Chapter 5
Changing the Case Law *pro futuro* – A Puzzle of Legal Theory and Practice

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Abstract The method of restricting the temporal effect of judgments to future cases has a longstanding tradition in German legal practice, which the Federal Constitutional Court has not called into question. The topical case law, however, does not offer a coherent solution to this complex issue. The method of *pro futuro* restriction is widely used in the field of civil law, in particular in company law and employment law, also by the Federal Constitutional Court itself, but not by the Federal Administrative Court and the Federal Court of Justice in the domain of criminal law. Some academic authors argue that the constitutional rules restricting the retroactive introduction of statutory law should be applied to changes in the case law as well, but the courts have repeatedly rejected this proposal with reference to functional differences between the legislature on the one hand and the judicature on the other. In fact, the issue of temporal effect of judgments correlates with the broader question of whether judges are restricted to applying directives of the legislature by a purely cognitive process or are generating legal rules in a decisionistic process.

The Importance of Case Law in Legal Practice

In general, German courts are not legally required to follow the rulings of other courts and there is no legal rule that establishes the legally binding effect of case law or precedent.[1] According to article 20(3) of the Basic Law (*Grundgesetz*),

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[1]Federal Court of Justice 09.07.2002 – X ARZ 110/02 – [2002] Neue Juristische Wochenschrift Rechtsprechungs-Report 1498, 1499.

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E. Steiner, *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions*, Ius Comparatum – Global Studies in Comparative Law 3,
DOI 10.1007/978-3-319-16175-4_5

courts are solely bound by 'law and justice'. The term 'law' refers to statutory laws enacted by the legislature (*materielle Gesetze*). This reflects the democratic principle according to which principal decisions on the matter of material justice are to be taken by Parliament and not by the judiciary.[2] It follows that courts have no legislative capacity *strictu sensu* and – in general – no court has the capacity to authoritatively interpret statutory laws in a way that would be legally binding on other courts. In the domain of civil law, this is a consequence of paragraphs 322 and 705 of the Code of Civil Procedure (*Zivilprozessordnung*), which strictly limit the legal effect of a judgment to the case at hand. Accordingly, civil judgments are applicable only *inter partes*. This rule also applies in other areas of law and there are few exemptions to it, the most prominent being paragraph 31 of the Act on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*). According to this provision, rulings of the Federal Constitutional Court (*Bundesverfassungsgericht*) apply *erga omnes* and in certain cases have the same legal force as statutory law.

Thus, precedent is in general not legally binding. Nonetheless, it is of utmost importance in legal practice. Empirical studies in the field of civil law have demonstrated that in 95 % of its decisions the Federal Court of Justice (*Bundesgerichtshof*) decides on matters with reference to its previous judgments, and in most cases such reference is used as a main argument. In addition, the courts of first and second instance commonly refer to the judgments of the Federal Court of Justice without any further scrutiny of those decisions or attention to (potential) counterarguments.[3] It is commonplace that the lower courts, which institutionally belong to the *Bundesländer*, are *de facto* bound by the Federal Courts' interpretation of statutory law,[4] and this can be explained by procedural arrangements. According to paragraphs 511(4)(No 1) and 543(2)(No 2) of the Code of Civil Procedure (*Zivilprozessordnung*), an appeal (on a point of law) is admissible if the decision of the higher court is necessary to ensure uniform adjudication. Under this rubric, leave for appeal is given if a judgment departs from the legal reasoning of a decision of a higher court, in particular a Federal Court. Therefore, on the one hand, the courts of first and second instance are free to dissent from the legal reasoning of the Federal Courts; on the other hand, the applicable procedural rules provide that the dissenting judgment can be appealed to a higher court. Of course, it is highly probable that the judgment will be overturned if an appeal is lodged. Similar procedural rules apply in the judicial branches of the other four Highest Federal Courts, ie the Federal Administrative Court (*Bundesverwaltungsgericht*),[5] the Federal Fiscal

[2] R Herzog and B Grzeszick, in T Maunz and G Dürig (eds), *Grundgesetz* (C.H. Beck, Munich, 2013) art 20 [60, 66].

[3] P Krebs, 'Die Begründungslast' (1995) 195 Archiv für die civilistische Praxis 171, 182.

[4] D Olzen, 'Die Rechtswirkungen geänderter höchstrichterlicher Rechtsprechung in Zivilsachen' [1985] Juristenzeitung 155, 157.

[5] Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*), paras 124(2) (No 4) and 132(2) (No 2).

Court (*Bundesfinanzhof*),[6] the Federal Labour Court (*Bundesarbeitsgericht*),[7] and the Federal Social Court (*Bundessozialgericht*).[8] However, different procedural rules apply to the Federal Court of Justice in the area of criminal law.

Whereas the aforementioned procedural rules provide for uniformity in the individual branches of the judiciary, further rules applicable to the Federal Courts are intended to secure a uniform interpretation of statutory law at the federal level. First, each of the five Highest Federal Courts consists of several senates. If a senate intends to diverge from a ruling of another senate of the same court, it has to refer the matter – after a reference to the respective senate – to a Grand Panel (*Großer Senat*). A Grand Panel will then rule on the interpretation of statutory law, but not decide the case. This interpretative decision – one might say its *ratio decidendi* – will then be binding on all senates of the Federal Court in question. Its senates are not allowed to depart from the reasoning of the Grand Panel without a further reference to the Grand Panel.[9] In other words, only a Grand Panel is allowed to revise and eventually overturn its own decisions. Second, if a Federal Court intends to dissent from the interpretation of statutory law given by another Federal Court, it has to refer to the Joint Panel of the Highest Federal Courts (*Gemeinsamer Senat der obersten Gerichtshöfe des Bundes*). This is rare, but the procedure is set out in article 95(4) of the Basic Law and aims at securing the uniformity of legal practice[10]; the details of the procedure are governed by the Act on the Uniformity of the Jurisdiction of the Highest Federal Courts (*Gesetz zur Wahrung der Einheitlichkeit der Rechtsprechung der obersten Gerichtshöfe des Bundes*). Obviously, the establishment of Grand Panels at the Federal Courts and a Joint Panel of the Highest Federal Courts is to secure the uniform interpretation of statutory law at the level of the Federal Courts. However, the underlying premise is that the courts of first and second instance will follow the Federal Courts' (uniform) interpretation of statutory law.

In addition, each of the five Grand Panels is entitled to further develop the law by judicial interpretation (*Rechtsfortbildung*).[11] This method of interpreting statutory law is available to all courts, including the courts of first and second instance, but in practice it is primarily used by the Federal Courts. It enables them to fill lacunae in statutory law and to substantiate blanket clauses. The Federal Constitutional Court acknowledged that in this context the courts create the principles and rules of law according to which they decide the relevant case at hand.[12] The Constitutional Court deems this particular function of the judiciary to be 'virtually indispensable' in a

[6]Code of Fiscal Court Procedure (*Finanzgerichtsordnung*), para 115(2) (No 2).

[7]Code of Labour Court Procedure (*Arbeitsgerichtsgesetz*), paras 64(3) (No 3) and 72(2) (No 2).

[8]Code of Social Court Procedure (*Sozialgerichtsgesetz*), paras 144(2) (No 2) and 160(2) (No 2).

[9]See Courts Constitution Act (*Gerichtsverfassungsgesetz*), para 132; Code of Administrative Court Procedure, para 11; Code of Fiscal Court Procedure, para 11; Code of Labour Court Procedure, para 45; and Code of Social Court Procedure, para 41.

[10]Basic Law, art 95(3)(1).

[11]See the references in (n 9).

[12]Federal Constitutional Court 26.06.1991 – 1 BvR 779/85 – BVerfGE 84, 212.

modern state.[13] Judgments of the Federal Courts that further develop the law by way of interpretation and the legal rules evolving therefrom can – in a broader material sense – be called 'judge-made law' (*Richterrecht*). The relevance of this type of 'rule-making' in German legal practice cannot be overestimated. For example, the absence in statutory law of any substantive rules on industrial action means that this area of law is almost entirely governed by decisions of the Federal Labour Court. Hence, the topical decisions of the Federal Labour Court substitute statutory laws regulating industrial action (*gesetzesvertretendes Richterrecht*).[14] Consequently, in the field of collective action the German legal system very much operates like a case law system and supports the finding of the European Court of Human Rights (ECtHR) that 'case-law has traditionally played a major role in Continental countries, to such an extent that whole branches of positive law are largely the outcome of decisions by the courts'.[15] Another example of this is the award of damages in case of fault in conclusion of a contract (*culpa in contrahendo*). The relevant provision in paragraph 311 of the Civil Code (*Bürgerliches Gesetzbuch*) came into effect on 1 January 2002. It merely contains a general acknowledgement of the longstanding legal practice of the Federal Court of Justice after 1945[16] and the former Imperial Court (*Reichsgericht*), which, since the early twentieth century, adjudicated on *culpa in contrahendo*.[17] In addition, the intention of the drafters of paragraph 311 of the Civil Code was to leave further development of the law to the judicature.[18] As a consequence, the substantive rules are made by the courts and not by the legislature.

Finally, a solicitor is in general under a contractual obligation to advise clients on the basis of the legal practice of the Federal Courts even if he or she holds a different opinion.[19]

The Legal Status of Case Law in a Civil Law System

In absence of a better term, in the remainder of this report the standing body of Federal Courts' judgments will be referred to as 'case law', although the term 'law' is slightly incorrect because, in general, the judgments have a mere factual, practical,

[13] Federal Constitutional Court 19.10.1983 – 2 BvR 485, 486/80 – BVerfGE 65, 182.

