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Problems of Legislative Omission
in the Federal Constitutional Court's Case-Law

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A. Background¹

I. The legislature's commitment to fundamental rights

In accordance with Article 1.3 of the Basic Law for the Federal Republic of Germany (hereinafter "the Basic Law") of 23 May 1949, the fundamental rights specified in its Articles 1 to 19 bind the legislature, the executive, and the judiciary as directly valid law. When the Basic Law was created, the fact that the legislature is also bound by the fundamental rights, and the primacy of the constitution that goes with it, was an important innovation in comparison with the Weimar Constitution of 1919. The legislature is prohibited from adopting a law that is contrary to the fundamental rights. The commitment clause under Article 1.3 prohibits the legislature from encroaching on the fundamental rights to the extent that such encroachment is not justified, and it obliges the legislature to create a situation that is commensurate with the fundamental rights.

II. The function of the fundamental rights

It is generally acknowledged today that the fundamental rights can be violated not only in their classical function as rights of defence against encroachments by the state but also by legislative omission. A situation can be contrary to fundamental rights if the legislature does not comply with its legislative mission, i.e. if no relevant statute under non-constitutional law exists at all (so-called genuine omission) or if it is obvious that the existing regulatory provisions are entirely unsuitable or completely inadequate (so-called non-genuine omission). A fundamental-rights violation can also result from a situation in which a regulatory provision that

¹ The report does not deal with the methodical problems of the interpretation of the law and its further development.

was originally constitutional has become constitutionally unacceptable because circumstances have changed in the meantime; here, the state bodies are under an obligation to remedy the unconstitutional situation. Legislative omission can also occur where the principle of equality has been infringed in such a way that the infringement can only be remedied by action on part of the legislature. Such a situation is feasible as regards claims to state performance or to participation that flow from fundamental rights if a certain group of persons is excluded from the grant of benefits or from the entitlement to apply for such benefit (see also Höfling, in: Sachs (ed.), *Grundgesetz*, 4th ed. 2007, Art. 1, marginal no. 98, with further references).

III. Duties to protect that flow from fundamental rights

Omission by the state is discussed above all in areas in which the state is obliged to protect the citizens' fundamental-rights positions from interference by third parties. The question is what the state's conduct must be like where legal interests that are protected by the Basic Law, such as, for instance, life, health, freedom, honour or property are endangered or violated (see also Murswiek, in: Sachs (ed.), loc. cit., Art. 2, marginal nos. 188 et seq.). Duties to protect that flow from fundamental rights have a far-reaching importance: In the Federal Constitutional Court's case-law, they have attained particular importance as regards the protection of unborn life against the termination of pregnancy (Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* - BVerfGE) 39, 1 (41-42); 88, 203 (253 et seq.)). Apart from this, the Federal Constitutional Court has dealt several times with the possibility of violations of the protection of the citizens' life and health under Article 2.2 sentence 1 of the Basic Law, for instance, just to mention a few examples, in its decisions

on terrorist attacks (BVerfGE 46, 160 (164-165)), on licensing procedures under nuclear energy law (BVerfGE 49, 89 (141-145); 53, 30 (57)), on aircraft noise (BVerfGE 56, 54 (73)), on dangers caused by the storage of chemical weapons in the territory of the Federal Republic of Germany and by the possible use of such weapons (BVerfGE 77, 170 (214)), on traffic noise (BVerfGE 79, 174 (201-202)), on questions concerning the improvement of traffic safety, either by reducing the limit value for alcohol that is relevant for determining unfitness to drive (Federal Constitutional Court, Order of the First Chamber of the First Panel of 27 April 1995 - 1 BvR 729/93 -, *Neue Juristische Wochenschrift* - *NJW* 1995, p. 2343), or by reducing the permitted maximum speed - Speed limit case - (Federal Constitutional Court, Order of the Second Chamber of the First Panel of 26 October 1995 - 1 BvR 1348/95 -, *NJW* 1996, pp. 651-652), on the issue of the reduction of ozone peak concentrations (Federal Constitutional Court, Order of the First Chamber of the First Panel of 29 November 1995 - 1 BvR 2203/95 - *NJW* 1996, p. 651) and on hypothetical dangers caused by the radiation of a mobile-communications installation - Electro smog case - (Federal Constitutional Court, Order of the Third Chamber of the First Panel of 28 February 2002 - 1 BvR 1676/01 -, *NJW* 2002, p. 1638). The subject of a very recent decision of the Federal Constitutional Court was the Federal Armed Forces' authorisation by the Aviation Security Act to shoot down, by the direct use of armed force, aircraft that are intended to be used as weapons against other people's life (BVerfGE 115, 118). The Federal Constitutional Court has also dealt with duties to protect in connection with occupational freedom under Article 12.1 of the Basic Law, for instance as concerns the ban on competition for sales representatives that had been imposed without compensation (BVerfGE 81, 242 (255)) and the introduction of an International Shipping Register (secondary

register) for merchant ships operated under the German flag in international traffic (BVerfGE 92, 26 (46)).

1. Statutory duties to protect

The legislature is obliged to enact legal provisions in the areas in which the duties to protect result directly from the Basic Law. This is the case, for example, in Article 1.1 sentence 2 of the Basic Law, which establishes the obligation to respect and protect human dignity. Article 6.1 of the Basic Law places marriage and the family under the special protection of the state. Article 6.2 of the Basic Law stipulates that the state watches over children's care and upbringing by their parents. Pursuant to Article 6.4 of the Basic Law, every mother is entitled to protection by, and care of, the community. A duty of the legislature to protect young persons can be found in Article 5.2 of the Basic Law as a limit to the freedom of opinion, in Article 11.2 of the Basic Law as a restriction of the freedom of movement, and in Article 13.3 as a justification of encroachments on the inviolability of the home. Article 5.2 of the Basic Law lays down the protection of personal honour as a duty of the state (see also Dietlein, *Die Lehre von den grundrechtlichen Schutzpflichten*, 2nd ed. 2005, pp. 28 et seq.).

2. The doctrine of the duties to protect that flow from fundamental rights

Insofar as the Basic Law does not contain explicit mandates of protection, the Federal Constitutional Court has drawn upon the doctrine of the duties to protect that flow from fundamental rights and has developed it considerably further (see also Unruh, *Zur Dogmatik der grundrechtlichen Schutzpflichten*, 1996, pp. 29 et seq.). In its first decision on pregnancy termination from the year 1975, the Federal

Constitutional Court has described the state's duty to protect as comprehensive. According to the decision, the duty to protect, as a matter of course, not only directly prohibits state encroachment on gestating life but also instructs the state to shield, protect and promote such life. This means above all to keep it from illegal encroachment by others. The different sectors of the legal system must orient their action towards this mandate according to their specific tasks (see BVerfGE 39, 1 (42)).

The Federal Constitutional Court derives the duties to protect from the objective legal character of the individual fundamental rights and from the guarantee of human dignity. In its first decision on pregnancy termination, the Federal Constitutional Court based the duty to protect on Article 2.2 sentence 1 of the Basic Law, pursuant to which everyone has the right to life and to physical integrity, and on human dignity, which is guaranteed by Article 1.1 of the Basic Law. In this decision, the state's duty to protect every human life was directly derived from Article 2.2 sentence 1 of the Basic Law, but apart from this also from the express obligation imposed under Article 1.1 sentence 2 of the Basic Law; for gestating life also participates in the protection that Article 1.1 of the Basic Law grants human dignity. Wherever human life exists, it is accorded human dignity. Pursuant to the Federal Constitutional Court's established case-law, the fundamental-rights provisions not only establish defensive rights of the individual against the state; at the same time, they embody an objective system of values, to be taken as the fundamental decision under constitutional law for all areas of law, which gives directives and impulses to legislature, administration and jurisdiction. Whether and, if necessary, to what extent the state is constitutionally obliged to grant gestating life legal protection can therefore already be

inferred from the objective legal content of the fundamental-rights provisions (see BVerfGE 39, 1 (41-42)).

In its second decision on pregnancy termination from the year 1993, however, the Federal Constitutional Court makes reference above all else to human dignity in order to substantiate the duty to protect unborn life. According to the decision, this duty to protect is based on Article 1.1 of the Basic Law, which expressly obliges the state to respect and protect human dignity. Its object, and following from that, its extent are more precisely defined in Article 2.2 of the Basic Law. The dignity accorded to human life and also that accorded to unborn life exists for its own sake. In order for it to be respected and protected, the legal system must guarantee the legal framework for its development by providing the unborn with its own right to life. This right to life, which does not depend upon acceptance by the mother for its existence, but which the unborn is entitled to simply by virtue of its existence, is an elementary and inalienable right stemming from the dignity of the person. It applies irrespective of any particular religious or philosophical views, which the state is anyway not entitled to pass judgment on because it must remain religiously and ideologically neutral (see BVerfGE 88, 203 (251-252)). Pursuant to the Federal Constitutional Court's case-law, human dignity is the supreme constitutional value, or the centre, of the system of values laid down in the Basic Law's fundamental-rights provisions to which the individual fundamental rights lend concrete shape. This theory, which is referred to as the value-system theory, becomes apparent in the Court's findings that the Basic Law, which is not intended to be a system that is neutral as to values, has also set up an objective value system in its provisions on fundamental rights and that an enhancement in principle of the validity of the fundamental

rights is expressed thereby (see BVerfGE 7, 198 (205); 35, 79 (114)).

