

Strasbourg, 2 February 1998
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CDL-JU (97) 37
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

POWERS OF CONSTITUTIONAL COURTS OF FEDERATED ENTITIES

IN GERMANY

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**"Workshop on the Relationship of Central Constitutional Courts
and Constitutional Courts of Federated Entities"
Petrozavodsk, Russia, 22-24 September 1997**

Introduction

Following the visit some of you made a few months ago to the Constitutional Court in Hessen, Germany, I would never have expected to get so soon the immense chance to return this visit. I am very happy to be here and I am proud to have the opportunity to give you some explanations concerning our situation in Hessen and in Germany. It is a great honour to speak to such an audience.

Some of the issues which are the subject of my speech today have been discussed with those of you who visited us in Wiesbaden a few months ago. But I think it may not be worthwhile, although perhaps a little annoying for some, to repeat one or two arguments from that earlier discussion.

In order to understand the powers of Constitutional Courts of Federal Entities such as Hessen, you should be aware of the following three issues:

- I. Structure of the German Federal Republic
- II. Structure of the court system within this federal structure
- III. The relationship between the Constitutional Law of the Federal Republic on one side and the states (*Länder*) on the other

All these issues have been dealt with in more detail by the President of the Berlin Constitutional Court, Professor Dr. Finkelburg, and by Dr. Christina Stresemann of the Federal Constitutional Court. Consequently, I can be very brief and concentrate on a few remarks which need to be repeated for the understanding of the second part of my presentation.

In this second part of my description of the power of Constitutional Courts of Federal Entities such as Hessen, I shall present two additional issues:

- IV. The structure of the Constitutional Court in Hessen
- V. Competence of the Constitutional Court in Hessen and its procedures.

I. Structure of the German Federal Republic

The German federal structure differs from that of other federations such as the United States of America:

The basic principles of all the German Constitutions of the Federal Republic as well as of the States (called “*Länder*”) are laid down in Article 20 of the Federal Constitution (called “Basic Law”). After a period of centralism, the Federal Republic of Germany has returned to the principles of federalism. The country is divided into 16 states.

- Section 2 of Article 20 of the Basic Law contains the principle of representative government through elections and separation of powers among the legislative, executive and judicial branch of government.
- Section 3 of Article 20 stipulates that:
 - a) the Republic is governed by law. Therefore, it is called “*Rechtsstaat*”. This implies that all legislation be subject to judicial review by courts, and also if necessary by a Constitutional Court.
 - b) As far as the administration is concerned, we could say:

The primary “exercise” of governmental powers and the discharge of governmental functions is incumbent on the *Länder* (Art. 30). They exercise original authority. It does not derive from federal authority. The Federal Republic, therefore, is better characterized as a centralistic state which grants some of its powers to the *Länder*.

The Constitution vests a broad legislative power in the Federation. The consequence is clear: most of the law executed by the *Länder* is federal law. But their power is limited by the Federal Basic Law providing that Federal law overrides State (*Land*) law (Art. 31).

Since the principal areas of legislation fall within the competence of the Federation, the main task for the *Länder* is to implement and execute this legislation. Here they play the most important role. The federal government’s administrative powers over the *Länder* at local level are rather limited.

To further the idea of decentralized government, popular in Germany since the early 19th century, the communes (local authorities) are guaranteed the right under the Basic Law to regulate under their own responsibility all the affairs of the local community (Art. 28).

Summary

Let me summarize these principal ideas:

1. The law is made by the federal entity and by the *Länder*.
2. All laws, even federal ones, are principally executed by the *Länder*.
3. To limit the *Länder*’s powers granted by this system Art. 31 of the Basic Law stipulates:

“Federal law shall override Land law.”

4. This principle includes the Constitutional Law of the *Länder*. Federal law consequently shall override also the Constitutional Law of the *Land*. The overriding Federal law is not limited to constitutional law. It can be any kind of law. Even a very low level law made more or less only by the administration on the basis of special power of attorney can override constitutional law of the *Länder*.

You should bear these principles in mind for a better understanding of the following issues.

II. Structure of the court system

The basis of the structure of the German court system is Art. 19 of the federal Basic Law. It provides in Section 4 that there must always be access to the courts in case a private person should claim that public authority has violated his rights. The provision states:

“Where rights are violated by public authority the person affected shall have recourse to law.”

The Constitution vests judicial power mainly in the courts of the *Länder*. There is no dual judicial hierarchy.

