Federalism in Canada and Germany: Overview and Comparison

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We strongly recommend that you seek professional legal advice from a qualified lawyer to resolve your particular legal problem.

Contents

I. Federalism as a State Structure

What is a federal state? The term federalism characterizes an organizational structure that consists of two elements, a federal state and the individual member states, where the federal state is formed as an association of the member states. In contrast to unitary systems, where all governmental power is vested in one national authority, the governmental power of federal states is distributed between the central (or federal) authority and several member-state (or provincial or regional) authorities. In this political system, responsibility for specific areas is defined in the constitution and neither of these levels of government is subordinate to the other.

1. Advantages of Federalism

Significant arguments in favour of the federal system of government include (i) limitation of political power and (ii) protection of minorities. Limitation of political power through its distribution among different government levels (vertical separation of powers) provides opportunities for wider political participation and therefore opens new ways to exercise sound influence on the governing process. Another argument in favour of the federal system is the protection of minorities. This is in reference to groups that form a minority on the federal level while forming a majority on the member-state level. Through decentralisation, federalism aims to achieve integration of these minorities despite the overall diversity.

2. Legislative Power within a Federal State

The constitutional separation of power provides the federal and the member-state levels with independent legislative powers. It must be emphasized that the legislative power of a member state is not granted by the federal parliament and cannot be amended, controlled or taken away and vice versa. This is different with regard to local authorities, such as local or municipal governments, which are subordinate to the member-state authority. Their powers, including their legislative powers, are granted to them by the member state (e.g., the city of Toronto is subordinate to the province of Ontario).

Federalism has a profound effect on politics and legislation and from a legal perspective, it gives rise to legal pluralism, which should be kept in mind when applying the law to particular cases.

3. Federalism in Canada and in Germany

Canada and Germany are federal states. Germany is divided into 16 federal states with each exhibiting a certain degree of sovereignty. Similarly, Canada consists of 10 provinces and 3

territories; provinces possess considerable sovereignty and territories constitute an exemption, which we will examine later on.

II. Federalism in Canada

1. History of Federalism in Canada

On 1st July 1867, Canada adopted the *British North America Act, 1867* (now known as the *Constitutional Act, 1867*). Through adoption of the Constitution, federalism became one of the main pillars of the new constitution. The constitution established an independent central government and guaranteed the legal autonomy of the provinces and their equality in status with the central government.

At the time the constitution was being adopted, some of the colonies favoured a legislative union that would enable one parliament[1] to legislate for all colonies. On the other hand, Lower Canada (which became Quebec) and the Maritime provinces[2] feared that their culture, institutions, laws[3] and religion could be threatened by the majority represented by the English-speaking Protestants. The compromise was a federation that provided unity for economic and military purposes yet preserved diversity by equipping the provincial parliaments with extensive legislative powers. These legislative powers allowed the provinces to have their own civil law (e.g. law of obligations) and police law or their own court system, municipal institutions and an independent healthcare and education system. In this regard, it is important to note that certain provisions of the Constitution apply only to some of the provinces thus reflecting the unique terms upon which they were admitted to join the federal state.

The *British North America Act* did not contain an amending clause, which is the reason why it was the British Parliament that enacted the amendments to the Canadian constitution until 1982. The *Constitution Act, 1982*[4] finally provided an exclusively Canadian amendment procedure and, more importantly, it added the Canadian Charter or Rights and Freedoms to the Canadian constitutional law, making it applicable to all federal and provincial laws.

[1] It is Canadian practice to use the term "Parliament" for the federal parliament and the term "Legislature" for the provincial parliaments.
[2] New Brunswick, Nova Scotia and Prince Edward Island.
[3] e.g. Code Civil of the Province Quebec.
[4] *Constitution Act, 1982* was a part of Schedule B of the *Canada Act, 1982* both approved by the British Parliament.

2. Canadian Parliament, the Senate and the House of Commons

The Canadian Parliament consists of the Senate of Canada (upper house) and the Canadian House of Commons (lower house).

