The Merkel Court: Judicial Populism since the Lisbon Treaty

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The German Federal Constitutional Court's recent case law in context – A systematic account of the Federal Constitutional Court's changing constitutional imagination – The constitutional footprint of the grand coalitions during Angela Merkel's 16-year term as German Chancellor – The changing architecture of parliamentary government in the Federal Republic and the role of the Court – The supermajoritarian structure of the German political system – Majority rule and veto players – Legislation and parliamentary oversight – Executive autonomy and parliamentary control – Political representation and counter-representation by the Court – The constitutional nature of cabinet and ministerial responsibility – constitutional limits of political speech in government office – The normative model of administrative constitutionalism – The pouvoir neutre in the German constitution – The constitutionalisation of distributive justice

Introduction: the shifting constitutional imagination of the German Federal Constitutional Court

The leading role of the German Federal Constitutional Court (Bundesverfassungsgericht or BVerfG) among apex courts both in Europe and beyond stems from two main fields: its early signature rulings on fundamental rights famously contributed to the making of a liberal democracy after the Second

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World War[1] and, in more recent decades, often empowered a progressive agenda on issues like freedom of assembly,[2] privacy,[3] LGBTIQ rights,[4] global freedom of the press,[5] assisted suicide,[6] or climate change.[7] The same court, however, has a no less famous record as a frontrunner of judicial Euroscepticism and constitutional nationalism. As early as the 1970s, the Bundesverfassungsgericht began to voice objections against normative shortfalls of the European project in terms of rights protection and democratic governance, signalled ambitions to challenge the European Court of Justice on the primacy of EU law[8] and eventually did so in its notorious *ECB* case of May 2020.[9] Courts in Poland and Hungary have eagerly picked up on these German precedents.[10]

Situated between these two fields that shape the Bundesverfassungsgericht's image in international constitutional discourse, the Court's stance on the domestic political process – separation of powers, legislation, parliamentary oversight, federalism, administrative state – is equally robust and far less renowned. However, it is the core of the Court's constitutional imagination and the flipside of its stance on European matters. This jurisprudence of the Court, which the following article will analyse in more detail and in its constitutional context, has reacted to institutional shifts in the German political system after reunification and most significantly during the Merkel years with a bold reinterpretation of the constitutional order. The Court's new constitutional imagination emanates from a more aggressive reading of the idiosyncratic German model of the separation of powers, amounting to a departure from the principle of parliamentary responsibility. That model emphasises the Bundestag's role as a legislative assembly with certain oversight functions but denies its primary political function in a

[1]A. Gaillet, *La Cour constitutionnelle fédérale allemande: Reconstruire une démocratie par le droit 1945–1961* (La Mémoire du droit 2021); J. Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951–2001* (Oxford University Press 2015).

[2]BVerfG 14 May 1985, 1 BvR 233, 341/81; *see* A. Doering-Manteuffel et al. (eds.), *Der Brokdorf-Beschluss des Bundesverfassungsgerichts 1985* (Mohr Siebeck 2015).

[3]BVerfG 2 March 2010, 1 BvR 256/08, *Data Stockpiling.*

[4]BVerfG 10 October 2017, 1 BvR 2019/16, *Third option.*

[5]BVerfG 19 May 2020, 1 BvR 2835/17, *Federal Intelligence Service/foreign surveillance.*

[6]BVerfG 26 February 2020, 2 BvR 2347/15, *Assisted Suicide*.

[7]BVerfG 24 March 2021, 1 BvR 2656/18, *Climate Change.*

[8]J.W.H. Weiler, 'The State "über alles". Demos, Telos and the German Maastricht Decision', in O. Due (ed.), *Festschrift für Ulrich Everling*. Vol. 2 (Nomos Verlag 1995) p. 1651; D. Halberstam and C. Möllers, 'The German Constitutional Court says "Ja zu Deutschland!"', 10 *German Law Journal* (2009) p. 1241.

[9]BVerfG 5 May 2020, 2 BvR 859/15, *Public Sector Purchace Program (ECB).*

[10]R.D. Kelemen and L. Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland', 21 *Cambridge Yearbook of European Legal Studies* (2019) p. 59.

parliamentary system of government. Correspondingly, the Court has detached executive power from the parliamentary majority. Its idea of responsibility relies on standards of bureaucratic rationality of a government whose political basis in an elected majority is more of a problem than a solution. This alteration of the political foundations is fuelled by a new language of constitutional government, framing democratic decision-making in administrative law categories. This constitutional language advocates an idea of government drawing its legitimacy from an administrative ethos of objectivity, neutrality, impartiality, and responsibility for the common good, which the Court, apparently unconcerned with the normative shortfalls of its democratic theory, has applied to all key areas of the political constitution.

The argument proceeds as follows: I will give a brief account of the function of the Bundesverfassungsgericht in the German political and constitutional system. I will then argue that this function has altered considerably by the dominance of the grand coalition from 2005 to 2021,[11] when party competition for the chancellery was effectively suspended. The consequences of that shift were bold and far-reaching: they concern the very idea of government being responsible to parliament, which was increasingly replaced by a notion of politics as administration. In a concluding section I will sketch an explanation of how the Court's fundamental rights jurisprudence fits into the picture.

I will argue that in this paradigm shift the Court during the Merkel years has effectively embraced a kind of *judicial populism*. The very notion seems self-contradictory, as constitutional courts are usually seen as counterweights against political populism. And indeed, judicial populism is something other than a populist rhetoric or agenda practised by courts. What I aim to describe is more subtle. As the Court has transformed the very idea of political office, most of all by its rigorous stance on ministerial duties and the increasing disregard for the majority-building function of electoral rules, it has – intentionally or not – stripped the constitutional form of parliamentary democracy of its inherent plebiscitary element. However, the plebiscitary, or, as the more recent name goes, 'populist' nature of politics in general and of representative democracy in particular cannot be eradicated by whatever constitutional rules. It can only be institutionalised in different ways. The judicial populism of the Bundesverfassungsgericht then means two different things. On the one hand, it means that the core of the Court's constitutional language and imagination is designed to secure popular support for an administrative paradigm of politics as rational decision-making. The singular nature of Angela Merkel's chancellorship in this respect is underscored by the degree to which she has entrenched her policy

[11]The 2009-13 term, when the CDU formed a coalition with the FDP, marks a break only at first sight: The SPD remained committed to the role of a potential junior partner and was prepared and very willing to act as a reserve supermajority for key decisions, which Art. 23(1) Grundgesetz often stipulated during the European financial and debt crisis.

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approach within the institutions of the German constitution: the Merkel era imposed an administrative style of rationality and dispassion on political discourse and the government machinery, thereby leaving the populist side of politics to others – among them, the Court. This may explain why, on the other hand, recent cases provide ample evidence that the Court – which likes to think of itself as a neutral arbiter of conflicts arising within the political system – is poised to assume the role of a representative of the people *against* the institutions of parliamentary democracy.[12] This is demonstrated not only by the introduction of an *actio popularis* in the field of European integration[13] – many fundamental rights cases, too, indicate this dynamic, as does the court's eagerness to adjudicate conflicts over distributive justice.

I do not argue that the Court, in its general stance on deciding political conflicts, forthrightly acts as a populist power. What I conceive as judicial populism is the flipside of what Philip Manow has described as the 'extremism of the center',[14] the ostentatiously apolitical style of government hegemony in the Merkel era that was based on the obfuscation of party-political competition for power. Judicial populism, then, is what happens when a constitutional court acts in line with the extremism of the centre. What I do argue, however, is that this broad shift in the Court's constitutional theory and role is both a reaction to the new political paradigm of Angela Merkel's grand coalition and an entrenchment of its institutional features. The Court invented its new doctrinal style as a defensive strategy against the permanent threat of supermajorities in the political system. In the course of years, it ended up constitutionalising the super-majoritarian mode of government employed by the grand coalition, systematically eliminating the distinction between politics and administration. Both aspects are interwoven in the court's increasingly explicit scepticism about majority rule.

Situating the Court in the dual constitution

The Bundesverfassungsgericht usually refers to the political system over which it exercises broad review powers as a constitution of separated powers.[15] This

[12] *Cf* notably remarks of the former president of the Court on the shortfalls of representative democracy and the Court's role: A. Voßkuhle, 'Demokratie und Populismus', 57 *Der Staat* (2018) p. 128; A. Voßkuhle, 'Erfolg ist eher kalt' (interview), *Die Zeit* No. 21/2020, 14 May 2020, p. 6 at p. 7, arguing that 'the liberal elite' has lost sight of '"normal" people' who have perhaps received too little attention from politicians.

[13] K.F. Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court', 15 *German Law Journal* (2014) p. 183.

[14] P. Manow, 'Der Extremismus der Mitte', 836 *Merkur* (2019) p. 5.

[15] A.Voßkuhle and C. Bumke, *German Constitutional Law* (Oxford University Press 2019) p. 347-349.

