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THE CONSTITUTIONAL COURT OF THE FEDERAL REPUBLIC OF GERMANY

MA Candidate Emir Kurtishi
Constitutional and Administrative Law - Faculty of Law
South East European University,
Tetovo, North Macedonia
ek24451@seeu.edu.mk

ABSTRACT

Decisions made so far by the Federal Constitutional Court of Germany have always been characterized by their writing and content, even down to details, precision, accuracy, professional legal style of writing, always clear in the elaboration and adjudication of cases from its competence, but surprisingly, in our country, only a few have paid attention to the German Court in a scientific context, which can be seen from the only few materials we possess in the Albanian language. The purpose of this paper is to provide an overview of this Court, so that the comparative aspects can be made, highlighting its advantages and disadvantages, in case of dictating the state need for reform of the Constitutional Courts. Those who have institutionalized this constitutional institution know its value in the system of constitutional justice, which performs it in terms of protection of constitutions, its principles and value, and most importantly in the protection of freedoms and rights of human beings and citizens. The Federal Constitutional Court of Germany, to this date, has conveyed the efficiency of the protection of the German legal order, the serious approach and law interpretation, for the protection of freedoms and human rights, which ranks this court into a high level among all other powers in the German law system. The author, in the following paper, gives an overview

of this Court starting with its history, organization and functioning, which today undoubtedly constitutes one of the most important constitutional courts in the world.

Key words: Federal Constitutional Court of Germany, Basic Law, judicial control, competence, position.

INTRODUCTION

The concept of the constitutional control has already gained wide expansion in the European constitutional landscape and beyond. As Comella points out, by analyzing the establishment of specialized constitutional courts, within the *27 countries* that make up the European Union, *18 of them* have established such bodies (this number now stands at 19 after Croatia's accession to the European Union) (V Comella, 2011, as cited in Morina, 2017, p .33). The Constitutional Courts have become *important judicial mechanisms* in order to protect the constitution and its values and the constitutional rights of citizens in their efforts to restore *constitutional justice* where ordinary justice fails to provide it (V Comella, 2011, as cited in Morina, 2017, p. 33). The interest in a more serious study of the Federal Constitutional Court of Germany, as we have pointed out earlier, came as a result of readings of its verdicts, such as that of *Solange I* and *II*, in which the question of the relationship between domestic law and the law of EU, which of them should have the *primacy* or *superiority* of implementation in the German state in terms of freedoms and human rights. These verdicts are mentioned in order to illustrate the *weight* and *importance* of this German court, which is and remains the work of the German people, which does not hesitate to make such decisions that always focus on freedoms and the rights of the German people as primary to everything else, even to those of the EU. In short, with these verdicts we come to a *conclusion* that as long as the European system does not contain a *catalog* of effective human rights and a fully democratic legislative process, the Constitutional Court will continue to exercise its right to control the consistency of European Union laws with constitutional provisions (Morina, 2017, p. 40).

We took this digression right, to reflect better the *activity* of this court, so, later the reader will be familiar in details for its activity and functioning. In this paper, the reader will see that the Constitutional Court, has not been identical throughout German history, given that after World War I several attempts were made to *institutionalize* the doctrine of constitutional control, especially during the 1919 Weimar Republic period, also to be continued after the Second World War, which adopted the Basic Law in 1949, in which the Federal Constitutional Court

has been part of the matter of its constitutional regulation, as a constitutional body. Also, in this paper we have mentioned the *ways of regulating* the constitutional courts and the chosen German model, as well as the competencies and status that should be given to this court in the constitutional legal system. We have paid great attention to the *organization* and *duties* of the Federal Constitutional Court of Germany, which are regulated by the provision of Article 92 of the German Basic Law, as well as by the Law on the Federal Constitutional Court. So, in details, in this part of the paper has been analyzed the *work of the court administration*, without which it would not have been able to function. The special part of this paper is the *composition* of the Federal Constitutional Court of Germany, which reflects the federal character of Germany. It will be highlighted the work and ways of electing judges, further to complete this work with the *broad powers* of this court which are recognized by the German Basic Law.