IV. Rights to state performance and to participation

A distinction is made between derivative rights to state performance and to participation and original claims to state performance (see also Osterloh, in: Sachs (ed.), loc. cit., Art. 3, marginal nos. 53 et seq.). Derivative rights to state performance and to participation are established by the general principle of equality in its interaction with the liberty rights. In the relationship between the citizen and the state, the more the modern state devotes its attention to the social security and cultural promotion of the citizenry, the more the original imperative of securing freedom against the state by fundamental rights will be complemented by the demand for guaranteeing participation in state benefits by fundamental rights. Even if one adhered to the idea in principle that, in the modern welfare state, it is still left to the legislature's non-actionable determination whether and in how far the legislature wishes to guarantee the right of participation in the context of the administration of that right, a right of access to state-created educational institutions can still result from the principle of equality in conjunction with Article 12.1 of the Basic Law (right of occupational freedom) and the principle of the social welfare state (Article 20.1 of the Basic Law). This applies in particular where the state - as, for instance, in the sector of higher education - has claimed a factual monopoly which cannot be given up at will and where participation in state benefits is at the same time the necessary precondition for the realisation of fundamental rights (see BVerfGE 33, 303 (330 et seq.) on absolute admissions limitations for medical studies).

A violation of the principle of equal treatment by omission has been the subject of Federal Constitutional Court decisions for instance in the field of tax law (see BVerfGE 66, 214 - case concerning deduction of necessary maintenance expenditure; 105, 73 - case concerning different taxation of civil servants' pensions and pensions from the statutory pension insurance funds; 107, 27 - case concerning the limitation of the deduction of expenses for maintaining two homes; 112, 268 - case concerning the deduction of the exemption from income tax of childcare costs caused by gainful employment). Legislative omission has also played a role in civil-service law, for instance in connection with the grant of a widower's pension (BVerfGE 39, 169 (185)) and the grant of a conurbation allowance for civil servants to compensate for their increased cost of living (Federal Constitutional Court, Judgment of the First Panel of 6 March 2007 - 2 BvR 556/04 -, *Neue Zeitschrift für Verwaltungsrecht - NVwZ* 2007, p. 568). In another decision involving civil-service law, which concerns early retirement for teachers, the Federal Constitutional Court did not find the principle of equality to be infringed but established that a claim for the creation of a transitional arrangement stemmed from the principle of protection of public confidence (BVerfGE 71, 255 (272 et seq.)).

In contrast, original claims to state performance result directly from the constitution, for instance from Article 7.4 sentence 1 of the Basic Law, which imposes on the state the duty to protect the establishment of private schools that serve as alternatives to state schools (see BVerfGE 75, 40 (62)). However, the duty to protect on the side of the state only results in a duty to take action if otherwise, there would be an evident danger to the existence of the system of private schools (see BVerfGE 75, 40 (67-68)). The Federal Constitutional Court has acknowledged that the fundamental

right to informational self-determination under Article 2.1 in conjunction with Article 1.1 of the Basic Law also provides legal positions to its subject that concern access to the personal data stored about him or her (see Federal Constitutional Court, Order of the Second Chamber of the Second Panel of 9 January 2006 - 2 BvR 443/02 -, *NJW* 2006, p. 1116 - on the right of a person undergoing correctional and preventative measures to inspect his or her medical files).

V. Other issues concerning legislative omission

The following case constellations, in which legislative omission may play a role, are only presented in a summarised manner.

1. Omission by the constitution-amending legislature

Legislative omission can be established in the law relating to the organisation of the state. If the Federal Constitutional Court reaches the conclusion that the existing system of regulatory provisions which results from the Basic Law is not (or no longer) a suitable instrument for solving the problems that arise from the subject-matter, the Federal Constitutional Court does not have the competence to oblige the legislature to amend the constitution. As concerns budgetary law, the Federal Constitutional Court has therefore restricted itself to indicating that in reality, the Basic Law's concept of regulation for borrowing under Article 115.1 sentence 2 has not proved to be an effective constitutional instrument for the rational management and limitation of state borrowing, and that it is for the constitution-amending legislature to modify the instruments of budgetary and fiscal policy which exist under constitutional law by taking into consideration new academic assumptions (see Federal Constitutional Court, Judgment of the Second Panel of 9 July 2007 - 2 BvF 1/04 -,

Deutsches Verwaltungsblatt - DVBl 2007, p. 1030 (1031-1032) - Federal budget 2004 case; see also BVerfGE 79, 311 (336)).

2. Legislative mandate under the law relating to the organisation of the state

Where the Basic Law contains reservations of regulation for the federal legislature, the federal legislature is authorised and, as the case may be, obliged to create a federal law in order to regulate the respective subject-matter. In this case, the Federal Constitutional Court is, if petitioned to do so, authorised to examine whether the legislature has complied with its mandate to create regulatory provisions or whether it has kept to its scope of action when lending concrete shape to the concepts under constitutional law.

A reservation of regulation exists, for instance, in the field of the law on political parties. Article 21.3 of the Basic Law lays down the Federation's authorisation to enact legislation in order to lend concrete shape to the system of political parties set out in Article 21.1 and 21.2 of the Basic Law (see only BVerfGE 85, 264 - case concerning the financing of political parties; see also von Münch, in: von Münch/Kunig (eds.), *Grundgesetz-Kommentar*, vol. 2, 3rd ed. 1995, Art. 21, marginal nos. 59 et seq.). As regards the federal electoral law, the Federation is simultaneously authorised and obliged, under Article 38.3 of the Basic Law, to enact an implementing law. The Federation must fill the framework provided by Article 38.1 and 38.2 of the Basic Law above all by regulating the electoral system, the electoral procedure and, taking into account other requirements established by the constitution (Articles 46 to 48 of the Basic Law), by regulating the legal position of the members of parliament (Article 38.1 sentence 2 of the Basic Law) and by lending the principles of electoral law (Article 38.1 sentence 1 of the Basic Law) concrete shape

(see Federal Constitutional Court, Judgment of the Second Senate of 4 July 2007 - 2 BvE 1/06; 2 BvE 2/06; 2 BvE 3/06; 2 BvE 4/06 -, *NVwZ* 2007, p. 916 - case concerning the members of the Bundestag's code of conduct and their obligation to disclose their additional income; on electoral law, see Magiera, in: Sachs (ed.), loc. cit., Art. 38, marginal nos. 106 et seq.). In its decision on the Budget Act of 1981, the Federal Constitutional Court reminded the legislature of its obligation to fully comply with the legislative mandate that results from Article 115.1 sentence 3 of the Basic Law, whose wording does not establish a mere empowerment of the legislature. The statutory concept of regulation under Article 115.1 sentence 2 of the Basic Law on state borrowing aims at limiting admissible state borrowing. To be fully realised it requires the implementing legislation provided in Article 115.1 sentence 3 of the Basic Law. This includes above all a more precise definition of the concept of "investment" within the meaning of the cited provision of the Basic Law (see BVerfGE 79, 311 (352); see also Federal Constitutional Court, Judgment of the Second Panel of 9 July 2007 - 2 BvF 1/04 -, *DVB1* 1997, 1030 (1033-1034), which establishes that the legislature has formally complied with its mandate to create a regulatory provision by creating a provision in the Federal Budget Code (*Bundeshaushaltsordnung*) but which expresses misgivings as concerns the compatibility with constitutional law of the concept of investment that has been taken over from budgetary practice).

3. Reservation of legislation to parliament

If the legislature has failed to enact a statutory regulation as concerns the exercise of fundamental rights for the legal sphere that is subject to organisation, this can be an infringement of the constitution (see BVerfGE 34, 165 (192-193)). According to the Federal Constitutional Court's case-

law, the rule of law and the principle of democracy oblige the legislature to regulate important decisions itself and not to leave them to the executive (so-called reservation of legislation to parliament, or parliamentary proviso; see BVerfGE 41, 251 (259-260); 45, 400 (417-418)). For the field of school law, the Federal Constitutional court has held that the decisive factor for determining what must be regarded as an essential or fundamental decision in the school system is the intensity with which fundamental rights of those to whom a regulation applies are affected. As the intensity can be different in the different areas of regulation in school law and in the different case-groups, each case requires a specific test based on the elements of materiality developed in the court's jurisprudence to determine what objectives are reserved for the parliament to formulate and what decision-making authority may be conferred by legal authorisation upon the authorities entitled to issue ordinances. Article 80.1 sentence 2 of the Basic Law requires the content, purpose and scope of the authorisation so conferred to be laid down in the statute concerned. Parliament cannot divest itself of its responsibility as a legislative organ by conferring part of its legislative power to the executive without having borne in mind the limits of such competences and having delimited them so precisely, according to their tendency and their programme, that it can be recognised and predicted from the authorisation what is supposed to be admissible vis-à-vis the citizen (see BVerfGE 58, 257 (274 et seq.), which enjoins the legislature to immediately create a legal basis for performance-related expulsion from school which complies with the requirements of the parliamentary proviso).

