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ФЕДЕРАТИВНАЯ РЕСПУБЛИКА ГЕРМАНИЯ**

**The Federal Constitutional Court of Germany
Bundesverfassungsgericht**

Anglais / English / Englisch / английский

- National Report: Germany -
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**I. The Role of the Constitutional Courts in Protecting Rights and
Applying the Constitutional Principles²**

The following discussion centres on the concept of “constitutional principles” (*Verfassungsgrundsätze*). Although the Federal Constitutional Court continuously uses this term in its practice, thus far the term has never been defined specifically. For purposes of the present report, constitutional principles are understood as normative optimisation principles,³ and the German terms *Grundsatz* (“precept”) and *Prinzip* (“principle”) are employed as synonyms.⁴

1. The role of constitutional principles in the case-law of the Federal Constitutional Court

Does the Federal Constitutional Court invoke certain constitutional principles, and what principles might they be?

In the very first volume of the official digest of the decisions of the Senates of the Federal Constitutional Court, the Second Senate found in 1951, in a constitutional dispute concerning the reorganisation of certain parts of the German national territory, that an individual constitutional provision cannot be considered in isolation and interpreted alone. Rather, the Court held, the overall content of the Constitution reflects certain overarching

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² The first part of this report was prepared by Justice *König*.

³ Cf., for example, Alexy, *Theorie der Grundrechte*, 1986, pp. 75 et seq.

⁴ This synonymous use conforms to the case-law of the Federal Constitutional Court; cf., for example, Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts*– BVerfGE) 1, 14 (15, fourth headnote) and BVerfGE 4, 387 (400). According to Reimer, *Verfassungsprinzipien. Ein Normtyp im Grundgesetz*, 2001, a “constitutional principle” (*Verfassungsprinzip*) represents a “central norm of the Constitution without prior definition of legal consequences”, and may be used as a synonym for the term “constitutional precept” (*Verfassungsgrundsatz*) (p. 249; p. 59, fn. 341 with many references for synonymous use in the literature; p. 270).

precepts of constitutional law and fundamental decisions to which individual constitutional provisions are subordinate. For that reason, a norm of the Basic Law (*Grundgesetz* – GG) must always be construed in a way that is compatible with the fundamental constitutional precepts and fundamental decisions of the constitutional legislature.⁵ In addition to the terms “precepts” and “fundamental decisions,” elsewhere in its early case-law the Federal Constitutional Court also referred to a “*constitutional principle* of the separation of powers”⁶ or to the “*concept* of the social state under the rule of law,”⁷ yet without attaching any differentiation to the respective choice of terms.⁸

Since then, the Federal Constitutional Court has repeatedly referred to explicit and implicit constitutional principles, such as the principle of the separation of powers,⁹ the principle of the rule of law,¹⁰ the principle of proportionality¹¹ and the “supreme principle” of the inviolability of human dignity¹², in its established case-law.¹³

2. Constitutional principles and constitutional identity

a) What constitutional principles shape the identity of the German Constitution? Does the Constitution contain any explicit provisions according to which such principles are determined?

Art. 79 sec. 3 GG defines the limits for a statute amending the Constitution: accordingly, amendments to the Constitution are inadmissible if they affect the division of the Federation into federal states (*Länder*), their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20. Due to this provision, certain parts of the Basic Law’s structure are immutable, and, for that reason, it is also referred to as the “eternity guarantee”¹⁴. The attribution of such a special status to the precepts listed in

⁵ Cf. BVerfGE 1, 14 (15, fourth headnote).

⁶ BVerfGE 4, 387 (400), emphasis added.

⁷ BVerfGE 9, 20 (35), emphasis added.

⁸ Cf. on the semantic vagueness, as one among many, Reimer, *Verfassungsprinzipien. Ein Normtyp im Grundgesetz*, 2001, pp. 27 et seq.

⁹ Cf. BVerfGE 4, 387 (400).

¹⁰ Cf. BVerfGE 20, 323 (331); 133, 168 (198, para. 55).

¹¹ Cf. BVerfGE 19, 342 (348 and 349); 35, 382 (400 and 401); 55, 28 (30); 76, 1 (50 and 51); more on this below.

¹² Cf. BVerfGE 54, 341 (357).

¹³ Reimer, *Verfassungsprinzipien. Ein Normtyp im Grundgesetz*, 2001, pp. 26 et seq.

¹⁴ Cf. in this respect Part II of the National Report (II., 1., c and 3., a-c)

Art. 79 sec. 3 GG results in a hierarchisation of constitutional law, which, according to the literature, may result in “unconstitutional constitutional law”.¹⁵ The Federal Constitutional Court acts as a guardian – particularly in the context of the European integration process – when it comes to violations of the constitutional identity as laid down in Art. 79 sec. 3 GG.¹⁶

b) Is there case-law governing these principles?

In terms of defining the scope of the immutable constitutional core within the meaning of Art. 79 sec. 3 GG, there are a variety of relevant decisions of the Federal Constitutional Court: according to a decision of the First Senate of 1991, the “principles laid down in Art. 1 and Art. 20 GG” do not only include the principle of human dignity enshrined in Art. 1 sec. 1 GG. In fact, also the acknowledgment contained in Art. 1 sec. 2 of inviolable and inalienable human rights as the basis of every human community, of peace and of justice, takes on importance in the context of the eternity guarantee. Furthermore, the Senate ruled, Art. 79 sec. 3 GG also covers the principle of equality before the law and the prohibition of arbitrariness, as well as fundamental elements of the principle of the rule of law and the social state.¹⁷ However, a majority of the Second Senate made clear in 1970 that the principle that citizens must be afforded the greatest possible protection of the courts, which is derived from the principle of the rule of law, does not belong to the “principles laid down” in Art. 20 GG as there is no mention of it in Art. 20 GG. Consequently, Art. 19 sec. 4 GG, which contains a guarantee of access to justice in this sense, is not ex-

¹⁵ Cf. generally, Bachof, *Verfassungswidrige Verfassungsnormen?*, in: *Recht und Staat in Geschichte und Gegenwart* (163/164) 1951; *ibid.*, *Neue Juristische Wochenschrift* (NJW) 1952, p. 242; cf. furthermore Unger, *Das Verfassungsprinzip der Demokratie*, 2008, pp. 193 et seq.; Herdegen, in: Maunz/Dürig (founders), *Grundgesetz-Kommentar*, version: July 2014, Art. 79, para. 74; Dreier, in: Dreier (ed.), vol. II, 3rd ed. 2015, Art. 79 sec. 3, para. 14 et seq.: unconstitutional constitutional law may arise only if later provisions amending the Constitution violate Art. 79 sec. 3 GG, but there is no original unconstitutional constitutional law; Hornung, *Grundrechtsinnovationen*, 2015, p. 92 with further references in fn. 516, 519; in a decision from 1953, the Federal Constitutional Court affirmed the “remote conceivability of ‘unconstitutional constitutional norms’”, cf. BVerfGE 3, 225 <2nd headnote and 231 et seq.>. The judgment concerned a further application of norms of statutory law, ordered by the Constitution itself in what was then Art. 117 sec. 1 GG, even though these laws violated Art. 3 sec. 2 GG (equal rights of men and women). The Second Senate’s judgment of 3 May 2016 – 2 BvE 4/14 –, juris, para. 111 and 112 labels the legal figure of unconstitutional constitutional law as generally controversial, but holds that the eternity clause pertains to an “exceptional constellation”; cf. in this respect Part II of the National Report (II., 2., 5. and 6., cf. 7. on the Federal Constitutional Court’s authority to review)

¹⁶ Cf., among many, BVerfGE 123, 267 (340, 344, 431) – Lisbon.

¹⁷ Cf. BVerfGE 84, 90 (120 and -121) with further references – Land Reform I.

empted from being subjected to a restriction and modification by an act amending the Constitution.¹⁸

A core constitutional principle is the principle of proportionality. According to the Federal Constitutional Court, it proceeds from the principle of the rule of law and from the essence of fundamental rights themselves, which are an expression of the citizen's general entitlement to freedom *vis-à-vis* the state, and therefore can be restricted by the public authorities only insofar as it is indispensable to protect the public interest.¹⁹ However, this precept is not only significant for the constitutional law context, but also has implications in the area of public law, criminal law, and private law, for example through what is known as the "indirect third-party effect" of fundamental rights that is relevant when interpreting and applying unspecific legal terms to legal relationships between private parties.²⁰

Art 79 sec. 3 GG has taken on particular significance in the context of the case-law of the Federal Constitutional Court concerning European integration. This norm has been the foundation on which the court has based its authority of review concerning measures of the European Union: the Federal Constitutional Court has developed two reservations of review over European law, using different standards, both of which are rooted in Art. 79 sec. 3 GG. First, when conducting its *ultra vires* review, the Court examines whether acts of the institutions, bodies, offices and agencies of the European Union are covered by the parameters of the relevant European integration agenda, or whether the legal act exceeds the bounds set out by the parliamentary legislature.²¹ Furthermore, given that the Federal Republic of Germany is authorised to transfer competences to the European Union only within the limits of Art. 79 sec. 3 GG, the *ultra vires* review is complemented by the identity review.²² Unlike the *ultra vires* review, the identity review does not concern

¹⁸ Cf. BVerfGE 30, 1 (25) – Wiretapping judgment, but cf. the separate opinion of Justices Geller, von Schlabrendorff and Rupp (41).

¹⁹ Cf. BVerfGE 19, 342 (348-349), established case-law.

²⁰ Cf. as a fundamental basis, BVerfGE 7, 198 – Lüth.

²¹ Cf. BVerfGE 75, 223 (235, 242) – Kloppenburg Order; 89, 155 (188) – Maastricht; 123, 267 (353) – Lisbon; 126, 286 (302 et seq.) – Honeywell; 134, 366 (382 et seq., para. 22 et seq.) – Order of referral to the CJEU in the OMT case; Federal Constitutional Court, judgment of the Second Senate of 21 June 2016, 2 BvR 2728/13 *inter alia* – juris, para. 153 – OMT.

²² Cf. BVerfGE 123, 267 (353) – Lisbon; 126, 286 (302) – Honeywell; 133, 277 (316, para. 91) – Counter-Terrorism Database Act; 134, 366 (382 et seq., para. 22 et seq.) – Order for referral to the CJEU in the OMT case; 135, 317 (399, para. 159 and 160) – ESM Agreement; Federal Constitutional Court, Order of the Second Senate of 15 De-

the scope of the transferred competence. Instead, the European Union measure at issue is measured in substantive terms against the “absolute limit” of Art. 79 sec. 3 GG.²³

3. The Federal Constitutional Court’s development of legal principles

a) Are there any implicit principles that are considered to be an integral part of the Constitution? What is the rationale behind their existence, and how have they been formed over time?

Constitutional principles, as normative optimisation principles, constitute an “internal compass” for the interpretation of constitutional law. They “enclose” the individual provisions and, because of their general and fundamental nature, define the frame for the Constitution. Their genesis can be explained in particular by the fact that the Basic Law comprises only 146 articles, and that therefore written constitutional law in a way requires a supplementary or specifying interpretation.

The derivation and function of implicit constitutional principles can be illustrated on the basis of five additional examples:

aa) In the Second Senate’s decision of 21 May 1952, concerning the award of subsidy funding from the federal budget to the federal states (*Länder*), the Court developed the unwritten constitutional principle of allegiance to the federation (*Bundestreue*):

“The collaboration of the *Länder* in distributing federal funds is an expression of the federalist principle which – in addition to other principles – characterises the Constitution of the Federal Republic of Germany. As members of the Federation, the *Länder*, unless there are positive constitutional provisions to the contrary, have the same status; they stand beside each other with equal rights; among them, the majority rule that resides within the democratic principle’s scope does not apply, but rather the principle of unanimity, i.e., that no *Land* can be outvoted by the other *Länder*. It cannot be argued against this that it leads to minority rule. Rather, it is consistent with the principle of feder-

ember 2015 – 2 BvR 2735/14 –, juris, para. 40 et seq. – Identity Review; Federal Constitutional Court, judgment of the Second Senate of 21 June 2016, 2 BvR 2728/13 et al. – juris, para. 153 – OMT.

