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Constitutional Courts in Federal States: the case of Germany

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Résumé :

La préservation et le contrôle de la structure fédérale comptent parmi les domaines majeurs dans l'activité de la Cour constitutionnelle fédérale allemande. Toutefois, le fédéralisme allemand a fonctionné la plupart du temps comme un système très centralisé avec une prépondérance de la législation fédérale et un haut degré de coordination entre les *länder*, dynamique à laquelle la Cour a participé par le biais de ses interprétations assez large des compétences relevant du législateur fédéral. Si les réformes constitutionnelles consécutives à l'intégration des *Länder* de l'ancienne Allemagne de l'Est ont eu pour but de renforcer la positions des entités fédérées en introduisant une plus stricte séparation des pouvoirs fédéraux, les changements en résultant sont assez marginaux et n'ont pas fondamentalement atteint la nature centralisée du fédéralisme allemand.

Abstract :

The preservation and enforcement of the federal constitutional structure constitutes one of the main building blocks of the jurisdiction of Germany's Federal Constitutional Court. However, most of the time post-war German federalism has functioned as a highly centralised system with a dominant federal legislature and a high degree of coordination among the *Länder* in the exercise of their reserved powers, an evolution which the Court assisted through its broad interpretation of the scope of federal legislative powers. Constitutional reforms following the integration of the new *Länder* on the territory of the former GDR have tried to strengthen the position of the *Länder* by providing for a stricter federal separation of powers, but the resulting changes have been limited in scope and not fundamentally altered the centralised nature of German federalism.

1. Introduction

Federalism was seen by the drafters of the German Basic Law in 1949 primarily as a necessary response to the experience of totalitarian rule during the period of the so-called "Third Reich" and less as a constitutional acknowledgment of genuine diversity among the states (Länder), most of which were creations of the post-war era. While federal or quasi-federal structures had been an important feature of virtually all forms of state organisation that had existed in Germany since the Middle Ages, the National Socialist rulers between 1933 and 1945 created a highly centralized state with little regard for traditional regional or local autonomies1. After the surrender and occupation of Germany in May 1945 administrative structures were restored by the occupying powers – USA, Britain, France, and the USSR – first in the municipalities and then at the Land level before the Federal Republic of Germany in the Western occupation zones and the GDR in the Soviet

occupation zone were established as central entities within the space of a few months in 1949[2].

2. Structure of the German Federal System: an Overview

Following the accession of the former German Democratic Republic in 1990, the Federal Republic of Germany consists of 16 Länder: Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein, and Thuringia. While a few of these Länder have historical roots which reach further back in history (e.g. Bavaria), most of them were created after the Second World War. They vary considerably in size of territory and population: from 404 square kilometers (Bremen) and 660.000 inhabitants (Bremen) to 70.552 square kilometers (Bavaria) and 17.900.000 inhabitants (North Rhine Westphalia). The borders of the existing Länder may only be modified with the consent of the local populations affected by the change through a referendum (Article 29 Basic Law - BL)[3].

The Länder are free to adopt their own constitutions (and all have done so), but Article 28 BL commits the Länder to certain basic principles in the design of their constitutional structures and thus ensures a minimum degree of constitutional homogeneity. The constitutional order in the Länder must conform to the principles of a republican, democratic and social state governed by the rule of law within the meaning of the Basic Law. The primacy of the state constitution over other state law is enforced in all Länder by a state constitutional court[4]. Land law may not derogate from federal law, unless federal law provides for the possibility of such derogation. In case of conflict between Land law and federal law, the latter prevails (Article 31 BL).

Article 30 BL provides that all those state powers which are not expressly assigned to the Federation by the Basic Law shall remain with the Länder. However, a closer analysis of chapters VII. to IX. of the Basic Law which spell out the details of the federal separation of powers shows that the relevant provisions create a closely integrated federal system requiring a high degree of co-operation between the Federal Government and the Länder instead of one in which each side exercises its powers autonomously within its respective sphere. In this system the Federation enjoys wide law-making powers which ensure a high degree of legislative uniformity throughout the federal territory[5] while the implementation of those federal laws is primarily left to the administrations of the Länder[6].

The Basic Law recognizes three categories of legislative powers[7]: exclusive legislative powers of the Federation, concurrent legislative powers which are shared between the Federation and the Länder, and exclusive legislative powers of the Länder. On matters covered by the exclusive legislative power of the Federation, the Länder have the authority to legislate only when and insofar as they are expressly authorized to do so by a federal law (Article 71 BL). The exclusive legislative powers of the Federation cover, among other things, foreign affairs and defense, citizenship in the Federation, the unity of the customs and trading area, the law on weapons and explosives, and industrial property rights (Article 73 BL).