As regards the field of execution of sentences passed by juvenile courts, the Federal Constitutional Court has held that the requirement of a statutory regulation concerns the orientation of the prison regime towards the objective of

social integration beyond the realm of direct encroachments. The legislature itself is obliged to develop an effective concept of rehabilitation and to base the prison regime on it (see BVerfGE 116, 69 (89) with reference to BVerfGE 98, 169 (201), see also BVerfGE 33, 1 (10 f) - case concerning the legislature's obligation to enact statutes that regulate the execution of sentences).

B. Justiciability of legislative omissions

I. The Federal Constitutional Court's competences

The constitutional state constituted by the Basic Law is characterised by the primacy of the constitution, which is the summit of the national hierarchy of statutes. This results from Article 20.3 of the Basic Law, pursuant to which the legislature is bound by the constitutional order, and from the above-mentioned commitment clause under Article 1.3 of the Basic Law. Ultimately, the Federal Constitutional Court is the constitutional body that is called upon to guarantee the primacy of the constitution. It is authorised to control, upon application, all three state powers. Its standards of review are the fundamental rights, the rights that are equivalent to fundamental rights, and other provisions of constitutional law.

1. Constitutional complaint against a ruling

Pursuant to Article 93.1 no. 4a of the Basic Law in conjunction with §§ 13 nos. 8a, 90 et seq. of the Federal Constitutional Court Act (*Gesetz über das Bundesverfassungsgericht - BVerfGG*) every subject of fundamental rights can, after having exhausted all legal remedies before the non-constitutional courts, lodge a constitutional complaint alleging that one of his or her fundamental rights or rights

that are equivalent to fundamental rights have been violated by state authority. The Federal Constitutional Court's case-law has recognised that the constitutional complaint can also allege the violation of duties to protect that flow from fundamental rights. If a citizen regards his or her fundamental rights as violated by the ruling of a court of last appeal, the citizen can challenge the ruling by way of a constitutional complaint.

2. Constitutional complaint against a law

By way of exception, a law may also be challenged by means of a constitutional complaint before the Federal Constitutional Court. For such a constitutional complaint to be admissible, the citizen must be personally, presently and directly affected by the law. As a general rule, this is not the case with laws that need to be executed by public authorities or by courts so that the execution itself can be challenged before the trial court and courts of appeal (see BVerfGE 100, 313 (354); an example for an admissible constitutional complaint against a law is BVerfGE 115, 118 (136 et seq.) - Aviation Security Act case).

3. Proceedings to review the constitutionality of statutes

Legislative omission and breaches of the duty to protect can also be examined by the Federal Constitutional Court by means of proceedings to review the constitutionality of statutes. In this context, a distinction must be made between the abstract review of a statute pursuant to Article 93.1 no. 2 of the Basic Law, §§ 13 nos. 6, 76 et seq. of the Federal Constitutional Court act and the concrete review of a statute pursuant to Article 100 of the Basic Law, §§ 13 nos. 11, 80 et seq. of the Federal Constitutional Court Act. By performing the abstract review of a statute, the Federal Constitutional

Court examines the compatibility of a law with the constitution upon application of the Federal Government, of a *Land* (state) government or of one third of the members of the Bundestag (see BVerfGE 88, 203). The concrete review of a statute examines the compatibility of a law with the Basic Law upon the submission of a court that regards a law as unconstitutional on whose validity its decision depends in a specific case (see BVerfGE 33, 303 (325 et seq.)).

II. Admissibility requirements of constitutional complaints

1. Subject-matter of the constitutional complaint

Legislative omission is an admissible subject-matter of a constitutional complaint within the meaning of § 90.1 of the Federal Constitutional Court Act. From §§ 92 and 95.1 of the Federal Constitutional Court Act, it can be inferred that omissions by state authority can be challenged by means of a constitutional complaint. The Federal Constitutional Court at first negated the possibility of challenging legislative omission by a constitutional complaint arguing that the consequences of an admissible constitutional complaint against an omission on part of the legislature are not explicitly regulated, and that it is in the nature of things that the individual citizen, in principle, cannot have a judicially enforceable claim to force the legislature to act if a weakening of legislative power, which was hardly intended by the Basic Law, is supposed to be avoided. The Federal Constitutional Court further argued that it is not a legislative body, and that it is not for the Federal Constitutional Court to take the place of the legislature; the establishment by the Court that an omission of the legislature is unconstitutional would, however, cause such a shift of state competences (see BVerfGE 1, 97 (100-101); 11, 255 (261)). At first, the Federal Constitutional Court made

exceptions from this line of argument in the field of duties to act that are explicitly imposed on the legislature by statute (BVerfGE 6, 257 (264); 8, 1 (9)). Finally, it has also acknowledged that duties to protect which the Federal Constitutional Court itself derives from the fundamental rights may be the subject-matter of a constitutional complaint (see BVerfGE 77, 170 (214)).

Where violations of a duty to protect are concerned, cases in which the constitutional complaint is directed against the legislature's failing to pass a regulatory provision that is in conformity with its duty to protect (genuine omission) must be distinguished from cases in which a specific provision already exists but is challenged for non-conformity with the duty to protect (non-genuine omission). A genuine omission exists not only in the (rare) cases in which the legislature has not taken any action at all, but above all if a statutory regulation exists but protection that goes beyond the regulation has not yet been granted, with the consequence that no decision has been passed as yet concerning the protection sought by the citizen. If the subject-matter of the constitutional complaint is a statutory regulation on the basis of which the claim for protection asserted by the citizen has been rejected, the constitutional complaint challenges a non-genuine omission. The Federal Constitutional Court can only grant the relief sought by declaring the statute void or incompatible with the Basic Law. The challenge of the violation of a statutory obligation to subsequently improve laws forms a special group of cases of legislative omission. If a statutory regulation is no longer in conformity with the duty to protect due to a change in the factual circumstances, it requires subsequent improvement. The challenge can be directed against an existing statute (in the case of non-genuine omission; Federal Constitutional Court, *NJW* 1995, p. 2343 - Alcohol limit case), but it can also be

directed against the failure of adapting a law to changed circumstances, which means that it can also be directed against non-genuine omission (BVerfGE 56, 53 (71-72) - Aircraft noise case; see also Möstl, *Die öffentliche Verwaltung* - DÖV 1998, 1029 (1030-1031)).

Pursuant to § 92 of the Federal Constitutional Court Act, the complainant must specify the subject-matter of the constitutional complaint. In the case of a challenge of a legislative omission, it is sufficient to assign the omission to a body or to a public authority and to describe it in some detail. To comply with the requirements placed on the admissibility of a constitutional complaint that challenges a violation of a duty to protect that results from a fundamental right, the complainant must sufficiently substantiate that public authority has not taken any protective measures at all or that the regulatory provisions passed and measures taken are entirely unsuitable or completely inadequate for achieving the objective of protection. In principle, no description of the possible protective measures is required that goes beyond this. If, however, the complainant wants to assert that public authority can comply with its duty to protect only by taking a specific measure, the complainant must sufficiently substantiate this fact and the nature of the measure to be taken (see BVerfGE 77, 170 (215)).

2. Entitlement for lodging a constitutional complaint

Pursuant to § 90.1 of the Federal Constitutional Court Act, the complainant must claim that one of his or her fundamental rights has been violated by public authority. This means that a subjective right must apply to the complainant. The Federal Constitutional Court has acknowledged that subjective rights can correspond with the objective duties to protect. In its decision on the storage of chemical weapons on the territory

of the Federal Republic of Germany and the possible use of such weapons, the Federal Constitutional Court has held that the possibility of infringement of the protection of life and health laid down in Article 2.2 sentence 1 of the Basic Law is not ruled out only because the obligation on the executive power to provide the necessary safety measures in storing chemical weapons, which is independent of the fundamental decision to deploy chemical weapons, involves Article 2.2 sentence 1 of the Basic Law in its objective legal function as a "value-deciding fundamental provision". Article 2.2 sentence 1 of the Basic Law does not merely guarantee a subjective defensive right against the state but at the same time constitutes an objective legal value decision of the constitution applying in all areas of the legal system and establishing constitutional duties to protect. If these duties to protect are breached, this at the same time constitutes a violation of the fundamental right under Article 2.2 sentence 1 of the Basic Law against which those affected can seek protection by way of the constitutional complaint (see BVerfGE 77, 170 (214)).