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German separation of powers is different and peculiar in many respects. The Grundgesetz organises a parliamentary democracy, in which the government derives its legitimacy from the parliamentary majority that elects the chancellor (Article 63 Grundgesetz). The German political system nevertheless is no parliamentary democracy in a pure sense. Rather, the political autonomy (or separation) of federal government from the legislature is based on a strong culture of bureaucratic independence and the government's control over the complex architecture of federal inter-administrative coordination and bargaining.[16] The arguably more important separation of powers in the German constitutional order therefore runs between the administrative state, that is to say: federal and Länder bureaucracies, on the one hand, and majoritarian parliamentary democracy encompassing the Bundestag and the Federal Government on the other.

These institutional peculiarities do not fit easily into any coherent normative democratic theory, which is mirrored by a peculiarity of German constitutional theory. The pivotal normative model of this so-called separation of powers is no positive democratic theory of the several branches but the principle that certain key decisions constitutionally require parliamentary approval by statute or otherwise (*Parlamentsvorbehalt* or parliamentary reservation). This is hardly surprising. If the institutional fabric of the German constitution is not based on different branches of government but rather on 'state functions' (*Staatsfunktionen*) which, like legislation, are exercised jointly by different 'organs' (*Staatsorgane*) as different as the elected national parliament and the second chamber (*Bundesrat*) formed by the joint *Länder* governments,[17] it is a theory as vague and institutionally unspecific as *Parlamentsvorbehalt* that is needed to decide whether a certain decision is to be made by the government and administrative bodies alone or whether it is claimed for the institutions of parliamentary democracy. Over the 20th century, German constitutional law evolved largely along the lines of a changing understanding of *Parlamentsvorbehalt*. Once restricted to infringements upon fundamental rights and the national budget, the reservation was later extended to defence and European policy. By extending and broadening the reservation, the Court managed to indirectly adjust the relationship between parliamentary majority and parliamentary government by adjudicating the question of what must necessarily be regulated by statutes. Parliamentarisation largely functioned and still functions through tying decisions back to parliamentary approval.[18]

[16]F. Meinel, *Germany's Dual Constitution: Parliamentary Democracy in the Federal Republic* (Hart Publishing 2021) p. 18-23.

[17]In a groundbreaking study, C. Neumeier, *Kompetenzen: Die Entstehung des deutschen Öffentlichen Rechts* (Mohr Siebeck 2022) has traced the evolution of the paradigm of 'Kompetenzen' and 'Organe' to the peculiar situation of liberal political theory in Germany in the 19th century.

[18]F. Meinel, *Selbstorganisation des parlamentarischen Regierungssystems* (Mohr Siebeck 2019) p. 23-26.

How does this relate to the almost unparalleled powers of an independent constitutional court to enforce separation of powers standards? It is not self-evident why broad constitutional review is even compatible with parliamentary democracy from the outset. In line with the basic institutional features of parliamentary government, the key function of political majority within parliament is to form a government and to keep it in office through its political support (Articles 67, 68 Grundgesetz).[19] Vice versa, Article 76(1) Grundgesetz gives the cabinet bold powers to control the parliamentary agenda (albeit to a lower degree than in the UK or France, respectively),[20] while the cabinet is politically accountable to Parliament.[21] Unlike under a separation of powers constitution, the government has no democratic legitimacy in its own right, but only as part of the 'fusion of powers' (Walter Bagehot) that famously defines parliamentary government. In the ideal type of parliamentary government, the distinction between the governing majority in parliament and the government itself is therefore somewhat blurred.

Under these premises, the Court had come to terms with parliamentary democracy for decades. It took control over the involvement of parliament in key decisions through the doctrine of *Parlamentsvorbehalt* and increasingly engaged in the protection of parliamentary minorities, both of which have a strong backing in any democratic theory.[22] The Court, however, largely refrained from spelling out the institutional interplay between parliament and government in great detail and left it more or less to parliamentary practice. Judicial interventions into the political power dynamics between government and parliament are not only much more difficult to justify – they in fact have been much rarer in the history of the Bundesverfassungsgericht. Given its limited intervention in institutional dynamics, the Court also did not need to develop a *political question doctrine*. Therefore, a distinguished critic of the Court was right when he observed more than a decade ago that in the jurisprudence of the Court the entire law of the democratic process 'is astonishingly free of theory; one could also say that it

[19]Art. 67: 'The Bundestag may express its lack of confidence in the Federal Chancellor only by electing a successor by the vote of a majority of its Members and requesting the Federal President to dismiss the Federal Chancellor'. Art. 68: 'If a motion of the Federal Chancellor for a vote of confidence is not supported by the majority of the Members of the Bundestag, the Federal President, upon the proposal of the Federal Chancellor, may dissolve the Bundestag within twenty-one days'.

[20]'Bills may be introduced in the Bundestag by the Federal Government, by the Bundesrat or from the floor of the Bundestag'.

[21]Art. 65 cl. 1 and 2 Grundgesetz: 'The Federal Chancellor shall determine and be responsible for the general guidelines of policy. Within these limits each Federal Minister shall conduct the affairs of his department independently and on his own responsibility'.

[22]H. Kelsen, *Wer soll der Hüter der Verfassung sein?*, 2nd edn. (Mohr Siebeck 2019) p. 59; for the U.S. discussion, *see* J.H. Ely, *Democracy and Distrust* (Harvard University Press 1980); C. Möllers, 'Demokratie', in M. Herdegen et al. (eds.), *Handbuch des Verfassungsrechts* (C.H. Beck 2021) p. 86.

remains amorphous .... As advanced as the doctrine is in the realm of Basic Rights theory, it is just as pale in the law of state organization'.[23] What is misleading in the statement is the negative connotation. The lack of any theoretical conception of separated powers corresponded precisely to the institutional design of the constitution, the dualism of an administrative model of government with a federal basis on the one hand and parliamentary government on the other.

Ten years on, things have changed profoundly. The Court has tightened its standard of review immensely in key political fields such as European decision-making, electoral law, parliamentary procedure, parliamentary control, executive privilege, and ministerial powers. What is the essence of this shift? One part is *method*: Virtually every legal question is now answered in the universal rhetorical form of the proportionality test, which provides a scheme to weigh any interests against each. The Court's three-step approach starts off with the extensive scope of prima facie protection of both rights and institutional powers (*Kompetenzen*), against which every public or private interest, no matter how marginal, can be balanced. It thereby provides the Court with a standard it employs for cases that involve fundamental rights and equality, parliamentary control, electoral law principles, or minority rights. The other part is *doctrinal*. The Court has significantly sharpened its interpretation of the constitutional law of parliamentary democracy, formerly limited mainly to the protection of minorities and *Parlamentsvorbehalt*. The Court is firmly pushing against the institutional rules of parliamentary government developed by parliamentary practice over decades and instead arguing for the restoration of a more explicit organisational separation of parliament and government, echoing the scepticism towards parliamentarism widely held by the founders of the Grundgesetz. In the jurisprudence of the Court, the parliamentary majority – the normative centre of parliamentary democracy – has been systematically displaced from constitutional law, while the Court has removed all limits to its own powers of control without, on the other hand, subscribing to a *political question doctrine*.[24]

Super-majoritarian difficulties: the Court's political context in the grand coalition

The political environment the Court has been operating in since 2005 provides some contextual explanation for this doctrinal shift. This environment is defined by two realities of the Merkel era that emerged almost simultaneously and are

[23]O. Lepsius, 'The Standard-Setting Power', in M. Jestaedt et al., *The Court without Limits* (Oxford University Press 2019) p. 70 at p. 106 (originally published in German in 2011).

[24]C. Möllers, 'Legality, Legitimacy, and Legitimation of the Federal Constitutional Court', in Jestaedt et al., *supra* n. 23, p. 181.

deeply intertwined: the prevalence of coalitions between the two former main parties, the CDU/CSU and SPD ('grand coalition'); and a series of political and institutional crises.

Institutional effects of the grand coalition

The grand coalition is a political rather than an arithmetic concept. It is not the margin of a majority that defines it but the elimination of an alternative majority. It is this lack of a plausible alternative to CDU-led governments that defined German politics from 2005 until the 2021 election, largely caused by the schism of the parliamentary left over labour market reforms adopted by the Schröder government in 2003. For one and a half decades, the CDU alone could credibly lay claim to the chancellery. This shift in the party system has had considerable consequences for the German constitutional fabric. Political competition for the chancellery has been a key mechanism that has fuelled the building of parliamentary blocks and the working of a parliamentary democracy whose institutional mechanisms are not enshrined in the constitution but largely the result of post-constitutional developments.[25] During the Merkel years, political competition was reduced to a race to be the junior partner in her coalitions but with no claim to political leadership. It is therefore no surprise that the government's dependence on the parliamentary majority was decreasing during the grand coalition and that political decision-making by intra-federal bargaining has gained an unprecedented importance. In this regard, the era of the grand coalition has in many respects reinstated the most problematic features of the German constitutional model. It approximates the ideas of a separation of powers with a bureaucratic government independent from parliament held by many of the founders of the Basic Law.[26] After all, the Basic Law was originally designed for limited parliamentarism, for the containment of Weimar-style parliaments incapable of forming majority coalitions, for bold executive autonomy, and for the empowerment of the federal and state bureaucracies, mediated through the Bundesrat.[27]

The simultaneous crisis of both the social democratic and the centre-right parties is by no means a problem peculiar to Germany. The new complexity of forming coalitions across fragmented political aisles is a development common to most Western democracies, with roots in their changing political economy, media system, and social structure.[28] However, it coincides with a genuine institutional

[25]A detailed account is Meinel, *supra* n. 16, p. 33-69.