On matters falling within the concurrent legislative power, the Länder have the power to legislate so long as and to the extent that the Federation has not made use of its legislative power by enacting a law (Article 72 (1) BL). However, with regard to the matters enumerated in Article 72 (3) BL – hunting, protection of nature and landscape management, land distribution, regional planning, management of water resources and admission to and graduation in institutions of higher education

– the Länder may enact laws at variance with existing federal legislation. If the Länder make use of this power, the principle that federal law takes precedence over Land law (Article 31 BL) no longer applies. Instead, the more recent Land legislation prevails over the already existing federal provisions. However, Land legislation on these matters does not preempt the later enactment of new – and different – federal laws. But their entry into force is deferred: they become effective six months at the earliest after they have been promulgated, unless they provide otherwise with the consent of the Bundesrat.

With regard to the other matters featuring in the list of concurrent legislative powers of Article 74 BL federal legislation supersedes existing and preempts future Land legislation. However, on some of those matters the Federation may only use its power to legislate if, and to the extent that, the establishment of equal living conditions throughout the federal territory or the maintenance of economic or legal unity renders such legislation necessary in the national interest. These matters are specifically designed in Article 72 (2) BL. They include residence and establishment of aliens, public welfare, economic affairs, regulation of educational and training grants, promotion of research, transfer of land, natural resources and means of production to public ownership, economic viability of hospitals and regulation of hospital charges, law on foodstuff, road traffic, motor transport, state liability, and medically assisted reproduction of human life. Whether a federal regulation on these matters meets the requirements of Article 72 (2) BL is subject to review by the Federal Constitutional Court (Article 93 (1) no. 2a BL). On all other matters which are subject to concurrent legislation, including important matters like civil and criminal law, the law governing court organisation and procedure, or the law of the legal professions the Federation may freely decide when and to which extent to exercise its legislative powers.

Similarly, most legislative powers on matters of taxation are vested in the Federation, while only a few residual powers, mainly with regard to local consumption taxes, are left to the Länder (Article 105). In terms of revenue distribution, Article 106 BL provides that the most important tax revenues are shared between the Federation and the Länder. The income and the corporation tax are shared equally, while the value-added tax (VAT) is shared on the basis of a periodically adjusted percentage numbers. Other tax revenues are allocated either to the Federation (e.g. customs duties, taxes on capital transactions) or to the Länder (e.g. property, inheritance, motor vehicle and gambling taxes). Horizontal and vertical mechanisms of financial equalization, i.e. transfer of tax revenues from the richer to the poorer Länder as well as additional financial grants by the federal government to the latter, shall ensure a reasonable equalisation of the disparate financial capacities of the Länder (Article 107 BL)8.

The primary responsibility for the implementation of laws, on the other hand, lies with the Länder. The decentralized implementation of federal legislation is meant to avoid the establishment of a costly parallel federal administration. The Länder are subject to federal supervision in the execution of federal laws. Normally this supervision is limited to the lawfulness of the execution. Only in those cases in which a Land executes a federal law on federal commission does it also extend to matters of administrative expediency, enabling the Federal Government to address instructions to the highest Land authorities concerning the application of the law in the individual case (Article 85 BL).

In order to counterbalance the strong position of the Federation with regard to legislation, the Länder participate in the legislation and administration of the Federation through the Bundesrat (Article BL). The members of the Bundesrat are appointed and recalled by the Land governments (Article 51 (1) BL) and bound by their instructions. Strictly speaking, the Bundesrat is not a

parliamentary body since it does not represent the legislatures of the federal states but their governments. The distribution of votes in the Bundesrat is weighted in favor of the smaller states: while each Land has at least three votes, Länder with more than two million inhabitants have four, Länder with more than six million inhabitants five and Länder with more than seven million inhabitants six votes (Article 51 (2) BL). As a result, the biggest Land, North Rhine-Westphalia, only has twice as many votes as the smallest Land (Bremen), although its population is almost thirty times as big as that of Bremen (18 million people vs. 660.000 inhabitants). The votes of each Land may be cast only as a unit (Article 51 (3) BL).

In exercising its right to participate in the federal legislative process, the Bundesrat is not placed on an equal footing with the Bundestag. In general, it may block legislation only temporarily by adopting a suspensive veto which can be overridden by the Bundestag with a majority corresponding to the one which has supported the veto in the Bundesrat (Article 77 (4) BL). However, if the Basic Law explicitly requires the consent of the Bundesrat for the adoption of a law, it cannot enter into force without the concurring vote of the Bundesrat. Generally speaking, such consent is required in cases where genuine interests of the Länder are affected by the piece of legislation in question. Important examples include proposed constitutional amendments (Article 79 (2) BL), all laws affecting state revenues (Article 105 (3)), and laws and directives impinging on the administration of federal law by a state (Article 85 (1) BL). In cases in which the consent requirement applies the Bundesrat is entitled to examine the entire content of the law, not only those provisions which bring the consent requirement into play[9].

