The Bavarian *Crucifix* Case

One of the Biggest Crises of the Bundesverfassungsgericht

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Undoubtedly, the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) is one of the most respected institutions not only in Germany but throughout Europe. Although its decision on the European Central Bank's bond purchase programme (2 BvR 859/15) has been widely criticised in Europe, this has not led to a crisis of confidence (at least among the German population) for the time being. The extent to which the court's open conflict with European institutions (European Central Bank, Court of Justice of the European Union) and the criticisms surrounding it will affect German citizens' perceptions of their own Constitutional Court in the longer term remains to be seen. On the other hand, it is worth noting that the BVerfG's public support was by no means strong in its early years. This was partly due to the fact that some German citizens were unfamiliar with the institution, and partly due to its serious conflicts with the Adenauer Government.[1] How the court subsequently managed to gain authority is undoubtedly a fascinating question, but it would stretch the framework of the present study.[2] This paper will investigate the reasons why political actors circumvent a decision of this highly respected institution, even by engaging in open conflict with it.

[1] For an early history of the court, see Kálmán Pócza, 'Politika és alkotmánybíróság: a Bundesverfassungsgericht létrejötte', *Külügyi Szemle* no 1 (2014), 111–131.

[2] On the building of authority and public support for the BVerfG, see Werer J Patzelt, 'Warum mögen die Deutschen ihr Verfassungsgericht so sehr?' in Robert C van Ooyen and Martin HW Möllers (eds), *Handbuch Bundesverfassungsgericht ibid. politischen System* (Wiesbaden: Springer Fachmedien, 2015). In general, for courts, see Georg Vanberg, *The Politics of Constitutional Review in Germany. Political Economy of Institutions and Decisions* (Cambridge: Cambridge University Press, 2005), 21; Georg Vanberg 'Establishing and Maintaining Judicial Independence' in Gregory A Caldeira et al. (eds), *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008); Georg Vanberg, 'Constitutional Courts in Comparative Perspective: A Theoretical Assessment', *Annual Review of Political Science* 18, no 1 (2015), 167–185, 177; Philipp A Schroeder, *The Political Constraints on Constitutional Review* [PhD dissertation] (London: University College London, 2019), 20; Brandon L Bartels and Eric Kramon, 'Does Public Support for Judicial Power Depend on Who is in Political Power? Testing a Theory of Partisan Alignment in Africa', *American Political Science Review* 114, no 1 (2020), 144–163.

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The case under scrutiny is the court's so-called *Crucifix* decision of 1995 (1 BvR 1087/91), which provoked an unprecedented wave of resistance in Germany against the decision of the Federal Constitutional Court. Analysis of the *Crucifix* decision seems relevant in two respects. On the one hand, it was and still is the only decision in the post-World War II history of the Federal Republic of Germany on which politicians and a significant proportion of German voters have voiced highly critical views in tens of thousands of demonstrations, and even openly called for resistance. The result, in fact, was that the BVerfG's decision was, in a sense, sabotaged: Despite the Court's decision to remove the crosses from the walls of Bavarian public educational institutions, they still hang on the walls of classrooms in Bavaria to this day. On the other hand, considering this topic is also relevant because the *Crucifix* case is still at the centre of public debate in Bavaria. This is well illustrated by the fact that the prime ministerial candidate of Christlich-Soziale Union in Bayern (CSU) promised in the 2018 Bavarian state election campaign, that if they won, it would now be mandatory to display the cross not only in classrooms but in all Bavarian state offices.

This paper will first address the findings of the theoretical literature on the implementation of and compliance with court decisions, based on which four hypotheses will be formulated. According to the theoretical literature, political and institutional actors comply with the decisions of constitutional courts enjoying high levels of public support because they fear the negative reactions of the electorate. In other words, it is not worthwhile for political actors to openly (or in a concealed way) sabotage the decision of the Constitutional Court, which enjoys great recognition among voters, because it could lead to serious loss of votes in the next general election. Interestingly, however, in the *Crucifix* case, this hypothesis did not hold up at all. Moreover, rational choice models have not attempted to explain the reasons of this deviance in any way. After a brief presentation of the research methodology, I will outline the historical context of the *Crucifix* decision, take stock of the reactions to the decision, and examine whether it is reasonable to suggest that compliance with the decision was sabotaged. I will further establish that the hypotheses formulated in the theoretical literature should be rejected as far as the *Crucifix* case is concerned. I will then offer an alternative explanation for the *Crucifix* decision, which is considered to be a deviant case.

I Theoretical literature and hypotheses

According to the classical view, the judiciary does not have the means to enforce its own decisions at all, which is one of the reasons why it is considered the least dangerous branch of government. As Alexander Hamilton argued in his essay *Federalist* No 78:

> Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; . . . and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[3]

What Hamilton referred to as the 'efficacy' of court judgments in modern legal language actually means the compliance with court decisions. As the court does not have the means (purse or sword) to enforce its decisions, it must in fact rely on the power of the executive and the legislature, and it is not at all clear to the latter why they should enforce or comply with court decisions that do not benefit them.

Two approaches to examining the reasons of compliance with court decisions can be identified in the modern literature. According to the *instrumental theory*, the actors involved implement the court's decision because it is in their own well-conceived (but selfish) political interest. According to the *norm-based approach,* on the other hand, political actors implement court decisions because, facing legitimate power, compliant behaviour is the default setting.[4] Although the latter approach is not one of the mainstream approaches, and its explanatory power seems to be somewhat weaker, it should also be noted that norm-based compliant behaviour may emerge over time, even if court decisions were originally complied with only due to well-conceived self-interest.[5]

According to the instrumental approach, the court itself can have some influence on whether the addressees comply with its decision: The persuasive power of the reasoning or the clarity (ambiguity) of its language can affect, for example the compliance.[6] The same is true as far as the temporal effect of the decision is concerned: If its decision has only *pro futuro* effect, actors may be more likely to comply with it.[7] At the same time, the court reduces the chances of compliance if the judges formulate dissenting opinions, or if only a narrow majority of the judges lines up behind the decision.[8] In contrast, it increases the chances of compliance if the court is able to set up a monitoring body to track the implementation of the

[3] John Jay, Alexander Hamilton and James Madison: *The Federalist Papers* (New York: New American Library, 1961), 465.

[4] Diana Kapiszewski and Matthew M Taylor, 'Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings', *Law & Social Inquiry* 38, no 4 (2013), 803–835, 819.

[5] Ibid. 822.

[6] Jeffrey K Staton and Georg Vanberg, 'The Value of Vagueness: Delegation, Defiance, and Judicial Opinions', *American Journal of Political Science* 52, no 3 (2008), 504–519, 515; Sebastian Sternberg, *No Public, No Power? Analyzing the Importance of Public Support for Constitutional Review with Novel Data and Machine Learning Methods* [PhD dissertation] (Mannheim: Universität Mannheim, 2019), 141.

[7] Alexei Trochev, *Judging Russia: The Role of the Constitutional Court in Russian Politics 1990–2006* (Cambridge: Cambridge University Press, 2008), 23.

[8] James F Spriggs, 'Explaining Federal Bureaucratic Compliance with Supreme Court Opinions', *Political Research Quarterly* 50, no 3 (1997), 567–593, 571.

decision. Strategically, the court has the opportunity to influence compliance by holding public hearings and thus becoming the focus of media interest, or simply by delivering its decision during an election campaign period, when all important political issues may have a much greater impact.[9] Compliance may also be affected by who the decision applies to, which institutions or administrative bodies should act, the level of complexity of action needed to comply with the court decision, and to what extent it is needed to re-regulate the policy area concerned. If only one actor has to change relatively little, through a relatively simple process, the chances of compliance are obviously much higher than if several complex organisations have to change many things through complex processes.[10] The political actors involved may also sometimes have an interest in the court deciding on sensitive issues and assuming responsibility for it.[11]

In addition, one of the most dominant models in the literature, based on the insights of rational choice theory, assumes that court decisions are most likely to be complied with if the court enjoys significant public support and is able to make its decision visible to the public in an appropriate way, or to put it more simply, that the public will notice and monitor the court's decision.[12] According to the rational choice model, in such situations the political actors will have a rational self-interest in accepting the decision of the court, otherwise it is likely that the voters may punish them in the next election. If the decision of the court which

[9] Jay N Krehbiel, 'The Politics of Judicial Procedures: The Role of Public Oral Hearings in the German Constitutional Court', *American Journal of Political Science* 60, no 4 (2016), 990–1005; Jay N Krehbiel, 'Elections, Public Awareness, and the Efficacy of Constitutional Review', *Journal of Law and Courts* 7, no 1 (2019), 53–79.

[10] Spriggs, 'Explaining Federal Bureaucratic Compliance'.

[11] Mark A Graber, 'The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary', *Studies in American Political Development* 7, no 1 (1993), 35–73; George I Lovell, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy* (Cambridge: Cambridge University Press, 2003); Scott E Lemieux and David J Watkins, 'Beyond the "Countermajoritarian Difficulty": Lessons from Contemporary Democratic Theory', *Polity* 41, no 1 (2009) 30–62.

[12] Georg Vanberg, 'Legislative-Judicial Relations: A Game-Theoretical Approach to Constitutional Review', *American Journal of Political Science* 45, no 2 (2001), 346–361; Vanberg, *The Politics of Constitutional Review in Germany;* Vanberg 'Constitutional Courts in Comparative Perspective'; Tom S Clark, *The Limits of Judicial Independence: Political Economy of Institutions and Decisions* (Cambridge: Cambridge University Press, 2010), 17 and 159; Krehbiel, 'The Politics of Judicial Procedures'; Krehbiel, 'Elections'; Sebastian Sternberg et al., 'Zum Einfluss der öffentlichen Meinung auf Entscheidungen des Bundesverfassungsgerichts. Eine Analyse von abstrakten Normenkontrollen sowie Bund-Länder-Streitigkeiten 1974–2010', *Politische Vierteljahresschrift* 56, no 4 (2015), 570–598, 574; Clifford J Carrubba and Christopher J Zorn, 'Executive Discretion, Judicial Decision-Making, and Separation of Powers in the United States', *Journal of Politics* 72, no 3 (2010), 812–824; Matthew EK Hall, 'The Semiconstrained Court: Public Opinion, the Separation of Powers, and the US Supreme Court's Fear of Nonimplementation', *American Journal of Political Science* 58, no 2 (2014), 352–366; Kevin T McGuire and James A Stimson, 'The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences', *Journal of Politics* 66, no 4 (2004), 1018–1035.

enjoys high level of public support is not implemented by the political actor concerned, and this resonates strongly with the public, voters will punish them at the ballot box.[13] The premise of this suggestion is that although the courts have neither the purse nor the sword, high level of public support and public awareness together give them enough strength and authority to 'enforce' the obedience of political actors, or at least ensure that they do not dare to oppose court decisions in any form. Reading the story conversely, one may also make the hypothesis based on the rational choice models that opposing and sabotaging the decisions of courts with high public support can simply imply too high political costs for the political actors.[14]

In order to maintain this diffuse public support and thus ensure the obedience of other branches of government, the court must be very careful not to turn against the majority view of the society systematically and regularly.[15] This, in turn, may lead to the court actually representing the will of the majority, which challenges the so-called counter-majoritarian difficulty[16] thesis elaborated first by Alexander Bickel. As empirical data show, Bickel's thesis proved to be less relevant in practice, since courts tend to make decisions that reflect the opinion of the majority of the society. This fact has been highlighted in the literature, not only in relation to the US Supreme Court[17] but also in quantitative and qualitative works which have reached the same conclusion with regard to the BVerfG.[18] On the other hand, researchers have analysed cases where not only the Constitutional Court enjoyed high level of public support but also the incumbent political force had good reason to

[13] Vanberg, *The Politics of Constitutional Review in Germany,* 176.