The Senate has an equal representation of the four main geographic regions (96); representatives for Newfoundland and Labrador (6), representatives of the three territories (3) and some senators appointed temporarily by the Governor General (4 or 8). All senators are appointed by the Governor General on the advice of the Prime Minister with their term restricted by the mandatory retirement age of 75. The Senate mainly reviews the work done by the House of Commons with the option of confirming, amending or vetoing legislation. The Senate can propose its own legislation, with the exception of "money bills" related to imposing taxes or spending public money. Bills passed by the Senate must be approved by the House of Commons.

The House of Commons in Canada is the elected lower house of Parliament with 308 members from electoral districts (ridings) across Canada[5]. The House of Commons passes most of the federal legislation, which then goes to the Senate for review. Members of Parliament (MPs) are elected by simple plurality, which means that the MP is the person who received the most votes in the riding. The Parliament's term is limited to 4 years.

3. Separation of Powers in the Canadian Constitution

a. Separation of Powers in General

In a federation, the division of responsibilities between the federal level and the provincial level should enable effective governing. Separation of power in Canada adheres to the principle of subsidiarity which prescribes that decisions affecting individuals should be made by the level of government closest to them and that matters which cannot be effectively regulated at the lower level should be managed by the federal level of government. In a country as large as Canada, it was reasonable to equip the federal parliament with powers related to matters of national importance such as defence, cross-border trade[6], banking and currency, transport and communication, criminal law, etc. At the same time, courts have provided a broad interpretation of provincial powers that now encompass private property law, consumer law, health law and other areas that directly impact individuals. Due to decisions of the courts, the balance of power of the federal state and the provinces has been shifting throughout Canada's history. Therefore, the wording of the *Constitutional Act, 1982* does not provide a complete picture of the legal reality. Prior to discussing the developments in this area, we provide below the following overview of federal and provincial powers:

[5] This number of MPs will rise in the next elections to 338.
[6] Interprovincial and international.

POWERS OF THE CANADIAN PARLIAMENT[7]	POWERS OF THE PROVINCIAL LEGISLATURES[8]
• Public Debt and Property • Regulation of Trade/Commerce • Unemployment insurance • Direct/Indirect Taxation • Postal Service • Census/Statistics • Defence • Navigation/Shipping • Quarantine • Sea Coast and Inland Fisheries • Ferries (interprovincial/ international) • Currency/Coinage • Banking /Incorporation of Banks/Paper Money • Weights and Measures • Bankruptcy • Patents • Copyrights • Indians/Indian reserves • Citizenship • Marriage/Divorce • Criminal law, including Criminal Procedure • Penitentiaries • Works connecting provinces; beyond boundaries of one province; within a province but to the advantage of Canada/or more than one province	• Direct Taxation within Province • Management/Sale of Public Lands belonging to Province • Prisons • Hospitals • Municipalities • Formalization of Marriage • Property and Civil Rights • Administration of Civil/Criminal Justice • Education • Incorporation of Companies • Natural Resources • Matters of a merely local or private nature

b. Residual Power

The Canadian constitution gives each level of government certain specified powers to make laws and anything not specified are deemed to be a responsibility of the federal parliament. This residual power of the federal parliament represents one of the most important provisions regarding the separation of powers.

[7] See http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng&page=federal&sub=legis&doc=legis-eng.htm#1.
[8] See http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng&page=federal&sub=legis&doc=legis-eng.htm#1.

c. Disallowance and Declaratory Power

Section 90 of the *Constitution Act, 1867* gives the federal parliament the power to disallow provincial statutes. Such power to abolish statutes enacted by democratically elected provincial governments is clearly contrary to the idea of separation of powers between the federal and the provincial level. Despite failed attempts to repeal this power of disallowance,[9] it has not been exercised since 1943 and is therefore assumed to be obsolete.

The Canadian constitution provides the federal government with one more significant power, namely the power to bring local works under federal jurisdiction. This is performed by declaring the work, such as the creation of important pieces of infrastructure, to be "for general advantages of Canada." Efforts to subject this power to approval by the individual provinces have failed and the power remains vested in the federal government.