²³ Cf. BVerfGE 123, 267 (343, 348) – Lisbon; 134, 366 (386, para. 29) – Order of referral to the CJEU in the OMT case; Federal Constitutional Court, Order of the Second Senate of 15 December 2015 – 2 BvR 2735/14 –, juris, para. 40 et seq. – Identity Review; judgment of the Second Senate of 21 June 2016, 2 BvR 2728/13 et al. – juris, para. 153 – OMT.

alism that there is a constitutional duty for the members of the Federation to be loyal both to one another and to the greater whole, and for the Federation to be loyal to the members, and to come to agreement. The constitutional principle of federalism that applies within the federal state therefore incorporates the legal duty of the federation and all its members to ‘act with allegiance to the federation’; i.e., all those involved in the constitutional ‘confederation’ are required to collaborate in accordance with the nature of that confederation and to contribute to its own stability and to help maintain such stability and the well-understood interests of its members [...]. While the mandatory requirement to reach agreement inherent in this legal duty does not operate as automatically as the democratic majority principle, it is nevertheless strong enough to bring about the necessary joint decisions in an appropriate manner. It is this, above all, that also keeps the supreme power of the state as a whole within firm bounds, in the members’ interest.”²⁴

The literature offers various opinions on the derivation of unwritten²⁵ constitutional principles²⁶: for example, the principle of allegiance to the federation is considered to be an emergence of the general prohibition of arbitrariness or a specification of the general legal concept of good faith. However, it can be concluded from the passage of the Senate’s decision cited above that the principle was developed on the basis of a systematic, teleological interpretation²⁷ of the Basic Law: the constitutional duty to be loyal to one another is connected with the federalist structure of the Federal Republic of Germany, because “[a] federal state can exist only when the Federation and the *Länder* take note, in their relations with one another, that the extent to which they may exercise their formally assigned competences is circumscribed by reciprocal consideration.”²⁸ The precept of allegiance to the federation is intended to ensure in particular that the power of the federal state and of its individual members is contoured and limited, and that a proper decision-making process is made possible. However, the principle does not establish any autonomous rights and duties, but “operates” only within conditions that already exist;²⁹ consequently, the manner in which the federal state and the *Länder* exercise their competences is structured by reference to the principle of allegiance to the federation. Allegiance to the federation has particularly achieved validity as a reciprocal limit on

²⁴ BVerfGE 1, 299 (314 and 315).

²⁵ Cf. BVerfGE 12, 205 (254).

²⁶ Cf. the description from Grzeszick, in: Maunz/Dürig (founders), *Grundgesetz-Kommentar*, version: March 2006, Art. 20, para. 120 and 121.

²⁷ On the various methods of interpretation in constitutional law, see Question 4 below.

²⁸ BVerfGE 4, 115 (141 and 142).

²⁹ Cf. BVerfGE 13, 54 (75).

competences in a number of constellations. This also applies in the context of the European integration process.

In 1995, for example, the Second Senate expressly held that while it is a matter for the Federation to assert the rights of the Federal Republic of Germany against what was then the European Community and its institutions, nevertheless in those cases where, on the level of domestic law, the Basic Law reserves the exclusive competence to regulate a certain matter to the legislatures of the *Länder*, the federal state, acting for the *Länder*, must safeguard their rights vis-à-vis the Community. Consequently the Federation is bound by procedural obligations to cooperate with the federal states and to take their interests into consideration.³⁰ However, the federal state or the *Länder* breach their duty to act in a manner supportive of the federation only if their assertion of this competence is abusive,³¹ or if it violates procedural requirements that derive from the allegiance to the federation.³² The Federal Constitutional Court furthermore emphasised that finding a breach of the duty of conduct supportive of the federation does not presuppose a demonstration of bad faith or ill will on the part of a *Land* (or of the federal state), and furthermore does not imply reproaches.³³

bb) The precept of allegiance to constitutional organs is closely linked to the principle of allegiance to the federation, and shapes the legal relationships among the federation's organs. Where the federal organs' action in relation to the *Länder* takes place *on the federation's behalf*, the principle of allegiance to the federation applies. But if the matter internally concerns the relationship among the federal organs themselves, the precept of

³⁰ Cf. BVerfGE 92, 203 (first headnote; 230 and 231, 234 and 235), procedural requirements as an expression of allegiance to the federation and the constitutional organs (see below) appear in Art. 23 sec. 2 and sec. 4-6 GG in conjunction with the Act for the Exercise by the *Bundestag* and by the *Bundesrat* of Their Responsibility for Integration in Matters Concerning the European Union (*Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union – Integrationsverantwortungsgesetz*, Act on Responsibility with Respect to European Integration), cf. also Scholz, in: Maunz/Dürig (founders), *Grundgesetz-Kommentar*, version: October 2009, Art. 23, para. 140 et seq.; cf. furthermore BVerfGE 12, 205 (255); 34, 9 (44); cf., for example on the exercise of the federal government's authority to issue directives to the *Länder*, BVerfGE 81, 310 (337 and 338); in the federal government's negotiating agreements when interests of the *Länder* are concerned, BVerfGE 12, 205 (255 and 256, 259); in foreign policy, BVerfGE 6, 309 (362).

³¹ Cf. BVerfGE 81, 310 (337) – Kalkar II with a reference to BVerfGE 14, 197 (215); 61, 149 (205).

³² Cf. BVerfGE 81, 310 (337) – Kalkar II with a reference to BVerfGE 12, 205 (255).

³³ Cf. BVerfGE 8, 122 (124, eighth headnote).

allegiance to constitutional organs applies.³⁴ It follows from this principle that the supreme constitutional organs are constitutionally required to treat one another with due regard, and that this legally required regard cannot be overcome by political considerations of any kind.³⁵

cc) A further unwritten constitutional principle to be mentioned here is the principle of openness to public international law.³⁶ The Federal Constitutional Court has developed this precept, its consequences, and also its boundaries. For example, a decision of the Second Senate of 2004 reads as follows:

“The Constitution emphasises particular institutions and sources of law of international cooperation and public international law (Art. 23 sec. 1, Art. 24, Art. 25, Art. 26 and Art. 59 sec.2 GG). In this respect, the Basic Law facilitates the genesis of public international law with the participation of the federal government and ensures the effectiveness of existing public international law. The Basic Law places the state organs in the indirect service of the enforcement of public international law and in this way reduces the risk that international law is not observed. [...].

However, under German constitutional law such a direct constitutional duty is not to be assumed indiscriminately for any and every provision of public international law, but only to the extent that it corresponds to the conception of the Basic Law laid down in Art. 23 to 26 GG and in Art. 1 sec.2 and Art. 16 sec.2 sentence 2 GG. The Basic Law aims to achieve the opening of the domestic legal system for public international law and international cooperation in the form of a supervised binding effect; it does not provide that the German legal system should be subordinated to the system of public international law and that public international law should have absolute priority over constitutional law, but instead, it seeks to increase respect for international organisations that preserve peace and freedom, and for public international law, without giving up the final responsibility for respect for human dignity and for the observance of fundamental rights by German state authority[...].

This duty to respect public international law, a duty that arises from the fact that the Basic Law is open to public international law, has three elements: firstly, the German state organs have a duty to follow the provisions of public international law that bind the Federal Republic of Germany, and, if possible, to refrain from violating them. What legal consequences arise from a violation of this duty depends on the nature of the public-international-law provision in question. The Basic Law itself deals with particular groups of cases. Thus, it

³⁴ Cf. Schenke, *Die Verfassungsorganrechte*, 1977, pp. 29 et seq., cases of application cf. pp. 53 et seq.; Bauer, *Die Bundestreue*, 1992, pp. 295 and 296; Voßkuhle, NJW 1997, p. 2216.

³⁵ Cf. BVerfGE 35, 193 (199); 36, 1 (15) – Basic Treaty; 45, 1 (39); 89, 155 (191) – Maastricht; 90, 286 (337) – Out-of-area Deployments; 134, 141 (196 and 197, para. 167) – Ramelow.

³⁶ Cf. as one among many, Knop, *Völker- und Europarechtsfreundlichkeit als Verfassungsgrundsätze*, 2013, pp. 73 et seq.

may be inferred from Art. 25 sentence 2 GG that the general principles of international law have priority at least over non-constitutional law. Secondly, the legislature must guarantee for the German legal system that violations of public international law committed by its own state organs can be corrected. Thirdly, the German state organs[...] may also have a duty to assert public international law in their own area of responsibility if other states violate it.”³⁷

In its 2015 decision concerning the so-called “Treaty Override”,³⁸ however, the Second Senate made clear that the principle of openness to international law does not entail an absolute constitutional duty to obey all public international law treaties. Rather, the legislature is generally not barred from revoking, under the rule of *lex posterior*, legal acts of previous legislatures that were determined by international law.³⁹ According to the Court, this results in particular from the principle of democracy and from a systematic interpretation of those norms that concern the implementation and rank of international law in the domestic sphere: only the “general rules of public international law” have direct effect domestically, by way of the implementation imperative governed by Art. 25 sentence 1 GG, and rank above statutory law, cf. Art. 25 sentence 2 GG. By contrast, under Art. 59 sec. 2 sentence 1 GG, an international treaty that regulates the political relations of the Federation or that concerns objects for which the Federation has the legislative competence enters into effect within the national legal order only after the necessary parliamentary Act of Assent has been passed, and as a rule has the same rank as a statutory federal law.⁴⁰ Limitations of the *lex posterior* principle cannot be derived, the Court held, from the rule of law principle, or from the principle of openness to international law.⁴¹

dd) The “open statehood”⁴² of the German Constitution requires openness not only towards international law, but also to the legal system of the European Union, or “openness to European law”. As in the case of openness to international law and allegiance to

³⁷ BVerfGE 112, 1 (25 and 26) – Land Reform III.

³⁸ The term refers to the overriding of an act implementing a (double-taxation) agreement under public international law by a subsequent national law.

³⁹ Federal Constitutional Court, Order of the Second Senate of 15 December 2015 – 2 BvL 1/12 –, juris, para. 49 et seq., 67 et seq., 85 – Treaty Override; with separate opinion of Justice König.

⁴⁰ Concerning the system under Art. 25 and 59 GG, cf. Federal Constitutional Court, Order of the Second Senate of 15 December 2015 – 2 BvL 1/12 –, juris, para. 37 et seq.; for the principle of democracy, cf. para. 53 et seq. – Treaty Override.

⁴¹ Federal Constitutional Court, Order of the Second Senate of 15 December 2015 – 2 BvL 1/12 –, juris, para. 77 et seq., 86; however, Justice König, in her separate opinion, argued that the principle of the rule of law, interpreted in light of the principle of openness to international law, normally speaks in favour of compliance with international-law treaties, and must in individual cases be weighed against the principle of democracy, para. 6 et seq.

⁴² See below concerning the concept of “open statehood”.

the constitutional organs, this principle is addressed also to the Federal Constitutional Court.⁴³ The principle was first mentioned in what is known as the “Lisbon” judgment of the Second Senate from 2009.⁴⁴ Here the normative linkage point for the derivation of openness to European law was specifically found in Art. 23 sec. 1 sentence 1 GG, which – like the Preamble to the Basic Law – prescribes, as an objective of the state, that the Federal Republic of Germany must collaborate in a united Europe.⁴⁵ In light of this constitutional mandate, the Federal Constitutional Court concluded that it does not lie within the political discretion of the German constitutional organs to decide whether or not to participate in the European integration process.⁴⁶ The principle of openness to European law goes beyond a merely descriptive dimension and has legal effects.⁴⁷ It serves, among other functions, as a “juristic argument” to resolve legal questions concerning precedence of the national or European legal system, to interpret norms of national law, or to develop German law further.⁴⁸ The two review reservations already mentioned above – *ultra vires* review and identity review – must also be exercised in a manner that is open to European law.⁴⁹

b) Have academic scholars or other societal groups contributed in developing these constitutional principles?

