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Seminar on

**"The budget of the Constitutional Court: a determining
factor of its independence"**

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**The Constitutional Court budget
as one of the guarantees of the independence
of constitutional justice**

Report

by

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This very topical subject¹ "The budget of the Constitutional Court: a determining factor of its independence", is one that greatly preoccupied the Federal Constitutional Court in the first years of its existence. Section 1 of the Federal Constitutional Court Act (*Gesetz über das Bundesverfassungsgericht*), which came into force in 1951², provides that the Federal Constitutional Court is "a court of justice of the Federation independent of all other constitutional bodies", and yet, in the first two years of its existence, under this Act, the Federal Constitutional Court had no budget of its own. Instead, the funds for the Federal Constitutional Court were provided as part of the budget of the Federal Ministry of Justice³. In the second section of this talk I will discuss how the Federal Constitutional Court acquired its own budget, and in the third section I will turn to the general independence of judges in Germany and the special independence and status of the Federal Constitutional Court; but first of all, it is necessary to consider the budget in general terms.

I. The central importance of the budget:

Even in times of great prosperity, and therefore times when the financial position of public funds is free of any problems – a situation that admittedly is quite different from that experienced by most countries and public budgets of the states represented here today, including Germany – it is still of great importance who administers and is therefore responsible for the budget allocated by the legislature. The course is determined at the very outset, when an application is made to the body responsible for the general budget – in almost all countries, parliament is the body that has the privilege of deliberating on the budget and passing it. It makes a quite considerable difference whether the budget of an institution forms a small part of the general budget of a large authority, or whether an institution has its own right of application and right to present reasons to the budget legislature. If the budget is part of that of a larger authority, priorities are established in the preliminary stages, and it may be necessary for lower priority to be given to the subordinate institution's interest. Even if such a weighing of interests in the early stages is always decided in favour of a particular subordinate institution, there is at least political consultation when an application is made with regard to the priorities and contents of the future budget. To put this in concrete terms: if the budget of the German Federal Constitutional Court were part of the budget of the Federal Ministry of Justice, as it was in the first years, there would be a danger that funds applied for by the Federal Constitutional Court would have to take second place in the overall balancing of interests of the Federal Ministry of Justice. The Federal Constitutional Court would certainly not be as free to establish its own priorities in the application as it is when it has its own budget.

The procedure of making an application to the budget legislature, giving reasons for the need for the funds applied for, is also important. If a filter were to be applied to this, for example by a federal ministry, then in general it would not be possible for the Federal Constitutional Court to make its own application and present its own reasons to the budget committee of the

¹ Engel in EuGRZ 2003, S. 122 ff.

² Erlass des Gesetzes über das Bundesverfassungsgericht vom 12. März 1951 (BGBl. I S. 243ff) aktuell in der Fassung der Bekanntmachung des Gesetzes von 11. August 1993 (BGBl. I S. 1473) in der Fassung des Gesetzes vom 13. 12. 2003 (BGBl. I S. 2546)

³ Vgl. schriftlicher Bericht der Haushaltsausschusses zum Entwurf eines Gesetzes über die Feststellung des Bundeshaushaltsplans für das Rechnungsjahr 1951 Einzelplan VII - Haushalt des Bundesministeriums der Justiz 1951 in Verhandlungen des Deutschen Bundestages, I. Wahlperiode 1949, Stenographische Berichte Band 9. S. 6697

Bundestag to support the budget it regards as necessary. But that committee is an important forum for presenting the justification for the funds applied for on the basis of the duties of the constitutional court. Moreover, it makes a great difference from the point of view of protocol and thus of the application of government law, whether a department, and therefore part of the executive branch, represents the budget of the Federal Constitutional Court vis-à-vis the *Bundestag*, or whether the Federal Constitutional Court as a constitutional body represents its own budget, as one constitutional body to another.

