

The Federal Constitutional Court: Function and Performance

I. Introduction: constitutional jurisdiction as an essential element of modern constitutionalism

1. Historical and theoretical foundations

- the need of a reliable, politically neutral mechanism to *enforce the primacy of the constitution effectively*
 - even against infringements by the legislator
 - without such mechanism the actual influence of the constitution remains low
- how it all began: the landmark decision *Marbury v. Madison*² of the U.S. Supreme Court of 1803
 - the Constitution as the "supreme law of the land" and the right of the courts to review the constitutionality of laws
- the establishment of constitutional courts in Europe, Asia and Africa since the 20th century
 - in Austria after the First World War (first specialised const. court)
 - in Italy and Germany after the Second World War
 - in France in 1958 (Constitutional Council)
 - in Spain and Portugal in the 1970s, in East Europe in the 1990s
 - in Korea in 1988, in South Africa in 1994, in Indonesia in 2003
- the triumph of constitutional jurisdiction in modern constitutional states
 - has shaped a modern constitutionalism where the primacy of the constitution is lived out in practice
 - has contributed significantly to consolidate free and democratic constitutionalism in Europe

2. Basic models of constitutional jurisdiction

- a) The U.S. model: constit. jurisdiction by the ordinary courts
 - includes const. review of laws in concrete cases, as inherent part of judicial power
 - common in common law countries and some Latin American countries
- b) The Austrian model: constit. jurisdiction by a Constitutional Court
 - a *specialised court* with exclusive, usually comprehensive const. jurisdiction, including the abstract and often also concrete const. review of laws
 - a concept originally developed by HANS KELSEN
 - nowadays the prevailing model; common in particular in Europe
- c) The French model: constit. jurisdiction by a Constitutional Council
 - a specialised institution with limited const. jurisdiction
 - common in African and Arab states, Cambodia
 - includes const. review of laws (mainly only preventive review)
 - in practice, French Conseil constitutionnel has approximated to a const. court

3. Constitutional jurisdiction as a motor for the development of constitutional law doctrine

- constitutional law develops much faster and also more consistently
- constitutional jurisprudence serves as point of reference and inspiration for scientific legal research but also takes up new developments in the scholarly discussion
- esp. important for the development of rule of law and fundamental rights³ doctrine

4. Constitutional jurisdiction and separation of powers

- a needed counterweight to the power of government and parliament
- in democratic states an important precaution against degeneration of democracy into dictatorship of the majority
- majority rule does not entitle to override fund. rights or the rule of law...

II. The Federal Constitutional Court (= FCC) [Bundesverfassungsgericht]

1. Legal basis

- art. 92, 93, 94, 100, 21(4), 41(2) of the Basic Law for the Federal Republic of Germany (= BL)
- Federal Constitutional Court Act (= FCCA)
- Rules of Procedure of the FCC

2. Status

- both court and constitutional organ
 - on equal footing with and independent of all other constitutional bodies (no supervision by anyone!)
 - with own rules of procedure and independent budgeting
- highly respected among lawyers, politicians and in the population

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² Underlined text passages indicate links to relevant internet resources. Just *click on the link* in the pdf file!

³ On terminology: Fundamental rights [Grundrechte, also translated as "basic rights"] are the human rights anchored as const. rights in the Constitution.

3. Structure and organisation

- two *Senates* with each 8 constitutional justice (sect. 2 FCCA)
- each Senate has several *Chambers* with each 3 justices which decide about admissibility of judicial referrals and admission of constitutional complaints (sect. 15a, 81a, 93a - 93d FCCA)
- *Plenary* decides if Senate wants to deviate from previous jurisprudence of the other (sect. 16 FCCA)
- *President* and Vice-President
- each constitutional justice assisted by 4 highly qualified *scientific assistants*
 - experienced judges, civil servants, young researchers, even professors
 - but still a too high workload - for all of them...
- justices elected half by Bundestag, half by Federal Council [Bundesrat], with two-thirds majority, for a 12 years term (art. 94(1) BL, sect. 2 et seq. FCCA)
 - election strongly politicised, but in practice justices are highly qualified and show strict neutrality with regard to party politics after their election

