Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Band 187, 2007, 491-498.

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Summary

The judiciary plays a key role in a government which is based upon the constitutional principles of the separation of powers and the rule of law. Thereby, it has not only the task to balance the constitutional competencies of the legislative branch and those of the executive, but it has also the intricate obligation to delimit its own competencies from those of the other two branches of government. Bearing in mind this situation, comparative and historical approaches to constitutional issues arising in connection with the judiciary appear likewise promising. For both approaches, the U.S. Supreme Court as the first actual constitutional court seems to be an interesting model, which can give insight in the organizational, institutional and procedural conditions of an effective and constitutionally balancing judiciary.

The study on hand deals with the influence of the U.S. Supreme Court on the German Federal Constitutional Court (FCC) at the time of its establishment and its development since. The word "influence" in terms of the survey implies various forms of significance. A constitutional model can have an impact on the legal development of another country by being an example (Vorbild) or by being a counter example (Gegenvorbild). For the study on hand, both forms are classified as "influence", since both, the adoption and the rejection of a legal provision or the pattern of an institutional body, help to assess the relevance of a constitutional model.

Beside this, the identification of a constitutional model and the assessment of similarities or dissimilarities make it necessary to compare the U.S. constitution with the German basic law (Grundgesetz) pertaining to the respective provisions on the federal judiciary, because only after ascertaining similar or dissimilar constitutional features the scope of a possible adoption can be assessed properly. Following the comparative survey, a historical examination of the documents and protocols of the German post-war constitutional convention, the Parliamentary Council (Parlamentarischer Rat), has been carried out. After all, proof for an actual influence results from substantial similarities or dissimilarities connected with evidence from the documents or protocols of the constitutional convention about discussions on characteristic features of Ameri-

can constitutional law, especially referring to the U.S. Supreme Court and the federal judiciary.

Since both, the U.S. Supreme Court and the FCC, are to be qualified as "constitutional courts" the study focuses on the organizational, institutional and personal features of the judiciary, and the typical constitutional proceedings.

1.

In the first part, the historical context of the post-war years and the constituent process in West-Germany (1948/1949) is outlined briefly. The creation of a West German state was chiefly a reaction of the U.S. administration and its military government in Germany to the developing cold war and the expansionist activities of the Soviet Union in Eastern and Southeast Europe during 1946 and 1947. A West German state militarily connected with the U.S. and its Western allies was intended to stop the Soviet invasion before it spread to Central Europe. In this situation, the U.S. and its allies tried to avoid the impression that the West German constitution, the so-called 'basic law', was forced on or heavily influenced by them. Therefore, the Western allies gave only general constitutional principles and refrained from prescribing detailed provisions or a complete institutional framework. One constitutional institution on which Allies and Germans likewise agreed to establish was an independent judiciary with the competencies of a constitutional court. However, details of the organizational and procedural scheme were at large left to the German members of the Parliamentary Council.

As a prologue to the constituent process the West German governors (Ministerpraesidenten) assembled a group of legal experts to take preparatory measures with respect to the provisions of the new German constitution before the Parliamentary Council convened in Bonn on September 1, 1948. This so-called 'constitutional convention of Herrenchiemsee' (Verfassungskonvent von Herrenchiemsee) elaborated a comprehensive proposal for the West German constitution which was – with reference to the basic law provisions on the federal judiciary – very seminal. Accordingly, it already provided for a Federal Constitutional Court with several key proceedings such as judicial review, suits between organs of the Federal Government, suits between states and the Federal Government, and an individual complaint to be initiated by the citizens against government action. One crucial issue was left open, since the constitutional experts were not able to agree on the general organizational and institutional scheme of the German federal judiciary and the role of the constitutional court.

2.

The second part of the study puts heavy emphasize on the debates in the committee on the constitutional court and the judiciary of the Parliamentary Council (judicial committee) with respect to organizational and institutional issues. Since the whole structure of the judiciary depends on the highest court, it is immensely important if this tribunal is integrated into the organizational scheme ("American model") or if it is separated from the other domestic courts ("European model"). In this regard, it is generally accepted that the U.S. Supreme Court is shaped after the "American model", whereas the German FCC is established according to the "European model" as a separate tribunal. Although this fundamental organizational difference has often been taken as a proof that the influence of the U.S. Supreme Court on the FCC is only of minor importance, the documents and protocols of the Parliamentary Council show otherwise. Many direct references to the example of the U.S. Supreme Court and the general framework of the American judiciary can be taken from the protocols. Moreover, not only a few members of the convention knew about the authority of the Supreme Court and deemed it exemplary, but many of them contributed numerous pieces of information about the American constitutional model. Even if the judicial committee of the Parliamentary Council eventually decided on a different solution, the U.S. Supreme Court and the federal judiciary clearly had the effect of being a counter example. Thereby, it had a strong influence on the decision on the organizational scheme of the German federal judiciary and the FCC.