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"And if necessary, I will go as far as **Karlsruhe!**" Whoever says this, does not talk about the beautiful city in southwestern Germany, but about the Constitutional Court, which is located in this city (Daphne Grathwohl and Aida Cama, 2011).

In the modern rule of law, there are *two possibilities* of establishing a Constitutional Court. It can be appointed for the filing of individual (concrete/individual) appeals in the Constitutional Court of natural and legal persons and thus be treated as an ordinary court. There is also the possibility, of which Germany has been determined, namely, the assignment of *two areas* of competence by the Constitutional Court. The Constitutional Court, according to the provision of Article 93 of the Constitution of the German Federal Republic, is on one hand a *Supreme Court* and on the other a *Constitutional Court of Appeal.* For the purposes of the Appeal Court, the number of cases in German jurisdiction (five in total) is being expanded with a separate constitutional review of a court decision (Брос, 2004).

After World War I in Europe, several successful attempts were made to institutionalize the doctrine of constitutional control. One such attempt that could be pointed out was the adoption of the *Weimar Constitution of 1919,* which ruled Germany during the period of the Weimar Republic from 1919 to 1933. The Weimar Constitution, established the *Supreme Court State* (Staatsgerichthof) and although it had not *explicitly* defined the right to a judicial review of the constitutionality of parliamentary laws, the Imperial Court of Justice (which was established

during the monarchy in 1879 and survived the republican revolution of 1918), some other courts had argued that they had jurisdiction to *review* the constitutionality of laws in form and substance, including the right not to enforce laws with *unconstitutional content* during a trial (Donald Kommers, 1997, as cited in Morina, 2017, p. 56).

The Constitutional Court in Germany was established after the Second World War, after the adoption of the *Basic Law* (Das Grundgesetz) of 1949, which in fact constituted the German constitution (At the time of the creation of the Basic Law, the solution was not only the fall of the Weimar Republic and the experience of National Socialism but also the time of its creation. In 1949, it was a frozen situation as a separate state. The Basic Law was adopted only in the western part of the Federal Republic of Germany, which also aimed at its unification. It has to be in force for a transitional period until all of Germany was able to work on the Constitution. That document is called the Basic Law and not the Constitution, (author's note)) and no one had expected that this law would become so well known. The Basic Law came as a counter to the barbarity of the national socialist dictatorship as well as an attack against totalitarianism, but not only of the communist type. This is most clearly expressed in the first two sentences of its first article: *"Human dignity is inviolable. For its respect and protection will be the commitment of every state authority."* Unlike the Weimar Constitution, the Basic Law puts fundamental rights before everything and only then proceeds to organize the state that must respect them. Like the guarantee of human dignity, this also aimed to express the point of view on the relationship between the individual and the state. The draft of the Basic Law had ended in the *Constitutional Convention in Herrenchiemsee*, which had put this *suggestion* in the introductory sentence: **"The state exists for the sake of man, not man for the sake of the state."** (LÜBBE-WOLF, 2019). According to the Basic Law, this Court has an *equal constitutional status* with other constitutional bodies defined by the Basic Law, such as the President, the Parliament and the Government (N Foster, S Sule, 2002, as cited in Morina, 2017, p. 79). As Kommers points out, judicial review was not adopted, as is often thought, as a response to pressure from allied states (Kommers, as cited in Morina, 2017, p. 79). Allied powers, moreover, had dealt with the issue of reorganizing the judicial system, insisting that any future German government should be federal, democtratic, and constitutional (Kommers, as cited in Morina, 2017, p. 79). Although familiar with the American judicial review system and guided by American experiences of shaping their post-war constitutional democracy, German relied heavily on its tradition of constitutional review to build its *own* system of constitutional control, based on German constituional values and traditions. During the drafting

of the Basic Law in 1948, a group of constitutional law experts finalized the first project of the constitution, which included provisions for the establishment of a national constitutional court, under the recommendation of Professor Hans Nawiasky, who is considered the father of the Bavarian constitution of the postwar period. In collaboration with the Austrian Kelzen, Professor Nawiasky has prepared a working document envisaging the establishment of a constitutional court modeled after the Staatgerichtshof of the Weimar Republic. The work of the Constitutional Convention, however, was followed by a debate on the structure of the court, whether the next court would be modeled on the system of the Weimar Republic, to be used to reslove conflicts between branches of state power and levels of government or whether the next court would also have to deal with reviewing the legislation constitutionality (e.g., judicial review) (Kommers, as cited in Morina, 2017, p. 80).