III. Types of proceedings before the Federal Constitutional Court

1. Disputes between constitutional organs (art. 93(1) no. 1 BL, sect. 13 no. 5, 63 et seq. FCCA)
 - about the constitutional rights and duties of federal constitutional organs or parts of them (or of other parties vested with such rights)
 - capacity to sue/be sued: constitutional organs, parts of constitutional organs, other parties
2. Abstract constitutional review (art. 93(1) no. 2 BL, sect. 13 no. 5, 76 et seq. FCCA)
 - review of the compatibility of federal and Land law with the BL without a special reason (and of Land law with federal law)
 - since 1994 also review of compliance of federal law in certain areas with the requirement of federal necessity in the national interest (art. 72(2) BL) on application of the Bundesrat [Federal Council] or a Land government or parliament (art. 93(1) no. 2a BL)
 - on application of Federal Government, Land government or ¼ of the members of the German Bundestag
 - FCC shall declare an unconstitutional law void but often only declares it "incompatible" with the BL, in order to avoid an even worse situation, and sets a time limit for revision
3. Concrete constitutional review (art. 100(1) BL, sect. 13 no. 11, 80 et seq. FCCA)
 - review of the constitutionality of federal or Land statutory law (not: ordinances), which a court considers unconstitutional, if the court's decision in the given case depends on its validity
 - also review of the compatibility of Land statutory law with federal statutory law, if the court considers it incompatible
 - judicial referral can be filed by every court but must be thoroughly reasoned
 - second most frequent type of proceedings before the FCC
4. Constitutional complaint (art. 93(1) no. 4a BL, sect. 13 no. 4a, 90 et seq. FCCA)
 - review of all kinds of German acts of public power for possible violations of fundamental rights under the Basic Law
 - can be filed by anyone, as a holder of a fundamental right, but only after all legal remedies have been exhausted
 - directly against a law only if the law affects the citizen directly (e.g. in criminal law)
 - otherwise incidental constit. review of the relevant provisions
 - review of court decisions limited to specific violations of fund. rights
 - no review for incorrect interpretation/application of the ordinary law: FCC no "super appellate body"
 - most frequent type of proceedings: ca. 5.000 - 6.000 complaints per year; therefore filtering of irrelevant complaints in a (non-discretionary) acceptance procedure before a Chamber of 3 judges (sect. 93a - 93d FCCA)
 - in most Länder also constitutional complaint before Land constitutional court against violations of fund. rights under the Land constitution
5. Federative disputes between Federation and Länder (art. 93(1) no. 3 BL, sect. 13 no. 7, 68 et seq. FCCA)
 - about the rights and duties of the Federation and the Länder emanating from their constitutional federal relationship
6. Others (selection)
 - constitutional complaints of communes and counties against laws violating their right to self-government (art. 93(1) no. 4b)
 - electoral complaints (art. 41(2) BL)
 - proceedings for the prohibition of political parties (art. 21(2) BL)

IV. Performance and role of the Federal Constitutional Court

1. Rich, continuous, often elaborate and sophisticated constitutional jurisprudence with numerous groundbreaking decisions from the beginning
 - the success of the Basic Law is not only based on its text but also on what the FCC made of it
 - decisions are transparent and thoroughly reasoned; some resemble little scientific masterpieces
 - new decisions usually refer to proven previous jurisprudence, relate to it and elaborate it in continuity
 - FCC often chooses path of *judicial further development of law*

Examples of landmark decisions of general significance:

- the *Elfes decision* of 1957 (BVerfGE 6, 32)⁴ and the *Riding in forests decision* of 1989 (BVerfGE 80, 137)⁵
 - art. 2(1) BL interpreted as guarantee of an all-encompassing general freedom of action
 - this practically brought comprehensive freedom, even beyond the traditional exercise of fund. rights
- the *Lüth decision* of 1958 (BVerfGE 7, 198)⁶
 - fund. rights as *objective system of constitutional values* guiding the interpretation & application of all law
 - obligation to *interpret all law in the light of the fund. rights*
 - fund. rights limits themselves limited in their freedom-limiting effect with regard to the rights' importance as constit. values (*doctrine of reciprocal effect* [Wechselwirkungslehre])
 - preventing excessive fund. rights restrictions caused by an unreflective formalistic recourse to the limitation clauses
- the *abortion I* and *abortion II* decisions of 1974 and 1992 (BVerfGE 39, 1; 88, 203)⁷
 - the *doctrine of state's duties of protection* under the fund. rights (here: the duty to protect the unborn human life)
 - most studied by foreign scholars and researchers; abortion II decision 220 pages long
- the *Census Act decision* of 1983 (BVerfGE 65,1)⁸
 - a fund. right of informational self-determination (right to data protection)
 - see also the *online computer searches decision* of 2008 (BVerfGE 120, 274)⁹: a fund. right to confidentiality and integrity of information technology systems
- the comprehensive but controversial jurisprudence on European integration, esp. the *Solange II decision* of 1986, the *Maastricht judgement* of 1993 and the *Lisbon judgement* of 2009 (BVerfGE 73, 339; 89, 155; 123, 267)
 - on the legal nature of the EU, democracy in supranational integration, the (ultimate) responsibility for fund. rights protection, the (ultimate) control of the observance of the limits of the Union's competences and other issues

2. A decisive factor for the consolidation of the free and democratic, rule of law-based constitutional order in the Federal Republic of Germany

