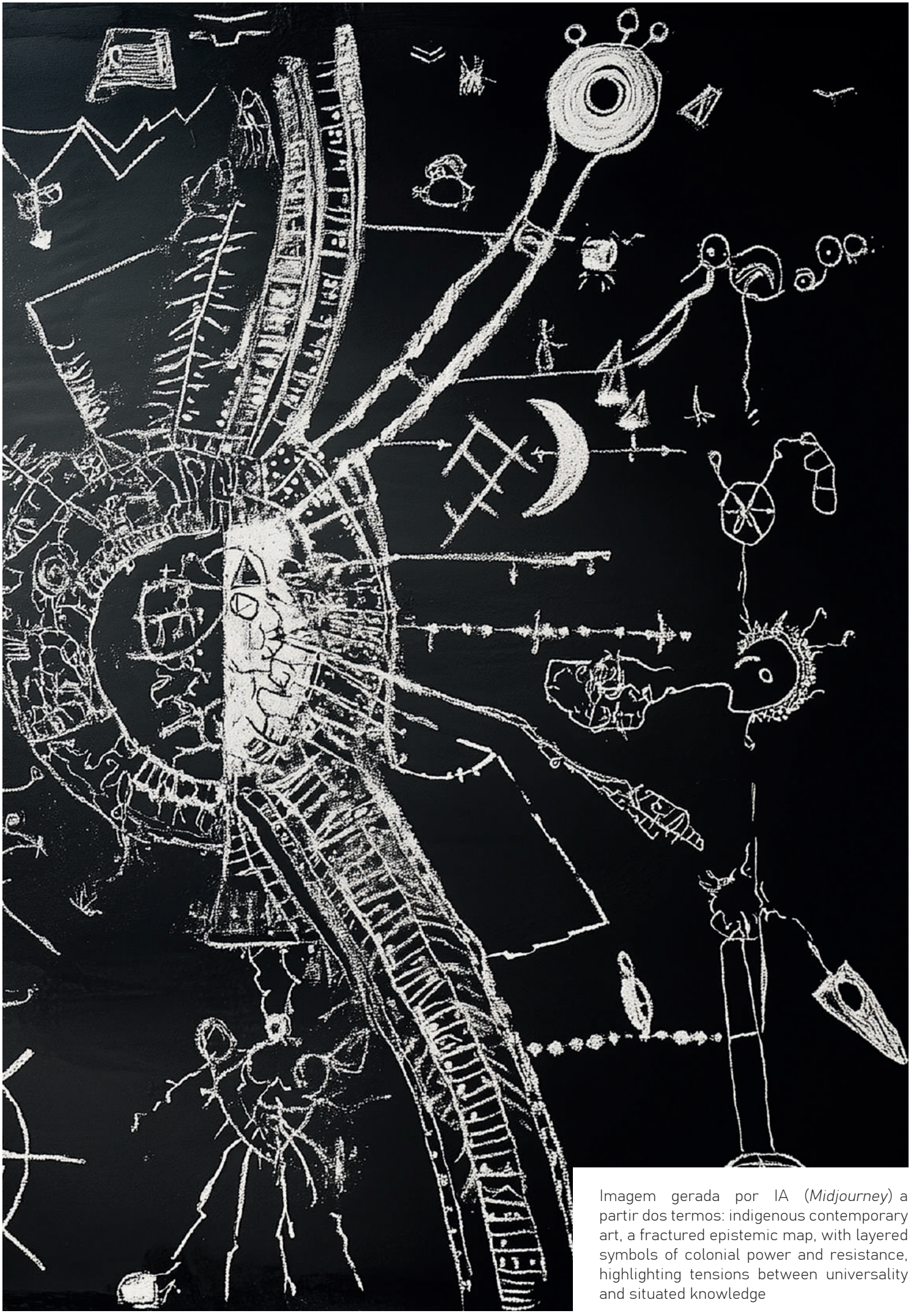

Imagem gerada por IA (*Midjourney*) a partir dos termos: indigenous contemporary art, a fractured epistemic map, with layered symbols of colonial power and resistance, highlighting tensions between universality and situated knowledge

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ARTIGOS

CONSTITUTIONAL WAVES OF FAITH:
REOCCUPATION, RELIGION AND THE RHETORICAL ENSEMBLE OF THE BUNDESVERFASSUNGSGERICHT (1951-1952)

Ricardo Martins Spindola Diniz 0000-0001-5127-5766
Universidade Federal do Tocantins, Palmas, TO, Brasil

Abstract
Despite the evidence it now entertains, constitutional adjudication at its inception in West Germany's Federal Republic was barely plausible, something that went beyond the practice's unprecedented character. This article reconstructs the challenges the Federal Constitutional Court faced regarding its establishment and consolidation during its first two years. Often framed as "the last of the constitutional organs," based on novel documentation on those personalities scouted to form the court's first generation, it shows how the delay in the court's institution derived from actors' lack of faith in its political-legal significance. Concomitantly, this piece highlights the importance of religion as a factor for the institution's stabilization. It does so by focusing on ceremonious instances of communication such as inauguration orations and radio speeches. As it accounts for the mortgage of religiously coloured expectations and hopes tainting this position from the standpoint of comparative legal studies, the article contributes to clarifying previous findings of the scholarship on the emergence of the Federal Constitutional Court. Particularly, exploring the religious undertones subtending the roles and involving the audiences of the Hüter der Verfassung in post-war Germany augments our understanding of (i) the projects and actions of the court's first adversary, Konrad Adenauer's minister of justice Thomas Dehler; (ii) the influence of constitutional judge and Dietrich Bonhoeffer's brother-in-law Gerhard Leibholz and the force of his argumentation in a milestone for the court's authority, namely, the Status-Denkschrift; and (iii) the resolution of the final showdown between Dehler and the court's first president, Hermann Höpker-Aschoff.

Keywords
German Federal Constitutional Court, Guardian of the Constitution, Comparative Constitutional Studies, Political Theology, Hans Blumenberg.

CONSTITUCIÓN, FE Y ONDAS DE RADIO: REOCUPACIÓN, RELIGIÓN Y EL MARCO RETÓRICO DEL TRIBUNAL CONSTITUCIONAL FEDERAL ALEMÁN (1951-1952)

Resumen
A pesar de la evidencia que ahora posee, la adjudicación constitucional en sus inicios en la República Federal de Alemania Occidental era difícilmente plausible, algo que iba más allá de la naturaleza sin precedentes de la práctica. Este artículo recorre los retos a los que se enfrentó el Tribunal Constitucional Federal en su creación y consolidación durante sus dos primeros años. A menudo enmarcado como "el último de los órganos constitucionales", basándose en documentación inédita sobre las personalidades elegidas para formar la primera generación del tribunal, muestra cómo el retraso en el establecimiento del tribunal se derivó de la falta de fe de los actores en su importancia político-jurídica. Al mismo tiempo, este artículo destaca la importancia de la religión como factor de estabilización de la institución. Este papel de la religión sale a relucir al centrarse en las instancias ceremoniales de la comunicación del tribunal, como sus discursos de inauguración y los discursos radiofónicos de su primer presidente. Al explorar desde una perspectiva de estudios jurídicos comparados la hipoteca de las expectativas y esperanzas cargadas de religiosidad para determinar la posición de "guardián de la Constitución", el artículo contribuye a aclarar conclusiones previas en la literatura sobre el surgimiento del Tribunal Constitucional Federal. En particular, explorar las implicaciones religiosas que subyacen a las funciones y que implican a los públicos del Hüter der Verfassung en la Alemania de posguerra mejora nuestra comprensión de (i) los proyectos y acciones del primer adversario del tribunal, el ministro de Justicia de Konrad Adenauer, Thomas Dehler; (ii) la influencia del juez constitucional y cuñado de Dietrich Bonhoeffer, Gerhard Leibholz, y la fuerza de su argumentación en una construcción histórica de la autoridad del tribunal, a saber, el Status-Denkschrift; y (iii) la resolución del enfrentamiento final entre Dehler y el primer presidente del tribunal, Hermann Höpker-Aschoff.

Palabras clave
Tribunal Constitucional Federal Alemán, Guardián de la Constitución, Estudios Constitucionales Comparados, Teología Política, Hans Blumenberg.

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Introduction

"For over 200 years constitutional projects have oscillated between the poles of magic and deceit, depending on how ideology, myth and the symbolic dimension came into play."[1] This statement appears at the first pages of a major work for comparative constitutional studies. In terms of the theoretical and methodological commitments embraced in this investigation, Günter Frankenberg's *Comparative Constitutional Studies: Between Magic and Deceit* certainly presents a standard, both inspiring and yet to be surpassed. Despite its merits, Frankenberg' approach interestingly encapsulates some of the issues common to otherwise parallel if not even antagonistic research programs, namely, those of legal history and legal theory. On the one hand, as the loose concatenation of "ideology, myth and the symbolic dimension" suggests, Frankenberg shares with legal history a thrust for undertheorization, ultimately constraining the sort of sources either Frankenberg or legal history manage to consider. On the other hand, consider how Frankenberg fleshes out "constitutional projects." Focusing exclusively on a plethora of constitutional documents, while refraining from further probing primary sources regarding their pre-history, genesis and reception, relying instead on the surrogate of secondary literature accounted at best in a transdisciplinary key and at worst as an excuse for "context," the lack of multidisciplinarity in his theorization speaks to a relented common trait of legal theory. In contrast to Frankenberg's, this comes thoroughly to the fore when one considers legal theory at its worst. In their clumsiness in handling "thick things,"[2] legal theorists often indulge themselves with harebrained metaphors, boyish examples – consider English-speaking legal theorists' obsession with sports[3] – and "the tiring exercise of comparing authors from different ages"[4] instead of pursuing detailed case studies that the "thickness" of the medium of the law demands.

True, Frankenberg acknowledges that "constitutional magic appears in different guises." Yet, when the comparatist states that "a single written text [...] accompanied by ritual converted the population inhabiting a given territory into a political community referred to as 'people', 'nation', 'peuple', 'Staatsvolk', 'pueblo' and so on" and that this "single written text" accomplishes this "almost by sleight of hand,"[5] he is taking too much for granted. Frankenberg does not ponder thoroughly as one should the distinct shapes subtending the incisiveness of words such as the "people" and "Staatsvolk," but also judicial review and *Verfassungsgerichtsbarkeit*, insofar as my purpose is to account for

[1] Frankenberg, *Comparative Constitutional Studies*, p. 10.

[2] In the sense proposed, for instance, by Ken Alder on the introduction to the focus section of Isis; Alder, Introduction, 2007. In the author's words, "the things of the world are assembled as much according to ethical, aesthetic, and political prescriptions as in the service of narrow utility." Further, the phrase invokes that "creating artifacts to meet human ends is not a simple task and that it requires the coordination of heterogenous networks of people and processes. The material world is lumpy, recalcitrant, and inconsistent." For a recent work that approaches legal artifacts from this perspective, see Bomhoff, Getting Legal Reason to Speak for Itself, 2023.

[3] For an account of the roots of this obsession, see Taylor, A Secular Age, 2007, p. 398ff ("[Victorian] education was very successful, in the sense that the élite male youth who attended these schools carried these ideals with them into their later lives, in regiments, board rooms, and politics, as well in public service at home and in the Empire. Its success is perhaps best attested by the importance that the game-playing image took on in élite imagination.")

[4] As recently pointed out by Somek, *Liberalism and the Reason of Law*, p. 396.

[5] Frankenberg, *Comparative Constitutional Studies*, p. 10.

some of the ways through which the latter became in Germany a constitution's crucial "accompanying ritual."

Interestingly, in so proceeding, Frankenberg reveals a proximity to Michael Stolleis. Consider how the legal historian accounts for the fortune of two tenets of the instrumentarium of the early years of the *Bundesverfassungsgericht* among constitutional judges and scholars, namely, *Integration* and *praktische Konkordanz*. Stolleis remarks this certainly was due to how both notions hearkened back to "a venerable tradition of ecclesiastical law." *Integration* and *praktische Konkordanz* fit the general enterprise of securing evidence for constitutional adjudication beyond the "fundamental provision in force in the early years of the Federal Republic," evoking thereby the "subcutaneous influence of the tradition of ecclesiastical thought."[6] "Subcutaneous influence" certainly begs the question for further theoretical considerations, whether one has in mind the relationship between constitutions and bibles, modernity and Christendom, or the supplementary relationship between legal reasoning and the familiarity and consecration of "ecclesiastical thought," argument and figure.[7] Not the least because in the absence of theory – more precisely and respectively, a theory of history and a theory of rhetoric –, one cannot address a historian's main concern, that is, where is the archive a historian can go and what are the sources a historian should interrogate for unfolding a narrative on the "subcutaneous influence of the tradition of ecclesiastical thought" in German constitutional law?

One must, however, underscore Stolleis' insight. In evoking such subcutaneous influences, the legal historian refers to judicial-doctrinal artefacts developed in the aftermath of the so-called "renaissance of natural law." In other words, investigating the afterlife of Christendom in German constitutional law is not exhausted in probing the "transition-literature" [*Wendeliteratur*] of post-war natural law scholarship to borrow Lena Foljanty's sharp characterization. Remarkably, notwithstanding the breadth and detail of Foljanty's analysis, something further confirmed in this piece's reliance on her work, a shortage of theorization brings the argument into a striking contradiction. On the one hand, Foljanty argues that the paucity of any references to the Basic Law in natural law scholarship and its corresponding lack of contributions to the "most important questions on the reconstruction of justice" evince the "discrepancy between the representations of order ingredient to natural law literature and the Basic Law."[8] On the other, Foljanty claims that the "professional ethics" engendered within this discussion conveyed a "legitimation for a vigorous jurisprudence," whose loadstar would be nothing but "a judiciary that remains close to the people."[9] Now, should "legitimation" speak to the establishment, connection, and dissolution of references, either the first or the second claims must go. For instance, if natural law literature created a leeway for rearranging how judges addressed and considered public opinion, especially the press, and vice-versa, something paramount in post-war constitutional judicial administration, then it did a decisive contribution. Illustratively and as I show below, one can trace these semantics in press coverage of the court's establishment. Meanwhile, considering many post-war

[6] Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, p. 217. All translations except when noted are mine.

[7] On this distinction and its imparing, see, among others Steinhauer, *Die Rückkehr des Bilderstreites ins Recht*.

[8] Foljanty, *Recht oder Gesetz*, pp. 252, 366.

[9] Foljanty, *Recht oder Gesetz*, p. 304.

constitutional scholars and judges were confident that "the image of the human" of the Basic Law was a "Christian image," such as Günter Dürig, to name just one, scholarship should entertain whether they did not discuss the Basic Law because of how those actors became persuaded that it meshed well with their convictions.[10]

The theoretical framework subtending this research offers an answer to the historian's dismay while embracing for the sake of doing legal theory the multidisciplinary methodological suggestion that comparative legal studies should acknowledge its strong affinity to anthropology and history in their thrust for detail (Section A). To borrow Pierre Legrand's assertion, comparative legal studies in its proximity to anthropology and history should face the fact that its questions on the other's law are "a compound of incongruous elements, a 'series of things at once rather heterogenous and yet in a state of co-incorporation, contaminating and teratological,' – that every question is inescapably, precisely, a hybrid, an interface, or, figuratively, a monster[.]" Questions about foreign law cannot be addressed "in isolation, but as incorporating a seamless web of further questions, [...] taking [the comparatist] across fields of knowledge conventionally labelled as 'ethnology', 'history', 'politics', and 'sociology'[,]"[11] insofar as one would like to entertain, as Marietta Auer recently sustained, that legal research must have as its goal knowledge. Therefore, its subject cannot be "the law for its own sake, but rather the law as a medium of society that can be observed from a manifold of perspectives, as symptom of social developments and above all social deformations."[12]

Of course, judicial rulings continue to entertain pride of place from the standpoint of a court's social memory. Thus, methodologically, I pursued the narrative here unfolded around three decisions, all of which were identified by the court's main opponent in its first two years, Thomas Dehler (1897-1967), Konrad Adenauer's first minister of justice, as discussed below. These decisions are, respectively: the court's first ruling, *Beschluß des Zweiten Senatsvom 9. September 1951* ("BVerfGE 1, 1"); the judgment on the constitutional hostility of the *Sozialistische Reichspartei*, *Urteil des Ersten Senats vom 23. Oktober 1952* ("BVerfGE 2, 1"); and the decision on the bindingness of advisory opinions issued by the court's plenary for its two senates, *Beschluß des Plenums vom 8 Dezember 1952* ("BVerfGE 2, 79"). Yet, following the theoretical approach adopted here, one should equally turn to other ceremonious instances of communication, such as, but not only: (i) the decline letters of personalities considered for the office of president of the Federal Constitutional Court; (ii) the inauguration of the *Bundesverfassungsgericht*; (iii) the Court's broadcasted response to the assaults of Thomas Dehler apropos of the so-called *Statusfrage* and the court's ruling on the bindingness of its advisory opinions. By dint of their immediate scope and form, but also due to each's audience, as a mixture of judicial authorities, political personalities and journalists either involved in setting, attending and transmitting such "rites of passage," these three focal points offered the opportunity for the court's champions to probe the "rhetorical ensemble" required for ensuring to

[10] Dürig, *Die Menschenaufassung des Grundgesetzes*, pp. 30-32, 35-36. As I mention below, Friedrich August Freiherr von der Heydte is an important exception both to Foljanty's first claim and my suggestion. Yet, to my mind, the fact that Von der Heydte's deeply religious natural law critique of the Basic Law foundered does not show, however, that there is a "discrepancy" between one another, but rather how inadequate it sounded to Adenauer's Ministry of Justice to insist on a cleavage where there was none to be seen. See footnote 69.

[11] Legrand, *Negative Comparative Law*, p. 187.

[12] Auer, *Zum Erkenntnisziel der Rechtstheorie*, p. 51.

constitutional adjudication as a novel form of communication its plausibility and evidence (Section B). Methodologically speaking, explicitly exploring more passionate, popular and religiously coloured renditions of the court's enterprise, the modes of operation ingredient to such semantics and media circumscribing constitutional adjudication's identity and reference can be further traced into judicial rulings, internal reports and official communications with government, just as they are reflected in how the press approaches and frames the court's deeds. In a sense, their selection was prefigured throughout the files produced by Adenauer's cabinet, eliciting a glimpse into how the court's movements were followed from the standpoint of political observers. As I probe the documentation organized under the aegis of "B136," to wit, the code for the volumes derived from the files produced by Adenauer's secretaries on the court's activity, I trace and reconstruct from such memory traces how the constitutional court was observed from a political standpoint – therewith relying on the selection of news articles introduced among official letters, memoranda, and administrative drafts. Concomitantly, I cross these documentations with those available in the estates of some of the main actors when those were available – such as Gerhard Leibholz's – and - whenever they were not available for public appraisal or incomplete regarding these chains of deeds and events - biographies written upon family-owned estates. Illustratively, most of the documentation I found concerning the court's inauguration ceremony was part of Leibholz's estate.

In what follows, these instances are carefully parsed under the methodological rubrics of Hans Blumenberg's "metaphorology." Blumenberg offers us both a theory of history and a theory of rhetoric for squaring the problem common to legal theory and legal history, especially when his theoretical-methodological framework is duly grafted with some more recent contributions on the intertwinement between arguments and figures, concepts and images, reason and media, and that were elaborated having in mind circumstances and events closer to this piece's subject in contrast to Blumenberg's extensive focus on early modernity. Indeed, by deploying the philosopher's alternative account to the "afterlife of Christendom" for making sense of the role of religious semantics in the early success of constitutional adjudication, this piece contributes to reconsider what has been framed as "the crucial question facing secularization theory," to wit, the reputedly demise of the force and validity of religious modes of expression in twentieth century's Europe in contrast, for instance, to the USA.[13] In this vein, as this article explores religion as a factor in the context of effects of the Federal Constitutional Court, it addresses a gap recently identified in the scholarship,[14] while also amending and qualifying some of the latter's findings and hypotheses on what prompted the court's series of early victories in its endeavour of shaping and securing its identity and structure vis-à-vis its political environment.

[13] Taylor, *A secular age*, p. 530.

[14] See Gilcher-Holtey, *Integration der Rechts- und Verfassungsgeschichte in die Allgemeingeschichte?*.

A – Rhetorical ensembles, reoccupations and the afterlife of Christendom

The anthropologist Mary Douglas once wrote "[m]oney is only an extreme and specialized type of ritual." Consequently, "[m]oney can only perform its role of intensifying economic interaction if the public has faith in it. If faith in it is shaken, the currency is useless."[15] As the metaphors of "magic" and "subcutaneous influences" convey, something similar can be said regarding political power, law, and, therefore, constitutions. Nonetheless, evaluating boundary setting rituals and events shoulder to shoulder with landmark decisions may sound preposterous from a strict legal standpoint. When raising the amount of money involved in one's proposal becomes more convincing for striking a deal than winning the partner's soul through words, when the proper concatenation of paragraphs and legal concepts matters more than praising one's virtues before the court, ritual and rhetoric may at best amplify what is settled in terms of the matter at hand. But do they really? One cannot deny, for instance, that dining and toasting are a substantial part of international trade, just as they often subtend the making of landmark decisions.[16] Tellingly, as I show below, the dispute on the status of the Federal Constitutional Court as a "constitutional organ" pivoted, among other things, on control over the resources necessary for supporting the intensive engagement of the constitutional judges with its multiple audiences.

Indeed, the detour of dining and the ornamentation of metaphors speak neither to the acceptance in the sense of persuasion nor to the acceleration of communication. While setting a ruling over dinner certainly does not undermine one's arguments, it does not in principle make them more persuasive. Dining ensures the necessary deferment for political arguments to translate into legal arguments, as it establishes, connects and dissolves references.[17] In other words, parsed from the standpoint of rhetoric and its tradition, the sort of ritual Mary Douglas points out when writing about the ubiquitousness of "public faith" speaks to *decorum* and not to *persuasio*.[18] Under the aegis of decorum and ritual, anthropologically approached, rhetoric may eventually accelerate communication, but ultimately, it counts as the epitome of deferment. As Hans Blumenberg perspicuously framed it:

> Intricateness, procedural fantasies, ritualization, all imply a doubt over whether the shortest connection between two points stands also as the human way between them.

[15] Douglas, *Purity and Danger*, p. 70.

[16] Karen Alter points out, for instance, how underpinning the emergence of the ruling Costa v. Enel, which established the groundwork for the principle of the supremacy of European Union law, there is a meeting held by the Wissenschaftliche Gesellschaft für Europarecht [Scientific Society for European Law]. Alter argues associations such as the WGE operated as "kitchen cabinets," a metaphor that hearkens back to Andrew Jackson's presidency and how he circumvented his official, Senate-approved cabinet with a close circle of friends. In the WGE's meetings, "European officials test out ideas and seek informal advice[.]" Alter, *The European Court's Political Power*, p. 77. The metaphor equally evokes the importance of catering, especially when one has in mind the protocols determining "scientific meetings." Approached as media, food and beverages speak to what Urs Stäheli frames as "affectivity," insofar as affectivity may support processes of communication "through the activation of bodily resources." Stäheli, *Spectacular Speculations*, p. 13.

[17] I borrow this formulation from Steinhauer, *Bildregeln*, pp. 174-175.

[18] On this distinction, see Steinhauer, *Bildregeln*, p. 178.