If a constitutional complaint directly challenges a law, it requires the complainant to be personally, presently and directly affected by the challenged provisions as concerns the complainant's fundamental rights (see BVerfGE 1, 97 (101 et seq.); 109, 279 (305)). The requirement of the complainant's being personally and presently affected is in principle complied with if the complainant demonstrates that there is a certain degree of probability that his or her fundamental rights are affected by the regulatory provision which is not in conformity with the duties to protect, in other words, that the complainant belongs to the group affected by the present impairment or danger. This means that popular action is ruled out. Finally, the complainant is directly affected if the challenged regulatory provisions change the complainant's

legal position without requiring another act of execution. This can be assumed if the complainant cannot challenge a possible act of execution at all, or not in a reasonable manner (see BVerfGE 100, 313 (354)).

3. Exhaustion of all legal remedies and subsidiarity

Pursuant to § 90.2 sentence 1 of the Federal Constitutional Court Act, if legal action against the alleged fundamental-rights violation is admissible, a constitutional complaint may not be lodged until all legal remedies have been exhausted. The principle of the subsidiarity of the constitutional complaint requires that a complainant, beyond the obligation to exhaust all legal remedies in the narrow sense, avails himself or herself of all possibilities that are available in the respective situation to obtain a correction of the alleged violations of the constitution (see BVerfGE 73, 322 (325)). This means that for the constitutional complaint to be admissible, it is required that, prior to submitting the constitutional complaint, all legal remedies and other possibilities for petition that do not belong to the legal process in the strict sense of that term must have been used. Even if the challenged law does not leave the administration or the courts any latitude of interpretation or decision, the principle of subsidiarity requires that first of all, the non-constitutional courts with jurisdiction for the respective field of law must clarify whether and to what extent a complainant is affected by the challenged regulatory provision and whether the regulatory provision is compatible with the constitution.

If the complainant challenges a non-genuine omission by means of the constitutional complaint, and if the law requires an act of execution, the complainant, before lodging the constitutional complaint, must have unsuccessfully applied for

protective measures with the administration and must have unsuccessfully sought to enforce them by bringing action before the non-constitutional courts. If the non-constitutional courts reach the conclusion that the law which does not grant the protective measure sought is unconstitutional, the Federal Constitutional Court's decision in this matter must be obtained by means of proceedings for the concrete review of a statute pursuant to Article 100 of the Basic Law. This also guarantees that the Federal Constitutional Court's assessment is based on comprehensively ascertained facts and on the non-constitutional courts' assessment. The question whether the law is in conformity with the duties to protect is also material for the non-constitutional court's decision within the meaning of Article 100.1 sentence 1 of the Basic Law, because if a claim to protection under fundamental rights exists, the non-constitutional court is not allowed to dismiss the action but must stay the proceedings until the required protective statute is enacted.

If, however, no relevant statute exists under non-constitutional law, no review of a statute can be performed incidentally by the non-constitutional courts or in proceedings for the concrete review of a statute pursuant to Article 100 of the Basic Law by the Federal Constitutional Court. What is lacking in such cases is a formal law which can be submitted to the Federal Constitutional Court, without which an omission cannot be the subject of review in proceedings for the review of a statute (see Federal Administrative Court (*Bundesverwaltungsgericht* - BVerwG), Judgment of 15 January 1987 - BVerwG 3 C 19.85 -, Decisions of the Federal Administrative Court (*Entscheidungen des Bundesverwaltungsgerichts* - BVerwGE) 75, 330 (334-335)). The Federal Administrative Court's decision of 15 January 1987 confirmed the denial of a permit for performing pregnancy terminations

on an outpatient basis in a gynaecological practice because there was no statutory basis for the respective claim. The non-constitutional court can award a claim to an obligation or to a benefit only with the proviso of a statutory regulation being created. Only a judgment of final appeal that dismisses the action can be challenged by a constitutional complaint against a judgment.

A citizen cannot bring an action before the non-constitutional courts seeking the formal legislature's immediate action because this would be a dispute of a constitutional nature. Insofar as the relief sought by the citizen is the issuance of a sub-statutory provision such as an ordinance or a by-law, the citizen can seek it before the non-constitutional courts. This is a dispute of a non-constitutional nature, which must be decided in proceedings before the administrative courts (see § 40.1 sentence 1 of the Code of Administrative Court Procedure - *Verwaltungsgerichtsordnung*). In a recent decision concerning the grant of agricultural compensation payments, the Federal Constitutional Court rejected the admissibility of a constitutional complaint even though an unsuccessful appeal had been lodged in the shape of an action for the issue of an administrative act with an incidental examination of the ordinance issued by the competent federal authority entitled to issue ordinances. If the incidental examination alone does not eliminate the violation of the fundamental right in question (in this case the violation of the principle of equal treatment), it must be possible for the complainant to obtain effective legal protection before the non-constitutional courts by additionally bringing action for a declaratory judgment. In the view of the Federal Constitutional Court's First Panel, the necessity of acknowledging such a possibility of obtaining legal protection against sub-statutory acts before the non-constitutional courts follows from Article 19.4 of the Basic Law. The executive's law-making (in this case,

that of the Federal Ministry of Food, Agriculture and Forestry) in the form of ordinances or by-laws is also the exercise of public authority and must therefore be included in the guarantee of legal protection (see BVerfGE 115, 81 (92)).

4. Time-limit for lodging a constitutional complaint

If the subject-matter of the constitutional complaint is a non-genuine omission, the constitutional complaint must be lodged within the one-year time-limit laid down in § 93.3 of the Federal Constitutional Court Act. If the legislature has taken action and the statute contains a regulatory provision, even if it is a regulatory provision denying protection to the complainant, the legislature has not omitted to make a decision. Persons who consider this regulatory provision inadequate are obliged to submit it for the Federal Constitutional Court's review, i.e. to challenge it directly by contesting its application in a case affecting them or, to the extent that the necessary preconditions have been fulfilled, to challenge it directly by lodging a constitutional complaint, which, in the interest of legal certainty, must be lodged within the one-year time-limit that is set out in § 93.3 of the Federal Constitutional Court (see BVerfGE 56, 54 (71)). Due to the continued existence of an unconstitutional omission, it is hardly possible to determine a point in time in which a period for appeal starts to run (see BVerfGE 6, 257 (266); 77, 170 (214)). Constitutional complaints are in principle admissible as long as the omission continues (see BVerfGE 16, 119 (121)). The time-limit under § 93.3 of the Federal Constitutional Court Act does not become irrelevant if an amendment act which leaves the challenged regulation unaffected and thus does not contain a new cause for complaint is challenged arguing that the legislature had been obliged to issue a new regulation because the original regulation must be regarded as unconstitutional (see BVerfGE

23, 229 (238), see also Schmidt-Bleibtreu: in Maunz/Schmidt-Bleibtreu/Klein/Bethge, *Bundesverfassungsgerichtsgesetz*, as per February 2007, § 93, marginal no. 55). If an omission by a public authority or by a court is challenged, the one-month time-limit is applied, applying § 93.1 of the Federal Constitutional Court Act accordingly, as soon as the complainant obtains knowledge of the discontinuation of the omission (see BVerfGE 58, 208 (218)). If the relief sought by the complainant is directed against genuine omission, the one-year time-limit is not applicable, so that the constitutional complaint is admissible as long as the challenged omission continues.

C. Review by the Federal Constitutional Court of violations of a duty to protect

I. Standard of review

In the case of violations of the legislature's duty to protect, the Federal Constitutional Court examines first of all whether and to what extent duties to protect can be derived from the affected fundamental right beyond its nature of a defensive right against the state. If the Federal Constitutional Court finds that a fundamental right which contains state duties to protect is impaired or endangered by third parties, it must examine whether the legislature has sufficiently complied with its mandate to observe the duty to protect. Here, the following questions arise: What is the scope of the duty to protect? Who must implement it? And how can it be complied with?

II. Scope of the duty to protect

With all fundamental rights, their function as defensive rights against state encroachment comes first. When

determining the scope of the duties to protect that flow from the fundamental rights, one must bear in mind that they apply to legal relations between citizens - in contrast to the classical defensive situation between the citizen and the state - which means that conflicting fundamental rights must be weighed. Whether, when, and with which meaning duties to protect arising from the constitution are to be developed depends on the nature, immediacy, and magnitude of the possible dangers, on the nature and the significance of the constitutionally protected legal interest, and on the existing regulatory provisions. (see BVerfGE 49, 89 (142)). Public interests have to be taken into account as well.

In a decision on licensing procedures under nuclear energy law, the Federal Constitutional Court held that the state had complied with its duty to protect by making the commercial use of nuclear energy dependent on previous authorisation by the state and by making the grant of such authorisation dependent on preconditions specified under substantive and procedural law. According to the Federal Constitutional Court, the regulation of licensing procedures is a suitable means for protecting endangered third parties. At the same time, the state can thus best comply with its task to balance the fundamental-rights positions of endangered citizens on the one hand and of the operators of nuclear power plants on the other hand, taking into account interests of the common good (see BVerfGE 53, 30 (57-58) - case concerning the Mülheim-Kärlich nuclear power plant). If a nuclear power plant is licensed due to the public interest in energy supply, the state assumes co-responsibility of its own for the dangers that emanate from the operator, i.e. from a private third party. In the assessment under constitutional law of the provisions under substantive and procedural law for the licensing of nuclear power plants, the standards applied may therefore not be less strict than those applicable in the review of laws that

regulate state encroachment (see BVerfGE 53, 30 (58)). As regards the legislature's duty to protect, however, no regulation can be demanded of it which precludes with absolute certainty dangers to fundamental rights that may arise through the licensing and operation of technical installations; such requirement would ignore the limits of human cognitive powers and would make state licensing of technology use virtually impossible. As concerns the organisation of the social system, estimations based on practical reason will therefore remain the approach to be followed in this context (see BVerfGE 49, 89 (143) - case concerning the Kalkar nuclear power plant).

