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Stiftung 10.-12 Juni 1999 in Warrenton, Virginia,
USA: Comment on the Report by Professor Dr.
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“50 JAHRE GRUNDGESETZ”
KONFERENZ DER DRÄGER- STIFTUNG
10.-12 JUNI 1999 IN
WARRENTON, VIRGINIA, USA:
COMMENT ON THE REPORT BY
PROFESSOR DR. DONALD P. KOMMERS

*Professor Dr. Helmut Steinberger**

MR. Chairman,
Sehr verehrte Frau Präsidentin des Bundesverfassungsgerichts,
Honorable Justices O'Connor and Scalia,

Ladies and gentlemen:

Let me first express my appreciation to the Dräger Foundation for having organized this conference in celebration of the fiftieth anniversary of the Basic Law. We meet again in the United States, indeed a very appropriate place to do so.

We will probably hear a lot about a success story of the Basic Law, but may I assure our American friends that we Germans are very well aware that this story would have looked quite different if the Federal Republic of Germany would not have enjoyed over these fifty years the constant support by the United States, first economically via the Marshall Plan, which helped to bring about the so-called “economic miracle” in Germany, then by the political-military alliance, which until today has effectively protected our freedom, and last but not least, by her support of our quest for German reunification. For all of this we are and will be sincerely grateful.

From the excellent survey Professor Kommers¹ has given us on the developments of the Basic Law, I will—for reasons of time—just single out one issue which in my opinion is of far-reaching importance: the influence in recent decades of European integration on the *federal* system established by the Basic Law and its relations to other fundamental constitutional structures.²

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1. See Donald P. Kommers, *Kann das deutsche Verfassungsrechtsdenken Vorbild für die Vereinigten Staaten sein?* 37 DER STAAT 335 (1998).

2. From general literature, see, for example, HUBERT SCHROEDER, *DIE EUROPÄISCHE WIRTSCHAFTSGEMEINSCHAFT UND DIE LÄNDER DER BUNDESREPUBLIK*

European integration and German reunification have put federalism, as established by the Basic Law, on trial. Federalism is an expression of German political and cultural traditions and values. It is far more than mere administrative decentralization, vertical separation of powers, or an expedient organizational structure; it is rather a flexible design to preserve the identities and multiplicity of various entities and to integrate them into a pluralistic political system. We can see how deeply rooted federalism is from the fact that when the first Länder or state constitutions were adopted in Southern Germany—years before the Basic Law of 1949—they already considered the respective Länder as constituent state entities of a future German federation. And when in 1989 the Communist regime in the German Democratic Republic was ousted by a peaceful revolution, almost overnight the old state symbols of the former tradi-

