Conférence des Cours constitutionnelles européennes
Conference of European Constitutional Courts
Konferenz der europäischen Verfassungsgerichte
Конференция Европейских Конституционных Судов

CONSTITUTIONAL JUSTICE: FUNCTIONS AND RELATIONSHIP WITH THE OTHER PUBLIC AUTHORITIES

National report prepared for the XVth Congress of the Conference of European Constitutional Courts by
The Federal Constitutional Court of Germany

Rapporteurs:

Prof. Dr. Gertrude Lübbe-Wolff, Justice of the Federal Constitutional Court
Prof. Dr. h.c. Rudolf Mellinghoff, Justice of the Federal Constitutional Court
Prof. Dr. Reinhard Gaier, Justice of the Federal Constitutional Court

I. THE CONSTITUTIONAL COURT'S RELATIONSHIP TO PARLIAMENT AND GOVERNMENT

Prof. Dr. Gertrude Lübbe-Wolff
Justice of the Federal Constitutional Court

1. **The role of Parliament (as the case may be, of the Government) in the procedure for appointing judges to the Constitutional Court. Once appointed, can judges of the Constitutional Court be revoked by that same authority? What could be the grounds/ reasons for such revocation?**

The German Constitution, the Basic Law (*Grundgesetz* – GG), regulates in detail the types of dispute on which the Federal Constitutional Court (*Bundesverfassungs-gericht*) must decide (Article 93.1 of the Basic Law; over and above the competences of the Court as regulated here, according to Article 93.3 of the Basic Law, additional types of dispute may be established by a non-constitutional federal law). By contrast, the Basic Law only contains a small number of provisions on the organisation and modus operandi of the Federal Constitutional Court and on the election and legal status of its justices; details are regulated by the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG). With regard to the provisions of the constitution which are specifically concerned with the Federal Constitutional Court, this contains not only supplementary provisions, but – in the interest of having a regulation which is comprehensible on its own basis and coherent – also repeats the relevant provisions of the Basic Law. The legal situation is hence presented below using the Federal Constitutional Court Act. Where a provision cited is enshrined not only in this Act but also in the Basic Law, both the corresponding constitutional provision and the non-constitutional provisions are quoted, so that it can be recognised by each provision cited whether the provision stated applies only as a non-constitutional law or, over and above this, also has constitutional status.

The Federal Constitutional Court consists of two Senates (§ 2.1 of the Federal Constitutional Court Act) with eight justices each (§ 2.2 of the Federal Constitutional Court Act). Half of the justices of each Senate are elected by the *Bundestag* and the other half by the *Bundesrat* – that is by the national parliament and the chamber of the *Länder* – (Article 94.1 sentence 2 of the Basic Law; § 5.1 sentence 1 of the Federal Constitutional Court Act). The justices to be elected by the *Bundesrat* are elected directly by the *Länder* chamber itself (§ 7 of the Federal Constitutional Court Act) and those to be elected by the *Bundestag*, by contrast, are elected indirectly by a twelve-person electoral committee elected by proportional representation (§ 6.1 and § 6.2 sentence 1 of the Federal Constitutional Court Act). The election to the electoral committee and in the *Bundesrat* requires a two-thirds majority in each case (§ 6.5 and

§ 7 of the Federal Constitutional Court Act). None of the political forces represented in the *Bundestag* hence has any prospects to push through "its" own candidates; each parliamentary group must mobilise broad support. This is to ensure that only those individuals are elected whose views are regarded as being acceptable beyond a specific political camp, and from whom one may presume that they are guided not by radical views or unconditional loyalty to any political ideology, but by loyalty to law and statute and by the adoption of a fundamental stance based on appraisal.

If a successor is not elected according to these provisions within three months of the expiration of the term of office or early retirement, the Federal Constitutional Court must be requested to propose candidates (§ 7a.1 of the Federal Constitutional Court Act). The plenum of the Federal Constitutional Court – that is all the justices– then puts forward a list containing three proposals for each justice needing to be elected (§ 7.2 of the Federal Constitutional Court Act). However, the election is also carried out in this case by the above organs, which also remain free to elect a person not proposed by the Court (§ 7.4 of the Federal Constitutional Court Act).

The justices may belong neither to the *Bundestag*, the *Bundesrat* or the Federal Government, nor the corresponding organs of a *Land*; if a justice is elected from such functions, he/she ceases to be a member of the organ in question on being appointed (§ 3.3 of the Federal Constitutional Court Act). Any professional occupation save that of a lecturer of law at a German institution of higher education is incompatible with the functions of a justice of the Federal Constitutional Court (§ 3.4 sentence 1 of the Federal Constitutional Court Act). Justices are not prohibited from being a member of a party. Such membership also does not lead to the exclusion of the justice in question from proceedings where he or she might have an interest in the outcome in his role as a party member (§ 18.2 of the Federal Constitutional Court Act). Some of the justices of the Federal Constitutional Court are members of a party, whilst others are not. It is customary for those who belong to a party for their membership to be stayed during their term of office as a justice.

There is an informal tradition in practice that the representatives of the two major popular parties – the Christian Democratic Union (CDU) and the Social Democratic Party of Germany (SPD) – each nominate half of the candidates, whilst if one of these parties is in a governing coalition with one of the smaller parties, it leaves the right of nomination for a seat to the latter. The disadvantage of this nomination tradition is that the smaller parties are not – at least not all – represented in line with their current political significance. There is however one sense in which it has proven to be highly advantageous: It has promoted and strengthened the continuity and integrative force of the jurisdiction of the Federal Constitutional Court. Because of the described custom of equal occupation of the Court, and because a ruling with which an impugned measure (legislative or otherwise) is declared in the Senates to be unconstitutional requires a majority of justices – that is five out of eight votes – it does not occur at the Federal Constitutional Court that a certain group of justices who are affiliated with a political party or whatever kind of political direction ("left" or

"right", "conservative" or "liberal", "democratic" or "republican", etc.), or who at least lean closer towards one direction than to another, automatically forms the majority and can dominate the case-law of the Court until a further election which tips the majority situation. It is therefore always necessary, including in constitutional questions in which ideological evaluations play a particularly pronounced role, to solicit support for votes using arguments and to seek an understanding. This favours a definite agreement-orientated discussion culture in the Federal Constitutional Court, and a characteristic style striving to suitably consider all concerns which are at stake, orientated towards balanced solutions – and hence also the peace-making potential and the acceptance of its decisions.

The German party system is currently shifting in a manner which is also significant to the previous nomination tradition: The followers of the two "major" parties have recently decreased in number and those of the formerly "minor" parties, by contrast, have considerably increased. This will not be without consequences for the election of the justices of the Federal Constitutional Court. The parties which have been able to record a considerable increase in the number of voters are now laying claim to a correspondingly greater influence on the composition of the Federal Constitutional Court. The tradition of the efforts to achieve a composition of the Federal Constitutional Court which ensures that no ideological direction should have a majority there which *a priori* no longer relies on discussion and conviction work need however not necessarily suffer as a result of these changes.

The justices' term of office is twelve years, but at most up to retirement age (§ 4.1 of the Federal Constitutional Court Act), which is reached at the end of the month in which a justice reaches the age of 68 (§ 4.3 of the Federal Constitutional Court Act). Re-election – be it immediately after or subsequently – is ruled out (§ 4.2 of the Federal Constitutional Court Act). The justices continue to perform their functions until a successor is appointed (§ 4.4 of the Federal Constitutional Court Act).

The Basic Law guarantees judicial independence to all judges, and therefore also to the justices of the Federal Constitutional Court (Article 97.1 of the Basic Law). This naturally includes – inter alia – that judges may not be removed from office as politicians see fit.

Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred or retired before the expiration of their term of office only by virtue of judicial decision, and only for the reasons and in the manner specified by the laws (Article 97.2 sentence 1 of the Basic Law). The Basic Law provides specifically for the judges of the Federal Courts that, if a federal judge infringes the principles of the Basic Law, or the constitutional order of a *Land* in his official capacity or unofficially, the Federal Constitutional Court, upon application of the Bundestag, may by a two-thirds majority order that the judge be transferred or retired. In the case of an intentional infringement, it may order him dismissed (Article 98.2 sentences 1 and 2 of the Basic Law). This provision is

however interpreted such that it does not apply to the justices of the Federal Constitutional Court (cf. Thoma, *Rechtsgutachten betreffend die Stellung des Bundesverfassungsgerichts*, Jahrbuch des öffentlichen Rechts, 6 (1957), p. 109 <170>).

§ 105 of the Federal Constitutional Court Act makes a special regulation for these justices. Accordingly, the Federal Constitutional Court may authorise the Federal President to retire a justice of this Court because of permanent unfitness for service, (§ 105.1 no. 1 of the Federal Constitutional Court Act), or to dismiss a justice if he or she has been sentenced without appeal because of a dishonourable act or sentenced to over six months' imprisonment or if he or she has committed such a gross breach of duty that his or her remaining in office is ruled out (§ 105.1 no. 2 of the Federal Constitutional Court Act).

Only the plenum of the Federal Constitutional Court, that is the entirety of the sixteen justices of both Senates, may decide on the institution of such proceedings (§ 105.2 of the Federal Constitutional Court Act), and the decision requires a two-thirds majority (§ 105.4 of the Federal Constitutional Court Act). In the event of dismissal because of a criminal conviction or gross breach of duty, the justice forfeits all claims arising from his or her office (§ 105.6 of the Federal Constitutional Court Act).