Responsibility for the budget usually brings with it further competences. In Germany, the federal legislature has granted wide powers for managing the funds, in the form of the Budget Act (*Haushaltsgesetz*). The budget still contains a number of expense categories, for instance for staff, investments, day-to-day expenses etc. However, the institution that administers the budget is free to a certain extent to reappropriate funds between these various budget categories. If the budget of the Federal Constitutional Court were part of the budget of the Ministry of Justice, it would not be obligatory for the Ministry to pass on this freedom of appropriation to the Federal Constitutional Court. The normal procedure here is to provide that appropriations of institutions that are subordinate or assigned to another institution are subject to prior consent.

In addition, responsibility for the budget normally follows the power to appoint and dismiss staff. This was also the case in the first years of the Federal Constitutional Court, when the budget was still part of the budget of the Federal Ministry of Justice. At that time, the most important administrative and supervisory tasks, such as the selection, appointment and dismissal of the academic auxiliary staff and the selection, appointment, promotion and dismissal of the non-judicial officials of the Federal Constitutional Court, were carried out by the Federal Ministry of Justice. The responsibility for the budget is also associated with administrative competence, which comprises not only independent administration, that is, incurring administrative expenses on the institution's own responsibility, but also competence to enter into contracts, competence to make appropriations and other competences. In addition, in connection with administrative competence it should be added that in Germany at the present time budgets are being cut. Here too it is of great importance whether the Federal Constitutional Court has its own budget or its budget is part of a larger budget. Since the Federal Constitutional Court is a constitutional body, there are normally discussions before budget cuts or blocking of funds, and in view of its status as a constitutional body, and taking into account the particular tasks of the Federal Constitutional Court, in the past it has often been decided not to cut or reduce funds for the Federal Constitutional Court. Even if, as is unfortunately the case at present, the budget situation calls for a general reduction of the budget, and therefore the Federal Constitutional Court is also affected, the Federal Constitutional Court, as a result of its own budget, is competent to decide in what areas of its budget these cuts or this blocking of funds take effect.

In summary, it is a question of considerable importance and with far-reaching effects from the point of view of administration, in addition to the question of status, whether a constitutional court has its own budget or its budget is part of a departmental budget.

II. How the Federal Constitutional Court was given its own budget:

As I said at the beginning⁴, in the first two years after it was founded in 1951 the Federal Constitutional Court had no budget of its own. As early as in the year 1951, the year when the Court was founded, and therefore on the first occasion that a budget was passed in which the departmental budget of the Federal Ministry of Justice contained an appropriation for the Federal Constitutional Court, although as a separate item⁵, an objection was made in the course of the deliberations that the Federal Constitutional Court should be given its own budget. A member of the German parliament stated, "Under section 1 of the Federal Constitutional Court Act, the Federal Constitutional Court is an independent constitutional body equal in rank to all other constitutional bodies. The Social Democrat parliamentary party therefore does not consider it appropriate that the budget of the Federal Constitutional Court is integrated into the budget of the Federal Ministry of Justice. The Federal Constitutional Court must have its own budget in future, and this is at least as important as it is for the Federal Court of Audit. This court of justice is in no way subject to the administrative supervision of the Federal Minister of Justice, nor is it an authority subordinate to him. We therefore find fault with the fact that the present budget contains this error, and we wish to see the Federal Constitutional Court given its own budget in future"⁶.

However, in that year and in the following year, the budget remained an appropriation within the budget of the Federal Ministry of Justice. This also meant that not only the budget, but all staff matters, were administered in the Federal Ministry of Justice. This fact led among other things to a "Memorandum of the Federal Constitutional Court of 27 June 1952"⁷: The position of the Federal Constitutional Court " prepared by the Federal Constitutional Court in the year 1952. This memorandum was sent by the President of the Federal Constitutional Court, Mr. Höpker-Aschoff, on the instructions of the full court, to the highest federal bodies, that is, the Federal President, the German *Bundestag*, the German *Bundesrat* and the Federal Government⁸. It set out why the position of the Federal Constitutional Court as one of the highest constitutional bodies and the independence of the Federal Constitutional Court make it necessary to give the Federal Constitutional Court its own budget, and to transfer administrative power to it and thus also the power to appoint and dismiss staff with regard to its own affairs.