4. Amendment of the Constitution

The powers of the federal government and the provinces are determined by the Constitution Acts of 1867 and 1982. However, neither of these two levels of government have the power to amend the constitution unilaterally. To this end, part V of the Constitution prescribes an amendment procedure that requires the assent of both Houses of Parliament and two-thirds of the provincial legislative assemblies representing at least fifty per cent of the population of all provinces.

5. Disputes about Distribution of Power

The wording of the Constitution will never be precise enough to determine the exact extent of the responsibilities of each level of government. Disputes regarding the power to enact a particular piece of legislation arise and their resolution is subject to judicial review, which determines their consistency with the distribution-of-power provisions of the Constitution. There is no doubt that decisions on the distribution of power have significant political impact. From this perspective, the court's decisions should respect the intent of the legislatures, unless the inconsistency with the Constitution is clear.

If it is outside of power of a particular legislative body to pass a certain statute, that statute will be declared invalid. The court's decision in these matters is based on the interpretation of the purpose and effect of the statute. Even if the court does not render the statute invalid, it may still restrict its application and thereby prevent the intended reform. For these reasons, many private parties, whose obligations are based on a statute, bring forward actions and attempt to have these statutes declared invalid or restricted in their impact. Since the language of the Constitution is

[9] Charlottetown Accords of 1992.

quite vague and the passage of time has certainly brought unforeseen changes, the numbers of such cases have tended to increase.

6. Judicial Review of a Statute

The validity of a statute may be challenged if that statute was not enacted within the power allocated by the Constitution. The reasoning followed in a judicial review proceeds in two steps: 1) the characterisation of the law being challenged and 2) the interpretation of the power-distributing provisions of the Constitution.[10] Characterising the statute and its effect helps to identify the power (provincial or federal), to which the statute should be allocated. Difficulties arise when it remains reasonable to allocate one aspect of the statute to the power of the provincial level and another aspect to the federal level. If that happens to be the case, the courts extract the most important feature of the statute to determine whether its substance was intended to regulate a provincial or a federal matter.[11]

For example, a provincial act levying a tax (provincial aspect) on a bank (federal aspect) is evaluated by its most important feature, which is the levying of a tax. Since the province has power to levy taxes, the province was acting within its powers despite affecting matters outside its jurisdiction. It is important to note that the example used constitutes a simplification and that characterisation of the fundamental feature of a particular statute requires detailed investigation of its intended social and economic purposes and effects.

As explained above, provincial law may affect federal matters, but there is an exception to this rule accepted by the courts. According to this exception, provincial laws may not affect the fundamental powers or considerably impair the status of a federally incorporated company or a federally regulated enterprise; otherwise, the law will not apply.

The problem regarding the separation of federal and provincial powers does not end there. The contrast between the federal and the provincial features of a law is sometimes so weak that the Supreme Court of Canada has several times upheld both federal and provincial laws regulating the same issue (e.g. remedy for insider trading). The process of judicial review is also determined by a principle called the "presumption of constitutionality", which forces the courts to choose the characterisation and interpretation of law that would support its validity. Given these two considerations, such laws are not easy to strike down.

Once a law is found to be in breach of the constitution, the court may invalidate the statute partially or as a whole. In contrast to other federations, the Canadian courts have predominantly struck down unconstitutional statutes in their entirety, preventing survival of provisions that

[10] Hogg, Peter W., Constitutional Law of Canada, 2009.
[11] Pith and substance doctrine.

could have otherwise been constitutional. The underlying idea is that every statute is deemed to represent one complete package, parts of which cannot survive without the whole.

7. Challenging a Statute

In connection with the aforesaid, a statute may be challenged in three different ways. The legal challenge may be directed at the validity of the law, its applicability or its operability. The first method, related to the statute's validity, aims to emphasize the enacting body's lack of jurisdiction. In contrast to this, the second method does not challenge the validity of the statute, but rather targets its applicability to matters that are outside of the relevant jurisdiction. As a result, the statute's interpretation can possibly be restricted to matters within the corresponding jurisdiction. The third and last method, which takes aim at the statute's operability, concerns cases of inconsistent federal and provincial laws on the same issue. According to the principle of paramountcy, in such cases, the federal law prevails and renders the provincial law inoperable to the extent of the inconsistency.

