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The Execution of the decisions of the Federal Constitutional Court of Germany

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Ladies and Gentlemen,

I am very pleased to have the opportunity to participate in this interesting workshop. My topic will be the Execution of the decisions of the Federal Constitutional Court in Germany.

Let me first introduce myself: I am a judge at the administrative court of Hamburg. Since 1999 I have been working as a legal assistant to Justice Prof. Osterloh at the Constitutional Court in Karlsruhe. Next year I will return to my bench.

My presentation is divided into two parts. In the first part I would like to give a short overview of the system of judicial review and the role the Constitutional Court plays within that system. In the second part of my presention I am going to discuss the legal instruments and other means the court has to execute its decisions.

I. The Constitutional Court: Role and Competences

1) Its Role

The Federal Constitutional Court stands at the top of the German court system. It ist not an ordinary court of appeal in proceedings of civil, criminal or administrative law. Its exclusive power is to decide on questions of constitutional law. In doing so, the court is called upon to prevent the three powers of the State from violating the constitution. 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 competences of the Federal Constitutional Court are not defined in an overall clause, authorizing the court to settle constitutional conflicts. The competences are carefully enumerated in the Basic Law and in the the Federal Constitutional Court Act. They include the supervision over legislative bodies to determine whether legislation has been enacted in conformity with the Basic Law (Art. 93), as well as the supervision over all acts of public authorities and courts in order to determine whether their measures are compatible with the Basic Law. The Constitutional Court is able to declare the forfeiture of (fundamental) basic rights (Art. 18 of the B.L.), it decides about the prohibition of unconstitutional political parties (Art. 21), about the validity of parlamentary elections (Art. 41), about the impeachment of the Federal President and judges (Art. 61) and on disputes between individual governmental organs (Art. 93). This enumeration of competences could be continued. A number of items on the list are exclusively reserved to the Constitutional Court. But some of the competences have actually never been used, for example the removal of judges.

The Constitutional Court must not make use of its competences at its own discretion. It may exercise its power only if there is a case that is brought to the court in a proper way. In the following I will describe three specific groups of cases brought to the C.C.

2) Instruments of judicial review

a) The first group of cases is the request for a so-called "concrete judicial review" (Art. 100 Par. 1 Basic Law), which arises from an ordinary lawsuit. Every German Court which is convinced that a relevant federal or state law that is applicable to its case violates the Basic Law, must transfer the consitutional question to the Federal Constitutional Court and suspend the proceedings until a decision of the Constitutional Court has been reached. The Constitutional Court is the only court in Germany which is vested with the power to declare a law unconstitutional. No regular German court may decide on the unconstitutionality of a law. But of course every German Court has to reflect on the constitutionality of the laws applicable to cases before it, because the Basic Law says in its Art. 1 Par. 3 :

> "The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law."

If doubts about the constitutionality are raised but the court concludes that there is a way to interpret the statute in conformity with the Basic Law, it can do so. It is only the "negative declaration" of a court - concluding that a statute cannot be interpretated in conformity with the Basic Law - that is reserved exclusively to the Federal Constitutional Court.

The submitting court has to explain in detail why it considers the relevant legal provision to be in conflict with the constitution, why the outcome of the case depends on the validity of the law and why there is absolutely no acceptable way of interpreting the law in accordance with the constitution. The (lower) court has this obligation whether or not the issue of constitutional conformity has been raised by one of the parties. If the Constitutional Court accepts the request for judicial review, it provides the parties an opportunity to be heard and permits the highest Federal organs (or State government, if a state law is challanged) to enter the case.

The procedure of concrete judicial review is frequently used. It accounts for the second largest share of the Constitutional Court's activities. From the court's beginning in 1953 up to the end of 1999, the court has found over 300 statutory provisions unconstitutional.

b) The so-called "abstract judicial review" on the other hand does not stem from court proceedings. It starts on request from the Federal government, a state government or one third of the members of Parliament (Bundestag). Here the Federal Constitutional Court is asked to decide differences of opinions or doubts about the compatibility of Federal or State law with the Basic Law. The requesting party has to submit written briefs and the relevant federal organs or State governments are asked to participate.