Legal scholarship repeatedly impacts the development of constitutional principles in advance. One example is Klaus Vogel’s concept known as “open statehood” (“*offene Staat-*

⁴³ Concerning the obligations of the individual state organs, cf. only Knop, *Völker- und Europarechtsfreundlichkeit als Verfassungsgrundsätze*, 2013, pp. 294 et seq.; on the significance of the principle for the Federal Constitutional Court, cf. Kaiser/Schübel-Pfister, in: Emmenegger/Wiedmann (eds.), *Linien der Rechtsprechung des Bundesverfassungsgerichts*, vol. II, 2011, p. 545 (556 et seq.).

⁴⁴ Cf. BVerfGE 123, 267 (347) – Lisbon; continued in BVerfGE 126, 286 (303) – Honeywell; 129, 124 (172) – EFS; 132, 287 (292, para. 11) – European Stability Mechanism; Federal Constitutional Court, Order of the Second Senate of 15 December 2015 – 2 BvR 2735/14 –, juris, para. 43, 45, 49 – Identity Review.

⁴⁵ Cf. Kaiser/Schübel-Pfister, in: Emmenegger/Wiedmann (eds.), *Linien der Rechtsprechung des Bundesverfassungsgerichts*, vol. II, 2011, p. 545 (546).

⁴⁶ BVerfGE 123, 267 (346 and 347) – Lisbon.

⁴⁷ Cf. Kaiser/Schübel-Pfister, in: Emmenegger/Wiedmann (eds.), *Linien der Rechtsprechung des Bundesverfassungsgerichts*, vol. II, 2011, p. 545 (548); Knop, *Völker- und Europarechtsfreundlichkeit als Verfassungsgrundsätze*, 2013, pp. 265 et seq.

⁴⁸ Knop, *Völker- und Europarechtsfreundlichkeit als Verfassungsgrundsätze*, 2013, pp. 265 et seq.

⁴⁹ Cf. BVerfGE 126, 286 (303) – Honeywell; Federal Constitutional Court, Order of the Second Senate of 15 December 2015 – 2 BvR 2735/14 –, juris, para. 43, 45, 47 – Identity Review; Federal Constitutional Court, judgment of the Second Senate of 21 June 2016, – 2 BvR 2728/13 *inter alia* – juris, para. 154 et seq. – OMT.

lichkeit“).⁵⁰This key concept describes the orientation of the Constitution towards the objectives of international integration, safeguarding peace, and European unity, and has had a substantial impact on the normative principles of openness to international and European law developed by the Federal Constitutional Court.⁵¹It is self-evident that the constitutional principles evolved by the Federal Constitutional Court are constantly subject to academic scrutiny. The endeavour of such studies is often to define the limits of the principles and of their efficacy.⁵²These studies on the scope of constitutional principles, in turn, influence the Federal Constitutional Court, which to some extent fine-tunes or further differentiates its case-law in consideration of the literature.

Societal developments always influence the case-law of the Federal Constitutional Court. This is evident, for example, in the now-extensive case-law on data protection and in the right to informational self-determination derived from Art. 2 sec. 1 in conjunction with Art. 1 sec. 1 GG, which began in 1983 with the fundamental decision known as the “Census” judgment.⁵³So far as can be seen, however, no specific societal group has contributed to the development of any specific constitutional principle.

4. What role does the Federal Constitutional Court play in defining the constitutional principles? What method of interpretation is applied by the Federal Constitutional Court in defining and applying those principles? How much importance falls upon *travaux préparatoires* of the Constitution, or upon the Preamble of the Basic Law, in identifying and forming constitutional principles?

a) As the “guardian of the Constitution”,⁵⁴ the Federal Constitutional Court is called upon to make final and unappealable decisions on the interpretation and application of constitutional law – including constitutional principles.⁵⁵It performs this task within the limits of the competences assigned to it under the Basic Law. As an organ for the administration

⁵⁰ Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit*, 1964, p. 35; cf. on this point, for example, Knop, *Völker- und Europarechtsfreundlichkeit als Verfassungsgrundsätze*, 2013, pp. 13 et seq.

⁵¹ Cf. Voßkuhle/Kaufhold, *Juristische Schulung* – JuS 2013, p. 309.

⁵² Cf. on the principle of the Constitution’s openness to public international law, for example, Payandeh, *Jahrbuch des öffentlichen Rechts – JöR* 57 (2009), p. 465; Knop, *Völker- und Europarechtsfreundlichkeit als Verfassungsgrundsätze*, 2013, pp. 200 et seq.

⁵³ BVerfGE 65, 1 (41 et seq.) – Census.

⁵⁴ BVerfGE 1, 184 (195 et seq.); 1, 396 (408 and 409); 2, 124 (131); 6, 300 (304); 40, 88 (93); 119, 247 (258).

⁵⁵ Cf. BVerfGE 108, 282 (295) – Head Scarf I.

of justice, it becomes involved, upon application, in one of the proceedings listed in Art. 93 GG. In accordance with the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*) (§ 31 sec. 1), its decisions shall be binding upon the (other) constitutional organs of the Federation and of the *Länder*, as well as on all courts and those with administrative authority. The binding force extends to the operative part of the decision and the reasons on which that part is founded, insofar as these contain discussions of the interpretation of the Constitution.⁵⁶

b) The Federal Constitutional Court applies recognised methods of interpretation in interpreting constitutional norms. The purpose of a constitutional norm can be determined on the basis of the meaning of its words, its grammatical construction, the norm's systematic position within the Basic Law, the intent of the historical constitutional legislature, and objective and teleological aspects.⁵⁷ This is exemplarily evident in the two decisions of the Federal Constitutional Court on the dissolution of the *Bundestag* after a vote of no confidence in response to a call for a confidence vote by the Federal Chancellor.⁵⁸ In these decisions, Art. 68 sec. 1 sentence 1 GG, which deals with the Federal Chancellor's motion for a vote of confidence, is interpreted on the basis of its wording,⁵⁹ the systematic conception inherent in the provision itself, and the connotations that proceed from its position within the structure of the Constitution,⁶⁰ taking due account of the legislative history⁶¹ of the provision and its objective and purpose.⁶²

However, given that the interpretation of constitutional norms must deal with the problem of the openness of the provision's text⁶³ more frequently than the interpretation of statu-

⁵⁶ Cf. BVerfGE 40, 88 (93 and 94); 112, 268 (277).

⁵⁷ Cf. Herdegen, *Juristenzeitung* – JZ 2004, p. 873 (875); Starck, *Auslegung und Fortbildung der Verfassung und des Verfassungsprozessrechts*, in: Depenheuer/Heintzen/Jestaedt/Axer (eds.), *Staat im Wort, Festschrift für Josef Isensee*, 2007, p. 216; Starck, *Maximen der Verfassungsauslegung*, in: Isensee/Paul Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. XII, *Normativität und Schutz der Verfassung*, 2014, § 271 para. 17; Kreuter-Kirchhof, *Verfassungsgerichtsbarkeit im Dienst der Verfassung*, in: Isensee/Paul Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. XII, *Normativität und Schutz der Verfassung*, 2014, § 272 para. 47 and 48.

⁵⁸ Cf. on the first of these two decisions, and for further examples: Starck, *Auslegung und Fortbildung der Verfassung und des Verfassungsprozessrechts*, in: Depenheuer/Heintzen/Jestaedt/Axer (eds.), *Staat im Wort, Festschrift für Josef Isensee*, 2007, p. 216.

⁵⁹ Cf. BVerfGE 62, 1 (36 et seq.).

⁶⁰ Cf. BVerfGE 62, 1 (39 et seq.).

⁶¹ Cf. BVerfGE 62, 1 (44 et seq.); 114, 121 (153).

⁶² Cf. BVerfGE 114, 121 (152 et seq.).

⁶³ Cf. BVerfGE 62, 1 (45) with further references from constitutional doctrine.

tory provisions, the recognised interpretation methods often take on a specifically constitutional notion with regard to the provisions of the Basic Law.⁶⁴

Thus, systematic maxims of constitutional interpretation are, for example, the principles of “unity of the Constitution” (“*Einheit der Verfassung*”) ⁶⁵and “practical concordance” (“*praktische Konkordanz*”) ^{66, 67}. Under the principle of unity of the Constitution, each individual provision of the Constitution is understood within a context of meaning with the other provisions of the Constitution, which itself constitutes an internal unity.⁶⁸ With regard to this unity and the entire system of values it protects, for example, conflicting fundamental rights of third parties and community values of constitutional rank may even, by way of exception, be able to limit fundamental rights that, according to the provision’s wording, are not open to restriction^{69, 70}. The conflict between contending constitutionally protected interests must be resolved having recourse to the principle of practical concordance, which requires that one cannot prefer and give maximum assent to any one of the conflicting legal positions, but rather that all must enter into an accommodation that treats each with the greatest possible consideration.⁷¹ The conflicting constitutional provisions must be seen together, and their interpretation and their area of influence must be coordinated with each other.⁷²

c) The Federal Constitutional Court especially takes account of the legislative history of a constitutional provision if firm principles for its interpretation have not yet had the chance to emerge.⁷³ Even in these cases, however, the background materials to the Constitution have generally not taken on a deciding significance.⁷⁴

⁶⁴ Cf. Herdegen, JZ 2004, p. 873 (875).

⁶⁵ BVerfGE 19, 206 (220).

⁶⁶ Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th ed. 1999, p. 28.

⁶⁷ Herdegen, JZ 2004, p. 873 (876); Starck, *Auslegung und Fortbildung der Verfassung und des Verfassungsprozessrechts*, in: Depenheuer/Heintzen/Jestaedt/Axer (eds.), *Staat im Wort, Festschrift für Josef Isensee*, 2007, p. 216; Starck, *Maximen der Verfassungsauslegung*, in: Isensee/Paul Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. XII, *Normativität und Schutz der Verfassung*, 2014, § 271 para. 20.

⁶⁸ Cf. BVerfGE 1, 14 (32 and 33); 28, 243 (261); 34, 165 (183); 39, 334 (368); 55, 274 (300); 107, 104 (118).

⁶⁹ These include, for example Art. 4 GG (freedom of faith and conscience) and Art. 5 sec. 3 GG (freedom of expression, arts and science).

⁷⁰ Cf. BVerfGE 28, 243 (261).

⁷¹ Cf. BVerfGE 28, 243 (260-261); 41, 29 (50) – Christian Non-Denominational School; 52, 223 (247, 251) – School Prayer; 93, 1 (21) – Crucifix.

⁷² Cf. BVerfGE 108, 282 (302 and 303) – Headscarf I; 138, 296 (333) – Headscarf II.

⁷³ Cf. BVerfGE 1, 117 (127); 62, 1 (45).