8. Canadian Charter of Rights and Freedoms

The Constitution Act, 1982 not only the abolished Canada's dependence on the British Parliament, but also integrated the Charter of Rights and Freedoms into the Constitution. The following is a non-exhaustive overview of the rights and freedoms set forth in the Charter:

<table>
<tr><th colspan="2">Overview of the Canadian Charter of Rights and Freedoms
(non-exhaustive list)</th></tr>
<tr>
<td>
• Fundamental Freedoms
- Freedom of conscience
- Freedom of thought, belief, opinion, expression
- Freedom of religion
- Freedom of press
- Freedom of peaceful assembly
- Freedom of association.

• Democratic rights
- The right to vote or to become a member of Parliament

• Legal rights and rights related to the system of justice and the criminal prosecution
- Right to Life, Liberty and Security of the Person
- Right to be secure against infringements by the state
- Right against arbitrary detention or imprisonment
- Right to retain a legal counsel and to have the validity of a detention determined by way of
</td>
<td>
• Equality rights
- Legal equality and protection from discrimination

• Language rights

• Right to enter Canada, right to stay and the right to leave (Mobility rights)

❖ In principle, the rights are subject to reasonable limits (Article 1) and the proviso clause (Article 33).
</td>
</tr>
</table>

Habeas Corpus - Presumption of innocence	

The federal and provincial legislative bodies are bound by the Charter (s.32) and therefore, every statute that is in breach of the Charter is deemed invalid. Naturally, the principle is applicable not only to statutes, but to all state regulations.

Who can take advantage of the Charter? Freedoms such as freedom of conscience and freedom of opinion belong to and can be taken advantage of by all people. Depending on their nature, some of the rights and freedoms provide benefits to legal entities as well. Accordingly, a legal entity can claim certain freedoms, such as the freedom of press. The rights ensuing from s.15, the purpose of which is protection against discrimination on the basis of race, national or ethnic origin, colour, religion, sex, age, mental or physical disability, can only be claimed by people. The nature of some of the rights allows them to be claimed only by citizens (democratic rights) and permanent residents (mobility rights).

As explained above, the Charter limits the powers of the federal and provincial legislative bodies and governments to regulate private parties. The Charter is concerned with the relationship between the private parties and the government and not the relationship between private parties. The applicable provisions including the corresponding remedies are contained in specific regulations like the human rights codes or employment statutes.

9. System of Courts and Court Jurisdiction

The power to make laws related to administration of justice was allocated to the provinces in 1867.[12] Such power includes constitution of the civil and the criminal courts, and their maintenance, as well as regulation of the civil procedure.[13] Along with constitution of the courts and regulation of the civil procedure, the provinces have equipped their courts with jurisdiction over all types of law, whether provincial, federal or constitutional. Hence, there is fundamentally no need for a separate system of federal courts that would decide federal issues, although there are federal courts in Canada with jurisdiction over certain matters.[14] Once the case reaches the provincial court of appeal, which is every province's highest court, the appeal goes to the Supreme Court of Canada, which has the power to hear appeals from both the provincial and federal courts.

[12] S.92(14) of the Constitutional Act, 1867.
[13] Together with the substantive criminal law, criminal procedure is regulated federally.
[14] Tax Court of Canada, Federal Court of Canada and Federal Court of Appeal.

III. History of Federalism in Germany

The main pillar of federalism in Germany is the constitution. In line with the European tradition, the constitution is recorded in one document called Basic Law („Grundgesetz“ or “GG”) of the Federal Republic of Germany, which was enacted on May 23, 1949.

The German federal state of the 21st century is the result of an historical process, which proved the federation’s instruments and form to be the right tool to achieve political unity on a national level.