While the Federal Constitutional Court can refuse to decide a "concrete judicial review" case on the grounds that the submitting court has not sufficiently set forth its concern over of the unconstitutionality of the challenged law or because the Constitutional Court finds that the decision of the case is not necessarily dependend on it, there is "no easy way out" in the case of the abstract law review. Here

the Constitutional Court has to deliver an opinion which is binding for every state organ, including the legislature. Once the request is submitted, the party who started the proceedings no longer has the power to withdraw it. The court will analyse the law in question under every constitutional aspect, it is not limited to objections raised by the parties.

> A good example for an abstract judicial review proceeding are the abortion cases (BVerfGE 39,1 and BVerfGE 88, 198). In 1974 and again in 1992 the Bundestag had passed abortion reform statutes. Both times, a number of members of the Parliament as well as the state government of Bavaria (and in the first case 4 more state governments) petitioned the Federal Constitutional Court to review section 218 a of the Abortion Reform Act on the ground that it violated several provisions of the Basic Law, including its clauses on human dignitiy and the right to life.

c) The other instrument of control the Federal Constitutional Court has, which is important for the relation to other courts and which accounts for the largest share of its work load, is the constitutional complaint: More than 4900 constitutional complaints have been lodged by individuals and legal persons in 1999. After exhausting all other available means to find relief in the ordinary courts, any person who claims that a "public authority" has violated his or her fundamental substantive or procedural rights under the Basic Law can file a constitutional complaint. Basic rights are rights of protection against the state. They guarantee that individuals have an unlimited sphere of rights and all incursions by the state require justification. "Public authority" in this sense means any governmental action including judicial decisions, administrative decrees and legislative acts.

In any case, the complainant has to be directly and presently affected by the act of public authority. As most legislative acts require implementation by the administration, frequently the complainant will have to wait for an administrative act adressed to him and direct a court action against that act. In some cases however it has been found that a law itself presently and directly affects the Basic Rights. As no ordinary judicial remedy is available against legislative acts, a constitutional complaint has been considered admissable in these cases.

The constitutional complaint is an extraordinary legal remedy, available to the individual for the protection of his or her fundamental rights. All remedies within the relevant branch of jurisdiction must therefore have been exhausted before being able to go to the Federal Constitutional Court. This restriction makes sense, because all courts are obliged to consider constitutional values when deciding cases of ordinary law. The principle follows, as I already mentioned, from Art. 1 Section 3 of the Basic Law. It provides that the Basic Rights set forth in the constitution shall bind the legislature, the executive and the judiciary as directly enforceable law.

Most constitutional complaints are directed against court decisions. Therefore the scrutinizing of the case - and the full examination if it is accepted - necessarily has to include the evaluation of the preceding court decisions. The Federal Constitutional Court is restricted to a constitutional review. Usually the complainants claim the violation of Basic Rights in the findings of the regular courts, either because the courts applied a statute in an unconstitutional manner or because the law, appliable to the case itself is unconstitutional. The Constitutional Court, however, is only permitted to review whether the regular court has violated the complainants constitutional rights. As long as no basic right has been infringed, the Constitutional Court is bound by the decisions of the regular courts.

But if the Constitutional Court finds that the regular courts have applied a valid law in an unconstitutional way, it will overturn the decision. If it finds that a lower court has wrongly interpretated the underlying law to be constitutional, it will overturn the decision and additionally declare the law unconstitutional, because it violates a specific basic right. If this happens the statute in question is null and void just like in the judicial review cases and regular courts may no longer apply it. And if the Federal Constitutional Court finds that a law is only in compliance with the Basic Law if interpretated in a specific way, this specific interpretation is binding to all the other courts, too. I'll come to the point of executing again later.