Through the Bundesrat the Länder also participate in matters concerning the European Union, with the degree of participation required depending on the nature and the contents of the measure under consideration. If the measure is a legislative act of the European Union, the Federal Government must provide the Bundesrat with an opportunity to state its position on the proposed act and has a constitutional duty to take the latter’s position into account in the negotiations (Article 23 (3) BL). However, if the proposed measure primarily affects the legislative powers of the Länder, the structure of the Land authorities, or Land administrative procedures, the position taken by the Bundesrat shall be given “the greatest possible respect” (Article 23 (5) BL). The most-far reaching participation of the Länder is triggered if the proposed measure primarily effects exclusive competences of the Länder, i.e. school education, culture or broadcasting. In this case, the exercise of the rights belonging to the Federal Republic of Germany as a EU member state shall be delegated to a representative of the Länder designated by the Bundesrat (Article 23 (6) BL).

3. Links between federalism and constitutional justice

Constitutional jurisdiction is historically closely linked to the federal structure of the forms of state organisation which developed in German territory since the time of the Holy Roman Empire. Already the Imperial Chamber Court (Reichskammergericht) established in 1495 exercised important powers with regard to the settlement of disputes between the Empire and its subjects as well as between different subjects of the Empire which may be characterized as proto- or quasi-federal. On the other hand, the Aulic Council (Reichshofrat), a mixed executive-judicial body set up by the Emperor in Vienna, had jurisdiction in feudal law disputes which gave it an important role in managing the feudal relationships between the various entities and subjects of the Empire that underpinned imperial rule[10]. While in the German Confederation (Deutscher Bund) which succeeded the Holy Roman Empire the settlement of disputes among the member states was

let to political negotiation and mediation, the Constitution of the German Empire drafted by the revolutionary National Assembly in Frankfurt in 1848/49 expressly provided for jurisdiction of the Imperial Court (Reichsgericht) to determine complaints by member states against the Empire for violation of the Constitution, as well as public and private law disputes between member states11. However, due to the failure of the revolution the liberal Constitution of 1849 never entered into force. The idea of creating a judicial body for the settlement of constitutional disputes between the Empire and its component entities was subsequently abandoned and only resurfaced in the democratic Constitution of Weimar of 1919, which established a non-permanent judicial body, the Staatsgerichtshof, with jurisdiction to determine "all disputes of a non-private character" between different Länder or between a Land and the Empire12.

In the deliberations of the Parliamentary Council which discussed the adoption of a provisional Basic Law for the three Western occupation zones in Germany in 1948/49, the creation of a special judicial body for adjudicating constitutional cases was the object of much controversy. While some proposed a tribunal in the tradition of Weimar's Staatsgerichtshof which would serve mainly as an organ for resolving constitutional conflicts between state institutions and organs, others advocated the establishment of two separate bodies, one for the review of the constitutionality of legislation and the other for the decision of "political" disputes among the different branches and levels of government13. The drafters of the Basic Law finally settled for a compromise which combined both functions within a single institution with exclusive jurisdiction over all constitutional disputes. The court is divided into two senates with eight justices each. The BL extends its jurisdiction to a wide array of constitutional disputes and controversies, including disputes between the political branches, abstract and concrete review of legislation, individual complaints, and federal disputes (see Article 93 (1) BL).

4. Organisation of the Federal Constitutional Court

When the Constitutional Court started its work in late 1951, its precise constitutional status was still undetermined. While the Basic Law conferred wide-ranging powers of constitutional review on the new institution, it authorized Parliament to regulate the Court's organisation and procedure. The Constitutional Court was initially placed under the authority of the Federal Ministry of Justice, a situation which irritated several justices and led to the release of a memorandum, drafted by one's of the Court's most prominent members, which called for an end to the supervisory authority of the Ministry of Justice and argued that the Court is a supreme constitutional organ equal in rank with the highest political organs of the Federal Republic, the Bundestag, the Bundesrat, the Chancellor and the President14. Although the memorandum provoked considerable criticism and anger in the political branches, and especially in the Federal Ministry of Justice, the growing prestige of the Court finally enabled it to impose its views on Parliament and Government. Section 1 (1) of the Federal Constitutional Court Act (FCCA) declares that the Constitutional Court is a court of justice independent of all other constitutional organs, thus implicitly recognizing its status as constitutional organ. The Court is represented in official events by its President who ranks fifth in the protocol of the Federal Republic, behind the Federal President, the Federal Chancellor, and the Presidents of the Bundestag and Bundesrat15.

Half of the FCC's members are elected by the Bundestag and half by the Bundesrat. The important role given to the Bundesrat in the selection of the constitutional judges reflects the conviction of the Basic Law's framers that preserving the federal structure established by the Constitution against

centralizing tendencies would be one of the main functions, if not the key function, of the new Court16. The Bundestag used to elect its eight justices indirectly through a twelve-member Judicial Selection Committee on which the parties were represented in proportion to their parliamentary strength but has recently switched to election by the full Parliament17. In both chambers the election requires a two-thirds majority, meaning that there has to be broad consensus among the political parties, and especially among the big parties, about the suitability of individual candidates. Judges are elected for a non-renewable term of twelve years. Three (out of eight) judges on each of the two Senates must be elected from among the judges of the federal supreme courts (Section 2 (3) FCCA), thus making sure that the expertise of the professional judiciary in the various branches of the law – civil, criminal and administrative – is represented on the Court and can inform the court's handling of cases in which constitutional principle has to be expounded in a civil, criminal or administrative law setting, as happens frequently in fundamental rights cases.