DEUTSCHLAND: ZU VERFASSUNGSRECHTLICHEN FRAGEN DES VERTRAGES VOM 25.3.1957 (1964); HERMANN SCHMIDT-WENZEL, DIE DEUTSCHEN LÄNDER UND IHRE STELLUNG IM EUROPÄISCHEN EINIGUNGSPROZESS: EIN BEITRAG ZUR WAHRNEHMUNG DER INTERNATIONALEN BEZIEHUNGEN IM BUNDESSTAAT (1969); GERHARD BRANDMUELLER, DIE BESCHRAENKUNG DES STEUERLICHEN GESETZGEBUNGSRECHTS INSBESONDERE DER BUNDESREPUBLIK DEUTSCHLAND UND IHRER LAENDER DURCH DEN EWG-VERTRAG (1971); WOLFGANG VORWERK, DIE AUSFÜHRUNG VON GEMEINSCHAFTSAKTEN DURCH BUND UND LÄNDER UNTER BESONDERER BERÜCKSICHTIGUNG VON ART. 57 EWGV (1977); RUDOLF MORAWITZ, DIE ZUSAMMENARBEIT VON BUND UND LÄNDERN BEI VORHABEN DER EUROPÄISCHEN GEMEINSCHAFT (1981); RUDOLF MORAWITZ, DIE ZUSAMMENARBEIT VON BUND UND LÄNDERN BEI VORHABEN DER EUROPÄISCHEN UNION (1994); STEFAN SCHMIDT-MEINECKE, BUNDESLÄNDER UND EUROPÄISCHE GEMEINSCHAFT: ENTWICKLUNG UND STAND DER LÄNDERBETEILIGUNG IM EUROPÄISCHEN EINIGUNGSPROZESS (1988); RUDOLF HRBEK, DIE BETEILIGUNG DER DEUTSCHEN LÄNDER AN DEN INNERSTAATLICHEN BERATUNGEN UND ENTSCHEIDUNGEN IN EG-ANGELEGENHEITEN (insbesondere im Licht von Art.2 EEA-Gesetz und der Bund-Länder-Vereinbarung) (1988); WINFRIED KOESSINGER, DIE DURCHFÜHRUNG DES EUROPÄISCHEN GEMEINSCHAFTSRECHTS IM BUNDESSTAAT: BUND/LÄNDER-VERHÄLTNISS UND EUROPÄISCHES GEMEINSCHAFTSRECHT (1989); KARL-HEINRICH ROLFES, REGIONALE WIRTSCHAFTSFÖRDERUNG UND EWG-VERTRAG: DIE AKTIONSRÄUME VON BUND, LÄNDERN UND KOMMUNEN (1991); ALBERT PFITZER, DER BUNDESRAT: MITWIRKUNG DER LÄNDER IM BUND (4th ed. 1995); HENNING KLAUS, DIE DEUTSCHEN BUNDESLÄNDER UND DIE EUROPÄISCHE UNION: DIE MITWIRKUNG DER LÄNDER AM EU-INTEGRATIONSPROZESS SEIT DEM VERTRAG VON MAASTRICHT (1996); MARTHA DAGMAR MÜLLER, AUSWIRKUNGEN DER GRUNDGESETZREVISION VON 1994 AUF DIE VERTEILUNG DER GESETZGEBUNGSKOMPETENZEN ZWISCHEN BUND UND LÄNDERN (1996); Hans-Peter Schneider, *Die Aufgabenverteilung zwischen Bund Ländern nach dem Grundgesetz – eine Ausprägung des Subsidiaritätsprinzips?*, in JUTTA KRAMER, DIE ENTWICKLUNG DES STAATES DER AUTONOMIEN IN SPANIEN UND DER BUNDESSTAATLICHEN ORDNUNG IN DER BUNDESREPUBLIK DEUTSCHLAND (1st ed., 1996); JOHANNES TRAUT, DIE ROLLE DER DEUTSCHEN LÄNDER UND DER US-BUNDESSTAATEN IN DEN INTERNATIONALEN BEZIEHUNGEN (1997); STEFAN OETER, IST UNSER VERSTÄNDNIS DES BUNDESSTAATES NOCH ZEITGEMÄSS? (1998); *Stephan Detjen, Einheit und Vielfalt Der Wandel des Bundesstaats*, in IN BESTER VERFASSUNG?!: 50 JAHRE GRUNDGESETZ 200-05 (1999); Gottfried Leder, *50 Jahre Grundgesetz: Noch immer Anlass zu Verfassungspatriotismus?*, STIMMEN DER ZEIT (1999); PETER BADURA, ZUR RECHTFERTIGUNG DES FOEDERALISTISCHEN PRINZIPIES UND ZUM SUBSIDIARITÄTSPRINZIP, BITBURGER GESPRÄCHE (1999); DIETER FRICKE, ZUM KOOPERATIVEN FOEDERALISMUS; REFERAT BEI DEN 36. BITBURGER GESPRÄCHEN (1999); DETLEF MERTEN, REFORM DES FOEDERALISMUS IN GESETZGEBUNG UND VERWALTUNG, REFERAT BEI DEN 36. BITBURGER GESPRÄCHEN (1999); Matthias Mähring, *Die Mitwirkung des Bundesrates und der Länder, in BUNDESRAT UND EUROPÄISCHE UNION* 13 (1997); HANDBUCH DES BUNDESRATES FÜR DAS GESCHÄFTSJAHR (1998-1999).

tional states were seen in public, *e.g.*, the red eagle of Brandenburg, and the green-white flag of Saxony. Upon their accession to the Basic Law in 1990, they re-established themselves as states of the Federal Republic.