⁷⁴ Thus BVerfGE 62, 1 (45) with further references.

d) The Federal Constitutional Court attributes not only political but also legal significance to the Preamble to the Basic Law in interpreting the Constitution. However, the Preamble is referenced only rarely.⁷⁵ Initially, significance was attached to the intent “to preserve [Germany’s] national and political unity” and “to achieve by free self-determination the unity and freedom of Germany,” which was included in the Preamble until 1990. From this, the Federal Constitutional Court derived “the legal duty for all political state organs of the Federal Republic of Germany to strive for the unity of Germany and to refrain from any measures that might legally impede reunification or render it *de facto* impossible.” It followed from this that the measures taken by the political organs – albeit allowing for political discretion – could be constitutionally reviewed as to whether they were compatible with the so-called “reunification principle”.⁷⁶ In recent case-law, the intent of the German people, as set forth in the Preamble, to “promote world peace as an equal partner in a unified Europe”, together with the constitutional norm that governs the transfer of sovereign powers to the European Union (Art. 23 GG), has taken on significance for the derivation of the Basic Law’s openness to European law: the Federal Constitutional Court situates the Basic Law’s “integration mandate” and its openness to European Law in the Preamble and in Art. 23 sec. 1 sentence 1 GG.⁷⁷

5. What emphasis is placed by the Federal Constitutional Court upon the constitutional principles? Are the constitutional principles interpreted separately or in connection with the rights enumerated in the Constitution as complementary means of the latter’s interpretation?

a) Objective constitutional principles and subjective rights guaranteed by the Basic Law, especially the fundamental rights, are not interpreted in isolation; instead, in terms of the principle of “unity of the Constitution”, they are interpreted with regard to their overall context. Should a tension arise between an objective constitutional principle and a fundamental rights provision, the Federal Constitutional Court balances the interests at issue

⁷⁵ Cf. BVerfGE 5, 85 (127) – Prohibition of Communist Party; 36, 1 (17) – Treaty on the Bases for Relations between the Federal Republic of Germany and the German Democratic Republic.

⁷⁶ Cf. BVerfGE 5, 85 (127 and 128) – Prohibition of Communist Party.

⁷⁷ Cf. BVerfGE 123, 267 (354) – Lisbon; 126, 286 (303) – Honeywell; 129, 124 (172) – EFS; 132, 287 (292, para. 11); Federal Constitutional Court, Order of the Second Senate of 15 December 2015 – 2 BvR 2735/14 – juris para. 45, 49) – Identity Review.

and thus defines the scope of the constitutional principle, on the one hand, and of the fundamental right, on the other.

b) This is demonstrated in an exemplary manner by a decision of the Court on the requirements for terminating criminal proceedings if it must be feared that pursuing the main proceedings would endanger the life or physical integrity of the accused.⁷⁸

In that decision, the Court refers, on the one hand, to the special significance of the well-functioning administration of criminal justice, as part of the rule of law, without which justice could not be enforced. The principle of the rule of law, the duty of the state to protect its citizens' security and their confidence in the ability of state institutions to function, as well as the equal treatment of all persons accused in criminal proceedings, generally require enforcing the state's right to impose punishments. Accordingly, the Court held, the constitutional duty of the state to ensure the well-functioning administration of justice regularly also encompasses the duty to ensure that criminal proceedings are initiated and pursued.⁷⁹ On the other hand, the constitutional duty to guarantee effective administration of criminal justice does not justify pursuing criminal proceedings in each and every case of a sufficient suspicion of an offence, given that such proceedings itself may come into conflict with the principle of the rule of law, and may compromise fundamental rights of the accused, for example when it must be feared, in light of the accused person's health, that the person would lose his or her life if the criminal proceedings continued, or suffer serious damage to health. In such cases, the Court held, a situation of tension arises between the state's duty to guarantee the functional administration of criminal justice, and the accused's interest to have his or her constitutionally guaranteed rights preserved which the state is equally obliged to accord protection to under the Basic Law. Neither of these interests automatically takes precedence over the other. The state's entitlement to prosecute crime cannot be enforced without regard to the fundamental rights of the accused, nor does every conceivable threat to these rights require an abandonment of that entitlement.⁸⁰ A conflict between the state's entitlement to prosecute crime under the rule of law and the right of the individual concerned to life and

⁷⁸ Cf. BVerfGE 51, 324. Concerning the assessment reached in this decision as an exemplary resolution of a "conflict of principles," see Alexy, *Theorie der Grundrechte*, 1986, pp. 79 and 80.

⁷⁹ Cf. BVerfGE 51, 324 (343 and 344), with further references).

⁸⁰ Cf. BVerfGE 51, 324 (345 and 346).

physical integrity (Art. 2 sec. 2 sentence 1 GG) must be resolved by balancing the competing interests with due consideration for the standards determined by the principle of proportionality. If this balancing leads to the result that the accused's interests that pose an obstacle to the interference in that specific case clearly outweigh the interests that the state action is intended to preserve, then an interference that proceeds all the same violates the principle of proportionality, and thus the fundamental right of the accused under Art. 2 sec. 2 sentence 1 GG. In assessing this question, it may be necessary in particular to give consideration to the nature, scope and anticipated duration of the criminal proceedings, the nature and intensity of the harm to be feared, and possibilities for counteracting that harm. If there is a plausible and specific danger that the accused would lose his or her life or suffer serious injury to his or her health if the main proceedings were pursued, continuing the proceedings would violate the accused's fundamental right to life and physical integrity under Art. 2 sec. 2 sentence 1 GG.⁸¹

6. Please describe a constitutional principle that has been largely influenced by decisions of the Constitutional Court. To what extent has the Federal Constitutional Court contributed to forming and developing such principles? Please provide an example from the Court's case-law.

A significant constitutional principle developed in the case-law of the Federal Constitutional Court is the requirement of a parliamentary decision under the Basic Law's provisions which concern defence (*"wehrverfassungsrechtlicher Parlamentsvorbehalt"*).

a) The "requirement of a parliamentary decision under the Basic Law's provisions which concern defence" was established by the Federal Constitutional Court in the "Armed Forces" or "AWACS" judgment of 12 July 1994.⁸² In that decision, the Court found that the authorisation contained in the Basic Law for the Federation to establish armed forces for defence and to join in systems of mutual collective security also includes the power to participate with its own armed forces in deployments that are provided for within the framework of such collective security systems and that comply with their rules. In that

⁸¹ Cf. BVerfGE 51, 324 (346).

⁸² BVerfGE 90, 286 – AWACS I.

respect, it specified that the deployment of armed military forces is generally subject to the prior constitutive approval of the *Bundestag*.⁸³

The Federal Constitutional Court derived this requirement of a parliamentary decision from the overall context of the provisions of the Basic Law which concern defence, in light of the German constitutional tradition since 1918. The Court held that while the Constitution largely assigns competences relating to the area of foreign affairs to the executive's sphere of authority, the Constitution's provisions which concern defence generally require parliamentary participation in deployments of armed forces. The provisions of the Basic Law that relate to the armed forces are designed not to leave the *Bundeswehr*, as a potential source of power, to the executive alone, but rather to integrate it as a "parliamentary army" into the constitutional system of a democratic state under the rule of law, i.e., to ensure that the *Bundestag* has a legally relevant influence on the establishment and deployment of the armed forces.⁸⁴ Such a requirement of a parliamentary decision, the Court held, had been consistent with the German constitutional tradition since 1918:

"Under Art. 11 sec. 1 sentence 2 of the Constitution of the German Reich of 1871 [...], declaring war and concluding peace were a matter for the Kaiser, who – except in the case of an attack on the national territory or its coasts – was required to obtain the approval of the *Bundesrat* (Art. 11 sec. 2). The Act Amending the Constitution of the Reich (*Gesetz zur Abänderung der Reichsverfassung*) of 28 October 1918 [...], which completed the transition to a parliamentary system of government, amended Art. 11 sec. 2 as follows: 'For a declaration of war in the name of the Reich, the approval of the *Bundesrat* and *Reichstag* is required'. [...]"

[...] The Weimar Constitution, in Art. 45 sec. 2, took over the fundamental concept of this provision, with the addition that in declaring war and concluding peace, the legislative branch (the *Reichstag*) 'appears no longer as a merely consenting party, but as the master of the matter: war is declared and peace is concluded ... on the basis of, and in implementation of, a resolution adopted by the legislature' (Anschütz, *Die Verfassung des Deutschen Reichs vom 11. August 1919, Kommentar*, 14th ed., Berlin 1933, Art. 45 note 5, p. 260). [...]"

[...] The Act Supplementing the Basic Law (*Gesetz zur Ergänzung des Grundgesetzes*) of 19 March 1956 [...], in its provision under Art. 59a sec. 1 GG, tied into this provision of the Weimar Constitution and developed it further. [...] Only a finding of a 'state of defence', generally to be made by the *Bundestag* in accordance with Art. 59a sec. 1 GG, was to provide the legal

⁸³ Cf. BVerfGE 90, 286 (381) – AWACS I.

⁸⁴ Cf. BVerfGE 90, 286 (381 and 382) – AWACS I.

conditions for deploying the armed forces established by the Federation for purposes of defence (Art. 87a GG). [...]

[...]A number of provisions of law which concern defence that were inserted into the Basic Law with the 1956 amendment furthermore provide for greater parliamentary oversight over the armed forces and over government actions in the military sphere. A pronounced system of parliamentary oversight is expressed in particular in Art. 45a, Art. 45b and Art. 87a sec. 1 sentence 2 GG. [...] The Basic Law does not, however, reserve for parliament only oversight and a general management of planning and development for the armed forces, but also specific decisions on their use.”⁸⁵

b) In later decisions, the Federal Constitutional Court further specified the scope of the requirement of a parliamentary decision under the Basic Law's provisions which concern defence.

aa) In the “AWACS II” judgment of 7 May 2008,⁸⁶ the Federal Constitutional Court held that in case of doubt, the requirement of a parliamentary decision under the provisions of the Basic Law which concern defence must be interpreted “in favour of parliament”, and it defined the concept of “deployment of armed forces”:

It categorised the requirement of a parliamentary decision under the provisions of the Basic Law which concern defence as an “essential corrective to the limits of parliament's assumption of responsibility in the field of foreign security policy”. When military force is exercised, the executive's broad sphere of influence in foreign affairs ends. When armed forces are deployed, the German *Bundestag* does not have the mere role of an organ that only indirectly steers and monitors the situation, but instead is called upon to make fundamental, constitutive decisions. The German *Bundestag* can preserve its legally relevant influence on the deployment of the forces only if it has an effective right of participation in the decision on the deployment of armed forces before the military operation commences and then becomes essentially a question of military expediency.⁸⁷ In view of this function and importance of the requirement of a parliamentary decision under the provisions of the Basic Law which concern defence, its scope may not be defined restric-

⁸⁵ BVerfGE 90, 286 (383 et seq.) – AWACS I.

⁸⁶ Cf. BVerfGE 121, 135 – AWACS II.

⁸⁷ Cf. BVerfGE 121, 135 (161) – AWACS II.

tively. Instead, the requirement of a parliamentary decision must in case of doubt be interpreted by the Federal Constitutional Court in favour of parliament.⁸⁸

A “deployment of armed forces” subject to the requirement of a parliamentary decision⁸⁹ is to be assumed, the Court found, if in view of the specific context of the deployment and the individual legal and factual circumstances, the involvement of German soldiers in armed conflicts is concretely to be expected.⁹⁰ This precondition is subject to full judicial review. The Federal Government is not granted latitude for assessment or prognosis that cannot be verified, or that can be verified only to a limited extent, by the Federal Constitutional Court. Since the Basic Law gives the *Bundestag*, to the extent that the requirement of a parliamentary decision under the provisions of the Basic Law which concern defence applies, a primary right of participation, there is, under substantive constitutional law, no latitude for the executive to make decisions – apart from its emergency power – that would require limiting, in functional and legal terms, the intensity of the review by the Federal Constitutional Court.⁹¹

bb) In the “Libya” decision of 23 September 2015,⁹² the Federal Constitutional Court clarified that the requirement of a parliamentary decision under the provisions of the Basic Law which concern defence is not limited to military deployments of armed forces within systems of collective security, but generally applies to armed deployments of German soldiers abroad, irrespective of whether these deployments have the character of an actual war or a war-like character. Furthermore, it defined the scope of this requirement of a parliamentary decision in urgent matters:

Under the required interpretation “in favour of parliament”, the applicability of the requirement of a parliamentary decision under the provisions of the Basic Law which concern defence cannot be made to depend significantly on the Federal Government’s political and military evaluations and prognoses by invoking the executive’s discretion. In that respect, it is irrelevant whether the deployment of armed forces is carried out within a

⁸⁸ Cf. BVerfGE 121, 135 (162) – AWACS II.