> This state of affairs is thoroughly familiar to us by way of aesthetics, even music. Its overextension to the modern world proceeds from the intricacy of its situation, but not only. It also derives from the increasing divergence between the spheres of material requirements and decisions, especially in terms of their temporal structure.[19]

Like the splendor of sobriety may pivot on assembling its very opposite, Blumenberg contends that there is a purposiveness for that which lacks purpose.[20] At the very least, it buys time[21] – and time is especially necessary when the difference between operation and observation turns into a divergence deserving the title of "second-order observation."[22] Truly, "[i]n a highly artificial environment-realness [*Umweltwirklichkeit*], rhetoric is so inconspicuous because it is already ubiquitous."[23] Much more than once securing acceptance or avoiding rejection, rhetoric speaks to the conditions of possibility for understanding, identifying, and attributing communication. Now, intricateness, procedural fantasies, ritualization, and so on, following Fabian Steinhauer, we can designate the manifold of detours ensuring that communication takes place as communication's "rhetorical ensemble."[24] From such standpoint, Blumenberg's statement on how "metaphor is not only a chapter in the treatment of rhetorical means, [but rather] rhetoric's most significant element, whereby its function is presented and regarding which its anthropological aspect can be brought into view" becomes one of the most important cues for any investigation concerned with rhetorical ensembles.[25] There is something crucial appertaining to the metaphorical detour by dint of which something is grasped through something other – in contrast to grasping something as something.[26] According to Blumenberg, by looking past a thematical object towards another, "what one holds in anticipation goes under the assumption of bearing some insight, taking what is given as strange and the other as what is familiar, thereby standing at one's acting disposal." "The animal symbolicum," the author asserts,

> dominates the genuinely deadly realness as it lets [realness] be substituted [*vertreten*]; [the animal symbolicum] sees past what is eerie towards what is familiar. This is most significant there where the claim of the identity of a judgment cannot simply reach its goal, either because its object overcharges the procedure (the "world,' 'life,' 'history,' 'conscience') or because there is not enough room for such a procedure to be established, such as in situations one is pressed to action, where fast orientation and drastic plausibility are demanded.[27]

In what follows, I argue and explore how an object such as a "constitution" fits alongside magnitudes of the kind of "world," "life," "history" or "conscience." True, I am hardly the first to do so as Frankenberg's lifelong engagement with comparative

[19] Blumenberg, *Anthropologische Annäherung an die Aktualität der Rhetorik*, p. 128.
[20] *Ibid*., p. 129.
[21] On how rhetoric is intimately connected not only to the acceleration, but also and most importantly with the deferment or delay of time, see beyond Blumenberg, *Anthropologische Annäherung an die Aktualität der Rhetorik*, Blumenberg, *Beschreibung des Menschen*, pp. 614-615.
[22] On second-order observation as a consequence and a driver of the primacy of functional differentiation, see Luhmann, *Die Gesellschaft der Gesellschaft*, pp. 766-767.
[23] Blumenberg, Beschreibung des Menschen, p. 140.
[24] On the notion of „rhetorical ensemble," see Steinhauer, *Das rhetorische Ensemble*.
[25] Blumenberg, *Anthropologische Annäherung an die Aktualität der Rhetorik*.
[26] On the distinction between "something as something" and "something through something" in Blumenberg's account of rhetoric, see Weber-Steinhaus, *Conceptuality, Myth, Metaphor*.
[27] Blumenberg, *Anthropologische Annäherung an die Aktualität der Rhetorik*, pp. 122-123.

constitutional studies show. Nonetheless, much before scholars started to address the theologically embedded tropologies engendering constitutional documents,[28] North Atlantic actors struggling across the thresholds of plausibility and evidence employed religiously tainted tropes and detours for establishing novel modalities of communication such as constitutional adjudication. As indicated above, the need for a theory of history emerges when one endeavours to address not only *how* but also *that* "traditions of ecclesiastical thought" exerted a "subcutaneous influence" in late modern contexts such as that of the *Bundesrepublik*. Now, their presence certainly eschews secularization in terms of subtraction as a convincing portrait of the "afterlife of Christendom" in North Atlantic modernity, that is, in the sense that modernity's achievements entailed the retraction of religion's relevance, the disappearance of the conditions of possibility of belief and, accordingly, religion's import in public life.[29] Yet, one equally mischaracterizes this quandary should one frame these rhetorical deployments of "honoured ecclesiastical traditions" as "transpositions" from Christian "substances" due to an unsurpassable lack or fault ingredient to the existential project of North Atlantic modernity vis-à-vis the "deep structures" of human nature.[30] Instead of the sublimation of subtraction and the deep structures of transposition, Blumenberg speaks of the familiarity and consecration, in a word, of the popularity ingredient to particular frames of thought and action derived from the oscillating force of the religious sphere.[31]

Blumenberg adheres neither to secularization as subtraction nor to a softened version of the secularization theorem of political theology. Duly read, one finds a radically different picture of the afterlife of Christendom in Hans Blumenberg's theory of reoccupations. Not only Blumenberg claimed that reoccupations – which are tantamount to the happening of history – are rhetorically endorsed and enforced,[32] underpinning his alternative take stands a critique of the understanding of history common to secularization as subtraction and as transposition. Arguably, both approaches give too much credibility to North Atlantic modernity's self-description in terms of a rupture with its past while embracing a picture of history as the diachronic succession, whether one has in mind "metaphysical worldviews," "epochs of the history of being" or "paradigms." The fact that modernity's claim of rupture demands a qualification does not imply that nothing changed or that whatever changed cannot but be tainted by dint of its dependency on what came before. Only in the absence of such a caveat, thus, only when one proceeds under the assumptions that the happening of history takes place as the mere diachronic succession of what once was and what now is, whereby at the end of one epoch its enigmas are all solved and only an abyss remains, secularization either as subtraction or as transposition make sense. Conversely, for Blumenberg, the description of the phenomena of historical epochs should reach toward the inverse direction. An age does not come to an end with

[28] Beyond Frankenberg, Magic and Deceit, see also and among others Vorländer, *Integration durch Verfassung*. Vorländer and others, in turn, hearken back to Edward Corwin and the latter's notion of "constitutional worship." See Corwin, *The Worship of the Constitution*.

[29] I borrow this definition of "secularization as subtraction" from Taylor, *A Secular Age*. Note, however, that Taylor takes Blumenberg's approach as a mere twist of secularization as subtraction, something I contend is simply wrong.

[30] The critique that political theology entails a form of "historical substantialism" is Blumenberg's, see Blumenberg, *Die Legitimität der Neuzeit*. Following political theology's US reception, substance metamorphosed into "deep structures." For a critique thereof, see Steinhauer, *Non plus ultra*.

[31] Blumenberg, *Die Legitimität der Neuzeit*, p. 115.

[32] Blumenberg, *Anthropologische Annäherung an die Aktualität der Rhetorik*, pp. 128, 131.

all its enigmas solved. Quite the opposite, "ages exhaust themselves in the metamorphosis of their certainties and what they hold as questionless into enigmas and inconsistencies[.]"[33] Yet, should such a dynamic be interpreted not in terms of a "death drive or a longing for passing," namely, in terms of another mythologeme dear to the (North Atlantic) modern program, one must reckon with the following:

> Even the epochal transition as a deep caesura has its function of protecting identity, as the alterations the process allows are but the correlate for the constancy of the challenges that they fulfil. Then the historical process produces, on this side of the great conception of the epochal outlines, its 'reoccupations' as the sanitation of historical continuity.[34]

Supporting such remark on "the constancy of the challenges" in the excerpt just quoted is a web of approximations regarding the threshold between conscience, communication, and body. In this sense, as Blumenberg starts to unfold the "heuristic principle" condensed in the notion of reoccupation, he asks upfront about the possibility of experiencing an epochal transition. In his words:

> All alterations, all shifts from the old to the new are only accessible for us as they let themselves [...] be drawn to a constant frame of reference, through which the demands can be defined, in which an identical 'position' must be satisfied. That the new in history cannot be the in each case random, but rather that it stands under the pressure of preexisting expectations and needs, is the condition for that we may have something as "knowledge" regarding history at all. The concept of "reoccupation" designates in its implications the minimum of identity that even in the most moving movements of history must be found or that at least can be presupposed and sought. For the case concerning systems of what Goethe framed as the prospects concerning the world and men, "reoccupation" means that different statements can be understood as answers to identical questions.[35]

Blumenberg is careful in clarifying that such a "minimum of identity" has "nothing to do" with the "classical constants of philosophical anthropology nor with the 'eternal truths' of metaphysics." Emphasizing the necessity of avoiding the word "substance" in such a milieu, Blumenberg advances instead that is sufficient that "the framing conditions" ling for longer with consciences than the contents such framework shapes and orders, i.e., "that the questions are relatively constant in comparison to the answers." Therefore, "[t]o that what reoccupations assign their functional frame it suffices a lastingness that is already too big for our perceptibility of historical events and historical events' intensity of alteration."[36] In this vein, Blumenberg's emphasis on the intertwinement between perception and reoccupation can be usefully read as hinting towards a human boundary paramount to historical experience. For the author, this boundary ultimately bespeaks the following picture concerning the human condition:

> Before anything else, history does not run as the diachronic sequence of what is not yet, what is, and what is no more, but by way of synchronic parataxes and hypotaxes. There is no ultimate triumph of conscience over its abysses: formation, tradition, rationality enlightenment mean less something that was done in life once from scratch

[33] Blumenberg, *Die Legitimität der Neuzeit*, p. 539.
[34] *Ibid.*, p. 539.
[35] *Ibid.*, p. 541.
[36] *Ibid.*, p. 542.

> and that can be done once and for all, as rather the always novel instrumentalizing effort of disempowering, unveiling, releasing and rearranging into play.[37]

Parataxis and hypotaxis stand for rhetorical terms describing the way clauses are ordered in sentences.[38] Parataxis designates the juxtaposition of sentences through the omission of subordinating conjunctions in a never-ending string of "ands," commas, and rhythm, as in how children speak. In its turn, hypotaxis designates the subordination of clauses to one another, framing relationships of cause and effect, chronology, and so on, by way of terms such as "after," "when" or "because." Blumenberg's choice of these terms evinces his take on the close intimacy between rhetoric and history as I have been insisting from the outset. Indeed, as parataxis and hypotaxis render the way our capacity for perceiving history operates, they indicate the travail of reoccupation – as the fabric through which questions and answers, hopes, and expectations are woven together into rhetorical ensembles.

Developing Blumenberg's grasp of the happening of history as synchronic parataxes and hypotaxes demands underscoring a crucial insight ingredient to his key notion of "epochal thresholds." If one should not speak of diachronic sequences for framing the movements of history, this entails those epochal thresholds do not happen once and for all, at the beginning and the end of an epochal transition. Thresholds are torn before human perception whenever the juxtaposition and subordination between questions and answers, hope and expectations become unsettled. Quite often, such movements turn on metaphorical inversions of sedimented layers of semantic apparatuses, whereby what remained latent finds its way through toward plausibility by way of putting the right words and images upon their heads.

This brings us to the heart of Blumenberg's critique of secularization (as transposition) and his alternative account of the afterlife of Christendom – therewith unfolding a critique of secularization as subtraction. Secularization as transposition draws its plausibility from the assault upon the parataxis established at the dawn of enlightenment – as Blumenberg renders it, "there are for the secularization theorem thoroughly innocuous grounding formulas making almost impossible to rebuke it. One of such plausible turns of phrase is the 'unthinkable without.' Thus, generally speaking, the main thesis is: without Christendom modernity would be unthinkable." Let us read closely what Blumenberg states after tackling the rhetoric of the secularization theorem: "That [modernity is unthinkable without Christendom] is so *fundamentally right* that the second part of this book is dedicated to the proof thereof. There is only one difference, however. This thesis first acquires a precise meaning through the critique of the forefrontness of secularization – or better: its apparent backgroundness."[39]

Here also lies the crux distinguishing Blumenberg's phenomenology of reoccupations and Schmitt's political theology. A fortiori, this touches on the difference between this article and past contributions in constitutional theory on the relationship between constitutional adjudication and religion pursued under the aegis of political

[37] Blumenberg, *Wirklichkeitsbegriff und Wirkungspotential des Mythos*, p. 24.

[38] For a discussion of this distinction in Aristotle, see Trenkner, *Aristotle, Rhetoric III, 12, 4*, especially elucidative is Trenkner's concluding explanation: "Through [parataxis] the single facts are detached and cut off from their ensemble. They are thrown like separate sketchy pictures upon a screen. Therefore their number seems great. [...] But if we rearrange the passage into a subordinate structure [hypotaxis], an impression of terseness will be produced even if the text is no shorter than the original."

[39] Blumenberg, *Die Legitimität der Neuzeit*, p. 39.

theology. Political theology is ultimately concerned with confirming self-righteousness vis-à-vis the other, something that speaks to Schmitt's monstrous modernity, just as to how nicely he can be accommodated to liberal-democratic sensibilities, contributing to portray the violence of liberal democracy's "rational necessities" as a "factual datum."[40] Blumenberg's project aims at undermining the excesses of reason – illustratively, modernity's legitimacy can only come into view when the excess of its existential project, whose mythological connotations invite political-theological qualifications, is duly countered. Unfortunately, this is something quickly forgotten by Blumenberg's reception, often administered as a sanitized alternative to political theology, while confirming reason's self-assertive claims. This pivots on reducing his oeuvre to some sort of inversion of Martin Heidegger's *Seinsgeschichte*, where (European) modernity does not mean the forgetfulness of being, but the uncovering of humanity's essence as self-preservation. This reduction subtends the effort of transferring to Blumenberg Heidegger's epideictic rhetoric of praise and blame,[41] as if the first had not almost failed his Habilitation precisely by offering a thoroughly more ambivalent reading of figures such as Descartes.[42] Furthermore, Blumenberg selects, arranges, and interprets his sources in a way that has nothing to do with the engendering of black boxes – commonly designated by pitiful expressions such as "tradition" or "Western tradition" – that support a network of false assumptions concerning the relationship between philosophy, history, and existence, allowing philosophers or legal theorists to address any question whatsoever regarding any array of phenomena to a random selection of "great authors."

In the hope of conclusively relinquishing those interpretations that would rather sustain nothing resembles an account of Christendom's afterlife in Blumenberg's oeuvre, consider the following statement:

> Between that which became usually named the "afterlife" of ancient mythology and the other afterlife, that which came to be designated as the "secularization" of Christendom, persists a specific difference. I do not need to go into why one must abandon secularization as a category of historical understanding; it remains as something undisputed that those empty positions bequeathed by Christian theology retained residual claims to dispose and sustain vis-à-vis humans those absolute

[40] On Schmitt's modernity, see Augsberg, *Die Lesbarkeit des Rechts*, pp. 158-171. For an example of this crypto-authoritarian accommodation, see Van Der Walt, *The concept of liberal democratic law*. On liberal democracy's "rational necessities," see Spindola Diniz, *Rational necessities*. This pattern of banning one of European modernity's essential medium of progress, namely, violence, to a pre-modern, unliberal, surpassed past has been traced by Anselm Haverkamp in *The Future of Violence*, esp. p. 74. ("[I]t is exactly this simplicity with which until today we make it too easy for ourselves whenever we construe violence and the increase of violence as an enigmatic, ever-returning reminder of a prehistory that we, just as the age of Macbeth, consider to be behind us – although this violence actually increasingly governs modernity, or more pointedly, is nothing other than a phenomenon of the modern.")

[41] For an example of an enterprise pursued under the banner of Blumenberg's understanding of history, while simply advancing an inverted version of Heidegger's Seinsgeschichte, keeping thereby the commonplace of portraying Descartes as the scapegoat for modernity's aftermath, see Lindahl, *Authority and the globalization of inclusion and exclusion*, pp. 150, 252, 303. I discuss this issue in my introduction to the Portuguese translation of Lindahl's book, see Spindola Diniz, *Introdução*.

[42] See Blumenberg, *Die ontologische Distanz*, p. 113-126. Blumenberg's account of Descartes in his Habilitation reappears almost in its entirety in Die Legitimität der Neuzeit, followed by an explicit critique of Heidegger's Seinsgeschichte and the role of Descartes therein, Blumenberg, *Die Legitimität der Neuzeit*, pp. 219-22.

> demands of both theoretical and practical kind, that were introduced and stabilized through a religion of transcendence and revelation.[43]

To illustrate this point, Blumenberg refers to how these absolute demands determined, for instance, Renaissance's relationship to mythology. In his words, at the dawn of the threshold between Christendom and (North Atlantic) modernity, Renaissance attempted to assimilate mythology to Christendom "through a sort of allegorical dogmatization up to the point of making it a canon of novel obligations in the domain of aesthetics instead of seeing and using mythology as an instrument for dedogmatization."[44] The absolutism of truth ingredient to a religion of transcendence and revelation "leads to a coercion towards analogy, regarding which not even its most radical opponent can escape." Blumenberg consistently renders and compares movements such as the dogmatization of mythology and the mythologization of dogma – but also the rationalization of myth or, say, the dogmatization of reason – in terms of "the unfolding of a medium's immanent rationality."[45] Truly, the very choice of addressing reoccupations informs my focus on constitutional adjudication – instead of constitutions as such. Blumenberg's way of approaching myth, dogma, and reason does not search to clarify any of them as they "originally" or in a "determinate phase" of "our history or pre-history" came to be in historical or philological terms; rather, he parses them "as always already by-passed in reception." Accordingly, in employing Blumenberg's metaphorology, one may better grasp the myth and the dogma that the precariousness of constitutional reason cannot but avail itself of by focusing on the latter's aftermath, e.g., in the establishment of constitutional adjudication.

The genitive holding together myth, dogma, and reason[46] fleshes out quite nicely what Blumenberg had in mind when he contended that history happens only through synchronic parataxes and hypotaxes, that is, only through reoccupations rhetorically endorsed and enforced. Consequently, investigating the history of rhetorical figures demands probing the parataxes and hypotaxes that made them not only available but even unavoidable to those actors across epochal thresholds facing the pressure of preexisting expectations and needs. Accordingly, having in mind the forcefield of mythologization, dogmatization, and rationalization we can better circumscribe the relevance of a Christian embedded tropology for generating the fascination featured in the rhetorical ensembles of constitutional adjudication in post-war Germany.

[43] Blumenberg, *Wirklichkeitsbegriff und Wirkungspotential des Mythos*, p. 27.
[44] *Ibid*., p. 27.
[45] Blumenberg, *Die Legitimität der Neuzeit*, p. 378.
[46] In Arbeit am Mythos, Blumenberg articulates the three forms of thinking into a incisive aphorism that puts in a nutshell the intertwinement between his theory of history and his theory of rhetoric: "Das Dogma ruft, das mythische Bedürfnis, das es erweckt, sogleich wieder zur Raison," (Blumenberg, *Arbeit am Mythos*, p. 290). A free translation could read as follows: „Dogma invokes / the mythical need / that it awakens / readily back to Raison."

B - Deferred beginnings, delayed recognition: faith and broadcasted authority from Karlsruhe's day one to the *Statusfrage*

Surely, claiming that constitutional adjudication once was barely plausible at its inception in Germany and that its consolidation was a matter of struggle, fantasy and faith may appear absurd in hindsight, especially when a leading constitutional theorist and former constitutional judge strongly underscores that "[w]ithout the Constitutional Court's dominant role in the Federal Republic, which constantly demonstrates the Basic Law's relevance for political behavior and social conditions to the population, the constitution would hardly be as deeply rooted in the collective German consciousness as it is today."[47] Nonetheless, the lists prepared by Federal Ministry of Justice of prospective candidates for the Court tells us something different. More than five decades prior to Grimm's formulation, some of the prestigious names considered for nomination to the court's first composition – such as Walter Strauß (1900-1976), the main mind behind the court's constitutional design during the Herrenchiemsee Kovent and Adenauer's personal choice for the office of president – declined the judicial robes.[48] Indeed, some of those who had accepted the garment before it became scarlet velvet[49] were disappointed in face of the apparent downturn in their careers – such as Hermann Höpker-Aschoff (1883-1954), once Prussia's minister of finance during the Weimar Republic.[50] Even after the court started business, as the multiplication of its files, volumes and books increasingly challenged the tight spaces of Prinz Max Palais, Höpker-Aschoff's plead for reform before the commercial association that owned the building was met with an astonishing no.[51] What were the demands of the highest court in the land when compared to the integrity of a historical building dear to the good people of Karlsruhe?

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[47] Grimm, *Constitutional History as an Integral Part of General History*, p. 21.

[48] I discuss this below. Tellingly, historical scholarship on the establishment and the early years of the Bundesverfassungsgericht has ignored Adenauer's invitation to Strauß, notwithstanding the fact, as explored in the next section, that Strauß's decline illuminates important aspects of the political constellation imprinting the inception of the Federal Constitutional Court. In this regard, see recently Wesel, *Der Gang nach Karlsruhe*; Collings, *Democracy's Guardians*; Will, *Ephorale Verfassung*; but also Laufer, Verfassungsgerichtsbarkeit und politischer Prozeß, 1968; Billing, *Das Problem der Richterwahl zum Bundesverfassungsgericht*.

[49] The Federal Constitutional Court adopted its hallmark attire in 1963. For reasons of space, I do not address this important process here. Notwithstanding the fact that scholarship has reconstructed the main example that informed the judge's new robes, to wit, the garment reputedly wore by Florentine judges between the 15th and the 16th centuries, insofar as they were represented in a costume book of Baden's theatre tailor, it has not accounted for that such clothing appeared as fitting to presenting the role of constitutional judgeship. Arguably, one finds at the roots of such evaluation the invention of a "lost tradition" of German constitutional adjudication, returning to the Schöppenstuhl at Leipzig and its ruling of 1559, whereby the council of lay judges denied fulfilling a command from Prince-Elector August and going from there up to the constitutional assembly of Paulskirche and its epiphenomenon in the constitutional conflict of Kurhessen (1850). On the inspiration for the attire, see Wesel, *Der Gang nach Karlsruhe*, p. 80; see also Felz, *Die Historizität der Autorität oder*, pp. 109-117.

[50] On Hermann Höpker-Aschoff, see Aders, *Die Utopie vom Staat über den Parteien*, p. 302.

[51] In this regard, see the letter exchange between Hermann Höpker-Aschoff and the Commerce and Industry Association of Karlsruhe, which owned Prinz Max Palais, available at Bundesarchiv, *B/134/21719*.

Obviously, this changed. That it changed and how it did so comprehend courses of action unaccounted so far by legal history, by dint of how scholarship often proceeds under the historically and theoretically specious assumption that constitutions and constitutional adjudication are evident solutions to inherently modern problems. The question shifts, then, from how this very scheme became plausible to the extent to which a constitution and its "self-enforcing mechanism," constitutional adjudication, succeeded in taming political reality. That the success of constitutional adjudication was anything but obvious at its inception is something manifested in the delay for the establishment of the Constitutional Court. In hindsight, shadowed by its later achievements, constitutional doctrine often adorns the *Bundesverfassungsgericht* as the "last of the constitutional organs."[52] While today underscoring its "lastness" conveys different undertones, as the prophetic words were fulfilled and, apparently, "the last became the first,"[53] at the time its late establishment was a matter of distress and gloom. The first section fleshes this out by exploring the difficulties in finding the constitutional court's first presidency, considering documentation hitherto ignored by the literature regarding those personalities considered to lead this unprecedent institution.

Critics and champions alike are keen to describe the ascension of Karlsruhe's judicature as pivoting on the radio. In so doing, both groups touch upon the intertwinement of hyperconnectivity, affectivity and social structures ingredient for sustaining constitutional adjudication's popularity – which means, ultimately and according to Urs Stäheli, its communicative existence.[54] Whether one has in mind Dieter Grimm's relief in stating that "the eternal flux of procedures ensures that the court is present in the media and that the basic law becomes experienceable for the public,"[55] or Matthias Jestaedt's mocking remark that Karlsruhe is a "broadcast judicature,"[56] both formulations suggest that should one grasp how constitutional adjudication turned into something plausible, one must first approach not judicial rulings, but how judges and others framed the court and its rulings alike in, as and for the public – as, for instance, through the radio.

The immanent rationality inherent to radio as a medium is of great importance. One could point out, for instance, radio's affectivity of intimacy, just as its mass and widespread character, something that establishes it as a medium that pushes for the use of popular, familiar and consecrated semantics. Arguably, both features – which have been theoretically underscored since radio's spread as a medium of mass communication[57] – were thoroughly intensified by dint of the technological achievements pursued during the Second World War. As Friedrich Kittler perspicuously remarked, the invention of the world-war audiotape brought motor and movement to radio, revolutionizing the simulation of live broadcasts and making them even "automobile."[58] In this vein, Kittler argues that the radio involves the audience, prompting the affectivity that turns one from consumer

[52] Wesel, *Der Gang nach Karlsruhe*, p. 41.
[53] Matthew 20:16. In Luther's translation: "So werden die Letzten die Ersten und die Ersten die Letzten sein."
[54] Stäheli, *Spectacular Speculations*, pp. 7-14.
[55] Grimm, *Das Bundesverfassungsgericht im Überblick in Verfassungsgerichtbarkeit*, pp. 27-28.
[56] Jestaedt, *Verfassungsgerichtspositivismus. Die Ohnmacht der Verfassungsgesetzgebers im verfassungsgerichtlichen Jurisdiktionsstaat*, p. 191.
[57] The literature in this regard is huge. For an overview and insightful takes thereon, see, among others, the contributions and introduction to the volume HOLL (ed.), *Radiophonic Cultures*.
[58] Kittler, *Gramophone, Film, Typewriter*, pp. 107-108.

into producer, the receiver into a transmitter.[59] Bearing that in mind, radio's immanent rationality informs a core metaphor deployed by post-war literature regarding the intertwinement between law, politics, and legitimacy: when one can listen to the words of the president of the Federal Constitutional Court inside a car overwhelmed by traffic, one not only suddenly realizes the great divide between constitutional reality (highway traffic) and the domain where the promise of constitution has its grasp on the political domain (the constitutional court, as traffic certainly a consequence of unconstitutional politics), law becomes a "transmission-belt" [*Transmissionsriemen*]. Exemplarily, in Jürgen Habermas' words, "[law] operates as a sort of transmission belt, over which the structures ingredient to the concrete contexts of communicative action are transposed from the mutual acknowledgment between acquaintances [*Angehörigen*] to the more abstract but binding form of the anonymous and systemic mediated interaction between strangers."[60] In what follows, I refrain from further theorizing about this conundrum, turning instead in media res in the second and third sections to two instance of broadcast as focal points for a manifold of actions and events, deploying thereby these theoretical considerations and their consequences for grasping the ways through which Karlsruhe established its rhetorical ensemble, turning implausibility into evidence as the last constitutional organ became the first.

I. The lastness of the last constitutional organ: party competition, compromises and polite disinclination in face of the implausibility of constitutional adjudication

The Federal Constitutional Court's inauguration took place on 28 September 1951, almost a year after the other court "across the street," that is, the Federal Court of Justice [*Bundesgerichtshof*]. Since then, literature has uncovered a manifold of reasons accounting for the delay in the court's creation. Following Uwe Wesel's reconstruction, the constitutional court became the rearmost institution to begin its activities in Bonn's republic due to the strife surrounding the drafting and promulgation of its organizational statute – the *Bundesverfassungsgerichtsgesetz* [BVerfGG] of 12 March 1951. Wesel dexterously frames the dispute between Adenauer's government and the opposition as hinging on the difference between two thoroughly metaphorical concepts, namely, "Gerichtshof" and "Verfassungsorgan." Tellingly, both elliptically dwell together in the statute's first article: "The Federal Constitutional Court is an autonomous vis-à-vis all other constitutional organs and independent court of law of the Federation."[61] Framed as such, the legislative history and its definitive redaction illustrate respectively two important features. First, the legislative debate fleshes out a recurrent pattern pointed out by comparative constitutional studies concerning the linkage between party competition and constitutional adjudication. Second, the paragraph's elliptical wording is a manifestation – both institutionally and culturally determined – of the inclination for compromise in the early Bundesrepublik. As recurrently formulated by Tom Ginsburg and

[59] Kittler, *Gramophone, Film, Typewriter*, pp. 75, 81.
[60] Habermas, *Faktizität und Geltung*, pp. 662-663.
[61] Federal Republic of Germany, *Bundesverfassungsgerichtsgesetz*, § 1. Wesel, *Der Gang nach Karlsruhe*, pp. 40-41.

others,[62] reputedly, as soon as government and opposition are clearly drawn,[63] opposition drives for a vigorous constitutional court, hoping to fill it with partisan members wherefrom to resist government's agenda and push for its own until the next elections. Conversely, government's best interests would lie in undermining the court's field of action.

