Translation

0493/2008

The Role of the Federal Constitutional Court within Germany's Federal Structure

Speech by Prof Dr Udo Steiner, Retired Judge of the Federal Constitutional Court (University of Regensburg, Germany) at the international seminar "Constitutional Courts and Federalism" in Buenos Aires, 26/27 March 2008

I. Procedures for ruling on federal disputes under German constitutional law

1. Jurisdiction of the Federal Constitutional Court to rule federal disputes

a) In Germany there are many roads that lead to the *Bundesverfassungsgericht*, or Federal Constitutional Court, and there are many roads along which constitutional issues relating to the Federal state can be brought directly or indirectly before the Constitutional Court. The Federal Constitutional Court primarily decides directly on federal disputes:

– in the event of disagreements or doubts respecting the formal or objective compatibility of federal law or *Land* law with the *Grundgesetz*, or Basic Law, or the compatibility of *Land* law with

other federal law, on application of the Federal Government, of a *Land* government or of one third of the Members of the German Bundestag (Article 93 para. 1 No. 2 Basic Law);

– in the event of disagreements respecting the rights and obligations of the Federation and the *Länder*, especially in the execution of federal law by the *Länder* and in the exercise of federal oversight (Article 93 para. 1 No. 3 Basic Law);

– on other disputes involving public law between the Federation and the *Länder*, between different *Länder*, or within a *Land*, unless there is recourse to another court (Article 93 para. 1 No. 4 Basic Law).

Since 1994 the Federal Constitutional Court has also had its own procedure for ruling on disagreements concerning whether, based on a law passed by the Federation within the concurrent legislative power, there is a need for such a regulation (Article 93 para. 1 No. 2a in conjunction with Article 72 para. 2 Basic Law). Based on the reform of the federal structure of Germany in 2006, the Constitutional Court examines the necessity of a federal statute in other cases too (Article 93 para. 2 Basic Law).

There are also other roads that lead to the Court. Questions concerning the division under the Basic Law of legislative and administrative jurisdiction between the Federation and the *Länder* can be and are taken indirectly to the Federal Constitutional Court

in the form of constitutional complaints (Article 93 para. 1 Nos. 4a and 4b Basic Law) and cases brought before the Federal Constitutional Court for a decision in accordance with Article 100 Basic Law. These routes are frequently used to call on the Federal Constitutional Court to examine whether a *Land* law was passed in line with the jurisdiction assigned to it. Overall, jurisdictions regarding a decision in matters of federal law are assigned to the two Panels in the Federal Constitutional Court, naturally primarily by the Second Panel.

On account of Germany's law of constitutional procedure, the Federal Constitutional Court is best placed to rule on constitutional issues concerning the Federation. Many of its decisions regarding issues of federalism are the "big points" of its judicature. The Federal Constitutional Court is aware of its responsibility, and is confident in exercising it. It is often also called on to adjudicate federal matters because Germans like to turn political issues into constitutional issues. In addition, those who have lost out in the political process frequently call on the Federal Constitutional Court, which they see as another opportunity for pushing through their ideas. This has all, as it were, become customary in Germany.

b) The case law of the Federal Constitutional Court concerning federal issues grows on fertile substantive-law ground. It is the generally held view that a federally organized state requires a

written constitution. From a German perspective I can add: A written constitution requires a constitutional court. Germany has both: from the very outset the Basic Law contained substantial provisions which relate directly and indirectly to the federal state. They make up around half of all the constitutional text of the Basic Law. But the 52 laws amending the constitution that have been adopted since 1949 also mainly refer to issues concerning the country's federal structure. Germany's federal structure is its most important constitutional tradition, and is also permanently under construction. The next reform step will be to restructure the constitutional rules governing public finances.

