Attitude versus Doctrine

– A Jurimetric Analysis of the German Federal Constitutional Court

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I. Introduction – Judicial Decision-Making and Discretionary Power

How do judges make decisions? While this question might seem straightforward, even a cursory reading of the current literature indicates that the process of judicial decision-making is far from easy to explain. Among legal scholars and judges alike, the short (and in most cases only "legitimate") answer is: judges apply the law. However, this assertion implies that the law can provide an answer to all the legal problems that judges face in the exercise of their adjudicative function. This can hardly be the case, as the creation of an unambiguous and complete legal code is a Herculean task of sheer impossibility. And even if there was a complete legal code – what would be its authoritative reading? Should it be read in the context of its time, or seen in contemporary terms? Either way, a certain scope for legal discretion is inescapable, leaving judges a substantial amount of leeway in their judicial decision-making.

Judicial discretion is far more often discussed in common law jurisdictions, where the concept of precedent increases the importance of each individual decision as a benchmark for the future, than in code law jurisdictions like that of Germany. Whatever the legal system, however, any political influence on the judicial process raises questions regarding its legitimacy. Thus, given the necessary aspect of discretion in judicial decision-making, analysing and understanding the process of adjudication is just as relevant to code law countries. This paper will present such an analysis of the German Federal Constitutional Court.

Beyond and above the quasi-sacred reverence Germans exhibit for their Constitutional Court, there is a host of factors that present the Federal Constitutional Court as an ideal subject of investigation. Constitutional law is far less detailed in its nature than other fields of law in code law jurisdictions[1]. Accordingly, it exhibits the greatest scope for discretionary judicial decision-making. Thus, if the judicial decision-making process is in any way correlated with judges' political attitudes, this should find its most visible expression in the area of constitutional adjudication.

Various vivid debates surrounding the issue circulate within the legal community. Kommers suggests that in an ideal world, 'the judge is a cog in the wheel of judicial administration, unmoved by feeling or even conscience.'[2] Säcker, however, admits that Germany 'is under a Constitution; but the Constitution has the content that the Constitutional Court judges authoritatively establish'[3] (*my translation*). He further states that the 'apodictic brevity of the constitutional text, which may be desirable for various reasons, means for the constitutional court judges that they rather form the law than that they find it given'[4] (*my translation*).

So far, there is no rigorous empirical testing of the hypothesis that judicial decision-making in Germany is influenced by individual judges' attitudes. Indeed, it seems that the Court itself expresses an interest in the study of this question. The current Vice President of the Court, Winfried Hassemer, recently noted in a renowned German legal journal that 'judicial decision-making is a complex, theoretically by far not explained process'[5]; Hassemer then

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[1] Assessment of a Constitutional Court judge given during a confidential interview.
[2] Donald P. Kommers, *Judicial Politics in West Germany: A Study of the Federal Constitutional Court*, (Beverly Hills; London: Sage Publications, c1976), p. 44
[3] Horst Säcker, *Das Bundesverfassungsericht*, 4th edn. (Bonn: Bundeszentrale für politische Bildung, 1989), p. 43
[4] Säcker, *Das Bundesverfassungsgericht*, p. 29
[5] Winfried Hassemer, 'Gesetzesbindung und Methodenlehre', *Zeitschrift fuer Rechtspolitik*, vol.40, no. 7, 2007, p. 214

goes on to express his hope that the question will find a place 'back in the field of research'[6] (*my translation*).

An additional factor which makes the German Federal Constitutional Court suitable for this kind of analysis is that it administers constitutional complaints.[7] Due to their specific design, constitutional complaints offer the greatest scope for discretionary decision-making within the sub-field of constitutional adjudication. In particular the Chamber of Three *(Kammergericht)*, a committee of three judges which decides upon the acceptance or rejection of most constitutional complaints, is characterized by rather permissive standing rules and reliance upon individual opinions. Interviews with Constitutional Court judges and their law clerks strongly suggest that the Federal Constitutional Court has adopted the habit of relying on its own precedent as far as Chamber of Three decisions are concerned. This is rather unique, at least in German legal culture, although it closely correlates to practice in common law jurisdictions.

II. The Federal Constitutional Court – Jurisdiction and Structure

The Federal Constitutional Court commands both 'concrete' and 'abstract' review. While the former allows lower courts to approach the Court with ordinary cases based on a federal or state law violating the Basic Law, the latter entitles the Court to rule on constitutional issues in the absence of a case of controversy.[8]

Constitutional complaints occupy a central position in the German constitutional system, as they alone allow individual citizens to approach the Constitutional Court directly if one of their constitutionally guaranteed rights has been violated. In its original design, the German constitutional complaint procedure was universal in nature, allowing individuals to file a complaint without the need to seek legal counsel[9], and thereby assuring that access to justice is guaranteed irrespective of social background or income. Above all, it provides citizens with a tool to make their rights heard without having to rely on either the judiciary, the legislature or the executive to take the initiative on their behalf. Indeed, on many occasions, direct access cases have led to important human rights decisions.[10]

In this spirit, the German Federal Constitutional Court defines the constitutional complaint as a 'specific legal remedy for the citizen against the state', aiming 'not only for the protection of the actual fundamental rights safeguarding (…) the individual's sphere of freedom, but also for the implementation of political rights (…)'[11] (*my translation).*

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[6] Hassemer, 'Gesetzesbindung und Methodenlehre', p. 219

[7] Direct access in the form of constitutional complaints has only been adopted in a handful of other countries, such as in Switzerland and Austria, whose complaint procedure systems served as model for the subsequent adoption of the German system of constitutional complaints. The *amparo* system operating in Latin America and Spain is based on a similar conception. Hungary offers a further point of illustration. In addition to ordinary constitutional complaints, it also provides the provision of the *actio popularis*. This is essentially similar to German constitutional complaints.

[8] Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany,* 2nd edn., (Durham, N.C.: Duke University Press, 1997), p. 13

[9] However, this is only theoretically true, as the jurisprudential criteria for standing, such as the requirement to have exhausted all other legal means, in fact render it very difficult to file a complaint successfully without professional legal advice.

[10] For instance, the abolition of the death penalty in both Hungary and South Africa, or lifetime imprisonment in Germany.

[11] Rüdiger Zuck, *Das Recht der Verfassungsbeschwerde*, 3rd edn. (Munich: C.H. Beck, 2006), p. 5

While the First Senate is in charge of 'law cases', dealing with concrete and abstract norm control, as well as constitutional complaints, the Second Senate's nature is more politically charged, grouping under its jurisdiction '*Organstreitfälle*' (cases of conflict between governmental organs and levels).[1]

II. 1 – Case division between First and Second Senate at the Federal Constitutional Court[2]

First Senate

Originally:

- Forfeiture of Basic Rights
- Constitutionality of Political Parties
- Election Complaints
- Abstract and Concrete Norm Control Proceedings
- Questions Concerning the Continuing Validity of Federal Law
- Constitutional Complaints of Persons

⇨ **Court of Judicial Review**

Post-Reform:

- Abstract and Concrete Norm Control Proceedings
- Constitutional Complaints concerning Art. 1-17, 19, 101 and 103,1 Basic Law (as regards Art. 101,1 and 103,1 it is in charge of complainants with surnames A-K)