Hence, as the *Sozialdemokratische Partei Deutschlands* fought for a small court of fourteen members, aiming for the centrality of each's personality in the stage of public opinion, as manifested in the party's plead for the possibility of dissenting opinions and from where it could intensify and amplify its opposition, Adenauer's coalition pushed for a larger, unified and inconspicuous organization. In Wesel's interpretation, the SPD hearkened back to the image of the US Supreme Court. In contrast, the CDU hanged to an image of adjudication reputedly more in tune to the German legal tradition. Compromise: for the government, two senates, each with twelve judges; for the opposition, the establishment of the constitutional complaint [*Verfassungsbeschwerde*]. Indeed, the introduction of this action was openly resisted by the CDU during the BVerfGG's drafting, as the ministry of justice and the party's representatives argued for a traditional apex court solely bestowed with revision powers.[64] Interestingly, the procedural rules of the constitutional complaint brought it closer to the "popular action" explicitly eschewed during constitution-making,[65] something further confirmed in view of its practice, including therein precisely its "popularity," on the one hand, and how it became the building block for the court's often bemoaned "broad competence,"[66] on the other.

Yet, why it took parliament almost six months – from 12 March 1951 to the beginning of September – to settle twenty-four names as the court's first generation? Apparently, it was not a matter of striking a bargain between government and opposition. The two senates and the division of competences between one another offered a cue for both sides to focus on the senate their legal advisors understood as bearing the greatest prospects of playing a definitive role in political affairs. Adolf Arndt and the SPD placed their bets on the constitutional complaint, fundamental rights and, accordingly, the First Senate. In turn, the CDU-FDP coalition – following the expertise of Thomas Dehler and the main drafter of the BVerfGG, judge of the Bundesgerichtshof and later member of the Second Senate of the Bundesverfassungsgericht – directed its energies to the Second

[62] See, among others and recently, Dixon, Ginsburg, *Constitutions as political insurance*.

[63] This caveat to the "political insurance theory" follows Christian Boulanger's critique thereof. See, in this regard, Boulanger, *Hüten, richten gründen*, p. 21 ("Many contributions on the research field about constitutional adjudication, such as the "insurance"-theory of Tom Ginsburg, continue to run the risk of succumbing to [a] circular argument when the establishment of a constitutional court is explained without further reflection by its 'function' of offering an "insurance" to elites in case of losing power without empirically proving these convictions on the part of the actors."). My findings regarding the Bundesverfassungsgericht confirm Boulanger's qualification.

[64] Wesel, *Der Gang nach Karlsruhe*, p. 39.

[65] I trace the fortune of the constitutional complaint during constitution-making elsewhere. Nonetheless, Hermann von Mangoldt's commentary to the Basic Law are highly informative, insofar as Von Mangoldt is at pains to eschew both the view that the constitutional complaint should play a role similar to a "popular action" and the evaluation of the court's competence as "broad" or "comprehensive." See, Von Mangoldt, *Das Bonner Grundgesetz*.

[66] On these two features of the constitutional complaint, see, among others, Marcel Kau, *United States Supreme Court und Bundesverfassungsgericht*, p. 73ff; see also the contributions to Jestaedt, *Das entgrenzte Gericht*.

Senate, betting on the incisiveness of controversies between constitutional organs.[67] This difference translated into the divided efforts by the SPD and the CDU/FDP of assigning respectively to the first and second senates judges of a corresponding political inclination – something framed and even denounced by the press in terms of a "red" and a "black" senates.[68] Thus, considering the absence of partisan strife and in light of the available sources, the delay stems rather from the lack of interest the position of constitutional judge held for many of those scouted thereto.[69]

As hinted above, Walter Strauß consists of an outstanding example for probing this hypothesis. While scholarship reconstructed the whole process of appointment, identifying the personalities who were considered before consensus turned towards Hermann Höpker-Aschoff, interestingly Strauß's name has been passed over.[70] Now, the very first option, Joseph Beyerle (1881-1963), a member of the CDU, then minister of justice of Württemberg-Baden, showed interest, but ultimately declined due to health reasons. Despite Willi Geiger's gainsay, the second option, also a CDU political jurist, Gebhard Müller (1900-1990), who later eventually became president of the court and back at the time was "State president" of Württemberg-Hohenzollern, answered he would gladly take office as long as they could postpone his nomination due to his duties for the stake of Germany's south-west states. Notwithstanding the fact that the court came to pronounce its first decision precisely on this issue, as discussed below, to Müller's friends and his political environment, his services were best as the head of Württemberg-Hohenzollern and not of the constitutional court. By the middle of June, in face of the impossibility of shifting his nomination, Müller withdrew his candidacy. Concomitantly, Rudolf Katz (1895-1961), an SPD politician and a Jew who was exiled in the USA after Hitler's seize of power, was named the Court's vice-president. As scholarship points out, Müller's actions made room for the minister of justice, Thomas Deller, to push for a name belonging to the FDP, Hermann Höpker-Anschoff. Tellingly, while Höpker-Anschoff's name met approval from the FDP and SPD, Adenauer's co-partisans were enraged and surprised by the chancellor's ease in consigning the court's presidency to someone outside the party. Indeed, speaking to the core of our subject, the very Catholic Church contacted Adenauer to communicate its qualms. In the words of the head of the "Katholischen Büros" in Bonn, in a letter addressed to Adenauer, as one president shared "the worldview of liberalism" (Höpker-Aschoff) and the other that of "socialism" (Katz), Prelate Wilhelm Böhler (1891-1958) could only hope that the chancellor deployed his "great influence" for securing another configuration in agreement with the "Christian parcels of the population."[71] Having

[67] Wesel, *Der Gang nach Karlsruhe*, p. 40ff.

[68] See, for instance, Bundesarchiv, *B136/4436, Deutsche Zeitung, In der Hand der Verfassungsrichter*.

[69] One important exception I refrain from discussing in detail for reasons of space is Friedrich August Freiherr von der Heydte. Von der Heydte authored in 1945 a book titled "Das Weiß-Blau-Buch zur deutschen Bundesverfassung." After the promulgation of the Basic Law, Von der Heydte expanded the work, adding a discussion of the document's articles. Von der Heydte's strong criticism of the Basic Law pivots on confessional and political grounds, deserving a careful analysis. Nonetheless, this publication prompted his name's rejection by the Federal Ministry of Justice. From the Ministry's standpoint, to put it in somehow anachronistic terms, Von der Heydte lacked the necessary "Wille zur Verfassung." See Bundesarchiv, *B136/4436, Der Bundesminister der Justiz an den Herrn Staatsekretär im Bundeskanzleramt*.

[70] See the literature listed on footnote 45.

[71] Parcels of this letter are available and discussed in Wengst, *Staatsaufbau und Regierungspraxis 1948-1953*, p. 237, note 66.

in mind the necessity of indulging the "christilichen Volksteil" – by all means, an euphemism in the early *Bundesrepublik* – is crucial for understanding the incisiveness of Christian materials for shaping the court's rhetorical ensemble, as evident in the two episodes discussed below, both of which have Höpker-Aschoff as a leading character.

Nonetheless, Adenauer chose to disregard the demands of his close allies, Christian-Unionist and ecclesiastical alike. The chancellor's reputed "little personal interest in the Court,"[72] something that would account for his liberality in using the office of court president for appeasing his FDP coalition partners, can be better explained by dint of his previous offer to Walter Strauß and the state secretary's response. Strauß was member of the commission responsible for the chapter on adjudication of the Basic Law, someone who drafted the articles concerning the very Federal Constitutional Court, one of the leading legal thinkers of the CDU and Secretary of State at the Federal Ministry of Justice. Of Jewish descent, Strauß refused exile, surviving the Nazi regime hiding in the countryside at great pain and loss – his parents were murdered in the Ghetto Theresienstadt. Furthermore, Strauß was protestant, acquainted with and trusted by ecclesiastical leaderships of both the Catholic and the Evangelical churches.[73] Hence, Strauß was a natural choice.

Adenauer reached for Strauß after Beyerle's decline at the beginning of May, and before parliament's commission formed agreement on Müller in the middle of June. The letter dates from 4 June 1951. Adenauer informed his trusted ally in the Ministry of Justice that in the last days government dealt with the question about the judicial positions at the Federal Constitutional Court, especially concerning what persons could occupy the office of president and vice-president. "This circle of persons is not big. My suggestion, that you should make yourself available to the office of president, met universal welcome in the cabinet. The federal government certainly does not have any determinate influence upon the election, but it would engage therewith to secure your election." Asking for Strauß' response, Adenauer closed his communication stating that, on the one hand, he would regret losing him as secretary of state in the Federal Ministry of Justice, but that he believed, "on the other, that the Federal Constitutional Court will acquire a greater significance and, therefore, the wish of keeping [Strauß] in a leading position in the federal government must step back."[74]

Interestingly, the "origin history" [Entstehungsgeschichte] of the BVerfGG may explain why Walter Strauß ultimately rejected Adenauer's offer. As mentioned above, while compromise stands as the "midwife" of the statute, its tenets were bore inside the Ministry of Justice – but not by its Staatssekretär. Strauß was Adenauer's name. For this reason, Thomas Dehler named Willi Geiger (1909-1994) as a personal consultant. Geiger operated as Dehler's de facto secretary in circumstances worthy of the minister's political interests. In this sense, Geiger became not only one of the main heads behind the statute that came to light, but he also published the first commentary thereabout,[75] a decisive step for furthering his and Dehler's upper hand into the statute's interpretive and adjudicative reception. Arguably, beyond the mere play of party politics, the enterprise of undermining the court's foreseeable role meshed well with Dehler's project of shaping the Ministry of

[72] Collins, *Democracy's Guardians*, p. 7.
[73] See Utz, *Preußе, Protestant, Pragmatiker*. Remarkably, Utz does not also mention Strauß was scouted for the Federal Constitutional Court.
[74] Bundesarchiv, *B136, 4436, Konrad Adenauer an Walter Strauß, 4 Juni 1951*.
[75] See Geiger, *Gesetz über das Bundesverfassungsgericht*.

Justice as Bundesrepublik's "guardian of the constitution." From Dehler's standpoint, the *Justizministerium* should be fashioned both as a Rechts- and a Verfassungsministerium. In the words of constitutional historian Martin Will, for Dehler it was the Ministry of Justice's task "to oversee the legality and constitutionality of all acts of state authority."[76] As one may read in the protocol to one of the first meetings of the Ministry's committee for legal affairs and constitutional law, "[...] it is [Dehler's] personal endeavour to secure to the Ministry of Justice the interpretation of the Constitution as a field of work; [Dehler] wants to be the guardian of the constitution."[77]

To contemporary ears it may sound preposterous that a minister of justice once held as his "persönliches Bestreben" to be the *Hüter der Verfassung*. Yet, one must simply consider the layers interwoven into the fabric of this figure to reckon the plausibility of Dehler's goal in the early 1950s. True, during the Parliamentary Council many of its members were convinced that the task should befall a constitutional court. Indeed, Walter Strauß was among them. Further, Strauß explicitly argued that "the authority" held by a court designed and occupied in ways akin to Germany's tradition was "not of a sufficient magnitude," especially when compared to the US Supreme Court, calling therefore for a small judicial body that could decisively contribute to structure "the life of the state" and "legal consciousness."[78] Nonetheless, Strauß's plead for a comprehensive departure from the "German tradition of adjudication" stirred turmoil among other representatives, especially those of his own party.[79] Hence, one could venture that for the "Christian parcel of the people," having a minister as the ¨Hüter der Verfassung" sounded as less absurd than dressing judges with the old imperial clothes.

In this vein, in his monograph on the influence of the US Supreme Court in shaping the Bundesverfassungsgericht, Marcel Kau argued that the members of the Parliamentary Council were still deeply attached – "consciously or unconsciously"[80] – to an understanding of the difference between law and politics that could be best captured by a statement of Otto von Bismarck. In Von Bismarck's words: "if [...] a court would be called [...] to decide the whether the Constitution was violated or not would imply allotting to the judge the authority of the legislator; [the judge] would be called to either authentically interpret the Constitution or to materially complete it."[81] This is a short quotation of one of his political speeches, dated from 1863 and that hearkens back to the epiphenomena of the failure of Germany's bourgeois revolution. Von Bismarck's speeches were edited in the late 19th century, after his dismissal from the office of Reichskanzler. Therefore, his discourses became widely available as the former chancellor's mythologization became a steady enterprise.[82] This conveyed to his sayings an incisiveness of a mythical character along with an aphoristic valence – both of which confirm and underpin Kau's ingenious interpretation.

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[76] Will, *Ephorale Verfassung*, p. 150.

[77] Nachlass W. Strauss, *Anlage 1 zum Protokoll 9. Sitz. (09.01.1950) Ausschuss für Rechtswesen und Verfassungsrecht*, IfZ ED 94, Bd. 155, Bl. 2 *apud* Will, *Ephorale Verfassung*, p. 151, note 120.

[78] Strauss, *Die Oberste Bundesgerichtsbarkeit*, p. 28.

[79] Ironically, one could say that while scholars debate up to this date whether legal transplants are possible or not, German politicians were certain of their impossibility decades before.

[80] Kau, *United States Supreme Court und Bundesverfassungsgericht*, pp. 128-129.

[81] Von Bismarck, *Rede vor dem Preußischen Landtag*, 22. Arpil 1863 *apud* Kau, *United States Supreme Court und Bundesverfassungsgericht*, p. 130, note 424.

[82] Parr, *"Zwei Seelen wohnen, ach! in meiner Brust"*.

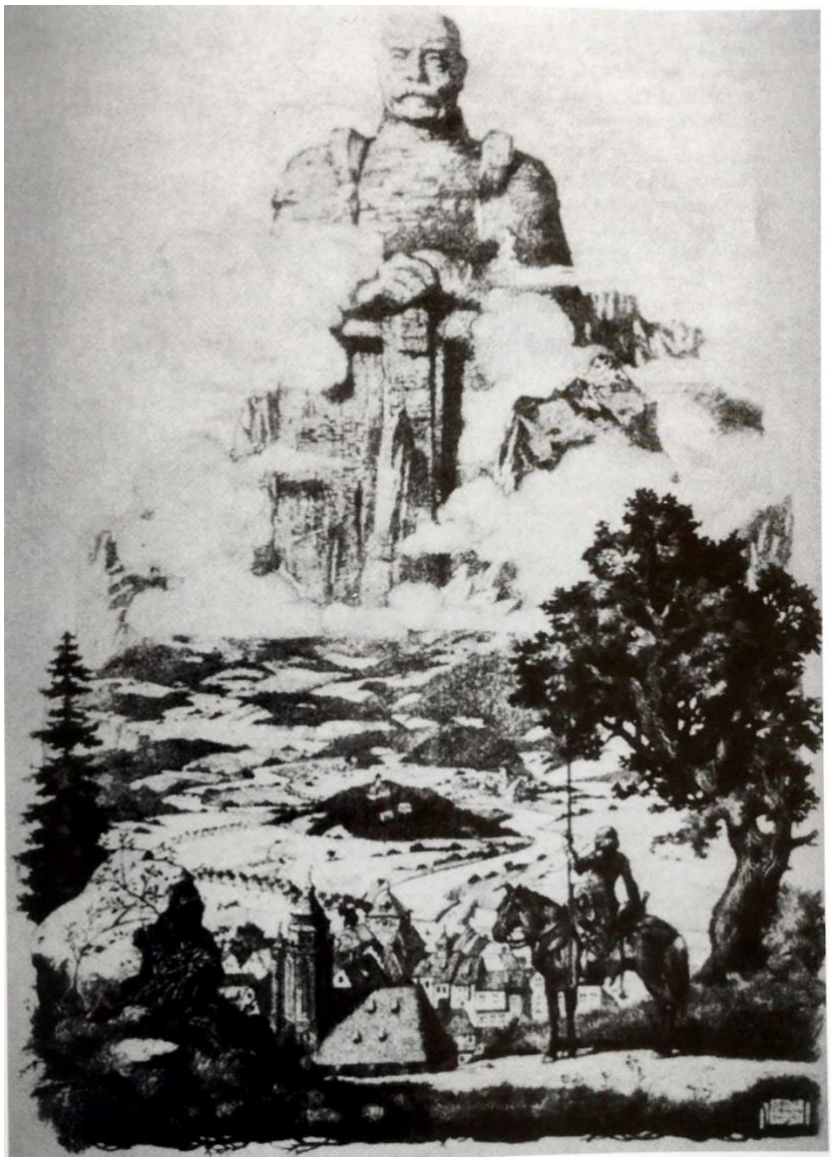

Figure 1 – Siegmund von Suchodolski, *Unser Vaterland*, Reproduktion in Der Türmer, v. 17, n. 2 (1914/15).
The drawing was commissioned by the magazine apropos of an issue dedicated to Bismarck's memory. Arguably, it captures quite well the "optical unconscious" subtending the "icon" of the Hüter der Verfassung.

Elsewhere, I explored how the splendour of the "Eisenkanzler" was paramount for conceiving political theology as a rhetorical ensemble apt for modulating the communication of constitutional doctrine,[83] especially as regards what became one of its most enduring icons (Figure 1),[84] to wit, the metaphorical concept of the *Hüter der Verfassung*. For reasons of space, I cannot reconstruct here the chain of reception whose starting point is Rudolf von Gneist, a milestone is Paul Laband, another is Friedrich Naumann, until one reaches the name of Carl Schmitt.[85] Nonetheless, through this

[83] I discuss this in an upcoming book, *The Book of Judges*.
[84] I am thankful to João Bachur for this formulation.
[85] „Sourcewise," see, among others, Von Gneist, *Soll der Richter auch über die Frage zu befinden haben, ob ein Gesetz verfassungsmäßig zu Stande gekommen?*; Laband, *Das Staatsrecht des Deutschen Reiches*, p. 46; NAUMANN, *Versuch volkverständlicher Grundrechte*, p. 573ff.

process, first Gneist's judges as *Wächter der Verfassung* metamorphose into Laband's emperor as the sole *Hüter der Verfassung*. Second, as the collapse of the *Kaiserreich* makes the emperor's position as a symbol of unity empty, Naumann – a leading Protestant pastor, publicist and member of the Constitutional Assembly of 1918-1919 – suggested fundamental rights and judges should seize the spot. Yet, the position was cumbered with expectations and hopes that an equally militarized president, whose own myth rendered Von Bismarck as Von Hindenburg's prefiguration, could reputedly better address and fulfil. Altogether, one realizes that this metaphorical concept was endowed with expectations and hopes making it challenging, to say the least, for a judge to behave and be seen as such. In sum, as Strauß had stated during constitution-making and Dehler certainly knew, keeping up with the traditional fashion of judgeship entailed that it would be easier for a minister to be acknowledged as the guardian of the constitution than a bench of judges. Accordingly, one can only make complete sense of Dehler's outburst during the controversy on the *Statusfrage* when one has in mind the struggle on the hopes and expectations attached to the "guardianship" of the constitution.

Strauß's response to Adenauer elliptically presents the first's evaluation of Dehler's degree of success as the main reason for his refusal. His answer arrived two days later, on 6 June 1951. In his letter of decline, after stating that in hindsight he saw the whole course of his life as finding its "goal" and its "fulfilling" in the travails of the Federal Constitutional Court, Strauß underscored that "the law gave to the constitutional court a layout that is to cause many difficulties in its practical handling."[86] These quandaries, Strauß continued, required "after his experience" accomplishing an "unconditional and necessary spirit of complete independence of any kind of party-political bond" and that could be achieved only by establishing "a genuine judicial atmosphere," ensuring therein the unity of the judicial college.

Yet, as he realized from his experience in Hamburg, but also in the Economic Council for the Combined Economic Area of Germany, the prospect of being second to someone else in an institution that he regarded as his destiny made Strauß frow. Considering the previous contextualization, there is an eloquent absence in Strauß's bemoan, to wit, his ordeal as Dehler's Staatssekretär in the Justizministerium.[87] Otherwise, neither Strauß's ambiguous even laconic formulation nor his refusal make sense. In his words, due to what he experienced in Hamburg and in the Vereinigten Wirtschaftsgebiet, "it would be simply too difficult to subordinate myself in this respect to the diverging views of overarching Chief presidents." Yet, Adenauer had explicitly said that should Strauß present his candidature government would secure his nomination as the court's president. Indeed, Strauß mostly shared the SPD's vision for the constitutional court. Truly, he did so since his double collaboration with Georg August Zinn (1901-1976) in the committees for adjudication and final redaction during the Parliamentary Council.[88] Thus, it would not be difficult to sell his name to the opposition. And even if political negotiations were to ultimately downgrade his name to the role of sitting judge, this does not sound as a convincing reason for dismissing one's self-declared "life's calling."[89]

[86] Bundesarchiv, *B136, 4436, Walter Strauß to Konrad Adenauer, 6 Juni 1951*.
[87] On the relationship between Strauß and Dehler, see UTZ, *Preuße, Protestant, Pragmatiker*, pp. 313-317.
[88] Utz, *Preuße, Protestant, Pragmatiker*, pp. 248-288.
[89] Tellingly, surviving as secretary of state in the Federal Ministry of Justice after five changes of leadership, Strauß was finally dismissed in the wake of the Spiegel Affair, whereafter he took a

Strauß's disclaimer bears on the nonsensical, except if one accounts for "mir hierin übergeordneten Chefpräsidenten" as referring to none other than Thomas Dehler and Willi Geiger. Walter Strauß could not imagine the leeway Rudolf Katz and Gerhard Leibholz would conquer one and a half year later, completely eschewing the grasp the ministry of justice had upon the constitutional court. As discussed below, Dehler's miscalculation upon defeat went to the point of destroying the minister's friendship with the court's first president Hermann Höpker-Aschoff, who publicly condemn the former's assault on the court's reputation and later requested before Adenauer and in the name of the court the forfeiture of Dehler's reappointment. At the time, Strauß saw Dehler's victory as final, something that arguably made a deep impression on Adenauer, thereby affecting his judgement on the prospects of the court's acquiring any significance vis-à-vis the political field. The court's conclusive organization thoroughly departed from what the secretary of state envisioned as necessary during the constitution-making process. The likelihood of the court's pettiness and the implausibility of constitutional adjudication before the gaze of the few suited to form its pioneering generation contributed to its late establishment, engendering a rather odd situation. The court had to decide its first case before its ceremonious inauguration.

II. Drawing boundaries between the servants and the lords of the law: Karlsruhe's first ruling and its inauguration

The mismatch between ruling and inauguration reminds something often underscored by constitutional scholarship, namely, that the time of the law is not the time of politics. One of the arguments Carl Schmitt levelled against constitutional adjudication's aptitude for safeguarding a constitution pivoted precisely on the fastidious but leisured demeanour of justice.[90] Indeed, on par with such feature, it is rare for courts to explicitly acknowledge the difference of pace outside their world of files.[91] It is even more exceptional for a court to do so while condemning the bending of time pursued by political opportunity in the search for occasional consensus that can ground decision-making. As the court took this route, it turned its postponed establishment into a leeway for developing the modulation of its communications vis-à-vis its political environment. It is not mere chance that in the very first decision Karlsruhe did, a minor procedural ruling that only suspended the course of events until the court had the chance – given its judicially acknowledged late start – to expound thereabout, the court seizes the opportunity to measure political action and find it wanting:

> Further, the statute concerning the Federal Constitutional Court contains binding determinations about the formality of the procedure, whose observance requires a certain time. The Federal Constitutional Court cannot punctually deliver the decision

position as a judge of the European Court of Justice. While one could argue Strauß simply seized the next opportunity he was presented with due to the circumstances leading to his dismissal from the Ministry of Justice, I believe this further confirms his qualms had their roots in Dehler's apparent success in becoming the guardian of the constitution of the Bundesrepublik. Interestingly, as Strauß was nominated to the European Court of Justice in 1963, he partook in its composition that decided the landmark case Costa v. Enel.

[90] Schmitt, *Der Hüter der Verfassung*, p. 33.

[91] Regarding this motif, its materialization and metaphorization, see Vismann, *Medien der Rechtsprechung*, pp. 56, 103-104, 148-149.