This provides far-reaching, effective precautions against unjustified "suspension" of a justice of the Federal Constitutional Court. Removal from office against the will of the Court is ruled out, given that the right to initiate retirement or dismissal lies solely with the Court. Justices may however ask to be released from service at any time (§ 12 of the Federal Constitutional Court Act).

2. To what extent is the Constitutional Court financially autonomous – in the setting up and administration of its own expenditure budget?

Parliament decides via a federal statute on the Federation's budget in which all income and expenditure of the Federation is to be included (Article 110 of the Basic Law). The Basic Law makes no provision for a special arrangement for the Federal Constitutional Court.

The Federal Budget Code (*Bundeshaushaltsordnung* – BHO) provides that the budget which is approved for one or two accounting years by the Budget Act (*Haushalts-gesetz*) (§ 1.2 of the Federal Budget Code) is sub-divided into individual budgets. Preliminary estimates of these individual budgets are drawn up by the agency which is responsible for the respective individual budget and then provided to the Federal Ministry of Finance (§ 27.1 of the Federal Budget Code). The latter draws up the draft budget; it may in doing so deviate from the preliminary estimates – on proviso that where possible a consensus can be established with the competent agency which has submitted it (§ 28.1 sentences 1 and 2 of the Federal Budget Code). The draft is then

adopted by the Federal Government (§ 29.1 of the Federal Budget Code) and forwarded to the *Bundesrat*, which is entitled to comment on it, and is at the same time submitted to the *Bundestag* (Article 110.3 of the Basic Law and § 30 of the Federal Budget Code).

In the first years of the activity of the Federal Constitutional Court (1951-1953), the budgetary funds for the Federal Constitutional Court formed an element of the individual budget of the Federal Ministry of Justice. The Federal Constitutional Court was therefore able to register and reason its funding requirements only to the Ministry of Justice, and not directly to the Federal Ministry of Finance and to Parliament's budget committee. A consequence of attribution to the individual budget of the Federal Ministry of Justice was also that the Federal Constitutional Court was not able to independently manage the funds provided for it, and therefore that it was not for instance able to decide for itself on filling posts within the administration of the Court.

This state of affairs was however soon regarded as not being compatible with the principle of the separation of powers, or with the legal status of the Court as a constitutional organ. The Federal Constitutional Court has had its own individual budget within the federal budget since 1953. This means that it is able to register its needs independently with the Federal Ministry of Finance. The latter is not required to accept all registered estimates according to the regulations of the Federal Budget Code described above. In the event that the estimates of the Federal Constitutional Court are derogated from, it is nonetheless safeguarded that its registrations are forwarded to the further deciding agencies. The Federal Budget Code provides that derogations in the draft of the Ministry of Finance from the preliminary estimates of the President of the Federal Constitutional Court, just as derogations from preliminary estimates of the Federal President and of the Presidents of the *Bundestag*, of the *Bundesrat* and of the Federal Audit Office, are to be notified to the Federal Government if they have not been carried out in agreement (§ 28.3 of the Federal Budget Code). A corresponding arrangement is provided for in case the draft adopted by the *Federal Government* on the basis of the draft of the Ministry of Finance which forms the basis of Parliament's deliberations derogates in a not consented manner from the preliminary estimates of the organs in question (§ 29.3 of the Federal Budget Code). It is ensured by these means that the Federal Constitutional Court is able to submit its budget proposals in unabridged form to the agency which ultimately decides, namely Parliament.

On the basis of the approvals contained in its individual budget, the Federal Constitutional Court manages the funds assigned to it independently. Here, as with all other constitutional organs, the Federal Audit Office (*Bundesrechnungshof*) reviews the use of funds as to their compliance with regulations and to economy and correctness (Article 114.2 of the Basic Law; see in detail §§ 88.1, 90 and 91.1 of the Federal Budget Code).

3. **Is it customary or possible that Parliament amends the Law on the Organization and Functioning of the Constitutional Court, yet without any consultation with the Court itself?**

There is no provision of constitutional or non-constitutional law which explicitly prescribes consulting the Federal Constitutional Court prior to such legal amendments.

There is however the constitutional principle of faithful co-operation between organs (*Organtreue*). This principle was first mentioned in a set of constitutional complaint proceedings in which the complainants referred as reasoning for the unconstitutionality of a statute about which they were complaining to the recognised constitutional principle of federal comity (*Bundestreue*) (also referred to as the principle of conduct which is well-disposed towards the Federation (*bundesfreundliches Verhalten*)), which obliges the Federation and the *Länder* to give consideration to one another, and had claimed that, by analogy to this, the principle of faithful co-operation between organs applied in the relationship between the constitutional organs of the Federation. The Federal Constitutional Court initially left it open at that time as to whether such a constitutional principle exists and whether, if so, a complainant in constitutional complaint proceedings can invoke it (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 29, 221 <233>: This is said to be irrelevant since, if this question were to be answered in the affirmative, the principle certainly would not be violated). The Court however explicitly recognised this principle in later rulings (see BVerfGE 89, 155 <191>; 97, 350 <374-375>; 119, 96 <122>). This principle does not imply that, prior to any exercise of its competence which is related in any way with the tasks of another constitutional organ, a constitutional organ would have to consult this other organ (see BVerfGE 90, 286 <337>). One could however consider whether or not the principle of faithful co-operation between organs could be considered to have been violated if the organisational and procedural basis of the activity of a constitutional organ was to be changed without the organ in question previously having been enabled to make a statement on the intended change. For instance, the principle of federal comity (conduct which is well-disposed towards the Federation), on which the principle of faithful co-operation between organs is modelled, has been interpreted by the Federal Constitutional Court in such a way that the duty to give consideration to one another postulated by this principle obliges the Federation to hear the *Land* in question – apart from in cases of particular urgency – prior to making use of the right to issue instructions to which it is entitled with regard to certain administrative matters of the *Länder* (see BVerfGE 81, 310 <337>; see also BVerfGE 104, 249 <270>; for the general statement that this principle obliges the Federation and the *Länder* inter alia to consult with one another, see BVerfGE 73, 118 <197>).

It is a matter of course in practice in Germany that the Federal Constitutional Court is heard prior to changes to the Federal Constitutional Court Act.

4. Is the Constitutional Court vested with review powers as to the constitutionality of Regulations/ Standing Orders of Parliament and, respectively, Government?

There are various procedures in which – partly directly and partly only indirectly – provisions of the Rules of Procedure of Parliament and of the Government can become the subject-matter of review by the Federal Constitutional Court.

In the proceedings for the abstract review of statutes (Article 93.1 no. 2 of the Basic Law, §§ 13 no. 6 in conjunction with §§ 76 et seq. of the Federal Constitutional Court Act) by request of the Federal Government, of a *Land* Government or of one-third of the members of the *Bundestag* the Federal Constitutional Court can – inter alia – review the compatibility of federal law with the Basic Law. According to the prevailing view, "federal law" within the meaning of these provisions includes legal provisions of all levels, including the rules of procedure of the constitutional organs (see Wieland, in Dreier, *GG*, Vol. III, 2nd ed. 2008, Art. 93, marginal no. 58; Hopfauf, in: Schmidt-Bleibtreu/Klein, *GG*, 11th ed. 2008, Art. 93, marginal no. 101). In practice, however, the Rules of Procedure of the German *Bundestag* and of the Federal Government have so far never yet been reviewed *in this procedure*.

However, provisions contained in the Rules of Procedure of the *Bundestag* have been the subject-matter of a review in disputes between organs (*Organstreitverfahren*) several times. In this procedure, the Federal Constitutional Court clarifies at the request of organs and sections of such organs which have been vested with rights of their own by the Basic Law or by the rules of procedure of a supreme federal organ and assert that the rights or obligations assigned to them by the Basic Law have been violated or directly placed at risk by an act or omission of another organ or a corresponding section of an organ, whether the impugned measure is indeed in breach of the Basic Law (Article 93.1 no. 1 of the Basic Law, §§ 63, 64.1 and 67 sentence 1 of the Federal Constitutional Court Act). Sections of organs may not only assert a violation of their own constitutional rights here in their own name, but also a violation of the rights of the organ of which they are a section; for instance, the violation of rights of the *Bundestag* can be asserted not only by this organ itself, but also by a parliamentary group, although not by an individual delegate (see BVerfGE 117, 359 <366-367>, with further references). Provisions of the rules of procedure and acts of the application of such provisions may also be reviewed in the disputes between organs.

For instance, a provision contained in the Rules of Procedure of the *Bundestag* which provided that submissions affecting public finances are only deliberated on if they are connected with an equalisation application – to cover the costs or the losses – was already declared unconstitutional in the first year of the activities of the Federal Constitutional Court in a dispute between organs. The Court regarded the constitutional right to take legislative initiatives as being restricted by this in a manner not provided for by the constitution (see BVerfGE 1, 144 <158 et seq.>; By contrast,

the provision contained in the rules of procedure which provided for direct assignment of submissions of the nature in question to the budget committee, and hence provided for the omission of the first of the three readings of a draft Bill in Parliament which were otherwise customary, was regarded as being in conformity with the constitution, loc. cit. pp. 151 et seq.).

Provisions of the Rules of Procedure of the *Bundestag* were also judged as unconstitutional according to which an independent delegate – in the concrete dispute it was a Member of the German *Bundestag* who had been expelled from his parliamentary group – had been excluded from any possibility to work on one of the committees of the *Bundestag*. The Federal Constitutional Court found that such a delegate did not have to be allotted a vote in one of the committees – which would of necessity have a disproportionate effect –, but had to be enabled to contribute to at least one of the committees as a member with a right to speak and move motions (see BVerfGE 80, 188 <221 et seq.>).