[14] Federal Labour Court (Grand Panel) 21.04.1973 – GS 1/68 – BAGE 23, 292.

[15] *Kruslin v France* (App no 11801/85) ECHR 24.4.1990 [29].

[16] See eg Federal Court of Justice 13.07.1954 – I ZR 60/53 – [1954] Neue Juristische Wochenschrift 1561.

[17] See eg Imperial Court 07.12.1911 – VI 240/11 – RGZ 78, 239.

[18] Bundestagsdrucksache 14/6040, 14.05.2001, 162.

[19] Federal Court of Justice 28.9.2000 – IX ZR 6/99 – BGHZ 145, 256.

or procedural, but not legally binding effect on the lower courts. In a 1973 landmark decision the Federal Constitutional Court stated:

> Traditionally judges are bound to statutory law and this is a constituent component of the principle of separation of powers and the rule of law [*Rechtsstaatsprinzip*]. The Basic Law, however, stipulates that the judiciary is bound to 'law and justice' – article 20(3) of the Basic Law. According to a universally held view, this is incompatible with strict legal positivism. The formulation reflects that the 'law' de facto and in general is in accordance with justice; however, this is not necessarily and not always the case. The law is not identical with the entirety of written statutory law. There may be more laws than the positive rules set by the public authorities as the law has its roots in the constitutional order taken as a whole which can have the effect of correcting written law. It is the task of the judiciary to find and to apply such law. According to the Basic Law, judges are not limited to applying the rules of the legislature in their literal sense to each individual case. This would presuppose the principal absence of any lacunae in the positive legal order, a condition that might be defensible with regard to the principle of legal certainty, but is unattainable in practice. The task of the judges is not limited to finding and pronouncing the decisions of the legislature. It can include shedding light on and applying the ideals of justice which are imminent to the constitutional order but which are not or merely imperfectly reflected in written statutory law; this task requires a critical assessment which is not free of voluntative elements.[20]

This Federal Constitutional Court decision received criticism for its tacit acknowledgement of (higher) natural law and its reference to an undefined constitutional principle of material justice which as a consequence granted judges the power to overcome the boundaries of statutory law. However, in accordance with the ruling of the Federal Constitutional Court, it is universally accepted that the courts are not restricted to a literal interpretation of statutory laws; the courts are not merely '*la bouche qui pronounce les paroles de la loi*'.[21] Their function implies a certain aspect of rule-setting. Nonetheless, the legal status of case law is a fundamental, yet dubious and highly contested matter. The academic debate, however, focuses on the methodological boundaries of the interpretation of statutory law and the constitutional limitations to judicial powers vis-à-vis the legislature.

The orthodox opinion in German legal theory rejects the idea that case law has in and of itself any kind of normative quality. According to this view, statute and custom are the sole sources of law and, due to the constitutional principle of separation of powers, judicial decisions cannot assume legislative character and cannot be legally binding.[22] Consequently, case law is held not to be a source of law, but a source of legal reasoning (*Rechtserkenntnisquelle*)[23] and must have an

[20] Federal Constitutional Court 14.02.1973 – 1 BvR 112/65 – BVerfGE 34, 629 (translation by the author).

[21] Federal Constitutional Court 08.04.1987 – 2 BvR 687/85 – BVerfGE 75, 223.

[22] E Picker, 'Richterrecht und Rechtsdogamtik'in C Bumke (ed), *Richterrecht zwischen Gesetzesrecht und Rechtsgestaltung* (Mohr Siebeck, Tübingen, 2012) 85, 102 and 116.

[23] K Larenz, *Methodenlehre der Rechtswissenschaft* (6th edn, Springer, Berlin and others, 1991) 432.

adequate legal basis in statutory law.[24] Other authors have argued that longstanding case law could evolve into legally binding customary law (*Gewohnheitsrecht*). This opinion rests on the assumption that judge-made rules could over time become universally accepted legal practice with normative power. However, even authors who argue that every judicial decision creates an individual rule and reject the idea that there is a bright-line distinction between legislation and adjudication, argue that case law has no legally binding effect whatsoever.[25]

A minority opinion refers to the de facto legal quality of case law and the procedural rules that secure the uniform application of statutory law. Accordingly, it qualifies case law as an autonomous legal source.[26] Numerous authors favour a 'presumptive binding force' of case law which has to be rebutted if a lower court wants to dissent from case law.[27] Furthermore, some contemporary authors go even further and object to the idea that courts could, in effect, be bound by statutory law because of their authority to determine its content by interpretation, a position that culminates in a rather radical conclusion coined by Walter Grasnick: 'There is no law. There are only judges.'[28]

The aforementioned debate reflects a more general discussion in legal theory on the interpretation and application of law.[29] The so-called *Interessenjurisprudenz*[30] understands all norms of statutory law as deliberate decisions of the legislators intended to balance and to reconcile conflicts of interests. Accordingly, judges shall not only be bound by written statutory law, but also by the principles that underlie the legal order and reflect the importance the legislator attributed to particular interests. The so-called *Wertungsjurisprudenz*[31] introduces a more

[24]E Picker, 'Richterrecht und Richterrechtssetzung' [1984] Juristenzeitung 153, 158; cf F Müller, 'Richterrecht – rechtstheoretisch formuliert' in Hochschullehrer der Juristischen Fakultät der Universität Heidelberg (eds), *Richterliche Rechtsfortbildung* (C.F. Müller, Heidelberg, 1986) 65, 78–84; F Müller, *Richterrecht* (Duncker & Humblot, Berlin, 1986) 96–110.

[25]M Jestaedt, 'Richterliche Rechtsetzung statt richterliche Rechtsfortbildung'in C Bumke (ed), *Richterrecht zwischen Gesetzesrecht und Rechtsgestaltung* (Mohr Siebeck, Tübingen, 2012) 49, 68.

[26]B Rüthers, *Das Ungerechte an der Gerechtigkeit* (3rd edn, Mohr Siebeck, Tübingen, 2009) 126–9; B Rüthers, C Fischer and A Birk, *Rechtstheorie* (7th edn, C.H. Beck, Munich, 2013) § 6 [243–48].

[27]F Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (Springer, Vienna/New York, 1982) 510–1; K Langenbucher, *Die Entwicklung und Auslegung von Richterrecht* (C.H. Beck, Munich, 1996) 120; cf D O Effer-Uhe, *Die Bindungswirkung von Präjudizien* (Cuvillier, Göttingen, 2008) 84–6.

[28]'Pater Brown und die Kamele' [2010] Mypos 12, 17.

[29]For an extensive discussion, including the temporal effect of judgments, see C Louven, *Problematik und Grenzen rückwirkender Rechtsprechung des Bundesarbeitsgerichts* (C.H. Beck, Munich, 1996) 180–204.

[30]P Heck, 'Gesetzesauslegung und Interessenjurisprudenz' (1914) 112 Archiv für die civilistische Praxis 1–313.

[31]Larenz (n 23) 119–124; cf Federal Constitutional Court 17.05.1960 – 2 BvL 11/59, 11/60 – BVerfGE 11, 126, 130–1.

stringent differentiation between individual interests and their evaluation by the legislator. In addition, it suggests that the content and the purpose of legal norms are not determined by the will of the legislator. Instead, and in accordance with Hegelian legal philosophy, legal norms are held to have an immanent, objective meaning that is independent of the intentions of the persons who participated in the legislative process. The objective meaning of statutory laws follows, in particular, from their systematic context within the legal order and the idea of material justice (*Rechtsidee*). Despite the differences in their theoretical groundwork, both *Interessenjurisprudenz* and *Wertungsjurisprudenz* are underpinned by the idea that general principles of law can be derived from the structural order of all statutory law and that in every individual case those principles enable the evaluation of competing interests.

If one accepts the assumption of a holistic legal order, it follows that the function of judges is principally limited to the reproduction and reconstruction of assessments deriving from the will of the legislator or the entirety of the written legal order. In any case, judges must not be influenced by their personal evaluation of competing interests. Hence, ideally, a judge should be restricted to a purely cognitive act without any voluntative element. In addition, such cognitive act can only result in one right answer, which truly and accurately reflects the legislators' assessment of competing interests.[32] In this particular regard, *Interessenjurisprudenz* and *Wertungsjurisprudenz* exhibit striking similarities to the declaratory theory and the 'one-right-answer doctrine'. On the issue of temporal effect of judgments, both doctrines submit that judges should be limited to pronouncing decisions based on the assessments of the legislator or the legal order taken as a whole; consequently, any change in the case law is tantamount to the mere correction of a previous error. In this context, the Federal Constitutional Court deviated from its 1973 ruling and described the interpretation and application of the law as a cognitive process, which in general is prone to error.[33] Of course, from this perspective it follows naturally that any error should be reversed immediately and retrospectively.

A rival opinion[34] argues that the written legal order is necessarily fragmented. It therefore challenges the idea that the legal order provides a coherent system that determines the outcome of every possible case. Rather, with reference to Gadamer's hermeneutics, this opinion submits that judges read provisions of written law in accordance with a preconception that reflects their personal conviction of material

[32] See C-W Canaris, Federal Labour Court 06.01.1971 – 3 AZR 384/70 – (case note) [1972] Sammlung Arbeitsrechtlicher Entscheidungen 22–3.

[33] Federal Constitutional Court 28.09.1992 – 1 BvR 496/87 – [1993] Neue Zeitschrift für Arbeitsrecht 213.

