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**Constitutional Control on the federal and regional levels :
the experience of Germany**

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C o n s t i t u t i o n a l c o n t r o l
o n t h e f e d e r a l a n d r e g i o n a l l e v e l s :
t h e e x p e r i e n c e o f G e r m a n y

The Federal Republic of Germany celebrates this year its 50th birthday. Fifty years ago, our constitution, the so-called Basic Law, became the supreme law first of the western part and then - ten years ago - of the reunited Germany. Every constitution is a child of its time: It dwells on the unique historic experience of its drafters, it reacts to the specific cultural, ethnic, geographic, economic and social situation of the respective country, and it is - often - a reflection on the current division of power in a society. In short, a constitution is almost always a mirror and answer to certain historic circumstances and challenges. This is true of the different French constitutions, it is true of the constitution of the United States, it is most certainly true of the German Basic Law, and, I assume, it is also true with respect the Georgian constitution of 1995, which in preparation for this seminar I read with much care and interest.

As far as Germany is concerned, it is easy to name the specific challenge, upon which - only four years after the end of Nazi-regime - the constitution had to find an answer. It was, in short, to make sure that never again a dictatorial tyranny of any single person or party abridging the fundamental rights of the people and bringing misery over its neighbouring countrys could take place in Germany. The constitutional answer to this challenge was the erection of a state that is founded on the dignity of man and four basic principles: democracy, the rule of law, federalism, and the social welfare principle (art. 20 of the Basic Law).

Two of those four principles touch the subject of my report: the rule of law and federalism. Why is that? It is because the drafters of the Basic Law, but also the drafters of many regional constitutions realized that the rule of law, in particular: solemnly phrased constitutional principles, are not much worth without an institution that serves as guardian of those constitutional values and principles. That is why we have the Federal Constitutional Court in Karlsruhe and the various constitutional courts in the different states. And that is why I can share with you a little bid about the German experience on constitutional control on the federal and regional level.

I would like to do this in two steps: First, I should talk to you about the delimitation of competencies between the Federal Constitutional Court and the State Constitutional Courts.

Second, I would like to invite you to consider in light of the German experience, whether and under which circumstances such a dual system of constitutional control as we know it in Germany is necessary or maybe counter-productive in a political system seeking to foster freedom and justice among its people.

I.

Delimitation of competencies between the
Federal Constitutional Court and the
State Constitutional Courts

The Federal Republic of Germany is comprised of sixteen different states. Each state is - as in the United States of America - an autonomous legal entity. Each state has its own constitution. Each state has a government, a parliament, and a court system. There are state elections, and - very important - state revenues. Each state has the power to spend its money in its own discretion.

Of course, as in any federal system, the states are integrated in the federal structure, as they do not have the sole power over their people. They only share their power with the federal government over the same people in the same territory. In fact, with respect to Germany, it is, I believe, a fair statement to say that the federal government is the more powerful and important legal entity since most of our laws originate in the federal domain.

As far as the constitutions are concerned, the states are basically free to choose their own constitutional scheme. However, our Basic Law stipulates that the constitutional order in the states must conform to the principles of republican, democratic, and social government based on the rule of law (art. 28 of the Basic Law). But apart from that, the states are not bound by federal constraints. Therefore, they are also free to set up a constitutional court or renounce to do so. As of now, fifteen of the sixteen states have chosen to set up their own constitutional courts. That is why we have in Germany sixteen constitutional courts, the Federal Constitutional Court in Karlsruhe and the fifteen various constitutional courts in the states.

How does that dual system of constitutional control work? Let us keep two situations of potential conflict apart: The first situation is that the same act is challenged both in the State and the Federal Constitutional Court. The second area of potential conflict is that not the same act is challenged in two different courts, but that the judgment of one court is challenged in the other court - and vice versa.

1. I come to the first point. How does it work, if the same law or act of public authority is challenged both in the State and Federal Constitutional Court? The answer is that it works

because, in principle, the function and powers of the federal and the state constitutional courts are clearly determined and delimited:

- A state constitutional court only reviews state laws and acts of state authorities against the standards of the respective state constitution. It can declare unconstitutional an act or law only with respect to the state constitution. However, please note that very often, the lower state courts apply federal law. If a citizen then challenges the application of the federal law by the lower state court, the State Constitutional Court is free to declare this particular application unconstitutional vis-a-vis the rights guaranteed by the State Constitution (cf. BVerfGE 96, 345).

- In contrast, the Federal Constitutional Court reviews not only federal, but both state and federal acts and laws, however only against the standards of the Basic Law, i.e. the federal constitution. The Federal Constitutional Court can declare unconstitutional an act or law only with respect to the federal constitution.