- some important elements of a free and democratic order were worked out and initially pushed through by the FCC, even against the opposition of state institutions and politicians but with broad approval in the legal community
- thus, the FCC became and still is the most trusted German state institution across party, ideological and generation lines

3. A model and source of inspiration for the development of constit. jurisdiction in Europe and beyond

- a model in the creation of constitutional courts in Portugal, Spain, East Europe, South Africa and East/Southeast Asia
- FCC jurisprudence as a source of inspiration and point of reference for the jurisprudence of other constit. courts
 - in particular in the fields of funda. rights and constitutional principles (e.g. rule of law)
 - some constit. courts often refer to FCC jurisprudence
 - however, not in matters of European integration, where the FCC's positions are controversial
- FCC's jurisprudence as a popular object of the legal research of foreign scholars
 - however, few decisions are officially translated into English

4. But no role model without problems

- a) The problem of the constant work overload of the FCC
 - not solved even after more than 30 years
- b) The delicate relationship between constitutional jurisdiction and specialised jurisdictions
 - the difficult balancing between enforcing the respect for fund. rights in all fields of law and illegitimately interfering with the subject-specific work of the specialised courts
- c) The risk of a "clash of courts": the Federal Constitutional Court and the European Court of Justice

V. Conclusion

Further Reading (selection in English)

See first the homepage of the Federal Constitutional Court, with comprehensive information on the Court, also on the types of proceedings, and a selection of decisions in English translation.

Bröhmer, Jürgen; Elsner, Gisela; Hill, Clauspeter; Spitzkatz, Marc (editors): 70 Years German Basic Law: The German Constitution and its Court, 3rd edition 2019, www.kas.de/de/web/rspa/publikationen/einzeltitel/-/content/70-years-german-basic-law-the-german-constitution-and-its-court-1 (English translations of landmark decisions on fundamental rights)

Bumke, Christian; Voßkuhle, Andreas: German Constitutional Law. Introduction, Cases and Principles, 2019 (casebook reflecting the jurisprudence of the Federal Constitutional Court)

⁴ Entscheidungen des Bundesverfassungsgerichts [Decisions of the Federal Const. Court], vol. 6, p. 32 ff.; see excerpts in English translation at *Jürgen Bröhmer; Clauspeter Hill; Marc Spitzkatz (editors)*, 60 years German Basic Law: The German Constitution and its Court. Landmark Decisions of the Federal Constitutional Court of Germany in the Area of Fundamental Rights, 2nd edition 2012, p. 130 ff.

⁵ Excerpts in English translation at *Bröhmer; Hill; Spitzkatz (editors)* (note 4), p. 135 ff.

⁶ Excerpts in English translation at *Bröhmer; Hill; Spitzkatz (editors)* (note 4), p. 350 ff.

⁷ Excerpts in English translation at *Bröhmer; Hill; Spitzkatz (editors)* (note 4), p. 180 ff., 203 ff.

⁸ Excerpts in English translation at *Bröhmer; Hill; Spitzkatz (editors)* (note 4), p. 144 ff.

⁹ Excerpts in English translation at *Bröhmer; Hill; Spitzkatz (editors)* (note 4), p. 156 ff.

- Collings, Justin*: Democracy's Guardians. A History of the German Federal Constitutional Court 1951-2001, 2015
- Glaser, Henning (editor)*: Constitutional Jurisprudence. Function, Impact and Challenges, 2016
- Hailbronner, Michaela; Martini, Stefan*: The German Federal Constitutional Court, in: Jakab, András; Dyevre, Arthurs; Itzcovich, Giulio (editors): Comparative Constitutional Reasoning, 2017, p. 356 ff.
- Heun, Werner*: The Constitution of Germany. A Contextual Analysis, 2011, p. 67 ff.
- Jestaedt, Matthias; Lepsius, Oliver; Möllers, Christoph; Schönberger, Christoph*: The German Federal Constitutional Court. The Court without Limits, 2020
- Lailam, Tanto; Chakim, M. Lutfi*: A Proposal to Adopt Concrete Judicial Review in Indonesian Constitutional Court. A Study on the German Federal Constitutional Court Experiences, Padjadjaran Jurnal Ilmu Hukum 10 (2023), No. 2, p. 148 ff., DOI: <https://doi.org/10.22304/pjih.v10n2.a1>
- Rogowski, Ralf; Gawron, Thomas (editors)*: Constitutional Courts in Comparison: The US Supreme Court and the German Federal Constitutional Court, 2016
- Schmitz, Thomas*: The Constitutional Review of Law - German Experiences, course materials, Jakarta 2014, www.iuspublicum-thomas-schmitz.uni-goettingen.de/Downloads/Schmitz_Constitutional-review-of-laws_Jakarta-2014.pdf

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