[26]A Doering-Manteuffel, 'Strukturmerkmale der Kanzlerdemokratie', 30 *Der Staat* (1991) p. 1.

[27]G.A. Ritter, *Föderalismus und Parlamentarismus in Deutschland in Geschichte und Gegenwart* (C.H. Beck 2005) p. 46-49.

[28]Philip Manow has developed this argument in his most recent books: *(Ent-)Demokratisierung der Demokratie* (Suhrkamp 2020); *Die Politische Ökonomie des Populismus* (Suhrkamp 2018).

feature of the German political system, which a grand coalition exacerbates considerably. The institutional place of the parliamentary opposition in federal government is inherently precarious. As the Länder are governed by highly diverse coalitions, all parties except for the AfD are represented in the second chamber and thereby exercise legislative functions on the national level. No party can ever fully play the role of the opposition. The German constitutional fabric in many ways and to an astonishing degree de facto requires an all-party consensus for major policy changes. It erects a high threshold to alter any given status quo and, hence, is highly super-majoritarian from the outset.[29] This inherently consensual, super-majoritarian structure of the German constitutional fabric weakens the case for counter-majoritarian institutions and makes it important to highlight and strengthen the framework of majoritarian decision-making.

The reinforcing effect of political crises

These effects were reinforced by a series of challenges the government was facing. The domestic crises that have preoccupied the Federal Republic since 2015 have favoured the grand coalition. Both the refugee crisis and the pandemic were primarily a matter of good administrative coordination and thus entrenched even further the political technique of a rational, evidence-based, but also apolitical, administrative culture of *Sachzwang*. This is more than rhetoric. Within the architecture of bureaucratic federalism, which divides administrative functions between local, state, and federal level, this federal network of administrations is easier controlled if the parties governing the states also form the governing coalition at the federal level. This is always the case with a national coalition of SPD and CDU, as no Land has a government without either party.

At the same time, the EU found itself in a new situation since the failure of the Constitutional Treaty (2004) and the series of political crises beginning in 2007. The institutional structure of the EU favours grand coalitions in a way similar to the fabric of German federalism: the Council, the key legislative body, is an institution without clear party majorities, in which positions of a grand coalition therefore have a greater chance of realisation. A grand coalition is more or less always present in the European Parliament due to the permanent majority of the European People's Party and the Party of European Socialists. This effect has been reinforced by the permanent situation of 'crisis' since 2008 in Germany in particular, as the domestic adoption of many critical measures required a two-thirds majority in the Bundestag (Article 23 Basic Law). In all these crises, Merkel was eager and managed to act on broad parliamentary approval beyond her own majority.

[29]In the sense of A. Przeworski, *Why Bother with Elections?* (Polity Press 2018) p. 40-41.

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The failure of the European Constitutional Treaty therefore also created a new starting point for the Court's stance on European integration. It could no longer play the role of a benevolent critic in a steady process of 'forming an ever-closer union'. With the outbreak of the financial crisis and the legal challenges filed successively against almost all political measures to tackle it, the Court was suddenly thrown onto the stage as a protagonist in an open constitutional conflict over the political legacy of the post-Nice process. With the onset of the sovereign debt crisis, it became a political force in the European institutional structure.[30]

The constitutional moment of the Lisbon case: from responsible government to the 'responsibility' of Parliament

How does a Court react to (and shape) political change?

Do constitutional courts react to profound changes in the political system? If they are – according to John Hart Ely's famous definition – institutionalised distrust in pure majority rule, it may seem natural that they lean more towards the conservative in times of left-wing governments and vice versa. History offers rich evidence that alternating government majorities in the federal government cause major shifts in the Court's jurisprudence. This is not only because, as a matter of fact, rulings at odds with the political government of the day draw more attention than others. The Bundesverfassungsgericht developed in the post-war period as a counterpart to the stable party majorities that formed the parliamentary system of government in the old Federal Republic. In the 1950s for instance, the Court insisted on the break with the Nazi past, stripped a free market economy of some traditional regulatory burdens and embraced a liberal approach to free speech.[31] In the Brandt era, the Court may have supported the economic and social policies, yet engaged in famous battles with the social democrats over issues like general conscription, abortion, university governance, foreign relations with the German Democratic Republic, and hidden public campaign funding.[32]

The counter-majoritarian narrative, however, faces at least two objections. First, the Court's decisions against the *all-party consensus* have, from the very

[30]A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015) p. 144-150.

[31]BVerfG 17 December 1953, 1 BvR 147/52, *Nazi Civil Servants;* BVerfG 15 January 1958, 1 BvR 400/51, *Lüth*; BVerfG 11 June 1958, 1 BvR 596/56, *Pharmacies;* BVerfG 28 February 1961, 2 BvG 1/60, 2 BvG 2/60, *Public Broadcasting.*

[32]BVerfG 13 April 1978, 2 BvF 1/77 and others, *Conscientious Objector II;* BVerfG 25 February 1975, 1 BvF 1/74 and others, *Abortion I;* BVerfG 29 May 1973, 1 BvR 424/71, 1 BvR 325/72, *University Reform;* BVerfG 31 July 1973, 2 BvF 1/73, *East-West Basic Treaty;* BVerfG 2 March 1977, 2 BvE 1/76, *Government campaigning.*

beginning, been crucial for its perception and extraordinary popular approval,[33] for example, on issues like party finance, electoral law, or European integration. Second, the Court exercises constitutional review also over Länder legislation which are adopted by different majorities. Changes in the federal government do not change the political tone of all legislation brought before the Court. Nevertheless, the history of the Court demonstrates that its constitutional interpretation has developed in a permanent engagement with the political branches, its changing majorities, and public opinion.[34] Even beyond courts, a high responsiveness towards public opinion is a common feature of non-majoritarian institutions.

How then did the Court react to the centrist supermajority of the grand coalition? Historical parallels matching the constellation of a strong Court in a parliamentary democracy under a grand coalition do not exist. The first grand coalition in Germany lasted only from 1966 to 1969, too short-lived to have any lasting effect. Cases are decided by courts with a certain delay. Back in the 1960s and 1970s, for instance, the Court did not rule on the constitutionality of the Emergency Powers Act, a signature piece of legislation of the grand coalition, until Willy Brandt was sworn in chancellor and the CDU was in opposition.[35]

Based on an average time-lag of three or four years, a reaction of the Court to the grand coalition could not have been expected before 2008 or 2009. And indeed, it was arguably the ruling of June 2009 on the Lisbon Treaty which first signalled the Court's changed attitude towards the political process and which was paradigmatic in many respects. First and foremost, the Lisbon case established 'constitutional identity' review,[36] allowing EU acts to be challenged based on the claim that they infringe upon 'the inviolable core content of the constitutional identity of the Basic Law'.[37] This doctrine offers the Court a way to strike down EU-related constitutional amendments to the Basic Law passed with the amending two-thirds majority in both chambers. The constitutional identity standard thereby adapts constitutional review to a situation where the majority required for constitutional amendments is no longer a major limitation, simply because it is easily available without convincing an opposition party.

[33]C. Möllers, 'Legality, Legitimacy, and Legitimation of the Federal Constitutional Court', in Jestaedt et al., *supra* n. 23, p. 131 at p. 137-138.

[34]The best account clearly is Collings, *supra* n. 1; C. Schönberger, 'Karlsruhe: Notes on a Court', in Jestaedt et al., *supra* n. 23, p. 54-55.

[35]BVerfG 15 December 1970, 2 BvF 1/69, 2 BvR 629/68, 2 BvR 308/69, *Wiretapping.*

[36]M. Wendel, 'The Fog of Identity and Judicial Contestation: Preventive and Defensive Constitutional Identity Review in Germany', 27 *European Public Law* (2021) p. 465.

[37]BVerfG 30 June 2009, 2 BvE 2/08 para. 240, *Lisbon Treaty.*

As the German amending procedure (Article 79 of the Basic Law) is relatively simple anyway,[38] the supermajority of a grand coalition exacerbates the problem it brings about, and tends to blur the boundary between constitution-making and legislation, between constitutional and statutory law. It was therefore hardly a coincidence that the Lisbon ruling of 2009 established a new standard of review, moving from procedure to substance (identity).[39] The idea of 'constitutional identity review' spelt out a full-fleshed model of powers and functions untransferable even by the most overwhelming majorities. There had, of course, long been large majorities for European integration in the German party spectrum. In December 1992, only the socialist PDS had offered parliamentary resistance to the Maastricht Treaty. At that time, however, the opposition SPD, traditionally more Eurosceptic, still had to be convinced without relying on cabinet solidarity. By the time of the Lisbon ruling, it was no longer possible to distinguish between constitution-amending power and a simple government majority.

