

The Legacy of Federal Constitutional Court President Jutta Limbach

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-- Jutta Limbach, *Grundrechtsschutz in der Europäischen Union – Savigny Vorlesung des Fachbereichs Rechtswissenschaften der Philipps-Universität Marburg* (Gounalakis ed., 2001, ISBN 3-7890-7639-2).

A. Introduction

[1] April marked the end of two, intertwined eras at the *Bundesverfassungsgericht* (BVerfG -- Federal Constitutional Court). Not only did Prof. Dr. Dr. h.c. Jutta Limbach conclude her distinguished service as the Court's President and the Presiding Justice of the Second Senate; (1) significantly, President Limbach's retirement also marked the end of the tenure of the first female President of the prestigious and powerful Federal Constitutional Court. (2) It is, however, difficult to decide whether it does Ms. Limbach's legacy more honor to refuse to remark the later of these points, treating her tenure as President from a gender-neutral perspective and thereby giving life to the issue of gender-equality that is so important to her. This question is made somewhat less perplexing for an English-language commentator, who must not employ the gendered forms of nouns as required by the German language. While Ms. Limbach served as a *Richterin* and *Präsidentin* (the female forms of the German words *Richter* and *Präsident* -- judge and president) in the German language, in the English language she was simply and fully (fully neutral with respect to gender) *Justice* and *President*. Nonetheless, if only at the level of pronouns, the issue persists in the English language as well: does President Limbach's retirement merit reflection as the conclusion of the tenure of a remarkable Jurist and public figure or the conclusion of the tenure of a remarkable *female* Jurist and public figure?

[2] At the official state ceremony honoring Ms. Limbach's service and retirement, Chancellor Gerhard Schroeder gave his emphatic answer, declaring Ms. Limbach to be "a wonderful woman." (3)

[3] Others have also insisted on recognizing the gendered duality of Ms. Limbach's role (as both President and the first female President), none-the-least the Court itself in a "judgment" issued as part of a collection entitled *Recht so, Jutta Limbach*. (4) Published on the occasion of Ms. Limbach's retirement, the book focuses explicitly, if lightheartedly, (5) on the gender dynamic inherent to her tenure and consists of more than 20 admiring essays (the book's Editors and more than half the contributors are women, including the current Federal Minister for Consumer Protection, Food and Agriculture, Renate Künast), a number of gender-sensitive and satirical political cartoons, and the "judgments" of the First and Second Senates of the Constitutional Court concerning the "legality" of Ms. Limbach's retirement. After assuring itself of its exclusive and unbiased jurisdiction over the matter, (6) the Second Senate wrestled with the applicability of Articles 4.1 and 4.3 of the *Bundesverfassungsgerichtsgesetz* (BVerfGG -- Federal Constitutional Court Act. Remarking that both provisions set limits on the tenure of "*der Richter*" (judge masculine) and not "*die Richterin*" (judge feminine), a majority of the Second Senate initially registered their doubts about applying the law to Ms. Limbach: "The current *Präsidentin* of the Federal Constitutional Court and Presiding Justice of the Second Senate is undoubtedly a *Richterin*." (7) The Second Senate noted, however, that the language and word-choice of the Federal Constitutional Court Act appears to have only provided for the election of male Justices in the first place, thus the question before the Senate inherently cast a shadow of doubt on the legality of Ms. Limbach's initial election as a Justice of the Court. (8) The Justices of the Second Senate considered a number of possible jurisprudential solutions to the matter. One proposed solution would have employed the principle of "double negation," through which the "illegal" election of a female Justice would now be remedied through her "illegal" retirement. (9) Another proposed solution called for the application of the principle of a "*de facto* legal relationship" that gives rise to a *de jure* legal relationship after long-standing action taken in accordance with or dependence on the *de facto* rule or relationship. This proposal, the Second Senate noted, was not only supported by the eight years of Ms. Limbach's *de facto* service as President and Presiding Justice, but also by the *de facto* election and service of four additional female Justices to the First and Second Senates during Ms. Limbach's tenure. (10) Finding neither of these proposed solutions adequate to the legal challenge with which it was confronted, the Second Senate instead felt pressed "to the degree possible, to develop, as a matter of general principle, a convergence between the written (statutory) law and the (constitutionally guaranteed) reality." (11) The Second Senate, therefore, simply (and unanimously) decreed that Ms. Limbach legally entered office, legally exercised her duties and, in principle, may legally exit the office. (12)