Generally, federations are formed through association of member states that historically precede the federal state rather than through decentralization of unitary states. Germany had experienced this process twice: in 1871 as an association of sovereign states after German victory in the war against France; in 1949 as an attempt of the occupied zones to regain partial sovereignty following Germany’s absolute defeat in the Second World War. We will demonstrate that German federalism has assumed a considerably centralized form.

1. Bundestag und Bundesrat

The main constitutional and legislative body in Germany is the Bundestag. Since the last elections, the number of Members of Parliament (MPs) has been 631. The MPs are elected through a system similar to the proportional system in that the number of MPs from one party is intended to mirror the proportion of votes received by that party. This electoral system is mixed with a different system that enables election of a member by geographic constituency. The parliament’s term is four years.

The Bundesrat is a legislative body that represents the 16 member states. According to its population, each member state is allocated between three and six votes. In contrast to Canada, the Bundesrat is not considered the second chamber of parliament. The Bundestag and the Bundesrat do not form a common parliament and their powers differ. The Bundesrat is involved in making legislation that directly affects state competences or changes the constitution. The members of the Bundesrat are not elected, but delegated by the individual state governments. Interestingly, the members delegated by one state must vote in the same way; otherwise they render the vote of their state invalid.

2. Separation of Powers according to the German Constitution

a. Separation of Powers in General

The Federal Republic of Germany consists of partially sovereign member states that are united in a federation.[15] The powers are split between the federal and the member-state level, so that each has its own specific responsibilities. As one of the consequences, each member state has its own constitution, parliament, government and a constitutional court. The member-state parliament is called the Landtag and the individual member-state governments are led by a premier.[16] As mentioned above, every member state has its own courts and it is particularly the constitutional court that underscores the sovereignty of the member-states.

The core of federalism is the constitutional division of legislative powers, since legislation is the primary tool of political leadership. Section 70 et seqq. GG set outs the legislative powers of the federation and of the member states. This section also establishes the basic principle of member-state jurisdiction, which may be broken by introduction of specific federal competences. Therefore, jurisdiction of the member-states is not formed through listing of powers in the constitution, but rather through a principle that prescribes member-state legislative power unless the constitution expressly states otherwise.

b. Exclusive Legislative Power of the Federal Parliament (s.73 GG)

In the field of exclusive legislative power, the federal state possesses specific legislative powers, which it can delegate to the member-states. However, in reality, delegation is rarely the case. The exhaustive list of exclusively federal legislative powers is set out in s.73 GG. Some examples include foreign policy (s.73 I (1)GG), citizenship (s.73 I (2)GG), currency and monetary policy (s.73 I(4)GG), weapon laws (s.73 I(12)GG) and use of nuclear energy (s.73 I (14)GG).

c. Competing Legislative Powers (s.74 GG)

Competing legislative powers provide member-states with powers to create specific legislation set out in the constitution. However, these powers may be applied only to the extent that the federal level itself does not use its superior power to regulate these specific areas. The areas covered within the competing legislation include almost all significant areas law and as the federal parliament has historically taken significant advantage of its power, there are almost no areas left unregulated by federal statutes.

Even where the legislative power has remained in the hands of member-states, one can assert that legislation of the states is virtually identical. The wording of the significant statutes is often identical with only the sequence of the statutes' provisions seemingly differentiating them from

[15] s. 20(1) GG.
[16] The premier on the member-state level corresponds to the Chancellor on the federal level.

one another. This goes so far that the German courts sometimes make use of the case law of other member-states for interpretation purposes, despite the fact that this legislation is deemed "foreign" in their jurisdiction.

d. Exclusive Legislative Powers of the Member-States (s.30, 70(I) GG)

Besides the educational system the powers that remain vested in the member-states are predominantly related to administrative law. Noteworthy are the law of civil service, police law, public order law and parts of environmental and construction law. Although these are areas that belong to the domain of the member-states, the differences between the individual states are marginal and often the wording of the statutes is identical, allowing lawyers to operate across different member-states without any difficulty.