Since the Maastricht ruling of 1992, the Court had used the constitutional principle of democracy as an argument to limit the transfer of powers to the EU. But only as of 2009 and its momentous cases on European integration did the Court impose a new constitutional model with broad implications for the entire fabric of government and politics. In this model, even though it may seem paradoxical, the majority's legislative powers were used as a constitutional argument against majority rule itself, while Parliament's government-creating function was specifically devalued. The consequences of this paradigm shift can be seen, for example, in the case law on parliamentary scrutiny powers, in the procedural law governing parliamentary committees and bodies as well as in in electoral law. If the *aim* of these rulings was to set limits to what the Court views as an unchecked rule of supermajorities under the conditions of a grand coalition with no institutional counterweights, its argumentative *means* consisted primarily in the broad transformation of administrative law concepts into constitutional standards. The Court's constitutional language has systematically levelled any difference between political institutions and administrative authorities. The *consequence* of this approach is that the political logic of governing with a grand coalition has now become remarkably entrenched in constitutional terms.

The new separation of powers

According to its often-proclaimed intentions, the Court is highly committed to parliamentary democracy and regularly defends the stance it has taken regarding

[38]For a comparative account, *see* C. Klein and A. Sajó, 'Constitution-Making', in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) p. 437-440.

[39]M. Wendel, 'Lisbon before the Courts: Comparative Perspectives', 7 *EuConst* (2011) p. 96 at p. 108-111.

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European integration by an overarching aim to put the *Bundestag* in a better position to assume responsibility for the making and implementation of EU law and for the monitoring of European legislation. Since the 2005 arrest warrant case, the Court insisted on a constitutional responsibility of parliament to use any discretion coming with the implementation of EU law to ensure compliance with domestic constitutional standards.[40] In the 2016 case on the European Central Bank's 'outright monetary transactions', it assumed a duty of the Bundestag to 'monitor compliance with the integration program and, in the event of violations of identity as well as obvious and structurally significant transgressions of competences ... actively work towards its compliance and the observance of its limits'.[41] According to the former president of the Court:

> [parliamentary] responsibility for integration means the permanent and sustainable assumption of responsibility within the framework of European integration .... The ... concept of responsibility for integration is intended to manage the tension between the constitutional concerns of participation in the European integration process on the one hand and the protection of national constitutional identity on the other.[42]

The logic of this argument makes parliament appear in a new light: it is no longer a political assembly that holds a government responsible; it is itself the addressee of a responsibility within the framework in which it exercises those competences. The Court's well-known argument runs as follows: as legislative powers are transferred to the EU, the national parliaments are displaced from their own legislative powers.[43]

[40]BVerfG 18 July 2005, 2 BvR 2236/04, paras. 62-80, *European Arrest Warrant.*

[41]BVerfG 21 June 2016, 2 BvR 2728/13, paras. 162-3, *OMT.*

[42]A. Voßkuhle, 'Verfassungsgerichtsbarkeit und europäische Integration', in Verfassungsgerichtshof der Republik Österreich (ed.), *Verfassungstag 2012 anlässlich der Wiederkehr des Tages der Beschlussfassung über das Bundes-Verfassungsgesetz und der Einrichtung der österreichischen Verfassungsgerichtsbarkeit* (Verfassungsgerichtshof 2012) p. 27 (my translation).

[43]BVerfG 30 June 2009, 2 BvE 2/08 (para. 210), *Lisbon Treaty:* 'Without the free and equal election of the body that has a decisive influence on the government and the legislation of the Federation, the constitutive principle of personal freedom remains incomplete. Invoking the right to vote, the citizen can therefore claim the violation of democratic principles by means of a constitutional complaint (Article 38.1 first sentence, Article 20.1 and 20.2 of the Basic Law). The right to equal participation in democratic self-determination (democratic right of participation), to which every citizen is entitled, can also be violated by the organisation of state authority being changed in such a way that the will of the people can no longer effectively be shaped within the meaning of Article 20.2 of the Basic Law and citizens cannot rule according to the will of a majority. The principle of the representative rule of the people may be violated if in the structure of bodies established by the Basic Law, the rights of the Bundestag are considerably curtailed and thus a loss of substance occurs of the democratic freedom of action of the constitutional body which has directly come into being according to the principles of free and equal elections [...]'.

Any exercise of powers not conferred upon EU institutions by the treaties or failing the constitutional identity standard violates the German constitution, as does any conferral that leaves the Bundestag without 'substantial' powers. What is more, as decisions are made on the EU level, the Bundestag must be compensated by rights to be informed or sometimes even requirements of subsequent approval.

What is often overlooked is the institutional consequence of a theory which in the end may be less committed to parliamentary democracy than it first seems. What the Court defends is a catalogue of legislative powers rather than a broader notion of political representation. As the Court identifies democracy and legislation, it reduces parliament, strictly speaking, to what it cannot be under the form of parliamentary government the German constitutional order is based upon: a mere legislative assembly. As a matter of fact, the Bundestag is in an utterly different position engaging with EU decision-making compared to its involvement in executive rulemaking. In the latter case, the *Gesetzesvorbehalt* doctrine enables parliament to keep the government in political check. As far as EU legislation is concerned, the 'responsibility' of Parliament for European integration politically amounts to no responsibility at all, neither of government nor parliament. The extensive rules of parliamentary involvement and co-decision stipulated by the Court as a necessary compensation for the Lisbon Treaty cause the Bundestag considerable work while offering little political prestige in return. The Court has unilaterally imposed on the political process a dense set of rules, consisting of the small-scale and rather technical statutory framework of rules governing the interaction of the Bundestag with the government in EU affairs, the transfer of further powers to the EU, and the involvement of parliament in the EU financial and budget architecture. There is evidence that these rules in fact inhibit a more political debate of the Bundestag on European policy issues and also prevent greater attention to the control of the Council and the Commission by the European Parliament.

As a result of this identification of democracy and legislative powers, the Court denies the dual role of the federal government acting in the EU Council, where it is both an agent of the parliamentary majority that legitimises and controls it, and the executive branch. If the essence of parliamentary government is parliament's active role in making and directing government, then this essence has been systematically marginalised by the Court's EU-related case law or outspokenly identified as an unwanted interference with the proper working of democracy. Peter-Michael Huber, the rapporteur of the Second Senate responsible for EU law from 2010 to 2022, has explicitly framed the idea of the parliamentary government as an obstacle to effective parliamentary control of European policy that

must be dismantled.[44] This is not an isolated opinion but fully in line with a jurisprudence that denies the Bundestag the role of a political parliament (with certain constitutionally assigned scrutiny functions in European policy) and increasingly views it as a monitoring body over both EU institutions and the federal government with certain remaining political powers. The paradigm shift has given rise to a large number of legal conflicts over the scope of parliamentary powers to obtain information from the government which for many reasons became a pressing constitutional issue only during the grand coalition.[45]

What drives the Court to more extreme views here may be a broad internal dissent over the future of a Court, which happens to consist of two Senates with full institutional independence from each other and different responsibilities.[46] It is no coincidence that most cases discussed in this article have been issued by the Second Senate with its core responsibilities in institutional and European law. It is this Second Senate alone which has engaged in the decades-old battle with the European Court of Justice over the primacy of EU law, while the First Senate, responsible for a major part of fundamental rights cases, has openly embraced the primacy of EU law and, since a 2019 landmark case, has directly applied the EU Charter of Fundamental Rights.[47]

Parliament in court: the procedural foundations of judicial populism

The institutional assumptions made by the Court in the context of European integration have long since migrated to other fields. The most obvious example is the broad way in which the Court makes use of its concept of 'responsibility'. First used to establish the Court's review over how the Bundestag uses its legislative assent when implementing EU acts, it is now employed in a rich variety of

[44]P.M. Huber, 'Die parlamentarische Kontrolle der supranationalen Herrschaftsgewalt', in Gesellschaft für Rechtspolitik Trier (ed.), *Bitburger Gespräche Jahrbuch 2018* (C.H. Beck 2019) p. 62-63.

[45]For an in-depth analysis, *see* F. Meinel, 'Confidence and Control in Parliamentary Government: Parliamentary Questioning, Executive Knowledge, and the Transformation of Democratic Accountability', 66 *The American Journal of Comparative Law* (2018) p. 317. The most important rulings include BVerfG 17 June 2009, 2 BvE 3/07, paras. 105-137, *Investigation Committee Secret Prisons*; BVerfG 13 October 2016, 2 BvE 2/15, para. 159, *NSA selector lists* (2016); BVerfG 1 July 2009, 2 BvE 5/06, *Surveillance of Members of Parliament*; BVerfG 19 June 2012, 2 BvE 4/11, *Parliamentary Scrutiny in the European Stability Mechanism*; BVerfG 21 October 2014, 2 BvE 5/11, *Arms exports*; BVerfG 23 September 2015, 2 BvE 6/11, *Evacuation from Libya*; BVerfG 2 June 2015, 2 BvE 7/11, *Parliamentary control of operations of the Federal Police*; BVerfG 7 November 2017, 2 BvE 2/11, *Parliamentary control of Deutsche Bahn AG and Financial Market Authority*.

