Conference of European Constitutional Courts
XIIth Congress

The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts

Report of
the Constitutional Court
of the Federal Republic of Germany

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Judges of the Bundesverfassungsgericht

I. The constitutional court, the other courts and the constitutionality review[1]

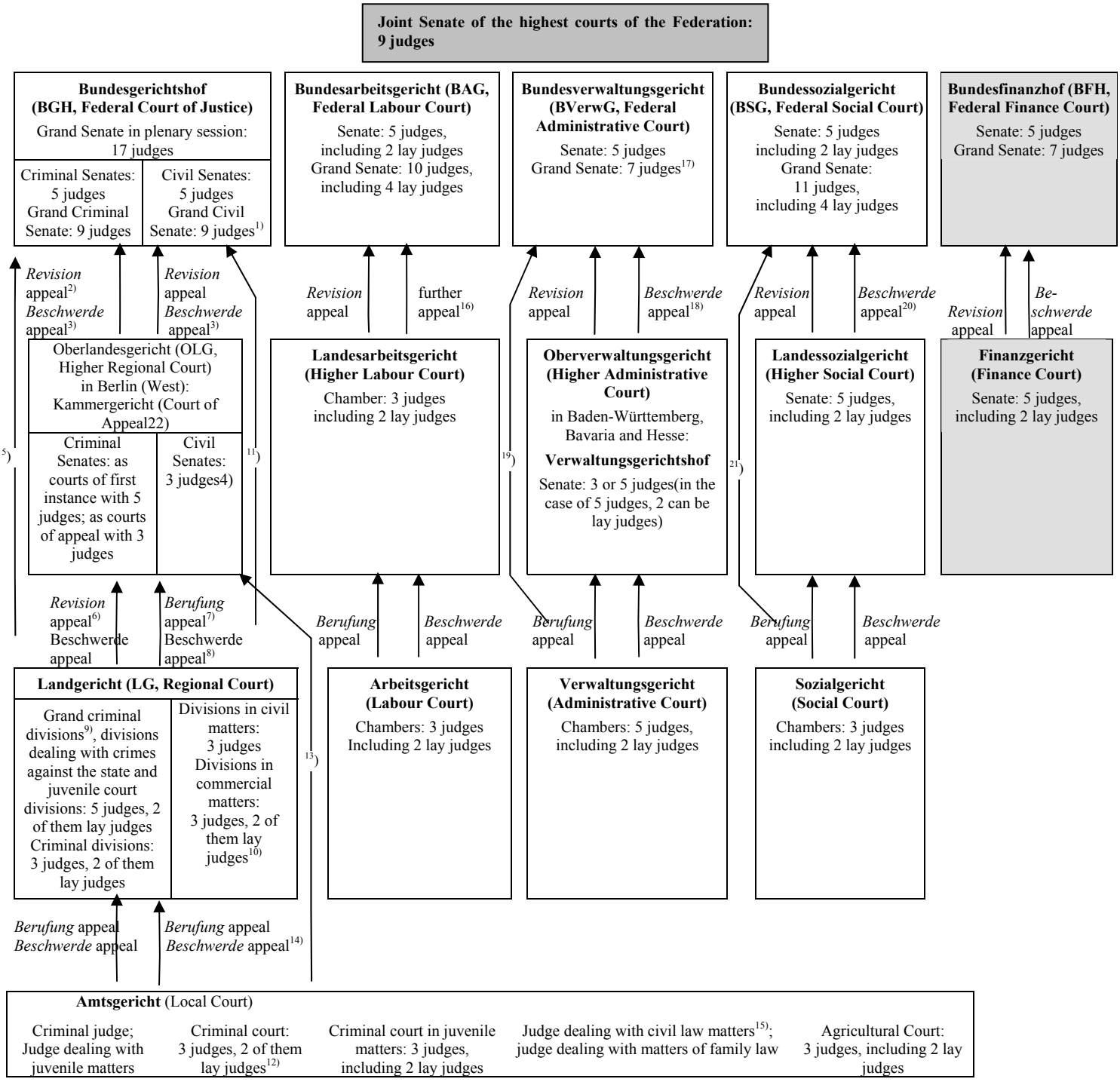
A. The judicial organisation of the state

1. The judicial system

1. The basis of the structure of the different branches of jurisdiction in the Federal Republic of Germany are Articles 92, 95 and 96 of the Grundgesetz (GG, the Basic Law). Pursuant to these articles, the judicial power is exercised by the Federal Constitutional Court, by the Federal Courts and the courts of the Länder (Federal States).

a) Pursuant to Article 95.1 of the Basic Law, German jurisdiction is divided into five independent branches (cf. the following diagram from the Brockhaus-Enzyklopädie in 24 volumes, 19th ed., Vol. 8, Frau-Gos. 1989, entry: Gericht [Court]):
- ordinary jurisdiction, which is headed by the Bundesgerichtshof (Federal Court of Justice); it comprises civil and criminal jurisdiction and voluntary litigation;
- labour jurisdiction, the highest court of which is the Bundesarbeitsgericht (Federal Labour Court);
- administrative jurisdiction, which is headed by the Bundesverwaltungsgericht (Federal Administrative Court);
- financial jurisdiction, the highest court of which is the Bundesfinanzhof (Federal Finance Court);
- social jurisdiction, which is headed by the Bundessozialgericht (Federal Social Court).

[1] R. Jaeger, Karlsruhe, August 28, 2001.



1) Also responsible for patent attorney, tax adviser, auditor, notary public, anti-trust and lawyer matters; the Grand Civil Senate is also the judges' national disciplinary tribunal. One of the Civil Senates is responsible for *Beschwerde* and *Berufung* appeals against decisions of the Federal Patent Court. - 2) Against first-instance criminal sentences of the Higher Regional Court. - 3) Only admissible in special cases. - 4) Senate for construction ground matters: 3 judges of the Higher Regional Court, 2 judges of the Higher Administrative Court; Agricultural Senate: 5 judges, including 2 lay judges; also Senate for patent attorney, tax advisor, auditor, notary public and anti-trust matters. - 5) *Revision* appeal against Regional Court judgements in the first instance. - 6) *Revision* appeal against first-instance judgements of the Regional Court only in cases in which the appeal is exclusively based on the violation of Land laws. - 7) *Berufung* appeal against first-instance judgements of the Regional Court. - 8) And further appeal. - 9) Act as criminal courts in special cases. - 10) Chamber for construction ground matters: 3 judges of the Regional Court and 2 judges of the Administrative Court; also Chambers for patent attorney, tax advisor and auditor matters. - 11) *Revision* appeal that bypasses the court for the *Berufung* appeal (§566a of the Code of Civil Procedure [ZPO]). - 12) Enlarged criminal court: 4 judges, including 2 lay judges. 13) *Berufung* and *Beschwerde* appeals in parent and child cases and family law matters from the Local Court (Family Law Court) to the Higher Regional Court. - 14) In proceedings that started at the Local Court, the stages of appeal end with the *Berufung* appeal to the Regional Court. Exceptions: parent and child cases and family law matters; here, a *Berufung* appeal is possible from the Local Court to the Higher Regional Court and a Revision appeal is possible to the Federal Court of Justice. - 15) In voluntary matters, the Local Court is responsible, in principle, as the court of first instance. Its decisions are appealable by way of a *Beschwerde* appeal before the Regional Court (in family law matters: before the Higher Regional Court). The Regional Court decisions are appealable by means of the further appeal (appeal on a point of law) before the Higher Regional Court, the Higher Regional Court decisions in family law matters are appealable by way of a further appeal before the Federal Court of Justice. - 16) Only admissible in exceptional cases. - 17) Also a disciplinary tribunal (3 judges and 2 associate judges from the civil service) and as such, instance of appeal against decisions of the Federal Disciplinary Tribunal; also an instance of appeal (5 judges, including 2 of honorary judges) against decisions of the military court 18) Only admissible in exceptional cases. - 19) *Revision* appeal that bypasses the court for the *Berufung* appeal or *Revision* appeal if *Berufung* is precluded by law. - 20) Only admissible in exceptional cases. - 21) *Revision* appeal that bypasses the court for the *Berufung* appeal. - 22) In Bavaria, the *Bayerisches Oberstes Landesgericht* (Bavarian Higher Regional Court) has restricted competencies.

aa) **Ordinary jurisdiction**

Civil jurisdiction is responsible for disputes under civil law, i.e., legal proceedings in which the subject matter of the action is an immediate legal consequence of civil law.

Criminal jurisdiction is concerned with criminal matters.

Voluntary litigation concerns proceedings for specific (mostly civil law) matters, which in some cases are instituted by the state, in other cases on application. The institution of these types of proceedings is regulated by the state. Voluntary litigation includes e.g., the jurisdiction of the Local Courts in their functions as guardianship courts, probate courts, registration courts, real property registers and as the authorities performing certifications, the Local Courts' responsibility for apartment ownership cases, agricultural cases, etc.

bb) **Labour jurisdiction** is the independent branch of civil jurisdiction that deals with disputes under labour law.

cc) **Administrative jurisdiction** concerns disputes involving public law that do not relate to constitutional law, to the extent that national law or Länder law does not assign them to other courts.

Other independent branches are:

dd) The **finance courts**, which are responsible for actions brought against fiscal authorities in public law cases on taxes, but also for disputes that concern professional conduct.

ee) Social jurisdiction, a special branch of administrative jurisdiction for decisions on disputes involving public law. Social courts decide, *inter alia*, on matters in the fields of social security and the promotion of employment, war victims' pensions, and the relationship between physicians belonging to the statutory health-insurance system, hospitals and statutory health insurance. The indemnification of victims of violence also falls under their sphere of competence.

Above these branches of jurisdiction there is another panel of judges, the Joint Senate of the highest Courts of the Federation. Pursuant to Article 95.3 of the Basic Law, it is established to preserve the uniformity of decisions.

b) **Constitutional jurisdiction** is to be distinguished from the above-mentioned branches of jurisdiction. The scope of the responsibilities of constitutional jurisdiction on the Federal level is regulated in Articles 93 and 94 of the Basic Law. The *Länder* have their own constitutional courts. Constitutional jurisdiction is situated outside the other branches of German jurisdiction.

c) Finally, the Parliament can, pursuant to Articles 96 and 101.2 of the Basic Law, establish courts in particular fields of law, the so-called **special courts**. Examples of such courts are: the *Bundespatentgericht* (Federal Patent Court), the admiralty courts and the military courts. Courts that ensure that the rules of professional conduct are respected are, e.g., the disciplinary courts for civil servants and soldiers and the professional disciplinary tribunals for lawyers and the health professions.

2. The constitutional court

2. The constitutional court is part of the judicial power in the broader sense.

The members of the Federal Constitutional court belong to a constitutional body that is of equal rank to the Parliament and the Government as concerns their constitutional functions (BVerfGE [Decisions of the Federal Constitutional Court] 7, p. 1 [at p. 14]; 65, p. 152 [at p. 154] ; the latter decision deals with the question whether the First Senate of the Federal Constitutional Court was properly constituted). The judges of the *Länder* constitutional courts form part of the judiciary of the respective *Land*. The constitutional court of the *Land* is the guardian of the Land Constitution and performs the function of a constitutional body of the *Land* (cf. BVerfGE 96, p. 231 [at p. 245] - Plebiscite on the Bavarian Waste Disposal Act).