For decades, a continuous debate on reforming German federalism has been going on. The main concern has been the ever-increasing trend towards more unitarian structures, caused, in particular, by the implications of the principles of the “social state” and social legislation. I may, for example, refer to the issue of provisions for the millions of widows and surviving dependants of the war victims, for the twelve million people driven from their homes in the eastern territories of the former Reich, from Czechoslovakia—3.5 millions alone from there—Poland, Hungary, and Yugoslavia by the whole ethnic purification of the time, and seeking refuge in West Germany. You could not establish the social network at different levels varying from land to land but had to establish a uniform federal level.

The main issues of this reform debate over the last decades have involved the financial provisions of the Basic Law—obviously a core element of each and every federal constitution. In particular, the debate involved reforming the interlinked system of apportioning revenues and expenditures between the federation and the Länder, which in 1969 had replaced the principal system of separation. Other important considerations have been the issue of financial equalization as between the Länder by re-orientation of its allocative and distributive goals, reforms in the area of the so-called “Joint tasks,”³ the system of mixed financing, of granting more taxation powers to the Länder, involving another transfer of federal legislative powers to them beyond the result brought about by the constitutional amendment of October 1994. Whether the replacement of the soft clause of Article 72, section 2, number 3 by the new “necessity” clause of Article 72, section 2 will result in reducing the federation’s use of its concurrent legislative powers is yet to be determined. We will also have to see whether the Land legislatures will resort to the new norm control procedure available now for such a purpose.⁴

I.

Turning to the effects of European integration on the German federal system, one has to start from the original text of Article 24, section 1, which in December of 1992 was replaced by the new Article 23.

Article 24, section 1 authorized the transfer to international organizations of sovereign powers of the federation as well as of the Länder. Although such transfers might have changed the allocation of these powers as prescribed in the constitution, no constitutional amendment was required for such transfer of powers, provided, according to decisions of the Federal Constitutional Court, that such transfers did not surrender the

3. GRUNDGESETZ [Constitution] [GG] art. 91a-b (F.R.G.).

4. See GG art. 93, § 1, no. 2a.

identity of the Basic Law by undermining its essential structures, such as the principles underlying fundamental rights and liberties.⁵

II.

A. From the very beginning, the States have realized the possible diminishing effect on their status that any transfer of *their* substantial powers would eventually bring about, and might result in a further pull towards unitarian solutions draining more and more of their powers. Of particular concern to them, for example, were the financial implications of such transfer and of consequent measures of the Community. Under the German Constitution the Federation and the States, as a rule, shall separately finance the discharge of their respective responsibilities insofar as the Basic Law does not otherwise provide.⁶

In addition to clarification of the financial consequences, the States pursued four aims:

- (1) to receive sufficient and prompt information in matters of European integration covering the Community level as well as the federal level;
- (2) to participate in the decision-making process at the *federal* level;
- (3) to participate, possibly, in the decision-making process at the *Community* level, and
- (4) to adopt a domestic legal instrument formalizing the roles of the Federation and the States in these matters.

In the context of Germany's constitutional framework, it turned out that these requests could only be made operational in practice if channeled through the Federal Council. The Federal Council is a federal organ, representing the States, composed of members of their governments, with voting powers roughly allocated according to their respective populations.

The States, nevertheless, have established coordinating bodies as among themselves, such as the Conferences of their prime ministers and of their ministers of various departments (cultural affairs, justice, transport, etc.). After the EU-Treaty entered into force, they established the Conference of their Ministers for European Affairs, where the political practice is to work out their opinions and attitudes within the Federal Council by unanimous consent. The Federal Council, on the other hand, makes its decisions by majority rule. There exist, moreover, at various levels, hundreds of common bodies composed of federal and State executives as well as interstate bodies engaged in activities such as consulting, planning, etc. These common bodies are the very fraternities or brotherhoods of parallel departments constantly consulting and communicating with each other, as their daily bread.

5. See, e.g., BVerfGE 37, 271 (279); BVerfGE 58, 1 (30); BVerfGE 73, 339.

6. See GG art. 104(a).

B. After the entry into force of the Treaty on the European Coal and Steel Community, cooperation between the Federation and the States started on the level of information. The Federal Government, according to Article 53 of the Basic Law, has a general obligation to keep the Federal Council informed about the conduct of its affairs.