[34] J Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (2nd edn, Athenäum Fischer, Frankfurt am Main, 1972); J Esser, 'Möglichkeiten und Grenzen des dogmatischen Denkens im modernen Zivilrecht' (1972) 172 Archiv für die civilistische Praxis 97–130.

justice (*Vorverständnis*).[35] In the absence of legal rules on how to interpret statutory law, judges will choose the method of interpretation that corresponds with their preconceptions. Thus, the interpretation and application of law is a rhetoric and decision-making process that is influenced by statutory law, the methods of its interpretation, existing case law, and legal literature. As a consequence, judicial decisions are functionally comparable to the creation of legal rules, although they operate on a lower level in the hierarchy of norms when compared to statutory law enacted by the legislature. It follows that, on the basis of this opinion, the issue of temporal effect of judgments would have to be resolved in accordance with, or at least be similar to, the (constitutional) principles restricting the retrospective effect of statutory laws.

Constitutional Boundaries of the Retrospective Effect of Judgments

In general, a court's decision is based on its interpretation of statutory law. It will apply its interpretation from the date the statutory law entered into force. In this sense, any judicial decision has retrospective effect because it interprets and applies the relevant legal rules to cases where the facts occurred in the past. Against this background, the retrospective effect of judicial decisions is the natural state of affairs. In addition, as precedent is, *strictu sensu*, not legally binding, there is no common legal rule that binds the courts to previous case law. In general, any court is therefore free to depart from previous case law and apply a new position to any case even if the case under consideration would have been decided differently under previous case law. However, there are some vague limitations to a retrospective change in the case law, deriving, in particular, from the constitutional principle of legitimate expectation (*Vertrauensschutz*), which follows from the rule of law (*Rechtsstaatsprinzip*). In 2010 the Federal Constitutional Court summarized its relevant case law as follows:

> Although decisions of specialized courts [*Fachgerichte*] affect only the individual case at hand and are legally binding only *inter partes*, they can clarify contested legal issues and can be of some value as precedent for future cases. This function of case law is reflected in the procedural rules applicable to the Federal Courts and follows in particular from the provision on the appeal on a point of law [*Revision*] according to which the harmonization of the case law is one of the tasks of the Federal Courts. However, as the courts of first and second instance are not legally bound by the case law of the Federal Courts, except for the individual cases which the Federal Courts have decided, acts of the judiciary can only to a limited extent be a source of legitimate expectation comparable to statutory law, which is of universal binding force. For constitutional reasons the administration of justice is not homogeneous because article 97 [of the] Basic Law guarantees the independence of

[35] J Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (2nd edn, Athenäum Fischer, Frankfurt am Main, 1972) 135.

> the judges. No party can rely on the expectation that a judge will continuously adhere to a particular point of view as laid down in previous case law. Accordingly, if the legal situation is uncertain, the case law of the Federal Courts is less suitable as a basis for legitimate expectations than clarifying statutory law. The case law of the Federal Courts has not the legal status of statutory law and it does not produce a binding force comparable to statutory law. Apart from the individual cases that the Federal Courts have themselves decided, the applicability of their case law solely rests on the persuasive power of their arguments and the authority and competence of the Federal Courts. Legitimate expectations may only evolve from longstanding and settled case law.[36]

In another judgment, the Constitutional Court added that judicial decisions would not alter the legal situation, but merely declare what the legal situation is.[37] This, of course, reflects the principle of the declaratory theory, according to which the courts do not create legal rules. Against this background, a change in the case law does not violate the constitutional principle of legitimate expectations if the court gives adequate reasons for its new opinion and this new opinion does not exceed the confines of a 'foreseeable evolution' of the case law. However, the Constitutional Court explicitly stated that due regard to the principle of legitimate expectation could be paid if a court on a case-by-case basis restricts the temporal effect of a decision that departs from earlier case law.[38]

Some authors maintain that the fundamental right of equality before the law according to article 3(1) of the Basic Law restricts the authority of the courts to change their case law.[39] However, the Federal Constitutional Court decided that article 3(1) of the Basic Law does not grant an individual entitlement to the continuation of a line of case law that the courts no longer hold to be correct.[40] Indeed, the general principle of equality (*allgemeiner Gleichheitssatz*) requires that like cases are decided in the same way. However, with regard to overturning earlier case law, it merely prohibits arbitrary changes in the case law.[41] Such changes will not be deemed arbitrary and thus will not violate the general principle of equality if they are justified by objective reasons. This is a rather low threshold as the court is merely required to base its new case law on objective reasons. Nonetheless, a recent opinion in legal literature argues that objective reasons should be the exclusive test for a change in the case law because acts of the judiciary are by their very nature

[36]Federal Constitutional Court 21.07.2010 – 1 BvL 11/06 and others – BVerfGE 126, 369 (translation by the author).

[37]Federal Constitutional Court, 28.09.1992 – 1 BvR 496/87 – [1993] Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis 140.

[38]Federal Constitutional Court 15.01.2009 – 2 BvR 2044/07 – BVerfGE 122, 248, 279–80.

[39]G Dürig/R Scholz, in T Maunz/G Dürig (eds), *Grundgesetz* (C.H. Beck, Munich, 2013) art 3 [402–7].

[40]Federal Constitutional Court 04.08.2004 – 1 BvL 1557/01 – [2005] Neue Zeitschrift für Verwaltungsrecht 81.

[41]Federal Constitutional Court 11.11.1964 – 1 BvR 488/62 and others – BVerfGE 18, 224, 240; 11.05.1965 – 2 BvR 259/63 – BVerfGE 19, 38, 48.

retrospective.[42] This opinion challenges the idea that judgments create legitimate expectation, because courts are unable to legally bind themselves to their earlier case law. The principle of legitimate expectation, however, requires that a state authority is able to create legal rules that it is bound by in future cases. As the courts are unable to bind themselves to a particular interpretation of statutory law, there cannot be any legally relevant expectation that a court will follow its previous case law in the future.[43]

Only a small number of cases that concern the issue of legitimate expectation in the context of a change of case law have been decided by the Federal Constitutional Court. In the vast majority of those cases, the Court did not find a breach of the Basic Law. It accepted a change in the case law where it was reasonable to expect such a change due to significant changes in factual or legal circumstances.[44] In several decisions the Court found that the relevant change did not exceed the confines of a foreseeable evolution of the case law.[45] For example, it held a change in the case law to be foreseeable if its aim was to correct scarcely tolerable discrepancies between the case law of the administrative courts and the employment courts. If two branches of the specialized courts decided similar cases differently it was, according to the Constitutional Court, to be expected that such differences would be abolished at some point in time.[46] However, the Federal Constitutional Court held a decision of a Chamber of a Regional Court (*Landgericht*) to violate the constitutional principle of legitimate expectation. Without prior announcement, the Regional Court had departed from its practice of accepting illegible signatures on written submissions. On the basis of its new practice, the Chamber dismissed an appeal. However, the Constitutional Court referred not only to the constitutional principle of legitimate expectation, but also to the fundamental right to a fair trial:

> No litigant can rely on the expectation that the judge will come to or adhere to a particular legal opinion. This would run counter to the principle of independence of the courts (article 97 of the Basic Law) because of which the case law is necessarily inhomogeneous. The claimant could therefore not expect that the Regional Court would follow the case law of the Federal Courts that expressed a rather generous approach to the formal requirements for the signature in written submissions to the courts. However, the Chamber [of the Regional Court] was not allowed to abruptly depart from its longstanding previous practice according to which the signatures of the claimant were sufficiently clear. This departure precluded the claimant from adapting to the new procedural practice of the Chamber. However, a procedural practice that is in conformity with the rule of law does not require that litigants

[42] L Brocker, 'Staatsfunktionengerechte Auslegung des rechtsstaatlichen Rückwirkungsverbots' [2012] Neue Juristische Wochenschrift 2296.

[43] J Burmeister, *Vertrauensschutz im Prozeßrecht* (De Gruyter, Berlin/New York, 1979) 32–5.

[44] Federal Constitutional Court 12.05.2009 – 2 BvL 1/00 – BVerfGE 123, 111.

[45] Federal Constitutional Court 06.05.2008 – 2 BvR 1926/07 – [2008] Neue Zeitschrift für Verwaltungsrecht 1111; 15.01.2009 – 2 BvR 2044/07 – BVerfGE 122, 248; 18.12.2012 – 1 BvR 2366/11 – [2013] Neue Juristische Wochenschrift 523.

[46] Federal Constitutional Court 06.05.2008 – 2 BvR 1926/07 – [2008] Neue Zeitschrift für Verwaltungsrecht 1111.

> be notified of intended changes in the case law. In addition, the judge has to pay attention to the formal requirements as enshrined in the procedural codes. Otherwise legal proceedings cannot operate in an orderly manner. However, in order to achieve this aim, judges and litigants have to cooperate on the basis of mutual consideration. This aim will not be achieved if a court accepts a particular signature over many years, with the result that a legal representative of the party concerned will legitimately expect that this signature is valid, but then the court departs from its practice without prior warning. This applies in particular where an appeal is dismissed as a result of a change in the procedural practice. It would have been possible to the Chamber to inform claimants, in general, that the formal requirements for a proper signature would change in the future. Under these circumstances, and if the signature had then not been amended, the dismissal of the appeal would not have come into conflict with constitutional law in case.[47]

The reasoning of the Federal Constitutional Court illustrates that there is no general obligation of the lower courts to adhere to the case law of the Federal Courts. Instead, the Regional Court was bound to its own procedural practice, which it was not allowed to modify without prior notification to litigants. However, it does not follow from the decision of the Constitutional Court that constitutional law would oblige the specialized courts to announce intended changes to their case law or to generally restrict the retrospective effect of their judgments. Although the Constitutional Court refers to a possible announcement of the Regional Court, it has to be noted that such announcement would not have required a final judgment. It would have sufficed to inform the parties during the course of the proceedings that the Chamber intended to change the formal requirements for signatures on written submissions. The reasoning of the Constitutional Court focuses on the matter of procedural practice rather than on changes in the interpretation of substantive law.