Exclusive Legislative Powers of the Federal State (S.73 GG)
• Foreign affairs • Citizenship • Money and Currency policy • Unity of the customs and trade area • Cooperation of the federal and member-state police in criminal matters • Defense together with protection of civilian population • Copyright law • Gun and explosives law • Nuclear energy law • Residence registration • Public notaries
Competing Legislative Powers (S.74 GG)
• Civil law, criminal law, civil and criminal procedure • Association law • Refugees and displaced persons • Commercial law (regulation of trades, energy law, mining law, trade law, bank law and law of capital markets etc.) • Abuse of economic dominance • Protection of agricultural production and forestry • Measures against dangerous or communicable diseases • Hospitals and the regulation of hospital charges • Food law • Ocean and coastal navigation and maritime aids to navigation • Traffic law, the construction and maintenance of rural roads for long-distance transport • State liability • Hunting • Nature conservation and landscape maintenance • Water supply • Admission to higher education and university degrees

Exclusive Legislative Powers of the States (S.30, 70(I) GG)
• Schools and higher education • Education, radio, television and art • Police • State fiscal policy • Municipal and local law and such other

In summary, it can be said that German federalism is not particularly developed. The uniformity throughout the federal territory is deemed more important than the individual regulation of certain areas of law by the member states. Restriction of the political power and the limited influence on the legislative proceedings through the Bundesrat is described as "cooperative federalism." Cooperative federalism enables the member states to coordinate with each other before laws falling into the remaining member-state jurisdiction are enacted.

Due to the aforementioned similarity of the legislation of the member-states, differentiation is generally not required. The main areas of law such as the entire civil law (i.e. contract law, tort law, and family law, law of succession, copyright law, commercial and company law, securities law, insurance law, labor law) and criminal law as well as the respective procedural rules are all regulated predominantly by federal law. It is therefore the Constitution itself that allows very little space for states to exercise their right to legislate. Since federal laws apply in each state equally, many areas of law that lawyers need to cope with are regulated federally and federalism has therefore almost no impact on the provision of legal advice.

3. Priority of Federal Law

In the case of collision of federal and state law, s.31 of the German Constitution stipulates the priority of federal law. In the event that an issue is regulated by both the federal and the state law, the federal law prevails.

4. Disputes over the Distribution of Power

Dispute between the federal and the member-state level on matters of legislative powers are decided by the Federal Constitutional Court.

There are some exceptions to competing legislation and the legislative competence of the federal state. The main exception allows member-states to regulate certain areas[17] insofar as the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity no longer requires federal regulation (s.72(2) of the Constitution).

[17] The areas stipulated in ss.74(1) subsections (4)(7)(11)(13)(15)(19a)(20)(22)(25)(26).

Should the federal level dispute this right, it then may risk a declaratory action before the Federal Constitutional Court. The goal of a declaratory action is to determine legislative competence of the member-states. Entitled to file this action are the state governments or parliament of the member-states as well as the Bundesrat.

5. Constitutional Amendment

The Constitution can only be amended by a constitutional law. Enactment of a constitutional law requires a two-thirds majority of the members of the Bundestag and two thirds of the votes of the Bundesrat. The principles of the Constitution protecting human dignity and the state structure cannot be modified under any circumstances (s.79(3) of the Constitution). Amendments to the member-state constitutions are in most cases adopted by consent of two-thirds of the members of the member-state parliaments. From time to time, such amendments require confirmation by referendum.

6. Fundamental Rights under the Constitution

The fundamental rights are defined in ss.1 to 19 and in some other provisions of the German Constitution.

Fundamental Rights under the Constitution (non-exhaustive list)	
• Human dignity • Free personal development • Right to life, right to physical integrity • General personal rights • Right to a fair trial • Principle of equality • Freedom of religion and conscience • Freedom of expression • Protection of marriage and family • Education rights • Freedom of assembly	• Freedom of association • Letter and postal privacy • Freedom of choice of occupation, prohibition of forced labor • Inviolability of the home • Property rights • Prohibition of expatriation and extradition • Asylum • Petition right • Right to invoke justiciability • Effective legal protection • Right to vote • Principle of rule of law and legal certainty, prohibition of retroactive effects of laws

The fundamental rights bind the federal state and the member-states, including the legislative, the executive and the judicial branch. The parties entitled to the rights vary according to the character of fundamental rights. Interestingly, other European Union (EU) citizens can rely on the fundamental rights in the Constitution as well. This is due to s.18 (1) of the Treaty on the

Functioning of the European Union, which prohibits discrimination on grounds of nationality and requires equal treatment of all EU citizens. The same applies to legal persons with registered offices in the EU.