3.

Consequently, in the following parts of the study (3rd to 6th) various constitutional features of the U.S. Supreme Court and the federal judiciary on the one side and the FCC and the German judicial order on the other side are compared. After that, the documents and protocols of the Parliamentary Council are examined for further evidence on actual influence.

For example, in the third part the personal features of both, the U.S. Supreme Court and the FCC, are outlined and compared thoroughly. In this regard, the study comes to the result that the legal framework on professional and personal qualifications of the judges is quite dissimilar. Notably, there are no provisions in the U.S. constitution and in federal legislation on professional or personal requirements for judicial personnel, even though in practice a long experience in the field of law is an inevitable prerequisite for the nomination as a federal judge. In contrast to this, the German basic law and the act on the FCC provide for

several professional and personal requirements, such as being a fully educated lawyer, having the German nationality and being at least 40 years of age. Surprisingly, the legal differences have only little impact on the judicial practice. Therefore, an almost identical group of people seems to be eligible to become judge on the highest courts of the two countries. Whereas in the U.S. a former president, three governors, numerous senators, cabinet secretaries, law school professors and appeal judges took a seat on the Supreme Court, in Germany a former governor, several federal and state ministers, high ranking civil servants, law school professors and judges from the highest courts of the country were elected to the FCC. Notwithstanding these similarities in the judicial practice, there was no hard evidence that the members of the Parliamentary Council in 1948/1949 had the U.S. Supreme Court and the federal judges in mind when elaborating the respective provisions of the basic law.

Likewise stunning differences appear with respect to the nomination and confirmation process of the highest judges in the U.S. and in Germany. As depicted in the fourth part, the U.S. president plays a more important role than the federal government or even the federal president (Bundespraesident) in Germany. Whereas the constitutional practice in the U.S. has led to broadcasted confirmation hearings and public debates on the aptitude of candidates, in Germany only few members of the two major political parties (CDU/CSU and SPD) secretly discuss and select the relevant candidates for the election by the competent committee of the federal parliament (Bundestag) or by the representative assembly of the states (Bundesrat). Even though this is not utterly against constitutional provisions, it is far less transparent as originally contemplated by the framers in the Parliamentary Council. After all, even if the American nomination and confirmation process is perceived as a more open and transparent procedure there is no evidence that the American example had substantial influence on the German provisions as laid down in the basic law and the act on the FCC.

Stronger ties between the two constitutional orders can be ascertained in the fifth and sixth part of the survey with respect to the organizational structure of the courts and to the numbers of judges on the bench. Albeit the constitutional and legislative provisions seem to indicate otherwise, the members of the judicial committee of the Parliamentary Council thoroughly discussed the American example before agreeing on different solutions. As a result, the German FCC consists of two panels with eight judges each, whereas the U.S. Supreme Court is only one judicial body with nine judges. Especially the repeated references to

a judicial tribunal consisting of nine judges in the protocols constitute important proof of the strong influence of the U.S. Supreme Court which, in the end, had the effect of a counter example. Regardless of the American model, practical requirements of German partisan politics engendered the decision on a two-panel constitutional tribunal with eight judges each.

Diverse constitutional provisions between the U.S. and Germany exist also pertaining to the period of time the judges spend in office. Unlike the German 12-year term, the U.S. constitution contemplates life term, or, as Art. III U.S. constitution puts it, "during good behaviour". Although, the issue of time during which the judges should serve on the bench was deliberated in the judicial committee, the American example was not referred to because the German legal tradition implied life time appointments for judges as well.

4.

Subsequently, in the following parts of the survey on hand (7th to 11th part) the most important constitutional proceedings are dealt with. Strong influence of the American model can be noted on the debates in the Parliamentary Council on the doctrine of judicial review. As the protocols show, the members of the judicial committee had very intense discussions, on the judicial authority to control and invalidate acts of congress. Especially during these deliberations, American legal advisers provided for immediate support in form of books and other information.

While the members of the committee generally endorsed the doctrine of judicial review, the German provisions remarkably deviate from the American example. Arguably, the members of the judicial committee queried if it would be expedient to have all courts, from first instance to the instance of last resort, administer the competence of judicial review. As several times before, the American constitutional model thereby had again the effect of being a counter example. According to the assessment of the Parliamentary Council, the decentralized performance of judicial review would have detrimental effects on the stability and consistency of the newly founded German judiciary. Therefore, the members of the Parliamentary Council voted for a generally centralized judicial review in the hands of the FCC. However, only three years later the FCC itself decided that all other courts could decide on the constitutionality of pre-constitutional acts and executive legislation alike. Only with regard to acts of parliament the FCC adhered to the principle of a centralized judicial review. In addition, similar proof can be found that the American doctrine also influenced the German proce-

dure of certification. However, there was no evidence in the documents and protocols of the Parliamentary Council that the American proceeding of certification did have any immediate influence.