[46]C. Schönberger, 'Karlsruhe: Notes on a Court, in Jestaedt et al., *supra* n. 23, p. 1 at p. 4-10.

[47]BVerfG 6 November 2019, 1 BvR 276/17, *Right to be Forgotten II*.

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contexts. Amending EU treaties activates an 'integration responsibility' (*Integrationsverantwortung*).[48] The budget process is governed by a parliamentary 'budgetary responsibility' (*Haushaltsverantwortung*) and so on.[49]

This constitutional paradigm reinforces the strategic unmaking of parliamentary responsibility of government. Consider, for example, a series of cases concerning the role of parliamentary committees in executive and supranational decision-making. The function of committees, as crucial and decisive as they may be for policy-making under parliamentary procedure, is usually restricted to the detailed deliberation of draft legislation and to recommendations to the whole house. At the height of the financial crisis in 2012, however, the Court upheld a statute conferring the final and binding parliamentary approval of government securities upon the budget committee. The Court made some provisions meant to preserve the 'overall responsibility' of the whole house,[50] but widened the scope of responsible decision-making by committees considerably beyond the budget process where they had traditionally been accepted. Seven years later, it refused to strike down key provisions of the 'Banking union', arguing that its democratic legitimacy was sufficient because the SSM Regulation itself provides that the national parliamentary committees may submit opinions on the European Central Bank's report and invite the chair or a member of the supervisory body to their meetings. According to the Court's ruling, these instruments allowed the Bundestag to exercise its general responsibility (*haushaltspolitische Gesamtverantwortung*).[51] Responsibility, these cases suggest, relates to the decision-making process within parliament.

Yet what can parliamentary responsibility *within the legislature* possibly mean? And who is the addressee of this responsibility? A responsibility without someone who can claim it is at best an ethical concept, but not a legal one. The answer is all but clear given that parliament, an assembly of elected representatives with parliamentary privileges, can be legally responsible only in a figurative, non-constitutional sense. In the substantive constitutional meaning of the word,

[48]BVerfG 30 June 2009, 2 BvE 2/08 (passim), *Lisbon Treaty*; *cf* P.M. Huber, 'Die Integrationsverantwortung von Bundestag und Bundesregierung', 15 *Zeitschrift für Staats- und Europawissenschaften* (2017) p. 268.

[49]P.M. Huber, 'Article 38', in P.M. Huber and A. Voßkuhle (eds.), *Grundgesetz* (C.H. Beck 2018) para. 31; A. Voßkuhle, 'Die Integrationsverantwortung des Bundesverfassungsgerichts', in P. Axer et al. (eds.), 10 *Die Verwaltung Beiheft* (2010) p. 221 ff; A. Voßkuhle, 'Die Rechtsprechung des Bundesverfassungsgerichts zu Rettungsmaßnahmen in der europäischen Staatsschuldenkrise', in A. Hatje et al. (eds.), *Verantwortung und Solidarität in der Europäischen Union* (Nomos 2015) p. 135.

[50]BVerfG 28 February 2012, 2 BvE 8/11, para. 109, *Stability Mechanism Act.*

[51]BVerfG 30 July 2019, 2 BvR 1685/14, 2 BvR 2631/14, paras. 230-231, *European Banking Union.*

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responsibility is the name for the legal relationship of the government ministers with parliament. That is obviously not what the Court is aiming at in these cases. It is not parliament that enforces responsibility. Rather, parliament and its committees are the institutions that the Bundesverfassungsgericht imposes responsibility upon. The counterpart of its responsibility, then, can only be and is in fact – the people as such. The diffuse concept of the popular will (*Volkswille*) – which the Court frames as a substantive principle of 'legitimation' has indeed gained an astonishing prominence in the Court's reasoning. In one of the leading cases on parliamentary oversight, the Court held that

> Art. 20(2,2) GG sets out the principle of sovereignty of the people. It determines that all state power is derived from the people, who exercise it through elections and other votes, as well as through specific legislative, executive and judicial organs. This requires that the people have an effective influence on the exercise of state power through these organs. Any actions of these organs must be attributable to the people's will and be justified before it .... The fact that 'all state authority is derived from the people' must be noticeable for the people as well as the state organs and take effect in practice. An adequate substance of democratic legitimacy – a certain legitimacy standard – must be achieved ....[52]

The Bundesverfassungsgericht's claim to representation

This conceptual shift from institutionalised parliamentary responsibility to an overall responsibility of the political process enforced by the Court acting on behalf of the people is no minor aspect of judicial reasoning or some rhetorical figure. It is the centrepiece of the Court's applied democratic theory, the constitutional flip side of the *action popularis* based on the right to vote introduced by the Court in EU affairs.[53] Most importantly, it explains how the Court conceives of its own role and legitimacy. It directly follows from the Court's assumptions that political representation of the people can no longer be confined to parliamentary representation. The *Volkswille* the Court envisages needs a representative specifically *against* the parliament. As matters stand, this can be none other than the Federal Constitutional Court itself, which in this way sets itself up as the true representative of the people against parliamentary representation. This ideal of a non-electoral form of popular representation against the alleged imperfections of electoral politics is populism in the truest sense of the word.[54]

[52]BVerfG 21 October 2014, 2 BvE 5/11, para. 132, *Arms exports*.
[53]*See supra* n. 13 and accompanying text.
[54]J.W. Müller, *What is Populism?* (University of Pennsylvania Press 2016).

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The way the Court makes its claim reveals much about its constitutional imagination. If the Court restates the legislative implementation of EU law as a glossy 'implementation responsibility', acts of integration as 'integration responsibility', the budget into 'budgetary responsibility' and so on, this essentially implies an administrative law concept of responsibility that subtly turns parliament into a quasi-administrative body. Why? There is no question that parliament may enact laws on the basis of its constitutional powers with the required majorities. As a matter of fact, democratic decisions can turn out one way or another – they are, in one word, undetermined.[55] It is parliament rather than the Court who decides what is a 'responsible' decision on EU law and what is not. Unlike in administrative law, where the responsibility of an agency is usually defined by statutory law laying out its aims, means and powers, it is the essence of the majority principle that decisions of the majority are binding not because of their reasons but because of the majority principle itself.[56] Any assertion of 'responsibility' therefore necessarily ends in empty rhetoric or comes at a high price: where there is no legislature that – like in administrative law – can adjust responsibility *differently,* both the objectives and the standard of 'responsibility' remain unclear. After all, what is responsibility supposed to be more than the fulfilment of the constitutional conditions of membership in the Union (Article 23(1) Grundgesetz). Unlike in administrative law, where responsibilities are assigned by law, the Bundestag's responsibility for the policies in question here (European policy, financial policy) is not even up for discussion. If the Court speaks of parliament as an 'organ' whose 'task' (*Aufgabe*) is 'representation', which it 'fulfils' in certain forms, this demonstrates the transformation of majoritarian decisions into subordinate regulation.

The invention of intra-parliamentary government: the dismantling of ministerial responsibility

The Court's new democratic theory is by no means purely theoretical. Instead, it is engaged in a very straightforward mission to reshape executive-legislative relations in the German constitution. Consider again the cases on delegated powers of parliamentary committees in major financial decisions during the financial crisis.[57]

[55]This has nothing to do with the question of the scope of Art. 23(1) cl. 3 in conjunction with Art. 79(3) of the Basic Law. Art. 79(3) of the Basic Law ('constitutional identity proviso'). Even if one assumes such limits, the unconstitutionality of a consent law already followed from these, and precisely because of the binding effect of Art. 79(3) GG, without the need for integration responsibility.

[56]The seminal text is H. Hofmann and H. Dreier, 'Repräsentation, Mehrheitsprinzip und Minderheitenschutz' in H. Hofmann, *Verfassungsrechtliche Perspektiven* (Mohr Siebeck 1994) p. 161 at p. 184-192.

[57]For a full account, *see* S. Egidy, *Finanzkrise und Verfassung* (Mohr Siebeck 2019) p. 374-377.

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The Court had initially upheld a provision of the Euro Stabilization Mechanism Act but ordered – irrespective of the statute's wording – that the assumption of guarantees by the government required not only the prior notification of the Budget Committee, i.e. its power of control, but also its consent.[58] Parliamentary scrutiny in committee was thus replaced by a committee *decision* binding on the government, although the court failed to explain why in such a case the committee was allowed to decide instead of the plenary chamber. The Bundestag consequently changed the law and conferred the approval power upon the Budget Committee, allowing for a smaller, nine-member body to decide in urgent matters. Shortly thereafter, the Court struck down this rule, on the grounds that the Bundestag 'exercises its function as a body of representation in its entirety and through the participation of all its members . . . , not through individual members, a group of members or the parliamentary majority'.[59]

In the Court's account, this representative function consists of individual powers: the right to speak, the right to vote, the right of submit motions, the right to ask questions, to engage in 'public exchange of arguments and counter-arguments, public debate and public discussion'.[60] Yet there is a remarkable gap in this account, namely the fact that parliament is the counterpart of a responsible government. The parliamentary responsibility of government is precisely the reason why there is in fact no constitutional need for a decision by a committee in such circumstances. How ministers run their departments and how the chancellor runs government is subject to their individual responsibility to parliament. In contrast to a legislature with an independent executive, the Minister of Finance is of course responsible for the assumption of guarantees for the European Financial Stabilization Facility. A parliamentary subcommittee that approves or takes the same decision under a statute is clearly not responsible and can never be. The implied principle – that it creates more legitimacy to have committees instead of ministers decide – lacks sufficient justification under the constitution.