⇨ **Court of Judicial Review of Legislation and of Substantial Rights of Persons**
⇨ ***Basic Right Senate (Grundrechtssenat)***

Second Senate

Originally:

- Constitutional Disputes between High Federal Organs
- Constitutional Controversies between the Federation and the States (*Länder*)
- Constitutional Disputes within the States (*Länder*)
- Complaints by Certain Governmental Agencies Against the Federal President and Federal Judges for Violation of Basic Law
- Disputes over whether a Rule of International Law is an Integral Part of Federal Law

⇨ **Court of Intra- and Inter-Governmental Conflicts**

Post-Reform:

- Political Parties
- Election Disputes
- Constitutional Complaints concerning Art. 19,4, Art. 33, Art. 38, Art. 101, Art. 103, Art. 104 (as regards Art. 101, 1 and 103,1, it is in charge of complainants with surnames L-Z)
- Abstract and concrete norm control proceedings as well as constitutional complaints concerning asylum law, public service, military service, criminal law (except for Art.5 and 8), and civil penalties

⇨ **Court of Judicial Review of Intra- and Inter-Governmental Conflict and of Procedural Rights of Persons**
⇨ **State Rights Senate (*Staatsrechtssenat)***

[1] Kommers, *Judicial Politics in West Germany*, p. 86
[2] Kommers, *Judicial Politics in West Germany*, p. 100

As Figure II.1 indicates, the Court's present set up results in the following case distribution: 'the First Senate (…) deals mainly with judicial review of legislation and with the substantive rights of persons, whereas the Second Senate is concerned primarily with the procedural rights of persons along with constitutional disputes between governmental agencies'.[3]

Chambers of Three *(Kammergerichte)*

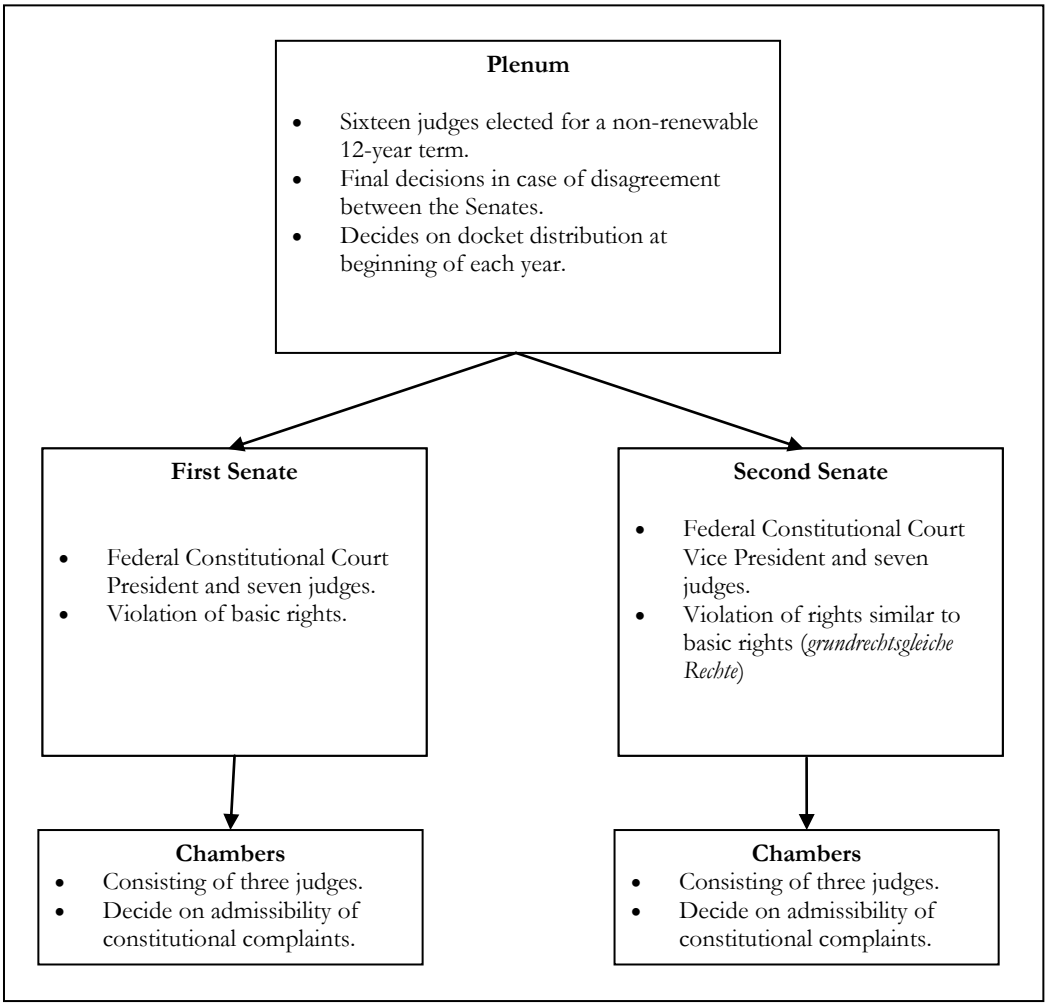
In order to cope with the increasing numbers of complaints that the Court every year, a total of six Chambers of Three (*Kammergerichte*) with three judges each was introduced through paragraph 15a Regulating Law of the FCC.[4] Since 1986, these chambers have been authorized to rule on the admission of constitutional complaints, and can thereby weed out unfounded or inadmissible complaints before these reach the full Senate. Additionally, the chambers are entitled to autonomously decide on constitutional complaints if these are evidently justified (*offensichtlich begründet*); in this case, the full Senate has already ruled on the underlying relevant constitutional questions.[5] Unlike majority decisions of the full Senate, where justices have the possibility to publish dissenting opinions, Chamber of Three rulings require unanimity. The resemblance to the common law concept of precedent is apparent, and unique within the German legal environment. Figure II.2 indicates the division of the Federal Constitutional Court into Senates and Chambers of Three.

[3] Kommers, *Judicial Politics in West Germany*, p. 101

[4] However, the Chamber of Three structure became itself subject to a constitutional complaint.[4] The complainant saw the introduction of the Chamber of Three as violating his right to adjudication by one's lawfully designated judge.[4] While the Federal Constitutional Court admitted the case, the judges made it clear in their reasoning that considerations of docket load had priority, and the complainant's claim was rejected.[4]

[5] Paragraph 93b, Abs. 2, Law Regulating the Federal Constitutional Court; note also that this is limited to the overturning of lower court decisions and executive acts. See Säcker, *Das Bundesverfassungsgericht*, p. 49

II. 2 Graphical Illustration of Federal Constitutional Court Composition for Constitutional Complaints



III. Qualitative Analysis – Interview Data

Some multi-faceted processes can simply not be captured adequately in the rigor imposed by statistical analysis, in particular so due to the Court's main *modus operandi* behind closed doors. The interview data presented here allows for a 'thicker' analysis of these processes, and furthermore guides the following statistical analysis. I interviewed five Constitutional Court judges from both Senates in February and March 2008.[6] Additionally, the data comprises interviews with a total of eleven law clerks, again working for judges from both Senates. Three judges were sitting on the same Committee of Three at the time of the interviews. Comparisons between individual perceptions of judicial decision-making and bargaining within their Chamber, in addition to law clerk statements about the interaction patterns in the remaining Chambers, allow for tentative conclusions about how judges reach decisions in this small group environment.