As both the Bundestag and the Bundesrat operate along party lines, the political parties dominate the selection process. In the German political system, the relevant parties are all national parties which pursue a national political agenda, with the notable exception of the CSU (Christian Social Union) which operates only in Bavaria where it has been the dominant party of government for more than six decades18. Since the requirement of a two-thirds majority enables each of the two bigger parties (Christian Democrats and Social Democrats) to veto the judicial nominees of the other party, they abstain from nominating controversial candidates. In the Bundesrat, the interests of the various Länder play a paramount role in the selection process. Whereas in the Bundestag elections take place on the basis of a list compiled by the Minister of Justice which contains the names of all federal judges who possess the qualifications for appointment, as well as the names of candidates submitted by the parliamentary parties, the Federal Government, or a state government, the list of potential nominees in the Bundesrat is drawn up by an advisory commission consisting of the state justice ministers. The commission also reaches an informal agreement which states shall choose prospective justices and in what order, and coordinates its work with the Judicial Selection Committee of the Bundestag with a view to avoiding duplicate judicial selections and to agree on the particular senate seats each side is going to fill. It has been said that these arrangements have worked well to consistently produce a Constitutional Court that is representative of Germany's main political parties as well of its regional and confessional diversity19.

The FCC as a federal organ is financed fully out of the federal budget. Following the above mentioned row with the Federal Ministry of Justice, the status of the Federal Constitutional Court as a supreme constitutional organ has not been questioned any more by the political branches. As a consequence, the draft budget for the Constitutional Court is drawn up by the Court itself. Once it is formally approved by the Federal Diet as a separate item in the General Budget, it is the Court, not the Federal Ministry of Justice, which manages and executes the budget20.

5. Competences of the Federal Constitutional Court

The Basic Law extends the Constitutional Court's jurisdiction to a wide range of constitutional disputes and controversies. As defined by the Basic Law its jurisdiction covers disputes between high federal organs about their respective powers (Article 93 (1) cl. 1 BL), abstract (Article 93 (1) cl. 2 BL) and concrete (Article 100 (1) BL) judicial review of laws, constitutional and other public law disputes between the Federation and the Länder or between different Länder (Article 93 (3), (4) BL), constitutional complaints (Article 93 (1) cl. 4a BL), applications for the ban of a political party

(Article 21 (2) BL), the review of decisions relating to the validity of an election (Article 41 (2) BL), the impeachment of the Federal President (Article 61 BL), the removal of judges (Article 99 BL) the verification of the status of rules of international law in domestic law (Article 100 (2) BL), the determination of state constitutional court references proposing to deviate from the jurisprudence of the FCC or another state constitutional court (Article 100 (3) BL) and the settlement of differences of opinion concerning the continued applicability of law as federal law (Article 126 BL).

The Basic Law provides for a number of constitutional court procedures which are specifically designed to allow the adjudication of federal disputes. Article 93 (1) no. 3 BL assigns to the Federal Constitutional Court a general jurisdiction to hear disputes concerning disagreement between the Federation and the Länder. Although the provisions refers expressly to disagreements on the execution of federal law and in the exercise of federal oversight in particular, the jurisdiction of the Court is not limited to such disputes but includes also disputes on the distribution of legislative powers. However, as such disputes can and will normally be brought in the form of abstract review proceedings under Article 93 (1) cl. 2 BL alleging a lack of competence of the Federation or the Land for the enactment of the relevant piece of legislation, Article 93 (1) cl. 3 BL virtually has no role in this respect. Constitutional disputes directly opposing the Federal Government and a Land government usually arise out of conflicts over a Land execution of federal law or the Federal Government's supervision of Land administration. In these and similar conflicts, the jurisdiction of the Federal Constitutional Court may be invoked in order to obtain an authoritative ruling on the respective rights and duties of the Federation and the Länder (Article 93 (1) cl. 3 BL). The proceedings may be brought only by a Land government or by the federal government.

In addition, the court may hear "other public law disputes" – i.e. disputes of a non-constitutional character – between the Federation and the Länder, between different Länder, or within a Land if no other legal recourse is provided (Article 93 (1) cl. (4) BL). Only the respective governments (not the legislatures) are entitled to bring an application in these proceedings. In its first alternative – jurisdiction of the FCC to hear other public law disputes between the Federation and the Länder – Article 93 (1) cl. 4 BL has remained irrelevant alongside the court's jurisdiction under Article 93 (1) cl. 3 BL21.

Finally, the jurisdiction of the FCC on federal issues was extended by the constitutional reform of 1994 to requests brought by the Länder to check whether the Federation has used its concurrent legislative powers in accordance with the special requirements now laid down in Article 72 (2) BL. In this procedure which was expressly introduced to afford more effective protection to the legislative autonomy of the Länder, standing is defined broadly: in addition to a Land government, an application may also be brought by a Land legislature or the Bundesrat.

