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"EXECUTION OF THE DECISIONS OF CONSTITUTIONAL COURTS: A CORNERSHONE OF THE PROCESS OF IMPLEMENTATION OF CONSTITUTIONAL JUSTICE"

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REPORT

"Reflections on the Execution of Constitutional Court Decisions in a Democratic State under the Rule of Law on the Basis of the Constitutional Law Situation in the Federal Republic of Germany"

by
Mr Siegfried BROSS
Judge of the German Federal Constitutional Court

I. Preliminary remarks

The execution of constitutional court decisions is a multi-faceted issue. In order to approach this issue, and the problems that it presents, in an appropriate manner, it is indispensable to establish a comprehensive context beyond the concrete question; because in a democratic state under the rule of law, the execution of constitutional court decisions is of far-reaching importance, an importance which cannot be compared to that of the execution of the decision of a court below the constitutional level. This recognition already results from the fact that the effect of all constitutional court decisions is not solely and exclusively restricted to that between the parties directly involved in the proceedings. Instead, also a finding issued by a constitutional court upon a constitutional complaint which has been lodged by an individual (that is, a finding which applies to this individual) inevitably has an effect which reaches into the entire sphere of state and of society.

With a view to this particularity, the reflections which I will present in the following will comprise two main subjects: the level of state organisation (II.) and the legal level of laws below the Constitution (III.).

II. The level of state organisation

1. In a democratic state under the rule of law, all state powers are obliged to respect the entire constitutional and legal order, in particular the fundamental-rights guarantees, and to orient their entire conduct towards them. In the Federal Republic of Germany under constitutional law, these principles of state organisation are laid down in constitutional law under Article 20 subsection 3 and Article 1 subsection 3 of the Basic Law (*Grundgesetz*, the German Constitution). Article 1 subsection 3 of the Basic Law, for instance, provides that the following fundamental rights shall be binding on the executive, the legislative and the judiciary as directly applicable law. The principle of the rule of law, which is set out in Article 20 subsection 3 of the Basic Law, binds the legislature by the constitutional order and the executive and the judiciary by law and justice.

Because the Constitution of the Federal Republic of Germany itself implicitly raises the Federal Constitutional Court to the level of the supreme state bodies in the Federal Republic of Germany through the Federal Constitutional Court's competencies specified under Article 93 of the Basic Law and through the effect of its decisions pursuant to Article 94 subsection 2 sentence 1 of the Basic Law, the court's case-law is part of the constitutional order already because the decisions that it issued can have the force of law. This is explicitly ordered by Article 94 subsection 2 sentence 1 of the Basic Law.

From this it follows that all state bodies in the Federal Republic of Germany, irrespective of the hierarchy of the state level, are originally and directly bound by the Constitution and by the Federal Constitutional Court's decisions. The assumption which the democratic state under the rule of law first and foremost lives on is the idea that all state bodies act according to the Constitution of their own accord and on their own responsibility. It would therefore be erroneous to withdraw to the position that state bodies may be permitted to take a "more relaxed" view on the Constitution and on the constitutional order because there still is, after all, a constitutional court that watches over the observance of the Constitution and of the constitutional order. If this role of a guardian which a constitutional court has in the democratic state under the rule of law is understood correctly, the constitutional court can only serve to exercise an ultimate control in exceptional cases. If the other state bodies restricted themselves to a minimum approach in their stance towards the Constitution and towards the constitutional order, this would be a fundamental misunderstanding. In a nutshell, the consequence of this for the macro-level of the problem of the "execution of constitutional court decisions" is that in reality, the question may, in a democratic state under the rule of law, only arise in very exceptional cases because if it were otherwise, this would subject the state's ability to operate and its viability to considerable doubts.