> regarding the main matters of the case before 16 September 1951, the date settled by the Federal Minister of the Interior for the voting day. [T]he Federal Constitutional Court was constituted through the Statute of 12 March 1951 – in force since 17 April 1951. The judges were chosen so late that the Court could assume its activities first on 8 September 1951. [...] [C]ould the legislator predict that the Federal Constitutional Court would first come together eight days before the time settled, the Federal Minister of the Interior would have measured the deadline otherwise. The legislator would have wished bequeathing to the participants the possibility of having a decision of the Federal Constitutional Court before the voting day. A suffrage conducted on the ground of a statute, whose legal validity is fiercely contested in public opinion and whose constitutionality is object of a procedure before the Federal Constitution Court, could baffle the voters and therewith possibly annul the results.[92]

By dint of the struggle of public opinion and its manifestation in the court's docket, politics must halt until law is adjourned to deliberation – truly, the future of three states (Baden, Württemberg-Baden and Württemberg-Hohenzollern) and their respective population must wait.[93] Doctrinally speaking, "*Beschluß v. 9 Sept. 1951 (BVerfGE 1 1-3)*" departs from the other rulings collected in the first volume of the law records of the *Bundesverfassungsgericht*. As the volume's first page laconically tells us, the record is organized by the court's members – "Heraugeben von den Mitgliedern des Bundesverfassungsgerichts."[94] While this is certainly fictitious, as law records emerge from the collective work of minor angels such as clerks and secretaries,[95] it reminds the reader that not all decisions the court had taken ultimately made to the prestigious grey hard covers of Mohr Siebeck.[96] Consequently, it says a lot that those overseeing others editing their decisions decided last but not least that a doctrinally minor but politically and chronologically first *Zwischenentscheidung* should have the pride of place.

Precisely due to the strains involved in bringing politics to a standstill, in his praise to the travails of constitutional adjudication, Dieter Grimm reminds his readers that a constitutional court's main addressees are other "constitutional organs."[97] When Karlsruhe's first president, Hermann Höpker-Aschoff, addressed the politicians attending the court's inauguration on 28 September 1951, as Uwe Wesel underscored, it was not at all certain whether the court should be considered as their peer, that is, as a "constitutional organ" of equal standing. Nonetheless, as seen above, those very same personalities who embodied the "high organisms" of government and parliament – such as the minister of the interior – in the ceremony have been censured due to their "political nature" just some weeks before. Not only Höpker-Aschoff's speech was published in a legal journal rightly after,[98] it was recorded and played in later opportunities, as, for instance, on occasion of the completion of the court's definitive venue in the late 1960s. Pushing further the point that the court had early made apropos of procedural

[92] Federal Republic of Germany, *Beschluß des Zweiten Senats vom 9. September 1951*, BVerfGE 1, 1, pp. 1-2.
[93] For an overview of the political circumstances pressing the ruling, see Wesel, *Der Gang nach Karlsruhe*. See also BOULANGER, *Hüten, Richten gründen*, pp. 90-93.
[94] Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts*.
[95] Regarding the world of the chancery and its proximity to the realm of angels, see Vismann, *Akten*, pp. 147-153.
[96] See Knappenberger-Jans, *Verlagspolitik und Wissenschaft*), especially the author's discussion of the publishing house's confessional orientation.
[97] Grimm, *Das Bundesverfassungsgericht im Überblick in Verfassungsgerichtbarkeit*, p. 15.
[98] N.N., *Eröffnung des Bundesverfassungsgerichts*, p. 791ff.

requirements and the time of the law, Höpker-Aschoff ventured to made it visual for the audience how the court conceived its relationship to politics (Figure 2):

> The legislator, people or sovereign, is the servant of the law, if it is valid. He is the lord of the law, as he creates novel right, but even then, he is yet a servant, because as he creates novel right, he must serve justice. We judges of the Federal Constitutional Court are also servants of right and are obliged to be subjected to the law as well. Moreover: the basic law equally subjects the legislator to our adjudication, as it designates us the task to proof whether the law accord to the basic law. [O]ne may be terrified before the burden of responsibility that lies here upon our shoulders. Boundaries must be drawn. [O]ne may say: fiat justitia, pereat mundus, but that would amount to a terrible judge, who does not bring into consideration the consequences of his decision. This counts first for the judge of the Federal Constitutional Court, whose decisions are legal decisions, but whose decisions can have long range consequences. The Federal Constitutional Court must remain conscient as it decides of the political consequences of its decisions, and this implies reviewing must carefully its legal decisions. The question must not be dodged, whether the court may lead with its decisions to a lawless state, which would mean a danger for the liberal democratic fundamental order of the state.[99]

Figure 2 - Hermann Höpker-Aschoff delivering his inaugural speech on 28 September 1951. Available at: https://www.deutschlandfunk.de/70-jahre-bundesverfassungsgericht-unermuedlicher-einsatz-100.html.

One must refrain from dismissing this paragraph as a mere expression of rhetorical accidents and common places. As Hans Blumenberg deftly argued, disregarding the effect of rhetorical accidents does not make justice to a rather "trivial state of affairs," namely, that any attempt at change must reckon with a public "and that before [any action] can find its approbation, it must overcome the threshold concerning the primary plausibility of its argumentation."[100] This is even more necessary when success pivots on

[99] Bundesarchiv, B/N1334, *Süddeutscher Rundfunk, Studio Karlsruhe, Sendung am 4. Mai 1969*.
[100] Blumenberg, *Die Genesis der kopernikanischen Welt*, p. 583.

attracting the fascination of mass audiences – that is, when plausibility hinges on popularity. Furthermore, the detour through familiarity and consecration is hardly something demanded only due to lay audiences, insofar as such figures are equally crucial for accommodating the technicized semantics of, say, "constitutional reason" to the all-too-human consciences of its experts. Even lawyers – or, better said, foremost lawyers – must adhere to metaphors and images for bringing a point home to themselves and others who share their craft.

Both semantically and subsemantically, Höpker-Aschoff's speech works as a protestant sermon. One of my main source for his speech consists of the transcription of a record played years later during a radio broadcast.[101] The source's availability and materiality bespeaks to the speech's fortune, standing as an important hint to the judge's praxeography, its reception, and, henceforth, the rhetorical ensemble it contributed to shape. Höpker-Aschoff delivers his point by way of alliterations and repetitions dear to pastors and priests alike, weaving the fabric of his discourse through core terms such as servants, lords, law, right and decisions. Further, these very terms hint to Höpker-Aschoff's "puritan coloured Protestantism," on the one hand,[102] and his wager on the prospects of success of the combination between faith and politics driving post-war West Germany's "democratization," on the other.[103] In such circumstances, platitudes such as "the burden of responsibility upon our shoulders" resonate with the omnipresent cry of how Germany was in need of a "conscience of responsibility" [*Verantwortungsbewußtsein*], a touchstone of liberal Protestantism.[104] In this same vein, one must consider the play underpinning the series of inversions regarding the lords and servants of the law.

1. The absolute metaphor of lordship and servitude, the historical index of its (German) Christian rendition and its rhetorical deployment in Höpker-Aschoff's performance

More important than the fact that Höpker-Aschoff designates here what some constitutional theorists would gladly formulate as "the paradox of sovereignty,"[105] it is how framing such paradox by way of a theologically embedded tropology makes room for staging constitutional adjudication as an answer to this conundrum, unfolding thereby the immanent rationality invited by previous instrumentalizations and reoccupations. One could account for the historical index of such tropology under political-theological terms, arguing that the paradox of sovereignty is tantamount to its Christian ornamentation, bespeaking to modernity's debt to Christendom, therewith conflating the many entries of such index into an enduring substance. Here I take another approach.

Now, it is certainly important that the scheme used by Höpker-Aschoff finds a prominent articulation in Paul's letters. Consider, for instance, the Letter to the Philippians, where one reads that "one must dispose as Jesus Christ was: who, despite

[101] See footnote 99.

[102] For this portrait of Höpker-Aschoff, see Heuss, *Abschied von Hermann Höpker-Aschoff*, p. 97. On Höpker-Aschoff's religious background, see Aders, *Die Utopie vom Staat über den Parteien*.

[103] Springhart, *Aufbrüche zu neuen Ufern*; see also Leininger (ed.), *Religiöse Akteure in Demokratisierungsprozessen*.

[104] On such connection, see the contributions in Albrecht; Anselm (eds.). *Aus Verantwortung. Der Protestantismus in den Arenen des Politischen*.

[105] For instance and illustratively, consider Luhmann, *Verfassung als evolutionäre Errugenschaft*.

being in a godly shape, did not consider it to be equal to God as a spoil, relinquishing himself and taking the shape of the servant[.]"[106] Concomitantly, one reads in the letter to the Romans, 6, 15 that as one is liberated from the slavery of sin posited by the law, one enters into the servitude of justice, then fulfilling the law.[107] Equally important is 1 Corinthians 7, 21, where Paul strikes that whoever has been called as a slave must not be concerned, as who comes to the lord as a slave is free and who is called as free becomes a slave of Christ. The inversion from the highest to the lowest and vice-versa is a great motif not exclusive but nevertheless essential to the tropology of Christianity, which obviously added a faithful and dogmatic twist thereto. Not only it serves for outlining a disciplinary program in Philippians 2: 5-11 and Romans, 6, 15, it resonates in 1 Corinthians 7, 21 to an exceptional and celebratory occasion known in Hellenistic Late Antiquity – as slaves momentaneously turn into lords and lords into slaves –, pushing it towards a more permanent if ambivalent and serious valence in line with what latter turns out as the double and dogmatic nature of God incarnate. Further discerning its many layers of meaning is a task as impossible as identifying all its functions – or, to borrow once again Cornelia Vissman's more apt expression, "rhetorical deployments"[108] –, especially when one turns to the synchronic parataxes and hypotaxes derived therefrom, that is, when one turns to the historical fortune of this absolute metaphor.[109]

Nonetheless, the inversion and ambivalence that became ingredient at the very least from Paul onwards to the scheme of slave, servant and lord – and their relieve in the notion of servitude – contribute for conveying as plausible something otherwise unlikely or even impossible. Accordingly, the scheme acquires pride of place in some of Martin Luther's most successful and popular writings – writings, therefore, familiar through different channels of socialization, formation and religious affiliation to Höpker-Aschoff, most of his fellow jurists, politicians, and the mass of individuals he wants to seize as the court's audience –, adorning his envisioning of issues such as freedom, responsibility, law and (scriptural) interpretation.[110] Consider, for instance, how Luther engages with the centuries' old scholastic rendition of Paul's letters, whereby the metaphysical notion of nature came to be duly enshrined. Dismissing the allegorical account of terms such as *litera* and *spiritus*, Luther turns the letters' valence, shifting them from the status of a reservoir of knowledge about the self and the world into a source of existential angst.[111]

Arguably, Luther harvests from the letters both a forceful formulation and confirmation of the existential program of self-assertion in his most successful pamphlet: "*Von der Freiheit eines Christenmenschen*" [On the freedom of a Christian man]. By dint of Christ, human nature is not whole.[112] One must reckon with "the divided nature of the

[106] In Luther's translation: „Ein jeglicher sei gesinnt, wie Jesus Christus auch war: welcher, ob er wohl in göttlicher Gestalt war, hielt er's nicht für einen Raub, Gott gleich sein, sondern entäußerte sich selbst und nahm Knechtsgestalt an[.]"

[107] Krajewski, *Der Diener*, p. 45ff. I am thankful to Fabian Steinhauer for this reference.

[108] Vismann, *Akten*, p. 19.

[109] Krajewski, *Der Diener*, p. 13.

[110] On the reputation and precedent of Paul and Luther, the scheme is also deployed by Kant and Hegel, whose instrumentalization thereof for taking anew questions such as the inception of human conscience or the nature of freedom confirms its incisiveness and comprehensiveness. See Kant, *Mutmaßlicher Anfang der Menschengeschichte*; and obviously Hegel, *Phänomenologie des Geistes*.

[111] Ebeling, *Die Anfänge von Luthers Hermeneutik*, pp. 191-192.

[112] For a reading of the notion of nature in Luther and its import for modern conscience, see Blumenberg, *Die Legitimität der Neuzeit*.

Christian man," torn by freedom and servitude, body and spirit, along with a whole series of dualisms that Luther projects into man and God alike.[113] Accordingly, such existential dualism comprehends the interpreter's relationship to scripture, determining a particular way of performing and fulfilling one's reading – that is, one must interpret as if one is actually "a prisoner of the text,"[114] whereby alliterations and playful repetitions become crucial –, while also conveying a definition of the law, both of which are informative to Höpker-Aschoff's performance and the instrumentalization engendering the reoccupation pursued thereto.

These two features bringing together Luther's theology and hermeneutics appear in a nutshell in his *Vorrede zu der Epistel von St. Paulus and die Römer* [Preface to the Epistle of Saint Paul and the Romans]. Luther considered the Letter to the Romans as the "main part" of the New Testament and of the gospel [Evangelium] as whole. The epistle offered, he contended, everything a Christian should know, "namely, what law, gospel, sin, sanction, grace, faith, justice, Christ, God, good works, love, hope, cross is, and how we must behave ourselves vis-à-vis anyone else, be it pious or a sinner, strong or week, friend or foe, and vis-à-vis us ourselves."[115] Regarding the very first word of Luther's enumeration, the reformer says as follows: "The little word *Gesetz* must not be interpreted here according to human fashion, as if the doctrine would be that one must do or let it be in terms of works. When it comes to human laws, it suffices to work according to the law, even if one's heart is not one with it. Conversely, God judges according to the reason of the heart. That is why His law also demands the reason of the heart."[116] Hence, insofar as the law is spiritual, fulfilling it demands one's "free will and proper forces" and the complete absence of coercion or unwillingness. While this may sound abrupt, it contributes to flesh out the import of Luther's rendition of this scheme: only due to how the basic law came to be rendered as a "spiritual law," Konrad Hesse could some years later famously demand from constitutional scholarship a *Wille zur Verfassung*.[117]

There is an array of sedimented layers allowing for Höpker-Aschoff as a judge to speak to his audience as a pastor and to deploy in his speech the building blocks of a sermon. In terms of the theoretical framework proposed above, underpinning his performance there are at least two parataxes, to wit, "Höpker-Aschoff and Luther," on the one hand, and "*Grundgesetz*, *geistlisches Gesetz*," on the other. Especially in light of the political circumstances in which the Federal Constitutional Court came into being, something I discuss in detail below, these layers of accumulated expectations and questions not only allowed but demanded this rhetorical deployment. Before exploring how these expectations and questions turned to be a subject of dispute, thereby engendering the instrumentalization of their semantic ornamentation as unavoidable, let me offer a brief outline of the latter's "immanent rationality."

Employing the terminology introduced above, at the time a first "epochal threshold" between Christendom and (North Atlantic) modernity came to be drawn, which parcels of the historiography dub as a "first confessional age," for turning plausible the autonomization of lawmaking as a political program – where autonomy regards both religion and gentry privileges –, lawyers and political theorists needed to frivolously ornate

[113] Luther, *Von der Freiheit eines Christenmenschen*, p. 55.
[114] Ebeling, *Die Anfänge von Luthers Hermeneutik*, p. 175.
[115] Luther, *Vorrede zu der Epistel von St. Paulus an die Römer*.
[116] *Idem*.
[117] Hesse, *Die normative Kraft der Verfassung*, p. 8.

"the legislator" with divine features. Concomitantly, these actors equally advanced politically coloured interpretations of scripture, comparing, for instance, "God's unfathomable ways with the *raison d'état*, and God himself with a Roman emperor and military leader," in the sharp formulation of Dirk van Miert.[118] In such endeavour, actors availed themselves of mythical and Christian materials and scripts alike, through a plethora of different ways varying according to time and space that make a complete account simply impossible here. It suffices to point out that while kings were portrayed as Greek deities and constitutional framers came to be shaped in statuary through the mirroring of Olympian legends and Roman heroes, sovereign administration and constitution-making were presented as acts of Christian and divine providence.

Surely, this is but a knot attendant to the transmission chain subtending the properness of a central paraphrasis bridging between the pre-history and the effectual history of constitutional adjudication in Germany. As argued above, framing the period whereby constitutional adjudication emerged as conditioned by the rifting of another "epochal threshold" between (North Atlantic) modernity and Christendom – i.e., something some historians account for as a "second confessional age"[119] – both draws our attention to the ubiquity of a theologically embedded tropology in the formation of constitutional communication and offers a sound hypothesis to this quandary. The paraphrasis I have in mind was first ventured by Heinrich Triepel at the doorstep of the downfall of the Weimar Republic. For making sense of the relationship between constitutional law and the constitution and endowing constitutional adjudication with some degree of plausibility, Triepel appealed to Rudolf Sohm, a "rigorous Lutheran" and a leading scholar of ecclesiastical law.[120] For Sohm, the relationship between ecclesiastical law and church pivots on an essential contradiction, to wit, the one between the city of men and the city of God.[121] By the time of Hesse's *Die normative Kraft der Verfassung*, one could spare the reader Sohm's original formulation, stating simply that "in variation to Rudolf Sohm's famous words, one can say: constitutional law stands in contradiction to the essence of the constitution."[122]

The interplay between lordship, slavery and servitude offers a detour through which the contradiction between law and politics becomes something productive. Hearkening back to previous semantic instrumentalizations pursued for securing to roles and programs of lawmaking their autonomy, such metaphors and analogies offered a cue for further elaboration. Duly unfolded, such religiously embedded tropology makes room for constitutional adjudication as a space where the legitimacy of political action comes under scrutiny. Accordingly, the ruling finds its counterpart in the second moment of Höpker-Aschoff's sermon, regarding the importance of the political consequences of the court's decisions for the latter's deliberation, as failing to do so could ultimately prompt a state of lawlessness – a recurrent obsession of the semantics of political legitimacy as established in the wake of the first epochal threshold between modernity and Christendom

[118] Van Miert, *The Emancipation of Biblical Philology in the Dutch Republic, 1590-1670*, p. 161.
[119] Blaschke, *Das 19. Jahrhundert*; regarding the second confessional age and the law in Germany, see Cancik *et al*. (eds.), *Konfession im Recht*.
[120] Triepel, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, p. 227.
[121] Sohm, *Kirchenrecht*, v. 1, p. 1 („Das Kirchenrecht steht mit dem Wesen der Kirche in Widerspruch").
[122] Hesse, *Die Normative Kraft der Verfassung*, p. 2 („Das Verfassungsrecht steht mit dem Wesen der Verfassung in Widerspruch").

mentioned hitherto.[123] Openly discussing the political consequences of not postponing the election day – pivotal for the fate of Baden-Württemberg – within the body of the ruling as the court did in his first decision was highly unusual considering the decorum and the corresponding praxeography of German adjudication. Meanwhile, the understanding of adjudication as a kind of service to the State was almost omnipresent, a touchstone of the persisting semantics of ceremony and courtesy that endured despite structural change, from the ballrooms to the cabinets up to the bureaus of the "personal regiment" of the Kaiserreich.[124] Thus, the court's boldness is tantamount to that of a valet who intervenes amidst his lordship's discussion with his peers. The Christian embedded tropology allows for the portrait of the consideration of political consequences in such a provocative manner, harvesting from its energy the force for the argument conveying the court's inversion from servitude to lordship.

2. Pressing precedents and mythical-dogmatic cues – expectations on the printed press regarding the Federal Constitutional Court

One can grasp the appositeness of the president's words by dint of how it resonated with the way newspapers had celebrated the resolution of political negotiations on the court's composition. Interestingly, one finds in the file that survived Adenauer's administration concerning its engagement with constitutional adjudication from 1951 to 1961 a selection of press coverage on the court's establishment. This helpful preformation evinces how different media outlets paved the way for the tone of the court's first ruling and Höpker-Aschoff's performance at its inauguration – while also revealing an administrative script sustaining a communicative chain between public opinion and government. Men who turned out as leading journalists of the Federal Republic drew parallelisms and genealogies that, while inventing an almost lost tradition of German legal constitutionalism, bestowed Karlsruhe's as its legitimate, if late heir. Tellingly, like the very Höpker-Aschoff, columnists had availed themselves of both mythical and dogmatic figures for making sense of constitutional reason.

Walter Mänkels (1906-1987), who became a lifelong Bonn correspondent both for *Die Zeit* and the *Frankfurt Allgemeinen Zeitung*, wrote an article apropos of Höpker-Aschoff's choice for the office of president already in August. Mänkels opened his article reminding his readers that this subject was the former minister of finance of Prussia during the Weimar Republic, a liberal democrat and a patriot whose family "descends in many regards, like Theodor Heuss [a framer of the Basic Law and the first president of the Bundesrepublik], in a straight line from the 48 of Paulskirche."[125] Speaking of family and generation as hinting to one's destiny or virtue is a currency common to both mythology and the Bible and here Mänkels leads his readers in entertaining that Höpker-Aschoff's nomination bestows to the foundation of the Federal Constitutional Court the significance of a redemption of the defeated tradition of German constitutionalism and its loadstar, the constitutional assembly of Paulskirche. By dint of Mänkels' craftsmanship, like German liberal constitutionalism, Höpker-Aschoff bore the traits of being both old in

[123] In this regard, see, among others, Blumenberg, *Wirklichkeitsbegriff und Staatstheorie*.
[124] Krajewski, *Der Diener*; on the „personal regiment," see Hull, *Persönliches Regimet*.
[125] Bundesarchiv, *B136/4436, Walter Mänkels, Um einen hohen Posten*.

experience and knowledge and young in body and spirit, a master of the "catechism of political wisdom and versatility."

Ernst Müller-Meiningen Jr. (1908-2006), the first redactor of the *Süddeutsche Zeitung*, addressed his readership with a piece titled "The Judge and the Power."[126] M-M Jr. began by expounding the court's constitutional competences. In a movement that seemed to invite the disregard for its infraconstitutional regulation, the journalist argued that the plenitude of power bequeathed to the court could make it a "trumping Ace" of the emerging *Rechtsstaat* in the Federal Republic. But only if it were to go beyond mere "competences and paragraphs." "Are we going to have judges capable of exercising this power?" To this posing question, Müller-Meiningen Jr. adds the following explanation: "It is not at all rare today to hide behind the honest demand for the political neutrality of the judges – the classical 'pouvoir neutre' in the sense of Montesquieu – a tendency for political indifference, the awe before the power that accrues the unprovided and countering will." Justice must renounce its inclination towards political indifference, should the Constitutional Court fulfil its task of building through the "forum of the law" among politicians a duly needed conscience of responsibility.

How avoid the opposite peril of politicization, whether through an erroneous attachment to "the letter of the law" or the even worse exploit of "general clauses"? From the letter, the author contended dictators of yore hatched out, while general clauses cannot but condemn justice to political decision-making. Thus, the judges of the Federal Constitutional Court must expound the law and nothing more than the law. "What is, then, law as such? Answer: Those that were born with us and the primeval and inherent claims to human existence to the elementary goods of freedom, life, education, marriage, property. These natural rights find their mirror in the fundamental rights of modern Rechtsstaaten." Under the guidance of the Federal Constitutional Court, for the redactor of the *Süddeutsche Zeitung*, Germany must abandon its attempts at simplifying those rights through formulas such as "the sound popular feeling," [*gesundent Volksempfinden*] embracing instead as a corrective to its legal tradition a legal conscience such as partially manifested in England or the USA. Indeed, looking elsewhere for inspiration acquires an outstanding existential dimension. According to M-M Jr., those distinct "legal currents" evince "the eternal tension between God and devil, good and evil, knowledge and error," insofar as "any life form veils in itself a padded measure of imperfection."

In turn, Hans Baumgarten (1900-1968), one of the founders of the newspaper *Frankfurt Allgemeinen Zeitung*, published *We have a Constitutional Court*.[127] Baumgarten began reminding his readers about the legend of the Miller of Sanssouci who in the author's variation proclaimed "Gott sei Dank haben wir in Postdam das Kammergericht," suggesting thereby many were prone to say "Gott sei Dank haben wir in Karlsruhe das Bundesverfassungsgericht." Baumgarten then explained how the Court's role pivoted in developing the tasks posited by the Constitution, something that the court should pursue not as a "secret science," but rather bringing "[the spirit of the Constitution] to its proper form, closer to the people." Indeed, the Constitution exists, Baumgarten contended, to legally bind the "bearers of majesty" in face of their subjects and this is what the Federal

[126] Bundesarchiv, *B136/4436, Ernst Müller-Meiningen Jr., Der Richter und die Macht*. Unfortunately, both due to how the file was photographed in its transposition to microfilm and a lack of results of a parallel investigation, I cannot pinpoint the venue where Müller-Meiningen Jr.'s article appeared. Nonetheless, one may assume it was published in the Süddeutsche Zeitung.

[127] Bundesarchiv, *B136/4436, Hans Baumgarten, Wir haben ein Verfassungsgericht*.

Constitutional Court must take care of. It is, therefore, the Court's task to realize the Constitution.

Before such a grandiose assignment, defending individual rights is just a parcel of the court's endeavour. In contrast to the other two articles discussed hitherto, Baumgarten explicitly brought to the attention of his readers the case concerning the south-west three German states, illustrating thereby the many sides to the tribunal's activity. Yet, among those most urgent matters, Baumgarten bestowed pride of place to the court's competence for deciding on the constitutionality of political parties. As the proper institution had been finally established, he reasoned, "now it will be verified whether Remer-Party [the *Sozialistische Reichspartei*, a successor of the National Socialist Party], the communists and their supporters forfeit the unrestrained affirmation of their disposition or not, considering their stance to a liberal community." In other words, Baumgarten claimed that the court's role as "the highest guardian of right and warden of piece" was already under proof, something that hearkens back, along with the effort of envisioning a middle ground between a blind attachment to the letter of the law and its interpretation through "sound popular feeling" in terms of the "animation of the law according to its spirit," to the hypotaxis "Bonn (is not) Weimar" and the parataxis "NS-Diktatur and Bundesrepublik."[128]

One may wonder to what extent such words and their fortune shaped the way public opinion started to follow and comment upon the court's landmark rulings, as if the entire world, but also the court's reputation oscillated between salvation and damnation at every decision.[129] Straightaway, as discussed next, the intertwinement invited by the force holding together the two parts of Höpker-Aschoff's speech, to wit, the connection between a Lutheran understanding of the doctrine of the two kingdoms, refashioned in reference to law and politics, on the one hand, and the motif of "learning from Weimar," on the other hand, became a touchstone of the court's response on the controversy over its status and, accordingly, a main feature of its rhetorical ensemble.