From politics to administration

As I have argued so far, the Federal Constitutional Court has engaged in an institutional model of democracy that is intended to draw more formal boundaries between the majority in parliament and the government and which, for this reason, tends to disregard the majority's political function in the making and political directing of government. The following section discusses the flip side of this shift,

[58]BVerfG 7 September 2011, 2 BvR 987/10, para. 141, *EFS*.

[59]BVerfG 28 February 2012, 2 BvE 8/11, para. 102, *Stabilization Mechanism Act*; on the consequences, *see* Meinel, *supra* n. 18, p. 311-312.

[60]BVerfG 28 February 2012, 2 BvE 8/11 paras. 101, 108, *Stabilization Mechanism Act.*

namely the very idea of government and politics underlying the case law. It reveals the core of the Court's constitutional imagination. These two sides are closely intertwined: if the Court advances the idea of a representative legislature detached from its involvement in parliamentary government and if the government at the same time has no direct electoral basis of its own, then what is left of the *political* idea of a democratic government? The answer the Court has given in its recent rulings is consequential. The legitimacy of government, in their account, is based not on its electoral basis – the majority in parliament – but on an administrative culture of '*Sachlichkeit*', objectivity, and neutrality. Has this paradigm shift been fully understood even by the justices on the bench? In the Court's Second Senate – chiefly responsible for political cases – two justices have shaped the reasoning of the cases in the past decade more than anyone else: Andreas Voßkuhle and Peter M. Huber, both administrative law professors, both committed to ideals of bureaucratic rationality and efficient executive branch decision-making, who would quite naturally reframe political questions in categories of administrative law.

The reach of the theory of government implied here can hardly be understated. Given that the distinction between government and administration, between cabinet and civil servants, between members of a political government and a neutral civil service, is the essence of parliamentary government,[61] it is perhaps the clearest demonstration of the Court's way of thinking. In turning standards of administrative behaviour into constitutional norms, the institutions of parliamentary government are being committed to acting and speaking like administrative agencies. I will follow the Court's argument in two key areas: government communication and civil service law.

Silencing the majority: constitutional limitations on political speech

The Court's break with the constitutional form of parliamentary democracy is most clearly expressed in the increasing number of cases concerning political statements by cabinet ministers. The facts may seem petty. For example, the far-right AfD successfully challenged a press release by the Minister of Education warning against attending or supporting anti-Merkel demonstrations organised by that party.[62] Shortly after, it had the Court declare unconstitutional an interview by the Minister of the Interior that contained some polemic assertions against the AfD.[63] Most recently, the Court ruled in a highly controversial case that

[61]Joseph Schumpeter described it as the principle of 'laying the hand of the leading group on the mechanism of the bureaucracy': J.A. Schumpeter, *Capitalism, Socialism, and Democracy* (Routledge 1950) p. 442.

[62]BVerfG 27 February 2018, 2 BvE 1/16, *Wanka.*

[63]BVerfG 9 June 2020, 2 BvE 1/19, *Seehofer.*

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remarks in a statement by Angela Merkel during a press conference on official visit in South Africa violated the constitutional principle of equal chances. Those remarks had dealt with the forming of a coalition between her own CDU and, again, the far-right AfD in Thuringia, an idea that she denounced as 'unacceptable'.[64] In each of these cases, the Court held that the principle of equal opportunity of political parties 'require[s] that state organs be neutral in the political competition of parties. Accordingly, it interferes with the parties' entitlement to equal opportunities [. . .] if state organs take a one-sided stand when reacting to the announcement or organisation of political demonstrations'.[65] In particular, it constitutes an encroachment on the parties' rights to fair political competition:

> if state organs, on occasion of a political demonstration, pass negative or positive value judgments on the party organising it. Also in this respect, the principle of neutrality requires that state organs refrain from openly or covertly advertising to the benefit or detriment of individual parties that compete with each other.[66]

What concept of government is implied in this argument? After all, the neutrality of the bureaucracy and the non-neutrality of the government are ultimately but two sides of one coin. It is the constitutional power of government to direct the neutral bureaucracy according to the policy goals of the parliamentary majority.[67] If that is true, the political advantage resulting from this power for the governing parties over others is not a distortion of fair competition and equal opportunity but simply the expression of majority rule. The chance to use the authority of public office for the sake of one's own political agenda is precisely the key motive to seek elected office rather than pursue a civil service career. The Court's disregard of this distinction once again highlights the underlying reading of the constitution: no normative connection shall be established between the parliamentary majority and governmental policy-making. The Court quite specifically rejects the interconnection of party politics, coalition-building, and government policies inherent in parliamentary government as a constitutionally irrelevant expectation of

[64]BVerfG 15 June 2022, 2 BvE 4/20, *Merkel*. The facts of the case deserve to be noted. The German Chancellor was on a state visit to the country that famously and peacefully overcame apartheid. On that same day in Thuringia (of all places, Thuringia being the state where in 1930 the NSDAP first entered a coalition government), a *Ministerpräsident* was elected with the votes of an extreme right-wing party. The Court ruled that Merkel's outright political condemnation of that result were at odds with the duties of her office.

[65]BVerfG 27 February 2018, 2 BvE 1/16, *Wanka,* para. 44.

[66]BVerfG 27 February 2018, 2 BvE 1/16, *Wanka*, para. 49.

[67]E.-W. Böckenförde, *Die Organisationsgewalt im Bereich der Regierung*, 2nd edn. (Suhrkamp 1998) p. 145-146.

uninformed citizens.[68] The two sides of the view expressed in these cases hence become transparent: While the Court verbally honours the majority principle, legislative powers, and the right to vote to make up a principle of constitutional identity and an *actio popularis* against the supremacy of EU law, it widely ignores the constitutional consequences of the majority principle when it comes to the institutional side of parliamentary government.

The crucial argument of the recent cases makes no differentiation between times of elections and other times with regard to how a government may communicate. The democratic process, it argues, takes place 'not only during election campaigns'.

> The principle of equal opportunities of political parties require[s] that the principle of state neutrality be observed ... because the formation of political opinions is an ongoing process that is not restricted to election campaigns .... While political competition between parties intensifies during election campaigns, it is, however, not limited to them, and affects the electoral decisions of voters.[69]

Compare the decisive argument with the Court's leading 1976 case on government communication and party competition,[70] now unjustly cited as an applied precedent. Back then, the Court had declared unconstitutional the use of public funding for a series of political adverts and leaflets which, at the height of the campaign for the general election, praised the political achievements and future policy projects of 'The Federal Government' and was used by the coalition parties in rallies, albeit the adverts did not make any direct references to the parties.[71]

The contradiction between the Court's reasoning in these two cases is striking, comprehensive, and twofold.[72] On the one hand, the 1976 ruling was primarily concerned with the use of state *funds* for party-political purposes, i.e., an indirect, disguised form of campaign finance channelled through the federal budget. Now, the Court subjects mere political speech in office to the same regime. On the other hand, the new cases lack any consistent democratic justification. In the 1976 case, the Court argued that the democratic idea of a periodic renewal of political office

[68]BVerfG 27 February 2018, 2 BvE 1/16, *Wanka,* para. 63 (my own translation): 'Although, from the perspective of citizens, there may be only limited expectations of neutrality vis-à-vis the individual member of the government due to the intertwining of state office and party-political affiliation ..., irrespective of this, it remains constitutionally required to guarantee the process of political will formation from the people to the state organs through the equal opportunity participation of parties in political competition to the greatest extent possible'.

[69]BVerfG 27 February 2018, 2 BvE 1/16, para. 46, *Wanka*; likewise BVerfG 9 June 2020, 2 BvE 1/19, *Seehofer*, para. 48.

[70]*See* the quotation above, *supra* n. 66.

[71]Collings, *supra* n. 1, p. 168-171.

[72]M. Payandeh, 'Die Neutritätspflicht staatlicher Amtsträger im öffentlichen Meinungskampf', 55 *Der Staat* (2016) p. 525.

implied the government should be restrained from campaigning for its own re-election.[73] A parliamentary majority forming the government has a political mandate only for a limited term, the Court noted, and therefore the government must not be allowed to abuse its power to secure a consecutive term. Accordingly, it is precisely because the political authority of the office of government rests on its party base that it must not openly interfere with party competition in elections and

> to put itself up for re-election, as it were, in the election campaign and to campaign for being 're-elected as a government'. This does not preclude members of the federal government from intervening in the election campaign outside their official functions for a party.[74]

The focus on campaign spending is the outright opposite of committing the government to a *general* principle of neutrality in its political communication. The rationale of the 1976 decision is, on the contrary, a democratic non-neutrality principle, insofar as the government is not allowed to obfuscate the acting party coalition behind the abstract entity 'federal government' during an election campaign. If, therefore, the Court today claims that the regime of neutrality applies regardless of the proximity of an election and regardless of whether state funds are used, it is ultimately saying that the government has no partisan and parliamentary mandate at all, but a mere administrative legitimacy, the political form of a government of bureaucrats.