Regarding the powers of the Constitutional Court, it is imposed an *issue* which is less important – what *status* should be given to the Constitutional Court? In Germany, the Federal Constitutional Court has the *highest position* of constitutional body in the federation. This position *does not* derive directly from the Constitution, on the contrary – Article 92 of the Constitution of the Federal Republic of Germany ranks the Federal Constitutional Court and other courts within the judiciary. For these reasons, it is more likely that the Federal Constitutional Court in the hierarchy of courts instances, is represented in the *highest instance*, but not only, on the contrary, in accordance with Article 1, paragraph 1 of the Federal Law of the Constitutional Court, it is appointed as Independent Federal Supreme Court in front of the other constitutional bodies. With this legislator, it has unequivocally resolved the issue of ranking. Even *without* this legal definition or Constitutional Court definition, the position of the Constitutional Court in the modern rule of law, as the highest constitutional body, should be understood that it figures as the Supreme Court and is not limited to making decisions by appeals addressed to this Constitutional Court.

When the issue, whether the Constitutional Court should be divided between the two powers arises, it should be considered carefully that the function of the Supreme Court in the modern rule of law is particularly important. Decisions on appeals to the Constitutional Court, can be handed down to the highest federal court, if there is only one judicial branch while or for more than one existing judicial branch we have submitted a higher court, which will be competent for all. To ensure legal certainty, it is inalienable that a single court to have such a monopoly of decision-making, in order to interpret, execute and implement the Constitution, in order not to be left without a contour and ultimately to be blurred (Брос, 2004).

The *question* that often arises is, when can we appeal to the Constitutional Court? The simplest answer we can give to this question is that anyone who thinks that his/her fundamental right have been violated by an *act of the state*, can *submit* a complaint to the Constitutional Court, after having passed all normal instances of courts. Such appeals are the most frequent and well-known processes that take place in the Constitutional Court. Therefore, it is *not very correct* for the Constitutional Court to be called "the highest German court", because *it is not* in charge of all instances. Such a *qualification* occurs with certainty, because the decisions taken by the Constitutional Court are binding on all state bodies, the federation, all courts and authorities. In most cases, this applies to the concrete cases being handled. However, the word of the *Karlsruhe* Court, which is a constitutional body, is highly important even for similar decisions to be taken in the future. Even if the law scholars themselves and the other courts are not of the same opinion, if the case goes as far as *Karlsruhe*, then the *last word* is said there. If we are dealing with the issue of whether the laws are in accordance with the constitution, then the decision of the Constitutional Court takes the power of law (Daphne Grathwohl and Aida Cama, 2011).

Organization and duties of the Federal Constitutional Court of Germany

The jurisdiction of this court is regulated under the provision of Article 92 of the German Basic Law, which states that it is given to *judges* and will be exercised by the *Federal Constitutional Court*, by the *federal courts* provided in this basic law and the *courts of the states* (Basic Law for the Federal Republic of Germany, n.d.).