[14] Of course, there are many problems with these assumptions, one is that courts are generally assumed to have high levels of social support, but usually research focuses only on courts for which this is really true. However, such cases may be an exception, see Amanda Driscoll and Michael J Nelson, 'The Costs and Benefits of Court Curbing: Experimental Evidence from the United States', 2018, 5; Sternberg, *No Public, No Power?,* 9. The French Constitutional Council has much less social support than the German one, and accordingly has much less room for manoeuvre, and the implementation of its decisions is much more questionable, see ibid. 139.

[15] Sternberg et al. 'Zum Einfluss', 589; Sternberg, *No Public, No Power?,* 4.

[16] Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962), 16.

[17] Robert A Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker', *Journal of Public Law* 6, no 2 (1957), 279–295; Clark, *The Limits of Judicial Independence,* 160; Jonathan P Kastellec, 'Empirically Evaluating the Countermajoritarian Difficulty: Public Opinion, State Policy, and Judicial Review Before *Roe v Wade*', *Journal of Law and Courts* 4, no 1 (2016), 1–42; Keith E Whittington, '"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court', *American Political Science Review* 99, no 4 (2005), 583–596; Sternberg et al., 'Zum Einfluss', 589.

[18] For quantitative works, see Vanberg, *The Politics of Constitutional Review in Germany;* Sternberg et al., 'Zum Einfluss'. For qualitative work, see Uwe Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses: Der Willensbildungs- und Entscheidungsprozess des Bundesverfassungsgerichts* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2010).

expect a re-election due to its high level of public support.[19] This latter circumstance may prompt the court to self-limitation, as it may fear that its decision will be sabotaged in some way by popular political actors.[20]

While empirical evidence suggests that courts tend to reach decisions which are in harmony with the majority views of the society,[21] more recently, convincing theoretical arguments supported by some empirical evidences have identified conditions under which the self-limitation of courts plays an important role.[22] The deferential behaviour of the political actors is not necessarily guaranteed if the close alignment of voters with their parties overrides the respect for and the high public support of the court. Such conditions may lead committed party supporters to approve the sabotaging of a court decision, if it is done by their favourite party. For this reason voters will not punish, but rather reward their favourite party in such cases.[23] This thesis thus argues that voters' attitude to the courts depends on their party affiliation: If a court promotes the agenda of their favourite party, they consider

[19] Matthew EK Hall and Joseph D Ura, 'Judicial Majoritarianism', *Journal of Politics* 77, no 3 (2015), 818–832; Schroeder, *Political Constraints,* 51.

[20] Mario Bergara, Barak Richman and Pablo T Spiller, 'Modeling Supreme Court Strategic Decision Making: The Congressional Constraint', *Legislative Studies Quarterly* 28, no 2 (2003), 247–280; Tom S Clark, 'The Separation of Powers, Court Curbing, and Judicial Legitimacy', *American Journal of Political Science* 53, no 4 (2009), 971–989; Hall, 'The Semiconstrained Court'; Michael A Bailey and Forrest Maltzman, *The Constrained Court: Law, Politics, and the Decisions Justices Make* (Princeton: Princeton University Press, 2011); Schroeder, *Political Constraints,* 48.

[21] For American aspects, see William Mishler and Reginald S Sheehan, 'The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions', *American Political Science Review* 87, no 1 (1993), 87–101; Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2009); Lee Epstein and Andrew Martin, 'Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're not Sure Why)', *University of Pennsylvania Journal of Constitutional Law* 13, no 2 (2010), 263–281; Christopher J Casillas, Peter K Enns and Patrick C Wohlfarth, 'How Public Opinion Constrains the US Supreme Court', *American Journal of Political Science* 55, no 1 (2011), 74–88; Kastellec, 'Empirically Evaluating'; Hall and Ura, 'Judicial Majoritarianism'. For German aspects, see Rudolf Gerhard, 'Die Medien haben Einfluss auf die Justiz – aber welchen? Eine Umfrage und ihre Ergebnisse' in Organisationsbüro der Strafverteidigervereinigungen (ed.), *Erosion der Rechtsstaatlichkeit: Werteverfall or Paradigmenwechsel?* (Berlin: Schriftenreihe der Strafverteetigervereinigungen, 2001); Hans M Kepplinger and Thomas Zerback, 'Der Einfluss der Medien auf Richter und Staatsanwälte', *Publizistik* 54, no 2 (2009), 216–239; Christoph Hönnige and Thomas Gschwend, 'Das Bundesverfassungsgericht im politischen System der BRD – ein unbekanntes Wesen?', *Politische Vierteljahresschrift* 51, no 3 (2010), 507–530.

[22] Jeffrey K Staton, 'Judicial Policy Implementation in Mexico City and Mérida', *Comparative Politics* 37, no 1 (2004), 41–60; Amanda Driscoll and Michael J Nelson, 'Judicial Selection and the Democratisation of Justice: Lessons from the Bolivian Judicial Elections', *Journal of Law and Courts* 3, no 1 (2015), 115–148; Gretchen Helmke, *Institutions on the Edge: The Origins and Consequences of Inter-Branch Crises in Latin America* (Cambridge: Cambridge University Press, 2017); Schroeder, *Political Constraints,* 32.

[23] Bartels and Kramon, 'Public Support'; Driscoll and Nelson, 'Costs and Benefits', 32.

it a legitimate institution and support it as such; if not, they will also withdraw their support from the court.[24] As a result, a ruling party or coalition, the voter base of which is closely tied to its favourite party, finds it easier to sabotage the court's decision because it does not have to fear alienating voters.[25]

Based on the above findings of the theoretical literature, two main hypotheses and two sub-hypotheses may be formulated:

(1) if courts wish to maintain their diffuse public support, the majority view of the *society* will be reflected in court decisions;
    a) if the political majority has good reason to expect to remain in power, then the *political* majority's opinion will be reflected in court decisions;
(2) if the courts have a high level of public support, the political actors will *comply* with court decisions;
    b) if the political majority has strongly committed supporters, the political actors may *defy* court decisions.

II Research methodology

The following section will attempt to test the four hypotheses formulated on the basis of the theoretical literature by presenting a case study. As a preliminary note, it should be stressed that the selected case refutes three of the four hypotheses, and further reasoning will be needed for the fourth hypothesis, which is why the *Crucifix* case will be considered a clearly deviant case. Process tracing seems to be the best method of explaining the causes of deviant cases.[26] Large-N studies relying on comprehensive theories and hypotheses, usually do not give explanation to deviant cases, as their primary purpose is to provide some explanation for the normal cases that make up the vast majority. Because necessities and regularities in social sciences cannot by their nature be universal, large-N social science studies usually do not aim to discover universal laws of social interactions but to identify probabilities. The explanation of the deviant case is thus better served by examining case studies, and to do so effectively, the method of process tracing is the best strategy.[27] Furthermore, case studies based on such process tracing methods may contribute to the modifications of general theories, refinement

[24] Brandon L Bartels and Christopher D Johnston, 'On the Ideological Foundations of the Supreme Court Legitimacy in the American Public', *American Journal of Political Science* 57, no 1 (2013), 184–199.

[25] However, it is also pointed out that in less polarised countries, such as in Germany for example, this kind of attitude towards the courts is less decisive, Driscoll and Nelson, 'Costs and Benefits', 31.

[26] Alexander L George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, MA: MIT, 2005), 215.

[27] Andrew Bennett and Jeffrey T Checkel (eds), *Process Tracing: From Metaphor to Analytic Tool. Strategies for Social Inquiry* (Cambridge: Cambridge University Press, 2014), 13.

of the theoretical framework of large-N studies, or they can lead to contingent generalisations that may clarify the conditions under which deviant outcomes of events can be expected.[28]

III Historical context of the *Crucifix* decision

An important element of the historical context of the *Crucifix* decision is that the Bavarian Constitution, adopted in 1946, mentions humility towards God as one of the main educational goals to be achieved in public schools,[29] while referring to two types of public educational institutions: Christian denominational schools *(Bekenntnissschule)* on the one hand, and 'Christian community schools' *(Gemeinschaftsschulen),* in fact ecumenical schools, on the other. In practice, however, the establishment of the latter was more the exception than the norm, and their establishment often encountered serious administrative obstacles; as such, in deeply Catholic Bavaria from 1945 onwards, the majority of Bavarian students attended Christian denominational (primarily Catholic) schools.[30] By the mid-1960s, voices that considered denominational public schools to be obsolete and demanded equality for 'community schools' *(Gemeinschaftsschulen)* were becoming stronger.[31] The constitutional amendment proposed by the Bavarian Government, led by the Christian Socialists, abolished the distinction between denominational and ecumenical schools, but explicitly included a requirement in the constitution that pupils in all schools be raised on the basis of Christian teachings.

Incidentally, the Social Democrats also approved this compromise solution (as in the case of the 1946 constitution), so after the 1968 amendment to the Bavarian Constitution, which was also approved in a referendum,[32] Article 135 of the Bavarian Constitution provided that pupils in all public schools in Bavaria were to be taught and raised in accordance with the principles of the Christian denominations, the details of which were laid down in the Public Education Act of 1983, as amended.[33] Section 13 of the Act, referring to the above-mentioned Article 135 of

[28] David Collier, 'Understanding Process Tracing', *Political Science & Politics* 44, no 4 (2011), 823–830, 824.

[29] Bavarian Constitution of 1946, Article 131.

[30] Although the Social Democrats (SPD) argued in favour of community schools, they recognised the traditions of denominational schools in deeply Catholic Bavaria, and given the fact that the CSU alone had a nearly two-thirds majority in the Bavarian Constituent Assembly, they, at the end, abandoned lobbying for more community schools, see Fritz Schäffer, 'Bekenntnisschule', 2006.

[31] Fritz Schäffer, 'Gemeinschaftsschule', 2006.

[32] With a turnout of 40.7 per cent, 76.3 per cent of participants agreed with the constitutional amendment, see Otmar Jung, 'Volksabstimmungen', 2006.

[33] Article 135 of the Bavarian Constitution of 1946.

the Bavarian Constitution, provided that the cross was to be displayed in Bavarian public schools. From a Bavarian point of view, then, basically everything was quite clear: The Constitution of the Bavarian state stipulated the obligation to teach in public schools on the basis of Christian principles. This constitutional principle was implemented by the Public Education Act of 1968 as amended in 1983, which required the Crucifix to be hung on the wall of all classrooms. Why, then, did this provision become a source of intense conflict?

The series of events leading to the BVerfG's *Crucifix* decision date back to the mid-1980s.[34] In 1986, the parents of three Bavarian siblings complained that their children were adversely affected by the school's worldview, which was different from that of the family; moreover, they could not avoid being affected by the worldview of the school, since the cross hung on the wall of the classroom of every public school. Following Rudolf Steiner's teachings, the parents were adherents of anthroposophy. First they attempted to persuade the leaders of the local school in Reuting to remove the cross from the wall of the classroom, but were unsuccessful, despite compromise solutions being suggested (instead of a Crucifix, a smaller cross was placed over the door). In addition, when their younger children were enrolled in the same school, the controversy between the school and parents flared up again, and parents now demanded that the Crucifix be removed from the walls of every classroom and the corridors, as their children would be faced with it there, too. Although their children were temporarily admitted to a Waldorf school, they were unable to fund attending private school, so the case was referred to the Bavarian Administrative Court (Bayerischer Verwaltungsgerichtshof) in 1991, demanding that crosses should be removed from all rooms their children should attend during their compulsory education. The Bavarian Administrative Court dismissed the petition, and the parents appealed to the German Federal Constitutional Court, seeking the annulment of the Bavarian Administrative Court's decision and of the relevant passage of the Public Education Act, as they violated the fundamental right to freedom of faith and conscience enshrined in Article 4(1) of the German Basic Law (Grundgesetz).