With respect to the three other key proceedings of constitutional courts, the suits between organs of the Federal Government, the suits between states and Federal Government or between different states, and complaints initiated by individuals, there was no proof that the American example had any impact on the drafting of the German provisions. Moreover, a comparison between the American political-question doctrine and the German organ proceeding (Organstreit) revealed two inherently different approaches toward conflicts on the level of the Federal Government. While the Supreme Court usually rejects jurisdiction for political questions right from the beginning, the FCC regularly decides on the merits of political cases but frequently leaves difficult issues to the discretion of the other two branches of government. Similar results were to be assessed in regard of individual constitutional proceedings. Although, the German constitutional complaint (Verfassungsbeschwerde) resembled a generalized and expanded Writ of habeas corpus, no proof was available in the protocols that it had considerable influence on the German proceeding. Equally, both constitutional orders furnish proceedings so solve conflicts between different states or between a state and the Federal Government. However, the German basic law provides for symmetric remedies by giving states the opportunity to sue the Federal Government, whereas in the American concept of federalism the United States can bring in action against the states, however, due to the "Souvereign Immunity"-doctrine a state is not able to sue the United States. After all, as the comparative and historical survey revealed, the concepts of federalism do not only differ from each other, but the origins of German constitutional proceedings between different states derive from earlier times so that there is no space for additional American influence in this field. Beside this, the documents and protocols of the Parliamentary Council remain absolutely silent with respect to any influence of the U.S. Supreme Court or American constitutional law on conflicts in the field of federalism.

5.

Eventually, in the last three parts of the study on hand (12th to 14th) specific and very characteristic features of the German judicial order are examined and compared with the respective American provisions. Unlike the similarities in the procedural parts, this survey led to the conclusion that the U.S. Supreme Court's decisions and the decisions of the FCC have equally binding authority. Even though differences re-

main in the details, the general concept of the binding authority of the highest court's decisions – which is familiar to the common law, but rather extraordinary in civil law – is accepted in the U.S. as well as in Germany. Moreover, the documents and protocols of the constitutional convention of Herrenchiemsee, of the Parliamentary Council and later of the Bundestag (federal parliament) many times refer to the U.S. Supreme Court and the respective principle of American law (stare decisis). Therefore, the influence of the American model on the binding authority of the FCC's decisions was very intense and, in the long term, decisive. Likewise, the German procedure of accepting individual constitutional complaints was shaped from the beginning according to the model of the certiorari-proceedings before the U.S. Supreme Court. Prior to its first establishment in an amendment to the act on the FCC in 1956, the commentators and responsible members of the competent committee of the Bundestag openly admitted to follow the path of the American example of the certiorari-proceeding. Similarly, the attention was expressly directed toward the Writ of certiorari every time the growing caseload of the FCC demanded measures of relief. Even today, the U.S. Supreme Court and the certiorari-proceeding is contemplated as a possible pattern to control the FCC's docket. Ultimately, strong similarities have been found between the opportunity of the Supreme Court justices to contribute a dissenting or concurring opinion and the German so-called 'Sondervotum' in which FCC judges can articulate their deviating legal opinions. While dissents and concurrences are accepted and normal in the common law countries like the U.S., this opportunity was all together new for Germany. Admittedly, the respective amendment to the act on the FCC was initiated in 1970 with an open legislative reference to the American example.

6.

In conclusion, the study on hand has shown that the German FCC and the constitutional provisions it is premised on were influenced in different degrees by the U.S. Supreme Court and the U.S. constitution. While there are some specific features and proceedings with almost no traceable influence of the American constitutional model, there are others where the U.S. Supreme Court had the effect of an example and others where it had, after serious debates in the competent committee, the effect of a counter example. Even though, constitutional models of different foreign countries such as the UK or Switzerland also exerted influence on the creation of the FCC, it can be said that the U.S. Supreme Court and the American federal judicial system had the most important

influence on the judicial provisions of the basic law and the act on the FCC.

Some commentators in the past took a very critical position toward the adoption of foreign countries' constitutional features or institutions. However, this impression is no convincing concept of constitutional law because the adoption and rejection of foreign examples is a very crucial part of legislative work and especially important for the constituent process. As the former Supreme Court justice Oliver Wendell Holmes once put it: "The life of law has not been logic – it has been experience." Therefore, it is essential for the success of a newly created constitution to discuss already proved principles and provisions of foreign constitutional law. In any case, it has to be taken into account that the legitimacy of the German constitutional order is not at all negatively affected by the proven influences of foreign constitutional principles and institutions.