The details of the *organization* and *functioning* of the Federal Constitutional Court are regulated and defined by the Basic Law and the Law on the Federal Constitutional Court (Bundesverfassungsgerichtsgesetz) of 12 March 1951. This law contains legal provisions for the *organization* of the court, *powers* and constitutional reference *procedures*. In terms of internal organization, the Constitutional Court is divided into *two chambers* (senates) which consist of 8 (eight) judges. The President of the Court usually *presides* over the presidency of the first chamber, while the vice-president *presides* over the second chamber. The first chamber deals mainly with the adjudication of *non-political* issues, such as the review of the constitutionality of laws and constitutional requirements, arising from ordinary court proceedings. As Kommers points out, concerned with the "non-political" and "objective" side of the constitutional interpretation process, the first chamber examines citizens' *constitutional complaints* and decides on references made by other courts to constitutional issues and on the

other hand, the second chamber is designed to function more as an instance which *decides* on the constitutionality of disputes of a *political nature*, such as the conflict of competence between branches of state power and levels of government, elections, constitutionality of political parties, impeachment, procedures and abstract constitutional review issues (Kommers, as cited in Morina, 2017, p. 80).

As a constitutional body, unlike regular courts, the Federal Constitutional Court is not subject to the administrative supervisory of any ministry. The plenary decides on the basic issues of the organization; The Budget and Personnel Committee, appointed by the Plenary, prepares the draft budget, approximately 28 million euro per year. The President also directs the administration of the Court and represents it abroad. The workload of the court is very high; in particular, it receives more than *6,000 constitutional complaints* each year. To handle this high number of new proceedings, the two senates from *chamber* of three members. Each judge is assisted by four court clerks who have previous work experience in regular courts, public authorities, law firms or universities. The court also has a library of about 400,000 books, magazines and databases. Furthermore, it would not be possible to manage the work flow of the court without *Rechtspfleger* (senior judicial officers) as well as staff working in the registries, external offices of judges, court office, administration, library and IT services. Above all, there are about 260 people that ensure the Federal Constitutional Court can fulfill all its duties (Bundesverfassungsgericht, n.d.).

The administration – consists of court administration, general administration, IT and documentation department, protocol department and library. It is headed by the Director of the Federal Constitutional Court on behalf of the President of the Federal Constitutional Court.

Judicial Administration – The judicial sector of the court administration consists of the Senate registers, the service of senior judicial officials, and the general register. Both Senate registers compile and administer the files, maintain the procedure database, and keep a deadline diary and oral charge sheets. They correspond with the parties to the proceedings and serve on courts orders (e.g. summonses and notice of hearings) and decisions for the parties. Furthermore, they manage access to folder or files. Senior judicial officials determine costs and rewards in individual proceedings and contribute to the preparation of oral hearings and the pronouncement of verdicts. They correct Senate judgments as well as other court decisions and issue final documentation. The general register registers and processes 10,000 complaints per year. The department is headed by an office officer who is qualified to hold the judicial office.

In the general register, all submissions to the Federal Constitutional Court can be recorded, through which the Applicant does not make any specific procedural request nor does he claim whether or not a request is within the jurisdiction of the Federal Constitutional Court. These submissions are usually treated as matters of judicial administration in accordance with the Rules of Procedure of the Federal Constitutional Court. These usually include investigations into the progress of proceedings and the case law of the court. The general register also records responses to express opinions regarding ongoing or procedures that are almost concluded. After a preliminary assessment, the constitutional appeals are registered in the general register, but, if they do not meet certain conditions, if they are out of the questioned issue, unclear, inadmissible taking into account the jurisdiction of the court, they are not registered. These are mainly procedures in which the relevant deadline has not been met or the available legal remedies have not yet been exhausted and the procedures, the act of the public authority being challenged or the fundamental right allegedly violated have not been sufficiently defined. In cases of uncertainty, after adequate information regarding the legal status for which a court decision is sought, the case is transferred to the register of proceedings and presented to the responsible reporting justice. If the jurisdiction of each Senate for a particular constitutional complaint cannot be determined immediately, the complaint may be pre-registered in the general register. In practice, constitutional complaints for which judicial remedies (e.g. a complaint sought by a judicial remedy for a violation of the right to be heard or an appeal against a denial of permission to appeal) are still available are pre-registered in the general register.

General administration – takes care of a range of responsibilities including budget, construction matters, court office, its directors, file department, incoming mail, personnel matters, press office, procurement, organizational matters, security measures, etc.