The courts apply federal or state law, whichever regulates the subject matter in issue. Only the courts of last resort, i.e. the Federal Supreme Court and the Federal Constitutional Court, are Federal Courts.

The German court system differs from that of other federations, such as the United States of America:

1. All trial and appellate courts are state courts. Only the courts of last resort are federal.
2. All courts may hear cases based on law enacted at the federal level.
3. The federal courts only ensure the uniform application of national law by the state courts.
4. There are five court systems with specialized jurisdiction:
 - a) The courts of general jurisdiction for civil and criminal cases,
 - b) Administrative courts,
 - c) Labour courts,
 - d) Social security courts, and
 - e) Courts for tax matters.

All courts have the power and the obligation to review the constitutionality of government action and legislation within their jurisdiction. But only the

- Federal Constitutional Court (Bundesverfassungsgericht) in Karlsruhe or
- the Constitutional Courts of the *Länder*

may declare legislation unconstitutional. Other courts must suspend proceedings if they find a statute unconstitutional and must submit the question of constitutionality to the relevant

Constitutional Court of the Federal Republic of the *Länder* for its determination.

The establishment of the Constitutional Courts in the Federal Republic as well as in the *Länder* is probably the most significant change the fathers of the federal Basic Law and of the constitutions of the *Länder* introduced compared to previous German constitutions. The establishment of these courts was clearly influenced by Anglo-American ideas of constitutional review. In its scope, however, it goes far beyond these models. The Constitutional Courts constitute the “Supreme Guardian of the Constitution.”

III. Relationship of the Federal Constitutional Law to the States’ Constitutional Law

The relationship between the federal Constitutional Law and the Constitutional Law of the *Länder* has been discussed in detail by Prof. Finkelburg, the President of the Berlin Constitutional Court, and by Dr. Christina Stresemann of the Federal Constitutional Court. For the purpose of the subject matter I have to deal with, it could be very briefly described as follows: “*Federal law shall override land law*”. This is the wording of Art. 31 of the federal Basic Law. We will find the same ruling in Art. 153 para. 2 of the Constitution of Hessen. Since the Constitution of Hessen is older than the federal Basic Law the language says:

“Any federal law to come shall override *land law*.”

This principle might even lead to the waiver by a *Land* of having a Constitutional Court of its own (Art. 99 of the federal Basic Law). Hessen did not waive this right. So consequently, I can speak about the power and function of the Supreme Court of Hessen.

Each *Land* has its own elaborate constitution. It must conform to the principles of republican, democratic and social government based on the rule of law within the meaning of the federal Basic Law (Art. 28). Consequently, each *Land* has an elected parliament, a government, administrative agencies, and independent courts.

IV. Structure of the Constitutional Court in Hessen

The *Länder* of the Federal Republic of Germany have not only their own constitutions and their own legislation but also their own constitutional jurisdiction and their own Constitutional Courts. There is only one exception: the *Land* Schleswig-Holstein has assigned its jurisdiction for constitutional disputes to the Federal Constitutional Court. This is legally possible according to Article 99 of the Federal Basic Law.

The constitutional courts of the *Länder* have different names. In Hessen the court’s name is *Staatsgerichtshof* (State Court). In other States they are called *Verfassungsgerichtshof* or *Verfassungsgericht* (Constitutional Court).

Like the Federal Constitutional Court, the State Court of Hessen (as all the other Constitutional Courts of the *Länder*) is the guardian of its own constitution.

The constitutional court of Hessen, the so-called State Court, is an independent court of justice like the Federal constitutional court. The State Court functions separately from all other constitutional organs. This means that the State Court is both a court and a constitutional organ.

In relation to all other courts it has a unique status. It has the final say on whether laws of

Hessen or other political acts are consistent with the constitution in Hessen. It can overrule the decisions of any other court in Hessen if they do not pass this test of constitutionality. And if the State Court's ruling affects the legality of *Land* laws, the decision will have the force of law and be published in the Law Gazette of Hessen.

1. The Constitutional Court in Hessen has its legal basis in the constitution of Hessen (Art. 130 until Art. 133).
2. The Constitutional Court in Hessen is made up of one panel only.
3. The panel of the Constitutional Court of Hessen consists of eleven judges. They are elected by the Parliament of Hessen.
4. All eleven judges have the same legal status, the same rights and powers. Every decision of the State Court is worked out by all eleven judges together. In the Constitutional Court of Hessen this means that virtually all details of a decision and literally every word of a decision was discussed among all the judges.