By contrast, in a dispute between organs which had been lodged by Members of the *Bundestag*, orders of the *Bundestag* with which the further debate of the *Bundestag* on a disputed subject-matter had been restricted to a certain number of hours, and each parliamentary group had been allotted a share of the speaking time corresponding to its size, were judged to be constitutional. The possibility to restrict the time for a debate in advance had not been explicitly provided for in the Rules of Procedure of the *Bundestag*; the Federal Constitutional Court however referred to a provision contained in the rules of procedure – adjudged as being in conformity with the constitution –, according to which the *Bundestag* may rule on the ending of a debate; this provision is said to also encompass the right to provide only a certain period for a debate from the outset or to restrict it from a certain time onwards to a concrete further duration (see BVerfGE 10, 4 <13>). Equally, the sub-division of the deliberation time according to the size of the parliamentary group was seen as constitutional (see BVerfG (Federal Constitutional Court) loc. cit. pp. 14 et seq.; the Rules of Procedure also did not contain any explicit provision for this, but only a provision from which it was presumed that it was conditional on this mode of attribution as a matter of course).

Also, it was found – with a narrow voting result – in a dispute between organs in which several delegates spoke against the regulations that had been adopted in 2005 to disclose the income made outside of their mandate, that the statutory provision in this regard was in conformity with the constitution (§ 44a of the Act on the Legal Status of Members of the German *Bundestag* (*Abgeordnetengesetz*)) as well as the details of the obligation of disclosure in the "Code of Conduct for Members of the German *Bundestag*" adopted by the *Bundestag*, which according to § 18 of the Rules of Procedure of the German *Bundestag* constitutes an integral component of the rules of procedure (see BVerfGE 118, 277 <323 et seq., 352 et seq.>).

A recognised principle is that the *Bundestag* has broad latitude for the structure of its rules of procedure (see BVerfGE 80, 188 <220>).

Provisions of the rules of procedure of the Federal Government have so far not yet been put up for review in disputes between organs.

Provisions of the rules of procedure of Parliament and of the Government which concern the proceedings to issue legal provisions can furthermore become the subject-matter of indirect review by the constitutional court in any proceedings which are related to the validity of the legal provisions in question. For instance, one set of constitutional complaint proceedings which related to the validity of provisions of the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*) and of an ordinance based on this Act, adopted in the circular procedure, reviewed amongst other things whether it is compatible with the Basic Law that § 20.2 of the Rules of Procedure of the Federal Government permits, under certain preconditions, legal ordinances to be issued in the circular procedure. This was affirmed (see BVerfGE 91, 148 <168 et seq.>).

5. Constitutionality review: specify types / categories of legal acts in regard of which such review is conducted.

Legal acts which the Federal Government has handed down – such as ordinances or provisions contained in the Rules of Procedure – can, as has already been stated in response to Question 4, constitute the subject-matter of a review by the Federal Constitutional Court in the proceedings for the abstract review of statutes.

In other types of procedure, both provisions adopted by the Government, and any other acts or omissions on the part of the Government, may become subject-matter of a constitutional review where the possibility exists that they violate constitutional rights of those who may initiate proceedings of the respective type to protect their rights. For instance, acts or omissions of the Federal Government may be the subject-matter of disputes between organs (Article 93.1 no. 1 of the Basic Law) if they may violate constitutional rights of a supreme federal organ or of other parties which are vested by the Basic Law or the rules of procedure of a supreme federal organ with their own rights. They may constitute the subject-matter of a Federation-*Länder* dispute (Article 93.1 no. 3 of the Federal Constitutional Court Act) if they may violate constitutional rights and obligations of a *Land*, and the subject-matter of an individual constitutional complaint (Article 93.1 no. 4a of the Federal Constitutional Court Act) or of a municipal constitutional complaint (Article 93.1 no. 4b of the Federal Constitutional Court Act) if the possibility exists that they encroach on fundamental rights or impair the constitutionally guaranteed self-administration rights of local authorities or associations of local authorities.

All in all, there are hence multifarious possibilities for constitutional court review of acts or omissions by the Government. In the individual case, these possibilities also depend on the substantive constitutional law, namely on whether the Basic Law grants to the respective plaintiff a right which may have been violated by the impugned measure of the Federal Government. Here are a few examples of this:

In response to constitutional complaints of parties affected, the Federal Constitutional Court has in several sets of proceedings reviewed information measures of the Federal Government or of individual ministries. Constitutional complaints are normally only admissible once all remedies have been exhausted (§ 90.2 of the Federal Constitutional Court Act) and if a constitutional complaint is well-founded; the Federal Constitutional Court quashes only the impugned court rulings, but does not rescind the underlying administrative measure, and refers the case to a court with jurisdiction (§ 95.2 sentence 2 of the Federal Constitutional Court Act). The court rulings which have approved the acts of the Federal Government are therefore normally the primary subject-matter of the constitutional court's review in such cases. Indirectly, however, – unless the impugned court rulings do not already need to be rescinded because of procedural errors – there may also be findings on the constitutionality of the underlying governmental acts. One case related to a list of wines published by the Federal Ministry of Health in which a chemical had been found that was detrimental to health. A businessman who was affected considered this list to impair his sales prospects, unsuccessfully sued in the administrative courts and finally lodged constitutional complaints against the court rulings which were unfavourable to him because of a violation of his occupational freedom and other fundamental rights protecting his freedom of competition. The Federal Constitutional Court found the constitutional complaint to be admissible, but considered the freedom of competition, which is protected by fundamental rights, not to have been violated, given that the Government had acted in the context of its tasks and competences and the information had not had a competition-distorting character (see BVerfGE 105, 252 <264 et seq.>). In a similar procedural constellation, the Court reviewed the compatibility of critical statements on a religious community made by the Federal Government – inter alia in responses to interpellations raised in Parliament – with the fundamental right of the association in question to freedom of religion, and reached the conclusion that the constitutional complaint of the association in question was well-founded in part; the Federal Government was not as a matter of principle prohibited from making statements – including critical ones – with regard to a religious association, but not all the statements in the case at hand had complied with the principle of the religious and ideological neutrality of the state (see BVerfGE 105, 279 <292 et seq.>).

In the Federation-*Länder* dispute (Article 93.1 no. 3 of the Basic Law and § 13 no. 7 in conjunction with §§ 68 et seq. of the Federal Constitutional Court Act), the Federal Constitutional Court reviewed an application from *Länder* as to whether supervisory instructions directed to a *Land* by the Federal Government, and measures of the Federal Government towards third parties, were within the framework of the powers

which the Basic Law grants to the Federation in administrative matters, or whether they constitute encroachments on *Länder* competences (see BVerfGE 81, 310 <329 et seq.>; 104, 249 <264 et seq.>).

It was reviewed in response to a request from a *Bundestag* parliamentary group whether the Federal Government had violated rights of the *Bundestag* by agreeing, without there being a basis in federal law, to the US forces stationed in the Federal Republic of Germany being equipped with medium-range missiles ("Pershing II") and cruise missiles. The Court considered the motion to be admissible since it could not be ruled out that permission to station this military equipment constituted a possible transfer of sovereign rights according to Article 24.1 of the Basic Law, which is only possible through a statute or, according to Article 59.2 of the Basic Law, an international agreement requiring the consent of the *Bundestag* in the shape of a federal law, and hence that the right of the *Bundestag* to participate had been violated by the Government having granted permission without the participation of the *Bundestag* (see BVerfGE 68, 1 <69>). The review of the merits of the motion however revealed that no rights of the *Bundestag* had been violated; the consent declaration of the Federal Government was said to constitute an act of defence policy within the framework of the NATO Treaty concluded according to Article 24.1 of the Basic Law, and not a declaration constituting the separate conclusion of a treaty (loc. cit., pp. 78 et seq.).

Equally, a motion in a dispute between organs was regarded as being admissible, but – with a small majority – as being unfounded with which a parliamentary group of the *Bundestag* had asserted that the Federal Government had violated rights of the *Bundestag* by having agreed to the New Strategic Concept of NATO without the cooperation of the *Bundestag*, and hence outside of a formal treaty amendment procedure, for which a federal statute would have been necessary, having brought about, in rem, a major amendment of the NATO Treaty (see BVerfGE 104, 151 <193 et seq.>). According to the Court, there had been no amendment of the Treaty, but only a further development of the NATO system within the framework of the Treaty; the Federal Government was said to be entitled to cooperate in such a further development without a formal amendment of the Treaty (loc. cit. pp. 199 et seq.).

Rulings of the Federal Government on the deployment of the country's own armed forces may be reviewed by the Federal Constitutional Court as to whether cooperation powers of the *Bundestag* have been violated. The Basic Law namely requires according to the case-law of the Federal Constitutional Court the consent of the *Bundestag* – as a rule *in advance* – to deployments of the armed forces abroad (see BVerfGE 90, 236 <381 et seq.>). Accordingly, the Federal Constitutional Court – in disputes between organs at the request of parliamentary groups of the *Bundestag* – found that the Federal Government had violated rights of the *Bundestag* by omitting to obtain the advance approval of the *Bundestag* for certain deployments of the armed forces. In one case, this related to deployments by German armed forces in connection with the Yugoslavian conflict and in the UN operation in Somalia in 1992 and 1993

(see BVerfGE 90, 236 <381 et seq.>), and in another case for the deployment of German armed forces to protect Turkey – specifically: reconnaissance flights with AWACS aircraft in Turkish airspace – in connection with the Iraq crisis in 2003 (see BVerfGE 121, 135 <153 et seq.>).