IT and documentation – The Federal Constitutional Court uses modern information technology to fulfill almost all the tasks that arise during the procedure. Therefore, reliable and secure IT network is the main pillar of internal data exchange. The court's IT department maintains and improves the necessary technical infrastructure, including applications. The documentation department records and documents the decisions of the Federal Constitutional Court, as well as other relevant materials, in particular legal literature that is relevant to constitutional law. Once processed by the documentation department, decisions are published in the legal database.

Protocol – one of the main activities of the protocol is to organize the court's contacts with other constitutional bodies and other national institutions, to cultivate international relations in the constitutional courts abroad. In addition, the protocol organizes major events in court and translates selected decisions into English language (Bundesverfassungsgericht, n.d.).

The main task of the German Federal Constitutional Court is to ensure compliance with the Constitution of the Federal Republic of Germany known as the Grundgesetz (Basic Law). Since its founding in 1951, the Court has *helped* ensure and respect for the effectiveness of Germany's fundamental and democratic order. This is especially true for the implementation of fundamental rights. All government bodies are obliged to respect the Basic Law. In this regard, if any *conflict* arises, the jurisdiction of the Federal Constitutional Court may be invoked and its *decisions* are final. All other government institutions are obliged to implement its decisions arising from case law. The work of the Constitutional Court has also a *political effect*. This is especially true when the court *declares* a law as unconstitutional. However, the court *is not* a political body. Its only standard of review is the Basic Law. The issue of political suitability may not even be considered by the court. It simply defines the constitutional framework within which politics can take place. Limitation of state power is a feature of modern constitutional democratic states (Bundesverfassungsgericht, n.d.).

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COMPOSITION OF THE FEDERAL CONSTITUTIONAL COURT OF GERMANY

The court *consists* of two senates and each of them has eight members. The President is the one who *presides* over the first senate, and the Vice-President with the second senate. Both senates hold several chambers with three members each. Each of the 16 judges is assisted by four court clerks who have previous work experience in regular courts, public authorities, law firms or universities.

The Constitutional Court *consists* of 16 members (eight in each chamber), where half of the members of the Court *elected* by *the Bundestag* (Citizens' Chamber of the Federal Parliament) and the other half by *the Bundesrat* (Chamber of Federal Units). Under the Law on the Constitutional Court, however, the Bundestag indirectly *elects* eight judges through the Judicial Selection Committee (Wahlmannerausschuss). This commission *reflects* the political composition of the Bundestag and the candidate must secure *eight* votes to be elected, while the Bundesrat is determined for eight other judges according to a majority of 2/3 of the required votes. In order to *qualify* for the Constitutional Court election, a candidate must be 40 years of age with the right to vote in the Bundestag and must have the legal qualifications specified in the Law on Judges (Deutches Richtergesetz). In other words, candidates *must* have successfully passed both state examinations in the field of jurisprudence and that they *cannot* simultaneously hold any function in the legislative or executive branch, either at the federation or state level, nor exercise any other public function, in addition to the part-time teaching practice in higher education institutions. Judges, according to the Judicial Law, are *elected* for a 12-year term and the retirement age is 68 years. Thus, their independence is *ensured*, in which case they *do not have* the right to be re-elected (Bundesverfassungsgericht, n.d.).

JURISDICTION OF THE CONSTITUTIONAL COURT OF GERMANY

The competences of the German Federal Constitutional Court are *expressly* defined by its Basic Law, also by the provision of Article 93, which states that the Court decides:

- for the interpretation of the Basic Law, in case of *disagreements* regarding the extension of the rights and duties of a supreme federal body or of other parties, who have been granted their rights by this basic law or by the rules of procedure of a supreme federal bodies;
- if there is a *disagreement* or doubt as to the formal or substantive compatibility of federal law or the law of the States with the federal law implementing the federal government, a government of the state or 1/4 of the members of the Bundestag;

