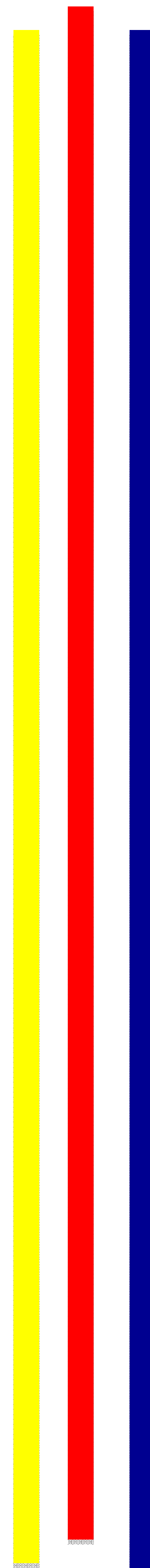

# SPECIAL SERIES ON THE FEDERAL DIMENSIONS OF REFORMING THE SUPREME COURT OF CANADA

## The Federal Constitutional Court of Germany: A Central Player in a Federal State

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SC Working Paper 2010 - 03

## *1- Introduction*

Germany can be considered as a state with a powerful constitutional court. After the failure of the democratic constitution of the Weimar Republic (1919 to 1933), the founders of the West German Federal Republic in 1949 felt the need to set up an independent guardian of the constitution. The Federal Constitutional Court was entrenched in the Basic Law as a court specialized in constitutional matters. After the Nazi dictatorship had not only ended democracy and civil rights but also abolished the *Länder* governments, the founders were determined to maintain federalism and saw in the court an institution for the purpose. Thus federalism and the existence of the *Länder* are entrenched in the constitution and protected against constitutional amendments (article 79 section 3 Basic Law). The role of the Court was to settle conflicts between the federal government and the *Länder* governments.

In this paper we want to shed some light on the Court's role in this respect, in particular, its impact on the structures and mechanisms of federalism. We start by explaining the functions and competences of the Court. Then we outline its organisation and the election of judges in order to reveal the internal logic of operation. Although it is influenced rather by partisan than by regional interests, the Court has repeatedly been able to shape the federal system. However, it has followed debates in politics and society instead of superimposing its own doctrine of federalism. Recent decisions on disputes about competences, financial issues and European integration show this very clearly. That the Federal Constitutional Court became a central player in German federalism can be explained as a consequence of a particular pattern of joint policy-making, which complicates a political resolution of conflicts, in particular where constitutional matters are concerned.

## *2. Functions and powers*

Inaugurated in 1951 in Karlsruhe, a peripheral city that is distant from the sites of government and parliament in Bonn, the Federal Constitutional Court became a powerful and widely accepted institution in the political system. Its basic function is to defend the constitution against infringements by any holder of state power, be it decisions made in the legislative or the executive arena. While most of the *Länder* established their own constitutional courts, the Federal Constitutional Court has the final say in matters of conflict between federal and state law due to the legal superiority of federal law. The Court only decides if it is called upon to do so by governments, parliaments, party groups or citizens who claim to be affected in their basic rights. The Basic Law defines four main areas of jurisdiction of the Court[1]:

(1) The Court is supposed to act as a final arbiter in conflicts between constitutional bodies that are on the same level with one another or different levels. Issues may concern the law on political parties, electoral law or parliamentary proceedings. Conflicts between different levels of government usually concern the allocation of power or fiscal equalization. In quantitative terms, between 1951 and 2008 only 1.53 per cent of all procedures concern this matter. In qualitative terms, decisions include matters of high constitutional and political relevance.

(2) At 2 per cent are proceedings in the Court which concern abstract or specific constitutional reviews of law. Authorized to initiate abstract reviews of a law (independent of its application) are the federal government, the *Länder* governments and one third of the members of the *Bundestag*. All courts can call upon the Federal Constitutional Court to decide whether in a specific case the relevant law conforms to the constitution.

[1] Data available from: http://www.bundesverfassungsgericht.de/organisation/statistik_2008.html

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(3) Introduced in 1951 and entrenched in the Basic Law in 1969, constitutional complaints mounted up to 169,592 in 2008, i.e. 96.42 per cent of all judicial proceedings. Every citizen who thinks that his or her constitutional rights have been violated has recourse to the Court, provided that he or she has failed in inferior courts originally responsible for the matter. At only 2.5 per cent of all complaints, the success rate is quite low. Issues of federalism can be raised in this context, in particular if the competence of the federal legislature is disputed.