By contrast, the *Organklage* of a parliamentary group was considered to be inadmissible which had asserted that rights of the *Bundestag* had been violated by virtue of the deployment of the armed forces to secure the G8 summit held in 2007 in the German town of Heiligendamm for which the consent of the *Bundestag* had not been acquired; the Basic Law was said to manifestly not require the consent of Parliament for domestic deployments of the armed forces, so that the possibility of a violation of rights of the *Bundestag* by the decision on deployment of the Federal Government did not exist here (see BVerfG, order of the second Senate of 4 May 2010 - 2 BvE 5/07 -, *Europäische Grundrechte-Zeitschrift* – EuGRZ 2010, pp. 363 et seq.).

6. **a) Parliament and Government, as the case may be, will proceed without delay to amending the law (or another act declared unconstitutional) in order to bring such into accord with the Constitution, following the constitutional court's decision. If so, what is the term established in that sense? Is there also any special procedure? If not, specify alternatives. Give examples.**

Where the Federal Constitutional Court reviews laws as to their compatibility with the Basic Law in the proceedings of the abstract review of statutes (see Question 4 above), in the proceedings of concrete review of statutes (Article 100 of the Basic Law), that is in response to the submission of another court, or in constitutional complaint proceedings, the declaration of nullity is provided as a standard consequence in the event of the Court finding the law to be unconstitutional (see for the abstract review of statutes § 78 sentence 1 of the Federal Constitutional Court Act, for the concrete review of statutes § 82.2 in conjunction with § 78 sentence 1 of the Federal Constitutional Court Act; for the constitutional complaint § 95.3 sentence 1 of the Federal Constitutional Court Act). The Court's finding of nullity means that the provision which has been declared null and void was so from the outset because it contradicts the Basic Law (see BVerfGE 1, 14 <36> – established case-law). The declaration of nullity however in principle does not touch on the legal force and standing of past rulings based on the provision in question. The rulings which can no longer be challenged based on a provision that has been declared null and void remain unaffected on proviso of another statutory provision; they may however no longer be executed (§ 79.2 of the Federal Constitutional Court Act; this provision relating to proceedings for the abstract review of statutes is also to be applied in the proceedings of the concrete review of statutes and in constitutional complaint proceedings, see § 82.1 of the Federal Constitutional Court Act and § 95.3 sentence 3 of the Federal Constitutional Court Act). A special regulation is provided for criminal law. The

resumption of the proceedings against a criminal judgment which has the force of law which is based on a provision that has been declared null and void or incompatible with the Basic Law is admissible according to the provisions of the Code of Criminal Procedure (*Strafprozessordnung*) (see for the abstract review of statutes § 79.1 of the Federal Constitutional Court Act; for reference to this provision in the proceedings for the concrete review of statutes and the constitutional complaint see in turn § 82.1 of the Federal Constitutional Court Act and § 95.3 sentence 3 of the Federal Constitutional Court Act).

According to the case-law of the Federal Constitutional Court, in place of the declaration of nullity mere incompatibility is exceptionally to be pronounced if the declaration of nullity would bring about a situation which is further removed from the constitutional order than that which would apply were the provision to temporarily continue to apply (see BVerfGE 61, 319 <356>; 87, 153 <177 et seq.> – established case-law). This also applies to provisions other than statutory ones. According to this principle, for instance, a statutory regulation on the composition of an organ with competences in the field of youth protection was declared not to be null and void, but only to be incompatible with the Basic Law, because the youth protection required by fundamental rights would otherwise have been impaired (see BVerfGE 83, 130 <154>). A regulation on radio and television licences was not declared to be null and void, but only incompatible with the Basic Law, because the supply of public-law broadcasting – considered to be necessary not lastly in the interest of preserving a functioning democracy – would otherwise have been placed in jeopardy (see BVerfGE 90, 60 <105>). Equally, there is a mere declaration of incompatibility if in the case of a declaration of nullity, a legal uncertainty which is not compatible with the principle of the rule of law would be anticipated (see BVerfGE 92, 53 <73 et seq.>; 119, 331 <382 et seq.>). Budgetary interests were also considered to constitute a reason justifying the temporary continued application of a provision of fiscal law – at least in view of an only slight burden on those concerned by the provision in question (see BVerfGE 123, 1 <37 et seq.>).

A further principle that has been developed in the case-law of the Federal Constitutional Court states that a provision is to be declared not null and void, but only incompatible with the Basic Law, if a variety of possibilities is available to remedy the violation of the constitution (see BVerfGE 28, 324 <362>; 77, 308 <337>; 115, 276 <317>; 122, 39 <62 et seq.> – established case-law). This refers not to the case – which is almost always applicable – of it being possible to design a constitutional provision differently in terms of details, but to the case that in place of the removal of the provision linked with a declaration of nullity of the provision, possibilities suggest themselves to remedy the violation of the constitution by means of positive provisions. This relates above all to a case in which a provision is considered to be unconstitutional because of a violation of equality, given that violations of equality cannot as a rule be remedied solely by removing an advantage or disadvantage which constitutes a violation of equality, but also by expanding the advantage – where appropriate in a manner altogether modified – to benefit other

groups. Accordingly, to name only a small number from many examples in the case-law: the prohibition to work at night which is in violation of equality for female workers (see BVerfGE 85, 191 <211 et seq.>), regulations in violation of equality for financial training promotion (see BVerfGE 99, 165 <184>) and a regulation which linked relaxations in the regime for granting the right of residence for a child of non-German parents born in Germany solely to the residence title of the mother and not also to that of the father (see BVerfGE 114, 357 <371>) were not declared to be null and void, but only incompatible with the Basic Law.

The possibility of a mere declaration of incompatibility is now also mentioned in the Federal Constitutional Court Act, in some places explicitly, but without defining the prerequisites (§ 31.2 sentence 3, § 79.1, § 93c.1 sentence 3 of the Federal Constitutional Court Act).

In the event of a mere declaration of incompatibility, a deadline is set as a rule for the temporary further application of the provision, or it is pronounced that the legislature is obliged to create a new regulation within a certain period. The length of the period is set according to aspects which in most cases are not explicitly named – such as the gravity of the violation or other urgencies, the complexity of the necessary new provision and special requirements of the matter.

Deadlines are largely set in the range of one to two years (see for instance very recently BVerfGE 120, 125 <168>; 120, 169 <179>, regarding in each case fiscal provisions; 121, 30 <68>, regarding a provision on the inadmissibility of participation by political parties in private broadcasting companies; 121, 175 <204>, regarding a provision of the Transsexuals Act on name changes after a sex change; 121, 317 <373>, regarding provisions of *Land* law on non-smokers' protection in pubs).

Longer deadlines are however also granted in some cases. For instance, a deadline of almost three years was set in an election scrutiny procedure for the new regulation on a provision of electoral law which was considered to be unconstitutional, explicitly referring to the need to consider the statutory deadlines for the acts in preparation of the elections and the complexity of the new provision required (see BVerfGE 121, 266 <316>), which led to a situation in which the *Bundestag* elections which were due almost one-and-a-quarter years after this decision still took place according to the provision which was regarded as unconstitutional. Also, a declaration of nullity of the previous election, which formed the actual subject-matter of proceedings, did not take place although the provision regarded to be unconstitutional had exerted an influence on the distribution of mandates. For this, a role was played inter alia by the fact that no considerable influence was exerted on the distribution of the mandates, and the error was also not particularly major in other regards. The error lay in a difficult-to-comprehend paradox of the calculation procedure for the distribution of mandates which had been chosen for reasons which were legitimate as such, but which may lead in certain cases to the absurd consequence of an increase in the number of votes being reflected in a reduction in the number of mandates achieved. Had this been for

instance a provision tending to deliberately favour certain political parties, the error would undoubtedly have been regarded as being major and a shorter deadline set.

Deadlines of less than one year are also sometimes set. Thus, the legislature was set a deadline of less than eleven months for the new regulation of social benefit provisions which the Court declared to be unconstitutional because the envisioned amounts for safeguarding the subsistence minimum required by the constitution had not been ascertained in a procedure that was transparent and expedient (see BVerfG, judgment of the First Senate of 9 February 2010 – 1 BvL 1/09 et al. –, www.bverfg.de).

Finally, it also happens that no deadline is set at all. Recently, for instance, a deadline was regarded as being dispensable for the required new provision, given that the Court itself had ordered a transitional provision for the period up to a new provision (see BVerfG, order of the First Senate of 21 July 2010 – 1 BvR 420/09 –, www.bverfg.de). In the case at hand, a statutory provision according to which the father of a child born out of wedlock was generally excluded from parental custody of his child without the consent of the mother was declared to be incompatible with the father's parental right which is protected by fundamental rights (Article 6.2 of the Basic Law). A declaration of the nullity of the provision in question could not be considered because it would have entailed the fathers in question not even being able to receive custody with the consent of the mother until there was a new statutory provision. Furthermore, the provisional application of the unconstitutional provision would have led to a perpetuation of the violation of the fundamental right, the consequences of which because of the particular significance attaching in such matters to the time factor with regard to the child's bond with the parent in question would possibly no longer have been reversible. Furthermore, the provision in question had already been declared by the European Court of Human Rights to be incompatible with Article 14 in conjunction with Article 8 of the ECHR (see European Court of Human Rights, judgment of 3 December 2009, no. 22028/04, *Zaunegger vs. Germany*). Under these special circumstances, the Court considered itself to be entitled to create a temporary provision of its own to which end the family court assigns to the parents, on request by a parent, parental custody or a part of such custody to the parents jointly where one may anticipate that this is in the child's best interests (BVerfG, loc. cit.). It was hence unnecessary to set a deadline for the legislature the purpose of which is ultimately to ensure that the interim state of temporary further applicability of a form which per se is unconstitutional normally occurring with a mere declaration of incompatibility, is ended in a suitable period.