But federal issues may also arise in constitutional court proceedings not specifically designed to preserve the federal arrangements of the Basic Law, and particularly in the procedures which have as their main object the review of the constitutionality of legislation. These include both the abstract and the concrete (collateral) judicial review of legislation. In the abstract judicial review procedure which is regulated in Article 93 (1) cl. 2 BL the Court rules on the compatibility of federal law or Land law with the Basic Law, or the compatibility of Land law with other federal law, upon the request of the Federal Government, of a Land government, or one third of the members of the Bundestag. The fact that standing is accorded to Land governments in the abstract review proceedings indicates that this procedure was meant to allow the Länder to defend their legislative powers against infringements by federal laws. In the concrete (collateral) review procedure, by

contrast, neither the federal nor a Land government has any role in triggering the constitutional review: while the private parties to the litigation may suggest a referral to the Constitutional Court, it is up to the court alone to make up its mind whether serious doubts exist with regard to the constitutionality of the legislation on which the outcome of the case before it depends, and, if it answers this question in the affirmative, to refer the constitutionality issue to the Federal Constitutional Court or to the competent Land Constitutional Court (in the rare case the consistency of a Land law with the constitution of that Land is at issue).

In most of the aforementioned review proceedings, the FCC will use (only) the provisions of the BL as reference norms for assessing the constitutionality of the law, measure or omission being challenged for its unconstitutionality. In the abstract and concrete review proceedings, it may also use other federal law if a Land law is being challenged. It will only interpret and apply the norms of a Land constitution in those cases in which a state has assigned the decision of constitutional disputes within the state concerned in accordance with Article 99 BL. In that case, it acts as constitutional court of the Land concerned, not as federal constitutional court[22]. As all Länder have made use of their right to establish their own state constitutional court, Article 99 BL is now obsolete. For more than five decades, however, the FCC also acted as state constitutional court for the Land of Schleswig Holstein.

The Länder have to be heard in proceedings before the FCC when the decision of the Court is likely to affect their constitutional status or rights. In abstract review proceedings, the Land governments have the right to submit their views to the FCC if the validity of a federal law is challenged. By contrast, if a Land law is being challenged only the government and the legislature of the Land in which aforesaid law has been promulgated must be provided with the opportunity to submit their views (Section 77 FCCA). By contrast, the question whether the requirements of Article 72 (2) BL are met so that the Federation may validly exercise its concurrent legislative powers is of concern to all states. Therefore not only the Land or the Länder which have initiated the relevant review proceedings under Article 93 (1) cl. 2a BL, but all Land governments and legislatures are to be given the opportunity to put their views on the matter to the FCC (Section 96 (2) FCCA).

In historical terms, the jurisdiction of the FCC in federal disputes under Article 93 (1) cl. 3 BL has been characterised as the “bedrock” of constitutional adjudication in Germany[23]. However, while important issues concerning the federal distribution of powers were determined in this procedure during the first decade of the FCC’s existence, including cases concerning the extent of treaty competences[24] and the regulation of broadcasting[25], its relevance has tended to decline in subsequent years[26]. In the 60 years between 1951 and 2010, only 26 cases were brought under Article 93 (1) cl. 3 BL, the majority in the first decade[27].

In using its powers to settle federal disputes the FCC acts neither as an arbitrator nor as a pacemaker in the relations between the component units of the Federal Republic. Both roles would imply a certain measure of discretion in the light of overarching political imperatives of pacification which the FCC does not have. It is a judicial body which decides in accordance with the law, not on the basis of equity or political expediency. It is the guardian of the constitution and has to enforce the principles and rules on the structure of the federal system and the distribution of powers between the Federation and the Länder laid down in the BL.

However, as the Constitution and the concept of federalism it seeks to promote keep evolving, so the role of the FCC in policing the constitutional arrangement keeps evolving, too. As political

practice and constitutional reforms during the first decades of the Federal Republic's existence tended to strengthen the co-operative features of the federal system established by the Basic Law up to a point where the term "unitary federal state" was coined by constitutional scholars to describe the way the federal system functioned in practice28, the FCC saw no reason to interfere with this process. While reaffirming its power to strike down federal legislation which exceeded the concurrent legislative powers granted to the Federation under Article 72 in theory, the Court abstained in its jurisprudence from any closer scrutiny of the relevant federal laws and left the assessment whether federal regulation was necessary in a specific case for the establishment of uniform (later equal) living conditions throughout the federal territory or the maintenance of legal or economic unity to the discretion of the Federal Parliament29. No federal law was ever quashed for violating the requirements of Article 72 (2) BL (old version). At the same time, the Court interpreted the power of the Federation to enact framework legislation under Article 75 in generous terms: such legislation, said the Court, was not necessarily restricted to fundamental principles but could well spell out the details of the regulatory matter at hand, provided that a strong and legitimate interest in national uniformity existed30.