2. The original obligation of all state bodies to observe the Constitution and the constitutional order, which has been explained before, is strengthened in the democratic state under the rule of law by what is known as institutional loyalty between constitutional bodies (*Verfassungsorgantreue*). The Federal Constitutional Court defines such loyalty in its decision BVerfGE 35, 193 (199) for the Federal Republic of Germany by stating that supreme constitutional bodies are constitutionally obliged to exercise mutual consideration. According to the court, such consideration, which is required by law, may not take second place to any political reasons. From this it follows in the individual case that already due to the institutional loyalty between constitutional bodies, which, in turn, is determined and shaped on the constitutional level, every supreme state body (and accordingly, all state institutions which are subsequent in rank) has to comply with the constitutional court's decisions. For the sake of completeness, it must be pointed out that this is not a particularity of the relation of the supreme state bodies to the constitutional court but rather something that goes without saying in a democratic state under the rule of law. If the obligation of the state bodies to exercise mutual loyalty were negated, the supreme state bodies could at any rate hinder each other in the performance of their tasks of state governance or even, in individual cases, exclude each other from the state power to which they are entitled by the Constitution. In a federative state system, institutional loyalty between state bodies attains a special manifestation due to the fact that the respective competencies and responsibilities of the central state vis-à-vis the constituent states, and, vice versa, of the constituent states vis-à-vis the central state, can only be assumed by showing openness towards the Federation and the states (*bund-/länderfreundliches Verhalten*) as it is called in Germany (on this, see BVerfGE 12, 205 (254-255)).

The reflections under 1. and 2. can be summed up by stating that if the Constitution, the constitutional order and the observance of institutional loyalty between constitutional bodies are understood correctly, the question of the execution of constitutional court decisions will only arise in very rare cases because each state body must regard itself as a "guardian of the Constitution" but may not regard itself as "*the* guardian of the Constitution with ultimate responsibility". In the democratic state under the rule of law, this key position is for the constitutional court alone.

3. Execution of constitutional court decisions

The Constitution of the Federal Republic of Germany does not itself regulate the execution of constitutional court decisions. Article 94 subsection 2 sentence 1 of the Basic Law merely provides in this context that a federal statute shall regulate the organisation and procedure of the Federal Constitutional Court, which shall specify in which instances its decisions shall have the force of law. It is not imperative for a Constitution to show such a reserved position as regards the problem which is at issue here. I do not even take the view that such a position seems to suggest itself. It is certainly worth considering that a democratic constitution which is based on the rule of law should fix a framework for the execution of constitutional court decisions. Such a framework is excellently suited to support the principle of the rule of law in the context described under 1. as well as the principle of institutional loyalty between constitutional bodies (which has been set out under 2. above) and to counteract misunderstandings and frictions between supreme state bodies especially in states which do not yet have a firmly established tradition.

The answer to the question whether Article 94 subsection 2 sentence 1 of the Basic Law, which opens the way for decisions of the Federal Constitutional Court which have the force of law, can also be regarded as a case of execution is ultimately of little informative value. One has to assume that in a democratic state under the rule of law, the constitutional court procedure may not be assessed, as regards its significance and its content, according to the categories that have evolved for the civil or administrative procedure. Due to the fact that the effect of the decisions of these courts is much more restricted in comparison to that of constitutional court decisions, a differentiated evaluation which takes account of this fact is required. It is, for instance, not apparent why the ordering of the force of law for a constitutional court decision cannot from the outset be regarded as a special kind of

execution because this judgment does not require any further implementation except for its publication in the relevant law gazette. Due to its force of law, the decision of the constitutional court forms part of the legal system, it becomes a component of the legal system and thus shares the fate of the rest of the legal system as regards its being observed or its reception being denied by the state institutions that are obliged to receive it.

III. The legal level below the Constitution

1. The execution of constitutional court decisions is preceded by the regulation of its effect. On this, Section 31 subsection 1 of the Federal Constitutional Court Act (*Gesetz über das Bundesverfassungsgericht – BVerfGG*) lays down that the decisions on the Federal Constitutional Court are binding upon Federal and *Land* (state) constitutional bodies as well as on all courts and authorities. The Federal Constitutional Court Act thus lends concrete shape to the principle of the rule of law that has been explained above and to the obligation to exercise institutional loyalty between constitutional bodies. Beyond the basis for its authorisation set out in Article 94 subsection 2 sentence 1 of the Basic Law, this provision determines the Federal Constitutional Court's place in constitutional law. The fact that a binding effect of constitutional court decisions is ordered also shows something else: A constitutional court with an extent of competencies such as the one that has, for instance, been entrusted to the Federal Constitutional Court in the Federal Republic of Germany is not only a court, as could be assumed from Article 92 of the Basic Law alone, but over and above this, on the level of state organisation, a supreme state body that is independent of the other state bodies. The fact that constitutional court decisions are ordered to have a binding effect on the constitutional bodies of a state as well as on all courts and authorities, which gives such decision the same force and effect as a statute adopted by parliament, would not make sense if the constitutional court were regarded only as a court like all others, which have other competencies.