How the scope of the state's duties to protect is determined by weighing conflicting fundamental-rights positions can also be seen from the Federal Constitutional Court's decision on the legislature's obligation to make available a suitable procedure to determine paternity. Providing a procedure to determine a child's parentage restricts fundamental-rights positions of child and mother. The access to the child's genetic data that results from a paternity test affects the child's right to informational self-determination under Article 2.1 in conjunction with Article 1.1 of the Basic Law, and it also affects the mother's right of personality under Article 2.1 of the Basic Law, which gives her the right to decide for herself whether she permits access to her privacy, and if so to whom and in what form. In the Federal Constitutional Court's view, however, such encroachments are justified because in this constellation of fundamental rights, the right of the legal father to know the paternity of the child must be given greater weight than the other fundamental-rights positions. This is required by the protection that is also given to the man by Article 2.1 in conjunction with Article 1.1 of the Basic Law (see Federal Constitutional Court, Judgment of the First Panel of 13 February 2007 - 1 BvR 421/05 -, *NJW* 2007, p. 753 (755)).

Duties to protect can be restricted by the parties' freedom of contract. Thus, the basis of the Federal Constitutional Court's decision on the general exclusion of compensation for the duration of non-competition in the context of bans on competition for sales representatives is that the contracting parties - the sales representative and the company - organise their legal relations independently on the basis of the freedom of contract, which is a structural element of a free system of society. They themselves determine how their opposite interests can be adequately balanced, and thus at the same time avail themselves of their legal positions, which are protected by fundamental rights, without state coercion (see BVerfGE 81, 242 (254)). However, freedom of contract only exists within the boundaries of the applicable law, which in turn is committed to fundamental rights. When creating a regulation that restricts the freedom to contract, the legislature must keep in mind that any restriction of one party's freedom to contract at the same time encroaches upon the other party's freedom. The legislature must consider these competing fundamental-rights positions in a well-balanced manner (see BVerfGE 81, 242 (255)).

State duties to protect can find their limits also where fundamental rights, such as the freedom of religion, of opinion, and of occupation are meant to be exercised in a situation of competition, particularly in the free competition of opinions, and therefore call above all for state neutrality. Accordingly, the Federal Constitutional Court has denied a religious and ideological community state protection against public criticism of its activities by a religious community recognised by Article 140 of the Basic Law in conjunction with Article 137.5 of the Weimar Constitution (in this case, by the Evangelical Church in Bavaria). In its decision, the Federal Constitutional Court approved the

weighing of the conflicting fundamental rights performed by the non-constitutional courts, according to which the complainant's right to undisturbed practice of religion under Article 4.2 of the Basic Law can be juxtaposed with a right of expression on part of the church. This right is based on the same provision of the constitution; principles that have been developed concerning the freedom of opinion are drawn upon to determine its scope. The fundamental right to undisturbed practice of religion does not mean that the religious societies or their members have a claim to the state's banning public criticism of their activities, even if it is harsh, by its courts. This applies in particular to contributions to an intellectual battle of opinions concerning an issue that affects the public in a fundamental way, such as the issue that has been raised here. The activities of religious and ideological communities cannot be regarded as a purely internal affair for which a "space that is free of criticism" must be reserved (see Federal Constitutional Court, Order of the First Chamber of the First Panel of 13 July 1993 - 1 BvR 960/93 -, *NVwZ* 1994, pp. 159-160).

Finally, duties to protect can attain importance as regards the incorporation of requirements under European law into national law. In its decision passed in 2005 on the Act to Implement the Framework Decision on the European Arrest Warrant and the Surrender Procedures between the Member States of the European Union (European Arrest Warrant Act), the Federal Constitutional Court held that the legislature has failed to take sufficient account of the interests of German citizens that are especially protected by a fundamental right, i.e. by the ban on extradition under Article 16.2 of the Basic Law, when implementing the Framework Decision. According to this decision, the legislature has to take into account that the ban on extradition is supposed to protect, *inter alia*, precisely the principles of legal certainty and protection of

public confidence as regards Germans who are affected by extradition (see BVerfGE 113, 273).

III. Guarantors of the duty to protect

Not only the legislative power, but also the executive and the judicial powers must fulfil duties to protect. This follows from the above-mentioned commitment clause under Article 1.3 of the Basic Law. The judicial power's relation to the fundamental rights is bipolar; as the power that protects fundamental rights, it has at the same time also a state function to enforce commitment to fundamental rights, as is shown by the above-mentioned decision on the forbearance sought by a religious community (see also Höfling, loc. cit., Art. 1, marginal nos. 105 et seq.).

If the administration and the courts can comply with the state's duties to protect in a sufficient manner on the basis of the existing statutory provisions, a claim against the legislature that is aimed at state action cannot exist. This was the case with the Federal Constitutional Court's decision on the protection of residents living near an airport against increasing aircraft noise. The Federal Constitutional Court held that the legislature did not violate its duty to protect citizens from aircraft noise that poses a danger to health by omitting to subsequently improve legislation because measures which have been adopted to implement already existing and newly created regulatory provisions since the beginning of the 1970s contradict such a conclusion (see BVerfGE 56, 54 (82 et seq.) - case concerning the Düsseldorf-Lohausen airport). In as far as the legislature has made administrative measures possible through statutory regulation, no duty to subsequent improvement can be imposed on the legislature. If, pursuant to Article 80.1 of the Basic Law, the legislature has authorised the authority entitled to issue ordinances to enact a

regulation that is in conformity with the duty to protect, and if the authority does not act, it is the omission of the respective authority that must be challenged. In the aircraft noise case, the Federal Constitutional Court pointed out that for the protection of the residents against aircraft noise, measures for the operation of airports and for air traffic are essential that can be undertaken on the basis of the amended or newly introduced provisions of the Civil Aviation Act (*Luftverkehrsgesetz*) and of the Federal Immission Control Act (*Bundesimmissionsschutzgesetz*). They include, for instance, executive measures, such as bans on starts and landing at nighttime, requirements for noise reduction during ground operations (noise abatement installations) and recommendations by the Federal Minister of Transport on noise reduction during approach and takeoff (see BVerfGE 56, 54 (86)).

IV. Scope for assessment, evaluation and action

When examining normative omission by the legislature, the Federal Constitutional Court emphasises that, in principle, the legislature has broad latitude for assessment, evaluation and action. However, in its decision on the 1976 Co-determination Act, which regulates co-determination for employees, the Court pointed out necessary differentiation. According to the ruling, the legislature's prerogative of evaluation depends on many different factors, in particular on the characteristics of the subject area concerned, on the opportunity to form a sufficiently certain opinion, and on the importance of the legal interests that are at stake. Accordingly, the Federal Constitutional Court has, although in connection with other issues, based the assessment of the legislature's forecasts on differentiated standards, which range from an examination of evident faultiness to an examination of the tenability of assumption to an intensive examination of content (see BVerfGE 50, 290 (332-333)).

In its first decision on pregnancy termination in 1975, the Federal Constitutional held that it is of the highest priority for the legislature to decide how the state complies with its obligation to effectively protect gestating life. The legislature decides which protective measures it regards as expedient and necessary to guarantee effective protection of life. What can be done here, and what shape assistance can take, is left to the legislature's discretion and is in general not amenable to assessment by the Federal Constitutional Court (see BVerfGE 39, 1 (44)). Due to the paramount importance of the threatened legal interest, however, the Federal Constitutional Court performed an intensified review in the course of the decision establishing that the legislature, in an extreme case, i.e. if the protection that is required by the constitution cannot be achieved in any other way, may be obliged to use criminal law to protect gestating life. The relevant provision under criminal law is, so to speak, the legislature's ultima ratio. However, even this last resource must be used if effective protection of life cannot otherwise be achieved (see BVerfGE 39, 1 (46-47)).

In proceedings on a motion for a temporary injunction concerning government measures for combating a life-threatening terrorist extortion - the kidnapping of the president of the Confederation of German Employers' Associations, Hanns Martin Schleyer, in 1977 - the Federal Constitutional Court again emphasised the executive's broad discretion. The Federal Constitutional Court held that, in principle, state organs have to decide independently how they comply with their obligation to effectively protect life. They decide which protective measures are expedient and necessary to effectively protect life. In this decision, the Federal Constitutional Court did not lay down one particular means for

effectively exercising the duty to protect that flows from fundamental rights because the competent state bodies must be in a position to appropriately react to the respective circumstances of the individual case, and because prescribing a particular manner of response would make the state's reaction calculable for terrorists right from the start. This would make it impossible for the state to exercise the effective protection of its citizens to which it is obliged by Article 2.2 sentence 1 of the Basic Law (see BVerfGE 46, 160 (164)).