[6] Due to considerations of confidentiality, judges will neither be named, nor in any way personally identified or attributed with specific opinions. Any inaccuracy or involuntary misrepresentation is the author's responsibility.

Decision-Making in Chambers of Three

The great majority of decisions rendered by the Federal Constitutional Court are the outcome of a so-called *'Beschluss'* (simple decision), the result of a decision reached within a Chamber of Three (*Kammergericht*). These chambers are divided according to area of specialization, and are only authorised to rule on legal questions already settled in principle through a full Senate judgement. Internal discussions and negotiations within the Chambers are not reported.

The particular institutional set-up of Chambers of Three lead to the following set of hypotheses regarding judicial decision-making and the interaction between judges.

Hypothesis 1: *Political ideology does play a role in the process of judicial decision-making within Chambers of Three.*

Hypothesis 1a: *Given that Chamber of Three decisions account for the vast majority of decided complaints, informal institutional mechanisms must be in place to facilitate decision-making among the judges in case of disagreement.*

Hypothesis 1 is the central question of this thesis. Although it is implied by Hypothesis 1a, it will be discussed as final point, in the light of the information on the Chambers' specific institutional mechanisms.

Early on in the interview, all justices stated that the process of reaching a unanimous decision in a Chamber of Three hardly ever creates any difficulty. Once specifically asked how decisions are reached, this initial consensus did not hold up, and judges reported that disagreement was indeed a natural stage in the decision-making process.

As regards Hypothesis 1a, all judges confirmed the theoretical suggestion that a set of informal institutional constraints was in operation. Judges emphasized the high frequency of interaction, which allowed members to anticipate each other's reactions and points of view. This parallels game theory, which suggests that any form of repeated bargaining should facilitate decision-making in small groups.[7]

While the rate of interaction between judges is much higher than in the case of Senate decisions, different forms of communication are in use. Some Chambers seem to prefer more direct and personal consultation through informal Chamber meetings. At the other end of the spectrum, some Chambers only communicated through written correspondence. It seems plausible that in the case of the written interaction, political ideology – if indeed a factor of decision-making – is less visible as it is covered by the formal and official style of a memorandum. One judge confirmed that the written nature of the discussion[8] creates an incentive to keep one's own arguments as concise, clear and uncontroversial as possible in order to deal with cases in a timely manner.

Individual interaction within an informal meeting context provides a greater scope for ideological considerations to surface. The interviews confirm this theoretical finding. Members of Chambers which communicated only through writing suggested a far smaller role for individual ideology than judges who belonged to Chambers that held regular

[7] Hal R. Varian, *Microeconomic Analysis*, 3rd edn., (New York: Norton, 1992), pp. 269f.
[8] I.e. the presiding judges case preparation as well as objections and addenda set out in writing.

informal meetings. Of course, ideological preferences can be the driving force of even the most formalistic written legal argument.

Looking closer at the Court's actual schedule, the interaction between committee members might be very intense when the Court is in session. The strength of the frequency argument thus depends on how closely judges choose to collaborate with their colleagues during the rest of the year. This certainly depends on personal just as much as on professional compatibility. As the reporting judge's law clerks research and compose the majority of written exchange and preparatory work on a case, they play a crucial role at this stage. Clerks can in this sense act not only as filter of information, but also facilitate (or indeed hinder) the exchange of ideas between judges. While law clerks were hesitant to give any firm statements on the matter, they implied that at times, they were acting as 'buffers' between judges of vastly different judicial values.

Compared to the full Senate, judges who sit on the same Chamber of Three should at the very least develop a greater familiarity with their colleagues. When directly confronted with the possibility of using their prior knowledge about a colleague in order to reach their preferred outcome, judges initially reported that they were not engaging in any such form of strategic interaction. Shortly into the interview, most judges however admitted to anticipating each other's reactions, especially when acting as a reporting judge. Indeed, they stated that their colleagues' reaction was an important factor in shaping their formulation and legal justification when they were writing the first assessment of a case.
Of course, being familiar with each other's preferences does not amount to unanimous results. A second recurring factor, again mentioned by all judges interviewed, referred to the very nature of incoming cases. In their own estimation, less than 20% of cases reaching the Chamber discussion stage are the object of any form of disagreement and less than 5% of these cases require a referral to the full Senate. This means that in only 1% of all cases, no final agreement can be reached in the Chamber.

Two institutional mechanisms can account for this (at least perceived) low rate of disagreement. Firstly, the body of constitutional principles that has emerged over the Court's history now covers the vast majority of issues reaching the court. As such, little disagreement can arise because of a strong sense of adherence to precedent, which, as a law clerk pointed out, is – according to his personal experience as judge at a lower court – unique within German legal culture.

Another limiting feature singled out as fostering unanimity is institutionally enforced discipline. Chambers of Three were introduced as a coping mechanism that would allow the court to handle the ever-increasing number of cases filed each year, in particular in form of constitutional complaints. The Chambers are a means for the court to avoid looming docket overload. As such, the option of referring cases to the full Senate is subject to a two-stage process. The first stage is the reception by the respective reporting judge, and his decision to classify a case as a Chamber decision or as the responsibility of the full Senate. Since the threshold is not as clear-cut as one might assume, judges suggested that the criteria used are rather malleable. One underlying consideration is to avoid the threat of docket overload in the full Senate, and the attempt to settle as many cases as possible with the tools of already existing principles.

On the other hand, it also opens up the possibility that a judge's personal preference could guide his or her decision, depending on whether or not they anticipate a more favorable result for their individual opinion in the Chamber or in the full Senate. The referral criteria

can thus be used more or less restrictively according to whether a judge's ideological preferences lead him to be in favor of accepting or rejecting a constitutional complaint.

Thinking strategically, as most judges seem to do, the next consideration is whether the complaint at hand has greater chances of being accepted in either the Chamber of Three of the full Senate. Due to the high degree of discretion left to the judges, they can interpret the criteria accordingly, increasing the chances that complaints whose acceptance they favor are referred to the decision-making body exhibiting the highest probability of success.

In addition to the classification stage, a second institutional disciplining factor sets in once a case is discussed within a Chamber. All members are aware of the time constraints, and it is thus in their – not to mention the Court's – best interest to settle as many cases as possible outside of the Senate. Interview data suggests that internal bargaining occurs within individual Chambers, leading to an increased willingness to compromise. While being very cautious in their wording, about two-thirds of the judges interviewed stated that for the sake of time constraints, they were at times more willing to find a compromise. This is especially the case when they find themselves in the minority (i.e. if both their colleagues share an opinion), or if one of their colleagues has a very strong opinion on how a case should be decided, while they themselves do not. At the same time, they expected their colleagues to reciprocate this behavior. Again, the repeated nature of the interaction is conducive to such a 'spirit of compromise', as each judge can expect to be returned the 'favor' of settling for a compromise in an upcoming case of his own. All judges emphasized that any form of compromise is only possible within the set of solutions deemed legally satisfactory by all members within the Chamber.

However, a host of problems arises from these informal institutional mechanisms. The stretching of legal principles set out by full Senate decisions is but one of them. Due to the lack of hard rules and the informational asymmetry inbuilt in the institutional set-up, justices are granted a great discretionary scope. While the mere opportunity for highly discretionary freedom does not signify that such discretion is indeed exercised, there is no way of scrutiny in case it does occur. Judicial self-restraint, or as one judge coined it, the court's 'judicial ethos' and 'spirit of the Court', seems to be a potent check on the judicial decision-making process, but it is by far not perfect.