B. The respective jurisdictions of the constitutional court and the other courts in the area of constitutional review

1. Review of laws and other acts

§ 1. Type of review

3. The Federal Constitutional Court is vested with the comprehensive authority to control all three powers of the state as concerns the constitutionality of their actions. The following acts are reviewed:

a) Judicial decisions:

On the application of any citizen who feels that he or she is adversely affected by a judicial decision issued by a court of last instance, the Federal Constitutional Court examines whether the court violated fundamental rights or rights that are equivalent to fundamental rights (the so-called **Urteilsverfassungsbeschwerde [constitutional complaint concerning a judgement]**; Article 93.1 No.4a of the Basic Law, § 90.1 of the *Bundesverfassungsgerichtsgesetz* [BVerfGG, Federal Constitutional Court Act]; cf. BVerfGE 15, p. 256 [at p. 261 *et seq.*]; 96, p. 231 [at p. 237]).

b) Acts of State power of the German administration and the German Government:

The Federal Constitutional Court reviews, on the citizen's application, whether the executive power, in its actions *vis-à-vis* the citizen, violated fundamental rights or rights that are equivalent to fundamental rights. This review can only in exceptional cases be performed directly, *i.e.*, by way of a constitutional complaint. As a general rule, all legal remedies must have been exhausted before a constitutional complaint is lodged (cf. § 90.2 of the BVerfGG; BVerfGE 8, p. 222 [at pp. 225-226]; 91, p. 1 [at p. 25]).

c) Legislative acts: statutes

The Federal Constitutional Court reviews the legislative acts by applying the standards of the Constitution to them (review of statutes).

In this context, the so-called **abstract review of a statute**, or **review of law in general** pursuant to Article 93.1 Nos. 2 and 2a of the Basic Law, § 13 Nos. 6 and 6a, § 76 et seq. of the BVerfGG must be distinguished from the **concrete review of a statute**, or **review of a specific statute** on the occasion of a specific case that is submitted to the court by way of judicial referral proceedings pursuant to Article 100.1 of the Basic Law, § 13 No. 11, § 80 et seq. of the BVerfGG. The abstract review of a statute must also be distinguished from the **constitutional complaint** pursuant to Article 93.1 No. 4a of the Basic Law, § 13 No. 8a, § 90 *et seq.* of the BVerfGG (in this context, cf. question 6). Moreover, municipalities and associations of municipalities can lodge the so-called **municipal constitutional complaint** pursuant to Article 93.1 No. 4b of the Basic Law; § 13 No. 8a, § 91 of the BVerfGG alleging that a Federal or *Land* law (or decree) violates the municipalities' right to self-government guaranteed in Article 28.2 of the Basic Law (cf. e.g., BVerfGE 56, p. 298 - Establishment of noise protection areas in the surroundings of military airfields; 59, p. 216 - Change of the municipality's name by the parliament; 86, p. 90 - Modification of the territory of municipalities).

d) Moreover, the Federal Constitutional Court is responsible for the **decision on constitutional disputes between constitutional bodies, including federalism responsibilities**:

The Federal Constitutional Court rules in disputes between constitutional bodies concerning their rights and duties under the Constitution (the so-called **Organstreit** proceedings, Article 93.1 No. 1 of the Basic Law; § 13 No. 5, § 63 *et seq.* of the BVerfGG; cf. *e.g.*, BVerfGE 20, p. 119; 24, p. 300; 85, p. 264 - Decisions on the financing of political parties; BVerfGE 44, p. 125 - The Federal Government's public-relations activities during election campaigns; BVerfGE 62, p. 1 - Dissolution of the *Bundestag* in 1983; BVerfGE 68, p. 1 - Re-armament Decision; BVerfGE 73, p. 1 - Financing of foundations that are closely associated with the political parties; BVerfGE 90, p. 286 - Missions of the German army abroad). The legal instrument that is to be reviewed in *Organstreit* proceedings is an **act or omission of a constitutional body** (President of the Federal Republic of Germany, *Bundestag*, *Bundesrat*, Federal Government and such parts of these bodies that are vested with rights of their own by the Basic Law or the Standing Orders of the *Bundestag* and the *Bundesrat*, § 63 of the BVerfGG).

Moreover, the Federal Constitutional Court is responsible for dealing with **federalism disputes** between the Federation and the *Länder*, between different *Länder* and within a *Land*, *i.e.*, it is responsible for:

aa) Disputes between the Federation and the Länder of a constitutional nature pursuant to Article 93.1 No. 3 of the Basic Law; §§ 13 No. 7, 68 *et seq.* of the BVerfGG: In accordance with these articles, the Federal Constitutional Court shall rule "in the event of disagreements respecting the rights and duties of the Federation and the *Länder*, especially in the execution of Federal law by the *Länder* and in the exercise of federal oversight." The matters in dispute are **acts or omissions** that **violate**, or directly **threaten**, a **legal position of the Land** or **the**

Federation under constitutional law that exists within a substantial legal relationship under constitutional law that comprises the Federation and the *Land* (cf. only BVerfGE 95, p. 250 [at p. 262] - Participation in the share capital of a public utility; with further references).

bb) Other disputes involving public law pursuant to Article 93.1 No. 4 of the Basic Law, § 13 No. 8, §§ 71-72 of the BVerfGG: Pursuant to Article 93.1 No. 4, 1st part, of the Basic Law, the Federal Constitutional Court shall rule "in other disputes involving public law between the Federation and *Länder*." This only concerns disputes involving public law that: (1) do not relate to constitutional law; and (2) the basis of which lies in laws or State treaties. This responsibility of the Federal Constitutional Court in disputes under administrative law, however, only exists to the extent that there is no recourse to another court (subsidiarity). Because normally there is recourse to the Federal Administrative Court, Article 93.1 No. 4, 1st part, is factually of no importance in practice. Until now, the Federal Constitutional Court has therefore only taken one decision that is based on this responsibility (BVerfGE 1, p. 299 - Government housing promotion). When this decision was made, the responsibility of the administrative courts for this type of dispute had not yet been established.

Pursuant to Article 93.1 No. 4, 2nd part, of the Basic Law, the Federal Constitutional Court is responsible for dealing with disputes "between different *Länder*". This responsibility comprises disputes under constitutional law as well as disputes involving administrative law. In these cases, however, the subsidiarity clause applies as well: for disputes involving public law that are of a non-constitutional nature, there is recourse to the administrative courts. As a consequence, only disputes between the *Länder* that involve constitutional law remain within the responsibility of the Federal Constitutional Court (cf. *e.g.*, BVerfGE 22, p. 221 - State treaty on the unification of Coburg and Bavaria).

cc) Constitutional disputes within a *Land* pursuant to Article 93.1 No.4, 3rd part, Article 99 of the Basic Law, § 13 No. 10, § 73 *et seq.* of the BVerfGG: The Federal Constitutional Court shall, pursuant to Article 93.1 No. 4, 3rd part, of the Basic Law, rule on disputes involving public law within a *Land* unless there is recourse to another court. Most *Länder* have established recourse to another court, *i.e.*, to their own constitutional courts on the *Land* level (cf. BVerfGE 90, p. 40 [at pp. 42-43] - Prior-ranking jurisdiction of the Constitutional Court of Saxony). Article 99 of the Basic Law permits the assignment, through a *Land* law, of the primary responsibility for constitutional disputes within a *Land* to the Federal Constitutional Court. Only Schleswig-Holstein has made use of this possibility (cf. Article 44 [formerly: Article 37] of the Constitution of the *Land* Schleswig-Holstein of August 1, 1990, GVOBl [*Gesetz- und Verordnungsblatt, Länder* Gazette] p. 391; cf. BVerfGE 27, p. 44 [at p. 51]; 60, p. 53 [at p. 61]).

dd) Other matters assigned to the Federal Constitutional Court by a Federal law, pursuant to Article 93.2 of the Basic Law: Federalist disputes in a broader sense comprise *e.g.*, complaint proceedings against the permission, or the refusal of the permission, to organise a petition for a plebiscite about the creation of a single *Land* from areas that belong to different *Länder* (cf. Article 29.4 and 29.6 of the Basic Law; cf. BVerfGE 96, p. 139 - Petition for a plebiscite seeking the creation of the *Land* Franconia). Details are regulated in the *Gesetz über das Verfahren bei Volksentscheid, Volksbegehren und Volksbefragung nach Art. 29 Abs. 6 des Grundgesetzes* (Act on the procedure for organising a plebiscite, a petition for a plebiscite or a referendum pursuant to Article 29.6 of the Basic Law) of July 30, 1979 (BGBl [*Bundesgesetzblatt*, Federal Law Gazette] I p. 1317; hereinafter: "Article 29.6 Act").

The Federal Minister of the Interior decides on the permissibility of a plebiscite. Pursuant to § 24.5(3) of the "Article 29.6 Act", it is permissible to lodge a complaint with the Federal Constitutional Court if permission is refused.

Pursuant to § 50.3 of the *Verwaltungsgerichtsordnung* (VwGO, Rules of the Administrative Courts), § 39.2 of the *Sozialgerichtsgesetz* (SGG, Social Courts Act), the Federal Administrative Court and the Federal Social Court are obliged, in the case of disputes between the Federation and the *Länder*, and in the case of disputes between *Länder* which have been brought before them, to submit the matter to the Federal Constitutional Court if they regard it as a constitutional dispute.

e) The Federal Constitutional Court's further responsibilities include special proceedings for the **protection of the Constitution**, *e.g.*,

- to rule **on the unconstitutionality of political parties** pursuant to Article 21.2(2) of the Basic Law; § 13, No. 2, § 43 et seq. of the BVerfGG.

The Federal Constitutional Court can decide on the unconstitutionality of a party and on the dissolution of the party that results from its unconstitutionality. This decision establishes, eliminates or refines legal relations in this respect. The two proceedings on the unconstitutionality of a party that have taken place so far were successful (BVerfGE 2, p. 1 - Socialist Reich Party; 5, p. 85 - Communist Party of Germany). More recent applications that sought the ban of a party have been dismissed as being inadmissible by the Federal Constitutional Court, as the challenged associations were not parties under the terms of Article 21.1(1), § 2.1 of the Party Act (BVerfGE 91, p. 262 [at p. 272 et seq.] - National List; 91, p. 276 [at p. 290 *et seq.*] - Free German Workers' Party). At present, the proceedings on the ban of the National Democratic Party of Germany (NPD), which has been instituted on application of the Federal Government, the *Bundestag* and the *Bundesrat*, are pending before the Federal Constitutional Court (2 BvB 1/01, 2 BvB 2/01 and 2 BvB 3/01).

- the **impeachment of the Federal President** pursuant to Article 61 of the Basic Law; § 13 No. 4, § 49 *et seq.* of the BVerfGG; such a case has not occurred yet.

f) Finally, the Federal Constitutional Court is responsible for the **scrutiny of elections** pursuant to Article 41.2 of the Basic Law, § 13 No. 3, § 48 of the BVerfGG. The scrutiny of elections is the task of the *Bundestag*, pursuant to Article 41.1(1) of the Basic Law. It is permissible to lodge a complaint with the Federal Constitutional Court that challenges the *Bundestag*'s decisions about the validity of an election or process of acquiring or losing one's status as a member of the *Bundestag*.

4. Most of the above-mentioned competencies are exclusive responsibilities of the Federal Constitutional Court:

The other courts, however, can also review the constitutionality of statutes. The Federal Constitutional Court's exclusive responsibility for dismissing statutes only extends to Federal laws, not to decrees (cf. BVerfGE 71, p. 305 [at p. 337] - Milk quota decree). Neither does it apply to laws enacted before the ratification of the Basic Law (cf. BVerfGE 2, p. 124 [at p. 128 *et seq.*]; 70, p. 126 [at pp. 129-130] - Act on the Insurance Contract of May 30, 1908 [RGBl [*Reichsgesetzblatt*, Reich Law Gazette], p. 263]). Matters of this nature can be

decided by any court. Apart from this, the courts can also review the constitutionality of other legal instruments.