According to the provisions contained in the Federal Constitutional Court Act, legal acts or omissions of the Government are also not to be declared null and void in disputes between organs even in the event of unconstitutionality, but only a finding is to be handed down on whether the impugned act or omission violates rights of the opponent (§ 67 sentence 1 of the Federal Constitutional Court Act). Also, however, a merely declaratory finding is binding on all constitutional organs of the Federation, as well as on all courts and authorities (see § 31.1 of the Federal Constitutional Court Act).

6. b) Parliament can invalidate the constitutional court's decision: specify conditions.

A power of Parliament to declare a ruling of the Federal Constitutional Court to be invalid does not exist according to German law. It is however possible for the legislature to amend the Basic Law in order thus to make a provision compatible with the constitution, with which the Federal Constitutional Court has declared it to be incompatible, if the boundaries here are complied with to which constitutional amendments are also subject according to the Basic Law (Article 79.3 of the Basic Law prohibits constitutional amendments which affect the principles contained in Articles 1 and 20 of the Basic Law; accordingly, in particular the obligation incumbent on all state powers to respect human dignity and the underlying principles of the structure of the state may not be infringed).

Particularly in this year, there has been a constitutional amendment in reaction to a judgment of the Federal Constitutional Court. The Court had declared a statutory provision to be unconstitutional which obliged local authorities to administrate certain social benefits for job-seekers jointly with the Federal Employment Agency because of a violation of the guarantee of self-administration of local authorities, and had declared a further provision of the Basic Law on administrative organisation unconstitutional (BVerfGE 119, 331 <361 et seq.>). The Act Amending the Basic Law (*Gesetz zur Änderung des Grundgesetzes*) of 27 July 2010 (Federal Law Gazette (*Bundesgesetzblatt* – BGBl. I p. 944) thereupon inserted an Article 91e into the Basic Law which is to make it possible to continue the organisation of authorities which was declared to be unconstitutional.

7. Are there any institutionalized cooperation mechanisms between the Constitutional Court and other bodies? If so, what is the nature of these contacts / what functions and powers shall be exerted on both sides?

The opposing party and the other parties are to be heard in proceedings before the Federal Constitutional Court (§ 23 of the Federal Constitutional Court Act). In the constitutional complaint proceedings, where there is no opposing party, the constitutional organ whose act or omission is complained of, and if the impugned act was committed by a minister or a Federal or *Land* authority, the competent minister, is to be given an opportunity to make a statement (§ 94.1 and § 94.2 of the Federal Constitutional Court Act; courts are also considered as authorities within the meaning of these provisions). Apart from those obligations to hear and rights to make a statement, there are no formal cooperation obligations. Contacts beyond this in concrete sets of proceedings in which the other respective parties do not participate would already be incompatible with their right to a hearing in court in accordance with law (Article 103.1 of the Basic Law). The principle that a selective exchange of information – including and excluding individual parties – concerning ongoing proceedings is not permissible is taken very seriously in practice. Any attempt to

establish such contact on the part of other constitutional organs is hence rare. It is known that a Federal Minister attempted in a party ban procedure to contact the then President of the Court and chairperson of the competent Senate by telephone in order to explain certain difficulties to her. The President refused to take the Minister's call.

According to a long-standing tradition, the Federal Constitutional Court meets at roughly two-year intervals with the Federal Government and meets the Presidium of the *Bundestag* and the chairpersons of the parliamentary groups in the *Bundestag* for a general exchange of information once per legislative term. This tradition grew out of the fact that the Federal Constitutional Court – as well as the Federal President, the *Bundestag*, the *Bundesrat* and the Federal Government – is one of the five constitutional organs provided for by the Basic Law and that the other constitutional organs also maintain a regular exchange of information. It is however very closely observed that ongoing or foreseeable sets of proceedings and legal issues relating to such sets of proceedings are not discussed at these meetings.

II. RESOLUTION OF ORGANIC LITIGATIONS BY THE CONSTITUTIONAL COURT

Prof. Dr. h.c. Rudolf Mellinghoff
Justice of the Federal Constitutional Court

Introduction

In addition to regulating the safeguarding of fundamental and human rights, the Constitution provides for a basic system of state rule and competences for state power. The Constitution regulates the essentials of the organisation of state power; in particular, the state organs are created, the procedure relating to their establishment and composition are defined, and the competences are determined which accrue to them. Given that several state organs are vested with rights of their own, it goes without saying that conflicts arise between them as to the lawfulness of their activities or omissions.

If such conflicts are to be ruled on not solely by political power, but also by legal principles, it is consistent to have a court decide on the disputes (see Stern, in: *Bonner Kommentar zum GG – Zweitbearbeitung –*, Art. 93, marginal no. 73). Since this relates to central matters of constitutional law, such disputes belong before a Constitutional Court.

An organic litigation, or dispute between organs (*Organstreit*) is however less about equalising subjective legal positions as they are known, for instance, from civil law. It is more primarily a matter of clarifying the system of competences set out in the Constitution. Review by the Constitutional Court hence does not serve primarily to bring about the legal positions of individual state organs, but the ruling of the Constitutional Court is to clarify the Constitution's competence system, and hence to safeguard functioning and ability to function in a state based on the division of powers.

Disputes between organs are as a rule among the highly political procedures before a Constitutional Court. With the aid of a dispute between organs, it is above all the respective political minorities in the Federal Republic of Germany which attempt to assert their rights towards the majority; the dispute between organs is a major tool of the opposition. Nonetheless, the dispute between organs is not a political, but rather a court procedure. The Constitutional Court rules in disputes between organs on the Constitution's competence system where conflicts of constitutional law flare up. The dispute between organs leads not only to a ruling on a concrete dispute between constitutional organs, but at the same time it also forms the occasion for an interpretation of the Constitution. As a major procedure on the system of competences

of the Constitution, the dispute between organs forms part of the core of constitutional jurisdiction.

A. The nature of disputes between organs

Disputes between organs are characterised by constitutional organs (of the Federation) exercising before an independent instance differences of opinion on the legal positions which are guaranteed to them in the Constitution. Constitutional organs are constituted by the Constitution in terms of their existence, status and essential competences such that, by virtue of their existence and function, they lend the State its specific shape, and by means of their activity participate in the supreme leadership of the State (Stern, in: *Bonner Kommentar zum GG – Zweitbearbeitung –*, Art. 93, marginal no. 92). The conflicts relating to the respective rights of the organs politically are as a rule disputes between a majority and a minority (Stern, in: *Bonner Kommentar zum GG – Zweitbearbeitung –*, Art. 93, marginal no. 76).

In disputes between organs, as already suggested by the word "dispute", two parties face one another who act as an applicant and an opposing party before the Federal Constitutional Court. The dispute between organs is hence a contradictory procedure which is contingent on a constitutional relationship existing between the applicant and the opposing party (see BVerfGE 2, 347 <365>; 45, 1 <29>; 104, 151 <193-194>). The dispute between organs serves not to abstractly review the objective constitutionality of the activity of the organ, but is intended to clarify the delimitation of the competences if a dispute occurs with regard to them (see BVerfGE 104, 151 <193-194>; 118, 244 <257>.

1. The historical development of disputes between organs

The dispute between organs is a core component of state jurisdiction in Germany, and is particularly rooted in the German constitutional tradition (Schlaich/Korioth, *Das Bundesverfassungsgericht*, 8th ed. 2010, marginal no. 80 et seq.). In the course of the constitutional system in the 19th century, the various states in Germany adopted constitutions which allocated rights to the rulers and to the estates or to the representations of the people. Since, however, each legal provision requires interpretation, and different opinions may be expressed in this process, most German constitutions provided for disputes on the content and the interpretation of the constitutions to be carried out before a state court.

For instance, § 153 of the Saxon Constitution of 1831 already stated as follows: "If there is doubt as to the interpretation of individual points of the constitutional document, and if doubt cannot be eliminated by an agreement being reached between the Government and the estates, the reasons for and against, both on the side of the Government and of the estates, shall be submitted to the State Court for a ruling." (Schlaich/Korioth, *Das Bundesverfassungsgericht*, 8th ed. 2010, marginal no. 80 with further references).

At federal level, however, the dispute between organs was not entrenched in constitutional law until the establishment of the Basic Law. The first democratically adopted constitution in Germany, the St. Paul's Church Constitution *(Paulskirchenverfassung)* of 1849, did provide for a constitutional dispute for the *Reich*. It was not implemented, however. The *Reich* Constitution of 1871 and the Weimar *Reich* Constitution of 1919 left the dispute between organs to the political equalisation of power, and did not provide for any settlement of disputes by an independent Constitutional Court (Schlaich/Korioth, *Das Bundesverfassungsgericht*, 8th ed. 2010, marginal no. 81; Stern, in: *Bonner Kommentar zum GG – Zweitbearbeitung* –, Art. 93, marginal no. 69; Voßkuhle, in: v. Mangoldt/Klein/Starck, *GG*, Vol. 3, 5th ed. 2005, Art. 93, marginal no. 96).