The memorandum ended with the following demands:

1. The budget of the Federal Constitutional Court, like those of the *Bundestag*, of the *Bundesrat* or that of the Federal President, must be a separate departmental budget in the federal budget, with the consequences in particular under the Reich Budget Code (*Reichshaushaltsordnung*).
2. The budget funds earmarked in this departmental budget must be administered by the Federal Constitutional Court itself, and where the legislation on budget law already mentioned above requires the individual ministers of the Reich (federal ministers) to

⁴ s. S. 1

⁵ So etwa im Entwurf eines Gesetzes über die Feststellung des Bundshaushaltsplans für das Rechnungsjahr 1953 (Haushaltsgesetz 1953), Deutscher Bundestag I. Wahlperiode 1949, Anlage Drucks. 4000 - Gesamtplan des Bundshaushaltsplans 1953, S. 4 und S. 16ff.

⁶ 165. Sitzung des Deutschen Bundestages in Verhandlungen des Deutschen Bundestages, I. Wahlperiode 1949, Stenographische Berichte Band 9, S. 6753

⁷ Der Status des Bundesverfassungsgerichts, Material - Gutachten, Denkschriften und Stellungnahmen mit einer Einleitung von Gerhard Leibholz in Jahrbuch des Öffentlichen Rechts der Gegenwart 1957, S. 109 ff, insbes. S. 144ff.

⁸ Fundstelle Fußn. 7, S. 144

carry out duties, these duties shall be performed by the President of the Federal Constitutional Court.

3. The President of the Court is to install the judges elected by the legislative bodies in the established posts at the Federal Constitutional Court.
4. The established civil servants of the Federal Constitutional Court must be appointed and dismissed by the President of the Court. For them, the highest administrative authority must be the President of the Federal Constitutional Court.
5. The academic auxiliary staff at the Federal Constitutional Court must be selected and appointed by the Court itself.
6. The President of the Federal Constitutional Court must enter into the contracts of employment with the salaried staff and wage-earners who work at the Federal Constitutional Court.
7. Under the *Reich* Budget Code and the provisions supplementing it, contracts for building work, leases and similar agreements must be entered into by the President of the Federal Constitutional Court to the extent necessary for the Court's independent administration of the budget funds.
8. In administrative matters, the Federal Constitutional Court deals with the Federal Government, with other constitutional bodies and with individual federal ministries direct, and not through the Federal Ministry of Justice. Correspondence is not in the form of a report, but in the form of letters to agencies of equal authority. It goes without saying that the Federal Ministry of Justice is still informed in full of all concerns of the Federal Constitutional Court that it needs to know to carry out its legislative duties.⁹

Despite this memorandum of the year 1952, in the draft Budget Act of spring 1953 the budget of the Federal Constitutional Court was once again included in that of the Federal Ministry of Justice¹⁰. A contributing factor to this may have been the fact that the President of the Federal Constitutional Court, Dr. Höpker-Aschoff, at the end of a letter to the Federal Minister of Justice states as follows (quote): "I can therefore not advise that the changes set out above (*this also included conferring budgetary sovereignty on the Federal Constitutional Court*) are carried out¹¹. The shorthand records of the deliberations of the *Bundestag* show that at this date the Federal Government had already decided to obtain an expert opinion – described as the opinion "of a respected constitutional scholar" – on the Federal Constitutional Court memorandum¹². This report comes to the conclusion that neither a separate budget nor its own administrative competence, including the power to appoint and dismiss staff, is constitutionally necessary for the Federal Constitutional Court. It states *inter alia*: "In view of these counter-arguments, the budget demands in the memorandum appear to me to lack all persuasive power. Surely there can be no desire to replace an appropriate and well-functioning system by a less appropriate one, for reasons merely of prestige or for the sake of terminological doctrines"¹³, and at the end of the report, "In contrast, there are serious objections to the creation of an independent self-administration of the Federal Constitutional

⁹ Fundstelle Fußn. 7, S. 148

¹⁰ Bundestags-Drucksache Nr. 4000, Nachweis Fußn.6

¹¹ Fundstelle Fußn. 7, 156

¹² Verhandlungen des Deutschen Bundestages, I. Wahlperiode 1949, Stenographische Berichte Band 15, S. 12476 - Bericht des Bundesministers der Justiz Dr. Dehler

¹³ Fundstelle Fußn. 7, S. 180

Court in judicial matters, completely separate from the supervision and control of the Federal Ministry of Justice, which is the aim of the memorandum"¹⁴ In response, the Federal Constitutional Court replied with "comments"¹⁵.