Article 2 of the federal law of July 27, 1957, consenting to the Treaties of Rome, specified this as a continuous obligation with respect to the developments within the Councils of Ministers of both communities—a provision which is still in operation. Up to the present time, there are about 600 topics per year on the agenda of the Federal Council in matters of European integration, amounting to roughly one third of its business. Also in 1957, the Federal Council established its Special Committee on European Integration which considers legislative projects of the communities. It became a permanent committee of the Federal Council in 1965. Since January 1967, this flow of information has been supplemented by biannual integration reports by the Federal Government to be discussed within this Committee.

Between 1963 and 1986, both sides at various occasions undertook consultations to coordinate and harmonize their interests in representing German positions on the community level. These efforts culminated in the Federal Chancellor's letter of September 1979 to the States, accepted by their prime ministers, assuring them that the Federation in matters concerning the *exclusive* legislative powers of the States will endeavor to come to agreed positions, to try to submit these to the fullest extent possible in negotiations or deliberations on the community level, and to get them accepted there. The Federation would deviate from the position of the States only for peremptory compelling reasons of integration policy and would inform the states of its reasons for doing so in such matters. The Federation, upon request by the States, would include two agents of the States within the German representation at the deliberating bodies of the EC-Commission or Council.

This accord has been acted upon since 1980. In 1986, on the occasion of the Federal Council's assent to the law approving the Single European Act, the States requested the formalization of this procedure by law. There were, nevertheless, serious constitutional controversies even within the States, in particular on the question of whether the functions of the Federal Council in this context could be delegated to its Committee on European Integration without amending the Constitution. While such a solution was not as yet provided for in the law on the Single European Act, it did formalize the practice agreed upon since 1979. It was, moreover, specified by a formal agreement of December 17, 1987, between both sides.

III.

The most recent step in the attempt to coordinate and harmonize federal and state policy on European integration was taken on the occasion

of the approval of the Treaty establishing the European Union by federal legislation of February 2, 1992.

This was accomplished primarily by amending the Basic Law. The main amendments are the following, and most of them are contained in Article 23:

1. With a view to establishing a united Europe . . . Germany shall participate in the development of the European Union, which is committed to democratic, rule-of-law, social and federal principles as well as the principle of subsidiarity, and ensures protection of basic rights comparable in substance to [the protection] afforded by [the] Basic Law.⁷

This has been called the “structural clause,” meaning that Germany has a constitutional obligation to participate only in a European Union which follows these principles. To this end, the Federation may transfer sovereign powers by law, which requires the assent of the Federal Council.

2. “The establishment of the European Union as well as amendments to its statutory foundations and comparable regulations which amend or supplement the content of [the] Basic Law or make such amendments or supplements possible shall [require the assent by law corresponding to constitutional amendments].”⁸ That is, the Basic Law requires the assent of a two-thirds majority in both the Federal Parliament and the Federal Council. The so-called “eternity clause”⁹ must not be encroached upon thereby. Moreover, Article 50, which defines the general functions of the Federal Council, has been amended to require state participation through the Federal Council in matters concerning the European Union. This makes it clear that state participation will be channelled formally through the Federal Council. The Federal Government shall inform the Federal Council (and the Federal Parliament) comprehensively and promptly on matters concerning the European Union.

3. “The [Federal Council] shall be involved in the decision-making process of the Federation in so far as it would have to be involved in a corresponding internal measure or in so far as the [States] would be internally responsible.”¹⁰

4. Where in an area in which the Federation has exclusive legislative jurisdiction the interests of the [States] are affected or where in other respects the Federation has the right to legislate, the Federal Government shall take into account the opinion of the [Federal Council]. Where essentially the legislative powers of the [States], the establishment of their authorities or their administrative procedures are affected, the opinion of

7. GG art. 23, § 1.

8. *Id.*

9. *See* GG art. 79, § 3.