⁸⁹ BVerfGE 121, 135 (156) – AWACS II.

⁹⁰ Cf. BVerfGE 121, 135 (163 et seq.) – AWACS II.

⁹¹ Cf. BVerfGE 121, 135 (168 and 169) – AWACS II.

⁹² Federal Constitutional Court, judgment of the Second Senate of 23 September 2015 – 2 BvE 6/11 – Libya, juris.

system of mutual collective security or whether it is only nationally accounted for. In both cases, the decision-making process involving both Parliament and the Federal Government does not constitute an exception to the executive's sole responsibility in the field of foreign policy; instead, it constitutes a characteristic element of the constitutional separation of powers.⁹³ The term "deployment of armed forces", as an expression of a specific expectation of an involvement of German soldiers in armed conflicts, defines a uniform threshold for the requirement of a parliamentary decision for all deployments of the *Bundeswehr* abroad, no matter whether the deployments are conducted consensually in a system of mutual collective security or nationally accounted for. An additional particular military importance must not be given in the concrete case. In principle, even deployments that are evidently of little importance and scope or of minor political importance may also require a parliamentary decision under the Basic Law.⁹⁴

The decision then focuses on the emergency powers of the Federal Government when there is imminent danger, and particularly on the question of whether a deployment of armed forces that was rightly ordered by the Federal Government because of imminent danger or that is already over before a parliamentary decision could have been sought at the earliest possible moment, nonetheless requires a retrospective parliamentary decision. The Court held that as a deviation from the originally provided parliamentary right to participate in decision-making, the emergency powers, which were already presumed in previous proceedings and are afforded to the Federal Government as an organ that is always capable of acting, are subsidiary to the parliamentary right and their purpose is not to provide the executive with its own leeway to design with regard to defence policy matters.⁹⁵ In any situation that is not already over, the Federal Government must promptly inform Parliament in any case of a deployment ordered under its emergency powers because of imminent danger, and has to withdraw the armed forces if the *Bundestag* so requests.

⁹³ Cf. Federal Constitutional Court, judgment of the Second Senate of 23 September 2015 – 2 BvE 6/11 – Libya, juris, para. 70.

⁹⁴ Cf. Federal Constitutional Court, judgment of the Second Senate of 23 September 2015 – 2 BvE 6/11 – Libya, juris, para. 78.

⁹⁵ Cf. Federal Constitutional Court, judgment of the Second Senate of 23 September 2015 – 2 BvE 6/11 – Libya, juris para. 86 et seq.

However, if a deployment is already over, the requirement of a parliamentary decision under the provisions of the Basic Law which concern defence does not require the Federal Government to obtain a retrospective decision from the *Bundestag* on the terminated deployment. Nonetheless, it results from the constitutional requirement of a parliamentary decision that the Federal Government must inform the *Bundestag* promptly and in a qualified manner about the relevant factual and legal considerations determining the deployment and about the details and outcome of the deployment.⁹⁶ Only in this way, the Court held, can the *Bundestag* retrospectively exercise its powers to control the Federal Government politically through its right to file a motion, its right to debate, and its right to adopt a resolution and thereby influence the Federal Government's future decisions, or elect a new Federal Chancellor and thereby oust the current Government.⁹⁷

⁹⁶ Cf. Federal Constitutional Court, judgment of the Second Senate of 23 September 2015 – 2 BvE 6/11 – Libya, juris para. 95 et seq.

⁹⁷ Cf. Federal Constitutional Court, judgment of the Second Senate of 23 September 2015 – 2 BvE 6/11 – Libya, juris para. 101 et seq.

II. Constitutional principles as higher norms? Is it possible to determine a hierarchy within the Constitution? Unamendable (eternal) provisions in Constitutions and judicial review of constitutional amendments⁹⁸

1. Do the constitutional principles enjoy a certain degree of superiority in relation to other provisions in the Basic Law? What is the prevailing legal opinion among both academic scholars and practitioners in your jurisdiction about attaching higher value to certain constitutional principles over other provisions of the Basic Law?

a) The text of the Basic Law (*Grundgesetz* – GG) does not explicitly endow any norm or principle of the Basic Law with superiority over other provisions of the Basic Law. Academic scholarship on constitutional law very predominantly holds that apart from the case of Art. 79 GG (see below), no principles of constitutional law are superior *per se* to other norms of constitutional law.

b) There is also generally no ranking amongst the fundamental rights governed by Art. 1 to Art. 19 GG. Instead, in principle all these fundamental rights have the same rank.⁹⁹ Even what are known as the unreserved fundamental rights (*vorbehaltlose Grundrechte*), regarding which the wording of the Constitution does not explicitly allow for limitations, do not rank higher than the other fundamental rights.¹⁰⁰

However, a particular status does attach to the guarantee of human dignity, because according to the first sentence of Art. 1 sec. 1 GG, this guarantee is inviolable. The guarantee of human dignity is not only placed beyond the reach of constitutional amendment by the legislature, under Art. 79 sec. 3 GG (see below), but because of the decision to make it inviolable under Art. 1 sec. 1 GG, it is also beyond the reach of individual interferences by the legislature, executive, or judiciary. While the state may interfere with other fundamental rights under certain circumstances if concerns to the contrary prevail in a specific case, human dignity is absolutely protected pursuant to the case-law of the Federal Constitutional Court (*Bundesverfassungsgericht*). There is no possible justification for an impairment of human dignity. Human dignity cannot be weighed against any

⁹⁸ This second part of the report was prepared by Justice Britz.

⁹⁹ Dreier, in: *id.* (ed.), *GG*, vol. 1, 3rd ed. 2013, Prefatory Remark to Art. 1, para. 65 with further references.

¹⁰⁰ Dreier, in: *id.* (ed.), *GG*, vol. 1, 3rd ed. 2013, Prefatory Remark to Art. 1, para. 160 with further references.

other individual fundamental right.¹⁰¹ Even extremely serious public interests cannot justify interference, for example with the core area of private life, which is protected as absolutely inviolable by the guarantee of human dignity.¹⁰² Accordingly, the content of Art. 1 sec. 1 GG is particularly beyond the reach of amendment, and has a particularly powerful efficacy with respect to the legislature, executive and judiciary. All the same, it is not in itself a norm superior to other provisions of the Constitution.

c) It is assumed that (only) the provision of Art. 79 of the Basic Law constitutes constitutional law superior to all other provisions of the Basic Law.

aa) Art. 79 of the Basic Law governs the conditions under which the Basic Law may be amended.

It reads as follows:

(1) This Basic Law may be amended only by a law expressly amending or supplementing its text. In the case of an international treaty regarding a peace settlement, the preparation of a peace settlement, or the phasing out of an occupation regime, or designed to promote the defence of the Federal Republic, it shall be sufficient, for the purpose of making clear that the provisions of this Basic Law do not preclude the conclusion and entry into force of the treaty, to add language to the Basic Law that merely makes this clarification.

(2) Any such law shall be carried by two thirds of the Members of the *Bundestag* and two thirds of the votes of the *Bundesrat*.

(3) Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Arts. 1 and 20 shall be inadmissible.

This superior status is founded upon an argument stemming from the norm's systemic conception: the provision is viewed as higher-ranking constitutional law because it represents a standard of review for constitutional amendments, and thus creates the possibility of "unconstitutional" constitutional law.¹⁰³

¹⁰¹ Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts – BVerfGE*) 93, 266, 293.

¹⁰² BVerfGE 130, 1, 22 with further references; established case-law.

¹⁰³ See, e.g., Franz Reimer, *Juristische Methodenlehre*, 2016, p. 105 para. 192 with further references; BeckOK GG/DietleinGG, 1 June 2016, Art. 79 para. 19; Dreier, in: *id.* (ed.), *GG*, vol. 2, 3rd ed. 2015, Art. 79 III, para. 14 with further references.

Some scholars hold that the assumption that Art. 79 GG constitutes superior constitutional law is restricted to its section 3.¹⁰⁴

bb) Because Art. 79 sec. 3 GG refers to other norms, these too indirectly reflect the standard for constitutional amendments, and therefore indirectly rank higher than provisions amending the Constitution.

(1) This pertains to the division of the Federation into *Länder*, their participation as a rule in the legislative process, and the principles laid down in Arts. 1 and 20 GG (see also I. 2. b) above).

Art. 1 GG reads as follows:

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Art. 20 reads as follows:

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.

(2) But in this regard, the following generally accepted assessment must be borne in mind: "Art. 79 sec. 3 GG does not embrace Arts. 1 and 20 GG in their entirety, but expressly declares only that their principles cannot be amended. This refers to the substantive core content of the referenced norms, which must be distinguished specifically for each case. There is general agreement that given this wording, the many and diverse

¹⁰⁴Dreier, in: *id.* (ed.), *GG*, vol. 2, 3rd ed. 2015, Art. 79 III, para. 14 with further references.

refinements that the legal norms contained in Arts. 1 and 20 GG have undergone, are not covered by the eternity guarantee.”¹⁰⁵

(3) The principles of Art. 20 GG referred to in Art. 79 sec. 3 GG include the principles of the republic, democracy, the social state, and the federal state mentioned in Art. 20 sec. 1 GG. They furthermore include the principle of the rule of law, which is not mentioned in Art. 20 sec. 1 GG, but the essential elements of which are governed by Art. 20 secs. 2 and 3 GG. There is disagreement whether the principle of the rule of law *per se* is covered by Art. 79 sec. 3 GG. In any case, the following elements are indeed included: the separation of powers, the precedence of the Constitution, the precedence of statute, and the requirement of a statutory provision.¹⁰⁶

(4) The principles that are stated in Art. 1 GG, and to which Art. 79 sec. 3 GG likewise refers, include

“... the principle of respect for and protection of human dignity (Art. 1 sec. 1 GG), but also recognition of inviolable and inalienable human rights as the basis of every community, of peace and justice (Art. 1 para. 2 GG). In conjunction with the reference to the following fundamental rights contained in Art. 1 sec. 3 GG, the guarantee of these rights is in principle immune to restriction by the legislature since they are indispensable to the maintenance of an order in compliance with Art. 1 secs. 1 and 2 GG ...”¹⁰⁷

It has not been entirely clarified to what extent the guarantees of the individual fundamental rights contained in Art. 2 to Art. 19 GG are also covered by the eternity guarantee; this would have to be determined individually for each such right.¹⁰⁸ In any event, the guarantees are not fully covered by the eternity guarantee, as is already evident from the fact that Art. 79 sec. 3 GG refers only to Art. 1 GG.¹⁰⁹

c) Art. 79 sec. 3 GG does not apply to the Federal Constitutional Court’s review of other measures taken by the state and that are not laws amending the Constitution. In that case, the principles set out in Art. 79 sec. 3 GG do not automatically take on a superior

¹⁰⁵Dreier, in: *id.* (ed.), *GG*, vol. 2, 3rd ed. 2015, Art. 79 III, para. 26 with further references; see also Maunz/Dürig/Herdegen *GG*, 2015, Art. 79 para. 63, 109.

¹⁰⁶On this see von Münch/Kunig-Bryde, *GG*, vol. 2, 6th ed., 2012, Art. 79 para. 44; von Mangoldt/Klein/Starck-Hain, *GG*, vol. 3, 6th ed., 2010, Art. 79 para. 67 et seq.; Dreier, in: *id.* (ed.), *GG*, vol. 2, 3rd ed. 2015, Art. 79 III, para. 50 et seq. with further references.

¹⁰⁷BVerfGE 109, 279, 310 with further references. Translated excerpt taken from 60 years German Basic Law: the German Constitution and its Court, 2nd ed., 2012, pp. 652 et seq.; translated by Donna Elliott; ©Konrad-Adenauer-Stiftung e.V., Berlin/Germany .