Within the respective latitudes accorded to them by the Constitution, the constitution-creating legislature and also the ordinary legislature are free to decide for which types of proceedings, and constitutional court decisions passed within these types of proceedings, the force of law is ordered. It suggests itself to provide the force of law for decisions in proceedings that involve the review of statutes, be it abstract or concrete review of statutes.

It is obvious that the binding effect cannot be executed because the "general effect" is directed towards a group of addressees which ultimately cannot be determined. In this respect, the constitutional court depends on the state institutions that are bound by its decisions complying with their being bound and, if this is not the case, on those who are affected by the disregard of constitutional court decisions invoking the constitutional court's jurisdiction and on an executable decision being passed in the concrete individual case.

This leads me to the question of the *res judicata* effect of constitutional court decisions, which can as a matter of course serve as the basis of an execution. The Federal Constitutional Court has discussed these connections already in its early case-law; it has pointed out that binding effect and *res judicata* effect must be distinguished. The Federal Constitutional Court found that contrary to the *res judicata* effect, which applies to the decisions of all courts, the binding effect does not apply to the Federal Constitutional Court (BVerfGE 4, 31 (38); 20, 56 (86-87); recently for instance BVerfGE 104, 151 (196)). Substantive *res judicata* only refers to the operative part of the decision, not to the components of the judgment that are contained in the reasoning, even though the reasoning can be consulted (and sometimes must be consulted) for ascertaining the meaning of the operative part of the decision, as is customary in the case of other court decisions as well (on this, see BVerfGE 4, 31 (38-39); 5, 34 (37)).

2. Since the Constitution of the Federal Republic of Germany does not make provision for the execution of constitutional court decisions, Section 35 of the Federal Constitutional Court Act attains central importance. According to this provision, the Federal Constitutional Court may state in its decision by whom the decision is to be executed. In the individual

case, it can also regulate the manner of execution. On this, BVerfGE 6, 300 (303-304) makes the following fundamental statements:

> "By taking due account of the rank of this court and its special position as one of the supreme constitutional bodies within the constitutional order, the Federal Constitutional Court Act has provided the Federal Constitutional Court with all the competence necessary for enforcing its decisions. This is the sense and the meaning of Section 35 of the Federal Constitutional Court Act. Relying on this competence, the Court *ex officio*, that is, irrespective of any "applications" or "suggestions" issues all the orders which are necessary for its substantive decisions that conclude proceedings to gain acceptance. Here the type, the extent and the contents of the execution orders depend, on the one hand, on the contents of the substantive decision that is supposed to be executed and on the other hand on the concrete circumstances that must be brought in harmony with the decisions; it depends in particular on the conduct of the persons, organisations, authorities and constitutional bodies to or against whom or which the decision is addressed. Not only judgments which oblige a party to perform or refrain from, or to tolerate, a certain act are amenable to execution within the meaning of Section 35 of the Federal Constitutional Court Act but also declaratory judgments; Here, execution is 'the epitome of all measures that are required for realising the law established by the Federal Constitutional Court' … Section 35 of the Federal Constitutional Court Act assumes that the orders concerning the enforcement of the decision are issued in the decision itself. From the comprehensive contents of the decision, which actually makes the court the master of the execution, it follows, however, that those orders can also be issued in an independent order by the court, if their necessity becomes evident only subsequently."