In its decision of 16 May 1995 (1 BvR 1087/91), the BVerfG upheld the petition and annulled not only the decision of the Bavarian Administrative Court but also the relevant passages of the Public Education Act, since they violated the fundamental right of 'negative religious freedom'. By the notion of negative religious freedom, the court meant that citizens of the state did not have to 'confront' religious doctrines with which they disagreed. In line with this decision, which was only made public on 10 August, crosses in the classrooms of the Bavarian public schools were supposed to be removed, although this never took place in practice (except in a few exceptional cases). The crosses still hang on the walls of the classrooms in Bavarian state public educational institutions and, since 1 June 2018, they are required to be hung not only

[34] For details on the case, see the decision of the Bundesverfassungsgericht, 1 BvR 1087/91.

in the classrooms but also at the entrances of all Bavarian state offices. In April 2018, as a kick-off of the campaign of the Bavarian parliamentary elections in October 2018, Bavarian Prime Minister Markus Söder passed a government decree requiring the cross to also be placed on the wall in Bavarian state offices. Surely, in Bavaria, crucifixes were already hanging in many places (including in public buildings), and Söder himself admitted that its administration did not systematically check whether the decree was being implemented.[35]

The *Crucifix* cases of 2018 and of 1995 have, nevertheless, a highly important common denominator. On both occasions, the question revolved around whether the Crucifix was primarily a religious or a cultural symbol more or less deprived of its religious character. The Söder Government, learning from the controversy surrounding the 1995 Constitutional Court ruling and, of course, from the second *Lautsi* ruling of the European Court of Human Rights (ECtHR),[36] referred to the Cross in the relevant government decree explicitly as a cultural and historical feature of Bavaria *('als Ausdruck der geschichtlichen und kulturellen Prägung Bayerns'),* and indeed the religious dimension did not even appear in the official document.[37] In subsequent statements, the Bavarian Prime Minister made it even clearer that the Cross was not only the ultimate symbol of Christianity, but also a cultural symbol of Western civilisation: 'The cross is a fundamental symbol of cultural identity.'[38] This argument, that the Cross is not exclusively nor primarily a religious, rather a cultural symbol, has also been of great significance in the Crucifix debate, but in its 1995 decision, the German Constitutional Court decided to consider the Cross to be primarily a religious symbol. The mandatory display of religious symbols in public schools is incompatible with the principle of state neutrality and violates the individual's right to (negative) freedom of religion guaranteed by Article 4 of the German Basic Law, which is why the Cross must be removed from the wall of all public schools, according to the BVerfG verdict in 1995.

[35] 'Söder ist offen für Kritik am "Kreuzerlass"', *Domradio,* 20 April 2019.

[36] The interpretation of the Crucifix as a cultural or religious symbol has already given rise to more serious tensions in other European countries, and, in the European arena, the so-called 2009 and 2011 *Lautsi* decisions of the ECtHR contributed to the legal clarification of the *Crucifix* issue (or just to the issue becoming even more controversial). However, this paper does not undertake legal dogmatic analysis; see András Koltay, 'Európa és a feszület jele: a Lautsi and Others v. Italy ügy alapvető kérdéseiről', in Levente Tattay, Anett Pogácsás and Sarolta Molnár (eds), *Pro vita et scientia. Ünnepi kötet Jobbágyi Gábor 65. születésnapja alkalmából* (Budapest: Szent István Társulat, 2012); Balázs Schanda and András Koltay, 'A Lautsi-ügy a feszületről az állami iskola osztálytermében: a vallási jelképek használatának megengedettsége a semleges állam közéletében', *Jogesetek Magyarázata* no 4 (2011), 77–85.

[37] Allgemeine Geschäftsordnung für die Behörden des Freistaates Bayern (AGO) vom 12 Dezember 2000 (GVBl. S. 873; 2001 S. 28) BayRS 200-21-I (§§ 1–38) – Bürgerservice, para 28.

[38] Markus Söder: 'Bayern schreibt Kreuze in allen Staatsbehörden vor', *Die Zeit,* 24 April 2018.

IV The response: Threats, petitions, demonstrations and amendments to the law

Since the BVerfG published its famous decision in 1995, a lot of water has flowed down the Danube, and the issue of Crucifix and Christianity has reached the wider European stage, first in connection with the debate on the European Constitution and then in ECtHR judgments (*Lautsi No 1* and *No 2* cases). Today, from a legal or legal dogmatic point of view, the debate, one of the starting points of which was the BVerfG's *Crucifix* decision, seems to have peaked and reached its standstill.[39] However, the silence of legal or legal dogmatic disputes and the Court decisions themselves do not always mean the final closure of a case. It is not just a question of how the courts' own views may change decades later but also of how the parties, political actors or even the social groups concerned react to the court's decision immediately after the decision is made public. With regard to the first *Lautsi* decision, for example, after losing the case, the Italian state appealed, and even certain groups in Italian society expressed their dissatisfaction with the outcome, but it would be a gross exaggeration to call this a radical mobilisation of Italian or European public opinion.[40] Furthermore, after the second *Lautsi* decision of the ECtHR, the waves seemed to have subsided and the issue of the Crucifix receded from view not only among lawyers and stakeholders but also on the European stage and in European societies. However, that was not the case following the 1995 *Crucifix* decision of the BVerfG. Although the topic of the Cross placed on the walls of classrooms was not the subject of German public discourse at all prior to the decision of the German Federal Constitutional Court (or more precisely before the decision was made public on 10 August 1995),[41] when the decision was finally made public, everything changed at once.

'Die Kreuze bleiben' ('The crosses remain in place') insisted Edmund Stoiber, the then Prime Minister of Bavaria a few days after the BVerfG published its *Crucifix* decision, which has since become famous, on 10 August 1995. Peter Gauweiler, Chairman of the Bavarian ruling party, a member of the CSU in Munich, pointed out that the Court's decision might remain mere words: 'It will be a measure of our political courage to see if we actually enforce the court ruling.' Hans Maier, a former Bavarian Minister of Culture, was clearer than this when he stated that 'resistance to such nonsense and arrogance in the supreme judicial forum is not only permissible

[39] The ECtHR Chamber first ruled in the *Lautsi* case in 2009 similarly to the BVerfG's 1995 decision, and this decision was reviewed by the Grand Chamber in 2011, finding that the fundamental right to negative religious freedom was not violated if there is a cross hanging on the wall of Italian public educational institutions. For a legal analysis of the case, see Schanda and Koltay, 'A Lautsi-ügy'.

[40] Dominic McGoldrick, 'Religion in the European Public Square and in European Public Life: Crucifixes in the Classroom?', *Human Rights Law Review* 11, no 3 (2011), 451–502, 470.

[41] Gary S Schaal, 'Crisis! What Crisis? The "Crucifix-Beschluss" and Seine Folgen', in Robert C van Ooyen and Martin HW Möllers (eds), *Das Bundesverfassungsgericht im politischen System* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2015), 275.

but downright mandatory'. Theo Waigel, President of the CSU and not incidentally Minister of Finance for Chancellor Helmut Kohl (1988–1998), also pointed out vaguely but rather suggestively that this decision could even have the effect of radically reshaping the BVerfG.[42] Cardinal Friedrich Wetter of Munich recalled the period of the Nazi regime in connection with the court decision: According to the cardinal, the Nazis were the last ones to remove the cross from the school classroom wall; accordingly, it is necessary to act in the same way as against the Nazis on this matter, that is to resist the implementation of the decision.[43] A Christian Socialist MP from the Bavarian State Parliament, Sepp Ranner, directly threatened to beat up the judges: 'Let the judges and complainants come here themselves and take the crosses off the classroom wall. In any case, we country folk will be waiting for them with flails.'[44]

Public dissatisfaction was not limited to Bavaria: Joachim Hörster, leader of the CDU and CSU joint faction of the federal legislature (Bundestag), initiated a debate on how to protect the majority against the tyranny of the minority, and Rupert Scholz, deputy leader of the CDU and CSU faction, stated that 'the Federal Constitutional Court is not the Pope of the Republic', while some joked that the judges should be hanged in place of the crosses.[45] Death threats were also sent to the judges, and Dieter Grimm, judge of the BVerfG, was asked by his American colleagues if the German Chancellor must now really send troops to Bavaria to implement the BVerfG's decision, referring to an act of President Dwight D Eisenhower, who sent federal troops to Arkansas to enforce the US Supreme Court's decision in the *Brown v Board of Education* case there.[46]

The politicians, public figures and Catholic faithful concerned expressed a great deal of dissatisfaction and outrage, not only orally but also in writing: More than 250 thousand signatures were collected and sent to the judges in Karlsruhe, while the *Bild* daily newspaper also set up a telephone line where Bavarians could voice their dissatisfaction with the Court's decision, although many called the Karlsruhe Court directly instead. According to a report in the *Süddeutsche Zeitung,* the lines and fax machines were very busy in Karlsruhe, while the door-staff were also busy with those who wanted to express their dissatisfaction in person.[47] If that was not enough, barely a month later (at least in Munich), the ire that the BVerfG's decision had provoked spilled onto the streets: On 23 September 1995, the Odeonsplatz in Munich was filled with people, twenty-five thousand protested against the Court's decision. Never in

42 Rolf Lamprecht, *Das Bundesverfassungsgericht. Geschichte und Entwicklung* (Bonn: Bundesentrale für politische Bildung, 2011), 246.

43 Uwe Wesel, *Der Gang nach Karlsruhe. Das Bundesverfassungsgericht in der Geschichte der Bundesrepublik* (München: Karl Blessing, 2004), 317.

44 'Das Kreuz ist der Nerv', *Der Spiegel,* 14 August 1995.

45 Justin Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951–2001* (Oxford: Oxford University Press, 2015), 263.

46 Ibid. 264.

47 Wesel, *Der Gang nach Karlsruhe,* 318.

the history of the Federal Republic of Germany had a court decision triggered such a mass movement. Bavarian Prime Minister Stoiber spoke at the demonstration about how in some cases the minority must also be tolerant of the majority. 'We respect the Court's decision, but we do not accept it in substance', he added, concluding his speech with what he had already emphasised in his interview the day after the decision was made public: 'The crosses remain in place.' Cardinal Wetter, referring to the Edict of Nantes in 1598, spoke to the masses of an 'edict of intolerance' in connection with the *Crucifix* decision, and again referred to the parallel with the Nazi dictatorship.[48]

Commentators from local newspapers, editorials in the national dailies and the majority of constitutional commentators, expressed their dissatisfaction.[49] An analysis of the discourse in the national dailies also showed that the vast majority of opinion articles did not accept the BVerfG's argument for state neutrality and focused much more on the fact that Germany is a Christian-based political community.[50] Only a minority of opinion articles advocated in favour of the BVerfG's argument; moreover, 40 per cent of the articles argued subtly or in a less sophisticated way that the court decision could be ignored. The latter was problematic because the BVerfG was now forced to suffer serious losses not only in the symbolic but also in the instrumental dimension. In other words, there was an increased chance that, in addition to open criticism, disobedience could become more widespread – at least in connection with the *Crucifix* decision.[51] Newspaper op-eds were fundamentally negative in tone; only in the late 1970s had so many negative-toned articles appeared about the Federal Constitutional Court as in 1995.[52] In addition, opinion poll data showed that more than half of the respondents clearly considered the BVerfG's decision to be a bad decision, and only 22 per cent of them considered it correct.[53] The general public's perception of the Federal Constitutional Court also changed significantly: While previously half of Germans held a good opinion of the Federal Constitutional Court, in 1995 it was only 36 per cent, while the BVerfG's general confidence index fell to 40 per cent, compared with the 1980s when it was well above 50 per cent.[54]

The tension was therefore palpable, and after the demonstration and the wave of protests, the big question of the autumn remained what the Bavarian legislature would do. Two days before Christmas, on 23 December 1995, the Bavarian legislature passed an amendment to the relevant Public Education Act, which ultimately ensured that the crosses would remain in place, and be removed from the classroom wall only