¹⁰⁸On this see, e.g., Maunz/Dürig/Herdegen *GG*, 2015, Art. 79 para. 115 et seq.; Dreier, in: *id.* (ed.), *GG*, vol. 2, 3rd ed. 2015, Art. 79 III, para. 32 et seq. with further references; von Münch/Kunig-Bryde, *GG*, vol. 2, 6th ed., 2012, Art. 79 para. 37; von Mangoldt/Klein/Starck-Hain, *GG*, vol. 3, 6th ed., 2010, Art. 79 para. 67 et seq.

¹⁰⁹von Münch/Kunig-Bryde, *GG*, vol. 2, 6th ed., 2012, Art. 79 para. 37.

status to other principles or provisions of the Basic Law and one must analyse individually for each norm of the Basic Law whether, and to what extent, it may yield precedence to other (constitutional) objectives.

2. What approach has the Federal Constitutional Court taken in terms of determining a hierarchy within the Constitution? Is it possible to conclude from the case-law of the Constitutional Court that it has given principal status to some constitutional principles over the rest of the Basic Law?

The case-law of the Federal Constitutional Court contains no general statements that certain principles or provisions of the Basic Law have superior status over any others. As does academic scholarship on constitutional law, the Federal Constitutional Court regularly (usually tacitly) proceeds on the assumption that no provisions have higher status *per se*, holding that the Basic Law can be understood only as a structural unity. It follows that at the level of the Constitution itself, it is generally not conceivable that norms will rank higher or lower, in the sense that they might be measured against one another.¹¹⁰

Most recently, the Federal Constitutional Court found on this point as follows in connection with the scope of constitutional rights of opposition:

“The controversial legal concept of unconstitutional constitutional law likewise has nothing to offer towards resolving the state of tension between the quorum to exercise parliamentary minority rights and the general constitutional principle of an effective opposition. This legal concept poses problems if only because no hierarchy can be distinguished within the same normative level that might furnish some criterion as to which constitutional norm would take precedence. The Basic Law can only be understood as structural unity[...]Consequently, as a rule, it is impossible at the constitutional level to conceive of norms of higher or lower rank, in the sense that they could be measured against each other.”¹¹¹

However, the situation is different – including in the Federal Constitutional Court's opinion¹¹² – in the special case of a constitutional amendment. If the Federal Constitutional Court must decide on the constitutionality of a constitutional amendment, it measures the new provision against the principles laid down in Art. 79 sec. 3 GG (see above), and thus

¹¹⁰ BVerfGE 3, 225, 231 and 232.

¹¹¹ Federal Constitutional Court, judgment of 3 May 2016 – 2 BvE 4/14 –, para. 111, juris.

¹¹² Federal Constitutional Court, judgment of 3 May 2016 – 2 BvE 4/14 –, para. 112, juris.

indirectly confers on those provisions a higher status than the new provision of the Basic Law that is under review¹¹³ (see above).

3. How is the Constitution amended in your jurisdiction? What is the procedure for the constitutional amendment set out in the Basic Law? How was the Constitution established originally and does it explicitly provide for unamendable (eternal) provisions? Is there any difference between the initial manner of constitutional adoption and the existing procedure of the amendment to the Basic Law?

How is the Constitution amended in your jurisdiction?

Constitutional amendments are governed by Art. 79 of the Basic Law (see above).

The Constitution is amended by way of legislation. The amendment must expressly alter the text of the Basic Law (Art. 79 sec. 1 sentence 1 GG). It is not sufficient if a statute satisfies the majority requirements needed to amend the Constitution (Art. 79 sec. 2 GG). In other words, a constitutional amendment is possible only by amending the text of the Constitution itself.

What is the procedure for the constitutional amendment set out in the Basic Law?

The procedure for a constitutional amendment is essentially a normal legislative procedure which – like other legislation, too – is guided by Art. 76 et seq. GG. Pursuant to Art. 76 sec. 1 GG, bills for legislation may be introduced in the *Bundestag* by the Federal Government, by the *Bundesrat* from the floor of the *Bundestag*. No other organs are involved. Nor are the German people directly involved. Art. 79 sec. 2 GG yields further procedural requirements that apply specifically to constitutional amendments: a law amending the Constitution must be carried by two thirds of the members of the *Bundestag* and two thirds of the votes of the *Bundesrat*. In this, legislation amending the Constitution differs from the normal legislative procedure insofar as in the normal legislative procedure, a simple majority vote in the *Bundestag* suffices, and additional approval by a simple majority of the *Bundesrat* is required only in the case of what are known as “approval acts” (*Zustimmungsgesetze*). There is also no popular participation in legislation amending the Constitution.

¹¹³ See BVerfGE 84, 90, 120: no possibility of “self-exemption from the limits on a constitutional amendment laid down in the Basic Law”.

How was the Constitution established originally?

The Basic Law was developed and entered into force under special circumstances. Following Germany's unconditional capitulation on 8 May 1945, the country's situation as a state was characterised by its occupation by the four Allied Powers and its impending division. First, statehood was restored at the level of the *Länder*. The four occupying powers' efforts to find a solution for the entire country failed. Efforts began in the three western occupation zones to develop a Constitution that would be of a provisional nature. Initially, in August 1948, the "Constitutional Convention at Herrenchiemsee", a panel of experts appointed by the minister presidents of the *Länder*, prepared a text for this purpose. Then, beginning in September 1948, the "Parliamentary Council" met, comprising 65 representatives elected by the *Landtage* – the legislatures of the *Länder* –, and on 8 May 1949 it adopted the final version of the Basic Law. The Basic Law was ratified by all West German *Landtage* except that of Bavaria, and entered into force at the end of the day on 23 May 1949 (Art. 145 sec. 2 GG). With Germany's reunification, the Basic Law also entered into force in the other parts of Germany on 3 October 1990. There was no direct participation of the people, neither in 1945 nor in 1990.

Does the Constitution explicitly provide for unamendable (eternal) provisions?

In Art. 79 sec. 3 GG, the Constitution provides for an eternity clause that prohibits amendments affecting the principles listed therein (see above).

Art. 79 sec. 3 GG also limits the possibility of transferring sovereign rights to international entities.¹¹⁴ In 1992, this was expressly regulated through Art. 23 sec. 1 sentence 3 GG¹¹⁵ for the process of European integration.

¹¹⁴ On the significance of Art. 79 sec. 3 GG in the context of the case-law of the Federal Constitutional Court on European integration, see most recently Federal Constitutional Court, order of the Second Senate of 15 December 2015 – 2 BvR 2735/14; Federal Constitutional Court, judgment of the Second Senate of 21 June 2016 – 2 BvR 2728/13, as well as I. 2. b) above.

¹¹⁵ Art. 23 sec. 1 GG reads as follows:

(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

Is there any difference between the initial manner of constitutional adoption and the existing procedure of the amendment to the Basic Law?

a) The Basic Law was originally adopted as described above, in a manner determined by the specific historical situation in Germany. Constitutional amendments are governed by Art. 79 GG. The two procedures are therefore fundamentally different.

b) However, the Basic Law also includes a provision for future adoption of a Constitution: in its Art. 146, the Basic Law contains a provision on its own expiration, and for the establishment of a new Constitution, which it places within the hands of the *pouvoir constituant*.¹¹⁶

In its current version, Art. 146 GG reads as follows:

This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.

This provision, which is unusual for a constitution, derived in its original version¹¹⁷ from the special conditions under which the Basic Law evolved, and expressed the provisional nature of the Basic Law. It is debated in constitutional law doctrine whether this provision is still valid and meaningful today.¹¹⁸

Art. 146 GG does not govern the manner in which the *pouvoir constituant* is to be activated for the adoption of a new constitution. It is debated in constitutional law doctrine whether the exercise of the people's power to enact a constitution under Art. 146 GG requires a plebiscite. This is concluded in part because of the wording ("Constitution...freely adopted by the German people").¹¹⁹

c) According to prevailing opinion among constitutional law academics, the eternity guarantee under Art. 79 sec. 3 GG applies only for amendments to the Constitution;¹²⁰ as long as the Basic Law remains in force, the principles mentioned in that article cannot be amended under any circumstances in the scope guaranteed by the eternity clause.

¹¹⁶ von Münch/Kunig-Bryde, *GG*, vol. 2, 6th ed., 2012, Art. 79 para. 3.

¹¹⁷ Until 1990, Art. 146 GG read as follows:

This Basic Law shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.

¹¹⁸ On this see Maunz/Dürig/Herdegen *GG*, 2015, Art. 79 para. 88; Dreier, in: *id.* (ed.), *GG*, vol. 3, 2nd ed. 2008, Art. 146, para. 28 with further references.

¹¹⁹ Dissenting, Dreier, in: *id.* (ed.), *GG*, vol. 3, 2nd ed. 2008, Art. 146, para. 52 with further references.

¹²⁰ Dreier, in: *id.* (ed.), *GG*, vol. 2, 3rd ed. 2015, Art. 79 III, para. 14 with further references.

By contrast, Art. 79 GG is not binding on the original constitutional legislature (the *pouvoir constituant*)¹²¹ and therefore does not apply to the replacement of the Basic Law pursuant to Art. 146 GG: Art. 79 sec. 3 GG binds the evolution of the state in Germany to the core content of the constitutional order stipulated in this provision, without being able to normatively bind the *pouvoir constituant*.¹²² However, some academic scholars of constitutional law do not share this interpretation.¹²³

However, the Federal Constitutional Court – without expatiating on this any further – has sporadically indicated that in its view the original constitutional legislature too is bound by certain requirements. This is expressed, for example, in the following wording:

“Just like the primary legislature creating constitutional law (cf. BVerfGE 3, 225 (232); 23, 98 (106)), the constitution-amending legislature too may not leave fundamental requirements of justice out of account. These include the principle of equality under the law and the prohibition of arbitrariness (cf. BVerfGE 1, 208 (233); 23, 98 (106 and 107)). Similarly, fundamental elements of the principle of the state under the rule of law and the principle of the social welfare state, which are expressed in Art. 20.1 and 20.3 of the Basic Law, must be observed.”¹²⁴

4. Should constitutional amendment procedure be subjected to judicial scrutiny or should it be left entirely up to the political actors? What is the prevailing legal opinion in this regard among academic scholars and other societal groups in your jurisdiction?

a) The procedure for amending the Constitution is prescribed by the Basic Law and is subject to review by the Federal Constitutional Court within the scope of its general competences. However, to date there has been no significant review of procedural provisions. Constitution-amending legislative procedure is equivalent to normal legislative procedures, the only difference being the majority requirements provided under Art. 79 sec. 2 GG. The provisions of Art. 79 sec. 2 GG that specifically apply to constitutional amendments are clear and explicit, and pose no difficulties in practice.

There is no widespread discussion in Germany whether the Federal Constitutional Court might be impeded from reviewing the constitutional amendment procedure with respect to procedural errors under constitutional law .

¹²¹ von Münch/Kunig-Bryde, *GG*, vol. 2, 6th ed., 2012, Art. 79 para. 3; BeckOK GG/DietleinGG, 1 June 2016, Art. 79 para. 20.2.

¹²² BVerfGE 89, 155, 180.

¹²³ See the references in Maunz/Dürig/HerdegenGG, 2015, Art. 79 para. 88.

¹²⁴ BVerfGE 84, 90, 121.

The prevailing opinion is that it is within the bounds of its jurisdiction that the Federal Constitutional Court also monitors the provisions of the Basic Law concerning the constitutional amendment procedure. There is no provision in the Basic Law that would relieve the Federal Constitutional Court in this regard from its task, within the bounds of its jurisdiction, of reviewing measures as to whether they violate the Basic Law.

b) In the early years of the Basic Law, there was indeed some debate as to whether the Federal Constitutional Court is permitted to review individual provisions of the Basic Law for unconstitutionality. However, this pertained not to the review of a constitutional amendment, but to the review of a provision that had been included in the Basic Law from the beginning. The debate finds expression as follows in a decision of the Federal Constitutional Court dating from 1953:¹²⁵

“... Rather, one must furthermore ask whether a court ... may perhaps have no authority to review because compliance with those minimum requirements that even a constitutional norm must meet is thought to be entrusted solely to the constitutional legislature, so that any noncompliance with those requirements could be corrected only by a statute amending the Constitution, or ultimately by a revolutionary act, but not by the judiciary.