5. The review by the Federal Constitutional Court can be a prior review or a subsequent review.

a) Review by the Federal Constitutional Court, however, cannot be performed before a law is enacted.

b) Article 100 of the Basic Law provides a *review of statutes* that is performed *prior* to the decision of the jurisdiction of the other courts:

If a court concludes that a law on whose validity its decision depends is unconstitutional, Article 100.1(1) of the Basic Law provides that the proceedings should be stayed and a decision should be obtained from the *Land* court with jurisdiction over constitutional disputes where the constitution of a *Land* is held to be violated, or from the Federal Constitutional Court where the Basic Law is held to be violated. This is the so-called **concrete review of a statute**, or **review of a specific statute**, or **judicial referral**.

If the purpose of the principle of subsidiarity (§ 90.2 of the BVerfGG), *i.e.*, to achieve review of the questions of fact and law in the other courts, cannot be accomplished, it is possible as an exception, pursuant to § 95.3 of the BVerfGG, to lodge a **constitutional complaint that directly challenges a law** (BVerfGE 65, p. 1 [at p. 38] - Census Decision; 72, p. 39 [at p. 44]; 79, p. 1 [at p. 20]).

Apart from this, the Federal Constitutional Court decides, pursuant to Article 100.2 of the Basic Law, upon judicial referral, whether a rule of international law is an integral part of Federal Law pursuant to Article 25 of the Basic Law.

Finally, the ***Länder*** **constitutional courts' *Divergenzvorlage* (deviation referral)**, pursuant to Article 100.3 of the Basic Law, is also a kind of "prior review"; If the constitutional court of a *Land*, in interpreting the Basic Law, proposes to deviate from a decision of the Federal Constitutional Court or of the constitutional court of another *Land*, it shall obtain a decision from the Federal Constitutional Court. The Federal Constitutional Court decides on the question of (the interpretation of the) law.

c) Contrary to this, **subsequent review** can be found *e.g.*, in the case of a constitutional complaint that challenges: (1) acts of State power of the German administration and the German government; and (2) judicial decisions, if the statute that is the basis of the decision is challenged indirectly.

6. The review carried out by the Federal Constitutional Court can be abstract as well as concrete. Abstract review is performed in comparatively few cases; it mainly concerns highly controversial political issues.

a) In the so-called "**abstract review of a statute**", or **review of law in general**, pursuant to Article 93.1 No. 2 of the Basic Law, §§ 13 No. 6, 76 *et seq.* of the BVerfGG, specific constitutional bodies (the Federal Government, a *Land* government or one third of the members of the *Bundestag*) can submit a statute to the Federal Constitutional Court for

review. "Abstract" means that the submission does not require a "concrete" case at issue. Important decisions of the Federal Constitutional Court have been taken in proceedings that involve the abstract review of a statute, *e.g.*, concerning the Basic Treaty with the German Democratic Republic (BVerfGE 36, p. 1); the time-phase solution for the termination of pregnancy (BVerfGE 39, p. 1); the consideration, under tax deductibility aspects, of contributions and donations to political parties(BVerfGE 52, p. 63); the reorganisation of the right to conscientious objection to military service (BVerfGE 69, p. 1); the Broadcasting Act of the *Land* Lower Saxony (BVerfGE 73, p. 118); revenue allocation between the Federation and the *Länder* (BVerfGE 72, p. 330; 86, p. 148; 101, p. 158); and the termination of pregnancy (BVerfGE 88, p. 203).

b) In cases of "**concrete review of a statute**", or **review of a specific statute** pursuant to Article 100.1, a judge whose decision in a concrete case depends on the validity of the statute in question refers the case to the Federal Constitutional Court. The Federal Constitutional Court reviews the statute to the extent that the decision in the "original case" depends on its validity.

c) The concrete review of a statute can be performed in the framework of a **constitutional complaint** pursuant to Article 93.1 No. 4a of the Basic Law. The constitutional complaint can directly challenge a judicial decision, and in its grounds, it can (indirectly) rely on the unconstitutionality of the statute that was regarded as constitutional and therefore applied in the decision. If the Federal Constitutional Court regards the statute on which the judicial decision is based as unconstitutional, it does not only reverse the decision but also declares - on account of the constitutional complaint - the statute unconstitutional. Apart from this, the possibility of lodging a constitutional complaint that directly challenges a statute exists in exceptional cases (cf. 5.b above). The review is concrete because the complainant must demonstrate that the statute personally affects him or her presently and directly. As concerns its dictum and its legal consequences, however, the Federal Constitutional Court decision about the statute is detached from the original case (as regards the consequences of the decisions in detail cf. question 37).

The other disputes (like *Organstreit* proceedings, federalism disputes, constitutional complaints challenging acts of the executive power), proceedings that concern the internal security of the state and proceedings concerned with the scrutiny of elections and the status of members of the *Bundestag* are "concrete" to the extent that a specific "case" or, in the scrutiny of elections, a specific election gave rise to them.

§ 2. Referrals to the constitutional court

a. Types of referral

7. Access to the constitutional court and number of cases

Example: Year 2000

Type of proceedings:	Number
Forfeiture of fundamental rights (Article 18 of the Basic Law)	-
Unconstitutionality of political parties (Article 21.2 of the Basic Law)	-
Scrutiny of elections and of the member of *Bundestag* status (Article 41.2 of the Basic Law)	6
Impeachment of the Federal President (Article 61 of the Basic Law)	-
Disputes between constitutional bodies (*Organstreit*, Article 93.1 No. 1 of the Basic Law)	2
Abstract review of a statute (Article 93.1 No. 2 of the Basic Law)	1
Disputes between the Federation and the *Länder* (Article 93.1 No. 3 and Article 84.4[2] of the Basic Law)	2
Other disputes involving public law (Article 93.1 No. 4 of the Basic Law)	-
Impeachment of judges (Articles 98.2 and 98.5 of the Basic Law)	-
Constitutional disputes within a *Land* (Article 99 of the Basic Law)	1
Concrete review of a statute (Article 100.1 of the Basic Law)	26
Review of international law (Article 100.2 of the Basic Law)	-
Referrals from *Länder* constitutional courts (Article 100.3 of the Basic Law)	-
Continued applicability of law as Federal law (Article 126 of the Basic Law)	-
Other referrals on account of Federal laws (Article 93.2 of the Basic Law)	-
Temporary injunction proceedings (§ 32 of the BVerfGG)	88
Constitutional complaints (Article 93.1 Nos. 4a, 4b of the Basic Law)	4,705

cf. also the table on the next page which shows the figures from the last 15 years.

Cases concluded (plenary / Senate / Chamber decisions)

Type of proceedings	Reference	Until 1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	Total
Forfeiture of fundamental rights Art. 18 of the Basic Law	BvA	2	-	-	-	-	-	-	-	-	-	1	-	-	-	-	3
Unconstitutionality of political parties Art. 21.2 of the Basic Law	BvB	2	-	-	-	-	-	-	-	-	2	-	-	-	-	-	4
Scrutiny of elections and of member of Bundestag status Art. 41.2 of the Basic Law	BvC	54	-	6	-	-	2	8	3	-	-	-	12	8	-	17	110
Impeachment of the Federal President Art. 61 of the Basic Law	BvD	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Disputes between constitutional bodies (Organstreit, Art. 93.1 No.1 of the Basic Law)	BvE	35	-	-	1	7	2	3	-	3	2	1	2	2	2	1	61
Abstract review of a statute Art. 93.1 No. 2 of the Basic Law	BvF	52	1	2	2	3	1	4	3	-	3	1	3	2	4	-	81
Disputes between the Federation and the Länder, Art. 93.1 No. 3 and Art. 84.4(2) of the Basic Law	BvG	10	-	-	-	1	2	-	-	1	2	1	1	-	1	1	20
Other disputes involving public law Art. 93.1 No. 4 of the Basic Law	BvH	25	1	-	-	-	-	2	-	3	1	-	1	1	1	2	37
Impeachment of judges Articles 98.2 and 98.5 of the Basic Law	BvJ	-	-	-	-	-	-	-	-	-	-	-	-	-			
Constitutional disputes within a Land Art. 99 of the Basic Law	BvK	10	-	-	-	-	-	-	-	-	-	-	1	1	1	1	14
Concrete review of a statute Art. 100.1 of the Basic Law - Senates - - Chambers since August 11, 1993 -	BvL	830	12	20	16	10	8	17	10 8	8 20	6 8	7 13	5 13	15 9	8 16	4 25	976 112
Review of international law Art. 100.2 of the Basic Law	BvM	5	1	-	-	-	-	-	-	-	-	-	-	-	1	-	7
Referrals from Land constitutional courts Art. 100.3 of the Basic Law	BvN	4	-	-	-	-	-	-	-	-	-	-	-	1	-	-	5
Continued applicability of law as Federal Law Art. 126 of the Basic Law	Bv0	19	-	-	-	-	-	-	-	-	-	-	-	-	-	-	19
Other cases assigned to the Federal Constitutional Court by a Federal law Art. 93.2 of the Basic Law - from 1971 -	BvP	2	-	-	-	-	-	-	-	-	-	-	2	1	-	-	5
Temporary injunction (§ 32 BVerfGG) and - until 1970 - other proceedings	BVQ	231	33	14	22	24	27	44	66	46	47	29	38	39	68	67	795
Constitutional complaints Art. 93.1 Nos. 4a, 4b of the Basic Law - Senates - - Committees of Judges or Chambers -	BvR	3,529 49,393	46 2,517	28 2,794	26 2,996	25 2,939	28 3,224	29 3,592	17 4,794	22 4,768	13 4,600	18 4,684	20 4,476	29 4,480	15 4,774	10 4,755	3,855 104,786
Plenary matters § 16.1 BverfGG	BvU / PBvU	2	-	-	-	-	-	-	-	-	-	-	1	-	-	_	3
Total of all proceedings:		54,205	2,611	2,864	3,063	3,009	3,294	3,699	4,901	4,871	4,684	4,755	4,575	4,588	4,891	4,883	110,893

- Forfeiture of fundamental rights pursuant to Article 18 of the Basic Law, § 13 No. 1, § 36 *et seq.* of the BVerfGG:

Upon application of the *Bundestag*, of the Federal Government or of a *Land* government (§ 36 of the BVerfGG), the Federal Constitutional Court decides, pursuant to Article 18 of the Basic Law, whether a person forfeits the possibility to engage in specific activities that are protected by fundamental rights. These types of proceedings have not been of importance in practice. The Federal Constitutional Court has rejected two applications because they were insufficiently founded (BVerfGE 11, p. 282; 38, p. 23).

- Party-ban proceedings pursuant to Article 21.2(2) of the Basic Law; § 13 No. 2, § 43 *et seq.* of the BVerfGG (cf. question 3e above):

Upon application of the *Bundestag*, of the *Bundesrat* or of the Federal Government (§ 43.1 of the BVerfGG), the Federal Constitutional Court decides about the unconstitutionality of a party and the attending dissolution of that party. Party-ban proceedings serve the preventive protection of the constitutional order. The Federal Constitutional Court is the only institution that may decide on the unconstitutionality of a party. Pursuant to § 15.3(1) of the BVerfGG, this decision requires a majority of two thirds of the Senate that deals with the matter.

