CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No : 500-05-065031-013

SUPERIOR COURT

KEITH OWEN HENDERSON

Petitioner

v.

ATTORNEY GENERAL OF QUEBEC

Respondent

&

ATTORNEY GENERAL OF CANADA

Mis en cause

et als

NOTICE OF PRODUCTION OF AN EXPERT REPORT
(art. 402.1 *Code of Civil Procedures*, art. 2809 *Civil Code of Quebec*)

TO:

Me Brent D. Tyler Edifice " La Caserne " 83 St-Paul West Montreal, Quebec H2Y 1Z1	Attorney for Petitioner Keith Owen Henderson
Me Jean-Yves Bernard Bernard, Roy (Justice Québec) 1 Notre-Dame Est, Suite 8.00 Montreal, Quebec H2Y 1Z1	Attorney for Respondent Attorney General of Quebec

TAKE NOTICE that the undersigned attorneys for the Mis en cause Attorney General of Canada have filed in the court record the Expert Report of Dr Dirk Hanschel.

Copy of the said report is attached to the present notice, along with Dr Hanschel's Curriculum vitae.

DO GOVERN YOURSELVES ACCORDINGLY,

MONTREAL, this 16th day of October, 2013

(s) Attorney General of Canada

Procureur général du Canada /
Attorney General of Canada
Mes Claude Joyal, Warren Newman,
Dominique Guimond et Ian Demers
Attorneys for the Mis en cause

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PROCUREUR GÉNÉRAL DU CANADA
ATTORNEY GENERAL OF CANADA

Dr. Dirk Hanschel
Reader
School of Law
University of Aberdeen, UK

Aberdeen, 11 October 2013

Expert Brief on Certain Aspects regarding the

Relationship of German *Länder* Constitutions to the Federal Constitution

A. SUBMISSION

I have been asked by the Attorney-General of Canada and have undertaken to draft a report providing information on the effect of provisions of state constitutions of the *Länder*, that, in one form or another, recognize the principle that all political power resides in "the people" or that "the people" have the right to abolish, alter or to reconstitute their governments.

As part of the report, I shall also provide an opinion on the effect of such provisions on the legal right of a *Land* to alter the relationship of that state to Germany; that is, on the authority of the constitutional or Basic Law of Germany and national law relative to such acts or decisions of the *Länder* governments as may be claimed to represent the will of the sovereign people of any given *Land*.

I understand that these questions are put in connection with the issue of the constitutional validity and legal scope or effectiveness, in Canada, of an Act respecting the exercise of the fundamental rights and prerogatives of the Quebec people and the Quebec State (Bill 99).

B. OVERVIEW OF THE REPORT

The report is divided into three sections. Section 1 lays out the overall constitutional framework of the German federal state which constrains the scope for constitutional autonomy of the *Länder* in several ways, in particular through its distribution of powers, the hierarchy of norms, the principle of preemption as well as the homogeneity principle. Section 2 deals with the exercise of constitutional autonomy of the *Länder* within that framework, in particular by looking at expressions of popular sovereignty, rules for constitutional amendment and on self-determination in their constitutions. Section 3 concludes by asserting

in essence that the German federation provides no convincing evidence that a *Land* people might determine its relationship towards the federal state on its own behalf, without safeguarding the permanent federalist conception provided by the Basic Law which in turn expresses the *pouvoir constituant* of the German people as a whole.

C. STRUCTURE OF THE REPORT

I. The overall constitutional framework of the German federal state

1. The basic notion of federalism under the German Basic Law
2. Statehood of the *Länder*
3. Distribution of powers, hierarchy of norms and preemption
4. The homogeneity principle as a limitation to constitutional autonomy of the *Länder*
5. Restrictions on territorital reforms
6. *Länder* participation in changes to the Basic Law
7. The principle of federal loyalty as an expansion of *Länder* powers?
8. Right to or prohibition of secession?

II. The exercise of constitutional autonomy by the *Länder* within that framework

1. Remaining scope for constitutional autonomy
2. An overview of typical expressions of constitutional autonomy
3. Particular aspects of constitutional autonomy
   a) Expressions of popular sovereignty
   b) Rules for constitutional amendment
   c) Reliance on the right to self-determination?

III. Conclusions

D. REPORT

I. The overall constitutional framework of the German federal state

1. The basic notion of federalism under the German Basic Law

(1) According to Art. 20 (1) of the Basic Law[1] "the Federal Republic of Germany is a "democratic and social federal state".[2] The two levels of government of the federal state are the Federation and the 16 German states (*Länder*[3]) as listed in the Preamble of the Basic Law.[4] The German Federal Constitutional Court adheres to a two-tiered federalist notion, whereby the Federation results from the unification of the *Länder*, performs central functions of government and hence constitutes the federal state.[5] The Court distinguishes between three types of legal interaction, namely amongst federal institutions, between federal and *Länder* institutions and amongst *Länder* institutions.[6] As members of the federal state, the *Länder* are equal to each other; hence the German state adheres to the principle of symmetric federalism.[7] By contrast, the relationship between the federal state and the *Länder* as organized by the Basic Law is characterized, as a matter of principle, by the superiority of the former.[8] The Court articulates this very clearly by attributing the so-called *Kompetenz-Kompetenz*, i.e. the power to create powers, to the federal state.[9] Equality of the federal state and the *Länder* may only be asserted in fields that have not been organized by the Basic Law.[10] This is the crucial start and end point for this analysis as it determines that the *Länder* lack the legal authority to depart from the federal constitutional framework of which they constitute an integral part.