As the Federal Constitutional Court does not execute its decisions itself, problems can arise where the institution affected, or a person affected, takes the view that the execution is not performed in accordance with the constitutional court decision. What applies in this case has already been established as follows by the Federal Constitutional Court in its decision BVerfGE 2, 139; in two headnotes which are valid even today:

> "1. Whoever is affected by an act performed by an administrative authority executing a decision of the Federal Constitutional Court can only invoke the Federal Constitutional Court's jurisdiction directly by means of a complaint against such act of execution if the authority has acted on account of a concrete mandate to execute that has been issued by the Federal Constitutional Court, and that does not leave any latitude to the authority's discretion.
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> 2. If the Federal Constitutional Court has assigned the execution of its decision to an authority in a general manner the acts of execution are performed in the authority's own discretion and can only be challenged by means of the remedies generally available against such acts."

From this it follows that the Federal Constitutional Court's jurisdiction can only be invoked against an execution of its decision if the Federal Constitutional Court has delimited the mandate of execution in so detailed a manner that no latitude of assessment whatsoever exists for the authority to which execution has been assigned. In relation to the constitutional court proceedings this would have to be regarded as a remonstrance under procedural law because obviously, no further remedies may be made available against constitutional court decisions due to the exhaustion of all domestic remedies and due to the legal certainty which is sought to be achieved. If, however, the authority to which execution has been assigned has latitude in assessing how to perform the execution of a constitutional court

decision, the remedies available in the relevant codes of procedure apply, for instance an action to oppose execution.

3. In a democracy based on the rule of law, it is, however, not enough to merely give thought about how to execute constitutional court decisions and how to thus implement them in everyday legal practice. Instead, it is necessary to also contemplate whether further measures are required after a constitutional court decision has been passed in order to avoid that a legal situation which has been declared unconstitutional continues in effect, thereby burdening people in contradiction to the legal situation under constitutional law. What this is all about is the conflict between legal certainty and substantive justice in constitutional law. It suggests itself to leave all final and unappealable decisions, or decisions with administrative finality, untouched if a law is retroactively declared unconstitutional and the facts on which the decisions were based were terminated in the past and do not have any effects concerning the future. Even if such effects concerning the future exist, a weighing is required. As a general rule, financial burdens that have arisen in the past due to an unconstitutional law must be tolerated because otherwise, the rule of law might suffer where legal certainty would never be achieved. It must therefore be considered to classify facts into groups. Where the personality of an individual is affected, substantive justice and hence the creation of a legal situation that is constitutional must be considered as inevitable also as regards the past. This applies first and foremost to judgments of criminal courts. Judgments rendered by criminal courts in the past which are based on a legal regulation that has been declared unconstitutional may not continue to apply in the future. A new trial is indispensable even in the event of the person affected having deceased in the meantime. In this case, the claim to restoring the person's reputation passes over to the person's relatives.

No difficulties arise if the facts are such that a judgment which is based, for instance, on a regulation under civil law that has been declared unconstitutional has not yet been executed between the parties. In this context, the execution must be declared impermissible. On the other hand, it must be taken into account that during the validity of a provision that was subsequently declared unconstitutional, all authorities and courts, as well as the persons affected by the application of the provision, relied on its constitutionality and thus also on its continued existence. In view of this, it is not appropriate to reverse "exchange relations" that were terminated in the past on account of final and unappealable judgments, for instance as regards claims arising from unjustified enrichment.

Section 79 of the Federal Constitutional Court Act, as well as Section 95 subsection 2 of the Federal Constitutional Court Act, essentially correspond to these considerations.

4. To conclude, I would like to illustrate the problems described with the help of some areas of regulation which were of relevance in the Federal Republic of Germany in the past.

a) After the entry into force of the Basic Law, the problem of the execution of constitutional court decisions was preceded by the pressing problem of the disregard of orders for regulation issued by the legislature creating the Constitution in the Federal Republic of Germany. In Article 3 subsection 2 of the Basic Law, for instance, the legislature creating the Constitution had explicitly ordered that all regulations had to be issued that were required for ensuring equal rights for men and women. Article 117 subsection 1 of the Basic Law contained a transitional arrangement according to which laws that were inconsistent with this regulation were to remain in force until 31 March 1953 at the latest.