Not lastly because of the experience in the Weimar Republic, the Basic Law placed the decision on disputes between constitutional organs of the Federation in the hands of the Federal Constitutional Court. The establishment of a constitutional jurisdiction signified opting for making the substantive binding of all state power to the Constitution amenable to a subsequent review by independent justices in court proceedings according to the standard specifically set by the Constitution, and acknowledging the resultant ruling as legally final (W. Meyer, in: von Münch/Kunig, *GG*, 5th ed. 2003, Art. 93, marginal no. 4).

2. The jurisdiction of the Federal Constitutional Court for disputes between organs

The Federal Constitutional Court may not involve itself in proceedings at its own initiative, but must restrict itself to types of applications and procedures which are allotted to it by the Basic Law. For this reason, the Federal Constitutional Court also depends on the assignment of tasks by the Constitution for the settlement of disputes between organs. Article 93 of the Basic Law designates the types of procedure allotted to the Federal Constitutional Court and regulates the jurisdiction of the Court.

According to Article 93.1 no. 1 of the Basic Law, the Federal Constitutional Court decides amongst other things 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. Hence, federal disputes between organs may be submitted to the Federal Constitutional Court for a ruling. It is the *Land* Constitutional Courts which have jurisdiction as a matter of principle for disputes between organs within a *Land*. Disputes between *Land* organs may only be brought before the Federal Constitutional Court according to Article 93.1 no. 4 of the Basic Law in exceptional cases, such as where there is no *Land* Constitutional Court (see on this VII below).

Details of the procedural prerequisites are not regulated in the Basic Law, but in the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG). § 13

no. 5 and §§ 63 to 68 of the Federal Constitutional Court Act lend concrete form to the prerequisites of disputes between organs established in § 93.1 no. 1 of the Basic Law; no constitutive significance is to be allocated to the dispute in this respect, given that it only fills with procedural life the framework prescribed by the Constitution (Storost, in: Umbach/Clemens/Dollinger, *BVerfGG*, 2nd ed. 2005, § 13, marginal no. 6; Voßkuhle, in: v. Mangoldt/Klein/Starck, *GG*, Vol. 3, 5th ed. 2005, Art. 93, marginal no. 90).

3. Major characteristics

In a dispute between organs, a request is made for a finding that an act or omission on the part of the opposing party was in violation of the Basic Law. This is a contradictory procedure in which as a rule no decision is handed down on an abstract legal matter, but a concrete legal dispute is decided upon (BVerfGE 2, 347 <365>; 45, 1 <29>; 104, 151 <193-194>). Disputes between organs serve to protect the rights of the state organs in their relationship with one another, and do not carry out general constitutional supervision (BVerfGE 100, 266 <268>). In the event of a dispute occurring, the Federal Constitutional Court decides on the interpretation of the Constitution. Even if, hence, the ruling on the dispute constitutes the essence of the dispute between organs, the Federal Constitutional Court may in its ruling at the same time help to rule on a legal question which is of relevance to the interpretation of the provision of the Basic Law (see § 67 sentence 3 of the Federal Constitutional Court Act).

The dispute between organs opens to the constitutional organs the possibility to dispute on the attribution of the competences that can be considered in the system of the separation of powers for a specific factual context. These may be questions of legislative competence, of maintaining the obligations of cooperation entrenched in the Basic Law (BVerfGE 104, 151 <194>) or indeed of individual acts relating to the status of the applicant as a constitutional organ. Since constitutional organs do not have subjective rights – they define themselves exclusively via their competences and their status in the constitutional system –, for instance the breach of fundamental rights may not constitute the subject-matter of a dispute between organs.

A comprehensive review of federal law as to its constitutionality can therefore not be achieved via disputes between organs. For this there is the abstract review of statutes, which can be initiated according to Article 93.1 no. 2 of the Basic Law in conjunction with §§ 13 no. 6 and 76 et seq. of the Federal Constitutional Court Act on request by the Federal Government, by a *Land* government or by one-third of the members of the *Bundestag*.

Disputes between organs also do not open to Parliament the possibility of general legal supervision of the acts of the other constitutional organs. The Federal Constitutional Court indicates this in a decision relating to a dispute between the *Bundestag* and the Federal Government:

> *"The Basic Law has established the* Bundestag *as a legislative organ, but not as a comprehensive 'legal supervisory organ of the Federal Government; (...). Accordingly, no 'right of its own' of the* Bundestag *can be derived from the Basic Law such that any substantive or formally unconstitutional conduct on the part of the Federal Government should be desisted from. 'Rights of the* Bundestag' *within the meaning of § 64.1 of the Federal Constitutional Court Act, rather, refers solely to those rights which are assigned to the* Bundestag *for its own exclusive exercise or as rights of participation or where compliance is required in order to guarantee the exercise of its competences and of its acts (...)." (BVerfGE 68, 1 <72-73>).*

The dispute between organs hence serves to delimitate the competences of the constitutional organs from one another, but not to review in a detached manner the objective constitutionality of the acts of the organs (see also BVerfGE 104, 151 <193-194>; 118, 244 <257>).

B. Parties to disputes between organs

According to Article 93.1 no. 1 of the Basic Law, the disputes on which a dispute between organs is based are those concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by the Basic Law or by the rules of procedure of a supreme federal body. Hence, supreme federal organs and other parties which are to be separated from one another as different groups are able to be party to disputes between organs.

1. Supreme federal organs

The highest federal organs are not listed in detail in Article 93.1 no. 1 of the Basic Law. The use of the term "supreme" implies first and foremost that the federal organs in question may not be subordinated to any other organ in organisational and hierarchical terms (Voßkuhle, in: v. Mangoldt/Klein/Starck, *GG*, Vol. 3, 5th ed. 2005, Art. 93, marginal no. 102). Since disputes between organs may only be pursued between players which are involved in constitutional life (see BVerfGE 1, 208 <221>; 27, 240 <246>), one may also conclude that only those organs may be parties to which the Basic Law allots the exercise of their own tasks in the political leadership of the State.

The group of supreme federal organs hence includes the *Bundesrat*, the Federal President, the *Bundestag*, the Federal Government, the Joint Committee (*Gemeinsamer Ausschuss*) and the Federal Convention (*Bundesversammlung*) (Pietzcker, in: *Festschrift 50 Jahre Bundesverfassungsgericht* Vol. I, 2001, 587 <593> with further references; see also Korioth, in: v. Mangoldt/Klein/Starck, *GG*, Vol. 2, 5th ed. 2005, Art. 50, marginal no. 10). Since the Federal Constitutional Court does not act within the leadership of the State, it may per se not initiate disputes

between organs; Stern, in: *Bonner Kommentar zum GG – Zweitbearbeitung* –, Art. 93, margin no. 92 et seq.). The list of applicants for disputes between organs which is found in § 63 of the Federal Constitutional Court Act is incomplete since it is restricted to the Federal President, the *Bundestag*, the *Bundesrat* and the Federal Government. Problems under constitutional law however do not emerge from the discrepancy, given that Art 93.1 no. 1 of the Basic Law (and its interpretation) in any case takes priority, as a lex superior, over § 63 of the Federal Constitutional Court Act, which only has a declaratory effect.

2. Sections of organs within the meaning of § 63 of the Federal Constitutional Court Act as other parties according to Article 93.1 no. 1 of the Basic Law

Other parties within the meaning of § 93.1 no. 1 of the Basic Law which have been vested with rights of their own by the Basic Law or by the rules of procedure of a supreme federal organ are, firstly, sections or sub-divisions of supreme federal organs (Schlaich/Korioth, *Das Bundesverfassungsgericht*, 8th ed. 2010, marginal no. 88; Voßkuhle, in: v. Mangoldt/Klein/Starck, GG, Vol. 3, 5th ed. 2005, Art. 93, marginal no. 105).

These include the Presidents of the *Bundestag* and of the *Bundesrat* (see BVerfGE 27, 152 <157>, 73; 1 <30>), the members of the Federal Government (see BVerfGE 45, 1 <28>; 67, 100 <126-127>), political committees (Schlaich/Korioth, *Das Bundesverfassungsgericht*, 8th ed. 2010, marginal no. 88; Umbach, in: Umbach/Clemens/Dollinger, *BVerfGG*, 2nd ed. 2005, §§ 63, 64, marginal no. 7 referring to BVerfGE 2, 143 <160, 165>), parliamentary groups (see BVerfGE 2, 143 <152 et seq.>; 90, 286 <336>; 100, 266 <268>), parliamentary groups within a sub-committee (see BVerfGE 67, 100 <124>) and groups within the meaning of § 10.4 of the Rules of Procedure of the *Bundestag* (GO-BT) (groups of delegates combining without reaching the size of a parliamentary group, see BVerfGE 84, 304 <318>; 96, 264 <276>). By contrast, mere voting majorities or minorities are not regarded as having the capacity to be a party (see BVerfGE 90, 286 <341-342>).

In the *Bundesrat*, its President, the Presidium, the committees, the members of the *Bundesrat* as well as the entirety of the members of a *Land* in the *Bundesrat*, are regarded as being parties to disputes between organs (Engels, *Jura 2010*, pp. 421 <423>).