2. Possibilities for settling disputes aside from proceedings before the Constitutional Court

a) Since it was established in 1951 the Federal Constitutional Court has repeatedly been called on by the Federation and the *Länder* to examine federal issues. This should not be interpreted as an expression of any love of litigation, of which Germans are often accused. Some of Germany's federal *Länder* are bigger, in terms of population and territory, than many a Member State of the European Union (EU). It is obvious that they also wish to protect their interests before the Federal Constitutional Court, particularly self-confident Bavaria, the only German *Land* which has an uninterrupted tradition of statehood. A federal state lives by the

willingness of its members to self-confidently exercise their jurisdictions. This willingness includes defending those jurisdictions in court.

b) Of course there are, in reality, other ways of dealing with federal disputes in Germany. The federal state as defined by the Basic Law has been shaped in a very particular way by a decision taken by the Parliamentary Council in 1949, namely that the Bundesrat represents a federal constitutional organ that is involved in federal legislative proceedings as well as in matters concerning the EU. It is a constitutional organ composed of representatives of the *Land* governments, who are subject to directives. In the event of disagreement between the German Bundestag and the Bundesrat, the *Vermittlungsausschuss*, or Mediation Committee, can be called upon. This committee helps to create a balance of interests between the Federation and the *Länder* in legislative proceedings, thus settling disputes before they reach the Constitutional Court. The Mediation Committee comprises Members of the German Bundestag and of the Bundesrat. The Members of the Bundesrat sent as representatives to the Mediation Committee are not bound by any instructions issued by the *Land* governments. By contrast, the Basic Law does not provide the option of holding plebiscites at the federal, *Länder* or local government level as a means of settling disputes between the Federation and the *Länder*. The same applies to so-called consultations of the people on federal issues. Of course,

polling institutes constantly carry out surveys in Germany, as they do in other countries, in order to convey to politics the population's opinion on various issues, for example the question of whether competence for school education should lie with the Federation or with the *Länder*.

3. "Grey areas" of constitutional law concerning the allocation of federal responsibilities

Something which is naturally also characteristic of a federal Germany is that some of the different opinions concerning the responsibilities of the Federation and of the *Länder* have consciously not been resolved in the Constitutional Court over the course of its nearly sixty years of existence. Numerous promotional activities by the Federation, for example in the field of culture and sports, have not been safeguarded by scrutiny under constitutional law. The *Länder* for very pragmatic reasons allow the Federation to pay cash benefits by institution of funds, for instance for the Wagner Festival in Bayreuth or for Olympic teams. These and other cases are, politically speaking, rather more "soft" activities which do not influence the balance of power within the federal state to any significant degree. German reunification reconfirmed this pragmatic, practical way of dealing with financial contributions, because the eastern *Länder* created following reunification are

especially dependent on money from the Federation for culture and sports.

II. Neutrality of the Federal Constitutional Court vis-à-vis the federal state

1. The Federal Constitutional Court as a constitutional organ of the Federation

Within the system of the Basic Law, the ultimate decision concerning constitutional disputes over the division of state authority between the Federation and the *Länder* lies with the judges of the Federal Constitutional Court, that is with a constitutional organ of the **Federation**. It seems reasonable to assume that when selecting the judges for the Court, the Federation and the *Länder* also consider whether the respective candidates are more federalistically or centralistically minded. There is no constitutional reason for doing so. Article 36 para. 1 first sentence Basic Law aims to ensure the *Länder* have an influence on federal authorities: it states that civil servants employed by the highest federal authorities are to be drawn from all the *Länder* in an appropriate proportion. However, the Federal Constitutional Court is not subject to this principle of regional proportionality. The Bundesrat, the representation of the *Länder* governments, also does not give preferential treatment to candidates whose attitude is

known to be favourable to the *Länder*. One can, naturally, argue over whether there is a link between a judge's attitude to conflicts of interests between the Federation and the *Länder* on the one hand and the political or professional environment from which the judge hails on the other. One could perhaps debate whether the judges put forward by the Free Democratic Party (FDP), which is orientated rather more to the nation as a whole, primarily think unitarily when working as a judge. One has also been able to hear those in the public debate expressing the opinion that Members of the Court (who are elected from among the judges of the highest federal courts of justice) tend to decide against the interests of the *Länder*. However, that is all mere speculation and not really a matter for serious academic discussion. Overall, the German judges' biographies yield very little in terms of corroboration for the notion that the constitutional court in Karlsruhe favours the Federation. At any rate, there is no serious theory in Germany that claims that the Federal Constitutional Court is primarily dictated by the interests of the Federation on account of its being its constitutional organ. The Federal Constitutional Court has in the past inflicted painful defeats on the Federation, which funds its expenses, in disputes over jurisdiction with the *Länder*. By contrast, the Court of Justice of the European Communities in Luxembourg is more likely to face the accusation that it rules in favour of Europe in matters of jurisdiction.

