

**Rule of Law Program
South East Europe**

Dr. iur. Stefanie Ricarda Roos

www.kas.de/rspsoe

**Constitutions, Constitutional Courts
and
Constitutional Interpretation
at the Interface of Law and Politics**

- Workshop with Professor Dr. Dieter Grimm -

Sofia (Bulgaria), November 10th, 2007

Dear Professor Grimm and Professor
Mishkova,

Your Excellency, Ambassador Geier,

Esteemed experts and CAS-fellows from the
countries of South Eastern Europe,

Distinguished guests,

Ladies and Gentlemen,

It is a great honor and a personal pleasure to welcome you on behalf of both the Centre for Advanced Study Sofia and the Rule of Law Program South East Europe of the Konrad-Adenauer-Stiftung, and to open our workshop with Professor Dr. Dieter Grimm on "Constitutions, Constitutional Courts and Constitutional Interpretations at the Interface of Law and Politics".

My name is Stefanie Ricarda Roos. I am the director of the Konrad-Adenauer-Stiftung's Rule of Law Program South East Europe.

There are several reasons why I feel privileged to be able to welcome you to this workshop on what I perceive to be a topic of utmost importance:

The first reason goes almost without saying: Being the director of a rule of law program which is sponsored by a German foundation, and being a German jurist by training, I feel honored to introduce the lecturer of our workshop who is one of the most distinguished German lawyers and experts on constitutional law and constitutional jurisprudence, Professor Dr. Dieter Grimm. Professor Grimm is not only a distinguished professor of public law and the former rector of the Wissenschaftskolleg Berlin, but he also served as a justice on the German Federal Constitutional Court. For this reason, I cannot think of anybody else who would be more predestined to present a lecture on our workshop's topic than Professor Grimm. He approaches the topic from both the academic and the practitioner's perspective which makes his presentation all the more interesting.

Professor Grimm studied Jurisprudence and Political Science in Frankfurt, Freiburg, Berlin, Paris, and Boston. He completed both juridical state examinations, holds a Master of Laws from Harvard University, and earned his Dr. jur. at Frankfurt University with a thesis on "Solidarity as a Legal Prin-

ple". Professor Grimm earned his habilitation in German and Foreign Public Law, Modern Legal and Constitutional History, Legal Theory, and Political Science.

From 1967 to 1979, Professor Grimm was a Research Lecturer at the Max Planck Institute for European Legal History in Frankfurt and, from 1979 on, Professor for Public Law at Bielefeld University, where he was also Director of the Center for Interdisciplinary Research.

From 1987 to 1999, Professor Grimm was, as I already mentioned, a Justice on the German Federal Constitutional Court in the First Senate. In that capacity he was responsible for the fields of freedom of opinion, the press, and broadcasting; freedom of assembly; and freedom of association, personal rights, data protection, and commercial law. In 1996, Professor Grimm was appointed Distinguished Member of the Global Law Faculty at New York University Law School.

In January of 2000, Professor Grimm was appointed Professor of Public Law at the Humboldt University of Berlin and a Permanent Fellow of the Wissenschaftskolleg zu Berlin. From October 2001 until March 2007 he was also the Rector of the Wissenschaftskolleg zu Berlin where his ties with the Centre for Advanced Study Sofia were created.

Professor Grimm, on behalf of the organizers of this workshop, I would like to thank you very much for agreeing to join us here today. We know how busy your schedule is, and deeply appreciate your participation.

So far I have mentioned the most important but not the only reason for feeling honored to welcome you to our workshop. The second reason relates to my current position as the director of a regional rule of law program in South East Europe. In that role, I

have gained first-hand experience with the rather young constitutional courts in South East Europe, and the manner in which their jurisprudence is perceived within their respective countries. Although the Constitutional Courts of every country in South Eastern Europe have the mandate to safeguard the constitution, *inter alia* by controlling the legislative branch through judicial review, they also have a rather short history of doing this in comparison to, for example, the Constitutional Court of Germany. From personal discussions with justices from the Constitutional Courts in South East Europe, judges from ordinary courts, legal NGOs, and the media, to name but few, I have received the impression that the Constitutional Courts are still facing an acceptance problem when it comes to judicial review; that they still have to find and establish their proper role within the legal and political systems of their respective countries.