48 Barbara Supp, 'Heiliger Edmund, bitt' für uns', *Der Spiegel,* 2 October 1995.
49 Schaal, 'Crisis!', 271; Collings, *Democracy's Guardians,* 264.
50 Schaal, 'Crisis!', 272.
51 Ibid. 274.
52 Oliver Lembcke, *Über das Ansehen des Bundesverfassungsgerichts: Ansichten und Meinungen in der Öffentlichkeit 1951–2001* (Berlin: Berliner Wissenschafts, 2006), 47.
53 Schaal, 'Crisis!', 271.
54 Hans Vorländer and Gary S Schaal, 'Integration durch Institutionenvertrauen?', in Hans Vorländer (ed.), *Integration durch Verfassung* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2002), 357.

in very exceptional cases. While the BVerfG's decision stated that no cross could be hung anywhere on the walls of Bavarian public education institutions, the reality was quite different. The amendment brought about a change in only two areas: On the one hand, the amended law on the Cross now explicitly stated that it belonged to the historical and cultural peculiarities of Bavaria and should therefore be present in all classrooms, that is, the religious dimension of the Cross was pushed into the background.[55] The second sentence suggested that the main educational goals set out in the Bavarian Constitution should be pursued on the basis of Christian and Western values while preserving religious freedom. The most significant addition was in the third sentence: If parents concerned objected to a Crucifix hanging on a wall, they can raise this with the head of the school, but only if they can give a *serious* and *acceptable* reason to demonstrate that their religion or worldview is being violated by the Cross. In this case, the school head shall 'attempt' *(versucht)* to resolve the situation. If no agreement can be reached with the parents concerned, the school head has the right to enforce a solution in the individual case that respects the religious freedom and worldview of the child of the parents concerned, but which also takes into account the religious beliefs of the classmates. In addition, 'the will of the majority must be taken into account as far as possible' *('dabei ist auch der Wille der Mehrheit soweit möglich zu berücksichtigen'),* states the text of the amended law. Thanks to this amendment to the law, the Cross remained on the walls of the classrooms, and if one parent did not like it then the head of the school was authorised to settle the conflict.

Of course, this amended version of the Bavarian Public Education Act was also challenged in court, first in a case before the Bavarian Constitutional Court (Bayerischer Verfassungsgerichtshof): In its decision of 1 August 1997, the Bavarian Constitutional Court ruled that, in the event of a conflict, the request of the parent concerned must be granted against the will of the majority if there is *serious* and *foreseeable* reason to conclude that the party concerned is overburdened by the sight of the cross.[56] What represents a serious and foreseeable reason is, of course, again left to the school head alone. For this reason, the case was referred again to the BVerfG, but the First Chamber of the First Senate of the German Federal Constitutional Court refused, for formal reasons, to consider the merits of the petition, as it did not consider the matter to be of fundamental importance from a constitutional point of view. At the same time, the judges also pointed out that the (Bavarian) legislature has a great deal of leeway in trying to resolve conflicts between negative and positive religious freedom, and claimed that the Bavarian legislature had fulfilled its obligation to regulate the resolution of conflicts by amending the law.[57] Whether this rejection was correct, in a legal dogmatic sense, we will not, of course, go into, since the purpose of this paper is not to examine the correctness of the Court's

[55] Bayerisches Gesetze über das Erziehungs und Unterrichtswesen vom 23 December 1995.
[56] Entscheidung des Bayerischen Verfassungsgerichtshofs vom 1 August 1997 – Vf. 6-VII-96.
[57] Beschluss der 1. Kammer des Ersten Senats vom 27 Oktober 1997 – 1 BvR 1604/97.

decisions, but to explore the reasons leading to the *Crucifix* decision. However, it is sure that, compared to the BVerfG's 1995 decision, it showed an almost complete *volte-face* with this new, negative decision, as it did not even examine the merits of the complaints, while indicating that the responsibility of the legislature is to settle the conflict between positive and negative religious freedom. As a result, it no longer insisted on removing the crosses from the walls of state-run schools.[58]

V Non-compliance with the court decision and rebuttal of the hypotheses

A Non-compliance with the court decision

The first question to be asked in connection with the 1995 *Crucifix* case concerns the implementation of the BVerfG's decision. It is undoubtedly true that the Bavarian legislature amended the Public Education Act, allowing at least a minimal possibility of resolution in the event of a conflict. Of course, the key question is whether placing the 'remedy' option in the hands of school leaders will really pass the test of access to justice – and there can certainly be serious doubts about that. In any event, it is clear that in 1997 the BVerfG, which was otherwise at the forefront of the protection of fundamental rights, no longer saw anything objectionable in the amended Public Education Act. The extent to which the 1997 decision of the German Federal Constitutional Court was influenced by the wave of protests that accompanied the 1995 decision is, of course, very difficult to establish, but it seems certain that it would have been much stricter (and more consistent) in its second decision had it not had to face the forms of protest outlined above during 1995.

It is absolutely clear that the BVerfG's 1995 decision not only explicitly stated that nowhere in public schools could a Cross hang on the wall of classrooms but also that the spirit of reasoning made it clear that, according to the BVerfG, there should be no place in Germany where students have to encounter a Crucifix within the walls of state-run schools. The intent and purpose was clear: Crosses could not hang on the walls of public schools. With the benefit of hindsight, it is clear that the BVerfG's 1995 decision has been almost completely neglected – or, to put it more severely, the opposite became reality. A substantial international literature has emerged on compliance with court decisions and on the concept and measurability

[58] One further development is worth mentioning: in 1999, the Federal Administrative Court (Bundesverwaltungsgericht), when examining a specific case, concluded that the amended Bavarian Public Education Act should be interpreted in such a way that the simple fact that the parents declare that they are atheists or have anti-religious views can be treated as a serious and foreseeable reason (BVerwG 6 C 18.98). However, since the Federal Administrative Court ruled only in individual cases, that is, its decision was not *erga omnes,* crosses were in fact removed from the walls of Bavarian public educational institutions only in individual cases where the parents took the case to court and won there.

of compliance – although it is also true that the problem of conceptualisation and measurability raises very serious questions. According to Diana Kapiszewski, a court decision is implemented when the relevant actors commit the act (or merely refrain from committing the act) that the court ordered (or forbade) in its decision.[59] Compliance therefore has an impact on the behaviour of the actors involved, on legal regulations and thus (if all goes well) on the state of affairs. Of course, court decisions are often only partially implemented and, as a result, the extent of their implementation should be placed on some kind of a scale. In addition, it should be borne in mind that the actors involved may, in certain circumstances, override the court's decision or even retaliate against the court on the pretext of a decision.

In any event, with regard to the case examined here, the original decision did not declare the Bavarian Public Education Act unconstitutional because there was no possibility of legal remedy or access to justice, but because it encroached on the fundamental right to (negative) freedom of religion (Article 4(1) of the Basic Law). That is, the court did not object the deficiencies of legal remedy, but sought to give a full guarantee of negative religious freedom in its decision, by removing the Cross, rather than introducing a somewhat weak conflict resolution procedure. In light of this, with regard to the *Crucifix* decision, it can be stated with absolute certainty that this is a case located at one of the endpoints (the non-compliance end) of the compliance scale. The *Crucifix* decision stipulated removing the Cross from the walls of public schools (in general, without exception). In fact, however, this never happened (or only in very exceptional cases). What exactly may have been the reason for the 'sabotage' of the decision, is a question that we will seek to answer based on the assumptions of the theoretical literature, on the one hand, and on the method of process tracing, on the other.

B Rebuttal of theory-based hypotheses

With regard to the theory-based hypotheses, it is clear that hypotheses (1), a) and (2) did not hold up at all in the *Crucifix* case. On the one hand, the verdict of the BVerfG stood in sharp contradiction to the opinion of the vast majority of the public and the political party (the CSU) which enjoyed high public support, thus the court risked a significant reduction in its public support, which could have significantly limited its room for manoeuvre against political actors [rebuttal of hypotheses (1) and a)]; on the other hand, the Bavarian Government quite simply sabotaged the implementation of the BVerfG's decision in spite of the fact that the Court has previously enjoyed consistently widespread public support, and that its decisions were constantly monitored by the German public.[60] Based on a rational choice model, this could have posed a danger to the Bavarian

[59] Kapiszewski and Taylor, 'Compliance', 805.

[60] Lembcke, *Über das Ansehen,* 47; Vorländer and Schaal 'Integration durch Institutionenvertrauen?'; Schaal, 'Crisis!'.

Government, in that voters would punish it. Nevertheless, the Bavarian parliamentary majority opted to sabotage the BVerfG's decision [rebuttal of hypothesis (2)]. Although the close party affiliation may, to some extent, explain the disobedience of the Bavarian legislators toward the *Crucifix* decision [hypothesis b)], overall, the hypotheses based on the rational choice literature do not seem to have sufficient explanatory power in connection with the *Crucifix* decision.

VI Explanation of the deviant case

A Why did the court behave in a deviant manner?

What could be the reason that neither the first hypothesis nor the second hypothesis were substantiated? Why did not the judges go along the majority of society, given that this would have been strategically rational on their part? And why did the Bavarian Government openly oppose the decision delivered by the BVerfG, if on the basis of the rational choice model, it could have been expected that the Bavarian parliamentary majority would behave in a deferential manner? Simply put, what could be the reason for the strategic or rational choice models not being substantiated for either the BVerfG or the Bavarian Government? Why was the BVerfG's decision not implemented at the end? The answer is complicated enough in both cases, so it is worth taking a closer look at the matter.

As for the first hypothesis, based on a thorough examination of the circumstances and the judges' statements, it seems clear that the judges did not think strategically about the *Crucifix* case, did not consciously take into account the possible social and political consequences of the decision, and that they *were not aware* that the issue could generate serious political and social conflicts. The possible responses by political actors and stakeholders were not taken into account at all; no consideration was given to the reactions that the decision could provoke in the majority of Bavarian voters or on the part of the Bavarian Government, and the extent to which these reactions could destroy the Court's authority or reduce the trust in it. What are the clear signs that judges neither thought nor acted in accordance with the strategic model of judicial behaviour?

First of all, it must be noted that, prior to the Court's decision, public political discourse had taken no interest in the case at all in Bavaria nor in Germany. The case was not covered in either the regional or national press. Gary Schaal points out that court decisions (1) *can settle* conflicts which have previously erupted, but (2) they may even contribute to *escalating* prior conflicts.[61] On the other hand, (3) it is also conceivable that

[61] Gary S Schaal, Kelly Lancaster and Alexander Struwe, 'Deutungsmacht und Konfliktdynamiken – Eine Analyse der Akzeptanz von Entscheidungen des Bundesverfassungsgerichts', in Christian Boulanger, Anna Schulze and Michael Wrase (eds), *Die Politik des Verfassungsrechts: Interdisziplinäre und vergleichende Perspektiven auf die Rolle und Funktion von Verfassungsgerichten* (Baden-Baden: Nomos, 2013), 196.

no social conflict of a more serious nature will be registered in connection with the given case, either before or after the decision. The conflict dynamics of the *Crucifix* decision, on the other hand, tend to fall into a category (4), whereby a more serious social conflict erupted as a result of the decision; prior to the decision, no heated debates were raging in Germany or even Bavaria over the issue of hanging crosses on the walls of school classrooms. This factor is worth emphasising because the judges did not add fuel to the fire with their decision – as there were not even any embers.