In fact, in the modern constitutional state, the courts too are creatures of the Constitution; they too derive their functions directly or indirectly from the Constitution, so that they generally only have to perform the tasks allocated to them under the Constitution. For that reason, one segment of academia and case-law denies in general that the judiciary has the function of reviewing the Constitution itself (cf. Apelt, *Neue Juristische Wochenschrift* – NJW 1952 p. 733, with further references). As reasons, it is mainly argued that through such a review, a judge would be improperly taking on constituent power and would be too far removed from the principle of separation of powers for that review to be justifiable under modern constitutions founded on the rule of law, and under the Basic Law in particular. Against this, the other side objects (cf. Bachof, *Verfassungswidrige Verfassungsnormen*, in: *Recht und Staat*, no. 163/164, pp. 11 et seq., and NJW 1952 p. 242, with further references) that the Basic Law itself has appointed a court, namely the Federal Constitutional Court, to guarantee the inviolability of the fundamental decision made in the Basic Law, and that the constitutional judiciary, as specifically organised in the Basic Law, accordingly must also have the duty of reviewing constitutional norms against the standard of the supra-statutory law incorporated and provided for in the Constitution. It is further argued that the Federal Constitutional Court would set itself above the intent of the Constitution, and thus endanger legal certainty, not by performing such a judicial review of statutes, but rather precisely by declining to do so; for if the Federal Constitutional Court were to re-

¹²⁵ BVerfGE, 2, 225, 234 et seq.

ject applications for review of constitutional norms claimed to be unconstitutional on the grounds that the Basic Law precludes any judicial review of norms in the Constitution itself, it would still be conceivable that another court would not adopt that reasoning, and would then perform such a review itself – an outcome that was intended to be averted by placing the judicial review of statutes with the Federal Constitutional Court.

If one affirms that “unconstitutional constitutional norms” are conceivable – albeit only remotely so – then in fact it is only logical to assign such finding to the judiciary, which after all founds its authority not just externally, on the Constitution, but – consistently with the nature of its activity – in a certain sense on the very idea of the law. The concept that the Constitution itself might contain unconstitutional norms might lose much value if one were to entrust the elimination of such norms solely to the constitution-amending legislature. The argument that the Federal Constitutional Court itself assumes constituent power by affirming this competence of judicial review must be completely ruled out because the judicial review of statutes in its defensive function, is in its essence different from the law-making function of the legislature; moreover, as already stated this competence to review by its very nature is executed within such narrow bounds with respect to original constitutional norms that it is very unlikely that the Court will find an original constitutional norm void.”

5. Does the Constitution in your jurisdiction provide for constitutional overview of the constitutional amendment? If yes, what legal subjects may apply to the constitutional court and challenge the constitutionality of the amendment to the basic law? What is the legally prescribed procedure of adjudication in this regard?

Does the Constitution in your jurisdiction provide for constitutional review of the constitutional amendment?

Constitutional amendments may be subject to review by the Federal Constitutional Court to the extent that the Basic Law establishes constitutional requirements for constitutional amendments. Federal Constitutional Court review of laws amending the Constitution differs from the Court’s review of other legislation only with respect to the standard applied. In its review of normal legislation, the Federal Constitutional Court generally applies the entire Basic Law as the standard for review, while for the review of laws amending the Constitution it must monitor compliance with Art. 79 GG alone:

“This Article provides that amendments are inadmissible if they “affect” the basic principles laid down in Article 1 and Article 20 of the Basic Law. Other review standards are out of the question in this context. In particular, Article 3.1 and Arti-

cle 14 of the Basic Law must be excluded as directly applicable criteria. They may be invoked only to the extent that central elements of these fundamental rights are among the basic principles laid down in Article 1 and Article 20 of the Basic Law and are therefore outside the scope of a constitutional amendment.”¹²⁶

There is no provision that specifically transfers to the Federal Constitutional Court the responsibility to review constitutional amendments. Rather, it is part of the Federal Constitutional Court’s general jurisdiction to review laws amending the Constitution for their compatibility with Art. 79 GG. There is no provision that would exempt the review of laws amending the Constitution from the general proceedings of the Federal Constitutional Court.

What legal subjects may apply to the Constitutional Court and challenge the constitutionality of the amendment to the Basic Law?

A review by the Federal Constitutional Court of laws amending the Constitution may occur in different proceedings that may be pursued by different legal subjects.

a) This can be done in constitutional complaint proceedings (Art. 93 sec. 1 no. 4a GG¹²⁷). A constitutional complaint may be filed by “any person”. This means primarily natural persons, but within the limits set by Art. 19 sec. 3 GG¹²⁸; it also includes legal persons. In constitutional complaint proceedings, for example, a complainant might claim that a constitutional amendment violates his or her human dignity as protected under Art. 1 sec. 1 GG, and therefore violates Art. 79 sec. 3 GG. According to the case-law of the Federal Constitutional Court, certain conditions allow the claim that a constitutional amendment violates the fundamental right under Art. 38 GG¹²⁹ and affects the

¹²⁶ BVerfGE 94, 12, 33-34.

¹²⁷ Art. 93 sec. 1 no. 4a GG reads as follows:

(1) The Federal Constitutional Court shall rule:

...

4a. on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 has been infringed by public authority

...

¹²⁸ Art. 19 sec. 3 GG reads as follows:

The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits.

¹²⁹ Art. 38 GG reads as follows:

(1) Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience.

(2) Any person who has attained the age of eighteen shall be entitled to vote; any person who has attained the age of majority may be elected.

principle of democracy (Art. 20 sec. 1 and sec. 2 GG¹³⁰) in a manner incompatible with Art. 79 sec. 3 GG.¹³¹

b) The constitutionality of a constitutional amendment may also be reviewed within the scope of an abstract judicial review pursuant to Art. 93 sec. 1 Nr. 2 GG¹³² or of a specific judicial review pursuant to Art. 100 sec. 1 GG¹³³. Applications for an abstract judicial review may be filed by the Federal Government, a *Land* government, or one fourth of the members of the *Bundestag*. A referral to the Federal Constitutional Court for a specific judicial review is made by a court.

c) Other possible proceedings are *Organstreit* proceedings (a dispute between constitutional organs) pursuant to Art. 93 sec. 1 no. 1 GG¹³⁴ or a dispute between the Federation and the *Länder* pursuant to Art. 93 sec. 1 no. 3 GG¹³⁵. In *Organstreit* proceedings, for example, it might be found that a constitutional amendment is incompatible with Art. 79 sec. 3 GG because of its impact on rights of the complainant organ of the state that are guaranteed by the principle of democracy (Art. 20 sec. 1 und sec. 2 GG). In a dispute between the Federation and the *Länder*, it might be found, for example, that a constitutional amendment is unconstitutional with regard to the elements of the principle of a federal state protected by Art. 79 sec. 3 GG.

(3) Details shall be regulated by a federal law.

¹³⁰ Art. 20 sec. 1 and 2 GG read as follows:

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

¹³¹ As a fundamental basis, BVerfGE 89, 155, 172; most recently Federal Constitutional Court, OMT II###

¹³² Art. 93 sec. 1 no. 2 GG reads as follows:

(1) The Federal Constitutional Court shall rule:

...

2. in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or Land law with this Basic Law, or the compatibility of Land law with other federal law, on application of the Federal Government, of a Land government, or of one fourth of the Members of the Bundestag ...

¹³³ Art. 100 sec. 1 sentence 1 GG reads as follows:

(1) If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained ... from the Federal Constitutional Court where this Basic Law is held to be violated.

¹³⁴ Art. 93 sec. 1 no. 1 GG reads as follows:

(1) The Federal Constitutional Court shall rule:

1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body ...

¹³⁵ Art. 93 sec. 1 no. 3 GG reads as follows:

...

3. In the event of disagreements concerning 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 ...

What is the legally-prescribed procedure of adjudication in this regard?

Review of a constitutional amendment within the scope of a constitutional complaint, a judicial review of a statute, *Organstreit* proceedings or a dispute between the Federation and the *Länder* follows the general rules of procedure for these types of proceedings. Those procedural rules are defined in further detail in the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*). There are no special requirements for reviewing laws amending the Constitution; the review follows the general rules.

The Federal Constitutional Court cannot review laws (including laws amending the Constitution) on its own initiative for their compatibility with the Constitution. It does so only when a provision of law (amending the Constitution) is submitted to the Court for review within one of the above proceedings.

6. Is the Federal Constitutional Court authorised to check the constitutionality of the Basic Law on substantive basis or is it only confined to review on procedural grounds? In the absence of explicit constitutional power, has the Federal Constitutional Court ever assessed or interpreted constitutional amendment? What has been the rationale behind the Court's reasoning? Has there been a precedent when the Federal Constitutional Court had elaborated on its authority to exercise the power of judicial review of constitutional amendments either on substantive or procedural grounds? Please, provide examples from the jurisprudence of the Federal Constitutional Court.

a) In the aforementioned proceedings, the Federal Constitutional Court may also decide on the substantive limits of a constitutional amendment that arise from Art. 79 sec. 3 GG. The Court has already done so on multiple occasions. To date, however, it has never declared a constitutional amendment unconstitutional.¹³⁶

¹³⁶ See, e.g., BVerfGE 30, 1, 26 (constitutional complaint and abstract judicial review), although, as shown in their separate opinion (pp. 33 et seq.), three justices saw a violation of Art. 79 sec. 3 GG. BVerfGE 34, 9, 20 et seq. (abstract judicial review); BVerfGE 84, 90, 120, 125 (constitutional complaint); 94, 12, 33 et seq. (constitutional complaint); 94, 49, 102 et seq. (constitutional complaint); 95, 48, 60 et seq. (constitutional complaint); 109, 279, 310 et seq. (constitutional complaint), although, as shown in their separate opinion (pp. 382 et seq.), two justices saw a violation of Art. 79 sec. 3 GG.

b) The Federal Constitutional Court's decision on the constitutional limitation of the fundamental right to asylum shows that the Federal Constitutional Court certainly gives latitude to the constitution-amending legislature:¹³⁷

"The revision of the fundamental right to asylum in Article 16a of the Basic Law does not violate the limits of Article 79.3 of the Basic Law. The amending legislature has also complied with the requirements of Article 79.1 sentence 1 of the Basic Law.

1. a) Article 79.3 of the Basic Law prohibits amendments to the Basic Law that affect the principles laid down in Articles 1 and 20 of the Basic Law. This includes not only the principle of respect for and protection of human dignity anchored in Article 1.1 of the Basic Law. The acknowledgement of inviolable and inalienable human rights as the basis of the human community, peace and justice contained in Article 1.2 of the Basic Law also becomes important in that regard; in conjunction with the reference to the following fundamental rights contained in Article 1.3 of the Basic Law, the guarantees of these rights are in principle immune to restriction since they are indispensable to the maintenance of an order in compliance with Articles 1.1 and 1.2 of the Basic Law. The fundamental elements of the principles of the rule of law and the social state expressed in Articles 20.1 and 20.3 of the Basic Law must also be respected. For all that, Article 79.3 of the Basic Law requires, however, only that the principles mentioned not be affected. It does not, on the other hand, prevent the legislature from adopting amendments to modify those aspects of these principles embodied in positive law for appropriate reasons (...).

b) "Like every provision of the Basic Law, the fundamental right to asylum lies in principle at the disposal of the legislature, which may amend the Basic Law (Article 79.1 sentence 1 and 79.2 of the Basic Law). The limit imposed upon the amending legislature by Article 79.3 of the Basic Law, according to which amendment of the principles laid down in Articles 1 and 20 of the Basic Law is inadmissible, is not violated by the fact that foreigners are not afforded protection against political persecution by a guarantee in the form of a fundamental right. The Federal Constitutional Court, has, however, stated in connection with the definition of the term "persons persecuted on political grounds" in Article 16.2 sentence 2 of the Basic Law (old version) that the fundamental right to asylum is based on the conviction, defined by respect for the inviolability of human dignity, to the effect that no state has the right to threaten or violate the body, life or personal freedom of an individual for reasons that lie exclusively in that individual's political convictions, fundamental choice of religion or characteristics beyond that individual's control (...).