- Impeachment of judges pursuant to Articles 98.2 and 98.5 of the Basic Law; § 13 No. 9, § 58 *et seq.* of the BVerfGG:

Upon application of the *Bundestag*, the Federal Constitutional Court may, by a two-thirds majority, order that a judge be transferred or retired (Article 98.2[1] of the Basic Law). In the case of an intentional infringement, it may order the judge dismissed (Article 98.2[2] of the Basic Law), if a Federal judge, in his or her official capacity or unofficially, infringes the principles of the Basic Law or the constitutional order of a *Land*. Article 98.5 of the Basic Law empowers the parliaments of the *Länder* to enact provisions concerning Land judges that correspond to Article 98.2. However, the decision in a case concerning judicial impeachment of a *Land* judge rests solely with the Federal Constitutional Court (Article 98.5[3] of the Basic Law).

In the existence of the Federal Constitutional Court this provision has not yet been applied.

- Continued applicability of law as Federal law (Article 126 of the Basic Law):

Pursuant to Article 126 of the Basic Law, the Federal Constitutional Court decides in the case of disagreements "respecting the continued applicability of law as Federal law". The Federal Constitutional Court is supposed to ascertain whether a statute enacted before the ratification of the Basic Law has the rank of Federal law (cf. BVerfGE 7, p. 18 - Bavarian Practitioners' Act). The *Bundestag*, the *Bundesrat*, the Federal Government and a court whose decision depends on the validity of a statute are entitled to file an application.

- Constitutional complaints (Article 93.1 No. 4a, Article 93.1 No. 4b of the Basic Law):

Pursuant to Article 93.1 No.4a of the Basic Law, **any person** may file a **constitutional complaint** alleging that one of his or her fundamental rights or one of his or her rights under Article 20.4, Article 33, Article 38, Article 101, Article 103 or Article 104 has been violated by a public authority. As concerns the number of cases, the constitutional complaint is the most important type of proceeding.

The Federal Constitutional Court is, pursuant to Article 93.1 No. 4b of the Basic Law, responsible for dealing with **constitutional complaints lodged by municipalities and associations of municipalities** on the ground that their right to self-government under Article 28.2 of the Basic Law has been violated by a statute (in this context, cf. question 3c). In the past, municipalities have successfully opposed, e.g., restrictions on their planning authority (BVerfGE 56, p. 298), an arbitrary change of the municipality's name (BVerfGE 59, p. 216) and a territorial reorganisation of municipalities by a *Land* statute (BVerfGE 86, p. 90).

b. Actions for annulment

8. The **abstract review of a statute** can be regarded as "direct recourse" against laws, other statutes and acts (Article 93.1 No. 2 of the Basic Law). Federal law as well as *Land* law can be under review in this type of proceeding.
Apart from this, statutes can also be under review in **disputes between the Federation and the *Länder***. Moreover, **constitutional complaints that are lodged by mu**nicipalities can also be regarded as direct recourse against statutes.

9. In **proceedings that concern the abstract review of a statu**te, the Federal Government, the government of a *Land* or one third of the members of the *Bundestag* are, pursuant to Article 93.1 No. 2 of the Basic Law and § 76.1 of the BVerfGG, entitled to file an application. There is no time limit for such application.

In **disputes between the Federation and the *Länder*** pursuant to Article 93.1 No. 3 of the Basic Law, applicants and opposing parties are, in accordance with § 68 of the BVerfGG, the Federal Government for the Federation and the respective *Land* government for a *Land*. In the case of Article 84.4 of the Basic Law, preliminary proceedings in the shape of a decision of the *Bundesrat*, which establishes upon application of the Federal Government that a *Land* has not correctly executed Federal laws pursuant to Article 84 of the Basic Law (notification of deficiencies). Pursuant to Article 84.4(2) of the Basic Law, the Federal Constitutional Court can only be invoked in response to this decision of the *Bundesrat*. The *Bundesrat* decision may only be challenged within one month (§ 70 of the BVerfGG), whereas, in all other cases pursuant to § 69 in conjunction with § 64.3 of the BVerfGG, there is a time limit of six months.

In the case of **municipal constitutional complaints** pursuant to Article 93.1 No. 4b of the Basic Law and § 91 of the BVerfGG, municipalities and associations of municipalities may file a constitutional complaint against a law (or a decree; cf. BVerfGE 26, p. 228 [at p. 236]; 76, p. 107 [at p. 114] - Regional development and regional planning). The constitutional complaint may, pursuant to § 93.3 of the BVerfGG, be lodged within one year of the law entering into force or the announcement of the act of State.

By way of their **constitutional complaint**, individual persons can also successfully challenge statutes, other regulations and acts (cf. BVerfGE 102, p. 26 - Living cell decree).

10. The Federal Constitutional Court can suspend laws or other statutes and acts by way of a temporary injunction pursuant to § 32 of the BVerfGG.

c. Preliminary issues - plea of unconstitutionality

Who can refer cases to the constitutional court?

11. In accordance with Article 100 of the Basic Law, the courts can refer cases to the Federal Constitutional Court. The notion of 'court' in Article 100.1 of the Basic Law is the general notion of 'court' stipulated in the Basic Law (cf. BVerfGE 4, p. 331 [at p. 344]). Pursuant to the Basic Law, courts are State bodies of the judiciary that are separate from the legislative and executive powers; they are independent and subject only to the law (cf. BVerfGE 4, p. 331 [at pp. 346-347]; 14, p. 56 [at pp. 67-68]). There is no broad or restrictive interpretation of Article 92 of the Basic Law.

12. If the conditions stipulated in Article 100 of the Basic Law are met (*inter alia*: the court's decision depends on the validity of a specific statute; the court is convinced that the Federal law or *Land* law is unconstitutional), the judicial bodies are obliged to take recourse to the Federal Constitutional Court (cf. question 5 above). If a judge only expresses doubts about the constitutionality of the law that is to be applied, this is not sufficient (cf. BVerfGE 80, p. 54 [at p. 59], with further references). The court does not need to refer a case if it has the possibility to interpret the respective statute in conformity with the Basic Law, and can thus avoid confronting the unconstitutionality of the statute (cf. BVerfGE 66, p. 84 [at p. 92]; 68, p. 337 [at p. 344]; 80, p. 54 [at p. 58]).

13. There is no possibility of opposing, by a procedure of objection, opposition or recourse, the referral of all or part of a case to the Federal Constitutional Court.

14. Pursuant to Article 100.1 of the Basic Law, all competent panels of all courts in all instances are entitled to make use of judicial referral. The Federal Constitutional Court performs the review *ex officio*.

The parties to the original case will set forth their legal viewpoint and will work towards achieving a judicial referral to the extent that the parties are of the opinion that the decision depends on the validity of the specific statute in question. The decision by the court whether to make use of judicial referral, however, is independent of the parties' opinion about the nullity of the statute (§ 80.3 of the BVerfGG).

15. The referring judge has the competence to examine whether a statute is in accord with the Basic Law. The judge either states that in his or her opinion, the statute is unconstitutional and substantiates this opinion, or holds that the statute is constitutional; in the latter case, the judge will not refer the statute to the Federal Constitutional Court for review.

The binding decision about the nullity of the statute, however, is reserved to the Federal Constitutional Court. The Federal Constitutional Court has the competence to dismiss a statute (cf. question 4 above).

Screening

16. Pursuant to § 24 of the BVerfGG, inadmissible or patently unfounded applications may be dismissed by a unanimous order of the Court (cf. BVerfGE 7, p. 59; 76, p. 100; 85, p. 165; 86, p. 52).

Moreover, a Chamber of the Federal Constitutional Court may, pursuant to § 81a of the BVerfGG, by unanimous decision, determine the inadmissibility of a judicial referral (cf. *e.g.*, the decision of the Third Chamber of the Second Senate of the Federal Constitutional Court of July 13, 1994, DVBl. [*Deutsches Verwaltungsblatt*, German Administrative Gazette] 1994, p. 1404 - Judicial referral concerning the proportionality of pre-deportation custody). The Federal Constitutional Court consists of two Senates with eight judges each. Each Senate appoints several Chambers for the duration of one business year (§ 15a.1(1) of the BVerfGG). Each Chamber consists of three judges (§ 15a.1[2] of the BVerfGG). In the year 2000, 25 out of 29 proceedings that concerned the concrete review of a statute were disposed of in this way by a chamber (cf. the annual statistics for 2000, p. 12).

As has already been stated with regard to question 12, judicial referral is impermissible if a possibility to interpret the law in conformity with the Constitution exists (cf. BVerfGE 66, p. 84 [at p. 92]; 68, p. 337 [at p. 344]; 80, p. 54 [at p. 58]). Thus, the Federal Constitutional Court has stated, e.g., in BVerfGE 78, p. 20 (at p. 24): "It is the purpose of Article 100.1 of the Basic Law to concentrate the review of statutes at the Federal Constitutional Court (BVerfGE 17, p. 208 [at p. 210]). On the other hand, the question how to interpret a statute is, in principle, left to the court that presides over the original case. If the responsible court is of the opinion that a statute, the interpretation of which is disputed, is only compatible with the Constitution if a specific interpretation is applied, the court must base its decision on this interpretation and may not take recourse to the Federal Constitutional Court" (cf. BVerfGE 22, p. 373 [at p. 377]).

Scope of referral to the constitutional court

17. In the case of a judicial referral, the Federal Constitutional Court takes into consideration, when examining the respective statute, all possible aspects of (constitutional) law, not only the ones that have been put forward by the submitting court (cf. BVerfGE 26, p. 44 [at p. 58]; 61, p. 43 [at p. 62]). This means that the Federal Constitutional Court can disregard the submitting court's considerations concerning the unconstitutionality of the submitted statute.

The only limitation posed by the original case is the object of review: The submitting court is responsible for the wording of the point of law which the Federal Constitutional Court is supposed to decide (cf. § 81 of the BVerfGG). This means that the legal provision that is regarded as invalid must be specified. The Federal Constitutional Court corrects obvious errors concerning specification; it narrows questions that are submitted for review if they are too broad, and, if necessary, it ascertains the exact content of the question that is referred for

decision (cf., *e.g.*, BVerfGE 13, p. 153 [at pp. 157-158], 15, p. 268 [at pp. 270-271]; 67, p. 348 [at pp. 361-362]).

It is possible to broaden the question submitted for decision if the overall context of the order for referral shows that the referring court has also considered, and regards as relevant, issues other than the ones that have expressly been put forward. It is also necessary to extend the scope of the question submitted for decision by other aspects if it would otherwise not be possible to examine the question in a meaningful way or if it becomes evident that there is a close, intrinsic connection between the issue that is relevant to the decision and another issue, which means that the other issue is to be treated as if it had been submitted for decision as well (cf. BVerfGE 96, p. 345 [at p. 360], with further references).

If the Federal Constitutional Court declares a legal provision null and void (§ 82.1, § 78, sentence 1 of the BVerfGG) and if further provisions of the same statute are incompatible with the Basic Law for the same reasons, the Federal Constitutional Court may, pursuant to § 82.1, § 78, sentence 2 of the BVerfGG, also declare these provisions null and void. The same applies to the declaration of incompatibility of a legal provision with the Basic Law.

When applying § 82.1, § 78 sentence 2 of the BVerfGG *mutatis mutandis*, it may also be necessary to apply the declaration of incompatibility with the Basic Law not only to the provision submitted for review but also to an identical provision contained in an amended version of the law that is presently in force, which has not been submitted for review (BVerfGE 28, p. 324 [at p. 363]; 65, p. 237 [at pp. 243-244]).

Finally, the declaration of nullity or incompatibility can also extend to identical provisions of other laws (BVerfGE 94, p. 241 [at pp. 265-266] - Assessment of periods of child-raising under pension law; 99, p. 202 [at p. 216] - subsequent provision).

18. Pursuant to § 81 of the BVerfGG, the Federal Constitutional Court decides solely on the point of law, *i.e.*, on the compatibility or incompatibility of the submitted statute with the Basic Law. The Federal Constitutional does not decide the original case.