In the light of the above information, Hypothesis 1 seems to find support. The scope for potentially discretionary decision-making on the grounds of political ideology indeed seems to be considerable. However, none of the judges interviewed was willing to confirm this directly. Disagreement on the grounds of political ideology was reported as 'vague possibility' that they could potentially imagine, but had not encountered themselves.

While this is valid for only a very small proportion of cases, it is exactly these cases of controversy in which an unbiased and legally sound judgment is of greatest concern: namely when no previous decision has been formed and the Constitutional Court judges are forced to create new 'precedent'. In the light of the Court's professed adherence to principles set out in previous judgments, any such decision is likely to shape future rulings for the time to come.

The interview data also corroborates Singer's[9] findings that the coping mechanisms the Court has adopted to deal with the high number of incoming complaints actually creates,

[9] Singer, 'The Constitutional Court of the German Federal Republic', pp. 331-356

even necessitates, a substantial part of this discretionary leeway. It provides an opportunity to clad rulings based on personal preference in the garments of institutional efficiency. As previously pointed out, however, the mere opportunity for politically charged rulings does not amount to a necessarily politically biased ruling.

Senate Judgments and Dissent

Cases which do not fall under any established constitutional principle addressed by previous judgments are referred to either of the Senates. The reporting judge to whom the case is initially assigned can either directly refer it to the Senate or attempt to reach a decision in the Chamber of Three. Judges stated that this process often resulted in the consultation among the Senate and individual Chambers in order to reach a legally satisfactory result that would not overburden the limited Senate docket.

Of course, opening the discussion to a group of eight justices changes the nature of the internal decision-making process, and its dynamics will differ from the Chamber of Three procedures. By the very criteria that led them to be subject to a full Senate judgment, these complaints are politically and legally more complex. Institutionally, the Senate differs markedly from the Chamber of Three interaction set-up. Firstly, decisions are reached by simple majority[10], and there is no need for unanimity. Justices also have the possibility to add a dissenting opinion to the majority judgment, which are published jointly. This institutional structure leads to the following set of hypothesis:

Hypothesis 2: *Political ideology does play a role in the process of judicial decision-making within the full Senate.*

Hypothesis 2a: *The possibility of dissent facilitates decision-making among the eight judges in the full Senate.*

Hypothesis 2b: *Given the low rate of dissent, there are informal institutional mechanisms that encourage unanimous rulings.*

Again, I shall address the central Hypothesis 2 after discussing the informal institutional mechanisms mentioned in Hypotheses 2a and b. Statistical information as to patterns of dissent and judicial ideology are analyzed in the following section to support and refine the conclusions drawn from the qualitative data.

Hypothesis 2a states that the opportunity to express either one's differing judicial reasoning, or indeed a completely different judgment, eases the strong requirement of unanimity governing Chamber of Three decisions. The majority of interviewed judges professed that reaching unanimous decisions among a group of eight – although desirable – is not always feasible. Allowing for the publication of dissenting opinions provides a sense of satisfaction for those in the minority: their alternative reasoning or conclusion is made public and open for discussion alongside the majority opinion.

Furthermore, the actual process of preparing a dissenting opinion also entails the submission of written memoranda to colleagues on the same Senate. Fellow Senate members are thus exposed to different arguments much more forcefully than through open debate, and they can see and evaluate the final decision. Thus, the judges stated, writing dissenting opinions at times enables them to change majorities by convincing their

[10] In the case of a 4 to 4 tie, the complaint will be considered as rejected.

colleagues through exposing them to their legal reasoning. Except for 'obviously absurd and outrageous mistakes'[11] both on a moral and legal level, one judge stated that the hope of swinging majorities through the preparation of a dissenting opinion is a motivational factor. According to the judge's individual estimation, close *votum* results can be changed through a dissent in nearly 40% of the cases. Other judges did not corroborate this estimation, and set the chances of success far lower. Nevertheless, they agreed with the general idea that being able to publish one's differing point of view has deliberative value.

Referring to Hypothesis 2b, judges were asked to describe the process which led them to publish their own, or endorse a colleague's, dissenting opinion. Their replies suggested that their decision was indeed influenced by informal institutional factors. While judges admitted that the opportunity of public dissent facilitates the decision-making process, it is met by severe criticism from within the Court. The majority of justices interviewed expressed concern about its effects on '*Rechtsfrieden'* (legal certainty). Many even professed an interest in the abolition of dissent at the Federal Constitutional Court, arguing that there are subtler ways of dissent, such as the publication of the exact *votum* (e.g. a decision reached by three to five, or two to six votes), which may also include references to individual judges, if they so wish.

Critics fear that the dissenting opinions are perceived as rivaling opinions that provide an incentive to challenge the court's judgment. More optimistic evaluators argue that dissenting opinions are a signal that due attention has been given to the losing party's position. This assessment is however not matched by the prevailing 'institutional' point of view, which implies that the publication of dissenting opinions only creates dissatisfaction and is an obstacle for effective adjudication. As such, the deliberative value of publishing a dissent is by far outweighed by the loss in legal certainty. The low rate of dissent can thus be explained by the perceived need to speak as a single institution in order to fulfill the responsibility with which the Federal Constitutional Court is endowed. This institutionally imposed responsibility is only sacrificed in very rare cases.
In the Senate as well as in the Chambers of Three, the nature of the complaint under consideration does play an important role. Judges from both Senates saw the Second Senate as more prepared to make use of dissents. They explained this divergence in the frequency of dissents by the more political character of complaints the Second Senate considers. This statement suggests that the degree of politicization should influence the rate of dissent. The more political the complaint, the greater is the professed scope for dissent.

In terms of matching this qualitative evidence with Hypothesis 2, it can be suggested that the Second Senate's higher dissent rate is evidence that political ideology does play a role. When directly confronted with the question of whether they thought that political ideology was a determining factor in Senate decision-making, not a single judge saw himself in the position to confirm this. They stated that for themselves, it was not an influencing factor, but they did not want to draw general conclusions about their colleagues, emphasizing that it might well be possible that it could play a factor for them. The judges also stated that the nature of decisions that the Federal Constitutional Court had to settle exhibit a normative core. Thus, their decisions inevitable contain an element of value allocation and public policy making, which rendered them 'political in a legal sense of the word'.

[11] Quoted from a confidential interview with a Federal Constitutional Court judge.

IV. Quantitative Analysis – Logistic Regression Models

In order to support and complement the qualitative findings, I employ logistic regression analysis to test different models and assess their predictive power. Following the neo-institutional approach advocated by Brace and Hall[12], these models will include a host of variables, grouped into the categories of judges' political ideology, specific characteristics of the case at hand, and institutional characteristics. Three models are set up on the basis of two different data sets – one including judgments by the full Senate (*Urteil*), the other decisions by the six Chambers of Three (*Beschluss*).[13] They are used to test the following hypotheses:

Hypothesis 1: *The ideological composition of the Chambers affects the likelihood of complaints being admitted or rejected.*

It suggests that depending on the composition of the respective Chamber, a case could be decided differently. In other words, a Chamber dominated by a majority of conservative judges should be more likely to reject a liberal claim (for instance regarding prisoners' rights) while the same complaint would have been accepted by a chamber with a two-to-one liberal majority.