3. Examples: The participation of parliamentary groups in disputes between organs in the recent case-law of the Federal Constitutional Court

Disputes between organs have recently been lodged particularly frequently by parliamentary groups of the German *Bundestag* before the Federal Constitutional Court. This is documented by the recent rulings of the Federal Constitutional Court in disputes between organs:

a) In its order of 4 May 2010 (2 BvE 5/07, EuGRZ 2010, 343), the Federal Constitutional Court had to deal with whether logistical support services which had been provided by 1,100 soldiers and civilian employees of the Federal Armed Forces (*Bundeswehr*) for security forces of the G8 summit at the Baltic resort of Heiligendamm (from 6 to 8 June 2007) were able to be ordered solely by the Federal Minister of Defence without the participation of the German *Bundestag*. The applicant was the *Bundestag* parliamentary group of Bündnis 90/Die Grünen, which complained of a violation of Article 87a.2 of the Basic Law because the *Bundestag* had not debated on the deployment of the Federal Armed Forces in Heiligendamm.

The Federal Constitutional Court rejected the motions in disputes between organs as being at any rate manifestly unfounded.

b) The Federal Constitutional Court found by its order of 7 May 2008 (BVerfGE 121, 135) that the Federal Government had violated the German *Bundestag*'s right of participation under the provisions of the Basic Law which concern defence in the form of the mandatory requirement of parliamentary approval for the deployment of armed forces. The Federal Government was said to have omitted to obtain the approval of the *Bundestag* to involve German soldiers in NATO measures for the surveillance of Turkish airspace from 26 February to 17 April 2003. The *Bundestag* parliamentary group of the FDP had acted as the applicant in these proceedings.

c) The Federal Constitutional Court ruled by its order of 3 July 2007 (BVerfGE 118, 244) that the participation of the Federal Armed Forces in the expanded ISAF mandate in Afghanistan resulting from the *Bundestag*'s resolution of 9 March 2007, did not infringe the rights of the German *Bundestag* under Article 59.2 sentence 1 of the Basic Law. The applicant in this dispute between organs, the *Bundestag* parliamentary group of the PDS/Die Linke, submitted that the Federal Government, as the opposing party, had participated in the further development of the NATO Treaty outside the Treaty's statutory framework of authorisation, and in doing so had violated rights of the *Bundestag* under Article 59.2 of the Basic Law.

4. Other parties in accordance with Article 93.1 no. 1 of the Basic Law which are not sections of organs within the meaning of § 63 of the Federal Constitutional Court Act

In contradistinction to § 63 of the Federal Constitutional Court Act, which "only" wishes to accord ability to be a party to disputes between organs to sections of the organs *Bundestag*, *Bundesrat* and the Federal Government vested with rights of their own by the Basic Law or the Rules of Procedure of the *Bundestag* or of the *Bundesrat*, Article 93.1 no. 1 of the Basic Law expands the group of participants to include those in whom rights of their own were vested by means of the Basic Law or the rules of procedure of a supreme federal organ. Practical significance is assumed by this distinction for the participation of political parties and members of the *Bundestag* in disputes between organs (Voßkuhle, in: v. Mangoldt/Klein/Starck, *GG*,

Vol. 3, 5th ed. 2005, Art. 93 marginal no. 106; Schlaich/Korioth, *Das Bundesverfassungsgericht*, 8th ed. 2010, marginal no. 90 et seq.).

a) The Members of the German *Bundestag*

An individual Member of the *Bundestag* is a potential party to a dispute between organs insofar as he or she alleges that an impugned act directly violates his or her status emerging from Article 38 of the Basic Law (BVerfGE 70, 324 <350>; 90, 286 <342>). He or she is not a part of the *Bundestag* when involved in disputes between organs, but is an applicant by force of his or her own status as an organ (see BVerfGE 60, 374 <378>; 114, 121 <146>).

The Members of the *Bundestag* are elected in general, direct, free, equal and secret elections (Article 38.1 sentence 1 of the Basic Law) for an electoral term of four years (Article 39.1 of the Basic Law). They are the representatives of the whole people, not bound by orders and instructions, and responsible only to their conscience (Article 38.1 sentence 2 of the Basic Law). As an organ directly elected by the people, the *Bundestag* is the representative decision-making organ in the state of the Basic Law (see BVerfGE 80, 188 <217>) and only appropriately represents the people if it is involved in this will-formation as a whole (see BVerfGE 44, 308 <315-316>). The deputies are a part of the constitutional organ which is the *Bundestag*, hold an office (Article 48.2 sentence 1 of the Basic Law), exercise public power (Pieroth, in: Jarass/Pieroth, *GG*, 10th ed. 2009, Art. 38, marginal no. 25) and must act in the will-formation of Parliament so that, in a representative democracy, parliamentary orders come into being (see BVerfGE 44, 308 <316>). They therefore have various rights to participate in parliamentary procedures in order to effectively carry out the task assigned to them by the Constitution.

In a dispute between organs, the individual deputy may claim the violation or endangerment of any right which is linked constitutionally with his or her status (BVerfGE 43, 142 <148>; 60, 374 <379>; 62, 1 <31>; 70, 324 <350>; 80, 188 <208-209>; 94, 351 <362>; 99, 19 <28>; 108, 251 <271>). His or her application is admissible according to § 64.1 of the Federal Constitutional Court Act if it cannot be ruled out from the outset that the opponent has violated or directly endangered rights of the applicant resulting from a constitutional legal relationship between those concerned, through the impugned legally material measure (see BVerfGE 94, 351 <362-363>; 99, 19 <28>; 104, 310 <325>; 108, 251 <271-272>). According to these measures, *Bundestag* deputies have inter alia appealed against constrictions of their right to speak in the plenum (see BVerfGE 10, 4), the early dissolution of the *Bundestag* (see BVerfGE 62, 1; 114, 121) or the obligation to notify activities pursued in addition to their mandate and to publish income made from them(BVerfGE 118, 277). It is however not a separate right of the *Bundestag* deputy if compliance with the institutional statutory reservation (see BVerfGE 80, 188 <215>) or compliance with the *Bundestag*'s own original competences vis-à-vis the Federal Government is called for (see BVerfGE 90, 286 <342>).

b) Political parties

According to Article 21.1 sentence 1 of the Basic Law, the parties participate in the formation of the political will of the people. They achieve this by being able to obtain seats as deputies by drafting lists, and b nominating candidates for elections to the *Bundestag* or the *Landtage* (see also Löwer, in: Isensee/P. Kirchhof, *Handbuch des Staatsrechts* Vol. III, 3rd ed. 2005, § 70, marginal no. 20). It does not necessarily emerge from this function that political parties may become parties to disputes between organs. The Federal Constitutional Court has however afforded to the parties which are active at federal level in the exercise of their functions a quality as an organ (fundamentally BVerfGE 4, 27 <31>) and has upheld this case-law despite being the object of considerable criticism in the literature (see Pietzcker, in: *Festschrift 50 Jahre Bundesverfassungsgericht* Vol. I, 2001, 587 <595> with further references) insofar as the constitutional legal dispute relates to the status of a political party as a subject of political will-formation and the opposing party is another constitutional organ (see BVerfGE 66, 107 <115>; 73, 40 <65>; 74, 44 <48 et seq.>; 79, 379 <383>). In this field, the parties came so close to state organ will-formation that they were said to have disputes between organs available to defend their status.

Provisions on party funding in the Law on Political Parties (*Parteiengesetz*) equally relate to the constitutional status of the political parties as factors of constitutional life in political will-formation, and are dealt with by the Federal Constitutional Court in the type of proceedings of the dispute between organs, this however not applying to the disbursement or repayment orders of the President of the *Bundestag* also emerging from party funding (see BVerfGE 27, 152 <157>; Pietzcker, in: *Festschrift 50 Jahre Bundesverfassungsgericht* Vol. I, 2001, 587 <594>). A political party can additionally avail itself of disputes between organs if it objects to the publicity advertising of the Federal Government in electoral campaign periods (see BVerfGE 44, 125 <136-137>).

Outside of this core area, it is however incumbent on the parties to seek their legal protection, after having exhausted the legal remedies before the non-constitutional courts, by means of a constitutional complaint. This applies particularly when the party wishes to assert its constitutional status against a public-law broadcaster (see BVerfGE 7, 99 – a broadcaster as an opposing party is not another constitutional organ).

Also associations of voters and other private associations are not able to be parties in disputes between organs, since they do not meet the prerequisites of § 2.1 of the Law on Political Parties – (see BVerfGE 1, 208 <227>; 13, 54 <81 et seq.>; 74, 96; 79, 379 <384-385>).

5. The loss of ability to be a party

The ability of a constitutional organ to be a party in a dispute between organs that is pending before the Federal Constitutional Court does not necessarily end with the change in the legal representative of the organ or the natural persons who represent

the constitutional organ. In particular with collegial organs such as the German *Bundestag*, it becomes clear that the legal status as an organ is independent from the legal status of the natural persons who are members of the collegial organ. The expiry of an electoral period does not automatically lead to the loss of the ability to be a party in a dispute between organs that is pending before the Federal Constitutional Court (see BVerfGE 4, 144 <152>). The principle of the personal and conceptual discontinuity of parliament only applies to the current, specific *Bundestag*, but not to the *Bundestag* as a constitutional institution (see Bethge, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, *Bundesverfassungsgerichtsgesetz*, § 63, marginal no. 81).

The principles of the continuation of the ability of constitutional organs which are involved in the dispute between organs to be a party or to join proceedings do not only apply to collegial organs. These principles also apply accordingly to other constitutional organs. A deputy's ability to be a party or to join proceedings does not end on leaving Parliament. Rather, the status of the deputy at the time when he or she brings the dispute between organs before the Federal Constitutional Court is decisive (see BVerfGE 102, 224 <231>).