According to the Federal Constitutional Court's decision on the storage of chemical weapons from the year 1987, both the legislature as well as the executive have broad latitude for assessment, evaluation and action in complying with their duties to protect, which also leaves room for taking any possible concurrent public and private interests into account. This broad freedom of drafting depends on the specific nature of the area at issue, the chance to arrive at an adequately certain judgment and the legal interests at stake (see BVerfGE 77, 170 (214-215) with reference to BVerfGE 50, 290 (332 f.) - Co-decision Act case). The result of compliance with the legislature's latitude is that the Federal Constitutional Court is restricted to a mere review for obvious legislative impropriety. The Federal Constitutional Court can therefore only establish that the duty to protect has been violated if the state bodies have not taken any protective measures at all or the measures that have been taken so far are evidently inadequate (see BVerfGE 56, 54 (80-81); 77, 170 (214-215); 79, 174 (201-202)).

Already in the Chemical weapons storage decision, the Federal Constitutional Court also pointed out that the fundamental-rights claim that is connected with a duty to protect can only in very special circumstances restrict the legislature's

freedom of drafting in such a way that only a particular measure can comply with the duty to protect (see BVerfGE 77, 170 (215)). The Federal Constitutional Court assumed such a case in its second decision on pregnancy termination from the year 1993. In this decision, it did not restrict its review to obvious impropriety but also examined whether the legislature's assessment of the effectiveness of a new concept of protection is tenable. It substantiated the expansion of the scope of review by stating that the legal interests that are at issue here, i.e. those of the unborn and those of the woman, are high-ranking under constitutional law (see BVerfGE 88, 203 (263)).

In this decision, the Federal Constitutional Court expanded the review for legislative violations of the duty to protect to include the aspect of the prohibition on too little protection. Pursuant to the decision, the constitution identifies protection as a goal, but does not define the form it should take in detail. Nevertheless, the legislature must take into account the prohibition on too little protection so that, to this extent, it is subject to constitutional control. What is necessary - taking into account conflicting legal interests - is appropriate protection, but what is essential is that such protection is effective. The measures taken by the legislature must be sufficient to ensure appropriate and effective protection and be based on a careful analysis of facts and tenable assessments. If the prohibition on too little protection is not to be infringed, the form of protection by the legal system must meet minimum standards. The extent of such latitude is determined by the Federal Constitutional Court in accordance with the factors mentioned in the Co-decision act case that has already been cited (see also Sachs, in: Sachs (ed.), loc. cit., before Art. 1, marginal nos. 35-36; Schulze-Fielitz, in: Dreier (ed.),

Grundgesetz-Kommentar, vol. 1, 2nd ed. 2004, Art. 2 Abs. 2, marginal nos. 89-90).

D. Review of rights to state performance and to participation

In so far as the subject of review is the legislature's obligation to take positive action as concerns the granting of rights to state performance and to participation flowing from fundamental rights, the general principle of equality must be observed. According to this principle, what is equal must be treated equally, and what is unequal must be treated unequally according to its characteristics, with the concept of equality being the permanent standard of orientation (see BVerfGE 3, 58 (135-136); 98, 365 (385)). It is, in principle, for the legislature to select the circumstances to which it will attach the same legal consequence, i.e. the circumstances which the legislature wants to regard as equal in the legal sense. The legislature, however, must make its selection according to appropriate criteria. What is objectively justifiable, or what is irrelevant and therefore arbitrary, when the principle of equality is applied cannot be established in an abstract and general manner but only in relation to the characteristics of the specific situation which is intended to be regulated. Thus, the normative content of the commitment to equality is specified in each case with a view to the characteristics of the subject area that is to be regulated. The principle of equality requires that if the law stipulates a different treatment, such treatment has to be justified, in relation to the respective subject area, by stating a rational reason that results from the nature of things or is otherwise factually convincing (see BVerfGE 75, 108 (157); 107, 27 (46)). The general principle of equality is violated where one group of persons addressed by a provision is treated differently in comparison to another although there are no differences between the two groups of such a nature and

weight that they could justify the unequal treatment (see BVerfGE 107, 27 (46) with further references). This does not however prohibit the legislature all differentiation. The limits to its freedom of drafting are, however, all the narrower, the more the exercise of freedoms that are protected by fundamental rights can be negatively affected by unequal treatment of persons or circumstances (see BVerfGE 88, 87 (96)). This means that in the examination of whether there is equal or unequal treatment, the respective differences in the actual circumstances must be determined first of all. Then it must be reviewed whether equal or unequal treatment is objectively well-founded and justified, i.e. not arbitrary (see Gubelt, in: von Münch/Kunig (ed.), *Grundgesetzkommentar I*, 5th ed. 2000, Art. 3, marginal no. 11 with further references)

The Federal Constitutional Court, in its decision on denying transsexual foreigners the possibility, created by the Transsexuals Act (*Transsexuellengesetz*), to change their first name or to apply for a determination of change of gender identity even if the law of their home state does not provide such a possibility, regarded such denial a violation of the equal treatment requirement in conjunction with the fundamental right to protection of the personality insofar as it concerns foreign transsexuals who are present in Germany lawfully and not merely temporarily. The Federal Constitutional Court regarded the fact that the category of persons entitled to apply was restricted to Germans and persons governed by German law as a grave violation of the protection of the personality of foreign transsexuals under Article 2.1 in conjunction with Article 1.1 of the Basic Law, who, for lack of a corresponding regulation in their *lex patriae*, are denied any possibility of the legal recognition of the gender identity they feel is theirs. The reasons for the unequal treatment given by the legislature cannot justify

this impairment of fundamental rights (see BVerfGE 116, 243 (259 et seq.)).

Whether and to what extent the legislature is obliged to mitigate or to eliminate unequal treatment is also important in tax law. In tax law, unequal treatment is examined against the standard of the requirement of fairness in taxation, which can be inferred from Article 3.1 of the Basic Law, and by which the legislature is bound. Orienting taxation towards economic ability to pay is a fundamental requirement of fairness in taxation. This especially applies to income tax (see BVerfGE 43, 108 (120); 61, 319 (343-344)). The economic burden imposed by obligations to pay maintenance is a special circumstance that impairs the ability to pay; the legislature cannot disregard this circumstance without infringing fairness in taxation. From this it follows that, for taking mandatory obligations to pay maintenance into account under tax law, the legislature may not establish unrealistic boundaries (see BVerfGE 66, 214 (223); see also Osterloh, loc. cit., Art. 3, marginal nos. 134 et seq.).

Obligations to state action can also result from the rule-of-law principle of the protection of public confidence. If a violation of this principle is assumed, an unconstitutional situation can be remedied by creating a transitional arrangement for the group of persons affected. In its decision relating to the alteration of provisions under civil-service law about the commencement of retirement, the Federal Constitutional Court points out that a civil servant, like any other citizen, may not in principle rely on a statutory arrangement favourable for him or her remaining in existence for all time. The constitutionally guaranteed protection of public confidence does not require that a person who is benefited by a particular legal situation is protected against every disappointment of the hope that that situation will

continue. Otherwise, the conflict between the reliability of the legal system and the necessity of its alteration with a view to the change in living conditions would be solved in a manner whose detrimental effect on the adaptability of the legal system would exceed the limits of what is justifiable. In principle, every field of law must be at the legislature's disposition. However, depending on the circumstances, the power of the legislature to issue specific legal provisions may be subjected to constitutional restrictions that arise by reason of the protection of public confidence if, as here, the reform of the law affects present legal relations that have not yet been completed. In general, it is necessary to weigh the confidence of the individual in the continuation of the legal situation beneficial for that individual and the importance of the legislative concern for the general public. In the case at hand, the legislature was not constitutionally prevented, in the Federal Constitutional Court's view, from changing the age limit for all teachers, also for those who were already members of the civil service. When weighing the civil servants' confidence in the continuation of the existing provision and the importance of the legislative concern for the general public and the severity of the encroachment, the legislature should, however, have created a transitional provision for those civil servants who reached the age of sixty-five in the first half of the school year 1979/1980 (BVerfGE 71, 255 (272-273)). For those teachers, the consequence of the new provision was that they did not commence their retirement at the age of about sixty-five years and six months as under the old provision but at the end of the month in which they reached the age of sixty-four years and six months. This was of importance to the teachers affected because the commencement of retirement marks a change in a civil servant's position under civil-service law, not least with the consequence of a loss of income.