[4] As the Court itself seems to have put the matter to rest, it makes sense (for the time being, at least) to look beyond this dialectical tension inherent to President (*Präsidentin*) Limbach's legacy, in order to remark her impressive

biography and to touch just one of the significant themes addressed by the Second Senate under her leadership. That Ms. Limbach might prefer this course, in spite of her well known advocacy (in part as an impressive role model) on behalf of gender equality, (13) can be inferred from the contents of her books *Das Bundesverfassungsgericht* (part of C.H. Beck's *Wissen* (knowledge) Series) (14) and *"Im Namen des Volkes" – Macht und Verantwortung der Richter*. (15) Neither serves as an explicit (really, not even an implicit) feminist legal/social critique. Whether her jurisprudential vision and style can and should be described by the phrase "a woman's touch," (16) I leave for others more capable and qualified than myself to discuss.

B. The Biography

[5] Jutta Limbach was born in Berlin on 27 March 1934, into a proud tradition of social justice and a staunch Social Democratic household. Her great grandmother, it has been reported, was imprisoned for speaking-out against the monarchy. (17) Her grandmother was a member of the *Weimarer Nationalversammlung* (1918-19 Weimar National Assembly, which served during the transition from the post World War I revolutionary unrest and the enactment of the Weimar Constitution in August, 1919 (18)), the *Reichstag* (Imperial Parliament) and the Prussian *Landtag* (Prussian State Parliament). (19) During the reign of the National Socialists her father was prohibited from practicing his profession, (20) but he was elected mayor of the East-Berlin district Pankow in 1945. (21) She studied law in Berlin and Freiburg and, following the conclusion of her undergraduate study of law, served as an Academic Assistant in the Faculty of Law of the Freien Universität Berlin. In 1966, she obtained her Ph.D. in Law (*Promotion*) with a dissertation entitled *Theorie und Wirklichkeit der GmbH* (The Theory and Reality of the Corporation). In 1971, she attained a Professorship with the book (*Habilitation*) *Das gesellschaftliche Handeln, Denken und Wissen im Richterspruch* (Social Behavior, Thinking and Knowledge in Judicial Decisions). Ms. Limbach taught Civil Law, Commercial and Business Law and Legal Sociology at the Freien Universität Berlin, beginning in 1971. As one observer recalls, her lectures in the 1970s were extremely informal and featured challenging but open discussions. (22) The same style would characterize the oral arguments over which she would preside at the Constitutional Court. (23)

[6] From 1989 to 1994, Ms. Limbach served as the *Senatorin für Justiz des Landes Berlin* (Director of the State of Berlin's Ministry of Justice) as a member of the Social Democratic Party (SPD), first in the SPD/Grün coalition government of Walter Momper and then in the CDU/SPD (great)coalition government of Eberhard Diepgen. (24) Her tenure as Director of the State of Berlin's Ministry of Justice was marked by the intense and unique challenges posed by Berlin's (and Germany's) reunification, including investigating and bringing to trial the perpetrators of the crimes of the East German communist regime. It has been remarked that Ms. Limbach was in politics long enough to grasp its nature but not so long that she was infected with its intellectual impoverishment. (25)

[7] After the SPD's nomination of Prof. Dr. Herta Däubler-Gmelin collapsed during the cloakroom horse trading that traditionally governs the highly political "election" of the Constitutional Court's judges by the *Bundestag's* (Federal Parliament's) Judicial Selection Committee, (26) Ms. Limbach was elected to be the Vice President of the Constitutional Court as the SPD nominee in March, 1994. After only half a year at the Karlsruhe Court, she was elected to the Court's Presidency by the *Bundestag's* Judicial Selection Committee in September, 1994. (27)