2. Decisions of principle by the Federal Constitutional Court regarding the constitutional status of the *Länder*

When formulating general principles which directly or indirectly affect the constitutional status of the *Länder* the Federal Constitutional Court has never put them at a disadvantage. From the very start the Court recognized the *Länder*'s own power which is to be exercised within the framework of the provisions of the Basic Law concerning the division of jurisdictions. The members of the German federal state, that is the *Länder*, have the attributes of a state. They are not only highly developed self-governing units, the *Länder* have their own constitutions. The Federal Constitutional Court calls it the *Länder*'s independent constitutional scope. Decisions of principle affecting the Federation also include the Federal Constitutional Court's case law regarding the fact that the Basic Law permits legal inequality at federal level that is based on the different content of *Länder* laws, over which the *Länder* have jurisdiction. It cannot be called into question under constitutional law by referring to the principle of equality set out in Article 3 Basic Law. The third important principle is the case law of the Federal Constitutional Court regarding the "constitutional duty to conduct that is favourable to the Federation". The Court can apply this principle as a legal principle in order, if I may paraphrase the matter so generally, to prompt the Federation to fair and considerate conduct vis-à-vis the *Länder* in the exercise of its jurisdictions (and

vice versa). According to the case law of the Federal Constitutional Court the *Länder* do not, theoretically, lack statehood. One further important principle relating to practical/political matters is that where only part of a federal law requires the consent of the Bundesrat, for instance that part relating to organisational matters in accordance with Article 84 Basic Law, then the entire law requires approval. This regulation was introduced by the Federal Constitutional Court; the aim of the reform of the federal structure carried out in 2006 is at least to weaken it.

3. The main focus of the Constitutional Court: Case law concerning legislative competence

a) The division of legislative competence between the Federation and the *Länder* is of key significance in any federal system. The Parliament Act remains the most important instrument for shaping politics in Germany. In the German way of thinking, anything that is of essential importance and especially affects fundamental rights must be decided by parliament. If, however, the law is important, then it is naturally also important who determines legislative competence. This is a key issue of the distribution of power in a federal state. If we can conclude for Germany that the Federation has the political upper hand as regards legislative competence (the *Länder* by contrast in the area of the exercise of those laws through its administration), then that is primarily a

consequence of the transferring of legislative competence to the Federation following constitutional amendments adopted in the past few decades. The *Länder* transferred legislative competence to the Federation in order, in compensation for that loss, to bring their influence to bear, with the help of the Bundesrat, in the exercise of that competence. Some have, on the other hand, observed that the Federation tends, probably like any nation, to interpret its competencies in the broadest sense and to push out the boundaries set by the Basic Law as regards its legislation as far as possible. In actual fact, one cannot rule out that the first, decisive "interference" by the Federation in legislative matters in political practice and perhaps even by the Federal Constitutional Court is, as it were, consciously bestowed. Overall, however, one can say that the Federal Constitutional Court's interpretation of individual competencies set out in the Basic Law very obviously do not favour either the Federation or the *Länder*. The same also applies to its case law regarding the "implied powers". In such cases the Court has no especial difficulties maintaining its neutral position vis-à-vis either the Federation or the *Länder*, where when interpreting individual legislative competencies, for instance in transportation, it above all adheres to the historical ideas of the Parliamentary Council, the creator of the Basic law, concerning content and scope. This interpretation is naturally not always the decisive method applied, particularly not as regards open and dynamic competencies, such as for example regarding the economy or the environment. The

case law of the Federal Constitutional Court includes cases in which the Federation's claim to competence was confirmed, as well as cases in which it was rejected. The number of victories and defeats on both sides, namely the Federation and the *Länder*, appear to be equally balanced if one looks back over the history of the Federal Constitutional Court's case law.

b) The Federal Constitutional Court has naturally faced basic criticism on two key points. Firstly, the original version of Article 72 para. 2 Basic Law provided that the Federation only had the right to legislate matters within the concurrent legislative powers if there was a - more precisely defined - need for a federal regulation. Initially the case law of the Federal Constitutional Court ruled that the Federation could independently decide whether such a need existed within the framework of its political discretion and that this decision could practically only be queried by the Federal Constitutional Court in clear instances of misuse of that discretion. The constitutional reform of the Basic Law in 1994 drew the substantive and constitutional law conclusions from this case law, as already mentioned, to protect the interests of the *Länder*. Based on the constitutional reform the Federal Constitutional Court has recently rescinded several federal laws on account of the lack of a need for a regulation at federal level. This has surprised the Federation. However, the Federal Constitutional Court must also

from time to time remind political forces and the public what applicable constitutional law is.

c) The federalism reform of 2006 reorganized the legislative powers of the Federation and the *Länder* and again gave more legislative responsibility to the *Länder*. The Bundesrat's rights to be involved in federal legislation were curtailed. In other words, the reform attempted to disentangle the various political tiers in the German federal state. However, the new regulations are too recent to have already been the subject matter of any case law of the Federal Constitutional Court.