The impact of the constitutional complaint on the constitutional law in Germany cannot be overstressed, although the rate of the successful complaints is very low. It is below 3 %. Most landmark cases in Germanys constitutional history have originated from a constitutional complaint by ordinary citizens. Let me give you a few exemples:

(1) In a 1958 case the Federal Constitutional Court held that an injunction by a civil law court against a man called Lüth violated his freedom of speech. Lüth had publicly demanded the boycott of a certain film. The Constitutional Court made clear that basic rights are to be taken into account within the civil law and its interpretation as well.

(2) In 1987 the court decided on a constitutional complaint of a farmer who won his case: On his land the Daimler Benz Automobile Company planned to build a test course for new cars. The court decided that the expropriation for a private

purpose requires a written law, which describes the purpose of the expropriation, the preconditions and the procedure to find out if the preconditions are fullfilled.

(3) And in 1995 the court held that former nationals of East Germany (GDR) who had engaged in spying against the Federal Republic of Germany may only be procecuted for espionage after reunification and only under certain circumstances.

II. The execution of decisions

Let me start with a quotation from a speech the Federal Chancellor Konrad Adenauer held before the Federal parliament in March 1961:

> "As soon as we had got the judgement of the Constitutional Court, the Cabinet of Ministers met to comment on the jugdement and on the Television lawsuit. The Cabinet made a decision, it was unanimous. All the ministers agreed that the judgement of the Constitutional Court is wrong, Ladies and Gentlemen."

So the question is whether the executive - or legislature - has the right not to accept the decisions of the Constitutional Court. The answer is: no!

1) Execution of abstract and concrete judicial review and constitutional complaints:

In the cases of abstract and concrete judicial review and of constitutional complaints the Constitutional Court has to decide whether a law, the decision of a lower court, or an act or order of administration is unconstitutional or not. If the Constitutional Court declares a law unconstitutional, it is null and void. If the Constitutional Court concludes that an act stands in contradiction with the constitution, the act may no longer be applied by any court or public authority. As Art. 31 section 1 of the Basic Law states:

> "The decisions of the Federal Constitutional Court shall be binding upon Federal and State constitutional organs as well as on all courts and authorities."

If a law is declared to be null and void or to be compatible with the Basic Law, the decisions of the C.C. shall have the **force of law**. The decision shall be published in the Federal Law Gazette by the Federal Ministry of Justice.
As all journalists and radio stations follow the hearings of the court and are informed by the spokes woman of the court and now by internet, everybody can follow the impact the C.C. has on the interpretation of fundamental political, social and legal questions. All the big newspapers report on the decisions. So do the law journals. Therefore the outcome of an abstract judicial review proceeding or a constitutional complaint affects the regular courts too, because they are not only legally bound by the decision. They are no longer allowed to apply the provision which was declared unconstitutional. If the court does not obey the law or the interpretation the C.C. has given it, the plaintiff can ask for an appeal.

There is no difference whether a court in one of the eastern "New Länder" (i.e. states formed after the reunification of the GDR and FRG) is affected or whether the constitutional question arises in a case submitted to a court situated in the western states. A reason might be that shortly after the reunification of the western and eastern parts of Germany many jugdes, civil servants and law professors went to the "New Länder" to help build democratic structures. (In many court systems - administrative courts for example - the "west imports" make 100 %.) They had been brought up under the western law system that incorporated the balance and control of powers among legislature, executive and judiciary, and the fundaments of the Federal Republic as a parlamentary democracy, based on the rule of law. Another reason may be the tradition of both former states to accept and execute a court decision.

Coming back to the consequences of a decision: The fact that a provision which was declared unconstitutional must no longer be applied does not mean that past (and final) decisions are also void or can be challenged again. There is no "retroactivity" except criminal law. Only if a criminal conviction has been based on a law which is later declared unconstitutional, the convict can demand a retrial. In all other cases, unless otherwise stated by the Federal Constitutional Court, things stay the way they are, but compulsory execution is no longer permissible.