Nor did the Court discourage the growing tendency to compensate the Länder for the loss of autonomous legislative powers by strengthening the role of the Bundesrat in the legislative process at the federal level. Quite on the contrary, by ruling that in cases in which the consent of the Bundesrat is needed because the law regulates the states' administrative procedure pursuant to Article 84 (1) BL the Bundesrat may examine the entire content of the law and refuse its consent because it disagrees with its substantive provisions31 the Court effectively sanctioned the role of the Bundesrat as the co-author of the relevant federal legislation.

When a change of mind gradually started to take hold in the period following unification in the 1990's, the change was driven by political actors and pressure groups, not by the FCC. The idea of uniform living conditions throughout the entire federal territory, which had been the main justification for the seemingly boundless expansion of federal legislation on economic, social, educational and cultural matters during much of the previous period, seemed increasingly unrealistic. In addition, the growing prominence of the principle of subsidiarity in the relations between the European Union and its member states which was given a constitutional status in the Maastricht Treaty (1992) encouraged discussions about a redefinition of federal-state relations at home. Faced with a structural majority of economically weaker Länder in the Bundesrat after unification, the southern and western states were also less keen on the extension of their legislative role in the Bundesrat. Instead they rediscovered their interest in a revival of the concept of competitive federalism. The most important element of this concept was the restoration of substantial legislative autonomy of the Länder with regard to all aspects of regional life.

An important step in this direction was taken with the constitutional reform of November 1994 which restricted the concurrent legislative powers of the Federation by defining the conditions for their use more narrowly. At the same time, the Bundesrat, the Land governments and the Land legislatures were given the right to request a ruling of the Constitutional Court on the issue whether a federal law met the requirements of the reformed Article 72 (2) BL. This was a signal to the FCC to scrutinize federal legislation more closely with respect to the constitutional rules on the federal distribution of legislative powers. In an important decision of 2004 the FCC struck down a federal framework law on the establishment of so-called junior professorships at the universities, arguing that the Federation had regulated the new category of professorship in meticulous detail, including with regard to salaries, thus leaving no room to the states to implement their own policies

on the matter[32].

In response to the ruling the federal government offered to transfer legislative powers to the Länder on more than 20 issues in a comprehensive reform of the federal system, an offer finally lead to the reform of the federal separation of powers in the already mentioned constitutional reform of 2006. This reform abolished the category of federal framework legislation altogether, thus providing greater space for legislative autonomy of the Länder.

Another important area in which the Federal Constitutional Court has intervened repeatedly concerns the financial equalization mechanisms (see already II. above). However, in this area its task is even more delicate, since it must try to strike a balance not only between the diverging interests of the Federation on the one hand and the Länder on the other, but also among the Länder themselves, as the horizontal equalization mechanism provided for in Article 107 BL aims at a “reasonable” equalization of the disparate financial capacities for the Länder by redistributing tax revenue from the richer states to the poorer states. Here the Court must balance the principle of solidarity championed by the poorer Länder with the principles of autonomy and responsibility invoked by the richer ones to justify why they should be allowed to keep the fruits of their successful economic policies for themselves.

6. Constitutional Effects of Decisions by the Federal Constitutional Court

The decisions of the Federal Constitutional Court are binding on federal and state constitutional organs as well as on all courts and authorities (Article 31 (1) FCCA). The states have a constitutional duty to take notice of FCC decisions under the principle of rule of law enshrined in Article 20 (1) BL. A Land which fails to comply with a FCC ruling could theoretically be forced to do so under the procedure of federal execution provided for in Article 37 BL, although the procedure may only be initiated with the consent of the Bundesrat.

If the FCC strikes down a federal or Land law in the abstract or concrete judicial review, the relevant provision ceases to produce legal effects from the date of publication of the judgment (Section 78 FCCA). However, the FCC has developed a constant jurisprudence that the legal effects of nullification may be suspended for a period specified in the judgment in order to avoid a legal vacuum and the resulting uncertainty and to give time to the legislature to replace the legislation declared unconstitutional by provisions which are consistent with constitutional requirements[33].

Although the FCC has the power to strike down state legislation for its inconsistency with the BL or other federal law, this power has little relevance in practice. As the bulk of legislation is federal, the elimination of federal laws which encroach on the limited legislative powers of the Länder is far more important. Land legislation is today in all states subject to review by the state constitutional courts. The practical effects of the FCC’s decisions on the public policies of the Länder can be very significant. A good example is the so-called first broadcasting decision which denied the federal government the right to establish its own public broadcasting network, arguing that under the Basic Law the Federation has only the right to regulate the relevant technical standards but must leave the regulation of all broadcasting activities as well as the establishment and regulation of public broadcasting corporations to the Länder[34].As a result, the Länder have a comprehensive responsibility for regulating, licensing, and supervising broadcasting activities, including its important economic aspects.

7. Connections between the Federal Constitutional Court and the Constitutional Courts of Federated Entities

All 16 states have now established their state constitutional courts, the last being Schleswig-Holstein in 2008. State constitutional courts have jurisdiction to determine disputes which arise under their respective state constitution. The procedures in which they exercise their constitutional jurisdiction are often modelled on the corresponding competences of the FCC at the federal level35, with the exception of those competences which relate to federal disputes and the verification and the status of international law in the domestic legal system.

