böckenförde, Grundrechte als Grundsatznormen in Ernst-Wolfgang Böckenförde (ed), *Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht* (Suhrkamp 1991).

[50] See in particular Ernst-Wolfgang Böckenförde, Methoden der Verfassungsinterpretation. Bestandaufnahme und Kritik in Ernst-Wolfgang Böckenförde (ed), *Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht* (Suhrkamp 1991) and Böckenförde, Grundrechte als Grundsatznormen.

[51] In Böckenförde's terms: the "parliamentary legislative state" (*parlamentarischer Gesetzgebungsstaat*) has given way to the "constitutional jurisdiction state" (*verfassungsgerichtlicher Jurisdiktionsstaat*). For an exposition of Böckenförde's understanding of the constitution as a framework, see Birgit Reese, *Die Verfassung des Grundgesetzes. Rahmen- und Werteordnung im Lichte der Gefährdungen durch Macht und Moral* (Duncker & Humblot 2013). 162–234.

widely accepted. In fact, it is hard to imagine German constitutional law without them.

However, many scholars had problems with the formula of an "objective value order", as this could generate the impression that the Court had opted for a substantive value philosophy. The Court has been sensitive to this criticism. It has replaced the formula of an objective value order by a number of expressions that sound more "legal". Instead of "values", the Court usually speaks of "principles".[52] This change in terms, though, has in no way affected the consequences of the value jurisprudence. Rainer Wahl points out that the formula of the objective value order was the catalyst for the development of positive state obligations and third party effect of basic rights.[53] Once these consequences were established, the court did not need the impulse of the objective value order anymore. In a similar vein, Dominik Rennert speaks of a "secularization" of the objective value order.[54] After having performed its function, the pathos of values could be omitted. This does not mean that the constitution is no longer an objective value order. It still is, but it is not explicitly discussed anymore. It is tacitly assumed. The focus of both academia and practice is on its implications.

The value jurisprudence of the Court has been defended, among many others, by Christian Starck.[55] Starck argues that the adoption of values in law is inevitable. There is no value-free legal order. The content of the law is the result of valuations. Democracy, for instance, is a value, even if we understand it in a formal way. The majority rule is based on the valuation that the majority and not the minority should determine

[52] Cf. Rainer Wahl, Lüth und die Folgen. Ein Urteil als Weichenstellung für die Rechtsentwicklung in Thomas Henne and Arne Riedlinger (eds), *Das Lüth-Urteil aus (rechts-) historischer Sicht. Die Konflikte um Veit Harlan und die Grundrechtsjudikatur des Bundesverfassungsgerichts* (Berliner Wissenschafts-Verlag 2005) 380–381.

[53] Ibid 381–382.

[54] Dominik Rennert, Die verdrängte Werttheorie und ihre Historisierung. Zu "Lüth" und den Eigenheiten bundesrepublikanischer Grundrechtstheorie (2014) 53 Der Staat 31, 50–52.

[55] Christian Starck, Zur Notwendigkeit einer Wertbegründung des Rechts, *Rechtspositivismus und Wertbezug des Rechts. Beiheft Archiv für Rechts- und Sozialphilosophie 37* (Franz Steiner 1990).

the content of decisions — regardless of the fact that the minority may be more reasonable than the majority. The crucial question, then, is not *whether* the legal order is based on values; it is the question on *which* values it is based.

The most thorough defence of the idea that the constitution gives expression to underlying values, however, comes from Robert Alexy. He has developed a general theory of basic rights.[56] Alexy explicitly states: "[o]ne aim of this investigation is the rehabilitation of the much-despised theory of values."[57] His theory, he claims, is "a theory of values purified of unsustainable presuppositions."[58] This article is not the place to give a full account of Alexy's theory. Yet, because of its relevance for the topic of this article, it is necessary to outline the main points. The central thesis of Alexy's theory is that basic rights are principles and that principles are demands for optimization that are subject to a proportionality test. According to Alexy, every legal norm is either a principle or a rule. Basic rights are principles and principles are fundamentally different from rules.[59] Principles are norms that require that something be realized to the greatest extent possible. They can be satisfied to varying degrees. Rules, by contrast, are norms that are always either fulfilled or not. If a rule applies, the requirement is to do exactly what it says, neither more or less.