III. A mortgage of expectations: the burdens and metaphors of constitutional guardianship from the Kaiserreich to Bonn

"Someone who plays a role has always a public, before whom [she] appears and whose anticipated and actual reactions bear a meaning for [her]."[130] As Christian Boulanger has argued there is much to be harvested from carefully considering the theatrical metaphorics underpinning the notion that constitutional courts fulfil the many "roles" court observers – indeed, as one of their "partial audiences" – often ascribe thereto. From my standpoint, Boulanger's enterprise meshes well with the theoretical framework informing this investigation along with its findings, insofar as the latter add to the first's ideal-typical, but empirically informed mapping of the possible roles played by a constitutional court how such roles came to be "scripted" in a particular "law-world" and that their reoccupation was a matter of struggle and historically shaped and transmitted hopes and expectations. Thus, regarding the first years of the *Bundesverfassungsgericht*

[128] See, among others, Frei, *Vergangenheitspolitik*; especially regarding „Weimar as an argument," see Gusy (ed.), *Weimars lange Schatten*.

[129] See Schönberger, *Anmerkungen zu Karlsruhe*. I discuss Schönberger's argument below in more detail.

[130] Boulanger, *Rollen und Funktionen der Verfassungsgerichtsbarkeit*, p. 3.

– in comparison with Hungary's constitutional court –, Boulanger parsed three ideal-typical roles, to wit, that of "guardians," "umpires" and "founders." The three find inspiration in different legal theorists, respectively, Hans Kelsen, Martin Shapiro and Bruce Ackerman. While the court as guardian protects the Constitution by raising the costs for political actors to behave in ways that openly violate constitutional provisions, ensuring thereby the coherence of the legal order, as "umpire," it acts settling disputes between constitutional stakeholders, and finally, as a "founder," the court contributes in a definitive but not necessarily uncontested way for determining the "meaningfulness" and the "values" of a given polity. Tellingly and for obvious reasons, Boulanger rejects Schmitt's contributions as sound for thinking the roles befit to a constitutional court in a democracy.[131] Nonetheless, insofar as Schmitt stands as both a reflection and an inflection of expectations and hopes ingredient to early and middle 20th century German constitutional discourse, briefly considering what Schmitt entertained as due to a "personality" worth of bearing the title of "guardian of the Constitution" may help locating what was at stake in the early Bundesrepublik.

As hinted before, in many ways, Schmitt's example of mythical proportions for assaulting "traditional constitutional doctrine" and the plausibility of constitutional adjudication as he argumentatively fashioned the burdens of constitutional guardianship was Otto von Bismarck. One of Schmitt's favourite quotations, namely, Gerhard Anschütz's laconic remark "here ends state law" ["*Staatsrecht hört hier auf*"] owes to Von Bismarck its ambivalence.[132] Anschütz's dictum concerned the famous "Prussian Constitutional Conflict" of 1867, when Bismarck and the King of Prussia, on the one side, and parliament, on the other, had clashed on whether there was an imperial prerogative regarding military budget and, ultimately, military reform. At the fin-de-siècle, the magnitude of this "constitutional moment" for Germany's physiognomy only increased by dint of Von Bismarck's mythologization – the unification of the German empire through a succession of victories in the battlefield and the militarization of the German bourgeoisie find their roots in Wilhelm I and Von Bismarck's transformation of Prussia's military.[133] As scholarship points out, the fantasy of the Kaiserreich as Germany's "golden age" was more alive than ever after the Second World War.[134] Conservative and liberal-authoritarian milieus before and after the war held Von Bismarck as someone who acted not only as a referee settling many political disputes, preventing conspirations and the formation of camarillas, or even as the "true founder" of the German Empire, but also as someone who dutifully guarded his sovereign's constitutional prerogatives and therewith the *Vaterland* (Figure 1). Therefore, despite the whole project of democratization fostered by the USA, in the 1950s the *Hüter der Verfassung* did not resonate with Edward Coke's "oracles of the law," Joseph Story's "guardians of life, property and liberty,"[135] or Kelsen's portrait of the judiciary as "an aristocracy of its own,"[136] but still, as the Grimm brothers' registered in their dictionary, with Luther's Psalms 121, 4: "*Siehe, der Hüter Israels schläft noch*

[131] Boulanger, *Hüten, richten gründen*, p. 47.
[132] Schmitt, *Politische Theologie*, p. 21.
[133] Ritter, *Staatskunst und Kriegshandwerk*, pp. 49-191.
[134] A survey conducted in 1951 asked West Germans when their country had its prime. 45% answered the pre-1914 Kaiserreich, 40% National Socialism during peacetime, 7% chose the Weimar Republic and 2 per cent the Bundesrepublik. See Noelle; Peter (eds), *Jahrbuch der Öffentlichen Meinung 1947–1955*, p. 126.
[135] Story, *Commentaries on the Constitution of the United States*, p. 265.
[136] Kelsen, *Wer soll der Hüter der Verfassung sein?*.

sclummert nicht." [See, the guardian of Israel will neither slumber nor sleep].[137] When one bears this in mind, neither Thomas Dehler's desire of becoming the guardian of the Constitution nor the metaphor Rudolf Smend deployed in his essay celebrating the tenth anniversary of the Bundesverfassungsgericht are surprising. Yet, both are very informative. As the son of a theologian specialized in the Old Testament, Smend fashioned German constitutional judges as the judges of the Hebrew Republic, teaching the German people to democracy as the Hebrew judges made God's people once more into a body politic:

> It has rightly been said of the judiciary that it is one of the original professions that already existed in non-state orders. It is a correct picture of early conditions when the most common account of an ancient people's history, that of the Old Testament, has a pre-state period of judges preceding the establishment of the state in kingship, and when the first hereditary king, Solomon, after his accession in the dream vision of Gibeon, asks the Lord instead of other goods and successes for the suitability to be a judge, for understanding, to hear judgment - and God rewards this evaluation of the judicial task according to the first book of Kings with recognition. Judgment and judgeship are among the oldest and indispensable foundations of human morality. [...] The Federal Constitutional Court has its full share in this independent, intrinsic inner power of the judiciary.[138]

This metaphor's contemporaneous force is even more striking when one reminds that some decades earlier, Otto Mayer, one of the founders of German administrative law, compared the idea of subjecting the state to the law to the vain attempt of subduing Samson through ropes.[139] Thus, before such deeply religious metaphorical reservoir could be – if it was[140] – debunked, preferring instead the "minimalist conception" of a "accountable production of norm transparency,"[141] judges, politicians and journalists engaged in establishing constitutional adjudication in post-war Germany had to envision a rhetorical ensemble presenting the Federal Constitutional Court not as allegorically mirroring the pitiful ropes binding Samson but rather as prefigured in the heroic Hebrew judge.

Schmitt had cultivated the icon of the Hüter der Verfassung at a distance or even in dubiousness vis-à-vis Paul von Hindenburg's presidency and the Field Marshal's mythical aura.[142] Yet, as I showed elsewhere,[143] as soon as the military forces retrieved their autonomy vis-à-vis parliamentary and, hence, "party-political" control, whereby the Reichswehrministerium augmented its importance in government along with its "constitutional division," Schmitt became one of the latter's closest advisors, gladly downplaying his former criticisms. As Schmitt changed gears, naming Von Hindenburg as

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[137] See „HÜTER, m.", *Deutsches Wörterbuch*.
[138] Smend, *Das Bundesverfassungsgericht*, pp. 583-584.
[139] Mayer, *Die juristische Person und ihre Verwertbarkeit im öffentlichen Recht*, p. 67.
[140] Consider, for instance, that Paul Kirchhof proposes that the plausibility of his threefold parsing of the validity of a Constitution derives from its prefiguration in the threefold structure of the positing of the Ten Commandments. In his words, "[t]he ten commandments came into validity because they were spoken with the authority of the Lord, written in the reliability of stone tablets, and their contents were evidently righteous[,]" Kirchof, *Die Identität der Verfassung in ihren unabänderlichen Inhalten*, p. 779.
[141] The formulation is Boulanger's, *Hüten, richten gründen*, p. 51.
[142] Schmitt, *Verfassungslehre*, p. 352.
[143] I refer the reader once again to the upcoming book *The Book of Judges*.

the sole and unique guardian of the Weimar constitution, it certainly helped that icon and personality considerably harvested their aura from Bismarck's myth. Accordingly, the kinds and ways through which Von Hindenburg failed to tame the political crisis in Weimar's last years, especially his refusal to pursue the relegation of extremist parties and unwillingness in dissolving parliament and postponing new elections, measures that apparently even Schmitt wished for and endorsed,[144] condensed a frustrated expectation of great incisiveness.

Hans Baumgarten's reference to the constitutional court's stance regarding the *Sozialistiche Reichspartei* (SRP) in the concluding remarks of an article dedicated to celebrating the court's institution expresses this disposition that became widespread across many of the court's "partial audiences,"[145] comprehending therein not only the press but the occupying powers as well. Could the Bundesverfassungsgericht achieve under the Basic Law what Paul von Hindenburg actively failed to do under the Weimar Constitution? Notwithstanding the fact that the Basic Law's provisions on political parties and the whole adjudicative procedure of party prohibition were designed under the aegis of the "lessons from Weimar," opinions on the SRP's "constitutional hostility" were divisive even after the extreme right's success in Niedersachsen's elections of 1951, especially among the CDU/FDP coalition. Conversely, the occupying powers' growing awareness regarding the electoral prospects of the SRP along with its manifold connections to the NSDAP increased the stakes involved therein. A display of a nationally embedded institutional solution to the SRP became a *conditio sine qua non* for progressing with the negotiations on the Bundesrepublik's sovereignty, something that took shape under Adenauer's external politics of the first two years in terms of the signature of the Treaty establishing the European Defense Community and West Germany's consequential rearmament. As Martin Will has convincingly argued, establishing the court turned into a priority for the government's agenda as a consequence of international pressure for a response concerning the SRP.[146] Hence, as the court had officially opened doors by the end of September, government submitted a petition on the ban of the SRP on 21 November 1951. By then, Adenauer's understanding of West German sovereignty was increasingly becoming a reality. Importantly, the underlying take on sovereignty and European integration to Adenauer's politics pivoted on an array of mythical-dogmatic motifs as well, whereby the Carolingian Empire appeared as a past "Christian Democratic Europeanism" could aspire for in their efforts for achieving the "'spiritual reconstruction (or Renaissance) of a world shattered by the atheist, pagan materialism of Nazism." In a word, Adenauer's external politics went shoulder to shoulder with what Rosario Forlenza named as "the politics of the *Abendland*."[147] In reaction, the opposition launched an assault on its constitutionality, challenging the very possibility of signing the treaty in the absence of any constitutional amendment before the Federal Constitutional Court on the last day of January 1952, moved thereto due to divergences regarding external and security politics.[148]

[144] See Berthold, *Carl Schmitt und der Staatsnotstandsplan am Ende der Weimarer Republik*.
[145] On the notion of „partial audiences," see, among others, Boulanger, *Rollen und Funktionen der Verfassungsgerichtsbarkeit*, 2013,
[146] Will, *Ephorale Verfassung*, 2017.
[147] Forlenza, *The Politics of the "Abendland"*, p. 271.
[148] Hoffmann, *Das Bundesverfassungsgericht im politischen Kräftfeld der frühen Bundesrepublik*.

Interestingly, both issues befell to the first "red" senate. The fact that the success of Adenauer's external policy suddenly laid inside a courtroom filled with SPD-friendly judges not only dragged the Bundesverfassungsgericht to the middle of the "political forcefield,"[149] it certainly bestowed momentum to Dehler's claims of bearing his "duty" as minister of justice "to meticulously oversee the judicature of the Federal Constitutional Court."[150] One day before the court's inauguration, the practical means at the disposal of Thomas Dehler's endeavour were already questioned by Adolf Arndt at the Bundestag on the occasion of the approval of the Ministry of Justice's budget on 27 September 1951. Arndt took the chance to claim for the Federal Constitutional Court administrative and budgetary independence, deriving such autonomy from its status as a constitutional organ.[151] A month later, in a much milder tone, but, nonetheless to Dehler's surprise, his friend Hermann Höpker-Aschoff endorsed over a meeting that constitutional judges should not be subjected to the ministry's disciplinary authority.[152] In the aftermath of this conversation, government and court started internal discussions on the status of the Federal Constitutional Court – the board was being set for an informal "Organstreitigkeit." As political opportunity overlapped the SRP-Verbot, the question on the Treaty establishing the European Defense Community and the controversy over the court's status – the first two unfolded before public opinion since the beginning, the latter up to its last and decisive moments behind the curtains –, those engaged in envisioning, in Martin Will's precise formulation, "the self-understanding, the habitus, the gesture etc. of the court"[153] had to follow and intervene at three different and concomitant contexts of action. Therefore, a detailed account of the formation of the court's rhetorical ensemble in its first two years following inauguration demands considering the intertwinement of actions and occurrences taking place across these three "theatres of operation," especially as I explain below when of concern is the import of fantasy and faith thereto.

1. From guarding to founding: the SRP-Verbot and 20 Juli 1944

Since the SRP became a subject of scholarly scrutiny, as Otto Büsch inquired on the relevant factors that could explain its electoral success at Niedersachsen's election of 1951, a correlation between the party's achievements and the Protestant background of the great majority of its electorate, along with its untoward reception in Catholic milieus, has been established.[154] For probing this relationship, Büsch relied on the state's statistical records of 1952. Accordingly, the SRP's political antagonists, such as government and the occupying powers had this knowledge at their disposal. While Büsch and Furth underscored confession was not an important element in the party's discourse,[155] an event that would become increasingly coloured by religion – in confessional and interconfessional keys – stood as one of SRP's ideological touchstone, to wit, 20 Juli 1944. At the forefront of the party perched Otto Ernst Remer (1912-1997). Remer's role in undermining the attempt of overthrowing Hitler's regime has been overemphasized by the

[149] *Idem*.
[150] Wesel, *Der Gang nach Karlsruhe*, p. 79.
[151] Federal Republic of Germany, *Stenographische Berichte, Bundestag, 1. Wahlperiode, 165 Sitz*.
[152] Will, *Ephorale Verfassung*, p. 313
[153] Will, *Ephorale Verfassung*, p 312.
[154] Büsch, *Geschichte und Gestalt den SRP*.
[155] Büsch, *Geschichte und Gestalt den SRP*, p. 100; Furth, *Ideologie und Propaganda der SRP*.

NSDAP and the SRP's propaganda. Effectively, Remer obeyed General Lieutenant Paul von Hase's orders to arrest Joseph Goebbels following Hitler's reputedly death. Yet, another official intervened, doubting the Führer's murder and suggesting this should be checked before Goebbels' imprisonment was carried on. Goebbels then put Remer to speak with Hitler over the phone, following which Remer went on to arrest his superior instead. Subsequent events led to the custody of many of those engaged in this and past insurrections' planning and execution, among which the Protestant theologist Dietrich Bonhoeffer. Bonhoeffer was not part of Von Hase's enclave, belonging rather to Wilhelm Canaris' circle. Bonhoeffer was sentenced to death by the "People's court" and executed on 9 April 1945. In the wake of Germany's defeat, 20 Juli 1944 turned into an opportunity for refurbishing the so-called "Dolchstoß-Legende."[156] Simply put, in its first version, the responsibility for the catastrophe of the First World War was shifted from the army, supposedly "undefeated in the battlefield," to the lack of civilian support in the most decisive hours. During the Weimar Republic, this legend was consciously exploited by the military and openly endorsed by Paul von Hindenburg. Now, the SRP blamed those involved in 20 Juli 1944 for Germany's second trounce.

As part of the joint endeavour to secure the SRP's ban by the Federal Constitutional Court, for the sake of producing evidence and acquainting the judges therewith, the federal government initiated before the tribunal procedures against the party's leadership for forfeiting some of their fundamental rights – the so-called *Grundrechtsverwirkungen* of art 18 of the *Grundgesetz*. In parallel, at the state level, the prosecutor's office pressed Remer and others with criminal charges. Due to a speech Remer performed to one thousand spectators three days before the elections of 1951 at Braunschweig – Niedersachsen, the SRP's spokesperson faced charges of a crime of opinion. Remer then disparaged against "the so-called resistance fighters" of 20 Juli, mirroring them and post-war politicians, both of whom counted as "conspirators" who turned into "land traitors," given their connections to foreign powers. The former officer harangued on the day these rascals would have to answer before "a German court." The renowned lawyer and judge Fritz Bauer (1903-1968), who was general prosecutor at Braunschweig at the time, seized Remer's case – whose hearings began on 7 March 1952 and were duly followed by the national press – as an opportunity for pursuing through the trial's attention in public opinion a revaluation of the meaning of the resistance movements against National Socialism. In this enterprise, due to the political-religious environment prevailing not only in Niedersachsen but in the Bundesrepublik as a whole, the force of the religious sphere bestowed to 20 Juli 1944 pride of place vis-à-vis left-wing, especially communist resistance. Importantly, Bauer's strategy comprehended the submission before the court of moral-theological advisory opinions – from both a Catholic and an Evangelical perspective – on the right of resistance vis-à-vis the Nazi regime in general and the actions concerning 20 Juli in particular. These opinions, along with many sources on the attempted assassinations of 13 and 21 March 1943 but also and obviously 20 Juli 1944 – including photographs and biographical profiles on Bonhoeffer and others –, were published by the magazine *Das Parlament* at the event's anniversary in 1952, and just

[156] See in general Petzold, *Die Dolchstoßlegende*.

some days after the conclusion of the hearings for the SRP-Verbot. Later, the material became a volume edited by the Federal Ministry of Homeland.[157]

Bauer's tactics worked, thereby pulling off "a milestone for a positive placement of 20 Juli in public opinion."[158] On 15 March 1952, the Landgericht of Braunschweig not only condemned Remer, but the judges also felt compelled to adjudicative addressing the meaning of 20 Juli. In the ruling's words, "the resistance fighters of 20 Juli 1944, whether they were motivated by Christian, legal, military or social considerations, they all strove to eliminate Hitler and thus the regime led by him out of a fervent love of the fatherland and a selfless sense of responsibility towards their people that went as far as unhesitating self-sacrifice."[159] This apparent detour from the "materiality" of judicial decorum actually bestowed to this account of the resistance the objectivity of adjudicated truth. Further, some of the semantic patterns interwoven into the ruling – such as the beforementioned *Verantwortungsbewußtsein* –, along with the reception of the documents produced and arranged during the trial, elicit how 20 Juli 1944 was metamorphosing into a touchstone of the discourse of post-war democratization, something that can be probed regarding the event's valence in BVerfGE 2, 1.

Interestingly, the fact that the decision on the SRP-prohibition may appear in hindsight and from the standpoint of legal doctrine as anything but a "masterly-achievement of the early judicature of the Federal Constitutional Court," insofar as it failed, in Martin Will's evaluation,[160] to engage in an "abstract argumentative effort," relying instead on the shortened option of showing the proximity between the SRP and the NSDAP can be directly connected to the roles imprinted into the judgment's writing and performance. Beyond addressing the expectations attached to the position of "guardian of the Constitution" with its militarized undertones, by sidelining the argumentative endeavour that would bring it closer to guardianship as conceived by Boulanger and expected by Will, the court managed to harvest from the activation of what Will dubs the "Ephoral Constitution," hearkening back to a metaphor ventured by Heinrich Triepel apropos of constitutional adjudication,[161] the sort of thrust founding moments demand and the meaningfulness values' deictic character requires. This is at its clearest when the court discusses Remer's and the SRP's refurbished Dolchstoß-Legende. In the ruling's formulation:

> Hitler's amateurish strategy accelerated the defeat. Every German soldier knows from his own experience that the front disintegrated towards the end of the war due to the lack of all resources. Despite this, the SRP is spreading the new stab-in-the-back lie that the German Wehrmacht would have remained undefeated in 1945 if traitors like Canaris, the July 20th Circle, the Red Orchestra and other resistance groups had not thwarted the final victory and worked towards a premature collapse in the last years of the war.[162]

[157] For the moral-theological advisory opinions, see Zimmerman *et al*. (eds.), *20. Juli 1944*. I refrain from analysing them here for reasons of space.
[158] Will, *Ephorale Verfassung*, p. 294.
[159] Federal Republic of Germany, *Landgericht Braunschweig Urteil*, v. 15.03.1952 *apud* Will, *Ephorale Verfassung*, p. 295.
[160] Will, *Ephorale Verfassung*, pp. 356-357.
[161] Triepel, *Wesen und Entwicklung der Staatsgerichtsbarkeit*.
[162] Federal Republic of Germany. *Bundesverfassungsgericht. Urteil des Ersten Senats vom 23. Oktober 1952*, pp. 53-54.

It is equally present in its bold manoeuvre of deriving from the party's prohibition the mandate's loss for those representatives belonging or who had been affiliated to the party. Not surprisingly, both moments are directly connected to the efforts of post-war democratization. As Will concedes, absent the mandate's loss, the ruling would not have worked to rearrange West Germany's political spectrum as it did.[163] Should the reader indulge a different register of argumentation, one could advance that the energy underpinning the *enargeia* at these two moments is similar to the one captured by the movement of Michelangelo's Moses (1513-1515) (Figure 3), that is, of a violent shape presenting "the last hesitation, the serenity before the storm."[164] Indeed, it consist of a rage suspended by the mass of the tablets of stone, whose weight comes to the fore by dint of Moses' movement while also constraining and binding it, showing thereby his care in guarding them.[165] Will wonders whether closely observed the SRP-Verbot does not appear to violate at least in some aspects the "prohibition of excess" [*Übermaßverbote*]. The point may well be that founding – understood as a technique that goes along with "founder" as a role – pivots on excess of measure and signification.

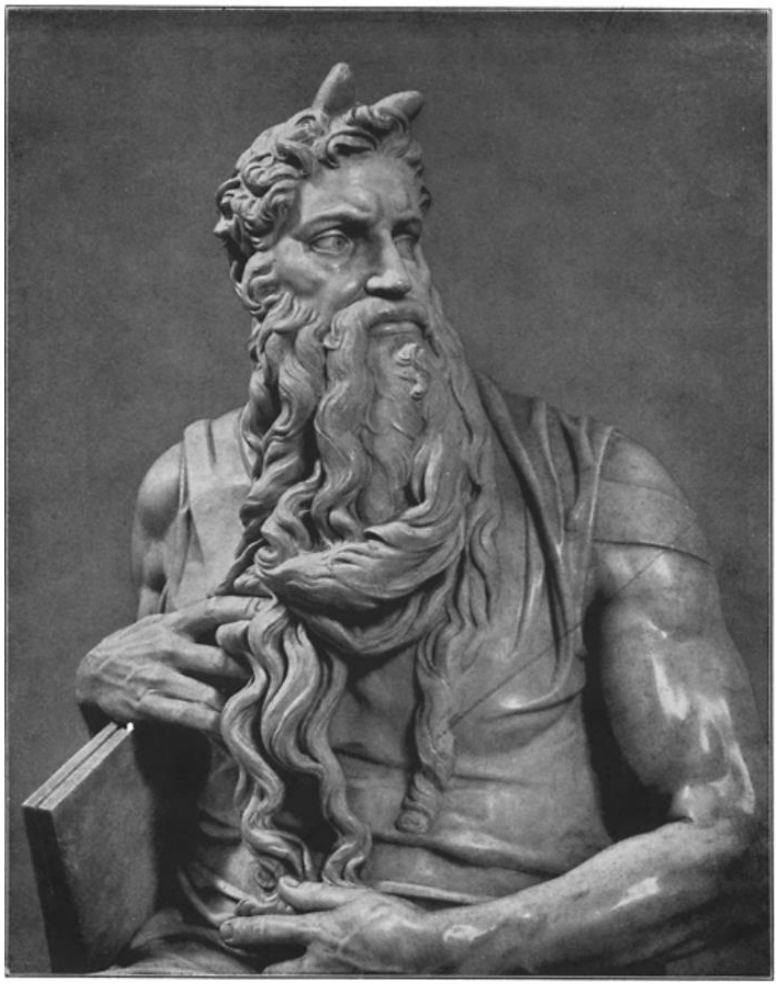

Figure 3 - Michelangelo's Mosè as printed in Imago. Zeitschrift für Anwendung der Psychoanalyse auf die Geisteswissenschaften, v. 3, 15-36 (1914).

[163] Will, *Ephorale Verfassung*, pp. 368-377, 397-428, 496-500.
[164] Freud, *Der Moses des Michelangelo*.
[165] *Idem*.