4. Summary

Naturally, the Federal Constitutional Court is involved in shaping the federal system. However, here it is only the third power, alongside state (government) practice and general political forces, that is concerned with formally developing the system of constitutional law.

a) Government practice has above all had an influence on the reality of Germany's federal structure on account of the idea of the so-called cooperative state, which tends to avoid disputes. It has ensured that the laws of the *Länder* are in many areas identical or at least very similar as regards content on account of agreements

reached between them. This applies to technical areas, such as building and road law, as well as to cultural matters that are legislated, for instance broadcasting or media law. The Federal Constitutional Court has not prevented the *Länder* from engaging in such politics. It merely on occasion felt this to be a perversion of the federal idea. After all, it is the *Länder* themselves that create uniform German *Land* law, which contributes to legal unity across the whole of Germany, and they refrain from competing for the best laws. However, one could also see this positively, namely that communication and cooperation are laws applied by *Länder* that they are concerned with maintaining their vitality. At the moment, at any rate, the politics of the bigger *Länder* in Germany is again geared more to competition.

b) The influence of political forces on the federal structure is above all determined by the fact that it is essentially the same political parties that hold political responsibility at federal and at *Länder* level. That can, for instance, result in the majority of the Bundesrat, not the Members of the German Bundestag, effectively engaging in political opposition. The aim of the 2006 federalism reform was to counteract precisely that development.

III. A special problem: The unitary interpretation of basic rights by the Federal Constitutional Court

1. General aspects

The basic rights set out in the Basic Law apply across the whole of Germany. Article 1 para. 3 Basic Law states that clearly: "The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law." The authority of the *Länder* and, in particular, their legislative powers, are also bound by these federal basic rights. The following ties in very easily to that: The more intensive and more extensive the Federal Constitutional Court's interpretation of the federal basic rights, the more federal law shapes matters relating to areas in the competencies of the *Länder* too. It is a well-known fact that in Germany the interpretation of basic rights is determined by powerful, well-developed and innovative dogma concerning these basic rights. The case law of the Federal Constitutional Court on the basic rights thus of necessity has a very powerful, unitary effect. It reduces the political and legislative scope of the *Länder*. Some believe a similar development may possibly occur in European case law if the EU gets its own Charter of Basic Rights by ratifying the Treaty of Lisbon (the Reform Treaty). From the point of view of the *Länder* this unitary effect is particularly palpable in policy areas in which they have the main right to legislate, that is in broadcasting, the arts

and culture, and especially secondary and tertiary education. I would like to take two examples from these areas: one example from the long tradition of the case law of the Federal Constitutional Court on broadcasting laws (a) and one example that is particularly disputed for political and constitutional reasons (b), namely what has become known as the Court's Crucifix Decision of 1995.

2. Two examples

a) The case law of the Federal Constitutional Court regarding broadcasting laws is seen by many experts as the most extreme instance of serious interference in the right of the *Länder* to legislate in matters regarding broadcasting. The constitutional basis is relatively narrow: Article 5 para. 1 second sentence Basic Law merely guarantees broadcasters, which includes television and radio, freedom of the press and freedom of reporting. From that the case law of the Federal Constitutional Court has developed a basic right to freedom of broadcasting, and set that right forth in detail in numerous judgements. It is proceeding from the assumption that freedom of broadcasting has constituting significance for a free and democratic order per se. Radio and TV are, it claims, media for and factors in the public formation of opinions. This "democratic/ functional" view of the basic right is used to make numerous very concrete demands of the legal order applicable to broadcasting. For instance, public broadcasters, that is institutions under public law,

are most particularly shaped by constitutional law: They may not be governed by the state, their continued existence and their development must be guaranteed, and self-financing by means of fees take priority over funding through advertising. Their collegial organs must be filled in a "pluralistic" manner. Public broadcasters, it claims, ensure the public enjoys a balanced "universal service". Although private broadcasters also have the right to broadcast in accordance with Article 5 para. 1 second sentence Basic Law, they must also be bound by guiding principles established by the *Land* legislator which guarantee a minimum of balance as regards content, objectivity and mutual respect. Germans call this the "dual broadcasting system". This example shows clearly that the Federal Constitutional Court has, through its case law, created the basic principles of a broadcasting constitution, and that in a core area of competency of the *Länder*.