2) Specific statutes concerning the execution of orders and decisions of the Constitutional Court:

Art. 35 of the Constitutional Court Act allows the C.C. to state in its decisions by whom they are to be executed; under certain

circumstances it may also specify the method of execution. Art. 35 does not play an important role in the rulings of the C.C. The court aknowledges the seperation of powers and the fact that specific executions fall into the jurisdiction of different branches of courts or legislative or executive bodies. In one case, concerning the prohibition of the Communist Party of Germany in 1956, the court stated who had to execute the decision, in this case the state minsters (BVerfGE 5, 85).

In urgent cases the C.C. may deal with a matter provisionally - i.e. until the decision in the main proceeding - by means of the temporary injunction. This may be issued only if this is urgently needed to avert serious harm for the person concerned, to ward off imminent force or for any other important reason for the common weal (Art. 32 CCA). A temporary injunction may be issued for example to defer the entry into force of a law. In these cases the Court states the way a complainant is protected against an action executing a law or a lower court decision. An example: In most cases asylum seekers who were not successful in the administrative court and don't travel back to their home-nations voluntarily, are held in custody by the immigration police. If they are booked on a flight for the next day and the constitutional complaint might be successful, the Court rules that the state where they are held in prison is not allowed to execute the decision of the lower court and release them from prison until the decision in the main proceeding before the Constitutional Court.

III. Specific problems in executing the decisions

I already mentioned that the Constitutional Court finding the applicable law unconstitutional has to declare the law null and void. In spite of that regulation in many cases the Constitutional Court found a way not provided by the Basic Law to avoid a time of unruled political or social conditions: it declares a law or a statute unconstitutional but not void. The aim is to avoid uncertain conditions and unwished consequences of the declaration of nullity. Therefore in most cases the Court declares that the unconstitutional statute or law may still be applied for a certain period of time. This will give the legislature (i.e. the parliament) an opportunity to reform the law according to the findings and interpretations of the Constitutional Court.

By using this method of executing a decision which is not clearly regulated by the Basic Law the C.C. takes into account the fact that huge numbers of legal relations have to be managed in the meantime although the statute is void. Examples include: (1) Decisions concerning political party financing; (2) the statute declaring that a couple who want to marry has to take the husband's name as family name (the statute violated the right of equality of men and women) and (3) statutes concerning the conditions of access to social insurances and benefits or pensions. The last time the court declared a law unconstitutional but not void was in 1999. The law concerning the financial balance between weak and financially strong public law entities (i.e. the Federal government and the states) was declared unconstitutional, but it will stay in force untill 2002. After that point of time the law will be void.

Now the Federal government and the State governments have started political negotiations about how to rule the financial balance in a federal law and they are under time pressure.

That is the point from which most difficulties arise. If the C.C. declares a law unconstitutional but applicable for a period of time, the parliament often is not able or fails to incorporate the decision by reforming the law in time. One reason for this is the lack of parlamentary majorities. Many times the questions had been brought to the Constitutional Court by a former government where a different political party had the majority or by the parliamentary opposition, which now forms the government and has different ideas about how to solve a certain question. The other reason is money. For laws that regulate financially intensive relations or facts such as social insurance and pensions, taxes or, as I mentioned, the financial balance between Federal and State bodies, it often takes long and difficult negotiations about the question who will pay which part of the substantial costs. Sometimes a parliamentary majority is no longer interested in the legal questions ruled on by the court because new problems have arisen or because the political parties have to prepare for the next election campaign.
There still is no definite answer to the question what happens if the addressed legislative bodies fail to pass a law in the period of time the Constitutional Court had demanded in its decision. The Basic Law does not comment on the possibility of fixing a fine on the Federal or State government.

So the Constitutional Court depends upon the legally binding power of its decisions and the moral pressure its role as the "supreme

guardian of the constitution" places on the legislature, the executive and the judiciary. And there are the citizens. They can transfer a decision or a provision based on an unreformed law to the Constitutional Court again. And that is what they do in many cases.