This lack of pre-existing social conflict may have contributed greatly to the fact that judges were unaware of the possible consequences of the decision, did not consider the consequences when making their decision, and were therefore quite surprised by the wave of reaction that swelled after the decision was made public. Although they admitted that they were aware that their decision would be criticised, they did not anticipate at all that they would encounter such widespread, significant, and massive resistance.[62] In retrospect, many judges considered that it would have been better to have had public hearings on the *Crucifix* case, as this would have allowed the public to be prepared to the decision well in advance; those interested in the case could have been informed and the press could have covered the case more thoroughly, with the result that it may have been easier for the public to accept the decision while at the same time it could have 'forced' its implementation.[63] In addition, several judges subsequently considered that not only a public hearing would have been necessary, but also the disclosure of concurring opinions, as through this the Court would have shown that the decision was ultimately a compromise solution.[64] The lack of a conscious account of the external circumstances and possible reactions to the court's decision is also indicated by the fact that the *Crucifix* decision was not published during an election campaign, as both the Bavarian parliamentary elections and the national parliamentary elections were held a year earlier in autumn 1994 (September and October). In addition, the decision was announced in the middle of the political 'silly season', in early August. As a result, the judges did not have any inkling that their decision would be at the centre of political battles. However, the social resistance also came as a surprise to the judges, because they thought that the decision was consistent with the Court's previous practice. The BVerfG, in a 1973 decision (*Kreuz im Gerichtssaal,* 1 BvR 308/69), had already ordered crosses to be removed from the walls of courtrooms. They also referred to this earlier decision in the 1995 *Crucifix* decision, which further supports the view that the judges were unaware of the explosive potential of their decision; after all, they took their decision on the basis of an earlier decision that did not provoke any serious social response at all.

[62] Dieter Grimm, *'Ich bin ein Freund der Verfassung': Wissenschaftsbiographisches Interview von Oliver Lepsius, Christian Waldhoff and Matthias Roßbach mit Dieter Grimm* (Tübingen: Mohr Siebeck, 2017), 154; Wesel, *Der Gang nach Karlsruhe,* 318; Collings, *Democracy's Guardians,* 262.

[63] Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses,* 307.

[64] Ibid. 321.

On the basis of all this, it can be stated that, while deliberating on the *Crucifix* decision, the judges certainly did not consider its social impact, did not assess what reactions it could provoke from political actors or from part of the Bavarian electorate, and that the judges were not motivated in their decision by the possible reaction of external actors. Hypotheses based on rational choice theory proved to be incongruent, in this instance, with judicial behaviour, because the judges did not think strategically but made decisions based on other considerations. The question, then, is that if the judges were not guided by strategic-rational considerations, what could be the explanation for the *Crucifix* decision? The answer may be based partly on an alternative theoretical model, partly on the text of the decision, and partly on interviews with judges. Up to now, four main types of explanatory models have been proposed for judicial behaviour in the literature: The first of these is a *formal–legal model,* according to which the judicial and court decision is determined only by adherence to the text of written law (in our case, the Constitution) and the related interpretive techniques. The judge, according to the classic wording, is only the mouthpiece of the law; he makes his decision on the basis of what the text of the constitution actually contains. This explanatory model now seems slightly outdated; scholars of empirical legal research have mostly turned to the other three models instead.[65]

In the discussion above we came to the conclusion that the *strategic model* of judicial behaviour is unable to provide an explanation for the *Crucifix* decision, as the hypotheses based on it proved to be false. Two other models, however, may together provide some explanation for the Crucifix decision. The *attitude model* suggests that judges have specific public policy preferences, while a *modified version of this model* argues that judges' voting behaviour may be greatly influenced by their 'loyalty' to the party organisations that nominate them.[66] Of the judges who took the *Crucifix* decision, four Social Democrat judges of the first Senate, and Johann F Henschel, who was nominated by the Free Democrats (who also served as rapporteur) formed the Senate majority, while three Christian Democrat judges were in the minority, who vehemently opposed the majority decision. The attitude model or its modified version may thus have more or less explanatory power in this case, since the fault-lines developed along the party attachment. As the Free Democrats (FDP) clearly represented the principle of state neutrality in religious matters and the Social Democrats were already striving to separate the state and the church, it is tempting to draw the conclusion that the line dividing the court cannot be considered an accidental mapping of the party or public policy fault-lines.

At the same time, party or public policy preferences tend to be more important in cases that have a serious political stake. Political conflicts often end at the courts

[65] For the four models, see Kálmán Pócza, 'Az alkotmánybíráskodás gyakorlata összehasonlító szemszögből', in Lóránt Csink and Balázs Schanda (eds), *Összehasonlító módszer az alkotmányjogban* (Budapest: Pázmány Press, 2017), 328.

[66] Ibid. 330.

and, according to a modified version of the attitude model, party affiliations can play a crucial role in such cases. However, as has been noted, the court was not part of a major political game in connection with the *Crucifix* case; it did not make a well-known decision as an arbiter of national party-political struggles, as the case did not actually exist for the public before the decision. As a result, the party-political variant of the attitude model may have less explanatory power in the *Crucifix* decision. The explanatory power of the party-political attitude model is further weakened by the fact that judges who signed the majority decision referred to an earlier decision of the court passed in 1973 by a Senate with a Christian Democratic majority. At the time of the *Kreuz im Gerichtssaal* decision, five Christian Democrat and three Social Democrat judges formed the first Senate, and nobody raised a dissenting opinion on this decision in 1973 (although it should be noted that the possibility of publishing a dissenting opinion was introduced only two years earlier, in 1971). In addition, it is evident that the court did not use the tool of vague wording at all, which could have given the Bavarian legislature a great deal of leeway in implementing the decision, but it made a decision very clearly and unequivocally that the Cross should be removed from the walls of state-maintained schools.

The explicit reference to the 1973 *Kreuz im Gerichtssaal* decision, the crystal-clear and unambiguous language of the decision, and the theoretical foundation of negative religious freedom therefore support the validity of another explanatory model, namely the *role model*.[67] According to this, judges are ordinary people who really care about what others think about them. Viewing the judges and their decisions from this perspective, the question arises as to who, what audience, the judge wants to satisfy best by his decisions and the reasoning of his decisions. Lawrence Baum's thesis is that judges want to satisfy multiple audiences at once, or they can even choose which sub-audience is the target group they would prefer to satisfy.[68] According to Baum, most judges have an interest in gaining recognition among their peers and the wider professional public for their decisions and for the reasoning for their decisions. Their fellow judges or colleagues in other courts may be an audience from which they wish to gain appreciation for their decisions and the statements of reason. Of course, for judges, a narrower social group, public policy pressure groups, the media, the general public or even government actors can also be a point of reference in this regard.[69] Applied to the *Crucifix* decision, this role model may perhaps explain the motivations of the judges in reaching the majority decision, as the reference to the previous decision, emphasising the consistency of court practice and the theoretical underpinning of the principle of negative religious freedom, also suggests that judges primarily sought to convince the competent legal community by their arguments.

[67] Ibid. 333.
[68] Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behaviour* (Princeton, NJ: Princeton University Press, 2008), 50.
[69] Ibid. 60.

Furthermore, the explanatory power of the role model is supported not only by the decision but also by the claims of the judges themselves. Uwe Kranenpohl cites one of the judges, who claimed a good decade after the events that he regarded the *Crucifix* decision as the consistent aftermath of the *Kreuz im Gerichtssaal* decision.[70] Defending the position of the Court majority, Dieter Grimm specifically stated, in an interview in December 1995, that it is not the duty of the Court to reflect the views of the majority of society in its decisions or to create social peace, but to interpret the constitution consistently.[71] Henschel, who acted as a rapporteur judge and presided over the first Senate, addressed the Bavarian Prime Minister in such a way that everyone must acknowledge that not only Christians live in Germany.[72] Overall, therefore, it can be stated that the decision of the judges who supported the majority opinion is certainly not explained by the strategic model but rather by the impetus of the role model. The majority of the judges made their decision primarily by focusing on the potential reactions from the legal community and wrote the reasoning for them, preferring to satisfy the legal community rather than the majority of society, political actors or even pressure groups.

B Why did political actors behave in a deviant manner?

Having fixed why the German Constitutional Court behaved in a deviant manner compared to the hypotheses of rational choice theory, let us now turn to why the hypothesis of the strategic model was not proved in case of political actors reacting to the Court decision. As we have seen above, the decision of the highly prestigious German Constitutional Court was in fact circumvented by the Bavarian Government and the parliamentary majority behind it. The key moment in this case was obviously the amendment of the Public Education Act by the Bavarian parliamentary majority, as this allowed the Crucifix to continue to hang on the walls of school classrooms. The statements of Catholic leaders, the petitions and the demonstration in Munich clearly show that the BVerfG's decision encountered opposition not only from politicians. Nevertheless, the main question is why the Bavarian legislature opposed the BVerfG's decision. Based on the rational choice model, it could have been expected that the decision of a highly respected court would eventually be accepted by the Bavarian parliamentary majority and the crosses would be removed from the classroom [hypothesis (2)].

Surely, after the Court's decision the Bavarian legislature did not have to do anything, since the relevant passage of the Public Education Act was annulled by the BVerfG. Thus, remedying the unconstitutional situation did not require a complex procedure in which several institutions had to be involved at the same

[70] Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses,* 350.
[71] Dieter Grimm, 'Interview mit der *Süddeutschen Zeitung*', *Süddeutsche Zeitung,* 9 December 1995, 284.
[72] Collings, *Democracy's Guardians*, 265.

time in order to re-regulate the case in an appropriate manner. Even the majority of the Bavarian legislature could have put their hands up, saying there was nothing to be done; the BVerfG had annulled the law, thus the case was closed. This would have practically meant removing the crucifixes and complying with the decision of the Constitutional Court. It was due to the coexistence of several factors that the Bavarian legislature did not let the case lie.

It is undoubtedly true that the Bavarian Christian Socialists had ruled Bavaria alone without interruption from 1962 (until 2008): They won an absolute majority in the Bavarian Parliament in all parliamentary elections, but they achieved one of their worst results since World War II in 1994. It is also true that the CSU voters were indeed very committed: apart from the 1950 and 1954 elections, the CSU gained consistently above 45 per cent of the votes, and from 1962 (up to and including 2008) they consistently won over 50 per cent (often around 60 per cent) of the votes in the Bavarian state elections.[73] However, these two factors alone would not have been enough to resist the decision of the BVerfG and to amend the Public Education Act so that the Crucifix could still hang on the walls of Bavarian state-run public education institutions. In other words, although hypothesis 2.1 holds true in part, that is the Christian Socialist Bavarian parliamentary majority did indeed dare to oppose part of the BVerfG's decision because it may have had the backing of a substantial number of very committed voters, that one factor alone would not have been enough to actually ignore the decision of the Court. The unprecedented disobedience of the Bavarian parliamentary majority required a combination of several further factors.

On the one hand, even before the *Crucifix* decision, the Federal Constitutional Court had been the subject of some serious criticism in other cases since mid-1994; that is, by the autumn of 1995, the Court had been in the crossfire of conflicting interests and criticism for over a year. In other cases, leading Bavarian politicians (such as Waigel), among others, had become embroiled in a serious conflict with the Federal Constitutional Court. On 12 July 1994, the BVerfG did not find the government's decision on the deployment of German forces abroad (Bosnia and Somalia) to be unconstitutional, but made it a constitutional requirement that the

[73] Russell J Dalton and Wilhelm Bürklin, 'The Two German Electorates: The Social Bases of the Vote in 1990 and 1994', *German Politics & Society* 13, no 1 (1995), 79–99; Rüdiger Schmitt-Beck, Stefan Weick and Bernhard Christoph, 'Shaky Attachments: Individual-Level Stability and Change of Partisanship among West German Voters, 1984–2001', *European Journal of Political Research* 45, no 4 (2006), 581–608; Herbert Maier, 'Das Kreuz mit dem Wähler: Erhöhte Komplexität der Wählermärkte als gesamtdeutsche und bayerische Herausforderung', in Gerhard Hopp, Martin Sebaldt and Benjamin Zeitler (eds), *Die CSU: Strukturwandel, Modernisierung und Herausforderungen einer Volkspartei* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2010); Ruth Dassonneville, Marc Hooghe and Bram Vanhoutte, 'Age, Period and Cohort Effects in the Decline of Party Identification in Germany: An Analysis of a Two Decade Panel Study in Germany (1992–2009)', *German Politics* 21, no 2 (2012), 209–227; Martin Elff and Sigrid Roßteutscher, 'Social Cleavages and Electoral Behaviour in a Long-Term Perspective: Alignment Without Mobilisation?', *German Politics* 26, no 1 (2017), 12–34.

