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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**SOME REMARKS ON THE DELIMITATION OF COMPETENCIES BETWEEN  
THE FEDERAL CONSTITUTIONAL COURT, THE ORDINARY COURTS, AND  
THE STATE CONSTITUTIONAL COURTS IN GERMANY**

by Ms Christina STRESEMANN,  
Scientific Expert at the Federal Constitutional Court in Karlsruhe,  
Judge at the Appeals Court in Berlin, Germany

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## **The delimitation of competencies between the Federal Constitutional Court, the regular courts, and the state constitutional courts in Germany**

### **1. Federal Constitutional Court and regular courts**

The Federal Constitutional Court is the highest court of the Federal Republic of Germany, but its jurisdiction is limited to the interpretation of the Federal Constitution, the so-called Basic Law. The court is therefore often called the supreme guardian of the Basic Law.

The competencies of the Federal Constitutional Court are enumerated in the Basic Law and in the Law on the Federal Constitutional Court. Two of these competencies are of special interest when looking at the relation to the other courts - these being civil courts, criminal courts, administrative courts, finance courts and social security courts.

#### a) Incidental judicial review of constitutionality

The first competence of the Constitutional Court which I would like to draw your attention to, is called incidental judicial review of constitutionality or concrete norm control. (art. 100 para. 1 of the Basic Law). It becomes relevant when a court - that is any court in Germany - comes to the conclusion that a law which is crucial to his decision is incompatible with the Basic Law.

Article 1 (para. 3) of the Basic Law reads: "The following fundamental rights shall bind the legislature, the executive and the judiciary as directly enforceable law." Every court in Germany must therefore consider constitutional issues in cases that come before them. But is *only* the Federal Constitutional Court that can declare a law incompatible with the Basic Law. The Constitutional Court's monopoly of the power to declare statutes unconstitutional expresses respect for the dignity of the legislature and seeks to promote uniformity of jurisdiction.

Therefore all other courts that consider a law - federal or state law - unconstitutional by means of the Basic Law must do the following: The court must interrupt its proceedings and send the files of the case to the Federal Constitutional Court, stating in detail why its decision in that case depends on the validity of the law submitted for review and why it considers the law to be unconstitutional. The Federal Constitutional Court then decides whether or not the law submitted is compatible with the Basic Law (it does not decide the outcome of the original proceedings). If the Constitutional Court concludes that a law stands in contradiction with the constitution, the law may no longer be applied by any court or other public authority.

This procedure is frequently used; it accounts for the second largest share of the Federal Constitutional Court's activities. From its beginning in 1953 up to the end of 1995 the court has found over 300 statutory provisions to be unconstitutional.

#### b) Constitutional complaint

The other competence of the Federal Constitutional Court which plays a role in relation to other courts and which accounts for the largest share of its workload, is the constitutional complaint.

Any person may claim before the Court that his basic rights set forth in the Basic Law have been

violated by an act of public authority (be it federal or state authority). Citizens therefore have a direct recourse to the Federal Constitutional Court. However, the requirement for lodging such a constitutional complaint is that there are no other means of eliminating the alleged violation of a constitutional right. In principle, all remedies within the relevant branch of jurisdiction must therefore be exhausted before having recourse to the Federal Constitutional Court.

An example here would be the "Crucifix Case" which triggered a storm of protest throughout Germany in 1995. A Bavarian school ordinance required the display of crucifixes in classrooms. The parents of children attending one of these schools objected to the display of the crucifix, claiming that this offended their children's religious beliefs and thus violated the constitution. The parents first filed an action in the Bavarian Administrative Court for the removal of the cross, but had no success. They then called on Bavaria's High Administrative Court which sustained the decision of the first court. Only after these procedures was the constitutional complaint admissible.

(It was also successful. The Federal Constitutional Court found that the rejection of the plaintiff's claim was incompatible with the right to freedom of religion [BVerfGE 93,1].)

Since a complainant is required to exhaust all other legal remedies before submitting his case to the Constitutional Court, most constitutional complaints are directed against court decisions. At this point it is important to note that the Constitutional Court is not a general court of review. It is only permitted to review whether the lower court has violated the complainant's *constitutional* rights. A violation of constitutional rights requires more than a simple misreading of a provision in the law. The Constitutional Court only intervenes if the deficiency of the challenged decision is a fundamental error of the lower court concerning the significance and the scope of a basic right. Complainants often fail to recognize this, with the result that some ninety-seven per cent of the complaints have no success.

c) Interference in the competencies of the regular courts ?

The Constitutional Court is sometimes criticized for too extensive interpretations of the constitution, thereby expanding the range of its power to review court decisions and curtailing the competencies of the regular courts.