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[1] Basic Law (*Grundgesetz*, hereafter "GG"), here and thereafter as translated by Tomuschat/Currie (2010), available at https://www.btg-bestellservice.de/pdf/80201000.pdf (last accessed on 7 October 2013).
[2] See Pieroth, Art. 20, para. 16 et seq.; Menzel (2002), p. 147 et seq.
[3] This correct German spelling has been standardized throughout this report even in direct quotations that might spell the term as "*Laender*" instead.
[4] See BVerfGE 6, 309 (340).
[5] See BverfGE 13, 54 (77 f.); for comparison see the three-tiered notion of German federalism developed by Kelsen (1927), p. 130 et seq. which elucidates the different functions of the federal state vis-à-vis the *Länder*; see furthermore Isensee (2008), § 126, para. 90.
[6] BVerfGE 13, 54 (78); Pieroth (2012), Art. 20, para. 17.
[7] Pieroth (2012), Art. 20, para. 17.
[8] See BVerfGE 1, 14 (51); 13, 54 (78); somewhat more cautious Bartlsperger (2008), § 128, para. 45.
[9] BVerfGE 13, 54 (78 et seq.)
[10] BVerfGE 13, 54 (78 et seq.)

2. Statehood of the *Länder*

(2) This finding does not conflict with the notion that the *Länder* are themselves considered as states. According to the three-elements-doctrine (*Drei-Elemente-Lehre*) developed by Georg Jellinek, statehood consists of state territory, state people and state power.[11] The Federal Constitutional Court has reiterated that these elements are fulfilled not only by the federal state itself, but also by its component parts, the *Länder*.[12] As the Court stated in its decision *Niedersächsisches Besoldungsgesetz*: "...It is a feature of the federation that the overall federal state and its member states both possess the quality of states".[13] While the exercise of governmental powers is split between these two levels of statehood, the degree to which the *Länder* may exercise their own statehood and constitutional autonomy [14] (or constitutional supremacy, *Verfassungshoheit*[15]) is limited by the Basic Law.[16]

(3) Admittedly, such autonomy or supremacy is hard to conceive without popular sovereignty.[17] However, presupposing that sovereignty can be split, its substance on the *Länder* level, whilst not being derived from the federal state, is nevertheless confined to a degree of constitutional autonomy within the overarching framework of the Basic Law. Accordingly, the Federal Constitutional Court stated that "the *Länder* are, as members of the federal state, states with their own sovereignty, which whilst limited in substance is not derived from the federal state, but recognized by it".[18]

(4) Clearly, the relationship amongst the *Länder* or between the *Länder* and the federal state cannot be compared to the relationship of sovereign nations under international law. Instead, as the Court has stated, the federal-*Land* relationship is solely governed by the Basic Law, i.e. by federal constitutional law.[19] The Basic Law in turn provides

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[11] Jellinek, Allgemeine Staatslehre (1905), p. 381 et seq.; see furthermore Hanschel (2012), p. 296 with further references.
[12] BVerfGE 1, 14 (34); 36, 342 (360); BVerfGE 60, 175 (207); for a more critical account see Menzel (2002), p. 135 et seq.
[13] BVerfGE 36, 42 (360), own translation.
[14] See Oeter (1997), p. 79, who even considers the constitutional autonomy to be the core of *Länder* statehood.
[15] See Dittmann (2008), § 127, para. 9 et seq.
[16] Pieroth (2012), Art. 20, para. 17; Degenhart (2012), para. 7.
[17] See Oeter (1997), p. 79.
[18] See BVerfGE 1, 14 (34), own translation.
[19] BVerfGE 34, 216 (231).

a notion of popular sovereignty which emanates from the German people as a whole and may, apart from popular votes including referenda[20], be exercised by the election of representatives both at the federal and at the *Länder* levels (see Art. 20 (2) GG).[21]

3. Distribution of powers, hierarchy of norms and preemption

(5) The basic distribution of powers is determined by Art. 30 GG which affirms that "[e]xcept as otherwise provided or permitted by this Basic Law, the exercise of State powers and the discharge of State functions is a matter for the *Länder*".[22] Subsequent provisions list federal powers, in particular as regards legislation (Art. 70 et seq. GG) and the executive (Art. 83 et seq. GG), resulting in a clear domination of federal legislative powers, which are further strengthened by supremacy and preeemption rules.

(6) Supremacy as stipulated in Art. 31 GG simply states that "[f]ederal law shall take precedence over *Land* law" which means that any federal law (not only the Basic Law) can override *Land* constitutional law.[23] Preemption concerns the area of concurrent legislation (Art. 72, 74 GG).[24] As expressed in Art. 72 (1) GG, this concept reduces *Länder* powers by stipulating that the latter shall only "have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law". The actual distribution of powers in this field is organized by three categories: unconditional federal powers (Art. 72 (1) GG), conditional federal powers (Art. 72 (2), (4) GG) based on necessity, as well as derogatory *Länder* powers (Art. 72 (3) GG). In the latter case (which is rather limited in terms of substance) the *Länder* may deviate from federal legislation, but their legislation may in turn be superseded by subsequent federal law.[25]

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[20] On the scope for such popular votes see e.g. Pieroth (2012), Art. 20, para. 7.

[21] Generally on popular sovereignty under German constitutional law, including the terms of "pouvoir contituant" and "pouvoir constitué" see Degenhart (2012), para. 16 et seq., 24 et seq.; Pieroth, Art. 20, para. 4 et seq.

[22] For a detailed account on the distribution of powers in the German Federation see Isensee (2008), § 133, as well as Rengeling (2008), § 135.

[23] On Art. 31 see in detail Pietzcker (2008), § 134, para. 38 et seq.

[24] See generally Rengeling (2008), § 135, para. 151 et seq.

[25] For the details of this rather unusual construction which can in effect lead to a "ping-pong game" between federal and *Land* legislation see e.g. Pieroth (2012), Art. 72, para. 28; generally on the dominance of federal powers in spite of the recent decentralization efforts see Hanschel (2012), p. 119 et seq., 216 et seq.