2. "The reputation of the Federal Constitutional Court stands therewith on the personality's worth of its judges and the wisdom of its decisions:" the Statusstreit, the Court as sanctorum communio and the clash between the ministerial and the judicial guardians of the Constitution on representation allowances

In a sense, then, through a combination of accident, chance, excess and cunning, the resistance and its dates became founding events for the early Bundesrepublik and that among different even initially hostile or skeptic audiences, from leading politicians to the public opinion to the general civil population.[166] Accordingly, whoever had any involvement with the resistance and survived the aftermath of its foundering acquired the gravitas of a "founding father." Enter Gerhard Leibholz (1901-1982).[167] Leibholz was born Jewish. He converted to Protestantism at the beginning of his adulthood. During Weimar, Leibholz quickly became a leading constitutional scholar, authoring widely recognized monographs on the principle of equality, representation and political parties in mass democracy. A student of Richard Thoma and Henrich von Triepel, Leibholz was also acquainted and had a friendly relationship with both Carl Schmitt and Rudolf Smend. Leibholz married Sabine Bonhoeffer on 6 April 1926, following the completion of his second doctorate. Sabine was the sibling of the theologist and later resistance leader Dietrich Bonhoeffer. In the wake of Hitler's takeover, Leibholz and his wife emigrated to England along with their two daughters, where Leibholz's brother-in-law secured him a position as a clerk of the theologist's close friend the Anglican Bishop George Bell (1883-1958). George Bell, Gerhard and Sabine Leibholz were Bonhoeffer's contacts in England for articulating foreign support to Hitler's domestic assassination.

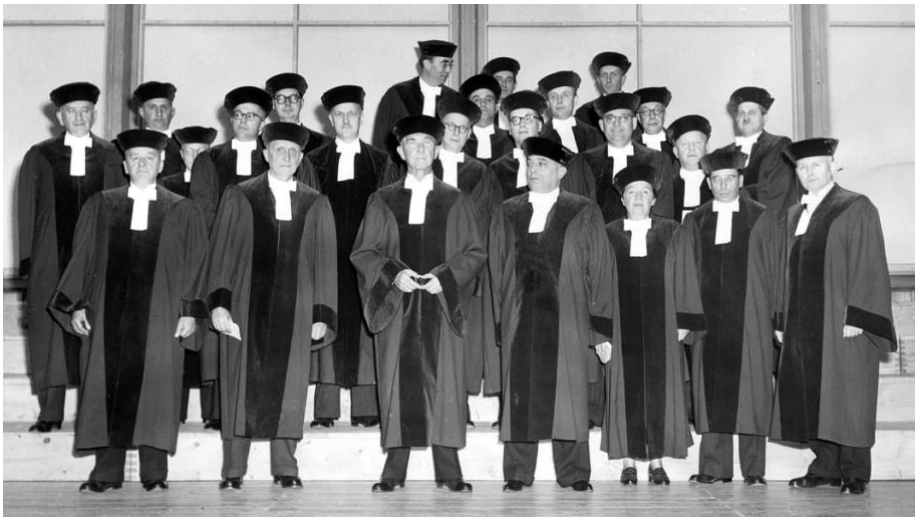

Figure 4 - The first 24 judges of the Federal Constitutional Court. At the front, in the middle, stands Hermann Höpker-Aschoff. Next to him (right), the vice-president Rudolf Katz. Next to Katz stands Erna Scheffler. Gerhard Leibholz is at the last row, above all his peers. Left Leibholz, wearing glasses, is Willi Geiger. Available at: https://www.deutschlandfunkkultur.de/100-jahre-frauen-juristinnen-diskriminierung-100.html.

[166] See, in this regard, Baur, *Das ungeliebte Erbe*. Concomitantly, I am indebted to Friedrich Weber-Steinhaus for a conversation on constitutional law and terrorism.

[167] For Leibholz's biography, see Wiegandt, *Norm und Wirklichkeit. Gerhard Leibholz (1901-1982)*.

Leibholz did not have to wait posterity to enjoy the acknowledgment of the magnitude of his leverage regarding the formation of the constitutional court's rhetorical ensemble by all sorts of means, actors and court observers (Figure 4). During and after office as constitutional judge, something Leibholz exerted for 20 years, one can sense this in the formulas announcing or following any reference to his name. Remarkably, Leibholz's candidature was a backup option advanced by the SPD in case other personalities declined the offer to join the court. Yet, as the court's forth president, Ernst Benda (1925-2009), who took the already scarlet robes after Leibholz' retirement, remarked, the latter's influence upon the tribunal's decisions were certainly greater than what may appear from outside and it definitely extended beyond the Second Senate to which Leibholz belonged.[168] As the very Leibholz revealed in a radio interview years after his retirement, his colleagues at the first senate had asked for his opinion on the legal foundations for banning the SRP, the necessity of which they were already convinced. Leibholz advised his peers that the "unconstitutionality of the [SRP]" should be grounded on the fact that "a liberal democratic order does not need to legalize its suicide, that freedom is subjected to constrains." In retrospect, he entertained that his fellow judges embraced his reasoning: "And I must say that when I read the decision today, which was composed by the first senate, it is basically the same in this part as if I had written it myself."[169] Most important, however, is his formulation "dass Freiheit eben auch Bindungen unterliegt." A truism no doubt, yet, a truism with a historical index that hearkens back to Dietrich Bonhoeffer's prison poem *Stages to the Path to Freedom* (1944) and one of its verses in particular, to wit: "No one learns the secret of freedom except through discipline." [Niemand erfährt das Geheimnis der Freiheit, es sei denn durch Zucht]. As Leibholz had read Bonhoeffer's verses before the public united in the Karlsruhe's townhall apropos of a celebration for the anniversary of 20. Juli, he added the following gloss: "This self-image of freedom properly understood is part of the legacy of Juli 20."[170]

Scholarship has yet to pinpoint what motivated Leibholz's choice as "reporting judge" for the informal Organstreitigkeit between the Federal Constitutional Court and government. Leibholz submitted his report to the court's plenum on 21 March 1952, a week after Remer's judgment at Braunschweig. The manifold organizational consequences, ranging from procedural rules to administrative law, that Gerhard Leibholz managed to connect and frame as direct implications of the status of the *Bundesverfassungsgericht* as a constitutional organ is rather impressive. Interestingly, this very feature would also be the subject of contention, as most of the judges, following Leibholz's reasoning, collide with Konrad Adenauer's minister of justice, especially as the latter claimed to exert some control on the Constitutional court's administrative and financial affairs,[171] having on his side none other than Weimar democrat Richard Thoma.

As scrutinized by Oliver Lembcke, based on the documentation composing the controversy on the status of the Federal Constitutional Court, notwithstanding Thoma's challenge mentioned above, fellow justice Willi Geiger's and the Court's president Hermann Höpker-Aschoff's stances should be considered as alternative "takes" to the

[168] Benda, *Gerhard Leibholz als Bundesverfassungsrichter*, p. 20.
[169] Leibholz, *Gerhard Leibholz im Gespräch apud* Will, *Ephorale Verfassung*, pp. 367-368.
[170] Leibholz, *Das Vermächtnis des 20. Juli 1944*.
[171] Wesel, *Der Gang nach Karlsruhe*, pp. 53-75; Lange, *Der Dehler-Faktor*; Bundesverfassungsgericht, *Denkschrift des Bundesverfassungsgerichts and also Schreiben des Vizepräsidenten des Bundesverfassungsgerichts vom 29*, (respectively pp. 144-148; pp. 156-159.

significance and organizational outline of constitutional adjudication. Of interest is precisely why they were pretermined vis-à-vis Leibholz's account.[172] Notwithstanding the quality of Lembcke's well-known analysis, to portrait the force of Leibholz's argument as an upshot from its "middle ground" misses much. Truly, in terms of judicial independence, Höpker-Aschoff's and not Leibholz's stands in the middle. Further, the understanding of history informing such framing overlooks the rhetoric of reoccupation fully operative as Dietrich Bonhoeffer's[173] brother-in-law pursues to anoint the Court as a kind of *sanctorum communio*,[174] while here and there already submitting such efforts to rationalizations. In contrast, neither Höpker-Aschoff nor Geiger ventured into such enterprise.[175] And even though Leibholz's attempt to paint the Court as a *sanctorum communio* was highlighted and heavily criticized by Thoma, Dehler and even Höpker-Aschoff, in hindsight one can hardly dispute their critique was to no avail.[176] What speaks to the incisiveness of Leibholz's vision of the Constitution Court as the main player in the process of political integration, with full autonomy in terms of administrative and financial matters? I focus here in two instances of Leibholz's rhetorical ensemble.

Amidst his engagement in the resistance to the Nazi regime, while writing his unfinished masterpiece *Ethik*, Bonhoeffer came to one bold conclusion. Both Christ and recent events – who and which, the theologist asserted, are always intertwined as history[177] – demanded a confrontation with what he portraited as the "colossus" of a "great part of the traditional Christian-ethical thinking."[178] After the epoch of the New Testament, Bonhoeffer argues, the fundamental idea of Christian ethics pivoted on the collision of two spaces, "one godly, holy, supernatural and Christian, the other worldly, profane, natural and unchristian."

As one of the major consequences of the "Two-Realms Doctrine," which Bonhoeffer saw manifested in the stance advocated by the Lutheran Church after 1933, the Church should refuse itself to take responsibility for wrongs perpetrated in the political realm.[179] This line of reasoning was denounced by Bonhoeffer as supporting the position that God's will would bind his flock to the "natural order," namely, "family, people, race (that means, a context of blood)."[180] To him, this would reduce God's reality [*Wirklichkeit*]

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[172] Lembcke, *Hüter der Verfassung*, pp. 105-166.

[173] On Leibholz and Dietrich Bonhoeffer's mutual influence, see Korioth, *Evangelisch-theologische Staatsethik und juristisch Staatslehre in der Weimarer Republik und der frühen Bundesrepublik*, p. 142 (Korioth misinterprets, however, this connection in his efforts to force into the early Bundesverfassungsgericht a movement towards secularization, in the sense of subtraction, that simply does not fit the sources); for a different appraisal, Radier, *The Leibholz-Schmitt connection's formative influence on Bonhoeffer's 1932-1933 entry into public theology*, p. 683.

[174] Bonhoeffer, *Sanctorum Communio*.

[175] See Geiger, Ergänzende Bemerkungen zum Bericht des Berichterstatters zur Stellung des Bundesverfassungsgericht and Höpker-Aschoff, *Schreiben des Präsidenten des Bundesverfassungsgerichts vom 13*, respectivelly, pp. 137-142, 149-159.

[176] For Thoma's highlight and criticism of Leibholz's rhetorics, see Thoma, *Rechtsgutachten betr. Die Stellung des Bundesverfassungsgerichts*, pp. 161-193, esp. pp. 165-168.

[177] Bonhoeffer, *Die Geschichte und das Gute [Erste Fassung]*, pp. 226-227.

[178] Bonhoeffer, *Christus, die Wirklichkeit und das Gute*, p. 41.

[179] Bonhoeffer, *Christus, die Wirklichkeit und das Gute*, p. 41, editor note 34. About the relationship between Hitler and the Evangelical Church, see Scholder, *Die evangelische Kirche in der Sicht der nationalsozialistichen Führung bis zum Kriegsausbruch*, p. 15.

[180] See *Der „Ansbacher Ratschlag" zu der Barmer „Theologischen Erklärung" In*: Schmidt, *Die Bekenntnisse und grundsätzlichen Äußerungen zur Kirchenfrage. v. 2*, pp. 102–104.

to one among others. Therefore, as Christianity renounces the world, "it decays into the unnatural, the unreasonable, devilment and despotism."[181]

For Bonhoeffer there were two realms, but not as two static, untouchable spaces. The challenge is how to think of this difference without falling back into its spatial, static representation.[182] In Christ was posited "the unity between the reality of God and the reality of the World," whose actualization "time after time" takes place in humans.[183] "It belongs to the revelation of God in Jesus Christ the seizure of space in the world." As God "in Jesus Christ claims space in the world," "he envisages this narrow space alongside the whole reality of the world together, revealing their ultimate foundations."[184] And, due to how Christ and the Church are essentially bounded – as his body was transferred to and continued as the *sanctorum communio* – "hence the Church is the place – that means the space – of Jesus Christ in the world, whose sovereignty of Jesus Christ over the whole world is testified and pronounced."[185]

The resonance of Bonhoeffer's theological writings within the sphere of the law goes beyond his family connections to Gerhard Leibholz. According to the political theorist Wilhelm Hennis, the pair *Verfassung* and *Verfassungswirklichkeit* would speak to an essential "passion." This passion would be a constitutive part of German's soil "since the reformation, the only German revolution." It pivots on the centrality of the distinction between "faith and sins, salvation and depravation, light and darkness."[186] In Leibholz the connection between this passion and constitutional doctrine finds one stark articulation. As one reads Bonhoeffer's ethical reflections in comparison to Leibholz's report on the status of the *Bundesverfassungsgericht*, it is difficult to overstate their proximity. Leibholz affirms that the conflict between "the irrational dynamics" of politics and the "static-rational essence" of law, the collision between existentiality and normativity, nature and ethical reason would have in constitutional law and constitutional adjudication its "essential imprint."[187] In doing so, Leibholz questions the validity of a principle enunciated by Weimar's *Staatsgerichtshof*. Following this principle, due to the Court's concern with the application of objective law, adjudication shouldn't have into consideration "the political consequences of its verdicts."[188] For Leibholz, the complete opposite is the case. And that is in reason of both Bonn's *Grundgesetz* and the experience of the Weimar Republic.

Following both, one must conclude it is the constitutional judge's "duty" – one could say his *Mandat Gottes*[189] – to have within his attention the political consequences and effects of his decisions. The Constitutional Court as a "Creature of the Constitution"[190] is the Constitution's place of existence within the political realm, seizing it as a whole and laying down its ultimate foundations:

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[181] Bonhoeffer, *Christus, die Wirklichkeit und das Gute*, p. 47.
[182] Bonhoeffer, *Christus, die Wirklichkeit und das Gute*, p. 54.
[183] Bonhoeffer, *Christus, die Wirklichkeit und das Gute*, p. 45.
[184] Bonhoeffer, *Christus, die Wirklichkeit und das Gute*, p. 49.
[185] *Idem*.
[186] Hennis, *Verfassung und Verfassungswirklichkeit*, p. 64.
[187] Leibholz, *Bericht des Berichterstatters des Bundesverfassungsgerichts vom 21. März 1952*, p. 122.
[188] *Idem*.
[189] Bonhoeffer, *Christus, die Wirklichkeit und das Gute*, pp. 55-57.
[190] Badura, *Verfassung, Staat und Gesellschaft in der Sicht des Bundesverfassungsgericht*, p. 2; see also Federal Republic of Germany. *Bundesverfassungsgericht. Gleichberechtigung*. pp. 234-235.

> The existing tension between constitutional law and constitutional reality is ultimately a tension inherent to life, mirroring the tension between normativity and existentiality, between ought and being, between ethical reason and nature. The task is therefore to rectify through a creative interpretation of the constitution this existing dialectic tension in concreto[.] [...] Therefore the constitutional jurist must also understand something of the essence of the political and its forces, if he wants to live up to the dignity and intrinsic value of the legal norms.[191]

Thoroughly operative therein is the implied identity between the two ministries of Church and Justice, whose counterfeit absence from worldly, political affairs during the Weimar Republic led judges and priests into the madness of National Socialism.[192] As Leibholz mobilizes "Weimar" as an argument, in line with what the scholarship has identified as the singular historical signature of this generation to its recent past,[193] he suggests that what could be once obscured due to the Weimar constitution cannot be anymore. Namely, how the *Bundesverfassungsgericht*, although a judicial body, is equally an institution with its feet in the political domain, wherein it assumes its role of "the guardian of the Constitution." As the Court intervenes into the "natural political process of integration,"[194] it does so that although "[*w*]*ir sehen jetzt durch einen Spiegel in einem dunklen Wort, dann aber von Angesicht zu Angesichte. Jetzt erkenne ich's stückweise; dann aber werde ich erkennen, gleichwie ich erkannt bin.*"[195]

Willi Geiger added his "complementary remarks" to Leibholz's report four days later. As the author of a leading commentary on the BVerfGG and Thomas Dehler's former personal referee, in terms of expertise and political compromise Geiger should be one's first pick. Tellingly, both also belonged to the same Second Senate, formally responsible for *Organstreitverfahren*. One may conjecture that despite its "customary" character, the judges framed it through such procedural categories, whereby the decision on the chair befell Rudolf Katz and not Hermann Höpker-Aschoff. In his eulogy for Katz, part of a mourning ceremony held at the court after the vice-president's demise, Leibholz reminded his audience that the demised vice-president

> knew [...] that in contrast to the Weimar Constitution, Bonn's Basic Law bears a special imprint, as here for the first time in German constitutional history a genuine court is called to partake into the formation of the will and integration of the State through its legal decisions. During the years when these discernments were not yet a secured common good, Rudolf Katz was a companion and comrade, who was never weary of always again ascertaining with his personality that errors and prejudice, wherever they appeared, were rectified and caring therewith that the Constitution was not harmed, that the status bestowed to the Federal Constitutional Court after the Basic Law was respected.[196]

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[191] See Leibholz, *Verfassungsrecht und Verfassungswirklichkeit*, p. 271.

[192] Sabine Leibholz, Gerhard Leibholz and Dietrich Bonhoeffer often discussed and exchanged letters over the right of resistance (Bonhoeffer refers to it as their "old topic of discussion"). See, for instance, Bonhoeffer, *Brief 182. An Sabine und Gerhard Leibholz 7.3.1940*, pp. 296-300.

[193] Gusy, Vergangenheitsrechtsprechung, pp. 411-418.

[194] Leibholz, *Bericht des Berichterstatters des Bundesverfassungsgerichts vom 21. März 1952*, p. 125.

[195] 1 Corinthinas 13, 1 in Luther's translation. "We see now through a mirror in an obscure word, but then from countenance to countenance. Now I recognize partially; but then I will recognize, just as I have been recognized."

[196] Bundesarchiv, B/N1334, *Trauerfeier des Bundesverfassungsgerichts am 30. September 1961*.

The very practice of performing eulogies after each member's passing stands as a rich source for capturing the reoccupations endorsed and enforced by way of fantasy and faith, whereby the modulation of the identity of constitutional adjudication came to be outlined. By reasons of space, I earmark a comprehensive analysis thereof for another opportunity. Immediately, Leibholz's words offer an interesting recollection of how the *Statusfrage* unfolded. Like Leibholz, Katz was also exiled due to his Jewish descent. Unlike Leibholz, Katz was filiated to the SPD. The confrontation between Thomas Dehler and Adolf Arndt, followed by Dehler's miscalculation in delaying a response to Höpker-Aschoff's milder demands, offered a cue to push the court into the direction championed by the social-democrats: more than a court, a constitutional organ. Importantly, Leibholz also singled out in his oration some of the rhetorical means deployed thereto, namely, the contrast Weimar/Bonn, "personality" and the commingle between constitution and constitutional court. Geiger certainly informed Dehler of these developments, most probably over dinner.[197] Consequently, on 9 April 1952 Dehler briefed Adenauer that the judges "will come forth next with the claim that they are completely sovereign in terms of administration and budget, not belonging to a ministry's area of operations."[198] Some days later, Dehler's letter was followed by an official communication along with a memorandum on "The legal position of the Federal Constitutional Court regarding administrative and budgetary matters."

While scholarship has paid lip service to this memorandum,[199] and even less to its argumentation, both deserve attention if only for the fact that they repeat almost verbatim the core of Geiger's response to Leibholz's report. In Geiger's one reads that while "the BVerfG does not belong as a constitutional organ to the area of operation of any ministry," just as "it is not subjected as a court to any other ministry," there would be an important difference as regards judicial administration. "Every administration, including judicial administration, ends according to the GG – as long as no explicit command determines otherwise – in a minister responsible before parliament."[200] In Dehler's words, "the Federal Constitutional Court has to discharge along its adjudicative activities, also administrative duties, for which, as established by the Basic Law, according to the principle of parliamentary democracy, a departmental minister must bear the political responsibility." In the memorandum's parlance, budget, decisions on matters of salary and pension and others must be submitted to "the state law principles of administration, especially the principle of parliamentary democracy, whereby any administrative activity of the State must end in [the hands of] a politically responsible minister."[201] As mentioned above, underlying the envisioning of this principle is the German imperial practice of "ministerial responsibility." As Carl Schmitt among others perspicuously underscored, in the

[197] For an account of dining as the form of communication through which Dehler and Geiger translated respectively political and legal communications, see Will, *Ephorale Verfassung*.

[198] NL Dehler, *Dehler an Adenauer v. 09.04.1954*, ADL, n1-2902 (copy) *apud* Will, *Ephorale Verfassung*, p. 316.

[199] Bundesarchiv, B136/4436, *Vermerk*. None of the literature referred to on footnote 42 discusses the memorandum. Remarkably, Oliver Lembcke frames the Status-Denkschrift as a spontaneous act of self-empowerment. While it certainly is an act of self-empowerment, in light of the memorandum and Dehler's parallel movements, "spontaneous" sounds a bit off the mark. See Lembcke, *Hüter der Verfassung*, pp. 91ff.

[200] Geiger, *Ergänzende Bemerkungen zum Bericht des Berichterstatters zur Stellung des Bundesverfassungsgericht*.

[201] Bundesarchiv, B136/4436, *Der Bundesminsiter der Justiz an den Staatssekretär des Bundeskanzleramts, 9 April 1952*; Bundesarchiv, B136/4436, *Vermekert*.

framework of the "constitutional monarchy," the responsibility before parliament bore by the emperor's ministers, especially the chancellor, rather than limiting the sovereign's powers vis-à-vis parliament, understood as a "mirror of society," the institute worked instead to protect "the unity of state power" (instanced in the monarch) from the "disruptiveness of society."[202] Yet, considering that after the court's move Dehler granted however late Höpker-Aschoff's earlier request, confirming constitutional judges were not subjected to the minister's disciplinary power, how could he deploy his overseeing authority to meticulously watch over the court's rulings? By denying its members the means for maintaining their presence in and engagement with public opinion. Months later, as Hermann Höpker-Aschoff attempted to draw a middle ground between Leibholz's and Geiger's approaches, the court's president touched upon this neuralgic point.

Höpker-Aschoff diminished Leibholz's argumentation to the stature of "desires" and "suggestions." Remarkably, the president sensed the theologically embedded tropology Leibholz deployed in the Status-Denkschrift. Höpker-Aschoff attempted to undermine it by assaulting the trope's immanent rationality from the standpoint of his strict Protestantism, whereby the president inaugurated what became a recurrent trope of German constitutional law, namely, of negatively comparing the court to the Catholic Church. As the saying goes, *Karlsruhe locuta, causa finita*. In Höpker-Aschoff's version, Leibholz's argumentation were to hold water if the court had been designed following the example of the "Roman Curia, where the pope names the cardinals, and the cardinals choose the pope." However, "[t]he judges of the Federal Constitutional Court are today chosen through the legislative and nominated by the Federal president." Yet, Höpker-Aschoff also diverged from Geiger on the fundamental point about ministerial accountability, insisting on the necessity of equating the court to a "federal organ" in administrative and budgetary terms for the sake of its "reputation." The court's reputation, the president reasoned, pivoted on the "personality's worth" of its judges and the "wisdom" of its decisions. Everything comes together under the rubrics of representation allowances [*Aufwandsentschädigungen*]. As Höpker-Aschoff framed it, "the judges have been taking part in multiple conferences and meetings and these participations serve the reputation of the Federal Constitutional Court," notwithstanding the fact that "in many cases" traveling to attend "these meetings and events cannot be acknowledged even through a generous interpretation as official journeys."[203] In sum, while Geiger had private dinner with Dehler in Karlsruhe, causally informing the latter about the court's affairs, and for that he was honored as a model of judicial decorum,[204] Leibholz spoke with Adenauer in "private" following the reception of "the Society for International Law" in Bonn. Further, as the *Privatgespräch des Kanzlers mit einem Bundesverfassungsrichter* was announced in the *Bundesländerdienst* and briefly commented upon, the magazine reported on how Adenauer had probed Leibholz on the constitutionality of the Treaty for establishing the European Defense Community. Leibholz, in turn, answered in the tone of the court's first ruling and its president's inauguration speech, namely, as the last who became the first in more ways than one: the constitutional court acted so that government could "reach its

[202] Schmitt, *Hüter der Verfassung*. See also Schönberger, *Das Parlament im Anstaltsstaat*.

[203] Bundesarchiv, *B136/4436, Schreiben des Präsidenten des Bundesverfassungsgerichts, Karlsruhe 13 Oktober 1952*, p. 9. Later published as Höpker-Aschoff, *Schreiben des Präsidenten des Bundesverfassungsgerichts vom 13. Oktober 1952*.

[204] See Der Spiegel, *„Dat ham wir uns so nicht vorjestellt."*.

goal," to wit, not signing and ratifying the treaty but rather "establishing constitutional-legal clarity."[205]

3. Constitutional showdown: the scandal apropos of the Treaty establishing the European Defense Community and Höpker-Aschoff's radio speech

To Dehler's dismay, then, despite his endeavor to keep the court away from the stage of public opinion and newspapers' headlines, both the press and opposition continued to knock at the court's doors, filling the latter's docket and hearing room up to their material limits. Dehler had not realized the reoccupation that was in motion, nor the rhetorical deployments underpinning it. Following a suggestion by legal theorist Karl Heinz-Ladeur,[206] who relied on the work of historian Martin Kohlrausch, the Federal Constitutional Court reoccupied the position of the emperor, as imprinted in the last decades of the Kaiserreich. As Kohlrausch carefully explored, addressing the novel space of communication brought by the "revolution of the media landscape," – as technological developments prompted the increase of newspapers, just as it shortened their daily production, almost approaching the simultaneity of radio's audiotape, along the concomitant transformation of their scope, whereby commenting and critique appear side by side with reporting and informing – and in the wake of the mythologization of Otto von Bismarck as an example, the imperial figure became almost a mirror to the rearranged public of capable readers and debaters, propelling monarchy's "embourgeoisement."[207] The style of government pursued by Wilhelm II made of his speeches and performances – conceived and conducted as "awkward and substantially diffuse attempts at political 'agenda-setting'" – "catalysators and points of crystallization for public confrontations."[208] Paramount in this regard was the scheme of the scandal. Scandals, Kohlrausch argued, worked as "a surrogate for participation" in face of the restricted possibilities for influencing political decision-making. Further, as a scheme, scandal came to fulfill, paradoxically as it may sound, a "stabilizing function" and the "democratization" of the monarchical figure. The scandal operated abridging political crises, reducing or even obliviating their structural features in favor of characters and personalities, whereby hope on a desirable outcome and on the monarchy could be established anew. Accordingly, each scandal brought "emperor" and "people" closer as ever.