Nonetheless, the Federal Constitutional Court itself has a longstanding and extensive tradition of restricting the retrospective effect of its own judgments. In numerous cases the Court set a time limit that precluded the retrospective application of the decision in question and granted a notice period within which the legislature or other state authorities could remedy the breach of constitutional law.[48] For example, in 2008 the Federal Constitutional Court quashed a provision of the Federal Election Act (*Bundeswahlgesetz*) that, in certain complex situations, could have had a peculiar effect in that, after having obtained a specific number of votes, a political party would lose seats in Parliament if it obtained any more votes. The Constitutional Court found that the relevant provisions of the Federal Election Act violated the Basic Law, but granted the legislature a period of about 3 years to remedy the violation of constitutional law because it would require a substantial revision of the said Act.[49]

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[47] Federal Constitutional Court 26.04.1988 – 1 BvR 669/87 and others – BVerfGE 78, 123 (translation by the author).

[48] See eg Federal Constitutional Court 09.02.2010 – 1 BvL 1/09 and others – BVerfGE 125, 175, 255–6; 20.12.2007 – 2 BvR 2433, 2334/04 – BVerfGE 119, 331, 382–3; 10.11.1998 – 2 BvR 1057, 1226, 980/91 – BVerfGE 99, 216, 243–4.

[49] Federal Constitutional Court 03.07.2008 – 2 BvC 1, 7/07 – BVerfGE 121, 266.

A rather academic debate concerns the question of whether the courts are, in addition to the principle of legitimate expectation, bound by the more restrictive constitutional rules that apply to the retrospective effect of statutory law. The Federal Constitutional Court has rejected this proposition in general and stated that its case law on the retrospective effect of statutory laws should not be applied to judicial decisions.[50] Some authors argue that the courts may not change their case law retrospectively in a way that the legislature would not be entitled to because a change in the case law could have the same effect as the enactment of new statutory law. In this regard, the powers of the courts could not exceed those of the legislature.[51] The prevalent opinion, however, opposes this proposition as it would result in a rigid continuity of standing case law and discourage litigants from seeking a change in the case law.[52] Also, the Federal Constitutional Court has drawn a clear distinction between statutory law and case law, emphasizing that case law does not have a legally binding effect comparable to statutory law.[53]

Another question is whether constitutional law prevents a court from restricting the retrospective effect of its new case law in the sense that it will be applicable only to future cases (*pro futuro*). This issue has not yet been explicitly addressed by the Federal Constitutional Court and has not been subject to a wider debate in legal literature. On the basis of the declaratory theory it has been argued that each party has a constitutional right to the 'correct' application of statutory laws to their case even if this is contrary to previous case law. Restrictions on the retrospective effect of judgments would be tantamount to an incorrect interpretation of statutory law.[54] Such restrictions would also be contrary to the constitutional principle that courts are bound by statutory law. This principle obliges courts to apply the 'correct' interpretation of statutory law immediately.[55] Furthermore, applying new case law only *pro futuro* would violate the constitutional principle of separation of powers because the power to change the law is reserved to the legislature.[56] However, this

[50] Federal Constitutional Court 16.12.1981 – 1 BvR 898/79 and others – BVerfGE 59, 128.

[51] D Medicus, 'Über die Rückwirkung von Rechtsprechung' [1995] Neue Juristische Wochenschrift 2577, 2582; H Prütting and S Weth, 'Zur Anrechnung von Unfallrenten auf Betriebsrenten'[1984] Neue Zeitschrift für Arbeitsrecht 24, 26; see further Federal Constitutional Court 16.12.1981 – 1 BvR 898/79 and others – BVerfGE 59, 128, 165.

[52] F-J Säcker, Higher Regional Court of Düsseldorf 18.09.1967 – 5 W 19/67 – (case note) [1968] Neue Juristische Wochenschrift 708; see further U Koch, 'Die Bewältigung von selbst- und fremdbestimmten Rechtsprechungsänderungen durch das Bundesarbeitsgericht' [2012] Soziales Recht 159, 160; D Olzen, 'Die Rechtswirkungen geänderter höchstrichterlicher Rechtsprechung in Zivilsachen' [1985] Juristenzeitung 155, 159–61; G Robbers, 'Rückwirkende Rechtsprechungsänderung' [1988] Juristenzeitung 481, 484.

[53] Federal Constitutional Court 21.07.2010 – 1 BvL 11/06 and others – BVerfGE 126, 369.

[54] See HP Westermann, Federal Court of Justice 18.03.1974 – II ZR 167/72 – (case note) [1975] Juristenzeitung 327, 330.

[55] Brocker (n 42) 2999.

[56] See Picker (n 24) 161.

view is contested.[57] Critics, first, call the declaratory theory into question because in their eyes it underestimates the impact of changes in societal circumstances on the case law. Second, it is argued that there is not merely one correct interpretation of statutory law. Instead, the 'correct' interpretation and application of statutory law requires consideration of when the relevant facts took place. Thus, the principle of legitimate expectation could have the result that the application of the former and now 'incorrect' interpretation of statutory law is the 'correct' judicial decision.[58] Third, the restriction of the temporal effect of judicial decisions *pro futuro* would not usurp powers of the legislature because the courts are undoubtedly entitled to change their case law (with retrospective effect). Therefore, they must, *a fortiori*, be entitled to make mere prospective changes to their case law, which are less far-reaching than changes with retrospective effect.[59] Fourth, the critics propose a distinction between two functions of Federal Courts decisions. The Federal Courts are, on the one hand, meant to decide individual cases; on the other hand, they give guidance to the lower courts on the interpretation of statutory law. Hence, the Federal Courts may make a distinction between deciding the case at hand and the mere announcement of a new point of view as a reference for future cases and as guidance for lower courts. Strictly speaking, such an announcement could be understood as a mere *obiter dictum* provided it does not affect the decision of the case at hand.[60] Fifth, by restricting the temporal effect of new case law *pro futuro*, the courts would interpret statutory law differently at different points in time. This is, nonetheless, still a mere interpretation of statutory law not comparable to the enactment of statutory law. If the courts were entitled to change their case law at all – which they undoubtedly are – they must also be entitled to determine at what point in time the change will come into effect.

Restriction by the Federal Courts of the Temporal Effects of Judgments

Before drawing some general conclusions, the remainder of this paper provides an overview of the judgments of the Federal Courts on the issue of temporal effect. Of course, such overview will be highly selective and not exhaustive due to the extent

[57] For an extensive account, see V Klappstein, *Die Rechtsprechungsänderung mit Wirkung für die Zukunft* (Duncker & Humblot, Berlin, 2009) 268–307.

[58] Robbers (n 52) 487.

[59] C Bittner, 'Höchstrichterliche Ankündigungsrechtsprechung – Rechtsfortbildung ins Ungewisse?' [2013] Juristenzeitung 645, 651.

[60] See ibid 648–9. Numerous examples of judgments, in which a court merely pronounces a 'tendency' to change its case law, can be found in the case law of the Federal Labour Court; see eg Federal Labour Court 20.02.1986 – 2 AZR 244/85 – [1986] Neue Zeitschrift für Arbeitsrecht 739 and 13.07.1993 – 1 AZR 675/92 – [1993] Der Betrieb 1479.

of existing case law. It will focus on rulings that, according to the relevant court, should only be applied to future cases as this is the exception to the general rule of the retrospective effect of judicial decisions.

Federal Court of Justice

It is predominantly in older civil law cases that the Federal Court of Justice has restricted the temporal effect of a change in the case law. In more recent cases, the Court refers to the case law of the Federal Constitutional Court on the constitutional limitations for the retrospective effect of statutory law, although it continuously emphasizes the significant functional differences between a change of statutory law and a change in the case law.[61] This approach has reduced the Federal Court of Justice's use of *pro futuro* restrictions.

One of the Federal Court of Justice's first decisions on the retrospective effect of a change in the case law dates back to 1969. The Court rejected a restriction of its new case law to future cases and stated:

> In principle, acts of the judiciary do not create new law if they assess similar cases differently even when there is no change in statutory law. Usually, the courts act on the assumption that a change in the case law is merely a clearer identification of the legal situation. This, however, does not preclude applying the principles of the retrospective effect of statutory law to a change of the case law by way of analogy, provided that such analogy is necessary with regard to the circumstances of the individual case. This can be the case if, in particular, the change of the case law is based on an *ex post* change of factual circumstances and is, in its factual effect, comparable to a change of statutory law and, in addition, reasons of material justice or legal certainty mitigate against a retrospective effect because it would be incriminatory or negate a previously held right.[62]

In this case the Federal Court of Justice did not restrict the temporal effect of its decision because the case required the application of the principle of misuse of rights, as well as the balancing of competing interests. Therefore, in the absence of a bright-line distinction between the proper use of the right in question and its misuse, the claimant could not have legitimately expected that the court would rule in his favour. In addition, the Federal Court of Justice noted that the change in the case law had previously been demanded in legal literature and therefore the claimant could have expected the courts to change their case law.