- in case of a *dispute* as to whether a law meets the conditions laid down in paragraph (2) of Article 72, for the implementation of the Bundesrat or of the government or legislature of a state;
- in case of *disputes* concerning the rights and duties of the federation and the state, in particular the execution of federal law by the state and the exercise of federal supervisory;
- for other *disputes* involving public law between the federation and the state, between different states or within a state, unless there is the support of another court;
- *constitutional complaints,* which may be filed by anyone claiming that one of his fundamental rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 has been violated by the public authority;
- for *constitutional complaints* filed by municipalities or associations within the municipalities, that their right to self-government under Article 28 has been violated by law; in the case of a violation by law of the state, however, only if the law cannot be opposed in the constitutional court of the State;
- for *constitutional complaints* filed by associations regarding their non-recognition as a political party for an election to the Bundestag;
- in *other cases* provided in this basic law;

At *the request* of the Bundesrat, the government of the State or the parliamentary assembly of a state, the Federal Constitutional Court shall *decide* in the cases provided in paragraph (4) of Article 72, there is a need for regulation by federal law which no longer exists or if, in the cases referred to in paragraph 1 (2) of Article 125a, federal law may no longer be issued. The determination of the Court that the necessity of existence has ceased or that the federal law cannot be enacted replaces a federal law under paragraph (4) of Article 72 or point 2 of paragraph (2) of Article 125a. A request under the first sentence is admissible only if a draft law falling under paragraph (4) of Article 72 or the second sentence of paragraph (2) of Article 125a has been rejected by the German Bundestag or if it has not been considered and decided on within a year or if a similar bill has been rejected by the Bundesrat. The Federal Constitutional Court also decides on other matters assigned to it by federal law (Basic Law for the Federal Republic of Germany, n.d.)

CONCLUSION

Instead of a conclusion, there is an *interesting question* to be asked. What lessons can we learn from the Federal Constitutional Court of Germany?

The lessons we can learn from its analysis can be great but also useful in the constitutional judiciary, because as we have seen, it is a court, which has already been established and proven

in the German constitutional legal system, with its sensational activities. *The intention* of this paper, I hope, will serve as an overture for more detailed analysis in the future, which will further enrich the comparative constitutional judiciary. Bringing out the advantages and disadvantages of this Court can serve in the perfection of the functioning of the Balkan constitutional courts. Thus, *the German model* of the Constitutional Court, in the territories of the Balkan states, can serve as a kind of *"compass"*, in the process of Europeanization of the courts that emerged from the former Yugoslav communist system. *The way* judges are elected, as we saw, is a *special features* of this court, which is a consequence of the regulation of the Basic Law of Germany, which is *de facto* and *de jure* its constitution, as with the Law on the Federal Constitutional Court. It is interesting that this court has a total of 16 judges, which is not coincidental, given the federal character of Germany, its division into states, which has a total of *16 states – 16 judges* and thus no state from its geographical aspect is *overlooked* in the composition and representation of the Federal Constitutional Court of Germany.

Another very significant feature of the German Federal Constitutional Court is the *respect* and *trust* that the people give to it, which is extremely great, if compared to the courts of the Balkan countries, but also the European ones, it has often been *the subject of comparison* in context of who has the biggest *support*, the German Chancellor or the Federal Constitutional Court. Regarding this, *the volume of its work* is not accidental, where almost every year the number of constitutional complaints that reach the address of this court is around 6,000 constitutional complaints. *The selection of judges* was the most interesting detail of this paper, which can be taken as *a model* for many other constitutional courts. In order to become a judge, the age of 40 was required, with a condition that the future judge also has the legal qualifications specified in the Law on Judges and a limited mandate of 12 years, without the right to be re-elected, with a retirement age of 68 years. So, this is *the authentic work* of the German opinion, the *"cherry"* of this court – model, which has been foreseen and thought by its constituents, in order to ensure the independence of judges and protection from political influence that can be exercised against them.

Finally, it is worth mentioning that this *excellent German work* is based on its creator, the Austrian professor Hans Kelsen, as well as Professor Nawiasky, who undoubtedly played an important role in the *design* and *establishment* of this Court. Therefore, often the "mistake" conditionally made, in the recognition of the superiority of this Court by other courts is related to the result of its activities and the securing of the status and position guaranteed by the Basic Law to the Federal Constitutional Court of Germany.

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