Importantly, the trial in court, due to its ritualistic and serial parsing of time, was perfectly suited to the kinds and ways outlining the monarchical scandal as a crucial communicative means in the Kaiserreich. Such medial affinity obviously contributed to the reoccupation's enforcement. When one considers the semantic patterns addressing the constellation between the emperor, his personality, scandals and the people, its Christian Lutheran undertones evince further layers underpinning the force of Leibholz and others' enterprise of conceiving the court's rhetorical ensemble as a sanctorum communio. Such formulas equally provide insight on the metamorphosis of the imperial office and its corresponding functions, a process of structural change that made not only Von Bismarck's mythologization possible, but it also made way for Paul von Hindenburg to seize and exercise it whether as Field Marshall or as president. Their proximity to the

[205] Bundesarchiv, *B/N1334, Bundesländerdienst*, v. 4, n. 29/30, p. 7.
[206] Ladeur, *Mythos als Verfassung*, p. 179ff.
[207] Kohlrausch, *Der Monarch im Skandal*, pp. 48-53.
[208] Kohlrausch, *Der Monarch im Skandal*, p. 79.

rhetorical deployments pursued, for instance, by Höpker-Aschoff in his inauguration speech and Leibholz in the Status-Denkschrift, bespeak to how these patterns came to embed the position, as a mortgage one could simply not ignore.

Among his many efforts to stand up to Bismarck's myth, Wilhelm II entertained fashioning himself as "the first servant of the State." As the emperor faced the pressure of public opinion, he often underscored – being duly reported and commented upon by the press – how first and foremost he was a Christian, torn between his two natures, sinful and godly, who prayed before God in search of guidance to fulfil his calling, giving to the ancient doctrine of *Gottesgnadentum* a modernizing twist of personal and even intimate election.[209] As mentioned above, Christoph Schönberger has highlighted the curious fact that the court's existence is always at play, as each ruling is discussed, praised or assaulted as if the world depended on it. For the author, one could possibly trace this feature to the court's "double nature," namely, of being both a judicial body and a "constitutional organ," consisting of "the state-legal equivalent to the Protestant 'simul iustus et peccator,' the founding principle of man as both sinful and justified before God."[210] While Schönberg is perspicuous in sensing the religious colours embedding the connection between the court's rulings and public opinion, his political-theological interpretation thereof misses the target. The "state-legal equivalent of the Protestant 'simul iustus et peccator" is rather the emperor refashioned as the nation's leader,[211] including therein the conceptualization of the imperial office as comprehending the guardianship of the Constitution. This assemblage of structures and semantics shaped the battlefield before public opinion in a way that criticizing and even attempting to profit from the court's centrality in the media for denouncing its collusion in matters of political opportunity would, ultimately, promote to the scandal's "stabilizing factor" and the court's semblance of democratization. Before such circumstances, one can only win against the other side by replacing it, but not by denouncing or condemning it. This was Thomas Dehler's mistake.

As beforementioned, in parallel to the SRP-Verbot and the Statusstreit, Adenauer's government had the main course of action subtending its external policy challenged by the SPD before the First Senate. After the action was not rejected from the outset as expected by Dehler and others, government conceived a political manoeuvre to hinder a decision from the "red senate." Relying on the later abrogated competence of the court for issuing advisory opinions on request from the Bundestag, the Bundesrat, government and the Federal president regarding "determinate constitutional-legal questions," Adenauer pressed Theodor Heuss to submit such an inquiry to the plenum of the court. This strategy was well-received by the court's president, as this could give the court as a whole the chance to decide about one of the flagbearers of Adenauer's policy. On those political grounds, the First Senate dismissed the SPD's action as inadmissible due to the legal-procedural reasoning that the action's subject was yet to become a "norm" that could be duly "reviewed" in a "Normenkontrollverfahren." Nonetheless, as notice reached the chancellor's cabinet that they faced prospects of losing in the plenum as well, on Dehler's idea, Adenauer mobilized his coalition to initiate a "Organstreit" before the Second Senate against the SPD-fraction regarding the interpretation of the basic law. The coalition

[209] See Sieg, *Wilhelm II*.
[210] Schönberger, *Anmerkungen zu Karlsruhe*, pp. 50-51.
[211] On the relationship of the figures of emperor (Kaiser) and leader (Führer), see Kohlrausch, *Der Monarch im Skandal*, p. 431ff.

submitted the action on 6 December 1952. Government's efforts of rigging the court's procedure, openly submitting it to the winds of political opportunity prompted an intensive discussion, outside and inside the court's walls. Outside, the press reported and commented on each development. Outside and inside the court, state law professors wrote and presented an array of conflicting advisory opinions on the issue, some of whom were invited to explain their positions before the judges. Rudolf Smend pictured the affair as an *unglückselige Gutachterschlacht* [a calamitous slaughter of advisory opinions], whereby the reputation of constitutional scholarship as a craft of clarity and unambiguity was severely damaged, further contributing to the court's "monopoly over constitutional signification."[212] Inside, the judges themselves were extremely critical of Adenauer's strategy of drawing to the fore and exploiting the judges' political inclinations. Accordingly, the court's plenum answered on 8. December 1952.

The court decided that its advisory opinions would be binding for the court's two senates. In response – something addressed by the ruling's published version –, two days later, pressed once more by Adenauer's government, Theodor Heuss withdrew his request. After recapitulating the course of events, the decision announces the beginning of its reasoning with the strong statement: "The institution of the Federal Constitutional Court and the scope of constitutional adjudication, how they were conceived by the basic law, have no paragon." As it continues, discussing the inherent limitations of its procedural rules, the court identifies its "division in two senates with a statutory established but by no means doubt-free distribution of competences," adding to that the plenum's attribution of issuing advisory opinions. In a sense, with such statements, the court submits the conception championed by Adenauer's government of constitutional adjudication, especially Thomas Dehler and Willi Geiger, to critique, as a means for leveraging the court's innovations on this regard. Indeed, after illustrating this fault design with how different political actors attempted to exploit it, the ruling strikes as follows: "should the Court wish to not lose its authority in the play of competences, it must establish fundamental procedural rules regarding the relationship between the advisory opinion procedure and the judgment procedure and between the plenum's advisory opinion and the judgment issued by a senate."[213] Accordingly, despite the fact even an advisory opinion issued by a constitutional court does not have a binding character, for the opinion to fulfil its "function of pacification," its "authority and meaning" must be observed by the other constitutional organs, especially the court's very two senates.

Interestingly, in this regard the ruling quotes the words of Walter Strauß, who represented government during the hearings before the first senate: "the Court reckons with the State Secretary of the Federal Ministry of Justice 'that any advisory opinion of the Federal Constitutional Court is of such an authority and meaning that no legislative organ or the federal government could be responsible for exercising its right of initiative in ways that entailed standing against an advisory opinion of the Federal Constitutional Court." Truly, Strauß went further, stating that irrespective of whether it is a binding judicial decision or an advisory opinion, "every constitutional organ or otherwise of the federation is not in the condition to behave regarding a constitutional question otherwise than what

[212] Günther, *Denken vom Staat her*, pp. 101-105, see also Lange, *Der Dehler-Faktor*.
[213] Federal Republic Of Germany, *Bundesverfassungsgericht. Beschluß des Plenums vom 8 Dezember 1952*, pp. 84-86.

was decided by the Federal Constitutional Court." [214] Both statements were made during the second hearing session, held before the First Senate on 18 July 1952, as Strauß and Arndt faced each other, clashing not only their different interpretations of the Basic Law, but their equally diverging remembrances of constitution-making. Perusing the hearing's transcripts, one notices that Strauß was impelled to take a stance on such issue by the president's inquiry. Whether Strauß could already foresee or not the course of action the court would take is difficult to discern. Nevertheless, considering Thomas Dehler's reactions in the aftermath of the decision from 8 December 1952, this further confirms how apart the visions on constitutional adjudication were between the minister and his state secretary.

Before a press conference, Dehler called the decision a "nullity," a mere consequence of the court's failed construction, now benefiting the man behind it, to wit, Adolf Arndt. In fact, both Adenauer and Dehler declared their willingness to change the court's statute, as a response to its erroneous ruling. As their statements reached the newspapers, the headlines spoke of a "constitutional crisis," a "state crisis," and of a "conflict between Bonn and Karlsruhe." To the many admonitions suggesting he should step back, Dehler answered on 11 December through a telegram that quickly made its way to the press as well: "You misunderstand the circumstances completely. The Federal Constitutional Court has deviated in a convulsing way from the way of the law and had therewith created a serious crisis."[215] While Adenauer quickly sensed his minister was crossing some lines – some of which were set at the court's inauguration –, distancing himself therefrom, Dehler pushed further. As his actions were condemned in the press, opposition seized the momentum. The SPD proposed before parliament a motion due to the minister's pronouncements regarding the court. In the transcripts of the proceedings of the Federal Assembly when the matter was debated, namely, on 4 and 5 March 1953 one finds a collection of Dehler's attacks. Framed as "demagogical" and a threat to democracy, Dehler's onslaught on the court's reputation backfired. Referring to the telegram quoted above, the SPD petitioner adduced to Dehler's pretensions of constitutional guardianship: "With this telegram the man who wants in his office to be the highest upholder of the law in Germany accused the highest court, which must watch over the integrity of constitutional life, from breach of law."[216] In his reply, Dehler repeated and defended his attacks, taking distance from the court's statute while framing the conflict as a collision of two opinions, one that made the court the lord of the Constitution and the other that reckoned its place as the guardian of the Constitution. While some constitutional judges shared the first position, Dehler defended the second rightful one. He then took this as his cue to renew his criticism of the decision of 8 December 1952, adding further comments on the SRP-Verbot and the court's first decision. Nonetheless, as one remembers Dehler's wish of dressing his ministerial office as the guardian of the Constitution, acknowledging the robes befell to someone else is tantamount to recognizing defeat – even though Dehler did so as a sore loser.

In response to Dehler's speech before the Bundestag, Hermann Höpker-Aschoff went to the radio. He later distributed a transcript of his speech to all his peers, but also

[214] Federal Republic Of Germany, *Bundesverfassungsgericht. Beschluß des Plenums vom 8 Dezember 1952*, p. 88. See also Institut Für Staatslehre Und Politik E. V. In Mainz (ed.), *Der Kampf um den Wehrbeitrag*.
[215] Bundesarchiv, *Stenographische Berichte, Bundestag*.
[216] Bundesarchiv, *Stenographische Berichte, Bundestag*.

to all federal ministers and the presidents of the Bundestag and the Bundesrat. Höpker-Aschoff began his speech reminding his listeners of Dehler's attacks and how government distanced itself from its minister of justice. Consequently, as Dehler entered the parliament session on 4 March 1953, the president expected from Dehler, with whom he was connected through a "yearslong friendship," an apology for his attacks on the reputation of the Federal Constitutional Court. "The opposite was the case." Yet, Höpker-Aschoff explains he came into public not to begin a struggle against Dehler, nor to defend the court's rulings – for the president, the decisions speak for themselves –, but to protect "the independency of justice" and "the idea of the Rechtsstaat." In his performance, Höpker-Aschoff refers his listeners to his inauguration speech, repeating verbatim the metaphor on the lordship and servitude of the law. As he now frames it, "in the accusation that the Federal Constitutional Court raise itself to legislator one significant problem of constitutional adjudication is concealed. I addressed this problem on the occasion of the inauguration of the Federal Constitutional Court on 28 September 1951." "These words," he underscored, "did not remain theory, the court was oriented in its decisions by them." Evincing this point through excerpts from two judicial decisions and the approving evaluation of a newspaper, this constitutes only one side of Höpker-Aschoff's speech. Concomitantly, Höpker-Aschoff deftly mobilizes a figure that was certainly dear to Dehler's endeavour of overseeing the court's decisions, namely Friedrich der Große (1712-1786). After resuming the affair, the very first quotation of the speech comes from Friedrich der Große's *Political Testament*, precisely from the chapter dedicated to adjudication. In the aftermath of the struggle for the plausibility of constitutional adjudication, Höpker-Aschoff could now mirror his actions on Friedrich's words. After stating his purpose of defending judicial independence and the idea of the Rechtstaat, the president asks his audience: "What is it all about?" Answer: "From the testament of the great king of Prussia these words of his are known: 'I have decided never to disturb the course of the process. In the courthouses the laws must speak, and the sovereign must silence.' What this means? That government must respect the courts' decisions even when they do not correspond to government's legal perspective." [217]

Concluding remarks

In his recent book *Against Constitutionalism*, Martin Loughlin dedicates a full chapter to a confrontation with what he dubs as "integration through interpretation." In so proceeding Loughlin has as his main example none other than the early judicature of the Bundesverfassungsgericht. Loughlin's distress leads to a normative argument against what lies at the core of this piece. In his words, "we should not look to the Constitution for our collective ideals of justice."[218] The Constitution should not stand for the "soul of the nation." That may well be, but the most interesting from a multi-disciplinary, knowledge-centered standpoint[219] is not the ethical question of whether we should do it or not, but

[217] Bundesarchiv, *B/237/1025701, Hermann Höpker-Aschoff, Rundfunkrede vom 14 März 1953*.
[218] Loughlin, *Against Constitutionalism*, p. 143.
[219] Auer, *Zum Erkenntnisziel der Rechtstheorie*, p. 51 ("Legal Science is precisely then a relevant science if it has revealed something relevant about our society. Obviously, that can be already the case with a 'pure' dogmatic proposition. The knowledge-goal of a theoretically ambitious legal

how "we" came to do it, and what is the place of constitutional adjudication in this conundrum.

The preceding pages explored how religious references, metaphors and images were deployed by actors engaged in establishing constitutional adjudication in post-war Germany. I equally addressed the conditions determining the possibility and even the necessity of such instrumentalizations. Why would there be a need for such religious resources in the first place? Because communication must fascinate. It must draw the attention of individual consciences and shape the behavior of bodies, organizing and distributing them in distinct social roles, therefore including (and excluding) individuals in social communication. Now, such drawing and shaping, the bulk of fascination, has much to do with religion. To borrow a line from Paul Valery apropos of this quandary, one Blumenberg considered as particularly incisive, "[a] religion conveys to men words, actions, gestures, 'thoughts' for cases before which they don't know what to say, what to do, what to imagine."[220] Even when religion is displaced, its materials may still retain some of its force. In such circumstances, one may speak religious resources are deployed for the sake of communications of other social domains by dint of their "consecration and familiarity."[221] In other words, these materials still attract and hold the gaze of individuals.

Thus, if and when "constitutionalism" reoccupies the position of religion, I believe it is fair to speak that its history pivots on a chain of catachresis. Indeed, catachresis, as the more or less deliberate deviating use of a word or expression, is perhaps the rhetorical figure that best embodies the antinomy between the need for history and the experience of history. The heart of this antinomy is, precisely, the phenomena of reoccupations. To borrow one of Hans Blumenberg's most perspicuous dicta, what was once meant metaphorically can be understood literally, such historical misunderstandings being productive in their own way.[222] Regarding constitutional adjudication, these productive historical misunderstandings take place – whether simultaneously, subsequently, or even retroactively, as past registers are dressed with new clothes – in the discursive field of constitutional hermeneutics and the medial constellation of constitutional ceremony. In any case, as constitutional adjudication manages to fascinate, it also becomes popular.

By focusing on the structural and semantic aspects of the court's popularity, to wit, its rhetorical ensemble, not only the sources for addressing the "subcutaneous influences of ecclesiastical traditions" come to the fore, but one also manages to probe, for instance, Günter Frankenberg's claim that "[i]n the domain of political legitimacy, religion has been superseded by constitutionalism."[223] Accordingly, as unfolded hitherto, the focus on rhetorical ensembles and reoccupation allows us to account for the availability of religious elements for the sake of arranging a religiously embedded tropology and its rhetorical force in a methodologically controllable way. Neither the availability of these elements nor their rhetorical force is considered as a matter of course, demanding the localization of those actors engaged with imagining constitutional adjudication in confessionally marked networks, answering to a religiously impregnated public. In a sense, this fleshes out one of Blumenberg's sharpest insights: "historical effects" often projected into a chain of

science must be broadly conceived. In the position defended here, it comprehends the claim of a multidisciplinary theory of society, observed through the medium of law.")

[220] Blumenberg, *Beschreibung des Menschen*, p. 729.

[221] Blumenberg, *Die Legitimität der Neuzeit*, p. 88.

[222] Blumenberg, *Die Legitimität der Neuzeit*, p. 99.

[223] Frankenberg, *Magic and Deceit*, p. 162.

actions and occurrences are often the last steps of the consequences of their presuppositions. In other words, "pre-history" conditions the "effectual history" pertaining to any subject matter.[224] Writing the "effectual history" of constitutional adjudication in Germany, as has been recently beseeched by Dieter Grimm in *Die Historiker und die Verfassung*, demands, more than simply following how newspapers framed "landmark rulings," reintroducing constitutionalism to its peers, confessionalization and nationalism. Connecting pre-history and effectual history, however, is something that requests multi-disciplinarity and theory.

[224] Blumenberg, *Die Genesis der kopernikanischen Welt*, p. 506.

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References

ADERS, Thomas. *Die Utopie vom Staat über den parteien*: Biographische Annäherungen an Hermann Höpker-Aschoff (1883-1954). Frankfurt a. M.: Peter Lang, 1994. 302.

ALBRECHT, Christian; ANSELM, Reiner (eds.). *Aus Verantwortung*: Der Protestantismus in den Arenen des Politischen. Tübingen: Mohr Siebeck, 2019.

ALDER, Ken. Introduction. *Isis*, v. 98, n. 1, pp. 80-142, 2007.

ALTER, Karen. *The European Court's Political Power*: Selected Essays. Oxford: Oxford University Press, 2009. 77

AUER, Marietta. *Zum Erkenntnisziel der Rechtstheorie*: Philosophische Grundlagen multidisziplinärer Rechtswissenschaft. Baden-Baden: Nomos, 2018.

AUGSBERG, Ino. *Die Lesbarkeit des Rechts*. Weilerswist: Velbrück, 2020.

BADURA, Peter. *Verfassung, Staat und Gesellschaft in der Sicht des Bundesverfassungsgerichts in Bundesverfassungsgericht und Grundgesetz*: Festgabe aus Anlass des 25-jährigen Bestehens des Bundesverfassungsgerichts. Tübingen: Mohr Siebeck, 1976. v. 2.

BAUR, Tobias. *Das ungeliebte Erbe*: ein Vergleich der zivilen und militärischen Rezeption des 20. Juli 1944 im Westdeutschland der Nachkriegszeit. Frankfurt a. M.: Peter Lang, 2007.

BENDA, Ernst. Gerhard Leibholz als Bundesverfassungsrichter in Christoph Link (ed.) *Gleichheitssatz im modernen Verfassungsstaat*. Baden-Baden: Nomos, 1982.

BERTHOLD, Lutz. *Carl Schmitt und der Staatsnotstandsplan am Ende der Weimarer Republik*. Berlin: Duncker & Humblot, 1999.

BILLING, Werner. *Das Problem der Richterwahl zum Bundesverfassungsgericht*. Berlin: Duncker und Humblot, 1969.

BLASCHKE, Olaf. Das 19. Jahrhundert: Ein Zweites Konfessionelles Zeitalter?. *Geschichte und Gesellschaft*, v. 26, pp. 38-75, 2000.

BLUMENBERG, Hans. Anthropologische Annäherung an die Aktualität der Rhetorik. *In*: BLUMENBERG, Hans. *Wirklichkeiten in denen wir leben*. Stuttgart: Reclam, 2020.

BLUMENBERG, Hans. *Arbeit am Mythos*. Frankfurt a. M: Suhrkamp, 2021. 290.

BLUMENBERG, Hans. *Beschreibung des Menschen*. Frankfurt a. M.: Suhrkamp, 2020.

BLUMENBERG, Hans. *Die Genesis der kopernikanischen Welt*. Frankfurt a. M.: Suhrkamp, 2021.

BLUMENBERG, Hans. *Die Legitimität der Neuzeit*. Frankfurt a. M.: Suhrkamp, 2021.

BLUMENBERG, Hans. *Die ontologische Distanz*. Frankfurt a. M.: Suhrkamp, 2022.

BLUMENBERG, Hans. Wirklichkeitsbegriff und Staatstheorie. *Schweizer Monatshefte*: Zeitschrift für Politik, Wirtschaft, Kultur, v. 48, n. 2, pp. 121-146, 1968-1969.

BLUMENBERG, Hans. *Wirklichkeitsbegriff und Wirkungspotential des Mythos in Terror und Spiel*: Probleme der Mythenrezeption, Poetik und Hermeneutik: v. IV. Ed. Manfred Fuhrmann. Munich: Wilhelm Fink, 1971.

BOMHOFF, Jacco. Getting Legal Reason to Speak for Itself: The Legal Form of the Gutachten and Its Affordances. *Law & Literature*, pp. 1-27, oct. 2023.

BONHOEFFER, Dietrich. Brief 182. An Sabine und Gerhard Leibholz 7.3.1940. *In*: BONHOEFFER, Dietrich. *Illegale Theologenausbildung*: Sammelvikariate 1937-1940. Munich: Ch. Kaiser, 1992. (Werke, v. 15)

BONHOEFFER, Dietrich. Christus, die Wirklichkeit und das Gute: Christus, Kirche und Welt. *In*: BONHOEFFER, Dietrich. *Ethik*. Munich: Ch. Kaiser, 1992. (Werkausgabe, v. 6)

BONHOEFFER, Dietrich. Die Geschichte und das Gute: Erste Fassung. *In*: BONHOEFFER, Dietrich. *Ethik*. Munich: Ch. Kaiser, 1992. (Werkausgabe, v. 6)

BONHOEFFER, Dietrich. *Sanctorum Communio*. Munich: Ch. Kaiser, 2005. (Werkausgabe v. 1)

BOULANGER, Christian. Hüten, richten gründen: Rollen der Verfassungsgerichte in der Demokratisierung Deutschlands und Ungarns. 2013. 395f. Dissertation. Freie Universität Berlin, Berlin, 2013.

BOULANGER, Christian. Rollen und Funktionen der Verfassungsgerichtsbarkeit: eine theoretische Annäherung. *In*: BOULANGER, Christian *et al*. (eds.). *Die Politik des Verfassungsrechts*. Baden-Baden: Nomos, 2013. v. 3.

BUNDESARCHIV. B/134/21719.

BUNDESARCHIV. B/N1334, Süddeutscher Rundfunk, Studio Karlsruhe, Sendung am 4. Mai 1969, Verfassungskontrolle – Hilfe oder Hindernis für den Gesetzgeber. Eine Sendung über das Bundesverfassungsgericht von Erhard Becker (Abscrhift des Sende-Bands).

BUNDESARCHIV. B136, 4436, Konrad Adenauer an Walter Strauß, 4 Jun. 1951.

BUNDESARCHIV. B136, 4436, Walter Strauß to Konrad Adenauer, 6 Jun. 1951.

BUNDESARCHIV. B136/4436, "Vermerk: Rechtsstellung des Bundesverfassungsgerichts in verwaltungs- und haushaltsmässiger Hinsicht" v. 31. Mär. 1952.

BUNDESARCHIV. B136/4436, Der Bundesminister der Justiz an den Herrn Staatsekretär im Bundeskanzleramt, 25 Juni 1951.

BUNDESARCHIV. B136/4436, Deutsche Zeitung, In der Hand der Verfassungsrichter: Spekulationen über den „roten" und den „schwarzen" Senat, 11 Jun. 1952.

BUNDESARCHIV. B136/4436, Ernst Müller-Meiningen Jr., Der Richter und die Macht.

BUNDESARCHIV. B136/4436, Hans Baumgarten, Wir haben ein Verfassungsgericht.

BUNDESARCHIV. B136/4436, Walter Mänkels, Um einen hohen Posten: Höpker-Aschoff, Ruh Nachrichten (28.8.51).

BUNDESARCHIV. B/N1334, Bundesländerdienst, v. 4, n. 29-30, 1953.

BUNDESARCHIV. B/N1334, Trauerfeier des Bundesverfassungsgerichts am 30. Sep. 1961.

BUNDESARCHIV. B136/4436, Schreiben des Präsidenten des Bundesverfassungsgerichts, Karlsruhe 13 Oktober 1952, 9. Later published as Höpker-Aschoff, Schreiben des Präsidenten des Bundesverfassungsgerichts vom 13. Okt. 1952c.

BUNDESARCHIV. B136/4436. Der Bundesminsiter der Justiz an den Staatssekretär des Bundeskanzleramts, 9 Apr. 1952a.

BUNDESARCHIV. B136/4436. Vermekert: Betr.: Rechtstellung des Bundesverfassungsgerichts in verwaltungs- und haushaltmässiger Hinsicht, 31 Mär. 1952b.

BUNDESARCHIV. *Stenographische Berichte, Bundestag, 252 Sitz. v. 04.03.1953, 12083 (12098 (A))*.