Bundestag must approve such deployments in advance [90 BVerfGE 286 (1994)]. There was talk, for the first time since World War II, of Bundeswehr reconnaissance aircraft being deployed abroad as part of an action overseen by the United Nations during the Balkan war without mobilising the army for self-defence. This decision had not only transformed the Bundeswehr into a parliamentary army, but also raised the possibility of German soldiers indirectly participating in foreign military actions, in which soldiers or, worse, civilians could lose their lives, without such a deployment falling under the self-defence clause.

The political elite generally accepted the BVerfG's decision, but this case was a directly and closely related antecedent to another decision, which in turn had already met with serious opposition from the Kohl Government. The *Soldaten sind Mörder* judgment of 25 August 1994 was delivered by the Third Chamber of the First Senate of the BVerfG, consisting of three judges (2 BvR 1423/92), stating that Kurt Tucholsky's famous sentence ('*Soldaten sind Mörder*' – 'Soldiers are murderers') did not violate the reputation of the Bundeswehr. The three-judge Chamber almost routinely found a court decision convicting the defendant for affixing a sticker to his truck during the First Gulf War repeating the famous Tucholsky quote to be unconstitutional. Foreign Minister Klaus Kinkel of the Kohl Government said such a decision would greatly undermine the authority of the military, and former Foreign Minister Hans-Dietrich Genscher referred to it as a scandalous decision. Defence Minister Volker Rühe called the decision unacceptable, but Chancellor Kohl himself also commented on the matter – albeit with restraint, saying only that millions of Germans were severely affected by the BVerfG's decision.[74] The CDU Chief of Defence said: 'This case is a disgrace to the German judiciary.'[75] The decision was not made public until 19 September, but Judge Grimm, who drafted the Chamber's decision, subsequently received threatening letters en masse, and a bodyguard even had to be assigned to him, as there were death threats in the letters.[76]

There was a public debate on the decision of the Chamber, and members of the political elite, both Christian Democrats and Liberals, expressed serious reservations. This critical mood was only heightened by the decision of the First Senate of 10 January 1995 [92 BVerfGE 1 (1995)], in which the Senate stated, with the narrowest possible majority (5:3) that a sit-in blockade could not be interpreted as violent coercion, and accordingly could not be punished on such a basis. In this case, moreover, the Court contradicted to its earlier decision (BVerfGE 73, 206), and ruled that a sit-in blockade could not be considered an act of violence. A significant number of Christian Democrat politicians repeatedly protested, as in May 1995, against the Constitutional Court's decision to 'acquit' the leaders of the secret service of the German Democratic Republic (GDR), which did not pass without comment (2 BvL 19/91). Referring to

[74] Wesel, *Der Gang nach Karlsruhe,* 310.
[75] Lamprecht, *Das Bundesverfassungsgericht,* 242.
[76] Grimm, *'Ich bin ein Freund der Verfassung',* 147.

the principle of proportionality, the BVerfG also annulled a number of court decisions sentencing several former GDR secret service leaders to serve terms of imprisonment.

Although the details of that case and the decision are not particularly relevant in this context, the reception of the decision is all the more so: CDU politicians had repeatedly made serious criticisms of Karlsruhe judges. Finally, another decision once again negatively affected the leader of the Bavarian Christian Socialists, as well as Chancellor Kohl's Minister of Finance: In June 1995, the BVerfG declared unconstitutional the provisions of the law on inheritance, gift and property taxes, as amended in September 1994, under the leadership of Waigel (CSU), the Minister for Finance (2 BvL 37/91).[77] It should be recalled that the *Crucifix* decision was made public in early August 1995, and that in the summer of 1994 a number of decisions had been made in the First or Second Senate of the BVerfG, or in one or other of the Senate chambers, which had enraged Christian Democrats and Christian Socialist politicians. In other words, the *Crucifix* decision can be seen as the straw that broke the camel's back, and one of a series of decisions that strongly hindered right-wing politicians from achieving their goals.[78]

The decisions of the BVerfG that preceded the *Crucifix* decision undoubtedly strained the relationship between right-wing politicians and the Court. However, in addition to these rulings, other factors contributed to the escalation of political and social reactions after the *Crucifix* decision as well. As we have seen above, since 1994 there had been several decisions in which only a narrow majority of one or the other Senate prevailed, and not only were the voting behaviour made public but judges also issued dissenting opinions on some decisions. The *Crucifix* decision itself was one of the few decisions to be accompanied by a dissenting opinion of the judges who disagreed with the majority decision. What is more, three dissenting opinions were published at once, which made it clear to those interested in the case that the narrowest possible majority (5 : 3) had delivered the verdict.[79]

Since 1971 (when the institution of dissenting opinions was introduced), it had been very rare for a dissenting opinion to be attached to a majority decision. Consequently, dissenting opinions were of much greater significance than in constitutional courts of other countries where it had become more or less a common practice. Critics of the *Crucifix* decision stressed not only that it was not possible to make an appropriate decision on such an important issue based on such a narrow majority, but were also furnished with credible arguments as presented in the dissenting opinions. The disclosure of a very sharp fault-line within the court in this case did not reassure the

[77] Lamprecht, *Das Bundesverfassungsgericht,* 247.

[78] The *'Soldaten sind Mörder'* case was finally concluded in October 1995 by a decision of the First Senate (1 BvR 1476), which in fact upheld the decision of the Third Chamber of the First Senate (in other cases) and annulled ordinary court decisions that convicted someone for the slogan *'Soldaten sind Mörder'*.

[79] In the event of a tie vote, no decision will be taken according to the German Constitutional Court procedure, that is, the reviewed legislation will remain in force.

mood but rather helped critics of the majority decision not only to challenge it but even reject it entirely, that is, to ignore the decision of the majority.

Third, in addition to political actors, there was a very strong and deeply embedded social organisation in Bavaria that disagreed with the BVerfG's decision to the utmost: The embeddedness and mobilising power of the Catholic Church in Bavaria certainly contributed greatly to the fierce criticism of the Court's decision and the outcome that a significant proportion of Bavarian voters did not punish but instead supported the Bavarian parliamentary majority that effectively overruled the Court's decision. As we have seen above, the Catholic Church was actively involved in collecting signatures against the decision, and the leaders of the Bavarian Catholic Church often made statements in various public forums such as in the press, on television and even at the Munich demonstration attended by Cardinal Wetter.

The Catholic Church and the Lutheran Church, each with roughly 25 million members, were among the largest social organisations in Germany, even though their active membership was much lower, and their number of politically active members had already certainly shrunk by several orders of magnitude by the 1990s.[80] However, their material and mobilising power cannot be underestimated, and in 1993 (following German reunification) the German Catholic Church launched a wide-ranging consultation on the challenges German society had to face, in view of the new political and social situation.[81] In the 1990s, the overall proportion of Catholic believers in Germany fell sharply, largely due to the accession of new provinces in the East which were (traditionally Lutheran, but due to the decades of Communist rule) mostly religiously non-committed. Consequently, the Church sought new channels through which, after the German unification, they could initiate a public debate on the most important social issues.

The Lutheran Church also joined this initiative, meaning that, in socio-political terms, the churches were very active in the mid-1990s.[82] The growing social activity of the Catholic Church was also fostered by the fact that, although secularisation has undoubtedly not escaped the always eccentric Bavaria, Catholic identity still massively defined the Bavarian electorate in the 1990s. All this make it clear why the Bavarian electorate was outraged en masse at the BVerfG's decision.[83] In the

[80] Ulrich Willems, 'Kirchen', in Thomas von Winter and Ulrich Willems (eds), *Interessenverbände in Deutschland* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2007), 317.

[81] Antonius Liedhegener, 'Veränderte politische Optionen? Kirche und Katholizismus im politischen System der Bundesrepublik Deutschland seit 1989/90', in Manfred Brocker, Hartmut Behr and Mathias Hildebrandt (eds), *Religion – Staat – Politik: Zur Rolle der Religion in der nationalen und internationalen Politik. Politik und Religion* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2003), 243; Antonius Liedhegener, 'Plural und politisch. Der Katholizismus in der Bundesrepublik Deutschland seit 1989/90', *Jahrbuch für Christliche Sozialwissenschaften* 44 (2003), 53–72, 63.

[82] Antonius Liedhegener, *Macht, Moral und Mehrheiten: der politische Katholizismus der der Bundesrepublik Deutschland und den USA seit 1960* (Baden-Baden: Nomos, 2006).

[83] Maier, 'Das Kreuz', 38.

1990s, the relationship between the CDU/CSU and the churches and believers was still relatively close;[84] the relationship between the Christian Democratic parties and the churches and believers only loosened somewhat in the early 2000s, when the parties realised that the traditional voter groups would no longer be enough to bring the Christian Democrats to power, so the religious theme (at least for a time) somewhat lost its appeal in the eyes of Christian Democrat politicians.[85]

Fourth, it should not be overlooked that the *Crucifix* decision had a federalist dimension as well: Since education was a purely state competence, some critics, relying on the dissenting opinions to the *Crucifix* decision, argued that the BVerfG had in fact decided in a case that was clearly and exclusively an area of state competence *(Länderkompetenz).*[86] This argument cites the principle outlined in Paragraph 72 of the Grundgesetz that federal bodies may not intervene in education matters even when upholding the principle of uniformity, since education is entirely a state competence.[87] Bavarian identity, based on special (and especially strong) traditions and, last but not least, on Catholicism, strongly shaped Bavarian political culture in the 1990s, even as secularisation progressed.[88]

This regional political culture and identity, based on Catholicism and tradition, and the fact that the management of educational issues was regarded as an exclusively state (hence regional) competence in Germany, certainly contributed to the opposition of the one-party Christian Socialist majority in the Bavarian Parliament to the BVerfG's decision. Even so, historically, it cannot be said that the Bavarian political elite or the Bavarian political institutions were in constant conflict with the Federal Constitutional Court, as there were periods (especially in the 1970s, when the Social Democrats ruled at the federal level) when the Bavarian Christian Socialists could also rely on the Federal Constitutional Court.[89] Moreover, it cannot be clearly stated that the BVerfG has always and consistently favoured the Federal

[84] Marcus Gerngroß, '(K)eine Bindung auf ewig – die CSU und die Kirchen', in Gerhard Hopp, Martin Sebaldt and Benjamin Zeitler (eds), *Die CSU: Strukturwandel, Modernisierung und Herausforderungen einer Volkspartei* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2010), 91.

[85] Liedhegener, 'Plural und politisch', 66.

[86] See 1 BvR 1087/91 dissenting opinions of judges Seidl, Söllner, Haas; Collings, *Democracy's Guardians*, 261.

[87] Otwin Massing, 'Anmerkungen zu einigen Voraussetzungen und (nichtintendierten) Folgen der Kruzifix-Entscheidung des Bundesverfassungsgerichts', *Politische Vierteljahresschrift* 36, no 4 (1995), 719–731, 723.

[88] Michael Weigl, 'Tradition und Modernität als Merkmale politischer Kultur', in Nikolaus Werz and Martin Koschkar (eds), *Regionale politische Kultur in Deutschland: Fallbeispiele und vergleichende Aspekte* (Wiesbaden: Springer Fachmedien, 2016), 124; Manuela Glaab and Michael Weigl, 'Politik und Regieren in Bayern: Rahmenbedingungen, Strukturmerkmale, Entwicklungen', in Manuela Glaab and Michael Weigl (eds), *Politik und Regieren in Bayern* (Wiesbaden: Springer Fachmedien, 2013), 75.

[89] Alexander Wegmaier, 'Beziehungen zum Bund', 2018.

Government in matters concerning federalism.[90] What is certain, however, is that in the 1990s, the relationship between the Bavarian parliamentary majority and the BVerfG was not exactly harmonious.[91] In this regard, the identities and allegiances of the opposing sides were very clear: On the one side, a Bavarian parliamentary majority with a one-party, stable and committed voter base, backed by the Bavarian Constitutional Court, the Catholic (and partly even the Lutheran) church and the Bavarian electorate (who, quite exceptionally in the history of the BVerfG, expressed their dissatisfaction with the *Crucifix* decision in the form of petitions and demonstrations) and, on the other side, the BVerfG. This institutional and social coalition against the Federal Constitutional Court proved strong enough to constitute an incendiary mixture that prompted the Bavarian parliamentary majority to override the decision of the Federal Constitutional Court.