[8] In 1999, Ms. Limbach was awarded an honorary Doctorate by the Universität Basel. She has received numerous other honors, including the "Justice in the World" recognition from the International Association of Judges (2000). In September, 2001, President Limbach presided over the festivities marking the 50th Anniversary of the Federal Constitutional Court, an event attended by dozens of the Presiding and Chief Justices of the World's Supreme and Constitutional Courts. Ms. Limbach has written numerous articles and authored and edited a number of books and collections. (28)

[9] Ms. Limbach is married and has three children. Beginning in May, 2002, she assumed the Presidency of the Goethe Institute, the international organization charged with promoting German culture internationally.

C. The Legacy -- German Military Policy and German Normalization

[10] During her eight-year tenure in the Second Senate, Ms. Limbach joined decisions affecting a dramatic range of issues of great significance to Germany, including: (I) German reunification; (29) (II) the maintenance and definition of Germany's Social Market Economy; (30) (III) Germany's dramatic integration in the European Union; (31) and (IV) endorsing and strengthening the diversity of German society, especially through decisions on religious freedom. (32) Another area seems particularly worthy of review upon Ms. Limbach's retirement, considering the near-revolutionary change it has heralded for German society: the expansion of Germany's post-cold war military engagement.

[11] Two judgements of the Second Senate that fundamentally define the evolving nature and scope of German military policy also serve as literal book-ends to Ms. Limbach's tenure as the Senate's Presiding Justice. And just as the two decisions reflect the gradual shift of opinion on the issue in German society, it is possible to read the

decisions as an evolution on the part of Ms. Limbach. Shortly after her arrival in Karlsruhe, Ms. Limbach participated in the *Bundeswehreinsetzung* Case (German Army Deployment Case), partially joining a rare dissenting minority. (33) Nearly eight years later, and just months before Ms. Limbach's retirement, the Second Senate unanimously decided the *NATO Strategische Konzept* Case (NATO Strategic Concept Case). (34) Though the constitutional issues at the core of the cases differed, both resulted in a broadening (or the perpetuation thereof) of the post-Cold War, post-Reunification profile of the German Army to include foreign deployments, after its long tenure as little more than a home-defense institution during the Cold War. (35)

[12] The 1994 *Deployment Case* involved challenges to the Government's out-of-territory German military deployments in, *inter alia*, Bosnia-Herzegovina (German AWACS used during NATO's first Balkan campaign) and Somalia (UNOSOM operation to monitor the UN-brokered cease fire). The Court's majority found no constitutional violation in the Government-ordered deployments, especially focusing on the military obligations and expectations that necessarily attend Germany's participation in multi-lateral treaty regimes like the United Nations and NATO. The Court found the *Bundestag's* approval of out-of-territory military deployments to be implied in the *Bundestag's* ratification of the treaties. (36) Ms. Limbach joined the dissent with respect to the UN operation in Somalia, arguing that Article 42 of the UN Charter, while permitting the UN Security Council to employ military measures to ensure peace, can not be used to require military engagement from UN member states without a separate and explicit agreement to that effect. (37) For this reason, the dissenters argued that the Somalia operation did not benefit from the majority's "implied authority" analysis.

[13] Having failed to persuade a majority of the Court to adopt a strict standard for the application of its "implied authority" ruling, Ms. Limbach nonetheless joined the undivided Court in holding that the Constitution required the Government to seek parliamentary approval for every deployment of the German Army outside the NATO area. (38) In her book *Das Bundesverfassungsgericht*, Ms. Limbach explained that the parliamentary proviso required by the Court in the *Deployment Case*, established that the Basic Law "does not leave to the German Army as a potential for power to the Executive alone." (39)