(7) In spite of these deviation competencies, recent judgments of the Federal Constitutional Court which have interpreted the necessity requirement in Art. 72 (2) GG more narrowly, and the rendering of additional powers to the *Länder* in the federalism reform of 2006, the federal parliament has maintained a dominant position.[26] This impression is confirmed when looking at the catalogue of exclusive federal legislative powers (Art. 71, 73 GG).[27] Conversely, *Länder* powers are more extensive in the administrative field (Art. 83 et seq. GG), since they are not confined to areas of *Länder* legislation, but include the power to "execute federal laws in their own right insofar as this Basic Law does not otherwise provide or permit" (Art. 83 (1) GG).[28] Nevertheless, dominant central legislative powers, the coordination of the exercise of remaining *Länder* powers and the exchange of such powers against a mere participation in federal legislation through the *Bundesrat* (only partially reversed by the federalism reform of 2006) still qualify Germany as a unitary federal state, as aptly claimed by the constitutional lawyer Konrad Hesse in the 1960ies.[29]

4. The homogeneity principle as a limitation to constitutional autonomy of the *Länder*

(8) A further limitation of *Länder* autonomy is provided by the principle of homogeneity (*Homogeneitätsprinzip*) as stipulated in Art. 28 (1), clause 1 GG, according to which the "constitutional order in the *Länder* must conform to the principles of a republican, democratic and social state governed by the rule of law, within the meaning of this Basic Law". This clause, which renders void any contravening *Land* law, both presupposes and limits the constitutional autonomy of the *Länder*.[30] Art. 28 (2) GG lays down municipal (not state) autonomy "within the limits prescribed by the laws". Art. 28 (3) GG stipulates that "[t]he Federation shall guarantee that the constitutional

[26] On the residual Länder powers see e.g. Rengeling (2008), § 138, para. 328 et seq.
[27] See e.g. Hanschel (2012), p. 196 et seq.
[28] This is why German federalism is also labeled as executive federalism (*Exekutivföderalismus*), see Hanschel (2012), p. 82 et seq.
[29] See Hesse (1962), p. 12 et seq.; see furthermore Hanschel (2012), p. 84 et seq.
[30] Pieroth (2012), Art. 28, para. 1, 2; more fundamentally Dittmann (2008), § 127, para. 11 et seq.; on the restrictions of *Land* constitutional autonomy and of the *pouvoir constituant* see also fundamentally BVerfGE 1, 14 (61) and the judgment of the Land Constitutional Court of Brandenburg, Case 18/95, Judgment of 21 March 1996, B. II 2. C. aa., at http://www.verfassungsgericht.brandenburg.de/sixcms/detail.php?id=5lbm1.c.57342.de&template=bbo_mandant_verfassungsgericht_d (last accessed on 7 October 2013).

order of the *Länder* conforms to the basic rights and to the provisions of (1) and (2) of this Article". Put in a nutshell, Art. 28 GG shows that the *Länder*, whilst constituting states in the sense of Jellinek's three-elements-doctrine, are not (fully) sovereign, since they lack the capacity to set up by themselves a superior and unchallengable legal order.[31] Instead, they have to respect the *Staatsfundamentalnormen*, i.e. the fundamental norms of the state as stipulated by the Basic Law, as well as its general election principles as laid down in Art. 38 GG.[32]

(9) Admittedly, this leaves a substantial amount of scope for the design of *Länder* constitutions,[33] even though the Federal Constitutional Court has sometimes postulated a more pronounced and immediate effect of the Basic Law on them.[34] In essence neither conformity nor uniformity of *Länder* constitutions is required.[35] As the Federal Constitutional Court has stated, homogeneity requires little more than a minimum as the *Länder* may even set up fundamental norms which are not identical to those of the federal state.[36] Art. 31 GG as the general supremacy rule does not apply in this context, since the homogeneity requirements of Art. 28 GG are considered to be more specific.[37]

(10) The reason for the Court's rather generous reading of the homogeneity requirement is that compatibility of norms can be asserted to the extent that they merely claim validity in different sections of the overall legal order (e.g. rules for dissolution of the federal or a *Land* parliament or the indictment of a federal or *Land* minister).[38] This would certainly not be the case where a *Land* sets up a procedure that would allow for secession, as this might clearly affect its legal relationship with the federal state.

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[31] Degenhart (2012), para. 8
[32] Pieroth (2012), Art. 28, para. 3 et seq.
[33] Pieroth (2012), Art. 28, para. 1; BVerfGE 4, 178 (189); 64, 301 (317).
[34] See BVerfGE 1, 108 (257), e.g. for Art. 21 GG which deals with the political parties. On the controversy regarding this view see Pieroth (2012), Art. 28, para. 1.
[35] Pieroth (2012), Art. 28, para 1 with further references.
[36] BVerfGE 36, 342 (360 et seq.)
[37] Ibid at 362.
[38] Idem.

5. Restrictions on territorial reforms

(11) Further limitations of *Länder* autonomy ensue from the fact that any internal resctructuring of German state territory is strictly regulated by Art. 29 GG[39] which demands a federal law for any major changes (Art. 29 (2) GG) to be confirmed by a national referendum[40], whilst the *Länder* are merely consulted. Only minor changes of territory within existing borders, e.g. concering domestic border adjustments, between neighbouring *Länder* (Art. 29 (7) GG) or as regards the internal reorganisation of *Land* administration (Art. 29 (8) GG) can be decided upon autonomously. Such changes may be implemented by a *Länder* agreement which, however, is governed by federal law or requires federal legislative approval.

(12) This illustrates the limited role that popular votes including referenda play under the Basic Law which places a clear focus on the representative character of the democracy. It further shows that the legal position of the *Länder* as regards territorial changes is rather weak, even where such changes do not alter the size of the federal territory as such, as they would in the case of secession. It is striking that in practice no attempt to reorganize the territory according to Art. 29 GG has so far ever been successful.[41] The restrictions on territorial changes as stipulated in that provision hence allow to infer a general principle of territorial stability serving to secure the functioning of the German federal state.[42]

6. *Länder* participation in changes to the Basic Law

(13) Related to that is the question to what extent the *Länder* can effectuate changes to the Basic Law, which might allow them to expand their autonomy and hence create the necessary leeway for popular votes and other expressions of sovereignty. According to Art. 79 (2) GG, any amendment to the Basic Law requires a two thirds majority of members of the federal parliament, the *Bundestag*, as well as of votes of the

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[39] Generally on the rules regarding territorial change see Würtenberger (2008), § 132, in particular on Art. 29 see para. 29 et seq.

[40] According to Art. 29 (3), (6) GG, the referendum is held in the concerned *Länder* as a whole and in the concerned areas within them and generally requires a combined majority of votes based on a quorum.