Hypothesis 2a: *Individual judges' ideological views affect the likelihood of admission success of constitutional complaints considered by the full Senate.*

Hypothesis 2b: *Individual judges' ideological views affect the likelihood of dissent in Senate judgments.*

Hypothesis 2a applies the logic of chamber decisions to judgments of the full Senate. In this case, the hypothesis suggests that a conservative or liberal majority within the First or Second Senate should be an indicator of whether a constitutional complaint is accepted or rejected.

Directly related to this proposition, Hypothesis 2b takes up where the qualitative evidence falls short. While judges implied that the rate of dissent is influenced by political ideology, they only did so reluctantly and indirectly. Using a logistic regression, I investigate whether dissenting opinions are indeed subject to any pattern.

Coding of Variables

Any attempt to quantify a process as complex as human decision-making is necessarily an approximation. Being aware of the limitations intrinsic to statistical analysis, the best of

[12] Brace and Hall, 'Integrated Models of Judicial Dissent', pp. 914-935

[13] The data used for the following *logit* analysis is derived from the published constitutional complaints between January 2005 and December 2007. This time period has been chosen as it spans the common time in service of the judges interviewed in spring 2008. Published complaints are included in the data set due to their greater public importance, expressed by an individual press release. They comprise Chamber of Three decisions (163 observations) and full Senate judgments (54 observations).

efforts is made to provide objective coding choices. Results should be considered valuable in the light of the richer account provided by qualitative analysis.

The central variable within the analysis is political ideology. Deriving information and classifications on judges from their decisions can only go so far. First, it does not allow us to differentiate between the relative weights of individual sources of influence such as partisan ideology, legal socialization and social background. A vote to accept or reject a constitutional complaint does not indicate whether it was given out of strictly legal reasons or because of differences in the ideological outlook on the question at hand. As described in detail below, this article employs a measure of ideology independent of judges' behavior on the Court, and is thus immune to Shapiro's circularity criticism[14].

Nevertheless, the question is not simply whether ideology determines voting behavior (in which case the circularity would be true) but rather about whether, and to what extent, judges' political ideology influences their judicial ideology and ultimately their decision. It is important to emphasize that political and judicial ideology are distinct concepts; while they can be synonymous, this is by far not necessarily the case. Alternative methods of classifying judges' ideological positions, such as newspaper articles, party membership, appointment or expert opinions, are an indication of political ideologies only. While this does not make such an alternative classification redundant, a scale of political ideologies is thus only an imperfect substitute for judicial ideology.

A classification of judges according to their political ideology – grouped as conservative or liberal – is compiled using qualitative data derived from newspaper articles commenting on the judges' nomination and inauguration[15]. Articles are classified according to the key words of *conservative/liberal*, *left/right*.[16]

Derived from this political ideology index, the variable *libcon* presents a classification of judges' political positions. In the case of Chamber of Three decisions, interview data suggested that one can generalize by majority, in other words, a Chamber with a majority of conservative judges is classified as overall conservative. In the case of full Senate judgments, an ideological average has been computed. 'Liberal' judges are coded with a zero, while 'conservative' judges receive the value of 1. Thus, the closer to unity the overall value of *libcon* in Senate judgments, the more conservative is the Senate's composition, whereas the inverse is true for more liberal Senate compositions.

Cases are grouped into eight categories according to their relative subject (see Tables IV.1 and IV.2); the most common cases in Chamber of Three decisions are complaints filed by prisoners, with a relatively even distribution among the remaining categories. Full Senate judgments exhibit overall a greater focus on decisions aiming at the economy, as well as to a lesser extent benefits, and prisoners.

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[14] Shapiro raises the problem of circularity by suggesting that 'there is a certain kind of circularity in statistical approaches to the problem of judicial attitudes. Consistency in voting behavior is used to infer the attitude, and then the attitude is used to explain the consistency'[14].

[15] The time frame is six months before until one month after their official nomination (with the exception of Justice Hassemer, for whom no relevant articles exist unless one goes back 7 months). Only articles focusing on the candidates themselves are included.

[16] Minimizing potential bias and misrepresentation (as much as this is possible), four German language newspapers have been chosen according to their relative position on the ideological spectrum: *Tageszeitung* representing a left-wing, *Süddeutsche Zeitung* a centrist, *Frankfurter Rundschau* a liberal, and finally *Die Welt* a conservative, position. Individual ideology scores derived through this process are listed for each Senate in Appendix B.

VI. 1 Case Types and Relative Frequency for Chamber of Three Decisions

Subject of Complaint	Frequency	Percentage of Total
Press	1	0.6%
Economy	5	3.1%
Privacy	13	8.0%
Judicial Process	12	7.4%
Benefits	17	10.4%
Family	13	8.0%
Prisoner	50	30.7%
Residual	52	32.0%

IV. 2 Case Types and Relative Frequency for Senate Judgements

Subject of Complaint	Frequency	Percentage of Total
Press	3	5.6%
Economy	14	25.9%
Privacy	6	11.11%
Judicial Process	4	7.4%
Benefits	7	13.0%
Family	2	3.7%
Prisoner	7	13.0%
Residual	11	20.4%

While a certain degree of arbitrariness is intrinsic to any classification scheme, these eight categories distinguish between the most important recurring topics the Federal Constitutional Court is concerned with. Privacy is defined in a broad sense, also including complaints regarding electronic surveillance. 'Benefits' is an umbrella classification for pension and social security claims, which form a substantial part of the Court's docket.

From an institutional point of view, a host of variables is used to control for the specific set up determining the decision-making process. For instance, the variable *senate* indicates which Senate has been in charge of decisions. Chamber of Three decisions exhibit a relatively clear imbalance towards the Second Senate, which decided on over twice as many complaints than the First Senate, while full Senate decisions are more frequently given by the First Senate (63% compared to 37% ruled on by the Second Senate).

In terms of legal factors, the complaints have been organized according to the underlying rights issue (grouped into four groups according to their position in the Basic Law, as well as four mixed categories, see Tables IV.2 and IV.3).[17]

[17] Conducting chi-square tests regarding the relative significance of the individual categories suggest that prisoner, family and privacy cases are best grouped into one single variable, as they are equally more likely to be accepted than other cases. Benefit cases seem to be less likely to be accepted compared to other cases, and are thus kept in a separate category. The remaining categories do not differ from each other in their likelihood of acceptance, and serve as reference. The same procedures are followed for the rights dummy variables. All of the mixed categories generate roughly equal coefficients, and are hence combined into one

IV. 1 Type of Rights Violated in a Case (Chamber of Three)

Type of Rights Violated	Frequency	Percentage of Total
Basic Rights (Art. 1-19)	111	68.1%
Federal and Land Governments	3	1.8%
Legislator	0	0%
Jurisdiction	6	3.7%
Mix Basic Rights/Federal and Land Governments	14	8.6%
Mix Basic Rights/Jurisdiction	18	11.0%
Mix Federal and Land Governments/Jurisdiction	1	0.6%
Mix of all	10	6.1%

IV. 2 Type of Rights Violated in a Case (Full Senate)

Type of Rights Violated	Frequency	Percentage of Total
Basic Rights (Art. 1-19)	42	77.8%[18]
Federal and Land Governments	1	1.9%
Legislator	0	0%
Jurisdiction	1	1.9%
Mix Basic Rights/Federal and Land Governments	6	11.1%
Mix Basic Rights/Jurisdiction	1	1.9%
Mix Federal and Land Governments/Jurisdiction	1	1.9%
Mix of all	2	3.7%

Precedent is taken into account by including the binary variable *reference* indicating whether an explicit reference to a previous Federal Constitutional Court decision has been made, both in the case of Senate and Chamber of Three rulings. The potential influence of comments from the side of government institutions or non-legal experts is considered through the inclusion of the variable *comment*. This dummy variable indicates whether the Court referred to other recommendations in its own ruling.