¹³⁷ BVerfGE 94, 49, 102 et seq. Translated excerpt taken from 60 years German Basic Law: the German Constitution and its Court, 2nd ed., 2012, pp. 745 et seq.; translated by Donna Elliott; ©Konrad-Adenauer-Stiftung e.V., Berlin/Germany.

It cannot, however, be inferred from this that the fundamental right to asylum is included in the substantive content of the guarantee of Article 1.1 of the Basic Law. What the substantive content of that guarantee is and the consequences to be drawn from its content for the powers of the German state must be determined independently.

If therefore the amending legislature is not prevented from suspending the fundamental right to asylum as such, it follows implicitly that Article 16a.2 of the Basic Law, sentences 1 and 2 which retracts the sphere of operation of the fundamental right from the level of the individual, paragraph 3 which restricts the substantive content of the guarantee in respect of procedure, paragraph 2 sentence 3 and paragraph 4 which reformulates the guarantee of legal recourse of Article 19.4 of the Basic Law and finally paragraph 5 which creates a basis for pan-European regulation of protection of refugees through agreements under international law, remain within the limits of a permissible constitutional amendment.

c) Article 16a.2 sentence 3 of the Basic Law contains a special clause pertaining to the procedure for termination of the stay in the country in cases of entry from a safe third country. This clause modifies Article 19.4 of the Basic Law. The question as to whether the principles set forth in Article 20 of the Basic Law make the principle of personal recourse to the courts under the rule of law, which is concretely formulated in Article 19.4 of the Basic Law, inviolate (see BVerfGE 30, 1 [157 et seq.]) and can remain open. Article 16a.2 sentence 3 of the Basic Law does not in any case infringe such a principle. This applies in particular since foreigners are to be sure returned immediately to the safe third country without prior review by a further controlling instance, but this measure is preceded by legal confirmation of the guarantee of application of the Geneva Refugee Convention and the European Convention on Human Rights in the third country.

The Federal Constitutional Court's position of giving latitude to the constitution-amending legislature is also emphasised in the Court's decision¹³⁸ on a constitutional amendment that authorised acoustic surveillance of private homes (Art. 13 sec. 3 GG¹³⁹):

“Article 79.3 of the Basic Law provides for an exception that must be narrowly interpreted; it does not prevent the legislature from adopting amendments to modify those aspects of these principles embodied in positive law for appropriate reasons ... The Federal Constitutional Court must respect the right of the legislature to

¹³⁸ BVerfGE 109, 279 et seq. Translated excerpt taken from 60 years German Basic Law: the German Constitution and its Court, 2nd ed., 2012, pp. 652 et seq.; translated by Donna Elliott; ©Konrad-Adenauer-Stiftung e.V., Berlin/Germany .

¹³⁹ Art. 13 sec. 3 GG reads as follows:

(3) If particular facts justify the suspicion that any person has committed an especially serious crime specifically defined by a law, technical means of acoustical surveillance of any home in which the suspect is supposedly staying may be employed pursuant to judicial order for the purpose of prosecuting the offence, provided that alternative methods of investigating the matter would be disproportionately difficult or unproductive. The authorisation shall be for a limited time. The order shall be issued by a panel composed of three judges. When time is of the essence, it may also be issued by a single judge.

amend, restrict or even suspend individual fundamental rights as long as it does not affect the principles laid down in Articles 1 and 20 of the Basic Law. The legislature is not prohibited from modifying those aspects of these principles that are embodied in positive law for appropriate reasons ... What the substantive guarantee contained in Article 1.1 of the Basic Law encompasses as regards the individual fundamental rights must be established through independent interpretation of each individual provision.”

c) However, the Federal Constitutional Court has been criticised¹⁴⁰ for occasionally establishing extensive requirements for the application of a provision of the Basic Law created by constitutional amendment, which the Court considered necessary so that it could find that the constitutional amendment was (still) compatible with Art. 79 sec. 3 GG. This is particularly obvious in the aforementioned decision on acoustic surveillance of private homes (Art. 13 sec. 3 GG). The Federal Constitutional Court considered this constitutional amendment to be compatible with Art. 79 sec. 3 in conjunction with Art. 1 sec. 1 GG only because the Court derived extensive stipulations from the Basic Law on how the newly created authorisation for acoustic surveillance of private homes should be understood and applied.

In this context, the Federal Constitutional Court referred to the principles under the eternity guarantee in order to interpret the new provision created by the constitutional amendment in the light of those principles. Instead of finding a violation of Art. 79 sec. 3 in conjunction with Art. 1 sec. 1 GG, it interpreted the new provision in accordance with the standards provided by the guarantee of human dignity in Art. 1 sec. 1 GG, in such a way that the new provision is compatible with human dignity:

“The power to authorize surveillance of private dwellings by law under Article 13.3 of the Basic Law does not violate Article 79.3 in conjunction with Article 1.1 of the Basic Law since it permits only provisions of law and measures based on such provisions that respect these limits. Limitations to this constitutional power are contained in Article 13.3 of the Basic Law, on the one hand, but also follow from other provisions to be taken into consideration in the course of a systematic interpretation of the Basic Law”¹⁴¹

“Article 13.3 of the Basic Law does not explicitly describe all limits to the use of acoustic surveillance of private dwellings for the purposes of prosecution of crimi-

¹⁴⁰ Maunz/Dürig/HerdegenGG, 2015, Art. 79 para. 62.

¹⁴¹ BVerfGE 109, 279, 315. Translated excerpt taken from 60 years German Basic Law: the German Constitution and its Court, 2nd ed., 2012, pp. 652 et seq.; translated by Donna Elliott; ©Konrad-Adenauer-Stiftung e.V., Berlin/Germany.

nal offences that derive from the requirement that the inviolable core area of private conduct of life be afforded absolute protection. Further limits follow - as in the case of all provisions relating to fundamental rights - from other provisions of the Basic Law. In the case of modification of provisions relating to fundamental rights, the legislature that adopts a constitutional amendment is also under no obligation to reiterate all relevant constitutional rules that otherwise apply. Review against the standard of Article 79.3 of the Basic Law is therefore subject to Article 13.3 of the Basic Law in conjunction with such other constitutional rules.

(a) Restrictions of constitutional rights inserted through constitutional amendment must therefore be systematically interpreted against the background of other provisions containing fundamental rights, in particular Article 1.1 of the Basic Law, and construed by applying the principle of proportionality ... In the case of a provision created through constitutional amendment, the limits to interpretation of constitutional law also lie where a provision with unambiguous wording and intent yields an opposite meaning, the substantive content of the provision to be interpreted is fundamentally redefined or the provision fails in an essential point to achieve its goal

(b) There is no reason to assume that these limits have been transgressed in the present case. For Article 13.3 of the Basic Law authorises only implementation in the form of legislation that adequately takes into account the limits to encroachment imposed by Article 1.1 of the Basic Law. This must also be complemented by reference to the principle of proportionality. Such interpretation is not in contradiction with the will of the legislature that adopted the constitutional amendment.”¹⁴²

“(c) Article 13.3 of the Basic Law is to be understood to mean that its statutory embodiment must preclude collection of information through acoustic surveillance of private dwellings whenever investigatory activities would intrude upon the inviolable area of private conduct of life protected by Article 13.1 in conjunction with Article 1.1 and 2.1 of the Basic Law.”¹⁴³

The decision then proceeds to fundamental statements on the need for legal provisions that ensure, by observing the principle of legal clarity, that the manner of acoustic surveillance of private homes does not result in a violation of human dignity (known as the “protection of the core area”). The decision states that surveillance must always be forgone in situations in which there is reason to believe that the measure would violate human dignity. Moreover, if acoustic surveillance of private homes unexpectedly leads

¹⁴² BVerfGE 109, 279, 316 and 317. Translated excerpt taken from 60 years German Basic Law: the German Constitution and its Court, 2nd ed., 2012, pp. 652 et seq.; translated by Donna Elliott; ©Konrad-Adenauer-Stiftung e.V., Berlin/Germany.

¹⁴³ BVerfGE 109, 279, 318. Translated excerpt taken from 60 years German Basic Law: the German Constitution and its Court, 2nd ed., 2012, pp. 652 et seq.; translated by Donna Elliott; ©Konrad-Adenauer-Stiftung e.V., Berlin/Germany.

to a collection of absolutely protected information, surveillance must be discontinued and the recordings must be deleted; any use of such absolutely protected data collected in the course of law enforcement is excluded. The specific resulting requirements are explained in more detail on the subsequent pages of the decision.¹⁴⁴

7. Is there any tendency in your jurisdiction towards enhancing constitutional authority in respect of the Federal Constitutional Court's power to check amendments to the Basic Law? Do academic scholars or other societal groups advocate for such development? How is the judicial review observed in this regard? Would the expansion or recognition of the Federal Constitutional Court's authority encourage the realisation of constitutional ends or threaten its viability? Please, elaborate on existing discussion in your jurisdiction.

a) The Federal Constitutional Court already has quite extensive options *de constitutione lata* for reviewing constitutional amendments. This is, on the one hand, due to the fact that Art. 79 sec. 3 GG declares important principles of the Basic Law inalterable, and thus establishes a substantive-law standard for assessing the constitutionality of a constitutional amendment. On the other hand, it is due to the fact that the Basic Law (concretised in the Federal Constitutional Court Act) has assigned the Federal Constitutional Court the task of reviewing the constitutionality of laws when a law is submitted for its review in one of the specified proceedings. Since laws amending the Constitution are not exempt from the Court's competence of review, the Federal Constitutional Court is also competent to review them.

b) As has been shown above, however, the Federal Constitutional Court has so far never found a constitutional amendment to be incompatible with Art. 79 sec. 3 GG. Two reasons may be adduced for this fact:

First, the Federal Constitutional Court exercises restraint in its constitutional review of constitutional amendments. It gives the constitution-amending legislature a certain leeway.

Second, the legislature takes account of the limits for constitutional amendments laid down in Art. 79 sec. 3 GG, so that violations do not occur. There is a profound consen-

¹⁴⁴ BVerfGE 109, 279, 318 et seq. Translated excerpt taken from 60 years German Basic Law: the German Constitution and its Court, 2nd ed., 2012, pp. 652 et seq.; translated by Donna Elliott; ©Konrad-Adenauer-Stiftung e.V., Berlin/Germany.

sus in Germany about the inalterability of the principles stated in Art. 79 sec. 3 GG, even if the specific meaning of the principles is not always assessed unanimously. For this reason, a constitutional amendment seeking to curtail the principles covered by the eternity guarantee would also politically be quite difficult to enforce. A further contributing factor is that for laws amending the Constitution a two thirds majority in both the *Bundestag* and *Bundesrat* is required.

c) There is no indication of a debate in Germany as to whether the Federal Constitutional Court's powers of review regarding constitutional amendments should be extended.

However, there is no extensive discussion of the opposite either, i.e. whether the Federal Constitutional Court's existing powers of review regarding constitutional amendments should be more restricted. Scholars of constitutional law tend to argue that the Federal Constitutional Court should exercise more restraint in its decisions on Art. 79 sec. 3 GG and refrain from interpreting the eternity guarantee too extensively.¹⁴⁵

¹⁴⁵ See, e.g., Maunz/Dürig/HerdegenGG, 2015, Art. 79 para. 81; see also von Münch/Kunig-Bryde, GG, vol. 2, 6th ed., 2012, Art. 79 para. 29 and 30.