If one of these judges should be unable to attend a court meeting, he will immediately be replaced by another judge elected in advance by the parliament in order to cover the eventual problem of absence.

Only a relatively small number of cases come before the *Land* constitutional courts. Therefore, the judges usually perform their duties in addition to their other responsibilities. I myself – to give you an example – am attorney-at-law and notary. But I am not a lay judge. Lay judges do not exist in the State Court of Hessen.

V. Competence of the Constitutional Court in Hessen and its procedures.

Between the Federal Constitutional Court and the Constitutional Courts of the *Länder*, competence is separated with regard to the principles which represent the general grounds of separation of powers between the Federal State and the Member States. Accordingly, the Federal Constitutional Court is empowered to decide in all cases of federal constitutionality. This means the conformity with the Federal Constitution, the so called Basic Law (“*Grundgesetz*”). On the other hand, the Constitutional Courts of the *Länder* are empowered to decide cases of constitutionality in the relevant State, called “*Land*”. This means the conformity with the constitutions of the *Land*; e.g. the Constitution of Hessen.

Both procedures can be simultaneous and parallel. The same regulation can be a matter for both Constitutional Courts. But this does not happen often. Very rarely would the claimant address both Constitutional Courts, the Federal and the State's Constitutional Court at the same time. But it is theoretically and legally possible.

In that case, both of the courts would have to coordinate their procedures. Should one of the courts have already made its decision with *erga omnes* effect, the other one should not rule against it. Whatever the case may be, the prevailing court, however, would be the Federal Constitutional Court. As long as I have been judge in the Constitutional Court of Hessen, we have never faced a conflict of this kind.

The provincial Constitutional Court is bound by the decision of the Federal Constitutional Court

in cases of Federal constitutional law. The Federal Constitutional Court would be bound by the decision of a Provincial Constitutional Court in cases of Provincial constitutional law.

The Constitutional Court of Hessen has competence to decide about:

1. the constitutionality of laws made by the Parliament or by the Government of Hessen.
2. a dispute of government agencies about the interpretation of the Constitutional Law of Hessen.
3. a complaint by individuals that their personal rights were violated by public authorities (courts or governmental agencies).

Any citizen who believes that his basic rights protected by the Constitution of Hessen have been violated by public authorities may lodge a constitutional complaint with the State Court. More than 90 per cent of all cases brought to the State Court are these kinds of basic rights protection claims. More than 95 per cent of all these claims are not successful.

Consequently, the power of the Constitutional Court is principally unlimited in matters concerning:

- the law of the *Länder* and/or
- an act of the government or one of the government authorities or any other authority in this *Land* (except a federal agency in such *Land*)
- an act or decision of all courts in the *Länder* (with the exception of some federal courts in that *Land*).

On the other hand, the competence of the Constitutional Court of Hessen or any other *Land* in Germany is limited to matters in which they enjoy competence. There are disputes, however, as to whether or not regional constitutional courts can decide on federal Law. This question could arise in cases in which the *application* of federal Law (not the Law itself) infringes the regional constitutional law. In such cases, parties have mostly claimed that they have not been heard properly by the court in accordance with the Law.

The *Land* constitutional courts are guardians of their respective constitutions. Their principal task is to review *Land* laws as to their compatibility with the *Land* constitution.

The competence of the Constitutional Court in principle requires that one of the institutions mentioned above has acted in conflict with the constitution of the respective *Land*.

The Constitutional Court - of the *Land* as well as of the Federal Republic - will only accept competence if the Constitutional Law is in question. They do not decide whether another (lower) court has correctly applied the relevant law. The only question of the court is whether this application is in accordance with the principal rules of the constitution.

The Constitutional Court of Hessen will never act on its own impetus. It needs a claimant party to start the procedure. We once had a provision in our Constitution that could be understood as if the court should act on more information about facts that could lead to criminal procedures in

order to protect the constitution. This article of the Constitution in Hessen, is, however, no longer applicable. The federal law about those procedures replaced it, following the rule
“Federal Law overrides State Law.”

Summary

The powers of Constitutional Courts of federated entities in Germany are limited.

1. First, they are limited to ruling on the Constitution Law in their Land. they have no right to decide about the question whether the act in question violates the federal Basic Law.
2. Second, the power of Constitutional Courts of federated entities in Germany is limited to controlling the acts of the government of a *Land*, its government agencies or whatever public authority exists in that Land (with the exception of the few federal agencies).
3. It is still in dispute whether or not regional constitutional courts may decide whether the application of a federal Law is in conflict with the State Constitutional Law.