10. GG art. 23, § 4.

the [Federal Council] shall be given due consideration in the decision-making process of the Federation; in this connection the responsibility of the Federation for the [Federal Republic of Germany] as a whole shall be maintained. In matters which may lead to expenditure increases or revenue cuts for the Federation, the approval of the Federal Government shall be necessary.¹¹

5. When legislative powers *exclusive* to the *States* are essentially affected, the exercise of the rights belonging to the Federal Republic of Germany as a Member state of the European Union shall be delegated to a representative of the States designated by the Federal Council. "Those rights shall be exercised with the participation of and in agreement with the Federal Government; in this connection the responsibility of the Federation for the [Federal Republic of Germany] as a whole shall be maintained."¹²

For matters concerning the European Union, the Federal Council may form (and has done so already) a Chamber for European Affairs whose decisions shall be considered as decisions of the Federal Council itself. In this chamber, as it is with the normal procedures of the Federal Council, each State shall have at least three votes: States with more than two million inhabitants shall have four; those with more than six million inhabitants, five; and those with more than seven million inhabitants, six votes. The votes of each State may be cast only as a block vote and only by members present or their alternates.

Details regarding the provisions of Article 23, sections 4 and 6 shall be subject of a law requiring the assent of the Federal Council.

IV.

From the detailed implementation of this constitutional amendment by the law of March 12, 1993, on the cooperation between the Federation and the States in matters of the European Union, let me single out a few elements.

Before determining internally the German position for negotiations at the level of the European Union, the Federal Government shall give the Federal Council in good time an opportunity to state its opinion insofar as interests of the States are concerned.

Where the Federal Council would have to be involved in a corresponding domestic measure, or where the States internally would be responsible, the Federal Government has to include representatives of the States nominated by the Federal Council in the *internal* deliberations for determining the German negotiating position.

If the interests of the States are involved in areas of the *Federation's* exclusive or concurrent legislative powers, the Federal Government is re-

11. GG art. 23, § 5.

12. GG art. 23, § 6.

quired to take into account the position of the Federal Council when determining the German negotiating position on the Union level.

If a project at the Union level in its central points concerns the internal legislative powers of the *States*, and the Federation does not dispose of legislative powers in this area or the project seriously concerns the establishment of State authorities or their administrative procedures, then the opinion of the Federal Council shall be controlling in determining the German negotiating position by the Federal Government if attempts to harmonize the respective positions have been abortive *and* the Federal Council's opinion has been taken by a *two-thirds* majority vote. Even in such cases, however, the Federal Government may deviate from the Federal Council's position for the sake of preserving its responsibility for the Federal Republic as a whole ("gesamtstaatliche Verantwortung") including questions of foreign, defense, and integration policies.

Before assenting to projects to be based on Article 235 of the EEC-Treaty, the Federal Government has to ensure the agreement of the Federal Council as far as its consent under domestic law will be required or the States internally are competent.

With regard to Union projects in which the Federal Council would have to participate in a corresponding domestic measure, or the States would be internally competent, or their essential interests will be otherwise concerned, the Federal Government on request shall include representatives of the States, to the extent possible, in the German representation at the negotiations within the consultative bodies of the European Commission or Council. The conduct of the negotiations on the German side lies with the Federal Government; with its consent the representatives of the States may convey statements in the negotiations.

With regard to Union projects vitally affecting exclusive legislative powers of the States, the Federal Government shall assign the task of conducting Germany's negotiations within the consultative bodies of the EU-Commission or Council and in meetings of the EU-Council in its composition of the ministers of the EU-Member States, to a representative of the German States. The exercise of the rights by this representative shall be performed under participation of and in harmony with the representative of the Federal Government. This procedure will not apply for rights which Germany holds in *presiding* over the Council of Ministers.

The law on cooperation of March 12, 1993, does not cover areas dealing with the common foreign and security policies of the European Union. There is some controversy between the Federal Government and the States as to whether it will apply to the so-called "mixed decisions" by the Council and the representatives of the Governments of the Member States assembled in the Council.

Under Article 8 of the law of March 12, 1993, the States may maintain with the institutions of the European Union permanent communication bureaus, not enjoying diplomatic status.

The law of March 12, 1993, moreover, has been supplemented by a formal agreement of October 29, 1993, between the Federal Government and the Governments of the German States.¹³

V.

