The Federal Constitutional Court: Institutionalising Judicial Review in a Semisovereign Democracy

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Introduction

Among the political institutions created by the Basic Law, the Federal Constitutional Court represented a genuine institutional innovation. As one scholar has put it, it ‘came to the German legal system as a late realisation of a liberal nineteenth-century dream’. In the German Confederation (1815–66) the setting up of such an institution failed mainly due to the opposition from the Southern German states. While the 1849 Constitution (the so-called ‘Paulskirchenverfassung’), provided for the first genuine constitutional court in Europe, the political circumstances in Germany until the end of the Weimar Republic remained altogether hostile to an institutionalisation of the principles of judicial and constitutional review. During the Empire the opinion prevailed that questions regarding the political order were to be solved by political, not judicial means. Consequently, disputes between members of the federation were decided upon by the Bundesrat. Also the area of competence of the Weimar State Court (Staatsgerichtshof) remained rather restricted with the authority to decide on cases of judicial referral resting with the Imperial Court (Reichsgericht).

In creating the Federal Constitutional Court the framers of the Basic Law were inspired by different foreign traditions. While the ‘Austrian model’ of 1920 – marked by a concentration of the right to scrutinise the constitutionality of laws and administrative actions in a single supreme body – became the dominant source of influence, the ‘American model’ inspired a number of minor institutional features, such as the reservation of the right to carry out judicial review to the Court as a whole. The creation of a Constitutional Court fitted with
more powers than any of its counterparts in the Western world was strongly influenced by the experiences which the founding fathers of the Basic Law had with the undemocratic Nazi regime in Germany’s most recent historical past.

Despite the recurring waves of criticism which have accompanied the Court’s work from the very beginning, the Constitutional Court has regularly topped the list of German institutions in terms of public esteem and credibility⁶ – a positive judgement which was also reflected in the assessments of the overwhelming majority of scholars. This remarkable position became less secure in the 1990s following a number of highly contentious decisions, leaving unqualified positive judgements about the Court’s performance almost exclusively to foreign scholars who became less infected with the highly emotional thrust of arguments.⁷ Together with the Bundesrat, the Constitutional Court stands out as the most intensively and heatedly debated German constitutional organ of the 1990s.

Starting with an assessment of the institutional profile and development of the Constitutional Court, this chapter addresses four different aspects on which the more recent discussion of the Court’s role within the German polity has focused. The first set of arguments to be dealt with relates to the much-discussed subject of ‘judicialisation’ of politics, that is the Court’s growing importance in the process of settling political and societal conflicts. The second one focuses on the question as to whether the Court can be rightly judged as a ‘counter-government’ within the German polity. A third aspect, raised more recently, is the question as to whether there are signs that the Court has lost touch with the dominant values in German society, the so-called ‘Zeitgeist’, thereby possibly reducing the public acceptance of its decisions. The fourth aspect well worth being discussed is the Court’s ever-growing work overload and the institutional reform proposals that have been put forward to tackle this problem.

The institutional profile of the Federal Constitutional Court

While the framers of the Basic Law set out the different areas of the Court’s jurisdiction, it left the task of regulating the Court’s organisation and procedure to parliament. The Federal Constitutional Court Act (FCCA, Bundesverfassungsgerichtsgesetz), passed in 1951, includes the general and special provisions governing each category of jurisdiction, the Court’s organisation and its general procedures.⁸ In 1975, following