BÜSCH, Otto. Geschichte und Gestalt den SRP. *In*: STAMMER, Otto (org.). *Rechtsradikalismus im Nachkriegsdeutschland*: Studien über die „Sozialistische Reichspartei" (SRP). Wiesbaden: Springer, 1967.

CANCIK, Pascale et al. (org.). *Konfession im Recht: Auf der Suche nach konfessionell geprägten Denkmustern und Argumentationsstrategien in Recht und Rechtswissenschaft des 19. und 20. Jahrhunderts*. Frankfurt am Main: Vittorio Klostermann, 2009.

COLLINGS, Justin. *Democracy's Guardians*: A History of the German Federal Constitutional Court, 1951-2001. Oxford: Oxford University Press, 2015.

CORWIN, Edward. The Worship of the Constitution. *Constitutional Review*, v. 4, n. 3, 1920.

DER SPIEGEL. Dat ham wir uns so nicht vorjestellt. *Der Spiegel*, 12 nov. 1978. Available at: https://www.spiegel.de/politik/dat-ham-wir-uns-so-nich-vorjestellt-a-93710ca9-0002-0001-0000-000040606997.

DEUTSCHES WÖRTERBUCH VON JACOB GRIMM UND WILHELM GRIMM [DWB]. *Digitalisierte Fassung im Wörterbuchnetz des Trier Center for Digital Humanities*. Version 01/23. Available at: https://www.woerterbuchnetz.de/DWB?lemid=H13837. Access on: 22 jul. 2023.

DIXON, Rosalind; GINSBURG, Tom. Constitutions as political insurance: variants and limits *In*: DELANEY, Erin F.; DIXON, Rosalind (eds.). *Comparative Judicial Review*. Cheltenham: Edward Elgar, 2018.

DOUGLAS, Mary. *Purity and Danger*: an analysis of concepts of pollution and taboo. London: Routledge, 2001.

DÜRIG, Günter. Die Menschenaufassung des Grundgesetzes. *In*: GLAESER, Walter Schmitt; HÄBERLE, Peter (orgs.). *Gesammelte Schriften 1952-1983*. Berlin: Duncker & Humblot, 1984.

EBELING, Gerhard, Die Anfänge von Luthers Hermeneutik. *Zeitschrift für Theologie und Kirche*, v. 48, n. 2, pp. 172-230, 1951.

FEDERAL CONSTITUTIONAL COURT. *Entscheidungen des Bundesverfassungsgerichts*, v. 1. Tübingen: Mohr Siebeck, 1952.

FEDERAL REPUBLIC OF GERMANY. Beschluß des Plenums vom 8 Dezember 1952, *BVerfGE*, v. 2, n. 79, 1952.

FEDERAL REPUBLIC OF GERMANY. Bundesarchiv, B/237/1025701, Hermann Höpker-Aschoff, Rundfunkrede vom 14 März 1953.

FEDERAL REPUBLIC OF GERMANY. Bundesverfassungsgericht. Beschluß des Zweiten Senats vom 9. September 1951, *BVerfGE*, v. 1, n. 1, pp. 1-2, 1951.

FEDERAL REPUBLIC OF GERMANY. Bundesverfassungsgericht. Denkschrift des Bundesverfassungsgerichts. *Jahrbuch des öffentlichen Rechts der Gegenwart*, v. 6, pp. 144-148, 1957.

FEDERAL REPUBLIC OF GERMANY. Bundesverfassungsgericht. Gleichberechtigung. *BVerfGE*, 3, 225, 1953.

FEDERAL REPUBLIC OF GERMANY. Bundesverfassungsgericht. Urteil des Ersten Senats vom 23. Oktober 1952, *BVerfGE*, v. 2, n. 1, pp. 53-54.

FEDERAL REPUBLIC OF GERMANY. Bundesverfassungsgerichtsgesetz. 1951.

FEDERAL REPUBLIC OF GERMANY. Landgericht Braunschweig. Urteil. 15 mar. 1952. In: WILL, Ephorale Verfassung. Tübingen: Mohr Siebeck, 2017.

FEDERAL REPUBLIC OF GERMANY. Schreiben des Vizepräsidenten des Bundesverfassungsgerichts vom 29. Oktober 1952. *Jahrbuch des öffentlichen Rechts der Gegenwart*, v. 6, pp. 156-159, 1957.

FEDERAL REPUBLIC OF GERMANY. Stenographische Berichte, Bundestag, 1. Wahlperiode, 165 Sitz. 27 set. 1951, 6695 (6753 (C)). Available at: http://dipbt.bundestag.de/doc/btp/01/01165.pdf. Access on: 22 jul. 2023.

FEDERAL REPUBLIC OF GERMANY. Stenographische Berichte, Bundestag, 252 Sitz. 4 mar. 1953, 12083 (12098 (A)), 1953. Available at: https://dserver.bundestag.de/btp/01/01252.pdf. Access on: 22 jul. 2023.

FELZ, Sebastian. Die Historizität der Autorität oder: Des Verfassungsrichters neue Robe. *Jahrbuch junge Rechtsgeschichte*, pp. 109-117, 2011.

FOLJANTY, Lena. *Recht oder Gesetz*: Juristische Identität und Autorität in den Naturrechtsdebatten der Nachkriegszeit. Tübingen: Mohr Siebeck, 2013.

FORLENZA, Rosario. The Politics of the "Abendland": Christian Democracy and the Idea of Europe after the Second World War. *Contemporary European History*, v. 26, n. 2, pp. 261-286, 2017.

FRANKENBERG, Günter. *Comparative Constitutional Studies*: Between Magic and Deceit. Cheltenham: Edward Elgar, 2018.

FREI, Norbert. *Vergangenheitspolitik*: Die Anfänge der Bundesrepublik und die NS-Vergangenheit. Munich: Beck, 1996.

FREUD, Sigmund. Der Moses des Michelangelo. *Imago: Zeitschrift für Anwendung der Psychoanalyse auf die Geisteswissenschaften*, v. 3, pp. 15-36, 1914. Available at: https://www.gutenberg.org/files/30762/30762-h/30762-h.htm. Access on: 22 jul. 2023.

FURTH, Peter. Ideologie und Propaganda der SRP. *In*: STAMMER, Otto (ed.). *Rechtsradikalismus im Nachkriegsdeutschland. Studien über die „Sozialistische Reichspartei" (SRP)*. Wiesbaden: Springer, 1967.

GEIGER, Willi. Ergänzende Bemerkungen zum Bericht des Berichterstatters zur Stellung des Bundesverfassungsgericht. *Jahrbuch des öffentlichen Rechts der Gegenwart*, v. 6, pp. 137-142, 1957.

GEIGER, Willi. *Gesetz über das Bundesverfassungsgericht*: Kommentar. Berlin: Franz Vahlen, 1952.

GILCHER-HOLTEY, Ingrid. Integration der Rechts- und Verfassungsgeschichte in die Allgemeingeschichte? Die Perspektive der Historischen Soziologie. *Rechtsgeschichte*, v. 31, pp. 188-190, 2023.

GRIMM, Dieter. Constitutional History as an Integral Part of General History: The German Case. *Rechtsgeschichte*, v. 31, pp. 18-30, 2023.

GRIMM, Dieter. Das Bundesverfassungsgericht im Überblick. *In*: GRIMM, Dieter. *Verfassungsgerichtbarkeit*. Frankfurt a. M.: Suhrkamp, 2021.

GÜNTHER, Frieder. *Denken vom Staat her. Die bundesdeutsche Staatsrechtslehre zwischen 1949-1970*. Munich: Oldenbourg, 2004.

GUSY, Christoph (ed.). *Weimars lange Schatten – „Weimar" als Argument nach 1945*. Baden-Baden: Nomos, 2003.

GUSY, Christoph. Vergangenheitsrechtsprechung: Die Nachwirkungen Weimars in der Rechsprechung des Bundesverfassungsgericht. *In*: GUSY, Christoph (ed.). *Weimars lange Schatten – „Weimar" als Argument nach 1945*. Baden-Baden: Nomos, 2003.

HABERMAS, Jürgen. *Faktizität und Geltung*. Frankfurt a. M.: Suhrkamp, 1994.

HAVERKAMP, Anselm. The Future of Violence: Machiavelli and Macbeth. *In*: HAVERKAMP, Anselm. *Shakespearean Genealogies of Power*. New York: Routledge, 2010.

HEGEL, Georg Wilhelm Friedrich. *Phänomenologie des Geistes*. Leipzig: Dürr'schen Buchlandlung, 1907.

HENNIS, Wilhelm. Verfassung und Verfassungswirklichkeit. *In*: HENNIS, Wilhelm. *Die missverstandene Demokratie*. Freiburg: Herder, 1973.

HESSE, Konrad. *Die normative Kraft der Verfassung*. Tübingen: J. C. B. Mohr, 1959.

HEUSS, Theodor. Abschied von Hermann Höpker-Aschoff. *Bulletin des Presse- und Informationsdienstes der Bundesregierung*, v. 13, 1945.

HOFFMANN, Dierk. Das Bundesverfassungsgericht im politischen Kräftfeld der frühen Bundesrepublik: die Auseinandersetzung um die Westverträge 1952-1954. *Historisches Jahrbuch*, v. 120, pp. 227-273, 2000.

HOLL, Ute (ed.). *Radiophonic Cultures*. Heidelberg: Kehrer, 2018.

HÖPKER-ASCHOFF, Hermann. Schreiben des Präsidenten des Bundesverfassungsgerichts vom 13. Oktober 1952. *Jahrbuch des öffentlichen Rechts der Gegenwart*, v. 6, pp. 149-159, 1957.

HULL, Isabel. Persönliches Regimet. *In*: RÖHL, John (ed.). *Der Ort Kaiser Wilhelms II. in der deutschen Geschichte*. Munich: Oldenbourg, 1991.

HÜTER, m. *In*: GRIMM, Jacob; GRIMM, Wilhelm. *Deutsches Wörterbuch*. Digitalisierte Fassung im Wörterbuchnetz do Trier Center for Digital Humanities, Version 01/23. Available at: https://www.woerterbuchnetz.de/DWB?lemid=H13837. Access on: 22 jul. 2023.

INSTITUTS FÜR STAATSLEHRE UND POLITIK E. V. IN MAINZ (ed.). *Der Kampf um den Wehrbeitrag*. v. 1. Munich: Isar, 1952.

JESTAEDT, Matthias et al. (eds.). *Das entgrenzte Gericht*: Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht. Frankfurt a. M.: Suhrkamp, 2019.

JESTAEDT, Matthias. Verfassungsgerichtspositivismus: Die Ohnmacht der Verfassungsgesetzgebers im verfassungsgerichtlichen Jurisdiktionsstaat. *In*: DEPENHEUR, Otto et al. (eds.). *Nomos und Ethos. Hommage anlässlich des 65. Geburtstages von Josef Isensee*. Berlin: Duncker & Humblot, 2002.

KANT, Immanuel. Mutmaßlicher Anfang der Menschengeschichte. *In*: VORLÄNDER, Karl (ed.). *Kleine Schriften zur Geschichtsphilosophie, Ethik und Politik*. Leipzig: Felix Meiner, 1913.

KAU, Marcel. *United States Supreme Court und Bundesverfassungsgericht*: Die Bedeutung des United States Supreme Court für die Errichtung und Fortentwicklung des Bundesverfassungsgericht. Berlin: Springer, 2007. p. 73.

KELSEN, Hans. *Wer soll der Hüter der Verfassung sein?*. Ed. By Robert Chr. Van Ooyen Tübingen: Mohr Siebeck, 2019.

KIRCHOF, Paul. Die Identität der Verfassung in ihren unabänderlichen Inhalten. *In*: ISENSEE, Josef; KIRCHOF, Paul (eds.). *Handbuch des Staatsrechts*. Heidelberg: C. H. Müller, 1987.

KITLER, Friedrich. *Gramophone, Film, Typewriter*. Trans. Geoffrey Winthrop-Young e Michael Wutz. Stanford: Stanford University Press, 1999.

KNAPPENBERGER-JANS, Silke. *Verlagspolitik und Wissenschaft:* Der Verlag J. C. B. Mohr (Paul Siebeck) im frühen 20. Jahrhundert. Wiesbaden: Harrassowtiz, 2001.

KOHLRAUSCH, Martin. *Der Monarch im Skandal*. Berlin: Akademie, 2005.

KORIOTH, Stephan. Evangelisch-theologische Staatsethik und juristisch Staatslehre in der Weimarer Republik und der frühen Bundesrepublik. *In*: CANCIK, Pascale et al. (eds.). *Konfession im Recht: Auf der Suche nach konfessionell geprägten Denkmustern und Argumentationsstrategien in Recht und Rechtswissenschaft des 19. und 20. Jahrhunderts*. Frankfurt am Main: Vittorio Klostermann, 2009.

KRAJEWSKI, Markus. *Der Diener*: Mediengeschichte einer Figur zwischen König und Klient. Frankfurt am Main: Fischer, 2010. 45f.

LABAND, Paul. *Das Staatsrecht des Deutschen Reiches*. v. 2. Tübingen: Lauppschen Buchhandlung, 1878. 46f.

LADEUR, Karl-Heinz. Mythos als Verfassung – Verfassung als Mythos. *In*: DEPENHEUR, Otto (ed.). *Mythos als Schicksal*: Was konstitutiert die Verfassung. Wiesbaden: VS Verlag, 2009.

LANGE, Felix. Der Dehler-Faktor. *Der Staat*, v. 56, pp. 77-105, 2017.

LAUFER, Heinz. *Verfassungsgerichtsbarkeit und politischer Prozeß*. Tübingen: J. C. B. Mohr, 1968.

LEGRAND, Pierre. *Negative Comparative Law*: A Strong Programme for Weak Thought. Cambridge: Cambridge University Press, 2022.

LEIBHOLZ, Gerhard. Bericht des Berichterstatters des Bundesverfassungsgerichts vom 21. März 1952. *Jahrbuch des öffentlichen Rechts der Gegenwart*, v. 6, 1957.

LEIBHOLZ, Gerhard. *Das Vermächtnis des 20*. Juli 1944. Vortag am 20. Juli 1969 im Rathaus in Karlsruhe. Available at: https://stiftung-20-juli-1944.de/reden/das-vermachtnis-des-20-juli-1944-prof-dr-dr-gerhard-leibholz-20071969. Access on: 22 jul. 2023.

LEIBHOLZ, Gerhard. *Leibholz im Gespräch: Recht, Philosophie, Politik*. Radiosendung, NDR, played on 17 mar. 1982, 20h-21h30. NDR-Schalarchiv, Archiv-nummer 6908342 000 in Will, Ephorale Verfassung, pp. 367-368.

LEIBHOLZ, Gerhard. Verfassungsrecht und Verfassungswirklichkeit. *In*: LEIBHOLZ, Gerhard. *Die Repräsentation in der Demokratie*. Berlin/New York: Walter de Gruyter, 1973.

LEININGER, Julia (ed.). *Religiöse Akteure in Demokratisierungsprozessen*. Wiesbaden: Springer, 2013.

LEMBCKE, Olivier. *Hüter der Verfassung*. Tübingen: Mohr Siebeck, 2007. 105.

LINDAHL, Hans. *Authority and the Globalization of Inclusion and Exclusion*. Cambridge: Cambridge University Press, 2018.

LOUGHLIN, Martin. *Against Constitutionalism*. Cambridge: Harvard University Press, 2022.

LUHMANN, Niklas. *Die Gesellschaft der Gesellschaft*. Frankfurt a. M.: Suhrkamp, 1997.

LUHMANN, Niklas. Verfassung als evolutionäre Errugenschaft. *Rechtshistorisches Journal*, v. 9, pp. 176-220, 1991.

LUTHER, Martin. Von der Freiheit eines Christenmenschen. *In*: JUNG, Martin H. (ed.). *Luther lesen*. Göttingen: Vandenhoeck & Ruprecht, 2017.

LUTHER, Martin. Vorrede zu der Epistel von St. Paulus an die Römer. Available at: http://www.reformatorischeschriften.de/Vorrede/roemer.html. Access on: 22 jul. 2023.

MAYER, Otto. *Die juristische Person und ihre Verwertbarkeit im öffentlichen Recht*. Tübingen: Mohr, 1908. (Festgabe Paul Laband, v. 1)

N.N. Eröffnung des Bundesverfassungsgerichts. *Neue Juristische Wochenschrift*, 1951.

NACHLASS W. STRAUSS. Anlage 1 zum Protokoll 9. Sitz. (09.01.1950) Ausschuss für Rechtswesen und Verfassungsrecht, IfZ ED 94, Bd. 155, Bl. 2. *apud* WILL, Ephorale Verfassung. p. 151, note 120.

NAUMANN, Friedrich. Versuch volkverständlicher Grundrechte. *In*: NAUMANN, Friedrich. *Werke*. v. 2. Opladen: Westdeutscher Verlag, 1964. 573f.

NL DEHLER, Dehler an Adenauer v. 09.04.1954, ADL, n1-2902 (copy) *apud* WILL, Ephorale Verfassung. Tübingen: Mohr Siebeck, 2017.

NOELLE, Elisabeth; PETER, Erich (eds). *Jahrbuch der Öffentlichen Meinung 1947–1955*. Allensbach: Verlag für Demoskopie, 1956.

PARR, Rolf. "Zwei Seelen wohnen, ach! in meiner Brust": Strukturen und Funktionen der Mythisierung Bismarcks (1860-1918). Munich: Wilhelm Fink, 1992.

PETZOLD, Joachim. *Die Dolchstoßlegende*: Eine Geschichtsfälschung im Dienst des deutschen Imperialismus und Militarismus. Berlin: Akademia, 1963.

RADIER, Karola. The Leibholz-Schmitt connection's formative influence on Bonhoeffer's 1932-1933 entry into public theology. *Stellenbosch Theological Journal*, v. 4, n. 2, 2018.

RITTER, Gerhard. *Staatskunst und Kriegshandwerk*: Das Problem des "Militarismus" in Deutschland. 4. ed. Munich: Oldenbourg, 1970. v. 1.

SCHMIDT, Kurt Dietrich. *Die Bekenntnisse und grundsätzlichen Äußerungen zur Kirchenfrage*: v. 2: Das Jahr 1934. Göttingen: Vandenhoeck & Ruprecht, 1935.

SCHMITT, Carl. *Der Hüter der Verfassung*. Tübingen: J.C.B. Mohr, 1931. 33.

SCHMITT, Carl. *Politische Theologie*: Vier Kapitel zur Lehre von der Souveränität. 11. ed. Berlin: Duncker und Humblot, 2021.

SCHMITT, Carl. *Verfassungslehre*. Berlin: Duncker & Humblot, 2017.

SCHOLDER, Klaus. Die evangelische Kirche in der Sicht der nationalsozialistichen Führung bis zum Kriegsausbruch. *Vierteljahrshefte für Zeitgeschichte*, v. 16, n. 1, 1968.

SCHÖNBERGER, Christoph. Anmerkungen zu Karlsruhe. *In*: JESTAEDT, Matthias *et al*. *Das entgrenzte Gericht*. Frankfurt am Main: Suhrkamp, 2011.

SCHÖNBERGER, Christoph. *Das Parlament im Anstaltsstaat*. Frankfurt am Main: Vittorio Klostermann, 1997.

SIEG, Ulrich. Wilhelm II. – ein "leutseliger Charismatiker". *In*: MÖLLER, Frank (ed.). *Charismatische Führer der deutschen Nation*. München: Oldenbourg, 2004.

SMEND, Rudolf. Das Bundesverfassungsgericht (1962). *In*: SMEND, Rudolf. *Staatsrechtliche Abhandlungen*. Berlin: Duncker und Humblot, 2010. pp. 583-584.

SOHM, Rudolf. *Kirchenrecht*: Die geschichtlichen Grundlagen. v. 1. Berlin: Duncker und Humblot, 1923.

SOMEK, Alexander. Liberalism and the Reason of Law. *Modern Law Review*, v. 84, n. 2, pp. 394-409, 2021.

SPINDOLA DINIZ, Ricardo. Introdução. *In*: LINDAHL, Hans. *Autoridade e a globalização da inclusão e exclusão*. Trad. Ricardo Spindola Diniz. São Paulo: Contracorrente, 2023.

SPINDOLA DINIZ, Ricardo. Rational necessities: on the silence of liberal democratic theory in front of the unreasonable other. *Ethics & Politics*, v. XXIII, n. 2, pp. 467-480, 2021.

SPRINGHART, Heike. *Aufbrüche zu neuen Ufern*: Der Beitrag von Religion und Kirche für Demokratisierung und Reeducation im Westen Deutschlands nach 1945. Zürich: Evangelische Verlagsanstalt, 2008.

STÄHELI, Urs. *Spectacular Speculations*: Thrills, the Economy, and Popular Discourse. Trad. Eric Savoth. Stanford: Stanford University Press, 2013.

STEINHAUER, Fabian. *Bildregeln*. Munich: Wilhelm Fink, 2009.

STEINHAUER, Fabian. Das rhetorische Ensemble. *Rechtsgeschichte*, v. 9, pp. 125-137, 2006.

STEINHAUER, Fabian. Die Rückkehr des Bilderstreites ins Recht. *In*: LERCH, Kent (ed.). *Recht vermitteln*: Strukturen, Formen und Medien der Kommunikation im Recht. Berlin: De Gruyter, 2005.

STEINHAUER, Fabian. Non plus ultra. Zu Formen der Kulturwissenschaft im Recht. *Der Staat*, v. 47, n. 1, p. 63-84, 2008.

STOLLEIS, Michael. *Geschichte des öffentlichen Rechts in Deutschland*. v. IV. Munique: C. H. Beck, 2014.

STORY, Joseph. *Commentaries on the Constitution of the United States*. v. I. Boston: Charles C. Little, 1851.

STRAUSS, Walter. *Die Oberste Bundesgerichtsbarkeit*. Heidelberg: Lambert Schneider, 1949.

TAYLOR, Charles. *A secular age*. Cambridge: Harvard University Press, 2007.

THOMA, Richard. Rechtsgutachten betr. Die Stellung des Bundesverfassungsgerichts. *Jahrbuch des öffentlichen Rechts der Gegenwart*, v. 6, pp. 161-193, 1957.

TRENKNER, S. Aristotle, Rhetoric III, 12, 4. *Proceedings of the Cambridge Philological Society*, v. 182, n. 2, pp. 3-6, 1952-1953.

TRIEPEL, Heinrich. Wesen und Entwicklung der Staatsgerichtsbarkeit. *In*: BOGDANDY, Armin von; MEHRING, Reinhard. *Heinrich Triepel*: Parteinstaat und Staatsgerichtshof. Baden-Baden: Nomos, 2021. p. 221-250.

UTZ, Friedemann. *Preuße, Protestant, Pragmatiker*: Der Staatssekretär Walter Strauß und sein Staat. Tübingen: Mohr Siebeck, 2003.

VALÉRY, Paul. *Œuvres II*: Cahier B 1910. Paris: Gallimard, [data]. p. 587.

VAN DER WALT, Johan. *The Concept of Liberal Democratic Law*. New York: Routledge, 2019.

VAN MIERT, Dirk. *The Emancipation of Biblical Philology in the Dutch Republic, 1590-1670*. Oxford: Oxford University Press, 2018.

VISMANN, Cornelia. *Akten*. Frankfurt a. M.: Fischer, 2011.

VISMANN, Cornelia. *Medien der Rechtsprechung*. Frankfurt a. M.: Fischer, 2011.

VON BISMARCK, Otto. Rede vor dem Preußischen Landtag, 22. April 1863. *apud* KAU, Bedeutung, p. 130, note 424.

VON GNEIST, Rudolf. *Soll der Richter auch über die Frage zu befinden haben, ob ein Gesetz verfassungsmäßig zu Stande gekommen?* Berlin: Julius Springer, 1863.

VON MANGOLDT, Hermann. *Das Bonner Grundgesetz*. Berlin/Frankfurt: Verlag Franz Vahlen, 1953.

VORLÄNDER, Hans (ed.). *Integration durch Verfassung*. Wiesbaden: Westdeutscher Verlag, 2002.

WEBER-STEINHAUS, Friedrich. Conceptuality, Myth, Metaphor: Reading Plato's *Phaedrus* with Blumenberg. In: MAYFIELD, D. S.. *Blumenberg's Rhetoric*. Berlin: De Gruyter, 2023.

WENGST, Udo. *Staatsaufbau und Regierungspraxis 1948-1953*. Düsseldorf: Droste, 1984.

WESEL, Uwe. *Der Gang nach Karlsruhe*. Munich: Karl Blessing Verlag, 2004.

WIEGANDT, Manfred. *Norm und Wirklichkeit. Gerhard Leibholz (1901-1982)*: Leben, Werk und Richteramt. Baden-Baden: Nomos, 1995.

WILL, Martin. *Ephorale Verfassung*. Tübingen: Mohr Siebeck, 2017.

ZIMMERMAN, Erich; JACOBSEN, Hans-Adolf (eds.). *20. Juli 1944*. 4. ed. Bonn: Berto, 1961.

ABOUT THE AUTOR

Ricardo Martins Spindola Diniz
Since October 2024, Ricardo Diniz has been an Assistant Professor of Philosophy of Law and Civil Procedure at the Federal University of Tocantins - Brazil. He was a researcher at the Max Planck Institute for Legal Theory in Frankfurt am Main, Germany (April 2024 - September 2024). Previously, he was a visiting researcher at the Faculty of Sociology at the University of Hamburg (March 2022 – August 2023) and at the Max Planck Institute for Legal History and Legal Theory (October 2023 – March 2024). *E-mail*: ricardo.ms.diniz@gmail.com.