In a 1974 case, the Federal Court of Justice decided that a private limited partnership (*Kommanditgesellschaft*), the sole partner of which with unlimited liability

[61] See Federal Court of Justice 29.2.1996 – IX ZR 153/95 – BGHZ 132, 120, 128–32, Federal Court of Justice 07.03.2007 – VIII ZR 125/06 – (2007) Neue Zeitschrift für Miet- und Wohnungsrecht 363 [28]; and Federal Court of Justice 19.07.2011 – II ZR 300/08 – [2011] Neue Zeitschrift für Gesellschaftsrecht 1023 [40].

[62] Federal Court of Justice 08.10.1969 – I ZR 7/68 – BGHZ 52, 365, 369–70 (translation by the author).

(*Komplementär*) was a limited liability company (*Gesellschaft mit beschränkter Haftung/GmbH*), had to use the suffix 'GmbH & Co.' in its trade name (*Firma*) in order to show that no natural person was liable for the obligations of the company. This was based on the application of a provision of the Limited Liability Company Act (*GmbH-Gesetz*) to a private limited partnership by way of analogy. The Court conceded that no one could have realized this particular duty because, first, it did not follow from a literal interpretation of statutory law; second, it was not acknowledged in previous case law and; third, it was rejected by the prevailing opinion in legal literature.[63] In addition, a violation of this newly created obligation would result in the retrospective personal liability of the managing director (*Geschäftsführer*) of the limited liability company, something that he could not have foreseen. In a subsequent judgment in 1978, the Federal Court of Justice decided that the obligation would only come into effect after the publication and dissemination of its 1974 judgment.[64] In effect, the Federal Court of Justice created a new obligation that became effective after a transitional period, the length of which was not clearly specified, and it neither provided specific legal reasons for this result nor did it refer to constitutional law.

In 1976 the Federal Court of Justice decided on the competences of a supervisory board (*Aufsichtsrat*) of a public limited company (*Aktiengesellschaft*) that consisted of only two board members. The Court held that such a board could not validly act on behalf of the company to conclude contracts of service with the members of the board of directors (*Vorstandsmitglied*). However, it acknowledged that this issue had been contested in legal literature over a long period of time and had not been previously decided by the Federal Court. Therefore, it would run counter to the principle of good faith and not strike a fair balance between the competing interests if previously concluded contracts were annulled retrospectively after the parties had acted in accordance with these contracts over many years. The Court compared the conflicting interests of the company and the member of the board of directors and argued that the retrospective application of its new case law would have a disparate impact on the board member because his entire economic existence was based on the assumption of the validity of his contract with the company. The Court came to the conclusion that its new case law should not be applied retrospectively to existing contracts. Instead, contracts already concluded were to be regarded as legally valid, both in the past and in the future.[65]

In a similar vein, in 1991 the Federal Court of Justice interpreted paragraphs 113 and 114 of the Public Limited Companies Act (*Aktiengesetz*). According to this judgment, certain consultancy agreements between a company and a consultant would automatically become invalid upon the appointment of the consultant to the supervisory board of the company. The Court emphasized that prior to its decision this legal consequence could not be derived from statutory law, case law, or legal

[63] Federal Court of Justice 18.03.1974 – II ZR 167/72 – BGHZ 62, 216, 228.

[64] Federal Court of Justice 08.05.1978 – II ZR 97/77 – BGHZ 71, 354, 356–7.

[65] Federal Court of Justice 23.10.1975 – II ZR 90/73 – BGHZ 65, 190, 194–5.

literature. This would, in principle, suffice to maintain the validity of the contract in question. However, the Court went on to ascertain whether the annulment of the contract in that particular case would have a disparate negative effect on the consultant.[66] In a subsequent case, in 1994, the Federal Court of Justice applied its new interpretation of paragraphs 113 and 114 of the Public Limited Companies Act to a consultant who had been appointed to the supervisory board of a company. In this case the Court acknowledged that the consultant could not have foreseen its new case law and therefore could have legitimately expected his contract with the company to be valid. However, the Court held that the consultant would not carry a heavier burden than the company if the contract were annulled retrospectively.[67]

The first sentence of paragraph 766 of the Civil Code (*Bürgerliches Gesetzbuch*) reads as follows: 'For the contract of suretyship [*Bürgschaft*] to be valid, the declaration of suretyship must be issued in writing.' According to longstanding and settled case law of the Federal Court of Justice, this requirement could be satisfied by a blank signature. However, in 1996 the Federal Court of Justice changed its case law and held contracts of suretyship that were concluded by a blank signature to be null and void and extended its new case law to contracts already concluded. The Federal Court of Justice referred to the case law of the Federal Constitutional Court and pointed out that its judgment did not have a legal quality similar to statutory law and could not be viewed as on an equal footing with statutory law. Hence, departing from previous case law would in general not violate the rule of law according to article 20(3) of the Basic Law. In addition, court decisions would, by their very nature, be applicable to cases not yet fully completed. The application of judicial decisions to past events would therefore be a case of pseudo-retrospective effect (*unechte Rückwirkung*) that, according to the Federal Constitutional Court's case law on the retrospective effect of statutory laws, is generally in line with constitutional law. However, the Federal Court of Justice went on to explain that this line of the Federal Constitutional Court's case law could not be transferred to changes in the case law. Nonetheless, in the domain of private law the principles of legal certainty and material justice could be upheld by applying the principle of good faith according to paragraph 242 of the Civil Code. This provision requires striking a balance between the protection of legitimate expectations and the continuity of the law, on the one hand, and the constitutional right to a judgment that is materially in line with statutory law, on the other hand. The Federal Court of Justice held that a restriction of the temporal effects of its judgments *pro futuro* should be reserved to cases that concern the legal existence of a contract for the performance of a continuing obligation (*Dauerschuldverhältnis*) and in which the retrospective annulment of such a contract would endanger the economic existence of one of the affected persons.[68]

[66] Federal Court of Justice 25.03.1991 – II ZR 188/89 – BGHZ 114, 127, 136–7.

[67] Federal Court of Justice 04.07.1994 – II ZR 197/93 – BGHZ 126, 340, 349.

[68] Federal Court of Justice 29.02.1996 – IX ZR 153/95 – BGHZ 132, 120, 128–32.

This restrictive approach of the Federal Court of Justice paved the way for future cases on different issues of civil law in which it departed from previous case law. The main argument in subsequent decisions was that a change in the case law merely had pseudo-retrospective effect and therefore was generally acceptable.[69] Any decision as to whether or not to restrict the temporal effect of a decision *pro futuro* should be made on a case-by-case basis by striking a balance between the conflicting interests. In some judgments the Court maintained that past events could only be exempted from the application of new case law if a contract for the performance of a continuing obligation was annulled or where the annulment of a contract would endanger the economic existence of one the parties.[70] Furthermore, the Court rejected the restriction of the temporal effect *pro futuro* of a decision that annulled a particular clause in the standard business terms (*Allgemeine Geschäftsbedingungen*) of a lease agreement. According to the Court, the user of such terms would bear the risk if the terms were annulled by the judiciary, even if the terms had previously been treated by the parties as valid over a long period of time.[71] In contrast, the Federal Court of Justice restricted the temporal effect of a decision that enabled shareholders of a real estate investment trust (*Immobilienfonds*) to restrict or exclude their personal liability to investors. Without further reasoning and without reference to the facts of the case at hand, the Court decided that investors in existing investment trusts could rely on its previous, more restrictive case law.[72] In a similar vein, and contrary to its previous longstanding case law, in 2003 the Federal Court of Justice decided that shareholders joining an existing partnership under the Civil Code (*Gesellschaft bürgerlichen Rechts*) were liable in person for the obligations of the company that accrued prior to their taking shares. Again, the Court generally restricted the temporal effect of its new case law without paying attention to the facts of the individual case; it held it to be disproportionate that the personal liability of the shareholders was established retrospectively because this liability could not have been foreseen at the relevant point in time.[73] The decisions in two cases about the personal liability of shareholders appear to be underpinned by the idea of generally preventing a disparate negative effect rather than balancing conflicting interests of individual persons. In both cases, however, the time when the new case law was applicable was at the publication of the Federal Court of Justice's judgment that announced the change in the case law.

[69] See eg Federal Court of Justice 07.03.2007 – VIII ZR 125/06 – (2007) Neue Zeitschrift für Miet- und Wohnungsrecht 363 [28].

[70] Federal Court of Justice 12.03.2001 – II ZB 15/00 – BGHZ 147, 108, 124.

[71] Federal Court of Justice 05.03.2008 – VIII ZR 95/07 – [2008] Neue Zeitschrift für Miet- und Wohnungsrecht 363 [20]; see further Federal Court of Justice 18.01.1996 – IX ZR 69/95 – [1996] Neue Juristische Wochenschrift 924, 925.

[72] Federal Court of Justice 21.01.2002 – II ZR 2/00 – BGHZ 150, 1, 5.

[73] Federal Court of Justice 07.04.2003 – II ZR 56/02 – BGHZ 154, 370, 377–78.