Article 100 (3) BL provides an avenue for direct interaction between the FCC and the state constitutional courts. If the constitutional court of a Land, in interpreting the Basic Law, intends to deviate from a decision of the FCC or the constitutional court of another Land, it shall obtain a decision from the FCC before doing so. This procedure, however, is rarely used. In the period from 1951 to 2010, it was initiated on only five occasions36.

8. Conclusion

The preservation and enforcement of the federal constitutional structure constitutes one of the main building blocks of the jurisdiction of Germany's Federal Constitutional Court. The impact of the federal structure is also visible in the Court's membership, half of which is elected by the Federal Parliament ,whereas the other half is chosen by the Bundesrat which represents the interests of the Länder. In political practice, however, the functioning of German federalism is shaped by a comparatively high degree of homogeneity of the population living in the various Länder in linguistic, ethnic and cultural terms. In economic and social terms, this homogeneity has been challenged through the accession of the five East German Länder on the territory of the former German Democratic Republic in 1990. However, due to their limited demographic and economic weight, the incorporation of the new Länder did not change the nature of German federalism fundamentally, although it has triggered some adjustments in the operation of the federal system which reflect the increased diversity of its constituent entities. While it may thus no longer be fully justified to characterise Germany as a unitary federal state, German federalism continues to operate as a centralised federal system in which the high degree of cooperation and coordination among the Länder as well as between the latter and the federal government are distinguishing features and genuine competition between the Länder takes place only on a limited scale. This political reality is also reflected in the FCC's case law. While it features a number of important decisions on the federal separation of powers (some of which are mentioned in the preceding sections), the latter pale alongside the pronouncements of the Court with regard to other areas of constitutional law, particularly those concerning fundamental rights.

Notes

1 The centralizing policies of the National Socialists were the culmination of a long process of territorial restructuring in Germany which had started during the Napoleonic era, with the Final Recess of 1803 removing many of the smaller principalities and independent cities which had been an important although cumbersome element of the complex territorial structure of the Holy Roman Empire from the map. The remaining smaller and medium-sized states formed the basis of the German Federation (*Deutscher Bund*) after 1815, of which Prussia and Austria were also members. The wars preceding the establishment of the German Empire in 1871 then created the

territorial structure which would basically persist until 1945, with Prussia controlling two-thirds of the territory of the new state, giving it a dominant position which it retained in the Weimar Republic but finally lost with the centralizing measures taken by the *Reichsregierung* in 1932. Those measures became popularly known as “Preußenschlag”, as they allowed the central government to assume direct control of the government of Prussia. Similar measures followed with regard to the smaller states following the accession of the National Socialists to power in 1933, leading in quick succession to the abolition of the last vestiges of the federal structure of the Weimar Republic.

2 The Basic Law of the Federal Republic of Germany as the provisional constitution of the Western occupation zones came into force on 23 May 1949; it was called Basic Law in order to signal that a constitution would have to wait until the Western occupation zones could be reunited with the Soviet zone. By contrast, the Constitution of the German Democratic Republic of 7 October 1949 was not seen by its drafters as a temporary arrangement. The *Länder* which had been created on the territory of the GDR were soon abolished and replaced by a strongly centralized state based at the regional level on a district structure with no genuine autonomy. The East German *Länder* were only restored in 1990 when the GDR joined the Federal Republic of Germany.

3 In 1953, Württemberg-Baden and Württemberg-Hohenzollern merged to form the new *Land* Baden-Württemberg. In 1996 an initiative to merge the *Länder* Berlin and Brandenburg into one *Land* failed because a majority of voters in Brandenburg rejected the planned merger in a referendum.

4 The last state to have established its own constitutional court was Schleswig-Holstein in 2006. Prior to its establishment the state had assigned constitutional disputes arising under the state constitution to the Federal Constitutional Court. Article 99 BL allows the states to “borrow” the Court for the settlement of *Land* constitutional disputes if they shun the costs for maintaining its own court.

5 Rengeling (H.-W.), Gesetzgebungszuständigkeit, *in* Isensee (J.) and Kirchhof (P.) (eds.), Handbuch des Staatsrechts, 3rd edition, vol. VI Bundesstaat, 2008, § 135 para. 52.

6 Oebbecke (J.), Verwaltungszuständigkeit, *in* Isensee (J.) and Kirchhof (P.), *op.cit.*, § 2 who stresses that German federalism is primarily an adinistrative federalism („Verwaltungsföderalismus“).

7 For an overview oft he federal distribution of legislative powers see Rengeling (H.-W.), Gesetzgebungszuständigkeit, *in* Isensee (J.) and Kirchhof (P.), *op.cit* 48-81.