For the full Senate models, the additional factor of dissenting opinions is taken into account. The variable *dissent* itself is coded as a binary variable, with zero representing unanimous decisions, while unity stands for decisions in which majority decisions have been reached (even if no formal dissenting opinion has been published).

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mixed rights category; they are less likely to be accepted compared to single right cases, which serve as reference category.

[18] It is hardly surprising that the non-amendable first 19 articles of the Basic Law grouped under the heading of 'Basic Rights' present over two-thirds of all complaints filed in both the Chambers of Three and the full Senates.

Discussion of Models

a) Chambers of Three

I ran logistic regressions on the Chamber of Three data set with the aim of discerning which factors exhibit a correlation with the probability of a Chamber accepting the constitutional complaint filed. In order to test Hypothesis 1, three nested models are used: an ideology model, a purely legal model, as well as a fully specified model. Results are presented in Table IV.4 below.

IV. 3 Comparison of Three Nested Models with Dependent Variable 'Acceptance of Constitutional Complaint'. The Table Shows the Estimate (and Standard Error) of the Coefficients of Regression.

Variable Coefficient	Ideology Model	Legal Model	Full Model
Political Ideology	-0.80* (0.36)	--	-0.93 (0.51)
Senate	1.41*** (0.39)	--	0.89 (0.54)
Comments	--	2.98*** (0.47)	3.01*** (0.50)
Reference	--	-0.67 (0.54)	-0.76 (0.55)
Family, Prisoner and Privacy Cases	--	1.25** (0.46)	1.08* (0.47)
Benefit Cases	--	-1.59 (0.96)	-1.03 (0.98)
Rights Mix	--	-1.38* (0.56)	-1.47* (0.57)
Constant	-0.55*** (0.34)	-1.28** (0.41)	-1.27* (0.51)

P-values: * = $p < 0.05$; ** = $p < 0.01$; *** = $p < 0.001$
Standard Errors in brackets; N=163

As the results presented above suggest, all models deliver at least statistically significant coefficients, especially in the case of the 'comment' variable, which is significant at the 1% level (whenever included).

The Ideology Model includes only two independent variables, namely the respective Senate to which the deciding Chamber belongs, as well as the core variable political ideology, which indicates either a liberal (coded as zero) or a conservative (coded as unity) Chamber. It suggests that the best prediction for judicial decision-making is in fact individual judges' political ideology. The variable *senate* has been included as one of the findings from the qualitative discussion suggested that the Second Senate is more political in its nature. Hence, the allocation to a specific Senate is itself an indication of the degree to which political ideology matters in the judicial decision-making process. Both independent variables are statistically significant; they suggest that a conservative Chamber is less likely to accept a constitutional complaint, while the Second Senate (which is coded as unity) is significantly more likely to accept complaints. The limited sample size unfortunately does

not allow for the investigation of potential interaction effects between the political ideology and Senate variables.

Secondly, the legal model concentrates on the predictive power of purely legal variables. *Comments*, *Rights Mix* and *Family/Privacy/Prisoner* cases are statistically significant. Their coefficients suggest that comments given by government agencies or expert associations increases the likelihood of a complaint's acceptance substantially, while more complex complaints including more than one rights category (as expressed by *rights mix*) decrease the probability of acceptance. Belonging to the either the family, privacy or prisoner category on the other hand increases a complaint's chances of success.

The fully specified model indicates that legal factors play a more important role; they are the only independent variables that yield statistically significant coefficients, confirming the findings of the legal model. Political ideology only narrowly fails the significance test, being significant at the 7%-level. In the light of the small sample size, one can suggest that political ideology nevertheless does play a role in the judicial decision-making process, with a lower chance of acceptance of constitutional complaints in the case of conservative Chambers.

Of course, statistical significance is not equivalent to substantive significance. Especially in the case of data as prone to limited sample size errors, the value of the statistical findings should not be overstated. While the coefficients of the *logit* analysis presented above indicate the variables' relative magnitude and direction, their interpretation is not straightforward. In order to assess the actual percentage change in the probability they predict, further mathematical transformations are required. The results are presented below in Table IV.5.

IV. 4 Predicted Probabilities for the Ideological, Legal and Fully Specified Models of Chamber of Three Decision-Making

Independent Variable	Predicted Probability of Accepting Complaint (in %): Ideology Model	Predicted Probability of Accepting Complaint (in %): Legal Model	Predicted Probability of Accepting Complaint (in %): Full Model
Liberal Political Ideology	59%	--	63%
Conservative Political Ideology	41%	--	40%
First Senate	26%	--	35%
Second Senate	59%	--	56%
Comments Given	--	84%	84%
No Comments Given	--	21%	21%
Reference Given	--	36%	35%
No Reference Given	--	53%	53%
Rights Mix	--	26%	18%
No Rights Mix	--	58%	49%
Family, Privacy and Prisoner Case	--	65%	63%
No Family, Privacy and Prisoner Case	--	35%	37%
Benefits Case	--	19%	28%
No Benefits Case	--	53%	52%

NB Individual probabilities predicted holding other variables constant at mean value.
All figures are rounded. See Appendix C for equations and mean values.

Judging from the predicted probabilities, all models suggest that Chambers staffed with a majority of liberal judges exhibit a higher probability of accepting constitutional complaints as compared to conservatively dominated Chambers (about 60% for liberal versus roughly 40% in the case of conservative chambers). The same holds for the acceptance record of the two Senates; the Second Senate shows a far greater likelihood of admitting complaints filed.

The single most important predictor of acceptance seems to be comments from government agencies and expert associations, in which case complaints are accepted in over 80%. However, the variable captures two different aspects. As most comments tend to recommend the rejection of a complaint, it may indicate that this is an incentive for the Court to accept it in spite of the governmental or expert recommendation. Judging from qualitative data, a safer assumption is that comments are an indication for the relative

salience of a case; thus, the statistical result suggests that more salient complaints have a higher probability of admission.

Considering case characteristics such as the specific subject and the rights allegedly violated, it seems that complaints concerning family, privacy or prisoner cases are more likely to be accepted as compared to other types of cases (both the legal model and the fully specified model show predicted probabilities of over 60%).

In general, it seems that while political ideology is correlated to the probability of acceptance, the most important factors are of institutional character. The respective Senate, as well as comments received from experts or public bodies, offer the greatest explanatory value. One should bear in mind that correlation does not signify causation. Nevertheless, the results of the statistical analysis confirm the qualitative findings.

b) Full Senate Judgments - Dissent

Testing for the respective predictive power of different variables on the rate of dissent, I run another *logit* model. Political ideology, as well as legal and institutional factors, are taken into account: case and right type[19], Senate, political ideology, comments given and references made to previous Constitutional Court decisions are included in the model.