It is a fact that in the oral report of the budget committee on a draft Act on the Adoption of the Federal Budget for the financial year 1953¹⁶ (*Gesetz über die Feststellung des Bundeshaushaltsplans für das Rechnungsjahr 1953*), a new departmental budget 19, "Budget of the Federal Constitutional Court", was envisaged. Following this, in the 276th session of the *Bundestag* on 25 July 1953, a budget was passed containing a new departmental budget 19 – Budget of the Federal Constitutional Court¹⁷.

One factor that contributed to this positive, desirable and necessary change was the fact that in autumn/winter of the year 1952 the then Federal Minister of Justice publicly criticised the case-law of the Federal Constitutional Court. Among other things, he said: "The Federal Constitutional Court has deviated from the course of justice in a distressing manner and has created a serious crisis in this way"¹⁸. This criticism resulted in the *Bundesrat* passing a resolution at the end of 1952 to ask the Federal Chancellor for clarification on the attitude of the Federal Minister of Justice in this constitutional dispute with the Federal Constitutional Court. On the same date, the *Bundesrat* accepted a motion that in future the Federal Constitutional Court should be given its own budget, which would make it independent of the Federal Minister of Justice¹⁹. The German *Bundestag* deliberated on these statements in detail. In the course of this debate, it was stated among other things: "If, on the other hand, one bears in mind the political and constitutional disputes that have taken place in public in recent times between the Federal Minister of Justice and the President of the Federal Constitutional Court, then, I believe, it is difficult to deny the justification for giving the Federal Constitutional Court its own budget"²⁰. It is unlikely to be pure speculation to suggest that the statement of the Federal Minister of Justice, which was interpreted as a breach of the principle of separation of powers, contributed to a structurally greater independence and strengthening of the position of the Federal Constitutional Court in 1953, among other things in the form of its own budget.

III. The independence of the Federal Constitutional Court:

The topic of this talk, "The budget of the Constitutional Court: A determining factor of its independence" might suggest that by "independence" I mean the independence of the work of judges under German constitutional law. In this respect, Article 97 of the Basic Law (*Grundgesetz*) provides as follows: "The judges are independent and subject only to the law". This provision of the Basic Law in conjunction with the principle of the separation of powers, above all in most recent years, has led to calls in the Federal Republic of Germany for institutions to have their own budgets, that is, the right of application and right to present reasons in parliament, and administration of the budget, in the judicial system as a whole, that is, both in the supreme Federal courts of justice and also in the branches of the judiciary

¹⁴ Fundstelle Fußn. 7, S. 193f.

¹⁵ Fundstelle Fußn. 7, s. 194ff.

¹⁶ Verhandlungen des Deutschen Bundestages I. Wahlperiode 1949, Stenographischer Bericht Band 17, S. 13702

¹⁷ Fundstelle Fußn. 16, S. 13702

¹⁸ Detlef Rilling, Thomas Dehler - eine politische Biographie. Ein Leben in Deutschland, Diss. An der Philosophischen Fakultät der Universität Augsburg (1988), s. 154

¹⁹ So der Bericht des Abgeordneten Dr. Güllich in Verhandlungen des Deutschen Bundestages, I. Wahlperiode 1949, Stenographische Berichte Band 15, S. 12089 und Bemerkungen des Bundesrates zum Einzelplan 07 - Bundesminister der Justiz in dem Entwurf eines Gesetzes über die Feststellung des Bundeshaushaltsplans für das Rechnungsjahr 1953 (Haushaltsgesetz 1953) Drucks. 4000 Anlage S. 14

²⁰ Verhandlungen des Deutschen Bundestages, I Wahlperiode, stenographische Berichte Band 15, S. 12474

established in the *Länder* (states²¹). It must be conceded that this demand correctly observes that budget decisions, for example the approval of jobs and funds, and also the administration of the budget in itself, may have effects on the dispensation of justice. Without the wish to discuss to the end this German debate, which is topical at present, with a focus on the budget of a constitutional court, nevertheless there is every reason to believe that the freedom of judges protected in the Basic Law relates above all to the actual act of judicial decision²².