Relevance of the question

19. Pursuant to Article 100.1(1) of the Basic Law, the decision in the original proceedings must depend on the validity of the statute submitted for review, *i.e.*, its validity must be relevant to the decision. The referring court must substantiate this. The fact that the decision in the original proceedings depends on the validity of the statute submitted for review is the prerequisite for the admissibility of the judicial referral. If the decision in the original proceedings does not depend on the statute submitted for review, the inadmissibility of the judicial referral is determined by the responsible Chamber and/or the responsible Senate (§ 81a of the BVerfGG) and the question is not decided by the Federal Constitutional Court. The decisive factors for the decision whether a judicial decision depends on the validity of a specific statute, however, are the interpretation of the law and the evaluation of evidence of the judge *a quo*, who will also decide the case later on.

Interpretation of the question

20. As has already been stated, the Federal Constitutional Court may narrow questions that are submitted for review if they are too broad, and, if necessary, it may ascertain the exact content of the question that is referred for decision (cf. *e.g.*, BVerfGE 3, p. 187 [at p. 196]; 3, p. 208 [at p. 211]; 7, p. 129 [at p. 138]; 58, p. 300 [at pp. 327-328]). It is also possible for the Court to broaden a question submitted for decision (cf. BVerfGE 96, p. 345 [at p. 360], with further references). There is no statistical evidence about the extent to which referrals are reformulated. Reformulation, at any rate, only comes into consideration in very few cases, and only if the referral is admissible.

Interpretation of the reviewed statute

21. When reviewing, as to substance, whether a statute, is in accord with the Basic law , the Federal Constitutional Court interprets the statute referred for review independently and without being bound to the submitting court's interpretation of the statute or to other courts' interpretation of the statute (cf. BVerfGE 98, p. 145 [at p. 154], with further references). Only this makes it possible to interpret a statute in conformity with the Basic Law, which is a frequent practice (cf. BVerfGE 2, p. 266 [at p. 282]; 67, p. 70 [at p. 88], with further references; BVerfGE 96, p. 315 [at pp. 329-330]).

Jus superveniens

22. If due to an amendment of the respective statute, the prerequisites of Article 100.1 of the Basic Law no longer exist, this renders the referral inadmissible (cf. BVerfGE 29, p. 325 [at p. 326]). This is only the case if the amended statute also applies to the original case that is dealt with by the *judex a quo*. If the effect of the amendment only applies to the future, the referral remains admissible (cf. BVerfGE 96, p. 315 [at pp. 324-325]). Sometimes, the new statute has also consequences for the interpretation of the old statute (cf. BVerfGE 98, p. 70 [at pp. 81-82]).

Parties

23. § 82 of the BVerfGG regulates who is entitled to join proceedings and who is entitled to make a statement.

a) Pursuant to § 82.3 of the BVerfGG, the Federal Constitutional Court gives **the parties to the proceedings before the court making the application** an opportunity to make a statement. The procedural rules that are valid for the courts regulate who is a party to the to the proceedings before the court making the application.

b) Pursuant to § 82.1 of the BVerfGG in conjunction with § 77 of the BVerfGG the bodies that have created a statute that is submitted for review are given the opportunity to make a statement. Moreover, the **constitutional bodies** that are granted in Article 93.1 No. 2 of the Basic Law the right to request review of the validity of a law, by way of proceedings that concern the abstract review of a statute, from the Federal Constitutional Court, are given the opportunity to make a statement. If a regulation of Federal law is the object of the procedure that concerns the review of a statute, the group of those who are entitled to make a statement is different from cases in which the subject matter is a regulation of *Land* law. The

Bundestag, the *Bundesrat*, the Federal Government, the parliament and the government of the Land involved are entitled to make a statement. Pursuant to § 82.2 of the BVerfGG, the constitutional bodies named in § 77 of the BVerfGG may, on their own accord, join the proceedings at any stage.

c) Moreover, § 82.4 of the BVerfGG provides the possibility for **supreme Federal or *Land* courts** to make a statement.

Those mentioned under a) to c) who are entitled to join proceedings and who are entitled to make a statement are served with a copy of the judicial referral.

d) In the framework of its official investigation, the Court, however, also may also give, on its own accord, other authorities and associations the opportunity to present an opinion as expert third parties (§ 27a of the BVerfGG).

There is no possibility of intervention for outside third parties that are not mentioned in § 82 of the BVerfGG.

24. There is neither a counsel for the defence nor a counsel for the prosecution in matters before the Federal Constitutional Court.

§ 22 of the BVerfGG regulates the representation in proceedings before the Federal Constitutional Court. Pursuant to § 22, the parties to the proceedings may, in principle, conduct the proceedings on their own; outside the oral argument, there is no mandatory representation by lawyers.

Points of law in the constitutional proceedings

25. The parties before the court *a quo* may, by declarations that end the proceedings (*e.g.*, withdrawal of the action, of the *Berufung* appeal or the *Revision* appeal, settlement in court), terminate the proceedings *a quo*. This, at the same time, renders the pending proceedings that concern the concrete review of statutes pointless (cf. BVerfGE 14, p. 140 [at p. 142]; 29, p. 325 [at p. 326]). The referral is to be withdrawn by the court that made the referral. If this does not happen, the referral is to be dismissed as inadmissible.

In the case of the death of a natural person who is party to the proceedings, or in the case of the dissolution of a partnership that is party to a case, the court that made the referral must examine whether the proceedings remain pending at the court *pro quo*, which is normally the case; otherwise, the order for referral is to be cancelled.

d. The constitutional appeal (*Verfassungsbeschwerde*, constitutional complaint)

Object of the constitutional complaint

26. a) The object of the **individual constitutional complaint** is the complainant's claim that one of his or her fundamental rights or rights that are equivalent to fundamental rights has been violated by a public authority (Article 93.1 No. 4a of the Basic Law, § 90.1 of the BVerfGG). All measures of German direct and indirect state authority fall under this concept.

This means that it is possible to lodge a constitutional complaint directly against laws; § 93.3, § 94.4, § 95.3 of the BVerfGG show that § 90.1 of the BVerfGG proceeds on this assumption. Laws that ratify treaties under international law can also be challenged by way of a constitutional complaint (BVerfGE 84, p. 90 [at p. 113] - Expropriations under occupation law between 1945 and 1949). Constitutional complaints are admissible against decrees (cf. BVerfGE 62, p. 117 [at pp. 119, 153] - Admission to a second university course; 65, p. 248 [at p. 249] - Price Indication Decree) and by-laws (BVerfGE 65, p. 325 [at p. 326] - Secondary residence tax). Only acts of the German state power can be objects of a constitutional complaint; acts taken by states other than Germany cannot be reviewed by the Federal Constitutional Court (BVerfGE 1, p. 10 [at p. 11]; 66, p. 39 [at p. 56 *et seq.*] - Cruise Missile Decision).

Most constitutional complaints, however, challenge court decisions. In this respect the Federal Constitutional Court can only examine whether specific constitutional law has been violated. If a decision, under the standard of ordinary law, is objectively defective, this alone does not constitute a violation of specific constitutional law; the defectiveness must lie in the non-observance of fundamental rights (BVerfGE 18, p. 85 [at p. 92]; 62, p. 338 [at p. 343]; 80, p. 81 [at p. 95]).

To the extent that no proceedings are taking place before another court, the Federal Constitutional Court establishes the facts of the case on its own. It is also not bound to other courts' finding of facts; it is, however, not the mission of the Federal Constitutional Court to examine other courts' evaluation of evidence and finding of facts, to the extent that they are not recognisably arbitrary (cf. BVerfGE 4, p. 294 [at p. 297]; 34, p. 384 [at p. 397]). Sometimes however, the statements of expert parties to the case change the substantive background of the challenged decisions. The Federal Constitutional Court examines, in the framework of the violation of the right to a hearing in court (Article 103.1 of the Basic Law), whether a court has fulfilled its duty to take note and consider the parties' statements (BVerfGE 25, p. 137 [at p. 140]; 85, p. 386 [at p. 404]).

b) The object of the **municipal constitutional complaint** pursuant to Article 93.1 No. 4b of the Basic Law, § 13 No. 8a, § 91 of the BVerfGG is exclusively Federal or *Land* decrees (cf. BVerfGE 26, p. 228 [at p. 236]; 76, p. 107 [at p. 114]; 78, p. 331 [at p. 340]).

Admissibility of the complaint

27. In the case of the **individual constitutional complaint**, "any person" is entitled to lodge an application to the extent that he or she is able to be a holder of fundamental rights. Foreigners are entitled to lodge a constitutional complaint to the extent that they can invoke a fundamental right that applies to foreigners. Domestic legal persons may lodge a constitutional complaint to the extent permitted by the nature of the respective fundamental right (Article 19.3 of the Basic Law).

As concerns the **municipal constitutional complaint**, only municipalities and associations of municipalities are entitled to lodge such complaint (§ 91 of the BVerfGG).

Pursuant to § 93.1(1) of the BVerfGG, the constitutional complaint shall be lodged and substantiated in writing within one month. If the complaint is directed against a law or some

other act of State against which the recourse to a court is not admissible, the constitutional complaint may be lodged only within one year of the law's entry into force or the announcement of an act of State (§ 93.3 of the BVerfGG).

There are no further requirements as to form; there is also no mandatory representation by lawyers. Pursuant to § 92 of the BVerfGG, however, the reasons for the complaint shall "specify" the right that has allegedly been violated and the act or omission of the body or authority that constituted the violation; the requirements placed on this specification are considerable.

28. Pursuant to § 90.2(1) of the BVerfGG, the constitutional complaint may not be lodged until all remedies have been exhausted. However, the Federal Constitutional Court may, pursuant to § 90.2(2) of the BVerfGG, decide immediately on a constitutional complaint lodged before all remedies have been exhausted if it is of general relevance or if earlier recourse to other courts would entail a serious and unavoidable damage for the complainant.

Screening procedure

29. Pursuant to § 93a.1 of the BVerfGG, the constitutional complaint must be admitted for decision. Pursuant to § 93a.2 of the BVerfGG it shall be admitted for decision,
a) to the extent that it has fundamental constitutional significance,
b) if this is indicated to enforce the rights referenced in § 90.1 (fundamental rights and rights that are equivalent to fundamental rights); this can also be the case if the complainant suffers especially grave disadvantage as a result of refusal to decide on the complaint.

This is not the case if the constitutional complaint is inadmissible: in practice, especially the observance of the one-month time limit (§ 93 of the BVerfGG), the observance of the subsidiarity of the constitutional complaint (§ 90.2 of the BVerfGG) and the due substantiation of the constitutional complaint (§ 23.1(2), § 92 of the BVerfGG) play an important role as concerns admissibility.

The decision about the admission of the constitutional complaint for decision is not a discretionary decision but is based on full legal review by a Chamber or a Senate. The Chamber's decisions are adopted by unanimous assent (§ 93d.3[1] of the BVerfGG). Acceptance of a complaint by the Senate is achieved if at least three judges agree (§ 93d.3[2] of the BVerfGG).

In the year 2000, 5,072 constitutional complaints were processed by the Federal Constitutional Court; 4,802 of them (*i.e.*, 94.68 %) were, by way of a Chamber decision, not admitted for decision (cf. pp. 11, 14 of the annual statistics of the Federal Constitutional Court for the year 2000).