7. Fundamental Rights under the Charter of the European Union

Together with the Lisbon Treaty, the Charter of Fundamental Rights of the European Union came into force in December 2009. The Charter includes all the rights and freedoms of the European Convention on Human Rights (1953), the principles arising from the jurisprudence of the European Court, and new principles such as those that deal with consumer protection and data privacy. The scope of the Charter makes it applicable to European legislation and EU public administration, which means that it is applicable not only to the legislation enacted directly by the EU institutions, but also to the legislation of the EU member states where EU law is involved. The Charter does not apply to purely national circumstances.

IV. Comparative Conclusion

The principles underlying the German and Canadian federal systems vary mostly in their respective arrangements of the distribution of power. The autonomy of the provinces in Canada goes far beyond what is accorded the member-states of the Federal Republic of Germany.

Most importantly, the constitutional arrangement of competences in Canada constitutes the exact opposite of the arrangement in Germany. While under s. 91 of the *British North America Act*, *1867*, the Canadian federal level has jurisdiction where matters are not specifically assigned to the provinces, s.70 of the German Constitution vests these "residuary powers" in the member-states and recognizes jurisdiction of the federal level only in cases of express assignment by the Constitution. The political and social understanding of federalism in both countries, however, has meant that these principles have *de facto* been supressed by the political reality. This has happened in Canada through an extensive interpretation of the provincial competences and in Germany by the possibility of "competence takeover" by the federal level under the concurrent legislation. For these reasons, the level of autonomy of the member states conferred by respective Constitutions of both countries stands in opposition to the political reality.

This reversal of the fundamental principles of the Constitutions is subjected to public criticism in both countries. Thus, efforts are made in Germany to transfer more powers to the member-states through “decentralization". Similar efforts, although in the opposite direction, are made in Canada, where the aim is to achieve more unity by strengthening the federation, while still supporting considerable provincial autonomy.

In Germany the criticism of federalism is based essentially on the following circumstances: the system is not considered to be effective in that it has become fossilized due to the severely tight interlocking of the federal and the member-state levels which caused federalism to lose its democratic legitimacy. One reason for this situation is the fact that the political process is characterized by "executive federalism ", in which the governments of the member-states have virtually the sole decision-making power and the state legislatures have only an outsider role. Influence on federal legislation is exercised almost exclusively via the Bundesrat. However, the federalism of Germany is here to stay, because it has been an essential building block of political organization of the country since well before World War II.

Federalism and the federal state stand at the centre of political life in all ten Canadian provinces as well as in the three less politically autonomous Canadian territories. The multicultural and indeed multi-national nature of Canadian society and the varying economic performance of the Canadian regions pose major challenges. Canada has identified the advantages of federalism clearly and does not perceive it as the lesser of evils. In a country that covers such a large area and consists of such diverse regions, distributing accountability at various levels can only be advantageous. The principle of "competitive federalism" is seen as a major advantage of the decentralized distribution of power. If a newly proposed policy is implemented through a new law and it proves to be beneficial, it can be adopted by other provinces. Should it prove to be a mistake, only a particular province, not the whole nation would be exposed to the resulting risk.

In contrast to that, the German guiding principle of "cooperative federalism" plays the leading role in the relationship between the federal and the member-state level as well as between the member-states themselves. Not without reason has German politics been criticized for misinterpretation of this principle. In Germany, cooperative federalism is misconstrued in the direction of Unitarianism which is unilateral in nature, which contradicts the very essence of federalism which is pluralistic. In Canada, federalism is a true association of the member-states called provinces, whereas in Germany federalism is rather only an administrative structure.