b) What has become known as the Crucifix Decision handed down by the First Panel of the Federal Constitutional Court on 16 May 1995 – my second example – launched a public debate like no other decision by the Federal Constitutional Court did. The Court found that the fact that the state ordered a cross or crucifix to be hung in schoolrooms in non-denominational state schools violated Article 4 para. 1 of the Basic Law. It was, the Court found, irreconcilable with the basic right to negative freedom of religion and thus the right of parents to protect children from religious

beliefs they feel are wrong or harmful. Of the broad, mainly critical debate among experts concerning this decision, I am here only interested in the federal aspect: According to the Basic Law, schools are subject to the law of the *Länder*. The *Länder* formulate the state's responsibility for education and thereby also determine the religious and ideological orientation of their school system. The aforementioned decision referred to Bavarian schools, and Article 135 first and second sentences of the Constitution of Bavaria provides that schoolchildren in all state primary and secondary schools are to be "educated and raised according to Christian principles". The highest educational goals for schools in Bavaria include reverence before God and respect for religious convictions (Article 131 para. 2). Bavaria had attempted, through its legislation, to "rescue" as many of these constitutional principles from adjudication by the Federal Constitutional Court.

3. Summary

Experts may discuss and, possibly, criticize each of these decisions. We are here only interested in the general observation that the interpretation of basic rights by the Federal Constitutional Court results - put objectively without passing judgement - in considerable interference in the legislative sovereignty of the *Länder*. Here the Federal Constitutional Court is no longer merely a referee in federal disputes: it takes on the role of playmaker. The Court can here only

set itself boundaries; it writes its own schedule. The unitary effect of the Federal Constitutional Court's interpretation of the Basic Law is, incidentally, amplified by the fact that the interpretation of basic rights in the *Länder* constitutions by the constitutional courts in the *Länder* is generally very much oriented to the case law of the Federal Constitutional Court when the *Land* constitutions contain the same or similar legal guarantees, which is predominantly the case. This is a consequence of the authority of the case law of the Federal Constitutional Court. However, this type of "obedience in interpretation" also results from a special option that is available in the German legal system, namely that of bringing a constitutional complaint before the Federal Constitutional Court based on the grounds that the decision by a *Land* constitutional court violates the basic rights set out in the Basic Law.

IV. The German federal structure and European union

The Federal Constitutional Court, through its case law, has for more than five decades essentially helped to shape, but not dominated, the development of the federal structure of Germany. The dominating forces have been the legislator amending the constitution and political practice. The Federal Constitutional Court has, however, played the role of a neutral referee in conflicts of interest between the Federation and the *Länder* based on the standards set by the Basic Law. Its task as guardian of the Basic Law is, however,

becoming increasingly more difficult, because the German *Länder* have suffered a loss of status on account of European union. They now represent only the third political tier within the EU. On account of several developments, the *Länder* feel that their statehood is under threat. They are worried that European Community law will increasingly determine the legal situation where the *Länder* primarily have state and political responsibility for their citizens: schools, education, culture, broadcasting and services of general interest, as well as public safety. The *Länder* have also recognized that EU policies demand the uniform exercising of Community law by its Member States, thus also **within** those Member States that have a federal structure. In that respect the EU also poses a threat to the *Länder* in those areas in which they have key responsibilities within the system of the Basic Law, namely in the area of execution of provisions concerning Community law. The Basic Law now contains a number of substantive and procedural regulations which limit the loss of *Länder* jurisdiction in favour of the EU, or at least attach conditions thereto. The Federal Constitutional Court is responsible for ensuring they are being complied with. It especially takes on the role of guardian of the Basic Law when there is a risk that on account of the establishment of a united Europe the Federal Republic of Germany risks losing its statehood and in particular its federal structure (Article 23 para. 1 in conjunction with Article 79 para. 3 Basic Law). However, the EU Reform Treaty (Lisbon

Treaty) that is currently being considered for ratification does not constitute such a threat.