That is why - theoretically - the same act can have a different fate in the State and Federal Constitutional Court. I myself had such an experience not long ago. The case involved a judgment by a lower state court from Bavaria that was challenged by a Bavarian citizen first at the Federal Constitutional Court where I worked on the case. The lower state court had applied federal law. The Federal Constitutional Court found the application of law that was in question to be constitutional, with respect to the federal constitution. The citizen then went to the Bavarian State Constitutional Court, which decided for the citizen and declared the challenged act unconstitutional, with respect to the Bavarian constitution.

Was that a problem for the Federal Constitutional Court? Not really, because the Bavarian court did by no means *overrule* the Federal Constitutional Court. It simply said that, by the standard of the Bavarian constitution, the lower court's judgment could not be held constitutional - notwithstanding the fact that it was in conformity with the federal Basic Law.

As a consequence, if a state decides to open its constitutional court for complaints by a citizen, the citizen is free to choose whether to go to the Federal Constitutional Court or the State Constitutional Court. Seemingly opposing judgments are no problem, because and if they result from the different yardsticks employed by the federal and state court.

2. I come to the second area of potential conflict. The question is: can a State constitutional court's ruling be challenged in the Federal Constitutional Court, and vice versa?

Very clearly, a decision by the Federal Constitutional Court cannot be appealed in the State Constitutional Court. This is true even then, if a citizen believes the decision violates his rights under the State Constitution. No state could open its court as a resort against judgments of the Federal Constitutional Court. The reason for this is simply that - as I have already lined out - State Constitutional Courts have jurisdiction only over state laws and state acts.

On the opposite, the decision by a state constitutional court can be appealed against before the Federal Constitutional Court. Of course, the complainant must challenge that the State Constitutional Court violated his rights under the federal Basic Law. This might astonish you. How could a State Constitutional Court possibly violate the federal Basic Law, if - as I said earlier - its only yardstick is the respective state constitution? Well, it is true that a State Constitutional Court can declare unconstitutional a law or an act only with regard to the state constitution. In its proceedings it must however, like any governmental entity in Germany, consider, obey and respect the provisions of the Basic Law. If necessary, the State Constitutional Court is obliged to stay its proceedings and obtain a decision of the Federal Constitutional Court (art. 100 of the Basic Law). Therefore, it is theoretically possible that the Federal Constitutional Court overrules a judgment by a State Constitutional Court.

3. Let me summarize this first part. Since there is a clear delimitation of competencies between the Federal Constitutional Court and the State Constitutional Court, the area of potential conflict is, even if the same act has a different fate in the two courts, small. However, if a State Constitutional Court does not respect the federal Basic Law, it is possible that it is overruled by the supreme guardian of the Basic Law: the Federal Constitutional Court.

II.

The benefits and chances of a dual system of constitutional control

I come to the second part of my report. I would like to very shortly reflect about the benefits and chances of a dual system of constitutional control. In doing so, the guiding question should be: given the German experience, is a dual system of constitutional control rather helpful or rather counter-productive in achieving what I lined out to you as the overriding goal of German constitutionalism, i.e. erecting a democratic state based on the dignity of man and ensuring freedom and justice to everyone?

The answer, of course, is not easy and can hardly be given in a short report. It is, however, possible to make three remarks:

1. First, I believe it is a fair statement to say that in Germany the existence of a dual system of constitutional control does not create any major problem. I am not aware of any substantive conflict in the past fifty years between the state and the federal level that had its reason in a constitutional court's ruling. Of course, there have been conflicts between the federal and the regional governments that led to constitutional disputes. And of course, there have been rulings by the Federal Constitutional Court that were approved of or disliked at in certain states more than in others. But that the mere existence of a constitutional court both on the state and the federal level created serious problems, I would not say.

2. Second, I believe that the overall good German experience with the dual system of constitutional control has some prerequisites that might deserve general attention. For example it seems to me indispensable to have a delimitation of competencies and powers between the State and Federal Constitutional Court that is as clear-cut as possible, if the dual existence of constitutional courts is to work. And, probably even more important, it seems to me also indispensable that the Federal Constitutional Court that has eventually the final word on the federal constitution does not yield as a matter of politics to either the central or a regional power, but accepts nothing but the constitution as the currency of its decision-making.

3. Third and last: I said that the existence of state constitutional courts, in my opinion, did not create any major problems in Germany. But did it help in fostering freedom and justice? Was it a benefit to our democratic society? Would the Germans be worse off if they did not have constitutional courts on the state level?

I am not too sure about this. Definitely, Germany has made excellent experiences with the concept of federalism as such. And, for sure, Germany has made excellent experiences with the concept of judicial review by the standard of the constitution. However, the landmark decisions of German constitutional jurisprudence certainly came from the Federal Constitutional Court in Karlsruhe. I do not want to imply by this that the State constitutional courts did not have their value as an important part of a federalist governmental structure. But I think we should keep in mind that - in Germany - it is rather the federalism as such and the idea of judicial review by the standards of our Basic Law that helped to foster freedom, peace and justice - rather than the dual structure of constitutional control.