(4) The fourth area of jurisdiction includes different instruments to maintain democratic procedures and institutions, such as the ban of a political party, the impeachment of the President of the Federal Republic or of judges and the verification of elections. With the exception of two successful and one failed attempt to ban extremist parties, these procedures are rarely utilized.

In principle, the Court can declare a law invalid because it does not conform to constitutional norms. For this reason it can be characterised to act as a passive veto-player in the political process. However, more often than not decisions or reasoning of the Court provide guidelines for legislation. Hence it can also influence the agenda of governments and parliament, which it has done in matters of federalism.

### *3. Organisation and election of judges*

Since 1971, 16 judges constitute the Federal Constitutional Court. They are assigned to one of the two Senates, each with eight judges. Both senates are supported by scientific assistants and an administrative staff. The internal organisation of the Court does not follow any regional or federalist logic, even though it is the second Senate of the Court, which usually decides conflicts between constitutional bodies and thus often on fundamental issues of federalism. Judges are elected by a two-thirds majority of the *Bundestag* and the *Bundesrat* for a twelve-year term, with each chamber electing half of the members of each Senate. Both chambers also determine the President and the Vice-President of the Court.[2] After being elected, the President of the Federal Republic officially appoints the judges.[3]

Judges are elected for a twelve year term, but they must retire at the age of 68. They cannot be re-elected. In principle each person, who is at least 40 years old and qualified in law (first and second state examination), is eligible. In practice, parties nominate members of higher federal courts or professors of law, and in rare cases, former ministers or members of parliament. Thus both Senates mainly consist of professional lawyers who made their career either in jurisdiction, public administration or universities.

The election of the judges reveals a federalist element. The *Länder* governments are involved via the *Bundesrat*. According to the proportionality principle applied in order to reduce the impact of political interests, half of the judges must find the support of two thirds of the *Länder* governments. However, this does not compel the judges to represent *Länder* interests. Moreover, the selection of candidates does not follow a regional logic. Rather it is the political parties that have an impact on the selection. The rule of qualified majority compels the leading parties to find

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[2] The need of a two-third majority is not provided for in the Basic Law, but determined in a law passed in 1956. An election by simple majority is considered to contradict the spirit of the constitution. In practice *Bundestag* and *Bundesrat* apply different election procedures. In the *Bundesrat*, the ministers of justice of all *Länder* meet to establish an ad hoc Commission which nominates candidates. Elections take place in the plenary of the *Bundesrat* with each candidate needing 46 of the 69 votes. The *Bundestag* sets up a standing committee to elect the judges. Of the 12 members, a candidate obviously needs 8 votes (Kau 2007: 199f.).
[3] The President only confirms the correctness of the elections process and is not supposed to deny the appointment of a regularly elected judge (Kau 2007: 193).

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an agreement over nominations.[4] Following informal party agreements, the right to fill a vacant position on the Court will be assigned to the party which already nominated the previous judge. If more than one judge is to be elected, the two big parties usually agree on a package deal approved unanimously in the *Bundestag* and the *Bundesrat*. Conflicts between *Länder* premiers occur from time to time, but they never concern particular *Länder* interests; instead they reveal different opinions about the expected "positions" of a candidate. There is no empirical evidence that the *Länder* governments aim at regional proportionality, which would be difficult to apply in practice. If such considerations play a role at all, they only are of minor relevance. All in all, it is the professional reputation of a lawyer that counts (see Hönnige 2007). Political disputes have overshadowed some of the recent elections of judges, but judges hardly follow the line of a political party or a government (Kneip 2009).

### *4. The impact of Court decisions on German federalism*

Nonetheless the Court's decisions are of a highly political nature. They have influenced procedures of decision-making in parliament, electoral law, financing of political parties or the deployment of the armed forces outside Germany. Many decisions have had an impact on economy and society. And even though the organisation of the Court does not reflect the federalist patterns of the German state, it is an important player in federal-*Länder* relations.

As mentioned above, arbitration of conflicts between the federal and the *Länder* governments has immediate repercussions for federalism. The abstract review of statutes may indirectly lead to a shift of powers, for instance if the court questions the competence of the federal legislative. Such decisions can induce the federal governments to initiate an amendment of the constitution. Moreover, with its decisions on social equality the Court supports uniform policies and centralization, too.