E. The Federal Constitutional Court's possibilities of rendering decision

I. Declaration of nullity

If a constitutional complaint challenges the violation of a duty to protect by an existing law (non-genuine omission), the Federal Constitutional Court states, in case of a decision in which it grants the relief sought, which provision of the Basic Law has been infringed, and specifies by which omission it has been infringed (§ 95.1 of the Federal Constitutional Court Act). If a constitutional complaint against a law is granted, § 95.3 of the Federal Constitutional Court Act provides, as the rule under the law, that the Federal Constitutional Court declares the law void. In its decision concerning the European Arrest Warrant Act, the Federal Constitutional Court declared the Act void and overturned the Higher Regional Court's order which declared the complainant's extradition permissible, as well as the decision of the competent judicial authority on an application for a grant of extradition because they were based on an unconstitutional law (see BVerfGE 113, 273 (274)). The Federal Constitutional Court pointed out that as long as the legislature does not adopt a new Act implementing Article 16.2 sentence 2 of the Basic Law, the extradition of a German citizen to a Member State of the European Union is not possible (BVerfGE 113, 273 (317)).

If the complainant challenges a genuine omission, a declaration of nullity of a statute is not a consideration because there is no statute. The only remaining possibility is the establishment of a fundamental-rights violation under § 95.1 sentence 1 of the Federal Constitutional Court Act.

The consequence of a declaration of nullity of a law renders the law ineffective - as a general rule, from the point in

time of its first entry into force (see Stark, in: Umbach/Clemens/Dollinger (ed.), *BVerfGG*, § 95, marginal no. 97). If the relief sought by the complainant is an action by the state, the litigation that is at the basis of the constitutional complaint is to be stayed until the enactment of the requested regulation.

II. Declaration of incompatibility

If the Federal Constitutional Court finds a statute unconstitutional, this does not in any case result in the declaration of its nullity; under certain preconditions, a declaration of incompatibility with the constitution can also be considered (see BVerfGE 112, 268 (283)). The Federal Constitutional Court has developed exceptions in which it refrains from making a declaration of nullity and only makes a declaration of incompatibility. The Federal Constitutional Court refrains from making a declaration of nullity if this serves to avoid an unacceptable gap in the law, if, in other words, the result of a declaration of nullity would be a legal situation which would even be further removed from the Basic Law, so that a declaration of incompatibility makes a less drastic transition possible (see BVerfGE 61, 319 (356); 99, 216 (244)). Especially in cases in which the complainant challenges inadequateness of the valid protecting statute, a declaration of nullity would result in an even more unconstitutional situation. This would not be of much use to the complainant.

A mere declaration of incompatibility is required especially in situations in which the legislature has several possibilities of remedying the infringement of the constitution. This is normally the case with violations of the principle of equality (see BVerfGE 99, 280 (298); 105, 73 (133)). The Federal Constitutional Court has the possibility

of discussing the different possibilities of enacting a new statute, or of delimiting the framework under constitutional law for a new regulation. The Federal Constitutional Court has made use of this possibility for instance in its decision concerning the exclusion of transsexual foreigners under the Transsexuals Act. It has specified the possibilities which are available to the legislature for remedying the infringement of the principle of equality (see BVerfGE 116, 243 (269-270)).

The mere declaration of incompatibility does not result in the ineffectiveness of the statute; its only consequence is that as a general rule the application of the statute is barred to the extent of its established incompatibility, for the person affected as well as for administrative and court proceedings that are conducted at the same time (see BVerfGE 73, 40 (101); 87, 153 (178)). In order to avoid insecurities in the transitional phase, the Federal Constitutional Court can also regulate the concrete consequences of its decision. The legislature is obliged to create a legal situation that is in harmony with the constitution; a time-limit can be imposed on it for doing so. The legislature's obligation to retroactively create a legal situation that is commensurate with the constitution extends in principle to the entire period affected by the declaration of incompatibility and to all decisions which are based on the statute that has been declared unconstitutional and which are not yet final (see BVerfGE 107, 27 (58)). Due to the necessities of drafting, with drafting being reserved to the legislature, the Federal Constitutional Court has, in its decision concerning the Transsexuals Act, refrained from making a provisional arrangement for the transitional period until the entry into force of a new regulation that is in harmony with the constitution. It has therefore declared the continued applicability of the challenged regulation until the creation of a new regulation, for which it set a time-limit (see

BVerfGE 116, 243 (270)). In the case of provisions under tax law which are important from the budgetary point of view the Federal Constitutional Court has repeatedly declared that the continued applicability of unconstitutional provisions for almost completed periods of assessment is justified in the interest of reliable fiscal and budgetary planning and of a uniform execution of administration (see BVerfGE 105, 73 (134) with further references). In proceedings for the concrete review of a statute concerning the employment promotion law applicable between 1998 and 2002, pursuant to which periods in which women interrupt compulsorily insurable employment because of the prohibition of employment under maternity protection law are not taken into account in the calculation of the qualifying period in statutory unemployment insurance, the Federal Constitutional Court stated that the subject-matter of the submission was not the review of the constitutionality of a legal regulation but the legislature's omission of enacting a regulation. The Federal Constitutional Court has therefore declared the incompatibility of the applicable law with Article 6.4 of the Basic Law and has set the legislature a time-limit within which it must pass a provision that is compatible with the constitution. If the legislature does not pass such a provision within the time-limit, then in proceedings in which there has been no final and non-appealable administrative or judicial decision and in which the decision depends on the law covered by the declaration of incompatibility, a specified provision of the Employment Promotion Act is to be applied with the necessary modifications (see BVerfGE 115, 259 (260 and 275-276), see also BVerfGE 116, 229 (242) on asylum seekers' use of damages for pain and suffering to provide for their subsistence as precondition for the grant of benefits under the Asylum Seekers Benefits Act). Finally, in both cited decisions on pregnancy termination, the Federal Constitutional Court gave instructions, pursuant to § 35 of the Federal Constitutional

Court Act, concerning the provisional legal situation to be taken into account after the quashing of the provisions that had been objected to. In these instructions, it specified the regulations which are applicable until a new legal regulation enters into force (see BVerfGE 39, 1 (2-3); 88, 203 (209 et seq.); see also BVerfGE 109, 190 (191), pursuant to which the provisions under *Land* law on the subsequent placement of criminals in preventive detention that had been declared incompatible with the Basic Law continue to be applicable until a specified date but the competent courts must examine immediately whether their orders for placement in detention comply with the provisos set out in the Federal Constitutional Court's reasoning; Roellecke, in: Umbach/Clemens/Dollinger (eds.), loc. cit., § 35, marginal no. 44).

III. Appeal to the legislature

The Federal Constitutional Court restricts itself to appealing to the legislature to take action in a specific area if the court deems the present legal situation constitutional but nevertheless regards it as necessary to ask the legislature to review legislation. In its decision concerning long-term care insurance contributions for child-caring and child-raising members of social long-term care insurance, it has declared the existing legal regulation incompatible with the principle of equality and with the fundamental right to protection of the family under Article 6.1 of the Basic Law and has set the legislature a time-limit for passing a new provision that is compatible with the constitution. When setting the time-limit, the Federal Constitutional Court has asked the legislature to review the existing legal situation by pointing out that the significance of the instant decision would also have to be examined for other branches of social insurance (see BVerfGE 103, 242 (270)). In its decision on the Federal Budget 2004, the Federal Constitutional Court regarded the challenged

provisions of the Federal Budget Act (*Bundeshaushaltsgesetz*) as constitutional but pointed out to the legislature that the constitutional concept of regulation had not proved to be effective in reality. The development of mechanisms that ensure the necessary compensation, over several budget years, for debt margins granted is reserved to the constitution-amending legislature; at the same time, the constitution-amending legislature is constitutionally obliged to develop such mechanisms. The Federal Constitutional Court has not regarded itself as being entitled to go any further in its ruling (see Federal Constitutional Court, Judgment of the Second Panel of 9 July 2007 - 2 BvF 1/04 -, *DVB1* 2007, p. 1030 (1032-1033)).

IV. Legislature's duty to monitor

Finally, the Federal Constitutional Court has the possibility of imposing on the legislature either a duty to monitor, or a trial period, if the challenged regulation is compatible with the constitution at the point in time of the Federal Constitutional Court's decision but the court nevertheless sees the necessity of monitoring legal practice to find out whether the law needs to be amended. In its second decision on pregnancy termination, the Federal Constitutional Court has established that the importance of unborn life, the kind of danger to which it is exposed, and the change in social conditions and attitudes noticeable in this area, make it necessary for the legislature to monitor how its legal protection concept applies in social practice. It must ascertain at reasonable intervals, for instance by periodical reports to be given by the government, whether the law really is having the protective effect expected or whether deficiencies in the concept or its practical application have manifested themselves in such a way that they constitute a breach of the prohibition on too little protection. This duty

to monitor exists especially after a change in the concept of protection (see BVerfGE 88, 203 (310)).

As concerns the environment, the legislature has appropriate leeway for gaining experience and making adaptations in complex hazard situations in which reliable scientific evidence is not yet available. In its decision on protection from radiation emanating from a mobile-communications installation erected near inhabited property, the Federal Constitutional Court has stated that it is incumbent on the authority entitled to issue ordinances to monitor and evaluate scientific progress under all aspects and with adequate means to be able to take further protective measures should the need arise (see Federal Constitutional Court, Order of the Third Chamber of the First Panel of 28 February 2002 - 1 BvR 1676/01 -, *NJW* 2002, p. 1638 (1639)).