At the very beginning of the memorandum of the Federal Constitutional Court that I have already mentioned, the reasons for introducing an independent budget were set out as follows: "The Federal Constitutional Court, as the supreme guardian of the German constitution, is, under the wording and meaning of the Basic Law and the Federal Constitutional Court Act, at the same time a constitutional body vested with the highest authority. From this it follows that the Federal Constitutional Court cannot be subordinate either to another federal body or to a federal authority."²³

After this, the necessity of an independent budget is explained as follows:

- The Constitutional Court differs essentially from the other courts in its nature and significance. The constitutional branch of jurisdiction differs from every other branch of jurisdiction in a fundamental way in that it alone deals with a particular type of legal dispute, that is, what are known as political legal disputes. "Political legal disputes" means disputes about political law in which the political itself is the subject of judicial decisions made on the basis of existing legislation.
- The Constitutional Court in its character as the competent guardian of the German constitution is at the same time a constitutional body vested with the highest authority. As such, the Federal Constitutional Court is constitutionally the equal of the *Bundestag*, the *Bundesrat* and the Federal Government.²⁴

In the following, the main emphasis is on the nature of the Constitutional Court as a constitutional body, from which there follow its fundamental position and the many competences that are allocated to it in the Basic Law. The argument seems to concentrate above all on the constitutional and political activity of the Court and its position as a constitutional body. It is somewhat surprising that the main emphasis of the argument was not on the competences and in particular on the Court's competence to reject a statute and in this respect its unique competence to declare a formal statute void and thus inapplicable. This competence places a Constitutional Court in opposition to all other constitutional bodies and is, as it were, the justification in itself of the independence it already has. In this point the Constitutional Court differs from all other courts, which may declare decisions of the executive branch invalid or even void, but which do not have this competence vis-à-vis the legislature or the acts of other constitutional bodies, such as the *Bundestag*, *Bundesrat* and so on. The Federal Constitutional Court even has a supervisory function vis-à-vis the Federal President, although this has never been exercised in the history of the Federal Republic of Germany.

²¹ Hoffmann-Riem in: Deutsche Richterzeitung 2003, s. 284 (258); Berlit in Deutsche Richterzeitung 2003, S. 298 (300f.); Peschel-Gutzeit in Deutsche Richterzeitung 2002, s. 345ff. (352)

²² So auch Papier in Neue Juristische Wochenzeitschrift 2002, S. 2586 (2588)

²³ Fundstelle Zußn. 7, S. 144

²⁴ Fundstelle Fußn. 7 S. 145

The position of the Court as a constitutional body follows from this extraordinary competence. Not the position as a constitutional body, but the competence in itself is the reason why since 1953 the German Federal Constitutional Court has been responsible for its own budget.

One could therefore say, in summary: a budget of its own for a Constitutional Court follows from its competence and the independence inseparably linked to this, and at the same time the Court absolutely needs its own budget in order to be independent, and this independent budget guarantees part of the Court's structural independence.

IV. Practical aspects of the budget responsibility of the Constitutional Court:

In Germany, budget debates are strongly influenced by the principle of departments and the agreements made in advance by the Federal Government. As a result, there might in principle be a danger that the Federal Constitutional Court will have difficulty in establishing the necessary prestige for its very small budget – only the *Bundesrat* has a comparably small one. Or to look at it from a different perspective: without a large department to support and promote it, it might be difficult for the Court to be granted the necessary budget in parliament. As far as I am aware, this danger has not been realised, although in the last years the general budget of the Federal Government has been particularly marked by reductions and caution. This surely results from the commission and competence of the Federal Constitutional Court and the great recognition it enjoys both from the other constitutional bodies, including the *Bundestag*, and also from the population as a whole. Even though, in the history of the Federal Constitutional Court, its case-law has been criticised both by the politicians and by the general population, perhaps not frequently but sometimes quite sharply, it is accepted that the Federal Constitutional Court carries out its work with great responsibility and competence.