[41] Hanschel (2012), p. 297.

[42] See Hanschel (2012), p. 297, with further references.

Bundesrat.[43] The latter, whilst not constituting a fully-fledged second chamber, participates in federal legislation and is composed of representatives of the *Länder* governments. Depending on the extent to which federal legislation affects the *Länder* autonomy, the *Bundesrat* has veto powers, whereas in other areas its decisions may be overruled by the *Bundestag*.[44]

(14) This shows that the *Länder* cannot alter the federal constitutional set-up on their own behalf, but may only enact changes by participating at the level of federal legislation. Even when doing so they are subjected to clear limitations: pursuant to Art. 79 (3) GG "[a]mendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process [...] shall be inadmissible". Whilst this in itself is not a guarantee of the current composition of the German federal state (although some argue that there have to be at least three *Länder*), this provision guarantees a minimum of autonomy and a core area of autonomous tasks for the existing *Länder*.[45] The *Länder* can neither renounce this autonomy nor expand it to full sovereignty.

7. The principle of federal loyalty as an expansion of *Länder* powers?

(15) The principle of federal loyalty (or duty of friendly behavior towards the Federation), so-called *Bundestreue*, has been identified by the German Constitutional Court as an unwritten, but implied principle of German federalism.[46] It is, however, not a free-standing title that a *Land* could rely on, but rather a subsidiary norm which is accessorial to existing rights and duties established under the Basic Law, which merely serves to fill gaps, and which does not by itself confer rights and duties on the Federation or the *Länder*.[47] Quite on the contrary, the principle of federal loyalty shows that German federalism is characterized by the notion of cooperation instead of unilateral decision-making. Hence, the principle may serve to constrain the *Länder*

[43] On these votes see Art. 51 (2) GG according to which each *Land* has at least three votes, whilst *Länder* with more then 2 mio. inhabitants have four, *Länder* with more than 6 mio. inhabitants five and *Länder* with more than 7 mio. inhabitants six votes. Art. 51 (3) GG stipulates that the votes of each *Land* can only be cast in a uniform fashion.

[44] See Hanschel (2008), p. 146 et seq.; fundamentally on the participation of the *Länder* in law-making see Anderheiden (2008), § 140.

[45] See Pieroth (2012), Art. 79, para. 8.

[46] BVerfGE 1, 299 (315); see, in detail, Isensee (2008), § 126, para. 160 et seq.

[47] Isensee (2008), § 126, para. 166.

when relying on autonomy where this would amount to an exploitation of their legal position to the detriment of the Federation (and vice versa).

8. Right to or prohibition of secession?

(16) The Basic Law contains no explicit prohibition of *Länder* secession.[48] However, the concept of the German federal state constitutes what may be referred to as an eternal federation ("Ewiger Bund") which already the German Reich of 1871 had referred to in its preamble.[49] This corresponds to a conception of the German people which is clearly unitary.[50] The Basic Law does not accumulate or tie up *Länder* peoples together, but instead presupposes a national unity of a German people which is divided up territorially as regards certain fields of governmental activity.[51] For the purpose of *Länder* statehood, the respective part of the German people that resides in a certain *Land* territory and hence has, at least geographically, a closer link with its government, constitutes the people of that *Land*.[52] This is reflected in the fact that the *Land* citizenship is generally attributed not to any notion of ethnic, religious, linguistic or other belonging, but to territorial residence.[53] Hence, the *pouvoir constituant* is primarily vested in the German people as such, not divided in regional units; as a consequence the *pouvoir constitué* as organized in a federalist manner originates from the same source.[54] As Isensee has pointed out, the following classical definition of uniform democratic legitimation by *The Federalist* may also claim validity for German federalism: "The Federal and State Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes".[55]

(17) It follows from this that secession of any part of the federal state is simply beyond constitutional scope; the Basic Law does not intend to leave this question at the

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[48] Hanschel (2012), p. 298.
[49] Isensee (2008), § 126, para. 61 et seq.
[50] Isensee (2008), § 126, para. 61.
[51] Isensee (2008), § 126, para 61.
[52] On the qualification of *Land* inhabitants as state people in the sense of the *Drei-Elemente-Lehre* see Herdegen (2008), § 129, para 11.
[53] Herdegen (2008), § 129, para. 11.
[54] Isensee (2008), § 126, para. 62; see also Oeter (1997), p. 77 et seq.; for a more cautious account see Menzel (2002), p. 140 et seq.
[55] Isensee (2008), § 126, para. 62, quoting from Madison (1961), p. 315.

disposition of the *Länder* and does not recognize any autonomous *Länder* peoples other than as parts of the German people itself.[56] This is reflected in Art. 146 GG as amended after reunification which states that the Basic Law is now valid for the whole German people.[57] This notion is in line with the fact that the *Länder* by and large do not show a clear and uniform ethnic, religious or other identity that might be recognized as an expression of a distinct regional popular sovereignty.

II. The exercise of constitutional autonomy by the *Länder* within that framework

1. Remaining scope for constitutional autonomy

(18) Within the confinements of the federal constitutional framework as laid out above, the *Länder* are left with a considerable amount of constitutional autonomy.[58] The Basic Law does not directly stipulate that right, but presupposes it when restricting its scope through the principle of homogeneity. The Basic Law constitutes a binding framework for the *Länder* which all branches of their governments have to respect. As a consequence, whilst substantial constitutional autonomy is recognized by the Basic Law, this autonomy is restricted by the homogeneity principle. Furthermore, *Länder* law may not disrespect the distribution of powers, compromise the supremacy clause or redefine the *pouvoir constituant* and hence claim a sovereignty that would clash with the German notion of federalism. These norms provide axioms applying to any conflict between the *Länder* and the federal state that must be resolved under the Basic Law.[59] In essence, they limit the constitutional autonomy of the *Länder* to the extent that they are barred from leaving the federal state on grounds of an asserted popular sovereignty.