In 2011 the Federal Court of Justice summarized its case law as follows:

> Generally, the so-called pseudo-retrospective effect of case law of Federal Courts is legally unproblematic. The courts are not legally bound by settled case law, which in the light of better knowledge is no longer convincing. However, the rule of law and the principle of legitimate expectations, which follows therefrom, require that it is established in each and every single case of a retrospective change of the case law whether the interest in the continuity of the previous legal situation should prevail over material justice according to the principles of proportionality and reasonability.[74]

Unlike in its civil law decisions, in its criminal law decisions the Federal Court of Justice virtually ignores the temporal effect of its judgments. The most prominent example is a 1966 decision in which the Court – without any prior announcement – lowered the relevant threshold of blood-alcohol concentration applicable to the statutory offence of driving while under the influence of alcohol according to paragraph 316 of the Criminal Code (*Strafgesetzbuch*).[75] This ruling raised serious concern with regard to constitutional law because, according to article 103(2) of the Basic Law, the principle of *nulla poena sine lege* prescribes that an act may only be punished if it was defined by law as a criminal offence before the act was committed. However, again in 1990 the Regional Court of Dortmund diverged from former case law and applied an even lower threshold of blood-alcohol concentration under paragraph 316 of the Criminal Code. On a constitutional complaint (*Verfassungsbeschwerde*), the Federal Constitutional Court upheld the judgment of the Regional Court on the basis that the new case law was based on new empirical and scientific data and did not create a new criminal offence.[76]

Federal Labour Court

In the domain of employment law, the Federal Labour Court has a longstanding tradition of restricting the temporal effect of its judgments. On 5 December 1969 it quashed a provision of pre-constitutional statutory law on the remuneration of an employee during the time of a post-contractual non-compete obligation (*nachvertragliches Wettbewerbsverbot*).[77] In principle, the ruling would have had the effect of annulling contractual non-competition clauses that had their legal basis in the quashed provision. However, with reference to the principle of legitimate expectation, the Court decided, in a subsequent decision of 20 April 1972, that employers and employees should enjoy a transitional period within which they could

[74] Federal Court of Justice 19.07.2011 – II ZR 300/08 – [2011] Neue Zeitschrift für Gesellschaftsrecht, 1023 [40] (translation by the author).

[75] Federal Court of Justice 09.12.1966 – 4 StR 119/66 – BGHSt 21, 157.

[76] Federal Constitutional Court 23.06.1990 – 2 BvR 752/90 – [1990] Neue Juristische Wochenschrift 3140.

[77] Federal Labour Court 05.12.1969 – 3 AZR 514/68 – BAGE 22, 215.

amend their contracts in accordance with the new decision of the Court. Thus, the new case law would be applicable as of 1 January 1971.[78] However, the claimant of the case at hand could immediately rely on the new case law because he had sought the change in the case law and therefore should enjoy its benefits.[79]

In 1974 the Federal Labour Court declared, rather generally, that the protection of legitimate expectations would weigh so heavily that it had to be taken into account even when a change in the case law was imperative. No person should suffer a disadvantage if he or she had acted in accordance with the case law applicable at the relevant time. However, this should not prevent the Court from changing its case law. According to the Federal Labour Court, the conflicting aims of changing the case law and protecting legitimate expectations could be reconciled if the Court announced its new case law and only applied it in subsequent cases.[80] In a further judgment the Federal Labour Court explicitly stated that a change in the case law would significantly alter the legal situation and employers and employees should be given an opportunity to adapt to the new legal situation. In this particular case the Federal Labour Court refrained from applying more stringent requirements for the termination (*ordentliche Kündigung*) of an employment contract. The new case law would have limited the employer to the use of a mere conditional dismissal combined with the option of altered conditions of employment (*Änderungskündigung*) and would have invalidated the termination of the contract in the case at hand. However, the employer could not have foreseen the respective restriction at the time the termination was declared.[81] In this case, the new case law was not applied to the individual employee who had initiated legal proceedings and sought the change in the Federal Labour Court's case law.

A 1975 ruling of the Federal Labour Court quite drastically altered certain requirements for the election of employees to the supervisory board of incorporated companies (*Kapitalgesellschaften*). This change in the case law would have invalidated previous elections, with the consequence that the supervisory boards of numerous companies were wrongfully established, and some of the resolutions of such boards would be null and void. However, the Court did not find it necessary to restrict the temporal effect of its judgment because the time limit for challenging the validity of elections of employees to a supervisory board was only 2 weeks according to statutory procedural rules.[82] For this reason previous elections could not be challenged on the basis of the Court's new case law.

[78] Federal Labour Court 20.04.1972 – 3 AZR 337/71 – BAGE 24, 235, 241–43.

[79] Federal Labour Court 20.04.1972 – 3 AZR 337/71 – BAGE 24, 235, 241–43; see further Federal Labour Court (Grand Panel) 21.04.1971 – GS 1/68 – BAGE 23, 292, 319–20.

[80] Federal Labour Court 29.03.1984 – 2 AZR 429/83A) and others – [1984] Neue Zeitschrift für Arbeitsrecht 169, 171; see further Federal Labour Court 27.09.1984 – 2 AZR 62/83 – [1985] Neue Zeitschrift für Arbeitsrecht 455, 456.

[81] Federal Labour Court 20.06.1985 – 2 AZR 418/84 – juris.

[82] Federal Labour Court 02.09.1975 – 1 ABR 50/74 – BAGE 27, 246.

One of the most contested issues of employment law in the 1980s was the question of whether, and under what circumstances, conditions of employment in an individual employment contract could be validly replaced by a works council agreement (*Betriebsvereinbarung*). The Federal Labour Court had not established any specific or burdensome requirements for such a replacement for more than 25 years. However, in 1986 the Grand Panel of the Federal Labour Court decided that a works council agreement, which was intended to replace an individual employment contract, taken as a whole must not be less favourable to the affected employees than their previous individual contracts.[83] In a subsequent decision in 1990 a Senate of the Federal Labour Court held that the ruling of the Grand Panel could not be applied to past events despite the fact that it would have merely pseudo-retrospective effect from the constitutional law perspective. The Senate argued that the employers had acted in line with the former case law when they had concluded the respective works council agreements. The legal relationship between these two kinds of agreements was not regulated by statutory law, and the change in the case law had an effect similar to the amendment of statutory law. In addition, the retrospective application of the decision of the Grand Panel would result in the insolvency of the individual employer who was the respondent in the case at hand. In order to protect the jobs in question, the previous case law was held to be applicable until the decision of the Grand Panel was published[84] in one of the standard legal journals.[85]

Several cases[86] in which the Federal Labour Court restricted the temporal effect of its judgments concern occupational pension schemes (*betriebliche Altersversorgung*) where changes in the case law affect long-term contracts, which are of crucial economic importance for employees and pensioners. For example, in 1995 the Federal Labour Court decided that certain part-time employees who worked less than half of the average weekly working time could not be excluded from an occupational pension scheme.[87] As a result of this new case law, employers had to extend their pension schemes to many employees who had previously not been included, and to directly pay a pension to former employees. The Federal Labour Court considered the temporal effect of its decision and came to the conclusion that – despite the financial burden for employers – its judgment should have retrospective effect. The Court noted that there are differences between enacting new statutory law and a new interpretation of statutory law by a Federal Court. It stated that the constitutional principle of protection of legitimate expectations was

[83] Federal Labour Court (Grand Panel) 16.09.1986 – GS 1/82 – BAGE 53, 42.

[84] German law does not require the specialized courts to release their decisions to the public.

[85] Federal Labour Court 20.11.1990 – 3 AZR 573/89 – [1991] Neue Zeitschrift für Arbeitsrecht 477, 479–81; see further Federal Labour Court 18.9.2001 – 3 AZR 679/00 – [2002] Neue Juristische Online Zeitschrift 1636, 1639.

[86] See eg Federal Labour Court 10.3.1972 – 3 AZR 278/71 – BAGE 24, 177; 24.10.1974 – 3 AZR 590/73, BAGE 26, 333.

[87] Federal Labour Court 07.03.1995 – 3 AZR 282/94 – [1996] Neue Zeitschrift für Arbeitsrecht 48, 52–55.

the more important the closer the function of the case law under review comes to enacting statutory law. In order to fully understand this argument, one has to bear in mind that whole branches of German labour law (for example, the right to collective action) are not regulated by the legislature. Hence, in these areas of labour law the function of the Federal Labour Court is often described as a substitute legislature (*Ersatzgesetzgeber*).[88] In these areas, the Court implicitly argues, the protection of legitimate expectations is of more importance, and only less so in areas regulated by the legislature, in which the function of the Federal Labour Court is limited to the more conventional interpretation of statutory law. The Court concluded that, first, no employer could have expected the discrimination of certain part-time employees to be justified; second, the development of its case law was foreseeable and; third, the employees had an overwhelming economic interest in obtaining an occupational pension. Similarly, the Court held in 2002 that no employer, when setting up an occupational pension scheme, could have expected that a general foreman could be treated less favourably than technical and commercial clerks.[89]

An important 2001 decision of the Federal Labour Court stated that a change in the case law must not establish new and retrospectively applicable requirements for past terminations of an employment contract that could not be subsequently satisfied by the employer.[90] This decision concerned the legal obligation of an employer to inform the staff council (*Personalrat*) prior to the termination of an employment contract, which is a legal prerequisite for the validity of the termination. The decision of the Federal Labour Court became an important precedent after the 2005 judgment of the European Court of Justice in *Junk*, according to which the European Directive 98/59/EC prescribed that an employer had to notify an intended collective redundancy to the competent public authorities prior to the termination of the employment contracts.[91] The decision of the European Court of Justice ran counter to the settled case law of the Federal Labour Court, according to which a notification prior to the end of the notice period (*Kündigungsfrist*) was sufficient.[92] Under the impression of the decision of the European Court of Justice in the *Junk* case and the obligation to harmonious interpretation of national law according to article 288(3) of the Treaty on the Functioning of the European Union (TFEU), the Federal Labour Court changed its case law and decided that employers had to inform the authorities prior to the termination of employment contracts. However, with a view to the constitutional principle of legitimate expectation, this new case law should not come into effect until the competent authority, the Federal Labour

[88] B Rüthers, 'Arbeitskampf in einer veränderten Wirtschafts- und Arbeitswelt' [2010] Neue Zeitschrift für Arbeitsrecht 6, 13.