Of particular importance in this context are decisions on the principles guiding the allocation of legislative powers and financial resources in the federal system. When it comes to decisions on these constitutional issues, federal and *Länder* governments regularly are caught in the joint-decision trap (Scharpf 1988) due to the zero-sum character of conflicts. To amend the status quo, they have to come to an agreement which can be ratified by a two-thirds-majority in the *Bundestag* and the *Bundesrat*. In the context of redistributive conflicts on the allocation of power and resources, constitutional amendments are likely to fail. In this situation, governments tend to pass the problem to the Court. Usually, the Court provides no definitive solutions but rather outlines an agenda for legislation. Moreover, its decisions are interpreted by governments and members of parliament as highlighting those problems which require amendment. Hence it is the interplay between dispute settlement by the Court and legislative or constitutional policy which drives the dynamics of federalism.

Court decisions on federal issues do not reveal a particular doctrine of federalism. Rather they tend to follow political discussions in the public sphere. Therefore, after supporting unitary and cooperative federalism until about the 1970s, the Court now emphasizes decentralization, the autonomy of governments and a clear separation of powers. Again it is not the impact of *Länder* governments on the recruitment of judges but the interplay between politics and jurisdiction which explains the effect on federalism, as the following examples illustrate.

After German unification (1990), economic disparities between the *Länder* affected debates about German federalism. Throughout the 1990s, Western *Länder* governments, burdened by

[4] Following the logic of the party coalitions in government, the bigger parties usually gave one seat to their smaller partners. Especially in the second Senate this practice ceased in 1987. See Hönnige 2007: 972.

payments for fiscal equalisation, initiated legal proceedings in order to alter the equalisation scheme. Given clear constitutional rules, the Court had limited leeway to question existing law. Moreover, it supported the concept of 'unitary federalism'. In legal disputes on the application of the right of equal treatment in social policy and taxation, the Court requested harmonised public policies all over Germany. The demand for uniform solutions provided reasons for federal legislation in matters of concurrent competences, but also required that all *Länder* governments could dispose of appropriate financial ressources. Despite the attempts of the rich *Länder* governments to promote change, the Court ultimately affirmed fiscal equalisation regulations.

However, during the late 1990s, the Court changed its opinion on federalism and began to support the *Länder* governments arguing for decentralisation. With its 1999 decision on fiscal equalisation, it required a more explicit and precise definition of norms of distributive justice. Given that definitive constitutional norms already existed, the Court was not able to change the constitution implicitly. In legal terms, it demanded a law setting out these norms explicitly. But in political terms, this decision launched a debate as to how the level of equalisation can be justified.

In matters of legislative competence, the impact of Court decisions was different. According to the Basic Law, the conditions for using concurrent and framework competences allowed the federal government to make laws in order to achieve or preserve equal living conditions in all regions, a clause which was open to diverse interpretation, even after it had been specified in 1994. Until the 1990s, the federal government had made extensive use of this clause and had left the *Länder* parliaments little room for autonomous legislation. The Court had accepted this as it considered the allocation of legislative powers a matter of politics rather than legal reasoning. In 1994, the constitution was amended and since then the Court has been obliged to decide on the matter. Following constitutional change, some *Länder* governments challenged federal competence for a number of laws and instituted legal proceedings to get that competence denied. By revising its former opinion on this issue, the Court now interpreted the conditions for federal legislation very restrictively. This way *Länder* could prevent federal legislation – although only with the help of the Court. The federal government had to accept that even its power to change existing law can be constrained. As the Court had altered the status quo to the benefit of the *Länder* governments, the balance of power in constitutional policy shifted as well (Scharpf 2006).

As a result, implicit constitutional change was turned into explicit change. In November 2004, following a fourth decision of the Court on legislative competences, the federal government became aware of the consequences of this new legislative environment. A commission working on the reform of German federalism delivered a catalogue of legislative competences which should be transferred to the *Länder* level. The *Bundestag* and the *Bundesrat* passed constitutional amendments to this end that came into force in 2006.