The EEC-Treaty in Article 198 provides for the Committee of the Regions, as is well known. The initiative for its establishment was taken by the German Government following an outspoken desire by the German States. Through the Committee of the Regions certain categories of regional and local territorial bodies of the Member States for the first time have obtained the institutionalized opportunity to represent their interests in the deliberative processes of the European Union. Of particular relevance here will be such things as regulation of the structural funds, the establishment of a cohesion fund, the implementation of regional funds, the building of European networks, and the promotion and support of projects of general education, culture, and health. The Committee may issue consultative opinions on its own initiative in matters where it considers such action appropriate.¹⁴ Its opinions are, as is well known, not binding, whereas the German states had preferred a representative body empowered to participate in binding decision-making processes of the Community.

The German Law on Cooperation of March 12, 1993, mentioned before, provides that with regard to projects of the European Union, the right of municipalities and their associations to regulate matters of the local communities shall be observed and their interests shall be protected. For their representation in the Committee of the Regions, the Federal Government shall propose to the EU-Council of Ministers the persons to be nominated by the States. The States ensure that the three representatives shall be elected on the proposal of the head Associations of the local communities.

VI.

In view of the aims and efforts of the German States to participate in the deliberative and decision-making processes at the Federal as well as at the Community level (within the respective German representation), it is no surprise that they have urged the Federal Government to try to insert into the Treaty on the European Union the "principle of subsidiarity", which on British and German initiatives was indeed adopted at Maastricht. While this is not the place to dive into the depths of this principle, its judicial interpretation and application by the Court of Justice eventually will become decisive and controlling. Its justiciability, expressly agreed upon by the Council of Edinburgh of December 1992, the Interinstitutional Agreement of October 25, 1993, and in the Protocol on

13. Bundesanzeiger no. 226, Dec. 2, 1993.

14. See EEC Treaty art. 198c.

the application of the principles of subsidiarity and proportionality attached to the Treaty of Amsterdam of October 2, 1997, may turn out to be a very thorny task. I trust that the Court will find its appropriate criteria and standards—bearing in mind also that within an ever-closer union among the peoples of Europe “decisions are taken as closely as possible to the citizens.”¹⁵

It has been estimated that more than 100 regulations of the European Community would not have passed the test of the principle of subsidiarity. The German Federal Constitutional Court has stated that the Federal Government will have to exert its influence in respecting this principle. The German Länder, nevertheless, will not be able to derive via the principle of subsidiarity new competences of their own.

VII.

The development of European integration undoubtedly has diminished the legislative powers of the States, while it has strengthened the position of the Federal Council with regard to the position of the State Governments within contemporary German federalism. This has seriously affected its balance of powers. The States have tried to compensate for this loss by endeavouring, as I tried to point out before, and by gaining a voice in the deliberative and decision-making processes at the Federal and EU-levels. The losers of this development undoubtedly were the state parliaments. Will their representatives in the future just be part-time or even leisure-time parliamentarians?

That is why some observers speak of today's *executive federalism*. The essence of German federalism, whether it is called cooperative, competitive, executive federalism or whatever, is the continuous attempt to preserve the political and cultural identity of the state entities of the Federation, and to infuse the wealth of ideas of sixteen states into the political process, competitive as they may be, undoubtedly with possibilities to delay, to block and even to obstruct decisions and policies at the federal level. The Federal Republic's vitality, nevertheless, rests on the Länder and their peoples. Its political process is characterized by a high degree of interpenetration and interlocking of the political and societal levels of the Federation and the States. It is a flexible system of distributing political power and a device to settle political conflicts through legally ordered procedures which up to now has provided remarkable stability. In the reform debate, mentioned before, passionate as it is, with a case on the financial equalization issue pending before the Federal Constitutional Court, no voice is heard to abolish federalism in favour of a unitary political system.

In comparing Italy and Germany, Romano Prodi, the new President of the Commission of the European Community, very recently has called them the countries of “the thousand cities,” alluding to the wealth of

15. Compare TEU tit. 1, art. A § 2 and art. B § 2, with EC Treaty art. 3b § 2.

their traditional cultural multiplicity, adding that it must be the task of the Political Union to reaffirm, not to destroy, these values.

They are part of Europe's cultural heritage. Article 6 of the EU-Treaty in the version of the Treaty of Amsterdam providing that the Union shall be based on the common principles of liberal democracy and the rule of law respecting the national identity of the Member States should furnish the political and legal foundations for maintaining this heritage.

