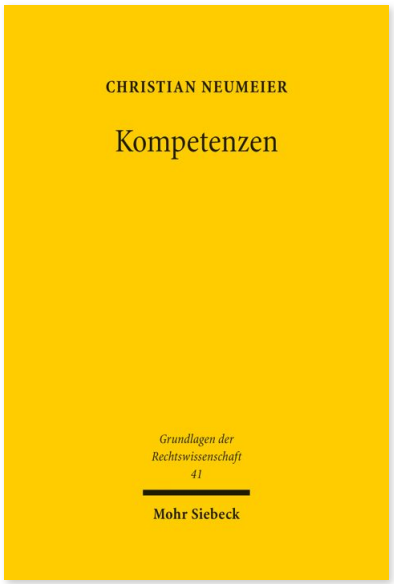
Christian Neumeier

Kompetenzen

Zur Entstehung des deutschen öffentlichen Rechts



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Since the latter half of the 19th century, German public law conceptualises political institutions in a distinct and peculiar way. The Bundestag and the Federal Government, the Bundesrat and the Federal Constitutional Court are all deemed organs that exercise competences. To this day, German constitutional law thus avoids calling political institutions by their democratic name. In theory, this concept allows to reduce the myriad forms of modern government – from central banks to regulatory agencies, from local assemblies to the European Council – to a single normative form. Whatever it may be that modern governments do, they exercise competences: they pursue legally defined ends with limited means. Despite their varying political objectives, governments are bound to an instrumental reason comprehensively governed by law.

Conceptualising (self-)government in these terms has three implications. First, it stipulates a unified and purposive political actor: the state. On this view, the state is not an association of free and equal citizens but an organisation, i. e. a social artefact to fulfil specific tasks. Second, political and administrative institutions are not primarily defined by electoral mandates, majority rule, different procedures or a system of checks and balances within this framework but by their respective functional role in carrying out the social tasks of the state. Hence, they act as mere organs of the larger organisation. Third, as a consequence, norms empowering public officials feature a specific structure. They define policy by setting up ends, specifying means to attain them, and assigning both to the various political and administrative actors. These norms are called competences. (This usage of the term differs from its usual meaning in legal philosophy.) It is their internal means-end structure which sets them apart from rights.

The book pursues two different questions. The first is historical: When and why did lawyers begin to think about political institutions in such abstract terms? In the first four chapters, the book traces competences as a foundational concept of German public law back to the desperate situation of German political liberalism between the failed revolution of 1848 and the First World War. It follows the convoluted path of a group of liberal politicians and lawyers who developed a new theory of public law in the second half of the 19th century, when the emerging administrative state began to shape the concepts of public law. These lawyers were deeply embedded in the intellectual and political tradition of liberal constitutionalism, but constitution was no longer a foundational concept of their theory. Nor was liberty. Instead, they began to think, write, and speak about the tasks that an abstract political subject called ‘the state’ – organised through competences – was supposed to carry out for its citizens. This break from the theory of their liberal predecessors (classical liberal constitutionalism) was caused by three theoretical differences. Mid-century liberals no longer believed in natural rights. They lacked the concept of a foundational, yet largely dormant popular sovereignty. Modern bureaucratic administrations did not fit easily within the classical separation of powers.

The result was a theory of public law both oddly simple and theoretically ambitious. In its legal description, political rule could now be organised through a single and uniform legal form: through limited authorisations that assign certain tasks and powers to various actors – in other words through competences. Yet this abstraction concealed an increasingly alarming political reality for liberals. What was abstractly termed ‘the state’, proved, more often than not, to be a rather specific actor: the new and modern forms of bureaucratic administration which liberal parliamentarians could hardly control. Except through legal norms telling them what to do. The internal means-end structure of competences was supposed to direct the bureaucracy to liberal political objectives without asserting direct political control. The newly developed constitutional theory resulted in the political idea that the legitimacy of government rests upon the services that modern administrations provide for its citizens. It thus formed a new and lasting paradigm of constitutional theory, just as sovereignty had once been or as constitutionalism is still today.

The book examines the political, social, and economic circumstances in which this paradigm came about, the political hopes it inspired, and the opponents it brought to the scene. It makes three claims in particular. By the end of the 19th century, state was not a conservative but a liberal concept. It was designed to incorporate modern day administration into a liberal theory of public law. This attempt, however, backfired. While trying to constitutionalise the bureaucracy, liberals effectively bureaucratised the constitution. Under the auspices of competences, political freedom became indistinguishable from rational administration.

The second question the book pursues is more theoretical. What are the consequences if constitutional lawyers talk about political self-government in the abstract terms of an organisational theory? The concept of competences reinforces the apolitical preferences of a society which favours cooperation over conflict and good administration over political freedom. The last chapter of the book examines various areas of contemporary constitutional law to assess the extent to which German public law is still shaped by the idea of a seamless translation of politics into administration, which is associated with the concept of competences. It aims to show that the paradigm of competences still forms a deep layer of German constitutional law. Although it has been superseded by the democratic elements of the Basic Law, it still informs how German constitutional law thinks about federalism, parliamentary government, administrative discretion, or government speech. Only a society that prefers its conflicts to be resolved by experts outside of politics will find it plausible that the government needs to be neutral in its speech acts, that political reasons are impermissible when exercising executive discretion, or that most if not all public authority is governed by the same standard of proportionality.

With the European integration, the concept of competence is no longer limited to German constitutional law. It has seen an astounding proliferation into European Union law. The book concludes by tentatively

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identifying three reasons for this renaissance. The abstractness of the concept allows to describe the unique institutional form of government established by the European Union. It captures well the purposive form of the normative powers conferred by the Treaties. Finally, it once more provides a paradigm of public law that tends to equate political freedom with good administration.

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