[89] Federal Labour Court 19.03.2002 – 3 AZR 229/01 – juris.

[90] Federal Labour Court 18.01.2001 – 2 AZR 616/99 – [2002] Neue Zeitschrift für Arbeitsrecht 455.

[91] European Court of Justice 27.01.2005 – C-188/03 – [2005] ECR I-885.

[92] Federal Labour Court 13.04.2000 – 2 AZR 215/99 – [2001] Neue Zeitschrift für Arbeitsrecht 144, 145.

Market Authority (*Bundesagentur für Arbeit*), changed its administrative practice by issuing a press release and amending its official forms.[93] This decision can be contrasted with the decision of the Federal Labour Court on paid annual leave in the aftermath of the European Court of Justice judgment in *Schultz-Hoff* in 2009.[94] Again, the Federal Labour Court had to change its case law. However, in this context it held that the mere existence of the European Directive on Working Time 93/104/EC had the effect that no employer could rely on the Federal Labour Court's case law after the Directive came into effect.[95] This decision received much criticism in legal literature because the Federal Labour Court implicitly acknowledged that it had violated its obligation to refer the relevant matter to the European Court of Justice in accordance with what is now article 267(3) of the TFEU and, what is worse, because the Court expected employers to foresee that its previous case law was not in line with European law.[96]

Employment contracts often refer to conditions of employment set out in a collective bargaining agreement (*Tarifvertrag*). Over several decades the Federal Labour Court rejected a literal interpretation of such clauses. It held that they should merely have the effect of treating employees who are members of the trade union and those who are not alike. According to German law, the collective agreement confers directly applicable rights only on the former, but not the latter. A reference clause (*Bezugnahmeklausel*) in individual employment contracts counterbalances this difference and entitles all employees to the collective agreement's conditions of employment. With its decision of 14 December 2005 the Federal Court changed its opinion with the effect that, contrary to its former case law, employers would be bound to collective agreements that were concluded even after they had resigned from the membership in the respective employers' organization. In such circumstances, the application of the collective agreement would be based solely on the (new interpretation of the) reference clauses in the individual employment contracts. With regard to its longstanding former case law, the Federal Labour Court restricted the retrospective effect of its new case law. However, the new case law would not apply as of the publication of the judgment announcing the change in the case law, but to all employment contracts concluded before 1 January 2002.[97] This was the date upon which new statutory provisions on standard employment terms

[93] Federal Labour Court 13.07.2006 – 6 AZR 198/06 – [2007] Neue Zeitschrift für Arbeitsrecht 25 [42].

[94] European Court of Justice 20.01.2009 – C-350/06 and C-520/06 – [2009] ECR I-179.

[95] Federal Labour Court 23.03.2010 – 9 AZR 128/09 – [2010] Neue Zeitschrift für Arbeitsrecht 810 [111].

[96] A Sagan, 'Europäischer und nationaler Vertrauensschutz bei Rechtsprechungsänderungen im Arbeits- und allgemeinen Privatrecht' [2010] Jahrbuch Junger Zivilrechtswissenschaftler 67, 89–90.

[97] Federal Labour Court 14.12.2005 – 4 AZR 536/04 – [2006] Neue Zeitschrift für Arbeitsrecht 607 [25–27].

came into effect. This part of the decision was heavily criticized in legal literature because the Court itself had applied its old case law after 1 January 2002.[98]

Public Law

Restrictions on the retrospective effect of judgments have also been used by the Federal Courts in the area of public law, albeit to a lesser extent than by the Federal Court of Justice and the Federal Labour Court. It appears that the Federal Administrative Court has not restricted the temporal effect of any of its judgments *pro futuro*. With a single sentence in a 1967 judgment the Court declared with apodictic certainty that 'a change in the case law is not a change in the legal situation'.[99] In 1996 the Court was explicitly asked whether a court had to make a prior announcement before changing its case law. The Court, again very briefly, replied in the negative.[100] According to the Court, it would be reasonable from the perspective of practical policy (*Rechtspolitik*) to announce intended changes in the case law. However, where the particular question was decisive in a specific case, the absence of such announcement would not hinder the court in changing the case law. The Court did not consider any restriction of this rather uncompromising view with regard to the function of the case law of the Federal Courts in the legal system or the constitutional principle of legitimate expectation.

In addition, in 2009 when the Federal Administrative Court changed its case law on the issue of competitor complaints (*Konkurrentenklagen*) in the civil service sector, it held that the constitutional principle of legitimate expectation would not require the Court to apply its previous case law to the case at hand. It argued that, according to the case law of the Federal Constitutional Court, a change in the case law would be unproblematic with regard to the principle of legitimate expectation provided the court gives adequate reasons and does not exceed the confines of a foreseeable development of the case law. Against this background, the Federal Administrative Court referred to previous rulings in which it already had overturned some aspects of its older case law. Therefore, according to the Court, the final change in its case law was sufficiently predictable.[101]

In contrast to the restrictive practice of the Federal Administrative Court, the Grand Panel of the Federal Fiscal Court in 2007 restricted the retrospective effect of a ruling in which it departed from its previous case law on the question of the heritability of loss deductions according to paragraph 10d of the Income Tax Act

[98] R Giesen, 'Bezugnahmeklauseln – Auslegung, Formulierung und Änderung' [2006] Neue Zeitschrift für Arbeitsrecht 625, 628–9.

[99] Federal Administrative Court 19.10.1967 – III C 123.66 – BVerwGE 28, 122.

[100] Federal Administrative Court 28.02.1995 – 4 B 214/94 – [1995] Neue Juristische Wochenzeitschrift 867.

[101] Federal Administrative Court 04.11.2010 – 2 C 16.09 – BVerwGE 138, 102 [59].

(*Einkommensteuergesetz*).[102] Its new case law was less favourable to taxpayers as certain tax deductible losses were no longer heritable. In its lengthy and principled judgment the Court held, first, that its previous case law, which it had upheld for more than 45 years, had not become customary law because it had been subject to constant criticism in legal literature. Second, it found that the continuity of the case law of the Federal Courts was of essential importance to legal certainty in order to ensure that taxpayers could foresee the criteria applied by the tax authorities and the Financial Courts and act accordingly. However, this would not preclude a change in the case law even if the respective case law had been established over a long period of time. Substantial reasons could necessitate the departure from such case law in order to prevent a 'petrification' (*Versteinerung*) of the case law. Third, the Court noted that the principle of legal certainty and the protection of legitimate expectation, on the one hand, and the idea of material justice and the fact that the courts were legally bound to statutory law, on the other hand, were on an equal footing as they followed from the fundamental constitutional principle of the rule of law. Therefore, these conflicting principles had to be balanced in accordance with the principle of practical concordance (*praktische Konkordanz*). After a reference to the case law of the Federal Court of Justice and the Federal Labour Court on the restriction of the temporal effects of their rulings, the Federal Fiscal Court stated that case law is not comparable to statutory law. Nonetheless, the Federal Constitutional Court's case law on the restriction of the retrospective effect of statutory law could be adopted by way of analogy if applicable. Fourth, the Federal Fiscal Court decided that its new case law should be applicable as of the publication of its ruling. This restriction should apply in general and without regard to the facts of the individual case because all taxpayers could rely on the former case law, and the new case law was not merely the result of a simple interpretation of statutory law but rather required taking into account abstract principles of law, complex assessments, and the balancing of competing interests. The Federal Fiscal Court explicitly accepted the argument of the Federal Labour Court that the constitutional principle of legitimate expectation should have more importance the closer the function of the case law in question comes to statutory law. The more the legislature refrained from regulating a particular area of law, the more pressing was the constitutional obligation of the courts to protect confidence in their case law in its function as guidance for individual behaviour.[103] In this context, the Court pointed out that due to the procedural rules of the Fiscal Court Act its decision would not only affect the individual case at hand but de facto had an impact on the general public. The ruling would not only substantiate but also constitute the legal situation (*Rechtslage*). In effect, a change of the case law would also change the legal situation.

[102] Federal Fiscal Court (Grand Panel) 17.12.2007 – GrS 2/04 – BFHE 220, 129 [90–112].

[103] Federal Fiscal Court 17.12.2007 – GrS 2/04 – BFHE 220, 129 [104] with reference to H Buchner, 'Vertrauensschutz bei Änderung der Rechtsprechung' in G Hueck and R Richardi (eds) *Gedächtnisschrift für Rolf Dietz* (C.H. Beck, Munich, 1973) 175, 192.