Another "filter" is the **Chamber decision that grants a constitutional complaint** pursuant to § 93c of the BVerfGG. A Chamber may, by unanimous assent, grant a constitutional complaint if the constitutional issue determining the judgement of the complaint has already been decided upon by the Federal Constitutional Court and if the constitutional complaint is patently well-founded (§ 93a.2, letter b of the BVerfGG). This decision is equal to a decision by the Senate. The Chamber decisions that grant constitutional complaints reduce the Senate's caseload in subsequent proceedings and expedite the proceedings. With the help of

such decisions, the Federal Constitutional Court increases the authority of Senate decisions by means of the Chamber jurisprudence if some courts have not sufficiently taken into account constitutional issues that the Federal Constitutional Court has already decided.

"Parties"

30. In so far as an oral argument takes place, the complainant may take part. It is the case, however, that the Federal Constitutional Court often dispenses with the oral argument (cf. § 94.5[2] of the BVerfGG).

If the constitutional complaint is directed against a court decision, the Federal Constitutional Court, pursuant to § 94.3 of the BVerfGG, also gives the party in whose favour the decision was taken an opportunity to make a statement.

Moreover, the Federal Constitutional Court gives the Federal or *Land* constitutional body whose act or omission is challenged by way of the constitutional complaint an opportunity to make a statement within a specified period (§ 94.1 of the Basic Law).

If the act or omission was committed by a minister or a Federal or *Land* public authority, the competent minister shall be given an opportunity to make a statement (§ 94.3 of the BVerfGG).

If the constitutional complaint directly challenges a law, § 77 of the BVerfGG shall, pursuant to § 94.4 of the BVerfGG, be applied *mutatis mutandis*, *i.e.*, bodies that have created a law that is to be reviewed are given the opportunity to make a statement. The constitutional bodies may join the proceedings.

Finally, the Federal Constitutional Court may, pursuant to § 27a of the BVerfGG, give expert third parties the opportunity to present an opinion.

31. Cf. the answer to question 24.

2. Settlement of conflicts between courts

32. It is not the task of the Constitutional Court to circumscribe the respective jurisdictions of the other courts. If, however, the complainant claims that his or her right to one's lawful judge (Article 101.1[2] of the Basic Law) has been violated because a court wrongly assumed competence for the specific case, the Federal Constitutional Court examines whether the measure or decision of the court was arbitrarily taken (BVerfGE 29, p. 45 [at p. 49]; 58, p. 1 [at p. 45]). Only in such an extreme case does the Federal Constitutional Court determine who the competent judge is or how the competent judge shall be ascertained.

II. The relations between the Constitutional Court and the other courts[2]

A. The organic link

33. The Federal Constitutional Court consists of two Senates with eight judges each (§§ 2.1 and 2.2 of the BVerfGG). Pursuant to § 2.3(1) of the BVerfGG, three judges of each Senate are elected from among the judges of the supreme Federal courts of justice. Only judges who have served at least three years with a supreme Federal court of justice should be elected (§ 2.3[2] of the BVerfGG). Pursuant to § 8.1 of the BVerfGG, the Federal Ministry of Justice draws up a list of all eligible Federal judges who have stated in writing that they are willing to become a member of the Federal Constitutional Court. In all other aspects, the election procedure for these members of the Federal Constitutional Court is the same as for other members.

B. The procedural link

34. If a judicial referral has become pointless (cf. question 25), the order for referral shall be reversed. An order of the Federal Constitutional Court that indicates the inadmissibility of the referral or the lacking prospect of success on the merits may give rise to an examination whether the prerequisites for submission (still) exist. Sometimes, the courts are also provided with indications as regards the deficiencies of the order for referral so that the judge *a quo* can improve upon the order.

Moreover, the Federal Constitutional Court may, pursuant to § 82.4(1) of the BVerfGG, ask supreme Federal or *Land* courts to state how and on the basis of what considerations they have hitherto interpreted the Basic Law with regard to the question in dispute, whether and how they have used in their exercise of justice the legal provision whose validity is contested, and which associated points of law are awaiting decision. Specific questions are asked as well.

There is no statistical evidence about whether and to what extent there is a "dialogue" between the courts that originally preside over cases and the Federal Constitutional Court. The Federal Constitutional Court, however, involves the other courts, on a regular basis, in Senate cases and in granting Chamber decisions, *i.e.*, the courts will be served with the applicant's written statement of the case with the challenged decisions, and the courts are given the opportunity to present their opinion.

[2] R. Jaeger, Karlsruhe, August 28, 2001.

C. The functional link

§ 1. The review and its effects

35. The decisions of the Federal Constitutional Court are binding on all courts (§ 31.1 of the BVerfGG). This also applies to granting Chamber decisions (§ 93c.1[2] of the BVerfGG). Beyond the decision in the individual case, the denial of admission for decision by the Federal Constitutional Court does not establish a binding precedent. The Federal Administrative Court has, for the case that a Federal Constitutional Court decision pursuant to § 24 of the BVerfGG has been taken which contains a detailed statement of reasons, even held that the *a limine* dismissal of a constitutional complaint has the binding effect stipulated in § 31 of the BVerfGG (BVerwGE [Decisions of the Federal Administrative Court] 24, p. 1 - Compulsory military service for Jehovah's Witnesses).

De facto, however, a Chamber decision regarding the denial of admission for decision that contains a statement of reasons has considerable effect. The courts normally adopt the constitutional appraisal in subsequent case law.

36. Review methods

a) in **proceedings that concern the review of a statute**:

aa) If the Federal Constitutional Court, in one of the relevant types of proceedings (abstract or concrete review of statutes, direct or indirect constitutional complaint against a law) comes to the conclusion that a law which it is to review infringes the Constitution, it declares the law **null and void**. This is provided in § 78, sentence 1, § 82.1, § 95.3(1) of the BVerfGG. The same applies to decrees and by-laws.

bb) The court may confine itself to declaring a law **incompatible with the Basic Law** without stating that it is null and void (cf. § 31.2, § 79.1 of the BVerfGG). With this type of declaration, three groups of cases can be distinguished:

(1) **Infringement of the principle of equality before the law: legislative discretion of the parliament**:
The most important group of cases in which the Federal Constitutional Court merely declares a law incompatible with the Basic Law consists of cases in which the parliament infringes provisions of the Basic Law that deal with the principle of equality before the law (Articles 3.1 to 3.3, Article 6.5, Articles 33.1 to 33.3, Article 38.1, Article 28.1 of the Basic Law). If the group of those favoured by a specific statute is insufficiently delimited, or if facts or constitutional directives to the state organs that are, as far as substance is concerned, similar to the ones in the statute to be reviewed, have not been taken into account (*e.g.*, in tax law: BVerfGE 25, p. 101 [at p. 111]; 33, p. 1 [at p. 12]; 61, p. 319; in social security law, as concerns widows, BVerfGE 29, p. 57 [at pp. 70-71]; 57, p. 335 [at p. 346]), the problem would not be solved by reversing a more favourable or less favourable treatment that runs counter to the principle of equality. By doing so, the court would anticipate the parliament's choice because, if the principle of equality before the law is violated, the parliament has several possibilities to ensure equal treatment.

In this context, a declaration of nullity is regarded as admissible, as an exceptional case, if: (1) only one possibility of eliminating the violation of the principle of equality is apparent; (2) if the parliament would certainly have chosen one specific procedure (*e.g.*, on account of a constitutional directive, BVerfGE 6, p. 246; 17, p. 148 [at pp. 152-153]; 21, p. 329 [at p. 338, p. 351 et seq.]); or (3) because the structure of the legal regulation only allows one solution (BVerfGE 27, p. 220 [at pp. 230-231]; 38, p. 187 [at p. 205]), *i.e.*, if the parliament's legislative discretion is limited to such an extent that only one constitutional alternative is possible (cf. *e.g.*, BVerfGE 16, p. 94; 61, p. 319).

(2) **Transitional arrangements after the entry into force of the Basic Law**:
The Basic Law provides the possibility that a law that dates back to the time before the entry into force of the Basic Law need not yet be null and void: Pursuant to Article 117.1 of the Basic Law, the legislation that ran counter to Article 3.2 of the Basic Law remained in force until March 31, 1953. In other cases as well, the Federal Constitutional Court has not declared so-called transitional law null and void, if the parliament, for historical reasons, had no alternative possibility of regulation (BVerfGE 4, p. 157 [at p. 169] - Saar Statute; 9, p. 63 [at p. 72] - Grain processing quota; 12, p. 281 [at p. 293] - Foreign currency controls I; 18, p. 353 [at p. 356] - Foreign currency controls II; 84, p. 90 - Indemnification and 84, p. 133 - Employment relationships of civil service employees in the GDR) or if occupation law was declared "merely incompatible" with the Basic Law (BVerfGE 15, p. 337 [at p. 339] - Law on inheritance of agricultural estates; 36, p. 146 [at p. 169] - Legal prohibition of marriage).

(3) **Relatively greater closeness to the Constitution**:
The Federal Constitutional Court restricts itself to merely declaring a statute unconstitutional but not striking it if the non-existence of the unconstitutional statute would result in a situation that is even less constitutional than the one that results from the violation of the constitution that is brought about by the unconstitutional statute. This applies, *e.g.*, to statutes referring to a specific status or to a specific organisation; if such statutes were declared null and void, and if such declaration had a retroactive effect *ab initio*, this would cause a legal vacuum or gaps in the regulations, which could even result in chaos (cf. BVerfGE 16, p. 130 [at pp. 142-143] - Constituency Case; 33, p. 1 [at p. 13] - prison regime; 37, p. 217 [at p. 260] - Nationality; 72, p. 330 [at p. 333] - Financial equalisation scheme between the Federation and the *Länder*).

Consequence of the declaration of incompatibility

The legal consequence of the declaration of incompatibility of a statute is that courts and government authorities may no longer base their decisions on it (BVerfGE 37, p. 217 [at p. 261]). The parliament is obliged to deal with the consequences by appropriate legislation. In exceptional cases, the continued applicability of unconstitutional statutes is tolerated for a transitional period to avoid chaos in the system of applicable law (cf. BVerfGE 41, p. 251 [at pp. 266-267] - School regulations; 61, p. 319 [at p. 356] - System of joint assessment of spouses; 85, p. 386 [at p. 401] - Screening of telecommunications data; 91, p. 186 [at p. 207] - Coal penny). Finally there have been cases in which the court itself has, pursuant to § 35 of the BVerfGG, determined the legal consequences in the individual case by establishing transitional arrangements (BVerfGE 73, p. 40 - Donations to political parties; 84, 9 - Common family name of husband and wife; 88, p. 203 [at p. 209 *et seq.*] - Termination of pregnancy). For a certain period of time, the court performs a substitute legislative function.

cc) The Federal Constitutional Court can also find that the statute is **"merely" constitutional**. In these cases, however, the court makes an appeal to the parliament for the parliament to become active in order to achieve a fully constitutional status or to avert a future threat of unconstitutionality (cf. *e.g.*, BVerfGE 16, p. 130 - Division of constituencies; 53, p. 257 [at pp. 312-313] - Pension rights adjustment after a divorce; 80, p. 1 [at p. 31 *et seq.*] - Medical university examinations). The possibility of declaring a law "merely constitutional" and accompanying this declaration by an admonition to the parliament is a special case of the declaration of constitutionality.

dd) Another possibility of ruling is the **interpretation of statutes in conformity with the Constitution**. If a statute can be interpreted in various ways, and some of the interpretations lead to the result that the statute is unconstitutional while others show that it is in conformity with the Basic Law, the statute is constitutional and must be interpreted in conformity with the Constitution (BVerfGE 64, p. 229 [at p. 242]; 69, p. 1 [at p. 55]; 74, p. 297 [at pp. 299, 345, 347] - Media Act of a *Land*; 88, 203 [at p. 331]). In this case, the Federal Constitutional Court ascertains in which interpretation the statute is compatible with the Basic Law, and in which it is not.

ee) In the case of decisions that concern the review of a statute, the Federal Constitutional Court need not restrict itself to rejecting the application as being unfounded; it may, at the same time, hold **that the statute is compatible with the Basic Law** (§ 31.2 of the BVerfGG; cf. *e.g.*, BVerfGE 95, 143).

b) The pronouncement of the decision in the case of **constitutional complaints**:

aa) The Federal Constitutional Court may, pursuant to § 93b.(1), § 93d.(1) and § 93d.(3) of the BVerfGG, refuse to admit the constitutional complaint for decision.

bb) If a constitutional complaint is granted, the decision shall state which provision of the Basic Law has been violated by which act or omission (§ 95.1[1] of the BVerfGG). The Federal Constitutional Court may at the same time declare that any repetition of the act or omission against which the complaint was directed will violate the Basic Law (§ 95.1[2] of the BVerfGG).