8 In a number of decisions since 1986, the Constitutional Court has clarified the purpose and the limits of the equalizations mechanisms provided for in the Constitution, see BVerfGE (Decisions of the Federal Constitutional Court) 86, 148 – *Finance Equalization III*; 101, 158 – *Finance Equalization* IV; 116, 327 – *Supplementary Grants Case.*

9 BVerfGE 37, 363 – *Bundesrat.* As a consequence, the scope of application of the absolute veto power of the *Bundesrat* has been considerably extended over the years. Had the framers of the Basic Law originally envisaged that only about 10 percent of all federal legislation would require *Bundesrat* approval, the scope of the *Bundesrat*’s veto power has been inflated in political practice

up to a point where it covers roughly 60 percent of all legislation. This development has greatly been encouraged by the fact that many federal laws which refer to matters not subject to veto nevertheless contain provisions that set forth how the states are to administer and implement the legislation. The reform of 2006 has tried to reduce the number of federal laws that are subject to the veto power of the *Bundesrat* and to strengthen the autonomy of the *Länder* in the execution of federal laws. Pursuant to the amended paragraph (1) of Article 84, the establishment of the administrative authorities and the regulation of the administrative procedure shall now be a matter for the *Länder*. However, the reform has maintained the right of the Federal Parliament to include provisions on the establishment of the *Land* authorities and the procedure to be followed by them in the relevant federal law.

10 See Stolleis (M.), Geschichte des öffentlichen Rechts in Deutschland, vol. 1, 1988, pp. s135-140.

11 Section 126 of the 1849 Constitution.

12 Article 19 (1) Weimar Constitution.

13 Parlamentarischer Rat, Verhandlungen des Hauptausschusses, 1948/49, p. 275.

14 Denkschrift des *BVerfG*, Die Stellung des *BVerfG*, in: Jahrbuch des öffentlichen Rechts (Neue Folge) 6 (1957), p. 144.

15 Kommers (D.P.) and Miller (R.A.), The Constitutional Jurisprudence of the Federal Republic of Germany, 3rd edition 2012, p. 18.

16 *Ibid.*, p. 23.

17 On 5 September 5, 2017 Josef Christ, former Vice President of the *Bundesverwaltungsgericht*, was the first constitutional judge to be elected in the new procedure.

18 The CDU (Christian Democratic Union), on the other hand, does not operate in Bavaria. Thus the two centre-right parties do not compete for votes with each other in any of the 16 *Länder*, neither in federal nor in *Land* elections. In the *Bundestag* they constitute a joint parliamentary group (*Fraktionsgemeinschaft*). Thus the right to submit proposals for Constitutional Court nominations to be decided by the *Bundestag* is also exercised jointly by the two parties, on the understanding that one of the seats for which the CDU/CSU exercises the right to nominate is reserved for a candidate backed by the CSU. As Bavaria is the only *Land* where the legislature voted against the adoption of the Basic Law in 1949, stating expressly that the federal system established by the Basic Law is insufficiently protective of the autonomy of the *Länder*, one might perhaps expect judges nominated by the CSU to have been especially keen defenders of *Land* rights in their opinions pronounced on the Constitutional Court. In practice, however, this has not been the case.

19 Kommers (D.P.) and Miller (R.A.), *op.cit.*, p. 24.

20 Umbach (D.C.), Thomas (C .) and Dollinger (F.-W.), Bundesverfassungsgerichtsgesetz: Mitarbeiterkommentar und Handbuch, 2nd edition 2005, § 1 para. 9.

21 Schlaich (K.) and Korioth (S.), Das Bundesverfassungsgericht – Stellung, Verfahren,

Entscheidung, 10th edition 2015, § 106.

22 BVerfGE 103, 332.

23 SCHLAICH(K.) and KORIOTH (S.), *op.cit.*, § 103.

24 BVerfGE 6, 309.

25 BVerfGE 12, 205.

26 HESSE (K.), Wandlungen der Bedeutung der Verfassungsgerichtsbarkeit für die bundesstaatliche Ordnung, *in* HALLER (W.), KÖLZ (A.), MÜLLER (G.) and THÜRER (D.), Im Dienst an der Gemeinschaft: Festschrift für Dietrich Schindler zum 65. Geburtstag, 1989, p. 728.

27 SCHLAICH(K.) and KORIOTH (S.), *op.cit.*, § 78.

28 HESSE (K.), Der unitarische Bundesstaat, 1962.

29 See KLEIN (H.H.), Der Bundesstaat in der Rechtsprechung des Bundesverfassungsgerichts, *in* HÄRTEL (I.) (ed.), Handbuch Föderalismus, vol. I, Grundlagen des Föderalismus und der deutsche Bundesstaat, 2012, § 17-19.

30 BVerfGE 4, 115 – *North Rhine-Westphalia Salaries Case.*

31 BVerfGE 37, 363.

32 BVerfGE 111, 126 – *Junior Professor.*

33 BVerfGE 33, 303; 73, 40; 109, 190; 115, 276.

34 BVerfGE 12, 205.

35 SCHLAICH(K.) and KORIOTH (S.), *op.cit.*, § 347.

36 *Ibid.*, § 78.