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[56] Isensee (2008), § 126, para. 63, more cautious Menzel (2002), p. 142 et seq. who, however, mainly discusses a potential factual acceptance of secession without claiming that it might be legally justified.
[57] On Art. 146 GG see generally Jarass (2012), Art. 146.
[58] Menzel (2002), p. 160 et seq.
[59] Generally on conflict resolution in federations see Hanschel (2012).

2. An overview of typical expressions of constitutional autonomy

(19) All *Länder* constitutions express the intention to organize regional matters with some degree of autonomy, the result being a certain constitutional pluralism.[60] As part of that, fundamental rights guarantees may well exceed the catalogue displayed in Art. 1-19 GG, and the foundations of society are referred to in a way that elucidates the various religious, historical and cultural backgrounds in different parts of Germany. Moreover, *Länder* constitutions contain multiple references to direct democracy, division of powers, rule of law, the principle of the social state, fundamental aims of government or programmatic rules, e.g. as regards education.[61] The homogeneity principle leaves plenty of scope for regional elements of direct citizens' participation, e.g. through referenda, and all *Länder* constitutions contain stronger elements of direct democracy than the Basic Law which clearly favors representative democracy.[62] Furthermore, by contrast to the Basic Law, they set up one chamber parliaments.[63] Moreover, they each stipulate their own specific rules on the organization of *Land* government.[64] Finally, they contain particular expressions of popular sovereignty, rules for constitutional amendment and in some cases regarding self-determination which deserve a more in-depth analysis as undertaken below.

3. Particular aspects of constitutional autonomy

a) Expressions of popular sovereignty

(20) The definitions of *Länder* constituencies vary.[65]

Most of the *Länder* constitutions address their citizens merely as "people of...".[66]

The Constitution of North Rhine-Westphalia is even more cautious by merely referring to the "men and women of".[67] This is certainly no coincidence as this *Land*

[60] On this and the following see Menzel (2002), p. 152 et seq.
[61] See generally Herdegen (2008), § 129, para. 1-10.
[62] See, for instance, Herdegen (2008), § 129, para. 14 et seq.
[63] Herdegen (2008), § 129, para. 26 et seq.
[64] Herdegen (2008), § 129, para. 33 et seq.
[65] For an overview see Menzel (2002), p. 387 et seq.
[66] Menzel (2002), p. 387.

is an amalgamation of previously distinct territories, each of them with their own respective cultural identity.

The Constitution of Rhineland-Palatinate (another artificial product of post-war reconstruction) attributes *Land* citizenship to "the Germans living in Rhineland-Palatinate or habitually residing there".[68]

Only the Bavarian Constitution has made a real attempt to distinguish the Bavarian people from the Germans living in Bavaria, but has never defined who the former might be.[69]

In turn, the Constitution of Saxony uniquely defines its people in Art. 5 as follows: "The people of the free state of Saxony is constituted by citizens of German, Sorbian and other ethnicity".[70] Whilst this definition may sound potentially far-reaching at first glance, it actually does not depart in any way from the Basic Law: Since Art. 115 of the Constitution of Saxony attributes *Land* citizenship to Germans as encompassed by Art. 116 GG, its Art. 5 is viewed as referring to aspects of ethnicity rather than citizenship strictu sensu (although the Sorbs living in Saxony would typically be Germans, as well).[71] At the same time, this provision shows that whilst there is no majority of citizens in a given *Land* which may invoke a redefinition of their status vis-a-vis the federal state, there clearly are minority ethnicities (like the Sorbs in Saxony or the Danes in Schleswig-Holstein) which may aptly claim and have been granted minority rights within the respective *Land* in which they reside.

Going beyond the Constitution of Saxony, Art. 3 of the Constitution of Brandenburg appears to expand the range of citizenship, but provides a clear caveat as regards differences of status following from the Constitution or ordinary legislation; as a

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[67] Preamble of the Constitution of North Rhine-Westphalia, see http://www.landtag.nrw.de/portal/WWW/GB_II/II.2/Gesetze/Verfassung_NRW.jsp (last accessed on 7 October 2013), own translation.

[68] Art. 75 (2) of the Constitution of Rhineland-Palatinate, see http://www.rlp.de/unser-land/landesverfassung (last accessed on 7 October 2013), own translation.

[69] The distinction may be inferred from Art. 8 of the Bavarian Constitution, which reads (official translation): "All Germans resident in Bavaria shall possess the same rights and obligations as Bavarian citizens.", see http://www.bayern.landtag.de/de/196.php (last accessed on 7 October 2013). Art. 6 adds the criteria of how state citizenship may be acquired and mandates the legislator to regulate the details, which, however, has not happened so far. As a consequence, the Bavarian Constitutional Court has ruled that a concrete conferral of Bavarian state citizenship is not possible, see Bay VfGH, Judgment of 12 March 1986, VF23-VII-84; on the whole issue see Menzel (2002), p. 387 et seq.

[70] See http://www.freistaat.sachsen.de/538.htm (last accessed on 7 October 2013), own translation.

[71] Menzel (2002), p. 388.

consequence the norm is still considered to be in line with the homogeneity principle stipulated in Art. 28 GG.[72]

(21) Many *Land* constitutions contain manifestations of popular sovereignty which reflect the clause in Art. 20 (2) GG by stating (sometimes with slight variations) that all government power emanates from the people and is exercised by the people through elections and popular votes and through specific legislative, executive and judicative organs.[73] This is reflected in Art. 25 (2) of the Constitution of Baden-Württemberg[74], Art. 66 of the Constitution of Bremen[75], Art. 3 of the Constitution of Mecklenburg-West Pomerania[76], Art. 2 (1) of the Constitution of Lower Saxony[77], Art. 61 (1) of the Constitution of the Saarland[78], Art. 3 (1) of the Constitution of Saxony[79], Art. 3 (2) of the Constitution of Hamburg[80], Art. 2 (1) and (2) of the Constitution of Schleswig-Holstein[81] and Art. 45 of the Constitution of Thuringia.[82]

By comparison the Constitution of North Rhine-Westphalia simply states that the people expresses its will through elections, popular petitions and popular decisions (Art. 2), and adds in Art. 3 (1) that legislation is carried out by the people and the people's representatives.[83]

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[72] Menzel (2002), p. 388; see http://www.bravors.brandenburg.de/cms/detail.php?gsid=land_bb_bravors_01.c.23338.de#3 (last accessed on 7 October 2013).