If a complaint against a court decision or an administrative decision is granted, the Federal Constitutional Court reverses the decision (§ 95.2 of the BVerfGG). This applies to all acts of public authority that can, pursuant to § 90.1 of the BVerfGG, be the object of a constitutional complaint.

If a complaint against a law is granted, the law shall, pursuant to § 95.3 of the BVerfGG, be declared null and void. The same applies if a complaint pursuant to § 95.2 of the BVerfGG is allowed because the reversed decision was based on an unconstitutional law. Court decisions are reversed completely or in part and referred back to the responsible courts.

cc) The different possibilities of ruling that have been mentioned concerning the proceedings that involve the review of statutes are possible with constitutional complaints as well.

c) The pronouncement of decisions in the case that an application is **inadmissible and unfounded**: Pursuant to § 24 of the BVerfGG), inadmissible or patently unfounded applications may be dismissed by a unanimous order of the court. In the ruling, inadmissible referrals or applications are labelled as such; they are *verworfen* or *abgelehnt* (dismissed as inadmissible), unfounded applications are *zurückgewiesen* (rejected as unfounded).

37. The effects of the Federal Constitutional Court's decisions reach further than those of other courts.

a) Just as the decisions of other courts that terminate proceedings, decisions of the Federal Constitutional Court have **legal force** (BVerfGE 4, 31 [at p. 38]; 20, 56 [at pp. 86-87]; 69, 92 [at p. 103]). "Legal force" means first and foremost the irrevocability of the court's decision. Apart from this, the decision is unappealable (formal *res judicata*). Finally, legal force comprises substantive *res judicata*, *i.e.*, the fact that the parties to the proceedings are bound to the unappealable decision beyond the proceedings itself, especially in subsequent proceedings. The constitutional complaint or referral may not be repeated.

Substantive *res judicata* ends if the facts that are of relevance to the decision change in comparison to the point in time in which the decision was made (cf. BVerfGE 39, p. 169 [at pp. 181-182]); this includes changes of the legal system, of everyday life and of social framework conditions. If such changes occur, a new referral or constitutional complaint is possible.

b) Pursuant to § 31.1 of the BVerfGG, **the decisions of the Federal Constitutional Court are binding upon Federal and Länder constitutional bodies as well as on all courts and authorities**. This expands the legal force of the decisions of the Federal Constitutional Court to all state bodies.

Moreover, the decisions on the compatibility or incompatibility of a statute with the Constitution, including the declaration of nullity, have the **force of law** (§ 31.2 of the BVerfGG). This makes the Federal Constitutional Court's decisions on the constitutionality of statutes binding upon all citizens, not only upon the bodies of the state.

c) If a law is declared null and void the effect of this declaration is *ex tunc*. The consequences may be mitigated by an execution order of the Court pursuant to § 35 of the BVerfGG. If a law is only declared incompatible with the Basic Law, the effects of the decision normally only arise with the new legislative act, *i.e.*, in the future. § 79 of the BVerfGG contains the general legal principle that a decision which declares a law null and void, shall, in principle, not affect **final decisions** that are based on this law, with the exception of final convictions (BVerfGE 32, p.387 [at pp. 389-390]).

38. As a general rule, the legal force and the binding effect of the decisions of the Federal Constitutional Court pursuant to § 31 of the BVerfGG are respected. The parliament, the administration and the courts, including the supreme courts of the Federation, generally (almost without exception) follow the Federal Constitutional Court. Sporadically, lower courts deviate from the jurisprudence of the Federal Constitutional Court (cf. *e.g.*, BVerfGE 40, p. 88 [at pp. 93-94]), however, such deviations are isolated cases which are remedied by the process of granting Chamber decisions. Sometimes, delays occur on the parliament's side (examples: regulation of temporary relief in social court proceedings, BVerfGE 46, p. 166 [at

pp. 181 et seq.]; different taxation of pensions from company pension schemes and from the statutory pension scheme, BVerfGE 54, p. 11 [at pp. 36 *et seq.*]; 86, p. 369). There have also been cases in which the parliament repeated a statute that had already been declared unconstitutional (BVerfGE 96, 260 - Special Leave Act of the *Land* Hesse; cf. also BVerfGE 102, p. 127 [at pp. 140 et seq.] - Calculation of earnings-replacement benefits that are funded by contributions).

§ 2. Interpretation by the constitutional court

a. Acceptance of the case law of other courts by the constitutional court in the exercise of its own jurisdiction

39. As has already been stated in the answer to question 21, when reviewing, as to substance, whether a statute is in accord with the Basic Law , the Federal Constitutional Court interprets the statutes referred for review independently and without being bound to the submitting court's interpretation of the statute or to other court's interpretation of the statute. As a general rule, however, the considerations of the Federal Constitutional Court are within the bounds of the case law of the other courts, except for the question at issue under constitutional law.

Only as concerns the review of admissibility in proceedings that concern the concrete review of a statute, the Federal Constitutional Court bases its ruling on the interpretation of the statute given by the *judex a quo* (cf. BVerfGE 79, p. 240 [at pp. 243-244]).

b. Effects of the interpretation of the constitutional court and the acceptance of the case law of the constitutional court by the other courts in the exercise of their own jurisdiction

40. In accordance with the consistent case law of the Federal Constitutional Court, its decisions, pursuant to § 31.1 of the BVerfGG, have a binding effect that goes beyond the individual case to the extent that the principles for the interpretation of the Constitution that are contained in the wording of the ruling and the essential reasoning of the decision must be respected by the courts in all future cases (cf. only BVerfGE 40, p. 88 [at p. 93], with further references). If the Federal Constitutional Court's interpretation is not respected by a court, an appeal can be brought before the competent courts against this court's decision. Subsequently, a constitutional complaint can (also) be lodged, which may result in an allowing Chamber decision.

41. Cf. the answer to question 36d (dd).

This method of interpretation is employed relatively often, because the consistent case law of the Federal Constitutional Court establishes that the interpretation in conformity with the Basic Law is the one that is primarily indicated: "For it is not only assumed that a statute is compatible with the Basic Law, but the principle that finds its expression in this assumption, also requires that, in case of doubt, the statute be interpreted in conformity with the Constitution" (BVerfGE 2, p. 266 [at p. 282] - Provisional accommodation of Germans on the territory of the Federal Republic of Germany; 7, p. 120 [at p. 126]; 8, p. 28 [at pp. 33-34]; 8, p. 38 [at p. 41]; 8, p. 274 [at p. 324] - Pricing Act; 12, p. 45 [at p. 61] - Conscientious objection [to military service]; 18, p. 70 [at p. 80]; 19, p. 1 [at p. 5]; 19, p. 76 [at p. 84]; 30,

p. 129 [at p. 148]; 31, p. 119 [at p. 132]; 32, p. 373 [at pp. 383-384]; 44, p. 105 [at p. 122]; 47, p. 285 [at p. 317] - Lowering of the standard fees of notaries public; 88, p. 203 [at p. 331] - Termination of pregnancy; 95, p. 64 [at p. 93] - Prolongation of the Controlled Tenancies Act). This interpretation can deviate from that of "living law". This happens quite frequently if the "living law", which has been shaped primarily by the rulings of the other courts, is challenged alleging that it is unconstitutional.

42. The special binding effect of the Federal Constitutional Court's decisions pursuant to § 31.1 of the BVerfGG, also applies to an interpretation of the Federal Constitutional Court finding a statute in conformity with the Constitution. This means that the other bodies of jurisprudence may not deviate from this interpretation.

III. The interference of the European courts[3]

In accordance with the distribution of competencies between the First and the Second Senate of the Federal Constitutional Court, I will, in the following, comment on the questions under III. A. and B.

A. The Constitutional Court and the other courts vis-à-vis *the European Convention on Human Rights and the case law of the European Court of Human Rights*

43. The Federal Constitutional Court is not bound by the case law of the European Court of Human Rights. With a view to the present legal situation in Germany as regards constitutional law, it can be assumed that the following framework conditions exist:

a) Essentially, two provisions of the Constitution regulate the relation between (1) international law and domestic constitutional law; and (2) international law and law that is subordinate in rank to constitutional law. Pursuant to Article 25, sentence 1 of the Basic Law, the general rules of international law are an integral part of Federal law. Pursuant to sentence 2 of this provision, they take precedence over the laws and directly create rights and duties for the inhabitants of the Federal territory. It is important to note that this provision does not make reference to the law established by international treaties. What it does make reference to are the general rules of international law. In Germany, they are subordinate to constitutional law but take precedence over the Federal and *Land* (Federal State) law below the Constitution. This means that the general rules of international law occupy an "intermediate rank" between constitutional law and other statute law.

Moreover, Article 59.2 of the Basic Law is relevant to the European Convention on Human Rights, which is also at issue here. Pursuant to this provision, international treaties, including the European Convention on Human Rights, attain the status of a Federal law by way of a law that ratifies the treaty. This means that, pursuant to Article 59.2 of the Basic Law, the European Convention on Human Rights, through the law that ratified it, obtained the rank of a Federal law. To the extent that provisions of the European Convention on Human Rights also

[3] S. Broß, Karlsruhe, October 17, 2001.

take up the content of general rules of international law, the rank of these provisions is the same as has been described before, *i.e.*, they take precedence over Federal law and *Land* law. In general terms, however, it must be stated that in Germany, the European Convention on Human Rights has the rank of an ordinary Federal law (BVerfGE 19, p. 342 [[at p. 347]; 74, p. 358 [at p. 370]).

b) The substantive framework conditions must be distinguished from the procedural framework conditions. In Germany, the procedural framework conditions have a special aspect as regards the extraordinary legal remedy of the constitutional complaint: A constitutional complaint may not be based on the European Convention on Human Rights (*e.g.*, BVerfGE 10, p. 271 [at p. 274]; 34, p. 384 [at p. 394]; 41, p. 126 [at p. 149]). In these decisions, however, the Federal Constitutional Court has not discussed this problem in any depth, if at all.

In BVerfGE 64, p. 135 (at p. 157) we find, for the first time, besides the general statement that a constitutional complaint may not be based on the European Convention on Human Rights, the hint that the Federal Constitutional Court does not take the guarantees of a fair trial, which are outlined in the European Convention on Human Rights (Article 6 of the ECHR), as a standard for its rulings.

The European Convention on Human Rights has only an indirect influence on the manner in which the German Constitutional Court proceeds with its decisions. Thus, in particular, the decision at BVerfGE 6, p. 389 concerning male homosexuality, which was comprehensively punishable at the time of the decision, cannot serve to prove that the Federal Constitutional court directly takes the European Convention on Human Rights into account, as ultimately, the relevant statements in this context (*loc. cit.*, pp. 440-441) are nothing more than an *obiter dictum*, which refers to the fairly extensive submission of the complainant. By no means does the reference to the ECHR acknowledge that an infringement of the ECHR can be challenged by way of a constitutional complaint.