Irrespective of the question whether at present, equal rights for men and women have actually been implemented in the Federal Republic of Germany due to the constitutional mandate, it must be stated at any rate that the measures required for this have only hesitantly, and in the course of decades, been taken by the legislature for instance as regards the determination of the family name after contracting marriage. Initially, the relevant regulation under Section 1355 of the Civil Code (*Bürgerliches Gesetzbuch – BGB*) provided that by contracting marriage, the wife was awarded her husband's family name. After the

end of the transitional period provided under Article 117 subsection 1 of the Basic Law, the continued validity of the provision was contentious. The legislature, however, reacted only 5 years later by providing women, from 1 July 1958 onwards, the possibility of adding their "maiden name" to the husband's name by making a declaration to this effect before the registrar. It is only since 1977 that spouses have been allowed to choose the wife's birth name as their family name. However, if they made no determination, the husband's name always became the common family name of husband and wife. By its order of 5 March 1991 (BVerfGE 84, 9), the Federal Constitutional Court declared this regulation incompatible with the principle of equal rights for men and women (Article 3 subsection 2 of the Basic Law) and established a transitional arrangement. If the spouses do not choose a common family name, they both retain their respective names for the time being. It was only in 1994 that the legislature amended the Civil Code by a provision to this effect, thereby abolishing the obligation to bear a common family name. A parallel evolution took place as regards the determination of a child's name. The original provision under Section 1616 of the Civil Code, pursuant to which a child received its father's family name, has been amended several times and has now been replaced by a differentiated system of regulation which distinguishes according to whether the parents have a common family name and whether they exercise joint parental custody or not.

The exercise of parental custody is another example of hesitant implementation. Until 1 July 1958, the Civil Code provided in its Section 1627 that only the father had, "by virtue of the parental power, the right and the obligation to care for the person and for the property of the child". However, after the expiry, in 1953, of the time-limit set to the legislature under Article 117 subsection 1 of the Basic Law, this provision was interpreted in case-law and legal literature in such a way that parental power is exercised by both parents (on this, see Decisions of the Federal Court of Justice in Civil Matters (*Entscheidungen des Bundesgerichtshofes in Zivilsachen* – BGHZ) 10, 266); however, at first it remained in force unamended. In 1957, the Equal Rights Act (*Gleichberechtigungsgesetz*) amended the regulation by introducing the joint parental power of both parents. However, the amended Section 1628 of the Civil Code provided a casting vote for the father in cases in which the parents were unable to agree. Only under narrow preconditions could this right be withdrawn from the father. In 1959, the Federal Constitutional Court declared this provision void (BVerfGE 10, 59). It was only 20 years later that the legislature reacted to this decision. Since 1 January 1980, the law provides that if the parents do not reach an agreement, a court may assign the decision to one of the parents.

The legislature was also enjoined, in Article 6 subsection 5 of the Basic Law, to provide children born outside of marriage with the same opportunities for their physical and mental development and for their position in society as are enjoyed by those born within marriage. It was only in 1969 that the legislature, in a large step, implemented such equality of rights; in the law of succession, implementation took only place partially at first; equality was fully implemented only in 1998. To put it simply: Between 1970 und 1998, illegitimate children were not placed on an equal footing with legitimate descendants upon their father's death as regards their inheritance claims: the only had a claim to financial compensation. In 1986, the Federal Constitutional Court declared an individual provision of the relevant complex of regulations incompatible with Article 6 subsection 5 of the Basic Law and hence void; according to this provision, claims only existed if upon the father's death, paternity had already been acknowledged or had been finally and bindingly established, or if at least proceedings for establishing paternity had been brought (BVerfGE 74, 33).

Such constellations inevitably give rise to the question not of how the Federal Constitutional Court's decision can be executed but how the legislature can be enjoined to comply with its mandate enshrined in the constitution. In this context, the lodging of a constitutional complaint by those affected by the legislative omission is a consideration. Their fundamental rights claim would be based on a qualified legislative omission because the legislature does not comply with a binding constitutional mandate.

b) With such constellations, the execution of constitutional court decisions is not possible for purely factual reasons already. The constitutional court decision would have to be enforced through direct compulsion if the unconstitutional situation can only be remedied by the legislature's becoming active. In such situations, it can be considered, if the legislature has not become active, to award from a certain point in time onwards the performance which has been deemed constitutional by the Federal Constitutional Court to those who are entitled to a claim as the equivalent of an execution which is not possible as such. This, however, could not be done to the full extent because the Federal Constitutional Court would, due to the fact that its mandate is restricted to controlling the other supreme state organs, not be permitted to shape policies to their full extent. Other possible solutions must therefore be considered; such solutions can only be successful if it is not a legislative omission *ab initio* which is at issue but the legislature's subsequent inactivity as regards the elimination of the situation that has been found unconstitutional after a law has been declared unconstitutional.