[73] Herdegen (2008), § 129, para. 5.

[74] http://www.lpb-bw.de/bwverf/bwverf.htm (last accessed on 7 October 2013)

[75] http://www.bremen.de/fastmedia/36/landesverfassung_bremen.pdf (last accessed on 7 October 2013)

[76] http://www.landtag-mv.de/fileadmin/media/Dokumente/Druckerzeugnisse/LT_Verfassung_01-2012.pdf (last accessed on 7 October 2013).

[77] http://www.nds-voris.de/jportal/portal/t/140w/page/bsvorisprod.psml;jsessionid=D7F46A85ACFFEC0BAA0DD2235C65B5FF.jp35?doc.hl=1&doc.id=jlr-VerfNDrahmen&documentnumber=1&numberofresults=92&showdoccase=1&doc.part=X&paramfromHL=true#focuspoint (last accessed on 7 October 2013).

[78] http://www.saarland.de/dokumente/thema_justiz/100-1.pdf (last accessed on 7 October 2013).

[79] http://www.revosax.sachsen.de/Details.do?sid=118544044111 (last accessed on 7 October 2013).

[80] http://www.hamburg.de/contentblob/1604280/data/verfassung-2009.pdf (last accessed on 7 October 2013).

[81] http://www.gesetze-rechtsprechung.sh.juris.de/jportal/?quelle=jlink&query=Verf+SH&psml=bsshoprod.psml&max=true&aiz=true (last accessed on 7 October 2013).

[82] http://www.thverfgh.thueringen.de/webthfj/webthfj.nsf/F6A7AF01618CE6BFC12572D5002372DA/$File/Verfassung%20des%20Freistaats%20Th%C3%BCringen.pdf?OpenElement (last accessed on 7 October 2013).

[83] http://www.landtag.nrw.de/portal/WWW/GB_II/II.2/Gesetze/Verfassung_NRW.jsp (last accessed on 7 October 2013), own translation.

Art. 2 (1), clause 1 of the Bavarian Constitution stipulates that "Bavaria is a people's state"[84], thus arguably emphasizing the role of direct democracy in this *Land*.

The Constitution of Saxony-Anhalt, whilst setting up a representative system of government like all other *Länder*, stipulates in Art. 2 (2) cl. 1 that the people holds the sovereign power.[85]

By contrast, the Constitution of Berlin is particularly anxious to emphasize the federal link by stating: "Public authority is held by all Germans residing in Berlin" (Art. 2, clause 1).[86] This suits the cosmopolitan character of this city state whose inhabitants may feel strong about being Berlin citizens, but certainly do not consider themselves as a people of its own.

Other constitutions such as those of Brandenburg (Art. 2 (2))[87] or Rhineland-Palatinate (Art. 74 (2))[88] simply state that public authority is held by the people. Art. 70 of the Constitution of Hesse adds the attribute "unalienably".[89]

(22) Hence, in spite of a certain degree of variation, all these manifestations of popular sovereignty[90] are ultimately framed rather cautiously and in any event have to be read in light of the restrictions set up by the Basic Law. They correspond to hesitant (if at all) invocations of regional identity, confirming the view that for the purpose of determining popular sovereignty any regional people is in essence a territorially confined part of the German people. Hence, none of these provisions would allow inferring any rights that a *Land* or "its" people may exercise independently of the overall German *pouvoir constituent*, as manifested in the Basic Law which sets up the *pouvoir constitué*.

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[84] http://www.bayern.landtag.de/de/196.php (last accessed on 7 October 2013), official translation.
[85] http://www.landtag.sachsen-anhalt.de/fileadmin/downloads/Verfassung_02.pdf (last accessed on 7 October 2013), own translation, the German term being "der Souverän".
[86] http://www.berlin.de/rbmskzl/verfassung/abschnitt1.html (last accessed on 7 October 2013), own translation.
[87] http://www.bravors.brandenburg.de/cms/detail.php?gsid=land_bb_bravors_01.c.23338.de#2 (last accessed on 7 October 2013), own translation.
[88] http://landesrecht.rlp.de/jportal/portal/t/gvu/page/bsrlpprod.psml?doc.hl=1&doc.id=jlr-VerfRPrahmen:juris-lr00&documentnumber=1&numberofresults=181&showdoccase=1&doc.part=X&paramfromHL=true (last accessed on 7 October 2013), own translation.
[89] http://www.rv.hessenrecht.hessen.de/jportal/portal/t/228m/page/bshesprod.psml?doc.hl=1&doc.id=jlr-VerfHErahmen%3Ajuris-lr00&documentnumber=1&numberofresults=187&showdoccase=1&doc.part=X&paramfromHL=true#jlr-VerfHEpArt65 (last accessed on 7 October 2013), own translation.
[90] See Herdegen, § 129, para. 5, with references to the various *Länder* constitutions.

b) Rules for constitutional amendment

(23) Like the Basic Law, the *Länder* constitutions contain rules on constitutional amendment (usually modeled along the lines of Art. 79 (3) GG); however, they generally also allow for referenda (usually by a qualified majority of actual voters or based on a quorum) instead of or in combination with a parliamentary decision.[91]

Bavaria is exceptional in that the referendum, at least when looking at the wording of Arts. 72, 74, 75 of its Constitution, does not appear to provide any such restrictions. However, the Bavarian Constitutional Court has derived a qualified quorum from the Bavarian Constitution as well as from Art. 28 GG in this regard.[92] This illustrates that even in the *Land* with the strongest manifestation of popular sovereignty the federal principle of homogeneity is adhered to and used by the *Land* Constitutional Court to read down a *Land* constitutional provision.