It can be assumed, however, that the Federal Constitutional Court certainly takes note of the case law of the European Court of Human Rights and takes it into consideration, without establishing by this a binding effect of any kind. These conclusions can be drawn from the decision at BVerfGE 74, p. 358 (at p. 370). In this decision, the Federal Constitutional Court conferred the ECHR the rank of a Federal law; in this context, the Federal Constitutional Court made reference to BVerfGE 19, p. 342 (at p. 347); 22, p. 254 (at p. 265); 25, p. 327 (at p. 331); 35, p. 311 (at p. 320). It also emphasised, however, that Article 6.2 of the ECHR does not enjoy the rank of constitutional law. In the following, however, it is stated that the content of the ECHR and the state of its development must be taken into consideration when interpreting the Basic Law to the extent that this does not limit, or derogate from, the protection of the fundamental rights that is provided by the Basic Law, an effect that the convention itself aims to preclude (Article 53 of the ECHR).

Against this background, the Federal Constitutional Court regards the case law of the European Court of Human Rights as an aid for interpretation when it comes to defining the content and the scope of the fundamental rights and of the principles of the rule of law that are enshrined in the Basic Law. The laws of the Federal Republic of Germany are to be interpreted and applied in accordance with its obligations under international law, even if they have been enacted after the conclusion of a valid international treaty. On the domestic level, it has to be assumed that the German parliament, to the extent that it has not otherwise clearly

and unambiguously stated by way of a reservation, neither wants to deviate from Germany's obligations under international law nor wants to facilitate the violation of such obligations.

44. The previous comments elucidate the relationship between the ECHR and the legal provisions with which the judges of the various jurisdictions of the Federal Republic of Germany must comply. For the judges at the German Federal Constitutional Court the Basic Law is the sole standard of their legal review. Along with the Federal law and, depending on the stage of the legal proceeding, the laws of the respective *Land* (Federal State), the courts of all jurisdictions are also required to observe the ECHR. Because procedural law in the context of constitutional jurisprudence provides that no infringement of the ECHR can be challenged by way of a constitutional complaint, the non-observance of the ECHR is, pursuant to German law, procedurally irrelevant in the context of constitutional jurisprudence. In this context, it is possible to imagine, in the case of "arbitrary non-observance," the presentation of an alleged violation of the ECHR to the Constitutional Court by way of a complaint that challenges the violation of the corresponding fundamental right.

45. As concerns the question of the exhaustion of all legal remedies, German law stipulates the following: The constitutional complaint is an extraordinary remedy and does not belong to the successive stages of appeal that exist within Germany. Moreover, an infringement of provisions of the ECHR cannot be challenged, as has already been explained, by way of a constitutional complaint (in this context, also see BVerfGE 9, p. 36 [at p. 39]; 74, p. 102 [at p. 128]). From the German perspective, the requirement that, after an action has gone through all stages of appeal that are provided in the respective rules of procedure, a constitutional complaint must be lodged before the case can be brought to the European Court of Human Rights would be unreasonable for the persons involved.

This question, however, requires an answer that takes heed of some complexities. Pursuant to Article 35 of the ECHR, the European Court of Human Rights may only deal with a matter, in accordance with the generally recognised rules of international law, after all domestic remedies have been exhausted. This is, *inter alia*, required by Article 35.1 of the ECHR. The everyday practice of the courts shows, however, that many complaints that are based on an infringement of the ECHR concern areas of regulation that are also protected pursuant to domestic German constitutional law: (1) pursuant to substantive constitutional law, by fundamental rights or rights that are equivalent to fundamental rights; and (2) under procedural aspects, particularly the possibility of lodging a constitutional complaint with the Constitutional Court. From the German perspective, a due exhaustion of all legal remedies includes, in such cases, especially with regard to the principle of subsidiarity that is expressed in Article 35.1 of the ECHR, that a serious attempt has been made to ensure that the alleged infringement is remedied on the domestic level by making use of the extraordinary remedy of the constitutional complaint before lodging a complaint with the European Court of Human Rights.

In a decision that concerned Germany (28 September 2000 - No. 51342/99 Kalantari), the European Court of Human Rights found that the rule of the exhaustion of all domestic legal remedies is not suitable for being applied automatically and that it is not of an absolute nature. When examining whether there has been compliance with this rule, the circumstances of the case are to be taken into account. Moreover, Article 35.1 of the ECHR is to be applied with a certain degree of flexibility and without excessive formalism. Apart from this, the purpose of this rule is to be taken into account: the signatory states are supposed to have the opportunity to prevent or to remedy the infringements with which they are charged before the case is

brought before the European Court of Human Rights (this decision has been published *e.g.*, in supplement No. I 9/2001 of issue 10/2001 of the NVwZ [*Neue Zeitschrift für Verwaltungsrecht*], pp.105-106).

B. The Constitutional Court and the other courts vis-à-vis *the case law of the Court of Justice of the European Communities*

46. In the Federal Republic of Germany, the Constitutional Court is not bound by the jurisprudence of the Court of Justice of the European Communities. If this brief answer were given without any comment or explanation, it would be insufficient. An adequate assessment of the situation is only possible after the framework conditions have been described in detail.

a) Pursuant to the case law of the Court of Justice of the European Communities, European Community law takes precedence, in its application, over contrary national law. The Court of Justice of the European Communities expressly extended the priority of application to national constitutional law (Judgement in the *Internationale Handelsgesellschaft* proceedings, Court of Justice of the European Communities, Judgement of 17 December 1970, European Court Reports 1970, pp. 1125 *et seq.*, marginal number 3). As early as 1964, in the Costa v. *E.N.E.L.* case, the Court of Justice of the European Communities derived these rules for conflicts between the jurisdictions, which are not expressly mentioned in the Treaties, from the special legal nature of Community law. The Court of Justice based this ruling on the conclusion that the EC Treaty has created a legal system of its own, which, upon its entry into force, has been integrated in the legal systems of the member states and is to be applied by the courts of the member states. The Court of Justice noted that the member states had established a community: (1) with unlimited duration; (2) which is equipped with governing institutions of its own; (3) with its own legal capacity, including the capacity to enter into transactions; (4) with the international capacity to act; and (5) above all, with genuine sovereign rights that arise from the restriction of the member states' rights or the assignment of sovereign rights of the member states to the Community. Through all of this, the Court of Justice concluded, the member states had created a body of laws that is binding for the Community, its institutions and for its members. The ruling of the Court of Justice of the European Communities concludes that Community law flows from an independent legal source over which, due to its autonomy, no domestic legal provisions whatsoever may take precedence (cf. Court of Justice of the European Communities, Judgement of 15 July 1964, Rec. 1964, pp. 1251 *et seq.*, marginal numbers 8 *et seq.*).

Contrary to this, the Federal Constitutional Court held, in its decision of 29 May 1974 (2 BvL 52/71, BVerfGE 37, pp. 271 *et seq.* - "As long as ..." Decision I) that Community law is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an independent legal source (*loc. cit.*, pp. 277-278). From this initial reflection, which is in accord with case law of the Court of Justice of the European Communities, the Federal Constitutional Court, however, has not drawn the conclusion that Community law takes precedence over national law in all respects. It has merely assumed that this results in the emergence of two legal spheres that stand independent of and side by side one another and that have each their own claim to validity (*loc. cit.*, p. 278). The Federal Constitutional Court assumed that due to the particular importance of the part of the Basic Law that contains the fundamental rights for the constitutional structure of the Basic Law, national law prevails in the case of a conflict between Community law and German fundamental rights (*loc. cit.*, p. 280-281). The Federal Constitutional Court has

upheld this view, in a more or less pronounced manner, also in its later case law (BVerfGE 73, pp. 339 *et seq.* - "As long as ..." Decision II; 89, p. 155 et seq. - Maastricht Decision; also see the Order of 7 June 2000 - 2 BvL 1/97 -, BVerfGE 102, pp. 147 *et seq.* - Banana Market Organisation).

This notwithstanding, it must be emphasised that first and foremost, a national constitutional court cannot be bound by case law of the Court of Justice of the European Communities because the bases for their respective judicial review have nothing in common. The judicial review of the Court of Justice of the European Communities is based on the Treaties of the European Community. The judicial review of the Federal Constitutional Court is based only on the Basic Law. On the one hand, the Court of Justice of the European Communities would not be allowed to base its judicial review on the Basic Law of the Federal Republic of Germany; on the other hand, the Federal Constitutional Court would also not be allowed to rely on the Treaties of the European Community as the basis of its judicial review. The Federal Constitutional Court has expressed this very clearly (BVerfGE 52, 187 [at pp. 200 *et seq.*]).

b) Against this background, one cannot speak of an influence of the Court of Justice of the European Communities on the Constitutional Court's course of action. The situation is certainly more adequately described if it is assumed that the Court of Justice of the European Communities and the Federal Constitutional Court keep out of each other's way, if possible. The decisive point is: What happens if, from the perspective of national constitutional law, the Court of Justice of the European Communities oversteps its competencies? For this case, no provision has been made in the Treaties of the European Community. There are no rules for conflicts between the laws of these jurisdictions. Against this background, it is the mission of the Federal Constitutional Court to observe whether the governing institutions of the European Community, including the Court of Justice of the European Communities, keep within the competencies that have been conferred upon them. In this respect, the case law of the Court of Justice of the European Communities does have an influence on the Constitutional Court's course of action. They take an attitude of benevolent attention *vis-à-vis* the Court of Justice of the European Communities.

47. The Federal Constitutional Court has not yet referred to the Court of Justice of the European Communities and on account of the completely different bases upon which their distinct areas of judicial review are founded, which have been described above, there appears to be no reason to do so in the future. On the other hand, Article 234 of the Treaty establishing the European Community obliges the other national courts to bring cases before the Court of Justice of the European Communities.

The Federal Constitutional Court does not have to deal with the question whether domestic provisions are compatible with Community law. As has been described, this question does not fall under its competence.

The violation of the obligation under Article 234 of the Treaty establishing the European Community affects the Federal Constitutional Court in such a manner that time and again, constitutional complaints are lodged claiming that a court arbitrarily failed to refer a case to the Court of Justice of the European Communities in which the question at issue was whether German law is in accord with Community law. The threshold for assuming such a violation, however, is very high (Order of the Second Chamber of the First Senate of the Federal

Constitutional Court of 9 January 2001 - 1 BvR 1036/99 -, NJW [*Neue Juristische Wochenschrift*] 2001, p. 1267).

48. The national courts have no choice between referring cases to the Federal Constitutional Court and to the Court of Justice of the European Communities. This follows, again, from the different bases for the two courts' judicial review. Should it result, however, that a national legal regulation that, pursuant to German constitutional law, was enacted after the ratification of the Basic Law, is not in accord with national constitutional law, the referral to the Court of Justice of the European Communities pursuant to Article 234 of the Treaty establishing the European Community takes priority over the referral to the Federal Constitutional Court if at the same time, its compatibility with Community law is called into question. The Federal Constitutional Court ruled along these lines in BVerfGE 85, p. 191 (at pp. 203 *et seq.*). It found that the validity of a decision does not depend on a specific statute as long as the applicability of a provision of this statute on the domestic territory has not been ascertained due to a violation of Community law. From this it results that the referral to the Court of Justice of the European Communities takes priority (in this context, also see BVerfGE 31, p. 145 [at pp. 174-175] and 82, p. 159 [at p. 191]).

A decision does not depend on the validity of a statute under the terms of Article 100.1(1) of the Basic Law if it is certain that it may not be applied on account of conflicting Community law (BVerfGE 85, p. 191 [at pp. 203 *et seq.*]).