A similar interplay between governments and the Court influenced the agenda of a second constitutional reform of the federal system. It was prompted by the government of Berlin's attempt to compel the federal government to bail out the debt-ridden city-state. Deviating from an earlier judgment, the Court ruled against Berlin and emphasised the responsibility of governments for their fiscal policy. In its reasoning, the Court confirmed the constitutional principles of fiscal equalisation and the existing law. However, it called for an improved constitutional regulation to prevent excessive public debt. The commission working on a reform of fiscal federalism reacted to this 'clear order of the Federal Constitutional Court' by making the issue a matter of high priority. It proposed new constitutional rules for reducing public debt and for coordinating the fiscal policy of federal and *Länder* governments, rules that have been in force since 2009.

The Court also strengthened German federalism by its decision on European Treaties. By acting as a guardian of national statehood against the evolution of a European federal state, it

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emphasized the constitutional principles of German federalism. In its ruling on the Maastricht Treaty the Court stated in 1993 that the process of European Integration should not weaken democracy or statehood, since the European Union was considered to be only a union of states and Germany one of the "masters of the treaties". In this context, the participation of *Länder* governments in European policies was guaranteed by a constitutional amendment. In a similar vein, the Court's decision on the Lisbon Treaty in 2009 marked the constitutional limits of European integration and stipulated a revision of procedures concerning the role of the Federal Parliament and required the participation of the *Bundesrat* in particular matters.

***5. Conclusion***

To summarize, we can characterize the German Federal Constitutional Court as a central player within the political system in a double sense of the term. First, it is an institution at the federal level. Accordingly, selection of judges is dominated by party politics rather than by any attempts to represent regional interests. Second, the Court is a central actor in the evolution of German federalism. With its decisions concerning the allocation of powers and fiscal resources between levels, the Court supported cooperative federalism until the turn of the century, but recently has emphasized the autonomy of governments, requested a clear division of powers and strengthened the position of the *Länder*. At the same time it defended the federal order of Germany in the context of European integration. Thus the Court's "judicial doctrine" of federalism (Baier 2006) has changed.

Theories of constitutional courts have revealed at least two principal mechanisms to explain their decisions and impacts on federalism. First, it is the institutional position of courts in a federal system and the election of judges that determines outcomes (e.g., Bzdera 1993). From this perspective, the German Federal Constitutional Court should tend to favour the federal government in conflicts with the *Länder* governments. However, recent decisions disconfirm this assumption. Therefore, a second theory seems to apply better to the German case (e.g., Vanberg 2004). It states that courts tend to follow general trends in political discussions. This way they increase the chances of their decisions to be implemented by legislation or constitutional amendments. In fact, by emphasising decentralisation, the autonomy of governments and diversity instead of centralisation, intergovernmental cooperation and uniformity, decisions of the Federal Constitutional Court on federalism clearly responded to the changing discussion on federalism. This paper cannot provide empirical evidence in favour of one of these theories or the other. Presumably, further conditions have to be taken into account, which may be revealed in a comparative study.

**References:**


- Website of the German Constitutional Court: www.Bundesverfassungsgericht.de
- Baier, Gerald, 2006: Courts and Federalism: Judicial Doctrine in the United States, Australia and Canada, Vancouver: UBC Press.
- Bzdera, André, 1993: Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review; Canadian Journal of Political Science 26 (1), 3-29.
- Hönnige, Christoph, 2009: The Electoral Connection: How the Pivotal Judge Affects Oppositional Success at European Constitutional Courts; West European Politics, 32 (5), 963-984.
- Kau, Marcel, 2007: United States Supreme Court und Bundesverfassungsgericht. Die Bedeutung des United States Supreme Court für die Errichtung und Fortentwicklung des Bundesverfassungsgerichts, Berlin/Heidelberg: Springer.


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- Kneip, Sascha, 2009: Verfassungsgerichte als demokratische Akteure, Baden-Baden: Nomos.
- Scharpf, Fritz W., 1988: The Joint Decision Trap. Lessons from German Federalism and European Integration, in: Public Administration, 66 (3), 239-278.
- Scharpf, Fritz W., 2006: Recht und Politik in der Reform des Föderalismus, in Michael Becker and Ruth Zimmerling (eds) Politik und Recht (PVS special issue 36), Wiesbaden: VS Verlag für Sozialwissenschaften, 307-332.
- Vanberg, Georg, 2004: The Politics of Constitutional Review in Germany, Cambridge: Cambridge University Press.

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