IV. 5 Logistic Model of Dissent

Variable	**Coefficient**
Political Ideology	7.40 (3.97)
Senate	-2.43 (1.30)
Comments	0.35 (1.68)
Reference	0.58 (1.11)
Family, Prisoner and Privacy Cases	1.20 (1.12)
Rights Mix	0.35 (1.4)
Constant	-5.38* (2.54)

P-value: * = p < 0.05; ** = p < 0.01; *** = p < 0.001
Standard Errors in brackets
N=47

While not quite significant at the 5%-level, Senate and political ideology (both significant at the 6%-level) deliver the best results. Their coefficients suggest that in the case of full

[19] Note that the variable *benefits cases* was dropped as it predicted dissent perfectly; this arises from the imperfections of the very small sample size.

Senate judgments, the Second Senate should be far less likely to exhibit dissenting opinions than the First.

This is at odds with the evidence given by judges and clerks during their interviews. A possible explanation for these contradictory results is the very limited sample size, which severely reduces the degrees of freedom, as well as the relatively short time span under consideration. For these reasons, predicted probabilities do not yield substantively meaningful results. More conservative Senates on the other hand are substantially more likely to issue dissenting opinions. As judges chose not to comment on the connection between political ideology and the rate of dissent, this finding is of particular interest, giving evidence that there is indeed a link between these two variables. All other variables' coefficients, while statistically far from significant, indicate that their occurrence would increase the likelihood of dissent.

c) Full Senate Judgments – Admission of Complaints in Senate Judgments

Bearing in mind the limitations arising from the very small sample size, logistic regressions are run on two models, one purely attitudinal, one taking into account the influence of dissenting opinions. Because of the small sample size (N=54), the inclusion of more than two variables leads to overspecification, prompting STATA to drop variables as well as observations.

Considering the size of the standard errors and the theoretical context, the results presented in Table IV.8 are relatively robust. Testing for the proportional reduction in error these variables yields compared to a model with only a constant, the model performance is in both cases increased. Model 1 reduces the prediction error by 62.5%, while Model 2 leads to a reduction by 70%.

IV. 6 Comparison of Two Nested Models with Dependent Variable 'Acceptance of Constitutional Complaint" in Full Senate

Variable Coefficient	**Model 1**	**Model 2**
Political Ideology	-5.73* (2.73)	-6.59* (2.84)
Dissenting	--	2.04 (1.23)
Constant	3.08* (1.21)	3.15* (1.24)

NB P-value: * = p < 0.05; ** = p < 0.01; *** = p < 0.001;
Standard Errors in brackets; N=54

Model 1 suggests that a more conservative Senate is substantially less likely to accept a constitutional complaint. This is confirmed by Model 2, which furthermore includes whether a dissent has been issued or not. *Dissent* narrowly misses the 5% significance level, being significant at the 7%-level. Again, data limitations can account for the lack of clear significance.

A look at predicted probabilities is instructive (see Table IV.9). Both liberal political ideology as well as dissent offer nearly perfect predictions (both over 95% probability).

Referring back to the findings of the Chamber of Three decisions, the general gist presented appears intelligible: political ideology does matter, however it is predominantly conditioned by the bargaining procedures and individual interaction of judges within the respective Senate.

IV. 7 Predicted Probabilities for Two Nested Models with Dependent Variable *'Acceptance of Constitutional Complaint'* in Full Senate

Variable	**Predicted Probability: Model 1**	**Predicted Probability: Model 2**
Conservative Ideology	1%	1%
Liberal Ideology	96%	97%
Dissent	--	93%
No Dissent	--	63%

NB Individual probabilities predicted holding other variables constant at mean value. All figures are rounded. See Appendix C for equations and mean values.

The results thus support the qualitative findings, confirming that political ideology does play a role in full Senate decision-making, especially so in comparison to Chamber of Three decisions. Political ideology is significant in both full Senate models. This suggests that full Senate decisions yield a greater scope for discretionary decision-making. Unrestricted by previous principles (unlike Chamber of Three decisions, which fully rely on principles set out by prior Senate judgments) they can be assumed to be politically more salient as judges have to create precedent themselves.

V. Conclusion

Both the institutional set-up as well as the empirical evidence suggests that the judicial decision-making process at the Federal Constitutional Court offers the scope for individual discretion, and is thus open to the potential influence of political ideology. Analyzing the institutional framework of the Federal Constitutional Court in general, and its constitutional complaint procedures in particular, one finds that there is a relative long list of legal criteria a complaint has to fulfill in order to be successfully admitted, which at first sight seems to limit the scope for discretionary judicial decision-making. It also points to further routes through which political ideology can enter, such as for example the influence of law clerks.

Counteracting the strictness of these criteria are measures enacted to cope with the severe problem of docket overload. Indeed, these reforms have in fact led to an increase in the decision-making autonomy of Federal Constitutional Court judges. Tension arises between the need to allow judges enough discretion to manage the Court's docket efficiently, and to ensure the objective consideration of each constitutional complaint. The Court's answer is to rely on the institutional spirit of judicial self-restraint, and trust the judges to exercise their decision-making power only within the responsibilities of the Court. While the possibility for abuse of this power cannot be avoided, it also does not necessarily have to arise.

Evidence from interview data suggests that the judges themselves are aware of the great decision-making autonomy they are given. At the same time, they perceive themselves as bound by informal institutional constraints, such as considerations given to the limited capacity of the full Senates to hear complaints. On the other hand, they professed to engage in strategic interaction within both the full Senate and their respective Chambers of Three. This entailed anticipating each other's verdicts on complaints, partially on the basis of known ideological preferences.

Direct assessments regarding the role of political ideology suggest that Federal Constitutional Court judges do not consider it a factor in their decision-making process. However, both the qualitative and quantitative empirical evidence point into a different direction, indicating at least a limited role for political ideology in the formation of judicial decisions at the Federal Constitutional Court. Even acknowledging the caveats of the statistical findings arising from a relatively small sample size, the *logit* models yield robust evidence that political ideology influences the probability of a complaint's successful admission, finding that both conservative Chambers and Senates are less likely to accept them.

Of course, judicial self-perception partially explains this divergence in the empirical evidence. Public display of overtly political behavior would be in conflict with the professional ethic among the German legal community. The common educational background and socialization into the legal profession endow judges with a logic of appropriateness, which excludes open references to their own preferences, especially in the context of political ideology. Kommers suggests on this point that in Germany, '[p]rofessional training and education is probably more important than any other background factor in the determination of judicial attitudes (…). German legal education (…) views the judicial process largely in mechanistic terms.'[1]

[1] Kommers, *Judicial Politics in West Germany*, p. 45

A more powerful explanation refers back to the theoretical stipulations of socio-legal studies. One can differentiate between conscious and subconscious rule-following. Applying the same logic to the judicial decision formation process, a distinction between conscious and subconscious influences of political ideology can be drawn. Political ideology can thus feed into the judicial decision-making process through two main channels: the direct consideration of one's preferences and the subconscious perception of the legal question at hand, seen through the lens of one's political ideology.