(24) The substantive limitations of constitutional change in the *Länder* constitutions are generally modeled along the lines of Art. 79 (3), 28 (1) of the Basic Law.[93] Sometimes, however, the *Länder* add specific constraints, such as Art. 150 of the constitution of Hesse which stipulates that the fundamental democratic ideas and the republican-parliamentarian form of government are untouchable and the establishment of a dictatorship is prohibited.[94]

(25) Generally, court decisions appear to have focused largely on the validity of constitutional change as measured by the yardstick of the procedural and substantive restrictions stipulated in the *Länder* constitutions themselves.[95]

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[91] Within this spectrum there is quite a variety of combinations across the *Länder*, see e.g. Herdegen (2008), § 129, para. 56, as well as Menzel (2002), p. 393 et seq, with further references.

[92] See on the debate Menzel (2002), p. 393, who also comments on the controversial requirements regarding the Constitution of Hesse.

[93] See Menzel (2002), p. 394.

[94] http://www.rv.hessenrecht.hessen.de/jportal/portal/t/228m/page/bshesprod.psml?doc.hl=1&doc.id=jlr-VerfHErahmen%3Ajuris-lr00&documentnumber=1&numberofresults=187&showdoccase=1&doc.part=X&paramfromHL=true#jlr-VerfHEpArt65 (last accessed on 7 October 2013), own translation; see Menzel (2002), p. 394.

[95] For an overview see Menzel (2002), p. 395; on decisions with regard to the validity vis-à-vis the Basic Law see Pieroth (2012), Art. 28, para. 3 et seq.

c) Reliance on the right to self-determination?

(26) The right to self-determination as expressed in the Preamble of the Basic Law is equally reflected in some of the *Länder* constitutions, namely in the preambles of the constitutions of Mecklenburg-West Pomerania[96], Saxonia-Anhalt[97] or Thuringia[98]. The Constitution of Brandenburg instead uses the expression "by free decision".[99] However, the Federal Constitutional Court has clarified at a very early stage that any such right cannot be exercised in an autonomous fashion and is restricted by the confinements of the Basic Law.[100] This clearly excludes any reliance on the right to self-determination that is intended to break up the federal state.[101]

(27) A related question would be to what extent the right to self-determination as accepted under international law might allow the *Länder* to claim a degree of autonomy domestically that goes beyond what has been stated so far. Attempts to apply this international concept to them may not simply be countered by referring to the fact that the *Länder* are no fully-fledged subjects of international law, or by the German Constitutional Court's rejection of international law analogies as regards the Federation. Such counter-arguments would be deficient since the principle of self-determination attributes a right to peoples, not to states, and the corresponding duty would be incumbent on the German federal state.[102] The principle of self-determination is partially recognized by treaty law (e.g. the joint Arts. 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights). These norms have entered German law through implementing legislation according to Art. 59 (2) GG[103], and hence rank as ordinary federal law which may not displace any rules of the Basic Law. To the extent

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[96] http://www.landtag-mv.de/fileadmin/media/Dokumente/Druckerzeugnisse/LT_Verfassung_01-2012.pdf (last accessed on 7 October 2013)

[97] http://www.landtag.sachsen-anhalt.de/fileadmin/downloads/Verfassung_02.pdf (last accessed on 7 October 2013).

[98] http://www.thueringer-landtag.de/imperia/md/content/landtag/jahr_der_verfassung/verfassung_des_freistaats_thueringen.pdf (last accessed on 7 October 2013).

[99] http://www.bravors.brandenburg.de/cms/detail.php?gsid=land_bb_bravors_01.c.23338.de#2 (last accessed on 7 October 2013), own translation.

[100] BVerfGE 1, 14 (50)

[101] This follows from BVerfGE 13, 54 (93) where the Court states that there is no right to self-determination which might be directed against the state.

[102] Fundamentally on the right to self-determination see Thürer (1976); see furthermore Ipsen (2004), p. 421 et seq.

[103] See Jarass (2012), Art. 59, para. 9 et seq.

that the principle is also part and parcel of customary international law, Art. 25 GG provides it with priority over ordinary federal law, but (according to the Federal Constitutional Court and most scholars) not over the Basic Law.[104] Hence, even if such a norm would be considered as directly applicable in German law, it would not have the capacity to render void the constitutional framework as analysed above.

(28) This conclusion might only be challenged if one could argue that people's sovereignty as stated under the *Länder* constitutions or the actual referral to the right of self-determination in some of their preambles needs to be interpreted in line with the right to self-determination as construed under international law. But as clarified above, these references are a priori constrained by the overriding constitutional order of the Basic Law. Furthermore, there is largely an agreement amongst scholars that the right to self-determination as recognized under international law is today limited to an internal component, i.e. autonomy of a people within a given state, but does not encompass a right to secession.[105] Finally, even as regards internal self-determination, it appears difficult to carve out *Länder* peoples with identities that would be distinctly different from the German people as such (although there clearly are ethnic minorities in some of the *Länder* which qualify as peoples or parts of them). Hence, due to the heterogenous composition of *Länder* peoples under the Basic Law (partially following from the redrawing of *Land* borders after the Second World War, but equally due to the overriding national German identity of most citizens), it might be impossible simply to identify a distinct and exlusive bearer of the right to self-determination at the regional level (apart from regional ethnic minorities which benefit from certain minority rights).

[104] See for this position BVerfG 37, 271 (279), as well as Jarass (2012), Art. 25, para. 14, with further references as regards competing views. This position is confirmed by the wording of the provision which merely suggests priority over the laws, not the Basic Law itself.

[105] Ipsen (2004), p. 423, 435 et seq. Yet, some controversy remains, see Hanschel (2012), p. 288, with further references.

