



Japan Local Government Centre, London

Monthly Report February 2011 (Germany) – Influence of court action on local government

Germany's system of government, including local self-government, is built on the premise of a codified legal system in the tradition of Roman law. For all state actions and all relationships between actors the law is the basis. The guardians of the law are the courts, and in Germany, there is a special court system for administrative matters. Furthermore, it is usual practice that different actors use court procedures to solve disputes or contested issues.

In German law, based on the codified legal system in which a constitution is of a higher order than an ordinary law, the concept exists of testing the compliance of an ordinary law against the constitutional law in a juridical review or 'norm control lawsuit' (Normenkontrollklage). All of the *Länder* (with the exception of Schleswig-Holstein, which has transferred this task to the Federal Constitutional Court) have a Constitutional Court. Thus it is not rare that local government will go to court over issues of finance or other issues such as reorganisation of local government, and court decisions increasingly exert a strong influence over legislative and policy matters. In some circles there is a view that indeed court judgements are restricting the scope of political actions, both at *Länder* and at federal level.

The kind of contested issues where court decisions have wide-ranging consequences are demonstrated by the following cases in two *Länder*, concerning both completed and ongoing cases.

Two court cases in Rhineland-Palatinate

Towards the end of 2010, two court decisions which will have wide-ranging consequences for local government as well as for the Land government were pronounced. One concerns the fact that the Constitutional Court Rhineland Palatinate has declared it unconstitutional that school transport of pupils to a particular type of schools is free, while transport to other types of schools carries a contribution. Although the court made it clear that asking for a contribution to school transport for all pupils would be constitutionally possible, the Association of Cities in Rhineland-Palatinate regards it as extremely unlikely that such a measure will be introduced. Instead it anticipates further burdens on counties and independent cities, which are already deep in the red in relation to pupil transport. It will be therefore incumbent on the *Land* government – as the legislator placing those burdens on local government – to ensure sufficient transfer funding for this task.

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Another case is going to be of even more fundamental importance. The Highest Administrative Court (Oberverwaltungsgericht, OVG) has referred a court case which was initiated by one county regarding the calculation of grants according to the current financial equalisation law against the *Land* to the Constitutional Court on the grounds that in its opinion, the current mechanism does not constitute adequate financial provision for the county in regards to formula-based grants. The Highest Administrative Court holds that 'adequate financial provision' entails a fair compensation for the increase in social welfare-related payments which should be reflected in a proportional increase in formula grant which covers at least half of the percentage increase in social welfare payments. This court case will have wider repercussions and not only concern this one case, as it touches on the fundamental question of how local government financial equalisation is regulated, and to what extent the current practice conforms to the constitutional principles of 'appropriateness of financial provision' and the 'principle of proportionality of distribution'. Therefore the decisions of the Constitutional Court will have a profound influence on devising the next financial equalisation framework in Rhineland-Palatinate.

One court case in North-Rhine Westphalia

In North-Rhine Westphalia, another important court case is just beginning. It concerns a law from 2010 which details financial contributions from local government to the *Land* with the purpose of paying for the costs of German reunification. Within this law, the NRW government stipulates that 800m Euro annually are needed to pay off the borrowing undertaken at the time of reunification, up to the year 2019. The law demands contribution from the local authorities over and above what they are currently paying to the total sum of 2bn Euros. The municipalities have banded together to deplore the in their view overly high burden on local government and to demand a reasonable and transparent accounting of the remaining burden. 91 municipalities are signatories to a demand for judicial review initiated on February 7, with 142 further municipalities supporting it, and the counties have also declared their solidarity. 'Considering the already dreadful financial situation of local government, the way the *Land* government is calculating the distribution of the remaining debt repayment is completely unacceptable as it renders the efforts by local authorities to balance their books useless. We are taking a stand against the overly high proportion local authorities are supposed to bear. Changing the way calculations are made 20 years after reunification is a violation of the law', according to a joint press release by the heads of the Association of Cities, the Association of Municipalities representing the smaller authorities, and the Association of Counties in NRW. Their claim is that the *Land* is now also receiving funding through the financial equalisation scheme (between all the *Länder*) and should therefore not need to hit local authorities this hard.

As the government of the Land has meanwhile changed, the current administration has declared a moratorium on the collection of monies under this law, until the

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constitutional court has come to a verdict. This decision was welcomed by the local government community.

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