In the preliminary talks on the budget, but also in the *Bundestag* budget committee, there has been no case to date where necessary extra expenses have not been included in the budget. This may also result from the great restraint shown by the Federal Constitutional Court when applying for the budget and in its administration. The rules of procedure of the Federal Constitutional Court provide for a Committee on Budgetary and Personnel Matters that deliberates on the budget of the Federal Constitutional Court. Here there is a thorough discussion of the individual expenses that need to be newly applied for. According to the function of the Federal Constitutional Court as a model and its own responsibility for general welfare, the budget is deliberated with great restraint and then applied for as part of the federal budget. When this application as part of the federal budget is made, it contains clearly discernible main points of emphasis. Expenses that are necessary for the dispensation of justice, e.g. funds for academic auxiliary staff or to buy books or data processing equipment are given a higher priority in the application than funds for other purposes. Thus, for example, the Federal Constitutional Court has always been very restrained when applying for funds for the purpose of prestige and display.

After the budget is passed by the Federal Constitutional Court, it is submitted to the Federal Ministry of Finance, since this ministry prepares the draft general budget. First, the ministry issues key data following a resolution of the Federal Government. The Federal Constitutional Court is to base its application on these. In the case of applications over and above this, for example for more funds and more posts, the Federal Constitutional Court must submit detailed reasons in support. These are prepared in the administrative department and deliberated on in the Committee on Budgetary and Personnel Matters. After the budget has

been submitted to the Ministry of Finance, there is a discussion with the Ministry. This is conducted by me together with my staff. In this discussion it may happen that the Ministry of Finance informs us that there are some items in the application which it will not support. These, and the general budget, are then discussed with the persons known as the rapporteurs of the *Bundestag* Budget Committee in a further round of talks. The rapporteurs consist of one member of parliament from each parliamentary party. Here, the Federal Constitutional Court has the opportunity once again to present reasons for applications that the Ministry of Finance regards as unsuitable for funding. The result of these talks may be that the rapporteurs regard the budget as applied for as suitable for passing. Then the budget of the Federal Constitutional Court is normally passed in the same form in the budget committee, which is the largest *Bundestag* committee, and later by the *Bundestag* as part of the general budget of the Federal Republic of Germany. However, it may happen that individual items remain disputed even after the discussion with the members of parliament. Then there is an opportunity to convince the budget committee of the *Bundesrat*, in its session, that they are necessary. However, normally this is extremely difficult. At these sessions too, the Federal Constitutional Court is represented by myself as Director of the Federal Constitutional Court.

With regard to the responsibility for the budget and its administration, it must finally be added that the administration of the budget, including entering into all contracts and making all staff decisions (except electing the judges) takes place in the Federal Constitutional Court itself. In this, the administration is also subject to the supervision of the independent Federal Court of Audit. The Court of Audit is also present the external budget talks. Before substantial expenses are incurred, for example recently with regard to the funds applied for to build an extension, it may review them to determine their economic efficiency. The later administration of the funds is largely restricted to complying with provisions, for example those of the budget regulations or provisions authorising expenditure, for example the rules on the reimbursement of travel costs, salaries and remuneration, and so on. Several years ago, for example, the official cars and the canteen of the Federal Constitutional Court were examined from the point of view of economic efficiency. If, in these cases, the Federal Constitutional Court is given a rebuke, there is normally a reaction to this on the part of the Ministry of Finance or the budget committee. Thus, for example, in earlier times official cars were withdrawn and chauffeurs' jobs cut. In order to demonstrate the economies made here, may I point out that the Federal Constitutional Court has sixteen judges but only four official cars. Two of these cars are allocated to the President and the Vice-President. The competence of the Court of Audit is restricted in the area of expenses for the dispensation of justice; thus, for example, the Court of Audit would not be able to review whether the expenses of a legal opinion commissioned before a decision are necessary. But as far as I am aware, there have not yet been any disputed questions on this point between the Federal Court of Audit and the Federal Constitutional Court.