III. Conclusions

(29) As the analysis has shown, the German federation provides no convincing evidence which would allow for an assertion that a *Land* may rely on the notion of popular sovereignty and claim that its own people may determine its relationship towards the federal state on its own behalf, i.e. without safeguarding the rules of the overarching Basic Law. Whilst these rules leave substantial scope for *Länder* autonomy, they clearly establish the homogenous and subordinate character of *Länder* law. Furthermore, the German federation is based on popular sovereignty of the German people as such, which has organized itself through central and regional governments, the latter applying to regional sub-units of this people, even though some of these units have their own history and a certain identity. Hence, the *pouvoir constituant* has been exercised and may only be exercised (e.g. through a new constitution; see Art. 146 GG) by the German people as such. This process of amalgamation corresponds to the historic transition from a confederal to a federal structure (with the exception of the Third Reich, of course) which shows that there is now an indissoluble alliance characterized by an overriding and overarching constitutional framework.[106] Whilst a confederation is based on a treaty that may be subject to termination, a federation is based on a Constitution that clearly is not.[107]

(30) Beyond this, Germany may aptly be qualified as a unitary federal state. But notwithstanding its peculiarities, this country may serve to illustrate that changes to a federal system essentially require the political consensus of all concerned units.[108] The German federation exemplifies this neatly by demonstrating that for any major changes to occur, whether they are shifts in the distribution of powers or internal territorial changes, both the Federation and the *Länder* (either themselves or through their votes in the *Bundesrat*) will have to consent in one way or another. Having said this, secession certainly is not one of the options provided in this system, whether consented to or not.

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[106] For a historical overview see Bartlsperger (2008), § 128, para. 11 et seq.
[107] See Oeter (1997), p. 76 et seq.
[108] This may even be considered to be part of a definition of federalism, see Hanschel (2012), p. 13

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Lexicon of German terms

Bundesrat: the second organ of federal legislation (next to the *Bundestag*), composed of representatives of the *Länder* governments and equipped with a limited veto right

Bundestag: the German parliament as the main actor of federal legislation

Bundestreue: principle of federal loyalty which applies between the Federation and the *Länder* and may limit powers when exercised to the detriment of the either side

Drei-Elemente-Lehre: definition of statehood as developed by the German scholar Georg Jellinek claiming that a state consists of state territory, state people, and state power

Exekutivföderalismus: denoting the dominance of *Länder* powers in the execution of laws rather than their making

Grundgesetz (GG): the German Basic Law

Homogenitätsprinzip: principle requiring the constitutional order of the *Länder* to be in homogeneity with the federal requirements stipulated under Art. 28 (1) GG

Kompetenz-Kompetenz: the power to create powers (vested in the federal state)

Länder: the 16 regions of the German federal state as listed in the preamble of the German Basic Law

Land: any of the 16 *Länder* (see above)

Staatsfundamentalnormen: the fundamental norms of the state which the *Länder* need to respect under Art. 28 (1) of the Basic Law

Verfassungshoheit: constitutional supremacy of the *Länder* as limited by the Basic Law

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N° : 500-05-065031-013

SUPERIOR COURT

KEITH OWEN HENDERSON

Petitioner

ATTORNEY GENERAL OF QUEBEC

Respondent

ATTORNEY GENERAL OF CANADA

Mis en cause

et als

NOTICE OF PRODUCTION OF AN EXPERT REPORT (DR HANSCHEL)

(art. 402.1 *C.C.P.*, art. 2809 *C.C.Q*)

OUR FILE

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OP 0828
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BUNDESVERFASSUNGSGERICHT / FEDERAL CONSTITUTIONAL COURT [OF GERMANY]

[Unofficial, personal translation by Prof. Dr. Dirk Hanschel, University of Halle-Wittenberg (14 March 2017) Source: BVerfG, Beschluss der 2. Kammer des Zweiten Senats vom 16. Dezember 2016 - 2 BvR 349/16, http://www.bverfg.de/e/rk20161216_2bvr034916.html]

2 BvR 349/16 -

In the proceedings regarding the Constitutional Complaint

by Mr. S...

against non-admission of a referendum in Bavaria regarding the exit of Bavaria from the Federal Republic of Germany and against the proviso that the referendum would have to be carried out in the whole territory of the Federation and not merely in Bavaria

the 2nd Chamber of the Second Senate of the Federal Constitutional Court decided unanimously on 16 December 2016 through

Judges Huber, Kessal-Wulf and König

according to § 93b in conjunction with § 93a BVerfGG (Federal Constitutional Court Act)[1] in the version of the announcement of 11 August 1993 (BGBl I S. 1473) as follows:

The Constitutional Complaint is not admitted for decision.

In the Federal Republic of Germany as a nation state based on the pouvoir constituant of the German people, the *Länder* are not the "*Herren des Grundgesetzes*" (*masters of the Basic Law*). The Basic Law therefore leaves no room for secessionist endeavors of individual *Länder*. They violate the constitutional order.

This decision cannot be appealed against.

Huber Kessal-Wulf König

[1] Footnote added by translator: http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=1 . According to § 93 a (2) BVerfGG, a Constitutional Complaint "[...] shall be admitted
a) in so far as it has general constitutional significance, b) if it is appropriate in order to enforce the rights referred to in § 90 sec. 1; this may also be the case if the complainant would suffer a particularly severe disadvantage if the Court refused to decide on the complaint."

BUNDESVERFASSUNGSGERICHT

- 2 BvR 349/16 -

In dem Verfahren
über
die Verfassungsbeschwerde

des Herrn S...,

gegen die Nichtzulassung einer Volksabstimmung über den Austritt Bayerns aus der BRD in Bayern und gegen die Bestimmung, dass die Volksabstimmung im ganzen Bundesgebiet und nicht nur in Bayern durchgeführt werden müsste

hat die 2. Kammer des Zweiten Senats des Bundesverfassungsgerichts durch

den Richter Huber

und die Richterinnen Kessal-Wulf,

König

gemäß § 93b in Verbindung mit § 93a BVerfGG in der Fassung der Bekanntmachung vom 11. August 1993 (BGBl I S. 1473) am 16. Dezember 2016 einstimmig beschlossen:

Die Verfassungsbeschwerde wird nicht zur Entscheidung angenommen.

In der Bundesrepublik Deutschland als auf der verfassungsgebenden Gewalt des deutschen Volkes beruhendem Nationalstaat sind die Länder nicht „Herren des Grundgesetzes". Für Sezessionsbestrebungen einzelner Länder ist unter dem Grundgesetz daher kein Raum. Sie verstoßen gegen die verfassungsmäßige Ordnung.

Diese Entscheidung ist unanfechtbar.

Huber Kessal-Wulf König