Finally, the *Crucifix* case is also interesting because the parliamentary majority did not 'hide' from the public that it was trying to sabotage the decision of the BVerfG but 'rewrote' it by harnessing public opinion. While it is undoubtedly true that the decisions of the Federal Constitutional Court were generally respected by the political actors, in some cases new regulations were adopted, which effectively circumvented the decisions of the BVerfG. These cases are also interesting because typically members of the public with some interest in politics were more in favour of the BVerfG in these matters.

As a result, the previous cases of covert non-compliance had not resulted in a more serious *loss of prestige* for the BVerfG, although in principle these were matters of public interest, such as the issue of party funding, the pension of civil servants, the consultancy contracts of Members of the Bundestag, or even the inheritance tax. These cases were already at the forefront of public interest before the Constitutional Court's decision, but in general a coalition of political interests was formed, which led the big parties on the same platform to decide to circumvent, overwrite or simply sabotage the decisions of the Federal Constitutional Court. Because the fault-lines in these cases did not overlap as clearly as in the *Crucifix* case, it was also much easier for political actors to manoeuvre between interests while trying to under-thematise or avoid the issue as much as possible in public.

VII Conclusions

The Bavarian *Crucifix* case sparked the BVerfG's greatest crisis since the Adenauer era, which also temporarily led to a decline in the social support for the institution. Although contemporaries perceived that, after the *Crucifix* case, nothing would be as was before

[90] Stefan Korioth, 'Die Rechtsprechung des Bundesverfassungsgerichts zum Bundesstaat', in Robert C van Ooyen and Martin HW Möllers (eds), *Das Bundesverfassungsgericht im politischen System* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2015).

[91] Wegmaier, 'Beziehungen zum Bund'.

and confidence in the BVerfG was so shaken that radical changes would be needed, time eventually worked in favour of the Federal Constitutional Court. A few years after the *Crucifix* case, the confidence index recovered, its diffuse public support returned to its usual very high level, and the court recovered from its second-largest crisis, regaining the confidence of the electorate. At the same time, exploring the causes of the crisis can provide many lessons for the practice of constitutional adjudication. This is because the rational choice model, which is widespread in the international literature, was not able to predict or explain in retrospect why and how this serious crisis situation could have developed. Both the BVerfG and the Bavarian parliamentary majority behaved in a deviant way – if the norm is that suggested by hypotheses based on rational choice theory. Although the explanations based on the strategic model can account for the deviant case, they do not address the reasons leading to it, as these models usually formulate general principles (more precisely, output probability) based on a large number of case studies. Exploring the causes of deviant cases thus requires a case study. This paper undertook this task when it argued that the BVerfG's decision in the *Crucifix* case could be explained, not by the rational choice theory but rather by the role model (and partly a modified version of the attitude model) of judicial behaviour.

Judges of the BVerfG did not think strategically in the *Crucifix* case but were more concerned with putting their arguments to their colleagues and the legal community, trying to demonstrate the consistency and theoretical soundness of their decision. At the same time, we also saw that the Bavarian parliamentary majority also behaved in a deviant way, and the decision of the highly respected BVerfG was quite simply circumvented, sabotaged and overwritten. The 'courage' of the Bavarian Christian Socialists is only partly explained by the fact that it is a deeply embedded party with committed believers. Dissenting opinions, a narrow majority at the court, the activity of the Catholic Church, the federal dimension of the case, and the direct antecedents of the *Crucifix* case all enshrined the fact that, at the end of the process, the Bavarian parliamentary majority passed an amendment that ultimately did ensure that the Crucifix could remain hanging in the classrooms in Bavaria.

The BVerfG lost the battle; the Bavarian parliamentary majority did not defer to its will. However, the court did not suffer such deep wounds that it would bleed out. In the spring of 2020, the German constitutional judges showed defiance not to a state government, but to the European Central Bank and the Court of Justice of the European Union in connection with the European bond purchase programme. This case does not suggest that German judges were afraid of another (now European-scale) constitutional crisis. Just as the BVerfG's confidence index recovered within a few years, it also seems that the court's (second) biggest crisis did not actually leave deep traces in the Court's case law.

Bibliography

Bailey, Michael A and Forrest Maltzman, *The Constrained Court: Law, Politics, and the Decisions Justices Make*. Princeton, NJ: Princeton University Press, 2011. https://doi.org/10.1515/9781400840267

Bartels, Brandon L and Christopher D Johnston, 'On the Ideological Foundations of Supreme Court Legitimacy in the American Public'. *American Journal of Political Science* 57, no 1 (2013), 184–199. https://doi.org/10.1111/j.1540-5907.2012.00616.x

Bartels, Brandon L and Eric Kramon, 'Does Public Support for Judicial Power Depend on Who is in Political Power? Testing a Theory of Partisan Alignment in Africa'. *American Political Science Review* 114, no 1 (2020), 144–163. https://doi.org/10.1017/S0003055419000704

Baum, Lawrence, *Judges and Their Audiences: A Perspective on Judicial Behavior*. Princeton, NJ: Princeton University Press, 2008.

Bennett, Andrew and Jeffrey T Checkel (eds), *Process Tracing: From Metaphor to Analytic Tool. Strategies for Social Inquiry*. Cambridge: Cambridge University Press, 2014. https://doi.org/10.1017/CBO9781139858472

Bergara, Mario, Barak Richman and Pablo T Spiller, 'Modeling Supreme Court Strategic Decision Making: The Congressional Constraint'. *Legislative Studies Quarterly* 28, no 2 (2003), 247–280. https://doi.org/10.3162/036298003X200881

Bickel, Alexander M, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. Indianapolis: Bobbs-Merrill, 1962.

Carrubba, Clifford J and Christopher J Zorn, 'Executive Discretion, Judicial Decision Making, and Separation of Powers in the United States'. *Journal of Politics* 72, no 3 (2010), 812–824. https://doi.org/10.1017/S0022381610000186

Casillas, Christopher J, Peter K Enns and Patrick C Wohlfarth, 'How Public Opinion Constrains the US Supreme Court'. *American Journal of Political Science* 55, no 1 (2011), 74–88. https://doi.org/10.1111/j.1540-5907.2010.00485.x

Clark, Tom S, 'The Separation of Powers, Court Curbing, and Judicial Legitimacy'. *American Journal of Political Science* 53, no 4 (2009), 971–989. https://doi.org/10.1111/j.1540-5907.2009.00411.x

Clark, Tom S, *The Limits of Judicial Independence: Political Economy of Institutions and Decisions*. Cambridge: Cambridge University Press, 2010.

Collier, David, 'Understanding Process Tracing'. *Political Science & Politics* 44, no 4 (2011), 823–830. https://doi.org/10.1017/S1049096511001429

Collings, Justin, *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951–2001*. Oxford: Oxford University Press, 2015. https://doi.org/10.1093/acprof:oso/9780198753377.001.0001

Dahl, Robert A, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker', *Journal of Public Law* 6, no 2 (1957), 279–295.

Dalton, Russell J and Wilhelm Bürklin, 'The Two German Electorates: The Social Bases of the Vote in 1990 and 1994', *German Politics & Society* 13, no 1 (1995), 79–99.

'Das Kreuz ist der Nerv', *Der Spiegel,* 14 August 1995. www.spiegel.de/spiegel/print/d-9206287.html

Dassonneville, Ruth, Marc Hooghe and Bram Vanhoutte, 'Age, Period and Cohort Effects in the Decline of Party Identification in Germany: An Analysis of a Two Decade Panel Study in Germany (1992–2009)', *German Politics* 21, no 2 (2012), 209–227. https://doi.org/10.1080/09644008.2012.679659

Driscoll, Amanda and Michael J Nelson, *The Costs and Benefits of Court Curbing: Experimental Evidence from the United States,* 2018. http://mjnelson.org/papers/DN_Packing.pdf

Driscoll, Amanda and Michael J Nelson, 'Judicial Selection and the Democratization of Justice: Lessons from the Bolivian Judicial Elections'. *Journal of Law and Courts* 3, no 1 (2015), 115–148. https://doi.org/10.1086/679017

Elff, Martin and Sigrid Roßteutscher, 'Social Cleavages and Electoral Behaviour in Long-Term Perspective: Alignment Without Mobilisation?' *German Politics* 26, no 1 (2017), 12–34. https://doi.org/10.1080/09644008.2016.1190833

Epstein, Lee and Andrew Martin, 'Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)', *University of Pennsylvania Journal of Constitutional Law* 13, no 2 (2010), 263–281.

Friedman, Barry, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*. New York: Farrar, Straus and Giroux, 2009.

George, Alexander L and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences*. Cambridge, MA: MIT, 2005.

Gerhard, Rudolf, 'Die Medien haben Einfluss auf die Justiz – aber welchen? Eine Umfrage und ihre Ergebnisse', in Organisationsbüro der Strafverteidigervereinigungen (eds), *Erosion der Rechtsstaatlichkeit: Werteverfall oder Paradigmenwechsel?* Berlin: Schriftenreihe der Strafverteidigervereinigungen, 2001.

Gerngroß, Marcus, '(K)eine Bindung auf ewig – die CSU und die Kirchen', in Gerhard Hopp, Martin Sebaldt and Benjamin Zeitler (eds), *Die CSU: Strukturwandel, Modernisierung und Herausforderungen einer Volkspartei*. Wiesbaden: VS Verlag für Sozialwissenschaften, 2010. https://doi.org/10.1007/978-3-531-92521-9_5

Glaab, Manuela and Michael Weigl, 'Politik und Regieren in Bayern: Rahmenbedingungen, Strukturmerkmale, Entwicklungen', in Manuela Glaab and Michael Weigl (eds), *Politik und Regieren in Bayern*. Wiesbaden: Springer Fachmedien, 2013. https://doi.org/10.1007/978-3-531-93414-3

Graber, Mark A, 'The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary'. *Studies in American Political Development* 7, no 1 (1993), 35–73. https://doi.org/10.1017/S0898588X00000687

Grimm, Dieter, 'Interview mit der *Süddeutschen Zeitung*'. *Süddeutsche Zeitung*, 9 December 1995, 284.

Grimm, Dieter, *"'Ich bin ein Freund der Verfassung"': Wissenschaftsbiographisches Interview von Oliver Lepsius, Christian Waldhoff und Matthias Roßbach mit Dieter Grimm*. Tübingen: Mohr Siebeck, 2017.

Hall, Matthew EK, 'The Semiconstrained Court: Public Opinion, the Separation of Powers, and the US Supreme Court's Fear of Nonimplementation'. *American Journal of Political Science* 58, no 2 (2014), 352–366. https://doi.org/10.1111/ajps.12069

Hall, Matthew EK and Joseph D Ura, 'Judicial Majoritarianism'. *Journal of Politics* 77, no 3 (2015), 818–832. https://doi.org/10.1086/681437

Helmke, Gretchen, *Institutions on the Edge: The Origins and Consequences of Inter-Branch Crises in Latin America*. Cambridge: Cambridge University Press, 2017. https://doi.org/10.1017/9781139031738

Hönnige, Christoph and Thomas Gschwend, 'Das Bundesverfassungsgericht im politischen System der BRD – ein unbekanntes Wesen?' *Politische Vierteljahresschrift* 51, no 3 (2010), 507–530. https://doi.org/10.1007/s11615-010-0030-z

Jay, John, Alexander Hamilton and James Madison, *The Federalist Papers*. New York: New American Library, 1961.