In Alexy's view, statements about principles are structurally equivalent to statements about values.[60] The difference between principles and values is that principles belong to the deontological domain, whereas values belong to the axiological domain. Deontological concepts have their basis in a command or "ought". Axiological concepts, by contrast, derive from criteria by which something may be judged "good". What is axiologically the best is deontologically what ought to be. As law is concerned with what ought to be, in respect to law it is better to speak of principles than of values. Principles express more

[56] Robert Alexy, *Theorie der Grundrechte* (Suhrkamp 1994).

[57] Ibid 18.

[58] Ibid.

[59] See in particular ibid 71–104.

[60] See in particular ibid 125–134.

clearly than values the obligatory nature of law. Nevertheless, it remains entirely acceptable for legal reasoning to proceed from values instead of principles.

Alexy discusses three different types of criticism of value theories.[61] The first type of criticism is philosophical and affects objective value theories in particular. Here the question is how we know values. The answer that we know them because we "intuit" or "see" their validity is implausible, Alexy admits. However, this claim is not necessarily part of all value theories, he adds. His own theory, he asserts, does not entail this claim.

The second type of criticism is methodological and concerns the rationality of value-oriented adjudication. If we assume the existence of a value order, it may be asked how we determine the relationship among values. An abstract ordering of values seems hardly possible. Moreover, it presupposes that we know all the values in the system, but a delimitation of the relevant set of values is a problem in itself. Alexy acknowledges the impossibility of a "hard" ordering of values, but argues that this does not exclude the possibility of a "soft" ordering, by which he means an ordering through *prima facie* preferences of particular values, or an ordering through a network of concrete preference decisions (as, for example, established by the case law of the Court). Preferential statements require justification; the justification must satisfy the criteria of general practical reasoning.

The third type of criticism is doctrinal. Here the main objection is that a conception of basic rights as values comes at the expense of the liberal content of basic rights. The subjectivity of individual freedom is replaced by the objectivity of values, which results in the alignment of constitutional freedom with a commitment to values. Alexy argues that this would only be the case if freedom and values were opposed to each other, which is not the case. Liberal liberty (negative liberty) — the freedom to do or not to do as one pleases — is itself a value (or principle) amongst others. It has to be balanced against competing values. Alexy claims that his own theory is neutral as to the question how much weight should be given to this value.

[61] See in particular ibid 134–157.

Mattias Kumm supports Alexy's approach to basic rights.[62] For him, Alexy's theory and the jurisprudence of the Court give expression to the ideal of "complete constitutional justice".[63] The general rights to liberty and equality are the explication of the moral-political values of the Enlightenment. By understanding basic rights as values, the basic requirements of liberal political morality can be incorporated into positive law.

V. CRITICAL EVALUATION

This section provides a critical evaluation of the Court's theory. First, it classifies the theory and explains its adoption. Next, it points out some serious weaknesses in the theory, including its potential to undermine the democratic nature of the constitution and its potential to lead to the moralisation of constitutional law and constitutional discourse. Subsequently, it argues that the Court does not need the theory, because the implications of the Court's assumption of the existence of an objective value order can also be based on the written provisions of the Basic Law.

The interpretative methodology employed by a constitutional court can be placed on a scale with on the one extreme normativism and on the other extreme legalism.[64] Normativism stands for a holistic understanding of the constitution as more than the sum of its written provisions. The constitution is a normative structure whose provisions are based on deeper principles, and ultimately on political morality as its deepest source of authority. Legalism, by contrast, focuses on the discrete, written provisions of the constitution. The authority of these provisions derives from the fact that they have been formally adopted

[62] Mattias Kumm, Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice. A Review Essay on *A Theory of Constitutional Rights* (2004) 2 International Journal of Constitutional Law 574.

[63] See in particular Mattias Kumm, Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law in Germany (2006) 7 German Law Journal 341, 365–369.