Some of the early decisions of the Federal Social Court, which were not applied to past events, concern the introduction of more stringent procedural rules for the submission of an appeal.[104] In a 2005 case, the Court changed its case law on the rate of interest payable from the commencement of legal proceedings (*Prozesszinsen*) but refrained from applying its new case law retrospectively because the affected public health insurance funds could not have foreseen this change and therefore could not have provided precautionary financial measures in their budgets.[105]

Finally, a 2006 ruling of the Federal Social Court on the issue of unemployment benefits sparked some controversy in legal literature. In an *obiter dictum* the Court 'considered' changing its case law on the eligibility of (former) employees for the said benefits, where those employees had terminated their contract of employment. According to the new case law, such termination should not impair the entitlement to unemployment benefits provided the former employees had reached an agreement with the employer for a severance payment that was less than half a month's salary per year of service. This threshold was introduced by a new statutory provision in the Dismissal Protection Act (*Kündigungsschutzgesetz*) and although it had no direct legal connection to the statutory unemployment insurance, the Federal Social Court used the occasion to revise its case law.[106] In reaction to the decision of the Court, which it affirmed in later judgments,[107] the Federal Labour Market Authority (which disburses unemployment benefits) adapted its administrative practice accordingly. Because the new case law and the new administrative practice of the Federal Labour Market Authority were more generous to the beneficiaries of unemployment payments, no cases on this particular issue were brought before the courts anymore. It was not until a rather atypical case reached the Federal Social Court in 2012 that the new case law could finally be introduced.[108] Against this background, the 2006 decision of the Federal Social Court was criticized on the ground that it was not the proper function of the judiciary to regulate administrative practice by *obiter dicta*.[109]

Conclusion

The German legal system has an ambivalent approach to the concept of precedent and judge-made law. *De jure*, the specialized courts are not obliged to follow the case law of another court, with the exception of judgments of the Federal

[104] Federal Social Court 18.03.1987 – 9b RU 8/86 – BSGE 61, 213; 02.12.1992 – 6 RKa 5/91 – [1993] Neue Zeitschrift für Sozialrecht 471; 10.11.1998 – B 4 RA 30/98 R – [1999] Die Sozialgerichtsbarkeit 78.

[105] Federal Social Court 28.09.2005 – B 6 KA 71/04 R – BSGE 95, 141 [40].

[106] Federal Social Court 12.07.2006 – B 11a AL 47/05 R – BSGE 97, 1 [19–20].

[107] Federal Social Court 08.07.2009 – B 11 AL 17/08 R – BSGE 104, 57 [19].

[108] Federal Social Court 02.05.2012 – B 11 AL 6/11 R – BSGE 111, 1 [19–25].

[109] Bittner (n 59) 652.

Constitutional Court and the individual cases in which a higher court has passed judgment. *De facto*, however, the case law of the Federal Courts is not only relevant to the cases they have decided, but is of general importance as the Federal Courts are the highest authority on the interpretation and the further development of statutory law.[110] This general importance is underpinned by the procedural rules establishing a system of Grand Panels supported by specific obligations to refer to these Panels in the event of differences of opinion or the possibility of divergent judgments. The respective set of procedural rules ensures the unity of the case law within and as well as among each of the Federal Courts.[111] In addition, the procedural rules commit the courts of first and second instance to grant leave to an appeal (on a point of law) if such courts diverge from the case law of the Federal Courts. Thus, in theory, a first or second instance court's decision that is contrary to the case law of a Federal Court can always be overturned.

The method of restricting the temporal effect of judgments to future cases has a longstanding tradition in German legal practice. However, the topical case law does not offer a coherent solution to this complex issue. From the perspective of constitutional law, the question of whether the courts are permitted to restrict the temporal effect of their judgments *pro futuro* has not been explicitly addressed by the Federal Constitutional Court. However, the Constitutional Court has not called into question the respective practice of the Federal Courts, and a majority of legal scholars accepts the power of the Federal Courts to restrict the temporal effect of their rulings.[112] Nonetheless, it is unclear under what circumstances constitutional law prevents the specialized courts from applying new case law retrospectively. In this regard, the main constitutional parameter is the constitutional principle of legitimate expectation. However, its operation in the area of temporal effects of judicial decisions is, as yet, unsettled. Generally, the Federal Constitutional Court takes a generous approach based on a categorical and rather formalistic distinction between statutory laws and case law, arguing that only the former are of universally binding force and that the courts are not legally bound by the latter. Therefore, no litigant could expect the courts to adhere to previous case law.[113] Of course, this approach of the Constitutional Court is intended to retain the judiciary's flexibility and to allow the courts to amend their case law from time to time as they see fit. Clearly, the Constitutional Court is determined to prevent a petrification of the case law that would deter litigants from challenging standing case law of a Federal Court. However, the Constitutional Court did accept that longstanding and settled case law could result in legitimate expectations that are protected under constitutional law.[114] The circumstances of this exception to the general rule, however, remain unclear. It

[110] See Krebs (n 3).

[111] See (n 9).

[112] See Klappstein (n 57).

[113] See Federal Constitutional Court (n 36).

[114] See ibid.

does, therefore, not come as a surprise that some authors have taken a firmer stance on this issue, emphasizing the importance of case law in legal practice and possible similarities to statutory law.[115] Certainly, it would be helpful if the Constitutional Court gave more detailed and practical guidance to the Federal Courts with regard to the constitutional limits of overturning case law and applying new case law to past events.

Regarding the practice of the Federal Courts, the method of *pro futuro* restriction is widely used, with the sole exceptions being the Federal Administrative Court[116] and the Federal Court of Justice in the domain of criminal law.[117] The said restriction has a longstanding tradition in the field of civil law, in particular in company law and employment law. This can be explained by the fact that the topical case law of the Federal Court of Justice[118] and the Federal Labour Court[119] focuses on decisions that concern the validity of long-term contracts.[120] The effect of a *pro futuro* restriction, however, vary from case to case. Typically the new case law is applied as of the publication and dissemination of the judgment in which it is announced.[121] It appears that in a majority of the cases no exception is made for the litigant who has strived for the change in the case law.[122] In addition, the scope of the restriction varies. In some cases it was held to be generally applicable,[123] whereas in other cases it was applied on a case-by-case basis.[124]

Generally speaking, there are two main rationales that are used in the field of civil law as a basis for changing the case law with retrospective effect and rejecting a *pro futuro* restriction. First, the Federal Courts at times argue that a change in the case law is to be expected because of criticism of their past case law in the legal literature. Second, the courts refer to the case law of the Federal Constitutional Court on statutory laws with retrospective effect. In general, the Constitutional Court holds such laws to be constitutional if the affected matters have not been fully concluded in the past but are ongoing at the time the respective Act comes into force. Drawing on this line of the Constitutional Court's case law, the Federal Court of Justice[125] and

[115] See (n 51).

[116] See Federal Administrative Court (n 99); Federal Administrative Court (n 100).

[117] See Federal Court of Justice (n 75).

[118] See Federal Court of Justice (n 62) to Federal Court of Justice (n 74).

[119] See Federal Labour Court (n 77) to Federal Labour Court (n 97).

[120] See Federal Court of Justice (n 68) and Federal Court of Justice (n 70)36.

[121] See Federal Court of Justice (n 64), Federal Court of Justice (n 73) and Federal Fiscal Court (Grand Panel) (n 102).

[122] See Federal Court of Justice (n 73), Federal Labour Court (n 81), Federal Fiscal Court (Grand Panel) (n 102); to the contrary (n 79).

[123] See Federal Court of Justice (n 73).

[124] See Federal Court of Justice (n 70).

[125] See Federal Court of Justice (n 68).

the Federal Labour Court[126] argued that their rulings would only affect matters that were still under legal review and thus not fully concluded. However, this argument ignores the functional and temporal differences between acts of the legislature and acts of the judiciary and is prone to justify any application of new case law to past events.

A rather new phenomenon is the obligation to change the case law retrospectively after a ruling of the European Court of Justice. This stems from the obligation of the national courts to interpret national law in accordance with European Directives. In the field of employment law the Federal Labour Court has not found a consistent answer to this particular issue. With regard to collective dismissals it continued its former case law, which was contrary to European law, until the relevant administrative bodies had adapted to the ruling of the European Court of Justice in the *Junk* case.[127] On the other hand, in the domain of paid annual leave it changed its case law retrospectively arguing in essence that employers could have foreseen that its former case law was not in line with European law.[128]

In the area of tax law the Grand Panel of the Federal Fiscal Court in a principled judgment explained that the issue of retrospective effect of judicial decisions is fundamentally intertwined with the function of the Federal Courts and the legal status of their case law.[129] This reflects the general discussion in legal theory that concerns the legal quality of judicial decisions and the possibility of judge-made law. In the end, the issue of temporal effect of judgments correlates with the broader question of whether judges are restricted to applying directives of the legislature to an individual case by a purely cognitive process[130] or are generating legal rules in a decisionistic process which they afterwards apply to the case at hand.[131] Following the former argument, judges will in general be bound by the decision of the legislature on the temporal effect of statutory law applicable to the case in question. From the latter point of view, it is, however, for the judge to decide on the point in time when a new line of case law will come into effect. Arguably, the root of the issue lies in the rather blurred line demarking the different functions of the legislature and the judiciary. Against this background, the Federal Fiscal Court[132] convincingly argued that the courts have all the more reason to restrict the temporal effect of their decisions *pro futuro* the more they act in lieu of a dormant legislature.

[126] See Federal Labour Court (n 85).

[127] See Federal Labour Court (n 93).

[128] See Federal Labour Court (n 95).

[129] See Federal Fiscal Court (Grand Panel) (n 102).

[130] See Heck (n 30) and Larenz (n 31).

[131] See Esser (n 34) and (n 35).

[132] See Federal Fiscal Court (n 103).