

Celebrating the Milk Maid: What Federal Constitutional Court President Limbach Doesn't Tell Us About the Court Says It All

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(Das Bundesverfassungsgericht. By Jutta Limbach. C.H. Beck Verlag, series "Wissen"; 128 pages; Munich 2001; DM 14,80). [1] It's a small book. Actually, it is a very small book. Only one hundred and twenty-eight pages, it's a format so thin it could fit into a pocket. As a matter of fact, it is smaller than a copy of the Grundgesetz (German Basic Law) that a German law student would carry along to class. The book's title, however, is considerably more intrepid than the book's small stature. At the same time breathtakingly pithy and slightly immodest, the book is simply called *Das Bundesverfassungsgericht (The Federal Constitutional Court)*. And at the top of the cover, just to make sure, the word "WISSEN" (KNOWLEDGE) appears in big letters. While one wonders how a publication of such limited size could deign to comprehensively present the important "knowledge" of the Federal Constitutional Court, the other words on the cover provide some assurance. Those words are the name of the book's author who obviously could not be more adequate for the task. The author, Jutta Limbach, is the current President of the Federal Constitutional Court presiding in her seventh year. [2] This is not a book for lawyers. There is not a single footnote. It does not seem to be written for law students either. There is one striking reason for that: everything in the book can be found in legal literature elsewhere, especially the constitutional law commentaries so fundamental to German legal education. In fact, there is nothing in this book that a law student would not have the opportunity to hear in any lecture; except here it is more terse. President Limbach's book is intended for a different, wider audience that is simply eager to acquire a basic familiarity and understanding about things dealt with in the other books in the same "KNOWLEDGE" series of books from the publisher C.H. Beck, things like "Bacteria", "Charles the Great", "Allergies", and the more transcendent title in the series "What is Light?" [3] In explaining what the Federal Constitutional Court is, President Limbach focuses primarily on what it is not. We learn, for example, that it is not a political but rather a legal instrument. Although mentioning (but not really treating) the never-ending criticism regarding the Court's evident political "role", at one point President Limbach states that, as far as the Federal Constitutional Court is concerned, the battle between law and politics has been won by the law.⁽¹⁾ The book misses the chance to tell this important story, if there is such a story to tell at all. Instead, President Limbach settles for a simple equation that follows the logic: since the Federal Constitutional Court is an organ of the law it is not a political entity. President Limbach is content in invoking "we-the-people" emotionalism and relying especially on the press to keep a "wakeful eye" on the Federal Constitutional Court and, for that matter, on democracy in general.⁽²⁾ Unfortunately, President Limbach's analysis of the law vs. politics question (and the other themes undertaken in the book) is true but also trivial. [4] The book, therefore, is not noteworthy in itself. Its appearance in a year that marks the Court's fiftieth anniversary, however, lends the book some significance and actually emphasizes some of the reasons for the book's modesty. Anybody slightly familiar with German institutions is well aware that the Court will not engage in dionysic, self-indulgent festivities. While the Court may have what it calls self-respect, it never had a spark of that radiant admiration shown, and dare we say, the self-indulgence exercised by the U.S. Supreme Court. Almost apologetically and certainly metaphorically, the Court's homepage describes the somewhat dreary buildings of the Federal Constitutional Court in the somewhat dreary city of Karlsruhe as an effort "not to build a palace of justice".⁽³⁾ To a certain extent the Court has always rejected for itself any kind of half-religious status. It did so for reasons that are, for the most part, entirely convincing. In light of this tradition and now that the Court effectively cannot escape some sort of celebration during its 50th year, it is not surprising that President Limbach released her small book instead of a solemn, gold-worked tome. Of course, this tradition of understatement and prudence did not prevent President Limbach from taking a solemn, "official" tone with the subject. Indeed, at the end of her KNOWLEDGE tour through the institution she directs, the only thing that is clear to any lay-reader is that everything is going just fine with "our" Federal Constitutional Court. To some extent, it seems President Limbach intended to wear the hat of a promoter not a critic and as she was not writing for legal professionals perhaps she is not to be criticised for this, not really. The story, however, is not over here. [5] What President Limbach did not really address is the precarious position of a Court, which over the years has increasingly been called to settle conflicts which should have been settled by politics in the first place. Indulging in mere references to the Court's status as a purely legal institution, the Court, indeed, behaves as one of its harshest critics put it: as if it were "white-washed and innocent like a milk maid among chimney-sweeps".⁽⁴⁾ Importantly, President Limbach neglected to provide the reader with a map to the new challenges the Federal Constitutional Court will face as old patterns of social conflict-solution evolve or die-off and give way to differentiated and highly complex mechanisms of social self-government. The law inevitably has to deal with these tremendous changes and the Federal Constitutional Court, inevitably exposed to those legal challenges, cannot put its head into the sand.⁽⁵⁾ If the Court does not perceive that the basis for this traditional self-concept has largely faded, it will not be able to deal adequately with the issues brought before it. If the Court keeps viewing them as mere individual conflicts in need of adjudication along the boundaries of "government" and "society", the results it reaches will not effectively solve any of those conflicts. And if the Court will not respond to a changed necessity for arrangements that

are compatible with the systemic arrangements already made by those turning to the court, the decisions it renders will cease to function as “law” at all. These thoughts are just the tip of the iceberg. And these dangers (and challenges) have extensively, and often thoroughly so, been discussed for quite a while now. In President Limbach’s book on the Federal Constitutional Court, however, we do not hear a single word about this. [6] It is nice that the President of the Federal Constitutional Court, instead of engaging in mere ceremonial speeches at professional conventions, released a “book for everybody” about that important institution. But instead of engaging in self-evident causeries, she should have saved the space for at least some solitary, more substantial thoughts on challenges the Court will face in the future. There is reason to believe that, had she done so, it would have really been an instructive book; one that explains the Federal Constitutional Court by explaining the challenges it is facing, since attending to the challenges facing society is what the Federal Constitutional Court is truly all about. Perhaps not everybody would be interested in that, but everybody should be concerned about it. [7] In a strange way, President Limbach’s book, by trying so hard to be so little actually celebrates too much.

(1) JUTTA LIMBACH, DAS BUNDESVERFASSUNGSGERICHT 20 (2001).

(2) *Id.* at 72; 88.

(3) See www.Bundesverfassungsgericht.de

(4) Gerd Roellecke, *Zum Problem einer Reform der Verfassungsgerichtsbarkeit*, 2001 JURISTEN-ZEITUNG 114, at 119.

(5) For just two examples of the flaws inherent in the jurisdiction of the Federal Constitutional Court and new, more suitable approaches, see Karl-Heinz Ladeur, *Das Bundesverfassungsgericht als “Bürgergericht”?*, 31 RECHTSTHEORIE 67-99 (2000); Gunther Teubner, *Ein Fall struktureller Korruption?, Die Familienbürgerschaft in der Kollision unverträglicher Handlungslogiken*, 83 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 388-404 (2000).