What is perhaps most astonishing about these cases is their deep political commitment to the style and rhetoric of Angela Merkel's chancellorship. According to the Court's decision in *Wanka* and *Seehofer*, the government may use its 'official authority' only for 'explaining its policy decisions and addressing objections to them on the merits (*Einwände in der Sache aufzuarbeiten*)'[75] rather than to openly attack other parties in political speech. It is obvious for anyone familiar with the political rhetoric of chancellors from Konrad Adenauer to Gerhard Schröder and ministers from Franz Josef Strauß to Joschka Fischer that these requirements would not have been met by any of her predecessors. This gives further evidence as to how deeply the Court's new constitutional imagination and the power technique of the Merkel coalitions are interconnected, how much of its implicit constitutional theory it owes to this specific political constellation.

On a more doctrinal note, too, the legal reasoning in *Wanka* and *Seehofer* is questionable.[76] The deduction of the neutrality principle from the very concept of

[73]BVerfG 2 March 1977, 2 BvE 1/76, paras. 59-66, *Government Campaigning.*

[74]BVerfG 2 March 1977, 2 BvE 1/76, para. 58, *Government Campaigning.*

[75]BVerfG 27 February 2018, 2 BvE 1/16, para. 58, *Wanka.*

[76]On the lack of constitutional justification for the neutrality obligation, *see* Payandeh, *supra* n. 72, p. 522.

government lacks any basis in the text of the constitution, which quite explicitly endows political leadership vis-à-vis the parliamentary majority upon the government through legislative agenda-setting[77] and procedural privileges.[78] Without much constitutional theory needed, both the constitution and statutory law quite explicitly state that it is the professional civil service[79] rather than the government that is 'neutral'.[80] Even the wording of the oaths of office, which the Court therefore wrongly cites for its neutrality principle, explicitly differ. Impartiality is part of the civil servants' oath of office only,[81] while the ministerial oath of office under Article 56 Grundgesetz does not mention impartiality at all, for good reasons.

It is difficult to see what the Court hopes to achieve with this interpretation. Does it hope to cool down the increasing political polarisation by setting the rules of the political discourse to a matter-of-fact reasonableness? There is evidence that an excessive expertocracy in political style mobilises even stronger support for discursive extremism. Mass democracy is inevitably populist to a certain degree, so what matters is channelling the energies of populism into the institutions of the constitution. A second explanation may therefore be more plausible. If the argument outlined above – that the Court has increasingly claimed and defended a 'populist' mandate for its own jurisdiction on key political fields – is plausible, this explains why the Court may be increasingly inclined to deny the government a straightforward majoritarian mandate. With a government confined to acting like an administrative body, judicial populism has a much broader scope.

Taking the administrative state away from parliament: constitutionalising the civil service

The political power base of a government neither directly elected nor legitimised by the parliamentary majority is the administrative state or, more specifically, the federal and, through the Bundesrat system, the Länder bureaucracies. It was Carl Schmitt in his 1931 'Guardian of the Constitution' who famously argued against parliamentary government and made the case for a constitutional plebiscitarian dictatorship of the President of the Reich. He described the authority of a bureaucracy whose function consists primarily in its independence from the political

[77]Art. 76(1) Grundgesetz.
[78]Art. 43(2) Grundgesetz.
[79]Art. 33(5) Grundgesetz; para. 60(1) *Bundesbeamtengesetz*.
[80]Payandeh, *supra* n. 72, p. 532-533, 538-539.
[81]Paras. 64 and 60(1) *Bundesbeamtengesetz*.

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parties and majoritarian rule as a '*pouvoir neutre*' or neutral power.[82] The very concept of neutrality has a longstanding anti-majoritarian tradition in German constitutional thought and implies an autonomous bureaucracy as the counter-weight of parties and elections.

How can parliament lay claim to the bureaucracy? The neutrality of the civil service, subject to instructions by the government of the day, is but one institutional mechanism that prevents the autonomy of administrative rule. Another is the comprehensive statutory regulation of the service law and salaries. It therefore deserves attention that the Court has indeed taken a decisive turn in this respect, too, by considerably cutting the dependence of the Federal Republic's most important *pouvoir neutre* on legislative majorities by assuming constitutional review over the absolute amounts of salaries.

Article 33(5) Grundgesetz states that the law governing the public service shall be regulated and developed 'with due regard to the traditional principles of the professional civil service (*unter Wahrung der hergebrachten Grundsätze des Berufsbeamtentums*)'.[83] Although it is generally accepted that this includes a principle of adequate alimentation (*Alimentationsprinzip*), the Court in more than six decades had not struck down a single provision for the reason of insufficient pay, before in 2012 it went on to hand down a whole series of cases profoundly changing the political parameters of remuneration for civil servants.[84] This happened shortly after the President of the Court had made the case for a bolder constitutional stance on the issue in a major article.[85] 'The performance of any organization and thus also of any administrative agency depends first and foremost on the people working there. They are agents and at the same time the most important resource of the administration'.[86] According to the core argument of the Court, the quality of public services can only be ensured by the payment of salaries competitive with those in the private sector:

[82]C. Schmitt, *Der Hüter der Verfassung* (Duncker & Humblot 1931) p. 149; *see* L. Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press 2015) p. 125.

[83]A. Leisner-Egensperger, 'Das System der Beamtenbesoldung', 38 *Neue Zeitschrift für Verwaltungsrecht* (2019) p. 425.

[84]BVerfG 14 February 2012, 2 BvL 4/10, *University professors salary*; BVerfG 5 May 2015, 2 BvL 17/09, *Career Justices Salaries I*; most recently BVerfG 4 May 2020, 2 BvL 6/17, *Career Justices Salaries II*; BVerfG 17 November 2015, 2 BvL 19/09, *Civil service pay. See* K.F. Gärditz, 'Professorenbesoldung', in J. Menzel and R. Müller-Terpitz (eds.), *Verfassungsrechtsprechung*, 3rd edn. (Mohr Siebeck 2017) p. 917.

[85]A. Voßkuhle, 'Personal', in W. Hoffmann-Riem et al.(eds.), *Grundlagen des Verwaltungsrechts*, vol. III (C.H. Beck 2010) § 43 para. 72.

[86]Voßkuhle, *supra* n. 85, para. 1.

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> The alimentation must enable the civil servant to devote himself entirely to the public service as a life profession and to contribute in legal as well as economic security and independence to the fulfilment of the tasks assigned to the professional civil service [. . .]. The salary thus not only serves the living expenses of the civil servant, but – given the importance of the civil service for the general public – at the same time has a quality-assuring function [. . .]. To make the civil service to be attractive to employees with above-average qualifications, the appropriateness of the remuneration must also be determined by its relationship to the income earned for comparable activities outside the civil service and based on comparable training.[87]

Building on these premises, the Court has developed a five-parameter model to control the adequacy of remuneration in which the fulfilment of three parameters indicates the adequacy of the salary altogether.[88]

Now consider the parallel argument the Court made in a highly contested case concerning the civil servants' right to strike. The constitutional challenge to the traditional strike ban arose after the European Court of Human Rights declared a general strike ban for all members of the civil service regardless of their function a violation of Article 11 of the Convention.[89] The Bundesverfassungsgericht defended the restrictive stance of the German constitution arguing that

> According to the present constitutional concept of the career civil service system, the ban on strike action is inseparably linked to the principle of alimentation and the duty of loyalty. A right to strike for civil servants is incompatible with these two principles which are essential elements of a civil servant's functions; rather, the ban on strike action for civil servants guarantees and justifies the present set-up of the described structural principles of the career civil service system. Against this background, the ban on strike action for civil servants under Art. 33(5) GG is an independent structural principle of the career civil service system that is necessary for the system and thus fundamental.[90]

Since the adequacy of remuneration, the Court argues, is protected under the Constitution regardless of parliamentary majorities, the parliamentary majority may not be put under pressure by the civil service going on strikes:

[87]BVerfG 14 February 2012, 2 BvL 4/10, para. 147, *University Professors Salary*, my own translation; likewise BVerfG 5 May 2015, 2 BvL 17/09 (121), *Justices salaries I.*

[88]In detail T. Hebeler, 'Verfassungsrechtliche Vorgaben für die Beamtenbesoldung, insbesondere im Hinblick auf die Orientierung der Beamtenbesoldung an der Tariflichen Gehaltsentwicklung', 30 *Zeitschrift für Tarifrecht* (2016) p. 366.