The institution of constitutional adjudication through constitutional courts is not self-evident in a democracy. There are several democratic states in which this institution does not exist, such as Great Britain and the Scandinavian States which have other means to protect civic rights. Constitutional adjudication through constitutional courts exists primarily in states which have overcome a dictatorship. This is true for the new democracies in Eastern and South Eastern Europe as well as in Africa and Latin America, but also in Germany.

Among the responsibilities of the German Constitutional Court, which arise as a result of the horrible experiences that occurred in Germany during the dictatorship in the years 1933 to 1945, is the responsibility of the Constitutional Court to ensure that the legislature does not go beyond the constitutional framework within which it is supposed to act, *i.e.* to guarantee the supremacy of the constitution *vis a vis* the legislature.

Dr. iur. Stefanie Ricarda Roos

Leiterin Rechtsstaatsprogramm
Südosteuropa/
Director Rule of Law Program
South East Europe

Konrad-Adenauer-Stiftung e.V.
Str. Sf. Elefterie 27
RO - 050524 Bucharest,
ROMANIA

Tel / Fax: ++ 40-21-410 8235

stefanie.roos@kas.de

www.kas.de/rspsoe

Konrad-Adenauer-Stiftung e.V

This leads me to the topic of our workshop, "Constitutions, Constitutional Courts and Constitutional Interpretation at the Interface of Law and Politics". The topic itself already implies possibly the greatest challenge that Constitutional Courts (or, rather, the justices of a Constitutional Court) are facing in their work: the challenge of, on the one hand, fulfilling their mandate of safeguarding the constitution and protecting society from unconstitutional public actions, in particular legislative acts, while, on the other hand, preventing themselves from turning into a "supreme legislature".

In Germany, the Federal Constitutional Court has been reproached repeatedly for having done the latter, *i.e.* for having taken the place of the legislature, and having turned into a so-called "Obergesetzgeber", a "supreme legislature". This accusation has a rather long tradition. In the second half of the 1970s, for example, the judgments of the Constitutional Court on the legal amendments regarding the right to refuse military service (*Urteile zur liberaleren Wehrdienstverweigerungs-Novelle*) or on the reform of the law regarding abortion (*Abtreibungsreform*) have caused widespread outrage. The Constitutional Court has been accused of playing politics, and of having put the legislature in chains. This criticism has been raised frequently even in the last few years with regard to several decisions which I am sure Professor Grimm can explain much better than I can.

Those who defended the Constitutional Court suggested that it has in many cases taken the place of the legislature not so much out of the desire to play politics, but out of the failure of the legislature to perform its proper function. These defenders appear to suggest that in cases where the parliament cannot agree on a certain law or legal provisions, they refer the case to the Constitutional Court for the court to decide. The judgments on the Maastricht-Treaty or

the out-of-area deployment of the German army, are but two examples cited by the Constitutional Court's defenders.

Thus, the questions arise: What should and can the proper role of a Constitutional Court be with regard to its power of judicial review? How far can a Constitutional Court go without being rightfully criticised for undermining legislative power and undemocratically restricting political functions? What is the role and responsibility of politics in this debate? And one could even further ask whether constitutional jurisprudence through Constitutional Courts, in particular judicial review, isn't a violation of the separation of powers principle as some critics argue. Isn't it the right of a Constitutional Court to declare a law fundamentally undemocratic when it interferes with the supremacy of the majority of the people even though the law was enacted by the parliament which is supposed to represent the people?

These are only a few of many questions which we can and should discuss together with Professor Grimm this afternoon.

Since you all came to listen to Professor Grimm, and not to me, I will stop at this point, and pass the microphone to Professor Grimm. Before I do so, however, I want to extend my wishes that we all enjoy an interesting and enriching workshop which will contribute to a better understanding of the proper role of constitutional courts and the limitations of constitutional interpretation.

Last, but not least, I would like to express a special thank you to the Centre for Advanced Study Sofia, in particular its director, Professor Mishkova, for having organized this workshop.

Professor Grimm, the floor is yours!

Dr. iur. Stefanie Ricarda Roos

Leiterin Rechtsstaatsprogramm
Südosteuropa/
Director Rule of Law Program
South East Europe

Konrad-Adenauer-Stiftung e.V.
Str. Sf. Elefterie 27
RO - 050524 Bucharest,
ROMANIA

Tel / Fax: ++ 40-21-410 8235

stefanie.roos@kas.de

www.kas.de/rspsoe

Konrad-Adenauer-Stiftung e.V