[14] Much had changed in Germany in the seven years that followed the Constitutional Court's decisions in the *Deployment Case*. Perhaps most significant was the change of Government in the fall of 1998, bringing Gerhard Schroeder's SPD/Grün coalition government to power after 16 years of the CDU/CSU/FDP coalition government led by Helmut Kohl. The new, center-left Government surprisingly rushed to ensure Germany's participation in the NATO-led Yugoslavian War in the spring of 1999. At the same time, during celebrations of NATO's fiftieth anniversary in Washington, D.C., the Heads of State of the NATO member countries (including Germany's Gerhard Schroeder) issued a "New Strategic Concept" for the organization. The document, principally, expanded the scope of NATO's territorial interests beyond the North Atlantic / European region and simultaneously eased the strict defensive nature of the organization, permitting instead pro-active campaigns like the War already proceeding in Yugoslavia.

[15] The small Parliamentary Group of the *Partei des Demokratischen Sozialismus* (PDS – Party of Democratic Socialism) challenged the new NATO Strategic Concept before the Constitutional Court. In essence, the PDS Parliamentary Group argued that the Government's accession to the terms of the new Concept had abused the Court's *Deployment Case* "implied authority" ruling, permitting the Government to manipulate the terms of a treaty (the NATO treaty, in this case) from which it would then imply the authority to make a military deployment, all without subjecting the new "treaty" terms to the Parliament for ratification. The Second Senate, with Ms. Limbach presiding, ruled unanimously that the Government's accession to the new NATO Strategic Concept did not constitute a violation of the Basic Law. (40) Though the Court particularly emphasized the continuing applicability (and attending constitutional protection) of the "parliamentary proviso" rule from the *Deployment Case*, neither Ms. Limbach nor Justice Sommer (the only other dissenter from the *Deployment Case* still serving on the Court) found cause to dissent from this dramatic erosion of the "implied authority" rule.

[16] Even though (as noted above) the core legal issues in the two cases differed, (41) the existence and terms of "implied authority," stemming from a collective-security treaty regime and serving as a mechanism for avoiding the limited (defensive) role the wording of the Basic Law assigns to the German Army, was clearly at stake in both. Importantly, the consequences of the Court's refusal to find a constitutional violation in both cases were quite similar: the deployment of the German Army in dramatically new contexts. (42) History, hopefully attended by libraries brimming with dissertations addressing Ms. Limbach's tenure, will grapple with the questions whether it was a matter of pacifist principle that led Ms. Limbach, as a new Justice in 1994, to join the dissent in the *Deployment Case* and whether her participation with the unanimous majority in the *NATO Strategic Concept Case* represent an erosion/evolution of that principle? Is it also possible to read the apparent shift as an issue of party politics (she voted with the SPD in both cases)? Or, rather, do the cases represent the refining of a dramatic, internationalist (treaty-oriented) legal doctrine?

[17] Whatever the answers to those questions, the Second Senate's decisions concerning military policy during Ms.

Limbach's tenure unmistakably paved the way for a more self-confident, internationally active, some would say, *normal* Germany.

D. Conclusion

[18] In her book *"Im Namen des Volkes"*, Ms. Limbach famously posed the question: Can the Constitutional Court Err? Her reply was a curt, "of course." (43) "The judges," she explained, "in spite of all their knowledge and good judgement, are also only fallible humans . . ." (44) The ease with which Ms. Limbach embraced this fact lent grace, and thereby a unique authority, to her work. She will be missed in Karlsruhe. Having had the benefit of her leadership of the Constitutional Court, we can hardly be surprised that "Blind Justice" of antiquity is almost universally portrayed as – a woman.

(1) Justices to the Constitutional Court are elected (by a committee of the *Bundestag* and the full *Bundesrat*) for 12 year, non-renewable term, not to extend beyond the mandatory retirement age of 68. Articles 4.1 and 4.3 of the *Bundesverfassungsgerichtsgesetz* (BVerfGG – Federal Constitutional Court Act). Ms. Limbach turned 68 on 27 March 2002.

(2) A woman served on the Court at its creation: Erna Scheffler was a member of the Court's First Senate and served from 1951 to 1963. There was a period, following Frau Scheffler's retirement, during which no woman presided at the Court. This period ended with the election of Gisela Niemeyer in 1977. Presently, including Ms. Limbach's successor Prof. Dr. Gertrude Lübbecke-Wolff, five of the Court's sixteen Justices are women.