[64] Cf. Jeffrey Goldsworthy, Constitutional Interpretation in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 689–693.

and enacted. Normativism and legalism are ideal types. In reality, constitutional courts will find themselves somewhere between the two ends of the spectrum, depending on many factors. Their position may also change over time.

The interpretation of the Basic Law by the Court in terms of an objective value order is a prime example of normativism. For the Court, the Basic Law is much more than a set of written provisions: it is a coherent whole that gives expression to a unified structure of substantive moral-political values. The Court's extremely normative interpretation of the Basic Law must be seen in light of the German effort to reaffirm an objective and substantive morality after the experiences of Nazism and the Holocaust. As Hailbronner notes, "[the] 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 German society."[65] The turn to values was also a response to the value-neutral interpretation of the Weimar constitution.[66] Furthermore, the theory of an objective value order perfectly fits German legal culture, which places a strong emphasis on normative theorising, deductive reasoning and doctrinal systematisation.[67]

Although this may explain why the Court has developed its theory of the objective value order, the theory itself is not without problems. First of all, the idea that the constitution has a foundation in substantive values could undermine the democratic nature of constitution. If the Court does not limit itself to the interpretation and application of the rules and principles enumerated in the Basic Law, but rather focuses on the implementation of unwritten and "supra-positive" values, the

[65] Michaela Hailbronner, Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism (2014) 12 International Journal of Constitutional Law 626, 637.

[66] Substantively, the theory of an objective value order combines elements of the integration theory of Rudolf Smend, the anti-positivism of Gustav Radbruch and Catholic social teaching. See also Thilo Rensmann, *Wertordnung und Verfassung: Das Grundgesetz im Kontext grenzüberschreitender Konstitutionalisierung* (Mohr Siebeck 2007) 25–42.

[67] Cf. Hailbronner. See also Goldsworthy 701–703.

Court in fact takes on a quasi-legislative role, making redundant the legislature and other democratic institutions. The objective value order does not provide a criterion that determines when the Court has fulfilled its task to implement the values of this order and at what point it should give room to democratic decision-making. In the name of values, the Court could furthermore override the political decisions made by the democratically legitimized legislature.

A crucial question in this context is how exactly the objective value order relates to the written provisions of the Basic Law: is the objective value order inherent to the written constitution or must it be considered independent of it? In the latter case, the constitution becomes divided into two different layers of constitutional norms of which one has superior status. On the dogmatic level, this would provide a justification for the *contra legem* interpretation of the Basic Law in case of conflict with the objective value order. This implies that citizens, but also state officials, including judges, can challenge the written constitution (and the democratic decisions that are based on it) in the name of higher values. Theoretically, the acceptance of values that have a superior status turns the validity of the Basic Law into a relative validity. Instead of enhancing the legitimacy of the Basic Law, this would seriously weaken its legitimacy.

In practice, however, the Court has always tried to interpret the Basic Law and the objective value order in harmony with each other; it does not regard them as (potential) opposites. Dogmatically, this follows from the doctrine of the "unity of the constitution" (*Einheit der Verfassung*).[68] This doctrine, whose purpose is to avoid potential contradictions and tensions within the constitution, requires that the Basic Law is read and interpreted as a coherent whole; its written provision should not be interpreted in isolation.

The objective value order that the Court has acknowledged seems to presuppose the existence of widely shared moral convictions in society. This might have been the case in the 1950s, when the Court developed its theory. It can seriously be doubted, however, whether this

[68] Cf. Hartmut Maurer, *Staatsrecht I: Grundlagen, Verfassungsorgane, Staatsfunktionen* (CH Beck 2010) 23.

presupposition still holds. Contemporary German society is often characterised as pluriform and multi-cultural. This makes it questionable whether present-day Germans can be said to share a single set of substantive moral values.

The assumption of an objective value order not only involves a dubious sociological claim, however; it also has a dangerous potential: it could lead to the moralisation of constitutional law and constitutional discourse. Values denote what is morally good. Constitutional claims based on the objective value order therefore easily turn into moral claims. In a liberal democracy, however, constitutional law is not oriented toward the implementation and realization of a moral programme. Rather, it aims at guaranteeing the conditions for citizens to live together peacefully despite deep and significant moral and political divisions.[69] The invocation of values that tolerate no contestation or difference of opinion and that exist independent of democratic deliberation is at odds with this idea. In the worst case, the objective value order could justify the authoritarian imposition of values on individuals or groups who do not share them.