An example for this criticism is the constitutionalization of private law, especially in the field of contractual relations. In 1993 a decision of the Constitutional Court concerning the validity of a guarantee attracted attention. The complainant was a 21-year old unemployed woman who had stood guarantee for her father, so that he could double the credit line of his business account. After her father went bankrupt the bank tried to make use of the guarantee. The Federal Court of Justice - the highest court for matters of civil law in Germany - had condemned the woman to pay the guarantee sum to the bank. In her constitutional complaint the woman accused the bank of having taken undue advantage of her lack of experience in business affairs. Her constitutional complaint was successful:

The Constitutional Court stressed that private autonomy, conceived of as the right to determine what the "law" is between private persons, presupposes a certain balance of power among the contracting parties. If the balance is grossly disturbed, the contract - conclusion as well as contents - tends to be dictated by the stronger party, leaving no room for the contractual liberty of the other party. The Constitutional Courts obliged the civil courts not to narrow their

decisions to the finding, that an adult is responsible for the contracts he or she signs, but to take human rights into account as far as possible within the framework of statutory interpretation when they construe and enforce contracts that bring forth distorted results. The case was therefore referred back to the Federal Court of Justice [BVerfGE 89, 214].

Another example for the constitutionalization of private law is a decision concerning the contractual relations between a landlord and a tenant. On the occasion of a constitutional complaint the Constitutional Court decided in 1993 that the tenant's right of possession is to be seen as property in accordance with art. 14 of the Basic Law which reads: "Property and the right of inheritance shall be guaranteed" [BVerfGE 89,1]. Critics reproached the Constitutional Court for having produced a new constitutional right - the tenant's "right of property" - , thus enlarging its possibility to review decisions of the regular courts.

## 2. Federal Constitutional Court and state constitutional courts

### a) Constitutional autonomy of the states

Germany is a federal state made up of sixteen constituent parts, the so-called "Länder" or "states". The German states are autonomous governments with their own legislature, executive, and judicial institutions. They share the power with the federal government within the same territory and over the same people. The states enjoy constitutional autonomy but must follow the constitutional order of the federation. Art. 28 of the Basic Law reads: "*The constitutional order in the Länder shall conform to the principles of the republican, democratic and social state based on the rule of law, within the meaning of this Basic Law.*"

Their constitutional autonomy enables the states to set up their own constitutional courts. With the exception of one state, all of the states have taken advantage of this possibility. The courts responsibilities and procedures are laid down in state law and therefore vary.

### b) The state constitutional court's sphere of responsibility

In principle, the Federal constitutional jurisdiction and the constitutional jurisdiction of the states exist side by side. This is possible because the courts take action with different yardsticks:

- A state constitutional courts reviews acts of state authorities as well as state law under the relevant state constitution; it is therefore the supreme guardian of the state constitution.
- The Federal Constitutional Court by contrast is responsible for monitoring and controlling the exercise of public power - both at federal and at state level - in accordance with the Basic Law; it is therefore the supreme guardian of the Basic Law.

As a consequence, the Federal Constitutional Court may only declare a statute incompatible with the Basic Law, while a state constitutional court may only declare a statute incompatible with the state constitution. Its authority is also restricted to examining state law. If federal law is incompatible with a state constitution, it is the federal law which supersedes state law, including state constitutional law (art. 31 of the Basic Law).

Please note that the following can happen: The Federal Constitutional Court can review state law which has been declared constitutional by the relevant state constitutional court and declare the same law unconstitutional. This is not an overruling of the state constitutional court by the Federal Constitutional Court. The seemingly opposing rulings have their cause in the different yardstick used by the two courts. A law can be constitutional under a state constitution and unconstitutional under the federal constitution. This works the other way around as well. A state constitutional court can declare a state law unconstitutional even if the Federal Constitutional Court has found the regulation in accordance with the Basic Law before.

c) Review by the Federal Constitutional Court

The decisions of state constitutional courts can, in principle, be appealed against before the Federal Constitutional Court by means of a constitutional complaint. The complainant however must argue that the state constitutional court violated his fundamental rights guaranteed by the Basic Law. The Federal Constitutional Court can not review the state constitutional courts interpretation of the state constitution.

Constitutional complaints directed against decisions of state constitutional courts are not very frequent - about 10 to 15 are received by the Federal Constitutional Court annually. At the time, constitutional complaints entered against a decision of the Bavarian Constitutional Court have attracted public attention. The decision of the Bavarian Constitutional Court deals with a law which was passed by the Bavarian parliament after the Crucifix decision of the Federal Constitutional Court I have mentioned earlier. Despite the court's ruling, the law stipulates that the crucifix has to be removed from a classroom only in the presence of students objecting to it on religious grounds and only on due compliance with a special procedure. The Bavarian Constitutional Court passed a judgment saying that the law was in accordance with the Bavarian constitution. The plaintiffs now have lodged constitutional complaints against this ruling to the Federal Constitutional Court. In view of the very negative public reaction to the Courts Crucifix decision of 1995, these constitutional complaints *would* be very delicate if the complainants could argue that the Bavarian Constitutional Court has violated their right to freedom of religion set forth in the Basic Law. The Federal Constitutional Court would then be forced either to affirm its controversial decision, thus stating that the Bavarian Constitutional Court violated the Basic Law, or to alter its opinion within a short period of time. However, the situation is defused, because the complainants themselves are not parents or pupils and therefore are not affected personally by the Bavarian law. In consequence, their constitutional complaints are not admissible with regard art. 4 of the Basic Law which guarantees freedom of religion.