(3) Helmut Kerscher, *"Eine wunderbare Frau,"* SÜDDEUTSCHE ZEITUNG (2 May 2002).

(4) UTA FÖLSTER AND CHRISTINA STRESEMANN (EDS.), RECHT SO, JUTTA LIMBACH, NOMOS Verlag, 2002, ISBN 3-7890-7982-0. The Editors note in their foreword that President Limbach strictly forbade the publication of a traditional, academic *Festschrift* (honorary publication) in her honor. (*Id.* at 11.).

(5) The collection is truly enjoyable, but leaves room for (if it does not demand) a more critical/theoretical analysis of the feminist "meaning" of President Limbach's tenure. The body of feminist legal criticism upon which such an analysis can be built is abundant. See, e.g., CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); HILAIRE BARNETT, SOURCEBOOK ON FEMINIST JURISPRUDENCE (1997); Cynthia G. Bowman and Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM LAW REVIEW 249 (1998); JO BRIDGEMAN, FEMINIST PERSPECTIVES ON LAW (1998); F. C. DECOSTE ; K. M. MUNRO ; LILLIAN MACPERSHON, FEMINIST LEGAL LITERATURE: A SELECTIVE ANNOTATED BIBLIOGRAPHY (1991).

(6) As opposed to being a matter for the jurisdiction of the full (16 judge) membership of the Court sitting in Plenum, the Second Senate seized the issues on the grounds that, as President, Ms. Limbach merely represented the interests of the Court as an institution, including the First Senate. This role, the Second Senate concluded, extended to the President no influence over the jurisprudence of the wholly independent First Senate. "The decisions of each Senate of the Constitutional Court, also in procedural questions, cannot be reviewed by the other Senate." (Beschluss BVerfG 2 BvY 1/02, RECHT SO, JUTTA LIMBACH 13, 14-15 (Uta Fölster and Christina Stresemann eds., 2002)). (Author's translation).

(7) *Id.* at 15-16.

(8) *Id.* at 16-17.

(9) In essence, two wrongs making a right. *Id.* at 18.

(10) *Id.* at 19.

(11) *Id.* at 20. Obviously relying, at least in part, on the equality guarantee of the *Grundgesetz* (GG – Basic Law). See, especially, Art. 3.2 GG.

(12) *Id.*, at 21.

(13) See, Kerscher, *supra* note 3. ("Das Engagement der Spitzenjuristin und künftigen Präsidentin des Goethe-Instituts für die Gleichberechtigung sowie für die beruflichen Chancen von Frauen rühmten alle Redner dieses hiter-

melancholischen Festakts.").

(14) JUTTA LIMBACH, DAS BUNDESVERFASSUNGSGERICHT (2001).

(15) JUTTA LIMBACH, "IM NAMEN DES VOLKES" – MACHT UND VERANTWORTUNG DER RICHTER (1999).

(16) *Beschluss BVerfG 2 BvY 1/2*, RECHT SO, JUTTA LIMBACH 13, 20 (Uta Fölster and Christina Stresemann eds., 2002).

(17) Karl Kardinal Lehmann, *Grußwort zur Verabschiedung*, RECHT SO, JUTTA LIMBACH 115 (Uta Fölster and Christina Stresemann eds., 2002).

(18) GERMAN BUNDESTAG, QUESTIONS ON GERMAN HISTORY: PATHS TO PARLIAMENTARY DEMOCRACY 201 (1998).

(19) *Id.*

(20) *Id.*

(21) Gerhard Kneier, *Limbach hat mehr verändert als alle ihre Vorgänger*, FAZ.NET (10 April 2002) www.faz.net.

(22) Lore Maria Peschl-Gutzeit, *Emanzipatorischer Gleichklang*, RECHT SO, JUTTA LIMBACH 89, 90-91 (Uta Fölster and Christina Stresemann eds., 2002).