Admittedly, this scenario of a "tyranny of values" has never been realized in Germany. Although the Court has never revised or revoked its value order theory, in its more recent jurisprudence it has barely taken recourse to it; other considerations have been much more decisive for the Court.

The Court's jurisprudence on the objective value order has been assessed positively by most scholars not so much because of its underlying reasoning as for the content of the decisions: the recognition of positive state obligations, third party effect of basic rights and entrenchment of the core of the constitution. It could be seriously doubted, however, whether these doctrines do indeed need a justification in terms of an objective value order. In fact, these doctrines can also be constructed on the basis of the text of the Basic Law, without the problematic assumption of an objective value order.

[69] See generally Jeremy Waldron, *Law and Disagreement* (Clarendon Press 1999).

The Basic Law does not expressly recognize positive state obligations. However, it contains provisions that suggest that the state in certain circumstances should take action if necessary. First of all, this follows from Article 1(1), which places a duty on the state "to respect and protect" human dignity. Somewhat more specific is Article 2(2), which guarantees everyone's right to life and physical integrity. A duty for the state to act can furthermore find support in the principle of the social state (*Sozialstaatprinzip*), which is contained in Articles 20(1) and 28(1). These provisions, in combination with the relevant basic rights, provide a sufficient basis for the development of a doctrine of positive state action — even if in practice concrete claims based on this doctrine will be accepted only in exceptional circumstances.

The text of Basic Law leaves the question of third party effect of basic rights largely open. The only explicit acknowledgement of third party effect provides Article 9(3), which declares null and void private agreements that restrict the right to form labour unions. On a very general level, the application of basis rights in private relations can be based on the principle of the supremacy of the constitution, contained in Article 20(3), and on the (unwritten) principle of the unity of the legal order. From the same Article, it follows that the legislature, when adopting legislation concerning private law, must take into account basic rights. Article 1(3) determines that basic rights directly bind all three branches of government, including the judiciary. When civil courts interpret open norms like "good morals" (*gute Sitten*) and "good faith" (*Treu und Glauben*), therefore, they must also pay due respect to the relevant basic rights.

The Basic Law explicitly provides for entrenchment of the core of the constitution. Article 79(3), the famous "eternity clause", declares inadmissible amendments to the Basic Law that affect the basic principles of the constitution.[70] Furthermore, the Basic Law contains provisions that provide the state with instruments to protect the "free democratic basic order" (*freiheitliche demokratische Grundordnung*).[71] For example, the state can ban political parties that seek to undermine

[70] See also section III.3.

[71] See Articles 10(2), 11(2), 18, 21(2), 73(1), 87a(4) and 91(1).

or abolish the free democratic basic order.[72] Both standards — the basic principles of the constitution and the free democratic basic order — overlap and should be interpreted in harmony with each other. The use of the objective value order as a third standard has no additional value. Rather, it could lead to confusion and controversy over what values exactly must be defended.

VI. CONCLUSION

Since the 1950s, the German Federal Constitutional Court has interpreted the Basic law in terms of an objective value order. The Court's interpretation has led to the recognition of positive state obligations and third party effect of basic rights. It has also reinforced entrenchment of the core of the constitution. This article has argued that the Court's theory of an objective value order — although understandable in light of Germany's particular historical and political circumstances — is both unnecessary and undesirable. All three doctrines can also be constructed on the basis of written provisions of the Basic Law. They do not need a foundation in an objective value order. Moreover, the theory has the potential to undermine the democratic nature of the constitution and could lead to the moralisation of constitutional law and constitutional discourse. This has not happened in Germany, because other considerations than the objective value order have been much more decisive for the Court. This does not make the theory itself less problematic, however. It is not advisable, therefore, to transplant the theory to other jurisdictions.

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[72] Article 21(2).

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