Not only does this fit well with both the Political Science and the socio-legal studies literature on decision-making processes; it is also intuitively appealing. Any kind of decision is based on a host of subconscious reflections which the decision-makers are not aware of. Especially a vital set of preferences such as those embodied in political ideology shape the way we perceive the world, and consequently how we evaluate facts. Judges are no exception. Following Dworkin's line of argument on objectivity and neutrality[2], even their best intentions cannot transform judges into value-neutral adjudicators; their decisions will always – at least to a certain degree conditioned by institutional and legal factors – reflect their own ideological preferences. Whether or not this should be seen as a flaw in the judicial, or even the democratic system shifts the analysis from a positive to a normative level and remains to be debated.

[2] Ronald Dworkin, 'Objectivity and Truth: You'd Better Believe It', *Philosophy and Public Affairs*, vol. 25, no. 2, Spring 1996, pp. 87-139

Appendix A – Constitutional Court Judges

A. 1 – Members of First Senate by December 2007

Name	Appointed in	Nominated by	Elected by	Party Affiliation	Previous Occupation
Papier, Hans-Jürgen (President)	February 1998	CDU/CSU	Bundestag	CSU	Law Professor*/ Judge
Hohmann-Dennhardt, Christine	January 1999	SPD	Bundesrat	SPD	Minister (Hesse)
Hoffmann-Riem, Wolfgang	December 1999	SPD	Bundesrat	Non-partisan	Researcher/Law Professor*
Bryde, Brun-Otto	January 2001	Bündnis 90/Die Grünen	Bundestag	Non-partisan	UN/Law Professor*
Gaier, Reinhard	November 2004	SPD	Bundesrat	SPD	Bundes-gerichtshof
Eichberger, Michael	April 2006	CDU/CSU	Bundestag	Non-partisan	Bundes-verwaltungsgericht
Schluckebier, Wilhelm	October 2006	CDU/CSU	Bundestag	CDU	Bundes-gerichtshof/Law Professor*
Kirchhof, Ferdinand	October 2007	CDU/CS	Bundestag	Non-partisan	Law Professor*

*still practising while at Federal Constitutional Court

A. 2 – Members of the Second Senate by December 2007

Name	Appointed in	Nominated by	Elected by	Party Affiliation	Previous Occupation
Hassemer, Winfried (Vice-President)	May 1996	SPD	Bundesrat	Non-partisan	Law Professor*/Civil Servant
Broß, Siegfried	September 1998	CDU/CSU	Bundestag	Non-partisan	Bundesgerichtshof
Osterloh, Lerke	October 1998	SPD	Bundestag	Non-partisan	Law Professor*
Di Fabio, Udo	December 1999	CDU/CSU	Bundesrat	Non-partisan	Law Professor*
Mellinghoff, Rudolf	January 2001	CDU/CSU	Bundesrat	Non-partisan	Bundesgerichtshof/ Law Professor*
Lübbe-Wolff, Gertrude	April 2002	SPD	Bundestag	Non-partisan	Law Professor*
Gerhardt, Michael	July 2003	SPD	Bundestag	Non-partisan	Bundes-verwaltungsgericht
Landau, Herbert	October 2005	CDU/CSU	Bundesrat	CDU	State Secretary/Law Professor*

*still practising while at Federal Constitutional Court

A. 3 – Constitutional Court Justices No Longer in Office in December 2007

Name	Appointed in	Nominated by	Elected by	Party Affiliation	Previous Occupation
Haas, Evelyn	September 1994	CDU/CSU	Bundesrat	Non-partisan	Bundesverwaltugsgericht/Law Professor
Hömig, Dieter	October 1995	FDP	Bundestag	Non-partisan	Bundesverwaltungsgericht
Jaeger, Renate	March 1994	SPD	Bundestag	Non-partisan	Law Professor
Jentsch, Hans-Joachim	May 1996	CDU/CSU	Bundesrat	CDU	Politician/ Law Professor
Steiner, Udo	October 1995	CDU/CSU	Bundestag	Non-partisan	Law Professor*

*still practising while at Federal Constitutional Court

English Translations

Bündnis '90/Die Grünen	Alliance '90/Green Party
CDU	Christian Democratic Union
CSU	Christian Social Union
FDP	Free Democratic Party (Liberals)
SPD	Social Democratic Party
Bundesgerichtshof	Federal Court of Justice
Bundesverwaltungsgericht	Federal Administrative Court

Appendix B – Coding of Political Ideology Scores

B. 1 – Ideological Classification of Federal Constitutional Court Judges

Name	*Tageszeitung*	*Süddeutsche Zeitung*	*Frankfurter Rundschau*	*Die Welt*	*Overall Classification*
Broß, Siefried	conservative/ liberal	conservative	-	-	**Conservative**
Bryde, Brun-Otto	liberal	liberal	-	liberal	**Liberal**
Di Fabio, Udo	conservative	conservative	-	conservative	**Conservative**
Eichberger, Michael	conservative	liberal/ conservative	conservative	-	**Conservative**
Gaier, Reinhard	-	liberal	-	-	**Liberal**
Gerhardt, Michael	liberal	-	liberal	-	**Liberal**
Haas, Evelyn	-	liberal	-	-	**Liberal**
Hassemer, Winfried (Vice-President)	liberal	-	-	-	**Liberal**
Hoffmann-Riem, Wolfgang	liberal	liberal	-	liberal	**Liberal**
Hohmann-Dennhardt, Christine	-	liberal	-	-	**Liberal**
Hömig, Dieter	liberal	-	-	-	**Liberal**
Jaeger, Renate	-	liberal	-	-	**Liberal**
Jentsch, Hans-Joachim	conservative	-	-	-	**Conservative**
Kirchhof, Ferdinand	conservative	conservative	-	conservative	**Conservative**
Landau, Herbert	conservative	conservative	conservative	conservative	**Conservative**
Lübbe-Wolff, Gertrude	liberal	liberal	-	-	**Liberal**
Mellinghoff, Rudolf	conservative	-	-	conservative	**Conservative**
Osterloh, Lerke	liberal	liberal	-	-	**Liberal**
Papier, Hans-Jürgen (President)	conservative	conservative	-	-	**Conservative**
Schluckebier, Wilhelm	conservative	conservative	-	-	**Conservative**
Steiner, Udo	conservative	-	-	-	**Conservative**

Appendix C – Further Statistical Data

C.1 Calculation of Predicted Probabilities

$Probability_{Variable\ X} = [\exp(\alpha + \beta_1 + \beta_2 + \ldots + \beta_n)]/[1 + \exp(\alpha + \beta_1 + \beta_2 + \ldots + \beta_n)]$,

where α represents the constant, and $\beta_1, \beta_2, \ldots, \beta_n$ the independent variable coefficients.

Except for the variable whose effect is estimated, all other variables are held at their mean value. A list of these values for the respective models is given below.

C.2 Chamber of Three Model

C. 1 – Mean Values for Chamber of Three Model

Variable	Mean Value
Political Ideology	0.60
Senate	0.69
Comments	0.44
Reference	0.21
Family, Prisoner and Privacy Cases	0.47
Benefit Cases	0.10
Rights Mix	0.26

NB All values are rounded to two decimals.

C.3 Full Senate Model

C. 2 – Mean Values for Senate Model

Variable	Mean Value
Political Ideology	0.40
Dissent	0.19

NB All values are rounded to two decimals.

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