d) Divergence in interpreting the Basic Law

A state constitutional court that wishes to apply a different interpretation to the Basic Law than that decided by the Federal Constitutional Court or by another state constitutional court must obtain a decision from the Federal Constitutional Court (art. 100 para. 3 of the Basic Law).

Only four decisions of this kind have been handed down by the Federal Constitutional Court since 1951. But it so happens that at the time a very interesting question concerning the interpretation of the Basic Law has been brought before the Federal Constitutional Court by the Constitutional Court of Saxony.

The public became aware of this question after a decision of the Berlin Constitutional Court in 1993 on the basis of which the former head of state in East Germany, Erich Honecker, was dismissed from imprisonment. He had been charged with manslaughter for the deaths of East Germans shot by East German border guards as they tried to flee across the Berlin wall, and was held in pretrial custody in Berlin. Honecker, who was mortally ill, filed a complaint to the Berlin Constitutional Court, claiming that the criminal proceeding violated his dignity because he would, with the utmost probability, not live as long as the trial was likely to last.

In its decision the Berlin Constitutional Court obliged the criminal court to reconsider Honecker's petition to dismiss his case and to release him from jail. The criminal court was to take into account that it violates the dignity of man if criminal proceedings are carried on although it is almost certain that the accused will die of an incurable illness before the proceedings are brought to an end. In view of Honecker's short expectation of life the criminal court then dismissed Honecker from imprisonment.

The interesting legal aspect of the case is the following:

Criminal jurisdiction in Germany, like all other "ordinary" jurisdiction, is mainly exercised at state level by local, regional and higher regional courts. The criminal court in charge of the Honecker case was therefore a state authority. As a state authority its actions are, in principle, subject to constitutional review by the Berlin Constitutional Court. For the Berlin Constitutional Act stipulates that anyone who claims that their rights laid down in the constitution of Berlin have been violated by the public authority of Berlin can file a constitutional complaint.

On the other hand, criminal procedures in Germany are regulated by a federal law, and Honecker had been put and kept in jail on the basis of this federal law. The criminal court in charge of the Honecker case therefore was a court at state level applying federal law. The question that arises is: Can a *state* constitutional court oblige a court (at state level) to apply *federal* law in a certain way ? Or is the application of federal law generally exempt from every influence of a state constitutional court ?

This is the subject of the question now put forward to the Federal Constitutional Court by the Constitutional Court of Saxony. The latter phrased the question with regard to art. 31 of the Basic Law which reads: "Federal law shall override state law". The Court has asked the Federal Constitutional Court: Does art. 31 of the Basic Law inhibit the Constitutional Court of Saxony to review the application of federal procedural law with respect to the constitution of Saxony ?

The Constitutional Court of Saxony wants to deviate from the ruling of another state constitutional court, that is the Constitutional Court of Hessen concerning the interpretation of art. 31 of the Basic Law. As I mentioned before, in this case the Basic Law requires the state constitutional court to seek a ruling from the Federal Constitutional Court, thus ensuring uniformity of its interpretation. The Constitutional Court of Hessen is of the opinion that it can not review court decisions that are based on the application of federal law because - according to art. 31 of the Basic Law - federal law is superior in rank to state law, including constitutional state law.

The Constitutional Court of Saxony is of the opposite opinion, providing that the fundamental rights guaranteed by the state constitution have the same substance as those guaranteed by the

Basic Law. It argues that there is no general predominance of federal law. Federal law and state law as well as federal and state constitutional jurisdiction exist side by side in principle. Only if there is a clash between federal and state law does art. 31 of the Basic Law come in and order the supremacy of the federal law. If fundamental rights laid down in a state constitution have the same substance as fundamental rights stated in the Basic Law, there is no clash and therefore no predominance of the federal regulations. According to the Constitutional Court of Saxony, it must therefore be possible for a state constitutional court to influence the application and interpretation of federal laws, just as the Berlin Constitutional Court did in the Honecker case.

The Federal Constitutional Court will decide on these different opinions in a few months and will probably make fundamental statements on its relation to the state constitutional courts. So, in Germany as well, the debate on the relationship of Central Constitutional Courts and Courts of the Federated Entities is still to be continued...