(23) "Two years ago, she opened up the Constitutional Court to the public, holding 'court days' during hearings on relatively straightforward matters that had emotional appeal. . . Ms. Limbach saw herself more as a moderator than one who conducted proceedings, something she managed to do successfully." (Friedrich Karl Fromme, *Profile: From Ivory Tower to High Court*, FRANKFURTER ALLGEMEINE ZEITUNG (English Edition) 2 (11 April 2002).

(24) Lehmann, *supra* note 17, at 117.

(25) Rolf Lamprecht, *Zur Akzeptanz des Selbstverständlichen*, RECHT SO, JUTTA LIMBACH 67, 71 (Uta Fölster and Christina Stresemann eds., 2002).

(26) See, Erhard Blankenburg, *Changes in Political Regimes and Continuity of the Rule of Law in Germany*, in COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE 249, 265 (note 16) (Herbert Jacob, et. al., 1996). Frau Däubler-Gmelin has since risen to the position of Federal Minister of Justice in Gerhard Schroeder's SPD/Grün coalition government. The informal, but highly political nature of the process is substantially similar for those judges "elected" by the full *Bundesrat* (Federal Council of the States). See, DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 22 (2d. ed., 1997).

(27) As is the tradition, the Court's Vice President rises to assume the position of President.

(28) See, e.g., "IM NAMEN DES VOLKES" (DVA 1999); DAS BUNDESVERFASSUNGSGERICHT (Beck Wissen 2001); DAS BUNDESVERFASSUNGSGERICHT – GESCHICHTE, AUFGABE, RECHTSPRECHUNG (ed., Müller 2000).

(29) See, e.g., BVerfGE 92, 277; BVerfGE 94, 351.

(30) See, e.g., BVerfGE 98, 169; BVerfGE 99, 216; BVerfGE 99, 246/268/273; BVerfGE 99, 300; BVerfG, 2 BvL 17/99 from 6 March 2002 (www.bverfg.de/).

(31) See, e.g., BVerfGE 97, 350; BVerfGE 102, 147.

(32) See, e.g., BVerfGE 102, 370; BVerfG, 1 BvR 1783/99 from 15 January 2002 (www.bverfg.de/).

(33) BVerfGE 90, 286.

(34) BVerfG 2, BvE 6/99 from 22 November 2001 (<http://www.bverfg.de/>).

(35) A role apparently intended by Art. 87a.2 of the Basic Law: "Other than for defense purposes the Armed Forces may be employed only to the extent explicitly permitted by this Basic Law."

(36) BVerfGE 90, 286, 344-380 (1994). See, e.g., Kommers, *supra* note 26, at 163.

(37) BVerfGE 90, 286, 353-353 (1994).

(38) BVerfGE. 90, 286, 381-390 (1994).

(39) Limbach, *supra* note 28, at 58.

(40) BVerfG, 2 BvE 6/99 from 22 November 2001 (<http://www.bverfg.de/>). See, Andreas Paulus, *Quo vadis Democratic Control? The Afghanistan Decision of the Bundestag and the Decision of the Federal Constitutional Court in the NATO Strategic Concept Case*, 3 GERMAN LAW JOURNAL 1 (1 January 2002) (www.germanlawjournal.com).

(41) The *Deployment Case* focused on Article 87a.2 of the Basic Law and the *NATO Strategic Concept Case* focused on Article 59.2(1) of the Basic Law.

(42) In the year since the Court's *NATO Strategic Concept Case* ruling, Germany has assumed leadership of NATO peacekeeping force in Macedonia (Ian Black, *Germany Heads New NATO Force: Schröder agrees security role in Macedonia after British leave*, THE GUARDIAN 25 September 2001 (<http://www.guardian.co.uk/macedonia/story/0,7369,557636,00.html>)) and joined the American-led Afghanistan War, representing the first deployment of German troops in a combat role outside of Europe since the end of World War II.

(43) Limbach, *supra* note 28, at 135-136.

(44) *Id.*, at 136.