In a civil-service-law decision on the grant of local cost-of-living allowances, the Federal Constitutional Court held that it is incumbent upon the legislature to monitor the factual development of the cost of living to find out if there are relevant differences between town and country to be able to appropriately counteract possible infringements of the traditional principle of the permanent civil service within the meaning of Article 33.5 of the Basic Law pursuant to which civil servants' remuneration must be commensurate to their office (see Federal Constitutional Court, Judgment of the Second Panel of 6 March 2007 - 2 BvR 556/04 -, *NVwZ* 2007, p. 568 (571)).

V. Interpretation in conformity with the constitution

What must be pointed out in addition is that there is the possibility of interpreting a law in conformity with the constitution. If a law can be interpreted in conformity with

the constitution, the constitutional complaint that challenges the law is rejected as unfounded. In this case, the Federal Constitutional Court can incorporate its interpretation into the declaration of the law's compatibility with the constitution to make its interpretation known to everyone who applies the law (see BVerfGE 33, 303 (305 and 338 et seq.) - case concerning admissions limitations to university studies).

F. Binding effects of Federal Constitutional Court decisions

As regards Federal Constitutional Court decisions, the German legal system distinguishes between the binding effect in the respective proceedings (formal finality, or non-appealability, and substantive finality, or *res judicata*), the specific binding effect under § 31.1 of the Federal Constitutional Court Act and the force of law pursuant to § 31.2 of the Federal Constitutional Court Act. It is necessary to make this distinction because the types of binding effect differ from each other as regards their preconditions as well as their effects (see Heusch, in: Umbach/Clemens/Dollinger (ed.), loc. cit., § 31, marginal nos. 21 et seq.).

I. Finality and non-appealability

Under Article 92 of the Basic Law, the Federal Constitutional Court is part of the judicial power. Upon application, it renders decision as a court (§ 23.1 sentence 1 of the Federal Constitutional Court Act). Federal Constitutional Court decisions are final under formal terms upon their being issued, as they are always non-appealable. According to established case-law, they are also *res judicata* (see BVerfGE 4, 31 (38); 20, 56 (86); 69, 92 (103); 78, 320 (328)). Only the operative part of the decisions is *res judicata*, not the reasons. There is a ban on repetition and on derogation; *res judicata* is an impediment to an action.

The purpose of *res judicata* is to establish legal peace between the parties within the factual and temporal boundaries of the matter at issue (see BVerfGE 47, 146 (165)). This means that in principle, the decision is only binding upon the parties to the action, their legal successors and those who intervene as a third party in the action. As concerns its duration in time, *res judicata* is only valid as long as there are no new facts (possibly also a change in the general interpretation of the law; this point has been left undecided in BVerfGE 33, 109 (203-204)). *Res judicata* is binding upon every court, even upon the Federal Constitutional Court, as regards the decision in the matter itself. Irrespective of its composition at a given point in time, the Federal Constitutional Court may not rule again (with a different result) on the same matter with the same parties. *Res judicata* is the basis, and the starting point, of the special, substantive binding effects pursuant to § 31 of the Federal Constitutional Court Act, which go beyond the boundaries of *res judicata* itself.

The Federal Constitutional Court explicitly assumes *res judicata* also for decisions that involve the review of the constitutionality of a statute although there are no parties to the respective proceedings (see BVerfGE 20, 56 (86); 22, 387 (404 et seq.)). Also in this case, the scope of *res judicata* is determined by the ruling on the subject-matter of the decision. According to the Federal Constitutional Court's case-law, laws that have been finally and bindingly declared void have been finally eliminated, irrespective of the fact that the extent of *res judicata* is, strictly speaking, limited as concerns the persons affected and its duration (see BVerfGE 69, 112 (119)).

II. Binding effect

Pursuant to § 31.1 of the Federal Constitutional Court Act, the Federal Constitutional Court's decisions are binding upon the constitutional bodies of the Federation and the *Länder* as well as on all courts and authorities. They are not forcibly binding upon all parties to the proceedings, but to them, the *res judicata* effect described applies.

There is an obligation to comply with judgments and orders issued in main proceedings and temporary injunction proceedings insofar as they are decisions on the merits (see BVerfGE 78, 320 (328); 92, 91 (107)). The binding effect only applies as long as the factual situation has not changed (see BVerfGE 33, 199 (203 f.); 78, 38 (48); 82, 198 (205)).

Pursuant to the Federal Constitutional Court's established case-law, the operative provisions and the principles that result from the essential reasoning of the decision are binding under § 31.1 of the Federal Constitutional Court Act for the application of the constitution (see BVerfGE 19, 377 (392); 24, 289 (297); 40, 88 (93-94)). Thus, the binding effect of the Federal Constitutional Court's legal statements also covers parallel cases. This gives § 31.1 of the Federal Constitutional Court Act its own area of application also with decisions that involve the review of the constitutionality of statutes because pursuant to § 31.2 of the Federal Constitutional Court Act, only their operative provisions have the force of law. Insofar as the authorities that are parties to subsequent proceedings are bound by a previous Federal Constitutional Court decision pursuant to § 31.1 of the Federal Constitutional Court Act and pass a decision in a parallel case that is contrary to the law, this act infringes § 31.1 of the Federal Constitutional Court Act in conjunction with Article 20.3 of the Basic Law and must be overturned

without further examination (see BVerfGE 40, 88 (94); 42, 258 (260)). An exception from the ban of repetition applies, however, in cases in which a statute has been bindingly declared unconstitutional because the legislature is not intended to be prevented from enacting a new statute (see BVerfGE 77, 84 (103-104)). When enacting a new statute, the legislature may, however, not disregard the reasons for the unconstitutionality of the original statute that have been established by the Federal Constitutional Court. Instead, special reasons are required for the repeated enactment of the same statute, which can result above all from an essential change of the factual or legal circumstances that are relevant for assessment under constitutional law, or of the views on which the assessment is based (see BVerfGE 96, 260 (263); 98, 265 (320-321)).

It is true that the Federal Constitutional Court, as a constitutional body (§ 1.1 of the Federal Constitutional Court Act), is potentially bound by its own decisions under § 31.1 of the Federal Constitutional Court Act. Pursuant to its established case-law, however, previous Federal Constitutional Court decisions do not bind the court itself, apart from their *res judicata* effect, which means that it can deviate from its own previous case-law (see BVerfGE 4, 31 (38); 20, 56 (87); 77, 84 (103-104); 78, 320 (328); 85, 117 (121)). The reason for this is that the Federal Constitutional Court, as an independent court, must be in a position to correct decisions for the future that it has acknowledged as being erroneous, and that it must be in a position to further develop the law. Under § 16.1 of the Federal Constitutional Court Act, a Panel of the Federal Constitutional Court is only required to request a decision by the Plenum of the Court, i.e. of both Panels sitting together, if it intends to deviate from the legal view that is essential, in another decision, for the reasoning of the other Panel (see BVerfGE 77, 84 (104)).

III. Force of law

Under § 31.2 sentences 1 and 2 of the Federal Constitutional Court Act, the Federal Constitutional Court's decision has the force of law in the cases specified therein (see Article 94.2 sentence 1 of the Basic Law). The respective decisions on the merits have the force of law and are binding upon everyone. The decision ranks equal with the statute whose validity was reviewed. Force of law is added to the binding effect under § 31.1 of the Federal Constitutional Court Act (see BVerfGE 1, 14 (37)). It only applies to the operative provisions of the decision, for the interpretation of which the reasons of the decision can, however, be consulted (see BVerfGE 22, 387 (404 et seq.); see also § 31.2 sentence 3 of the Federal Constitutional Court Act, see also Heusch, loc. cit., § 31, marginal no. 87). This therefore does not cover provisions which are parallel to those that are the matter of the dispute.

Under § 31.2 sentence 2 of the Federal Constitutional Court Act, the declaration of incompatibility with the Basic Law has the force of law. Already according to the wording of § 31.2 of the Federal Constitutional Court Act, the force of law does not cover the order of provisional continued application of the laws that have been declared incompatible with the Basic Law. Such an order only serves to solve problems that ensue from the declaration of incompatibility. In principle, such interim orders under § 35 of the Federal Constitutional Court Act only cause binding effect under § 31.1 of the Federal Constitutional Court Act. Also a commitment of the Federal Constitutional Court to its own decision is, in principle, ruled out in this context because if the predicted consequences do not ensue at all or in a different manner, the court must be able to revise its order pursuant to § 35 of the

Federal Constitutional Court Act at any time. Only if no new regulation has been enacted until the time-limit set, and if no new order establishing the continued application of the old regulation has been issued, the applicability of the provisions that are incompatible with the Basic Law ceases completely (see BVerfGE 93, 121 (122); 99, 216 (244 f.)); the substantive consequences are the same as in case of a declaration of nullity.