c) In its decision BVerfGE 101, 158, for instance, the Federal Constitutional Court indirectly ordered the execution of the constitutional court decision in the event that the legislature did not act within the time-limit imposed by the court (BVerfGE 101, 158 (160)). It declared the statute on financial compensation between the Federal Republic of Germany and its constituent states (which are called *Länder*) unconstitutional, but it ordered the continued applicability of the statute until a specific point in time (in the case at hand, until 31 December 2004) to prevent the life at state level being largely paralysed in the Federal Republic of Germany. In the judgment, however, the Federal Constitutional Court fixed an earlier point in time (31 December 2002, that is, two years earlier) on which the criticised legal regulation ceased to be applicable in the event that the legislature did not provide a new regulation in harmony with the Constitution. The Federal Constitutional Court reacted in this manner after the legislature had repeatedly disregarded mandates for regulation imposed on it by the court (for instance in BVerfGE 72, 330 and 86, 148). This is an extraordinary solution for executing a judgment, which, however, takes account of the principle of the rule of law and of the institutional loyalty between constitutional bodies to the greatest extent possible.

In this context, BVerfGE 99, 300 (304) must also be mentioned. The case was about the civil-service law and the law concerning judges in the Federal Republic of Germany. In this decision, the Federal Constitutional Court found that the existing legal situation was unconstitutional but fixed a transitional period of slightly more than a year for a new regulation. Moreover, it ordered that in the event that the legislature did not comply with its mandate to adopt a new regulation, a specific payment was to be made to the civil servants and judges affected from the day following the expiry of the time-limit. In this case, the concretisation by earlier case-law of the Federal Constitutional Court (BVerfGE 44, 249 und 81, 363), which, however, had been disregarded by the legislature, was so narrow and so highly differentiated as regards its details that it was possible for the Federal Constitutional Court itself to provide "execution" by determining a payment in so specific a manner.

d) With the constellations described, a constitutional court may sometimes run into considerable difficulties if the unconstitutionality of a statute is obvious, which would actually make the retroactive elimination of the statute mandatory. This is how things stood as regards the decision of the Second Senate of the Federal Constitutional Court of 10 February 2004 on what is called subsequent preventive detention (BVerfGE 109, 190). In this case, the Federal Constitutional Court decided that the *Länder* lacked the legislative competence to adopt the challenged regulation. If in a federative state under the rule of law – and it is only there that a constellation such as the one in the case at hand is possible – a legislature lacks the competence to adopt a specific statute, the inevitable consequence of this is not the "mere" unconstitutionality of the challenged regulation but its voidness *ab initio*. Contrary to this, the Senate majority at that time ordered, by 5 to 3 votes, the continued applicability of the challenged statutes until a specific point in time although Article 104 subsection 1 of the Basic Law lays down that a person's liberty may only be restricted pursuant to a formal statute. Due to the lack of competence of the legislature that had

become active, exactly these preconditions had not been complied with, and the order of the continued applicability was unconstitutional in this respect, as the dissenting opinion given on this by three members of the Senate explicitly emphasises (BVerfGE 109, 190 (244 et seq.)).

IV. Summary

The preceding reflections were intended to sharpen the view for the fact that the execution of constitutional court decisions must be looked at, and regulated, in a differentiated manner. The more differentiated a legal regulation is, the less is the Constitution itself the adequate place for such regulation. A democratic constitution under the rule of law should therefore be restricted to developing the framework, a framework which must be oriented towards the foundations of the democratic state under the rule of law, towards the interrelation of the supreme state bodies, and above all towards the legislature's relation to those who are subject to its state power. Due to the great variety of possible constellations, it is preferable to deal within such a framework, which could, at any rate, contain more provisions to this effect than the Constitution of the Federal Republic of Germany does, with the individual problems which are conceivable.