[89]ECtHR 12 November 2008, No. 34503/97, *Demir and Baykara* v *Turkey.*

[90]BVerfG 12 June 2018, 2 BvR 1738/12, para. 152, *Ban on Strike Action for Civil Servants.*

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> If civil servants' remuneration or parts of it could be negotiated by means of labour disputes, the existing possibility for civil servants to enforce alimentation, guaranteed by the Constitution, before the courts – and hence the guarantee of subjective rights under Art. 33(5) GG – could no longer be justified.[91]

The legal argument the Court uses is arguably circular: civil servants are not allowed to strike because they enjoy a constitutional guarantee of salary; they enjoy a constitutional guarantee of sufficient salaries because they are not allowed to strike. The core problem of these cases, however, is constitutional rather than logical: Even though adequate salary and the strike ban are legal principles enshrined in Article 33(5) Grundgesetz, this does not entail that the Court should exercise constitutional review over salary provisions, which, for that reason, it had never done until 2012. The constitutional principles of the civil service also include, and by no means on a marginal note, the setting of salaries by parliamentary statute rather than by the Constitutional Court. Despite what the Court suggests, the reason for this is not primarily the ban on strikes, but the political allegiance of the *pouvoir neutre* to parliamentary democracy, which is ensured by its dependence on parliamentary majorities rather than constitutional interpretation.[92] In exercising direct authority over civil service salaries by enforcing their competitiveness with the private sector, the Constitutional Court has gradually shifted this allegiance from legislation to the private sector and the wage growth rates generated there – and indirectly to the Court.

Securing legitimacy: embracing distributive justice in rights adjudication

The increased willingness of the Court to interfere with the political process over distributive issues is not limited to civil service salaries. In a wide range of fields, the Court is arguably poised to secure its self-attributed popular mandate by a bolder stance on economic and social rights, which, in the conventional liberal theory of constitutional review, were usually left to legislative majorities to decide. The progressive rights agenda would then reflect a need for a more explicitly political legitimacy of the Court for its positioning within the broader constitution. I cannot discuss these cases here in any depth and will mostly simply name them to point at a general feature that illustrates the shifting role of the Court itself. The

[91]Ibid., para. 153.

[92]On the connection between salary iura quaesita and the constitutional guarantee of loyalty – albeit politically with the opposite thrust – *see* C. Schmitt, 'Wohlerworbene Beamtenrechte und Gehaltskürzungen' in *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954* (Duncker & Humblot 1958) p. 174.

review of political decisions on questions of *distributive justice* is generally regarded as more difficult to justify in comparison with the control of restrictions on liberty.[93] The – call it Rawlsian – distinction between equal freedoms on the one hand, and political decision-making on distributive justice on the other, was based on the assumption that political decisions on the distribution of goods ideally emerge from a fair bargaining process between different interests that only establishes rights but does not interfere with them.[94] The non-recognition of positive constitutional rights hence had a strong theoretical and doctrinal basis. Not least because conflicts over distributive justice are usually highly politicised and constitutional review, for this reason, is necessary only in cases of discriminatory policies against minorities.

It is therefore remarkable how boldly the Court has engaged in constitutional conflicts over questions of distributive justice, thereby often, but not always,[95] supporting traditional middle-class interests. The Court set off for this path in a 2008 case, when it struck down – to the pleasure of many – a major policy project of fiscal consolidation involving the cut of tax deductions for commuters.[96] In 2014, the other Senate of the Court pushed for more social justice in the system of inheritance tax and declared unconstitutional the exceptionally generous exemptions of family-owned businesses – which represent a major part of the German economy.[97] In 2017, it called for more diverse and socially inclusive criteria in the established German system of university admissions.[98]

Since the outbreak of the financial and debt crisis, the Court has been busy deciding cases which involved questions of distributive justice on a much larger scale. Starting with the Greek bailouts case, the Court attempted to vest the Bundestag with the broadest possible instruments of control over the release and use of funds,[99] eventually resulting in the ruling of May 2020 on the

[93]Lepsius, *supra* n. 23, p. 235.

[94]K. Forrester, *In the Shadow of Justice. Postwar Liberalism and the Remaking of Political Philosophy* (Harvard University Press 2020).

[95]Notable exceptions include the 2021 climate change action case (*see* below n. 101) and BVerfG 18 July 2012, 1 BvL 10/10, *Minimum Benefit For Asylum Seekers*; a case concerning standards of distributive justice for a group *without* democratic representation, and BVerfG 9 February 2010, 1 BvL 1/09, para. 142, passim, M*inimum Social Benefits*, in which the Court declared the absolute amount of payments made to certain long-term unemployed persons incompatible with human dignity and the welfare state principle, largely on the grounds that the legislature had not comprehensibly disclosed its procedure for determining the standard rate.

[96]BVerfG 9 December 2008, 2 BvL 1/07, *Tax Deductibles for Commuters.*

[97]BVerfG 17 December 2014, 1 BvL 21/12, *Inheritance Tax.*

[98]BVerfG 19 December 2017, 1 BvL 3/14, *Numerus Clausus II.*

[99]On the case law of the Federal Constitutional Court on the financial and debt crisis *see*, among others, U.R. Haltern, *Europarecht*, *vol. I*, 3rd edn. (Mohr Siebeck 2017) paras. 1169-1183; U. Hufeld, 'Europäisierung der Finanzverfassung', in U. Hufeld et al. (eds.), *Entwicklungslinien der*

European Central Bank's public sector purchase program, in which the Bank bought government bonds worth around €2.5 trillion in order to stimulate the economy and raise the inflation rate to a certain level. The Court very forthrightly confronted the European Central Bank's measures with their distributional consequences, namely the 'effects that a programme for the purchase of government bonds has on, for example, public debt, personal savings, pension and retirement schemes, real estate prices and the keeping afloat of economically unviable companies'.[100] Finally, the Court in an internationally highly acclaimed ruling in 2021[101] eventually took on the issue of climate justice by hearing a challenge that all professional commentators had considered bound to fail and eventually invalidated the Climate Protection Act because it distributed the burdens of the national emissions reduction path unjustly between the generations.[102] The case marks a bold attempt of the Court to overcome systemic challenges that electoral politics faces in dealing with long-term structural problems such as climate change.

Conclusion

This article has pointed at the remarkable accumulation of cases in recent years that deviate from the constitutional achievements of parliamentary democracy after the Second World War, that push the institutions of the Federal Republic in a new and different direction and thereby attribute a new and even more robust role to the Constitutional Court itself. I did not intend to engage in a comprehensive or at-length discussion of any of the cases mentioned. My intention was merely to sketch a possible explanation for this ongoing process of remaking the German constitution and the changing political role of the Court.

The contextual analysis of the Federal Constitutional Court's landmark rulings of the last decade has revealed a distinct pattern of constitutional interpretation. Since the Lisbon decision, the Court has strategically relied on an institutional dualism between a democratic parliament and a bureaucratic government that had already been overcome by the development of parliamentary government in Germany. The flip side of this interpretative pattern is an administrative,

Finanzverfassung (Lehmanns Media 2016) p. 75; F.C. Mayer, 'Rebels without a Cause?', 49 *EuR* (2014) p. 573; M. Ludwigs et al., 'Das Bankenunion-Urteil als judikativer Kraftakt des BVerfG (2 parts)', *EWS* (2020) p. 1-7, 85-93; P.M. Huber, 'Die Integrationsverantwortung von Bundestag und Bundesregierung', 15 *ZSE* (2017) p. 286.

[100]BVerfG 5 May 2020, 2 BvR 859/15, para. 139, *Public Sector Purchase Program (ECB-case).*

[101]BVerfG 24 March 2021, 1 BvR 2656/18, *Climate Change.*

[102]R. Krämer-Hoppe, 'The Climate Protection Order of the Federal Constitutional Court of Germany and the North-South Divide', 22 *German Law Journal* (2021) p. 1393.

apolitical model of government. As I have argued, this institutional scheme was reinforced by the political constellation of the Merkel governments when, due to the division of the parliamentary left, grand coalitions were without alternative for a long time and the lack of programmatic majorities in the Bundestag paved the way for Angela Merkel's ostentatiously rational and matter-of-fact governing style, which thereupon became the normative centre of the Court's constitutional ideal.

In this respect, the constitutional ideal of judicial populism corresponds precisely with the German model of political integration through welfare state and administrative functions. This administrative structure of the social realm, deeply rooted in German political culture, may make the political system efficient in its reaction to crises. The dissembling of politics as administration is therefore by no means an invention of the Federal Constitutional Court. While in its early days it was in fact the Court that formed the constitutional imagination of the Federal Republic, it is now increasingly the constitutional imagination of the republic that forms the Court. The German public likes to think of political questions as administrative problems, be it migration, energy, or public health. The separation of powers between a representative legislature and a bureaucratic, non-majoritarian government mirrors in many respects this deeply rooted desire to eventually turn every political into an administrative problem. In a dramatically changing political environment both domestically and internationally, German politics has begun to face a new reality. The future of the Bundesverfassungsgericht, too, will depend on its ability to overcome the constitutional mindset of the Merkel Court.

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