Jung, Otmar, *Volksabstimmungen*, 2006. https://bit.ly/3uJYwfW

Kapiszewski, Diana and Matthew M Taylor, 'Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings'. *Law & Social Inquiry* 38, no 4 (2013), 803–835. https://doi.org/10.1111/j.1747-4469.2012.01320.x

Kastellec, Jonathan P, 'Empirically Evaluating the Countermajoritarian Difficulty: Public Opinion, State Policy, and Judicial Review Before *Roe v Wade*'. *Journal of Law and Courts* 4, no 1 (2016), 1–42. https://doi.org/10.1086/683466

Kepplinger, Hans M and Thomas Zerback, 'Der Einfluss der Medien auf Richter und Staatsanwälte' *Publizistik* 54, no 2 (2009), 216–239. https://doi.org/10.1007/s11616-009-0036-y

Koltay, András, 'Európa és a feszület jele: a Lautsi and Others v Italy ügy alapvető kérdéseiről', in Levente Tattay, Anett Pogácsás and Sarolta Molnár (eds), *Pro vita et scientia. Ünnepi kötet Jobbágyi Gábor 65. születésnapja alkalmából*. Budapest: Szent István Társulat, 2012.

Korioth, Stefan, 'Die Rechtsprechung des Bundesverfassungsgerichts zum Bundesstaat', in Robert C van Ooyen and Martin HW Möllers (eds), *Das Bundesverfassungsgericht im politischen System*. Wiesbaden: VS Verlag für Sozialwissenschaften, 2015.

Kranenpohl, Uwe, *Hinter dem Schleier des Beratungsgeheimnisses: Der Willensbildungs- und Entscheidungsprozess des Bundesverfassungsgerichts*. Wiesbaden: VS Verlag für Sozialwissenschaften, 2010. https://doi.org/10.1007/978-3-531-92242-3

Krehbiel, Jay, 'Elections, Public Awareness, and the Efficacy of Constitutional Review'. *Journal of Law and Courts* 7, no 1 (2019), 53–79. https://doi.org/10.1086/699241

Krehbiel, Jay N, 'The Politics of Judicial Procedures: The Role of Public Oral Hearings in the German Constitutional Court'. *American Journal of Political Science* 60, no 4 (2016), 990–1005. https://doi.org/10.1111/ajps.12229

Lamprecht, Rolf, *Das Bundesverfassungsgericht. Geschichte und Entwicklung.* Bonn: Bundeszentrale für politische Bildung, 2011.

Lembcke, Oliver, *Über das Ansehen des Bundesverfassungsgerichts: Ansichten und Meinungen in der Öffentlichkeit 1951–2001*. Berlin: Berliner Wissenschafts, 2006.

Lemieux, Scott E and David J Watkins, 'Beyond the "Countermajoritarian Difficulty": Lessons from Contemporary Democratic Theory'. *Polity* 41, no 1 (2009), 30–62. https://doi.org/10.1057/pol.2008.25

Liedhegener, Antonius, 'Veränderte politische Optionen? Kirche und Katholizismus im politischen System der Bundesrepublik Deutschland seit 1989/90', in Manfred Brocker, Hartmut Behr and Mathias Hildebrandt (eds), *Religion – Staat – Politik: Zur Rolle der Religion in der nationalen und internationalen Politik. Politik und Religion*. Wiesbaden: VS Verlag für Sozialwissenschaften, 2003. https://doi.org/10.1007/978-3-322-91612-9_13

Liedhegener, Antonius, 'Plural und politisch. Der Katholizismus in der Bundesrepublik Deutschland seit 1989/90'. *Jahrbuch für Christliche Sozialwissenschaften* 44 (2003).

Liedhegener, Antonius, *Macht, Moral und Mehrheiten: der politische Katholizismus in der Bundesrepublik Deutschland und den USA seit 1960*. Baden-Baden: Nomos, 2006.

Lovell, George I, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy*. Cambridge: Cambridge University Press, 2003.

Maier, Herbert, 'Das Kreuz mit dem Wähler: Erhöhte Komplexität der Wählermärkte als gesamtdeutsche und bayerische Herausforderung', in Gerhard Hopp, Martin Sebaldt and Benjamin Zeitler (eds), *Die CSU: Strukturwandel, Modernisierung und Herausforderungen einer Volkspartei*. Wiesbaden: VS Verlag für Sozialwissenschaften, 2010. https://doi.org/10.1007/978-3-531-92521-9_2

Massing, Otwin, 'Anmerkungen zu einigen Voraussetzungen und (nichtintendierten) Folgen der Kruzifix-Entscheidung des Bundesverfassungsgerichts'. *Politische Vierteljahresschrift* 36, no 4 (1995), 719–731.

McGoldrick, Dominic, 'Religion in the European Public Square and in European Public Life: Crucifixes in the Classroom?' *Human Rights Law Review* 11, no 3 (2011), 451–502. https://doi.org/10.1093/hrlr/ngr024

McGuire, Kevin T and James A Stimson, 'The Least Dangerous Branch Revisited: New Evidence on Supreme Court responsiveness to Public Preferences'. *Journal of Politics* 66, no 4 (2004), 1018–1035. https://doi.org/10.1111/j.1468-2508.2004.00288.x

Mishler, William and Reginald S Sheehan, 'The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions'. *American Political Science Review* 87, no 1 (1993) 87–101. https://doi.org/10.2307/2938958

Patzelt, Werner J, 'Warum mögen die Deutschen ihr Verfassungsgericht so sehr?', in Robert C van Ooyen and Martin HW Möllers (eds), *Handbuch Bundesverfassungsgericht im politischen System*. Wiesbaden: Springer Fachmedien, 2015.

Pócza, Kálmán, 'Politika és alkotmánybíróság: a Bundesverfassungsgericht létrejötte'. *Külügyi Szemle* no 1 (2014), 111–131.

Pócza, Kálmán, 'Az alkotmánybíráskodás gyakorlata összehasonlító szemszögből', in Lóránt Csink and Balázs Schanda (eds), *Összehasonlító módszer az alkotmányjogban*. Budapest: Pázmány Press, 2017.

Schaal, Gary S, 'Crisis! What Crisis? Der "Kruzifix-Beschluss" und seine Folgen', in Robert C van Ooyen and Martin HW Möllers (eds), *Das Bundesverfassungsgericht im politischen System*. Wiesbaden: VS Verlag für Sozialwissenschaften, 2015.

Schaal, Gary S, Kelly Lancaster and Alexander Struwe, 'Deutungsmacht und Konfliktdynamiken – Eine Analyse der Akzeptanz von Entscheidungen des Bundesverfassungsgerichts', in Christian Boulanger, Anna Schulze and Michael Wrase (eds), *Die Politik des Verfassungsrechts: Interdisziplinäre und vergleichende Perspektiven auf die Rolle und Funktion von Verfassungsgerichten*. Baden-Baden: Nomos, 2013. https://doi.org/10.5771/9783845247892-187

Schäffer, Fritz, *Bekenntnisschule,* 2006. https://bit.ly/2PUKqKg

Schäffer, Fritz, *Gemeinschaftsschule,* 2006. https://bit.ly/3djgDUp

Schanda, Balázs and András Koltay, 'A Lautsi-ügy a feszületről az állami iskola osztálytermében: a vallási jelképek használatának megengedettsége a semleges állam közéletében'. *Jogesetek Magyarázata* no 4 (2011), 77–85.

Schmitt-Beck, Rüdiger, Stefan Weick and Bernhard Christoph, 'Shaky Attachments: Individual-Level Stability and Change of Partisanship among West German Voters, 1984–2001'. *European Journal of Political Research* 45, no 4 (2006), 581–608. https://doi.org/10.1111/j.1475-6765.2006.00310.x

Schroeder, Philipp A, *The Political Constraints on Constitutional Review* [PhD dissertation]. London: University College London, 2019. https://discovery.ucl.ac.uk/id/eprint/10078526

Spriggs, James F, 'Explaining Federal Bureaucratic Compliance with Supreme Court Opinions'. *Political Research Quarterly* 50, no 3 (1997), 567–593. https://doi.org/10.1177/106591299705000305

Söder, Markus: 'Bayern schreibt Kreuze in allen Staatsbehörden vor'. *Die Zeit,* 24 April 2018. https://bit.ly/3g8sJkO

'Söder ist offen für Kritik am "Kreuzerlass"'. *Domradio,* 20 April 2019. https://bit.ly/3wRlL9U

Staton, Jeffrey K, 'Judicial Policy Implementation in Mexico City and Mérida'. *Comparative Politics* 37, no 1 (2004), 41–60. https://doi.org/10.2307/4150123

Staton, Jeffrey K and Georg Vanberg, 'The Value of Vagueness: Delegation, Defiance, and Judicial Opinions'. *American Journal of Political Science* 52, no 3 (2008), 504–519. https://doi.org/10.1111/j.1540-5907.2008.00326.x

Sternberg, Sebastian, *No Public, No Power? Analyzing the Importance of Public Support for Constitutional Review with Novel Data and Machine Learning Methods* [PhD dissertation]. Mannheim: Universität Mannheim, 2019. https://madoc.bib.uni-mannheim.de/52329

Sternberg, Sebastian, Thomas Gschwend, Caroline Wittig and Benjamin G. Engst, 'Zum Einfluss der öffentlichen Meinung auf Entscheidungen des Bundesverfassungsgerichts. Eine Analyse von bstrakten Normenkontrollen sowie Bund-Länder-Streitigkeiten 1974–2010'. *Politische Vierteljahresschrift* 56, no 4 (2015), 570–598. https://doi.org/10.5771/0032-3470-2015-4-570

Supp, Barbara, 'Heiliger Edmund, bitt' für uns'. *Der Spiegel,* 2 October 1995. https://bit.ly/3e7WcZQ

Trochev, Alexei, *Judging Russia: The Role of the Constitutional Court in Russian Politics 1990–2006*. Cambridge: Cambridge University Press, 2008. https://doi.org/10.1017/CBO9780511511226

Vanberg, Georg, 'Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review'. *American Journal of Political Science* 45, no 2 (2001), 346–361. https://doi.org/10.2307/2669345

Vanberg, Georg, *The Politics of Constitutional Review in Germany. Political Economy of Institutions and Decisions*. Cambridge: Cambridge University Press, 2005.

Vanberg, Georg, 'Establishing and Maintaining Judicial Independence', in Gregory A Caldeira et al. (eds), *The Oxford Handbook of Law and Politics*. Oxford: Oxford University Press, 2008. https://doi.org/10.1093/oxfordhb/9780199208425.003.0007

Vanberg, Georg, 'Constitutional Courts in Comparative Perspective: A Theoretical Assessment'. *Annual Review of Political Science* 18, no 1 (2015), 167–185. https://doi.org/10.1146/annurev-polisci-040113-161150

Vorländer, Hans and Gary S Schaal, 'Integration durch Institutionenvertrauen?', in Hans Vorländer (ed.), *Integration durch Verfassung*. Wiesbaden: VS Verlag für Sozialwissenschaften, 2002. https://doi.org/10.1007/978-3-322-80409-9_14

Wegmaier, Alexander, *Beziehungen zum Bund,* 2018. https://bit.ly/3e5td8I

Weigl, Michael, 'Tradition und Modernität als Merkmale politischer Kultur', in Nikolaus Werz und Martin Koschkar (eds), *Regionale politische Kultur in Deutschland: Fallbeispiele und vergleichende Aspekte*. Wiesbaden: Springer Fachmedien, 2016. https://doi.org/10.1007/978-3-658-10468-9_6

Wesel, Uwe, *Der Gang nach Karlsruhe. Das Bundesverfassungsgericht in der Geschichte der Bundesrepublik*. München: Karl Blessing, 2004.

Whittington, Keith E, '"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court'. *American Political Science Review* 99, no 4 (2005), 583–596. https://doi.org/10.1017/S0003055405051890

Willems, Ulrich, 'Kirchen', in Thomas von Winter and Ulrich Willems (eds), *Interessenverbände in Deutschland*. Wiesbaden: VS Verlag für Sozialwissenschaften, 2007.