Having said that, initiators such as the *Bundestag* or the *Bundesrat* are not precluded from withdrawing an application to implement disputes between organs when their majorities have changed (Pietzcker, in: *Festschrift 50 Jahre Bundesverfassungsgericht* Vol. I, 2001, 587 <598>).

C. Subject-matter of the proceedings

The subject-matter of disputes between organs is the concrete dispute regarding the competences or the status of constitutional organs. § 64.1 sentence 1 of the Federal Constitutional Court Act describes this in terms of "an act or omission of the opposing party" harming or directly endangering the applicant's rights and duties assigned to him or it by the Basic Law. The impugned act or omission must exist in objective terms and be legally material.

Any conduct on the part of the opposing party can be regarded as legally material which is suited to harm the legal status of the applicant. An act within the meaning of § 64.1 of the Federal Constitutional Court Act is not restricted to only being one single act (see BVerfGE 93, 195 <203>), but may also be the issuance of a law (see BVerfGE 1, 208 <220>; 4, 144 <148>; 82, 322 <335>; 92, 80 <87>; 102, 224 <234>; 103, 164 <169>) or cooperation in an act of creating provisions (see Bethge, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, *Bundesverfassungsgesetz*, § 64, marginal no. 23). The resolution of parliament on the rejection of a legal initiative can also be qualified as an act in the dispute between organs (see BVerfGE 80, 188 <215>). Also, the issuance of or change to a provision of the Rules of Procedure of the German *Bundestag* may constitute an act within the meaning of § 64.1 of the Federal Constitutional Court Act if it is able to mean that the applicant is currently legally affected (see BVerfGE 80, 188 <209>; 84, 304 <318>). The application of the Rules

of Procedure themselves, by contrast, is not a permissible object of attack in disputes between organs (see BVerfGE 80, 188 <209>). The rejection of a motion for recognition as a parliamentary group or as a group in the German *Bundestag* according to § 10.4 of the Rules of Procedure of the *Bundestag* also does not constitute an act which is able to give rise to a dispute between organs (BVerfGE 84, 304 <318>).

Acts that are not legally material do not constitute viable subject-matter of a dispute between organs. Legal materiality is missing if the acts only take effect within an organ, or if they are only preparatory in nature for another act which is legally material. A mere draft Bill is hence even less viable subject-matter of disputes between organs (see BVerfGE 80, 188 <212>), as is the issuance of a statute which requires a separate act of implementation (BVerfGE 94, 351 <363>). The complaints of the speaker of parliament towards a deputy (BVerfGE 60, 374 <382>), disparaging statements on the part of members of the Government towards political parties (BVerfGE 13, 123 <125>; 40, 287 <292>; 57, 1 <5>), or statements on the part of a parliamentary group that a draft Bill contained unconstitutional provisions (BVerfGE 2, 143 <168, 171-272) do not constitute legally material acts. This also applies to the preliminary ascertainments in the context of the scrutiny of a deputy (BVerfGE 97, 408 <414>) and the response to an oral question in Parliament (BVerfGE 13, 123 <126>; 57, 1 <5>).

Omission, conversely, means to not carry out an act (Bethge, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, *Bundesverfassungsgerichtsgesetz*, § 64, marginal no. 36). Even more than with a positive act, it is a matter of the legal relevance of the omission. Omissions only take on legal significance if there is a legal obligation to act (Klein, in: Benda/Klein, *Verfassungsprozessrecht*, 2nd ed. 2001, § 26, marginal no. 1025). If this is not the case, the application to find that the omission is unconstitutional must be rejected as inadmissible because of the lack of admissible subject-matter of the motion (BVerfGE 104, 310). A constitutionally relevant omission may for instance consist of the Federal President refusing to sign a federal statute, the Federal Government refusing to respond to a parliamentary question or the Federal Government refusing to permit the *Bundestag* or the committee of inquiry to inspect the files (Bethge, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, *Bundes-verfassungsgerichtsgesetz*, § 64, marginal no. 36).

It may not be possible to make a clear distinction in individual cases between a (positive) act and the omission of an act. This makes it a matter of the "focus" of the complaint (Bethge, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, *Bundesverfassungs-gerichtsgesetz*, § 64, marginal no. 23).

Since constitutional organs do not have subjective rights – they define themselves exclusively via their competences and their status in the constitutional structure –, the violation of fundamental rights cannot be made a matter for disputes between organs.

D. Procedural prerequisites

1. Empowerment to file a motion

Since the dispute between organs serves to enforce the rights of the organ per se, a motion is only admissible if the applicant asserts that he or she or the organ to which he or she belongs is violated or directly endangered by an act of the opposing party in his or her rights and duties assigned to him or her by the Basic Law (Article 64.1 of the Federal Constitutional Court Act). By these means, it is to be prevented in procedural terms that the applicant takes up third-party rights by proxy, for which there is no provision, without at least being a part of the organ in question. Whilst the ability to be a party at the same time abstractly asks as to the viability as an applicant and opposing party, the power to file a motion is concerned with the concrete relationship under procedural law and the possibility of a concrete violation of rights (Löwer, in: Isensee/P. Kirchhof, *Handbuch des Staatsrechts* Vol. III, 3rd ed. 2005, § 70, marginal no. 21). The applicant must substantiatedly demonstrate that the act impugned by him or her is legally material, in other words that it is not provisional, preparatory or merely executory in nature (see BVerfGE 97, 408 <414>), or that a constitutional obligation to carry out the act in question could not be ruled out (see BVerfGE 103, 81 <86>).

a) Relationship under constitutional law

The legal position that is alleged to have been violated must be based on constitutional law (see BVerfGE 102, 224 <231-232). Rights which are based solely on provisions of simple non-constitutional law are not sufficient to give rise to the empowerment to file a motion (see BVerfGE 103, 81 <88-89>). However, affiliation of the claimed legal position to constitutional law by itself is not sufficient. The potentially -violated legal position must over and above this be of an organ nature, that is in terms of the law on competences or on status (Bethge, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, *BVerfGG*, § 64, marginal no. 62); it must encompass the right asserted by the applicant (see BVerfGE 87, 207 <208-209>) and have been assigned to it for exclusively its own exercise or participation.

A relationship under constitutional law hence only applies if constitutional organs or sections of constitutional organs stand on both sides of the dispute and – cumulatively – dispute about constitutional positions (Benda/Klein, *Verfassungsprozessrecht*, 2nd ed., 2001, marginal no. 1011). There is no latitude for a general, abstract review of the constitutionality of an impugned act, separated from any own rights of the applicant, in the dispute between organs (see BVerfGE 68, 1 <73>; 73, 1 <30>; 80, 188 <212>; 104, 151 <193-194>). Respect for other (constitutional) law cannot be enforced in the dispute between organs. The dispute between organs is not an objective complaint procedure (see BVerfGE 104, 151 <193-194>); it serves to protect the rights of the state organs in their relationships with one another, but not in terms of general constitutional supervision (see BVerfGE 100, 266 <268>).

A deputy cannot for instance claim in the dispute between organs that a specific act requires to be settled in a specific manner by means of a formal statute (see BVerfGE 80, 188 <214-215>) unless this emerges exceptionally and directly from his or her status. He or she equally cannot invoke specific fundamental rights-orientated safeguarding mechanisms, such as the primacy of the law, a legal reservation or the principle of definiteness. The deputy can exclusively assert rights in the dispute between organs which emerge from his or her status as an organ within the meaning of Article 38.1 sentence 2 of the Basic Law (see BVerfGE 94, 351 <365>; 99, 19 <29>). The complaint of any violations of fundamental rights is hence ruled out from the outset (see BVerfGE 84, 290 <299>; 94, 351 <365>; 99, 19 <29>). Fundamental rights are assigned to the formed state organs neither as rights of their own, nor indeed for fiduciary exercise. The dispute between organs is not a conflict over fundamental rights.

b) Own rights

In so far as the applicant wishes to assert rights of his or her own, these legal positions must emerge from the Basic Law itself, and must have been assigned to him or her for exclusive exercise or participation (see BVerfGE 68, 1 <72>).

An individual member of the *Bundestag* is not a part of the *Bundestag* in disputes between organs, but is an applicant with independent status as an organ (see BVerfGE 60, 374 <378>; 114, 121 <146>) insofar as he or she claims that an impugned act or omission directly violates his or her status according to Article 38 of the Basic Law (BVerfGE 70, 324 <350>; 90, 286 <342>). Groups in the *Bundestag* have an independent right to retain the minority rights that are assigned to them (BVerfGE 70, 324 <351>). Parties may invoke the right to equal opportunities assigned to them from Article 21.1 sentence 2 in conjunction with Article 3.1 of the Basic Law (see BVerfGE 73, 1 <28-29>; 73, 40 <65-66>; 84, 290 <299>); they may however assert neither fundamental rights nor compliance with objective constitutional law as rights of their own (BVerfGE 73, 1 <29>; 84, 290 <299>; 104, 14 <20>).

c) Organ rights

§ 64.1 of the Federal Constitutional Court Act provides that the applicant may also assert rights of the organ to which he or she belongs in his or her own name. This is a case of being a statutory legal representative of the organ, which is as a matter of fact already provided for in Article 93.1 no. 1 of the Basic Law (Voßkuhle, in: v. Mangoldt/Klein/Starck, *GG*, Vol. 3, 5th ed. 2005, Article 93 marginal no. 110; Pietzcker, in: *Festschrift 50 Jahre Bundesverfassungsgericht* Vol. I, 2001, 587 <605>). It is based on the concept of minority protection and is to enable the opposition to have adherence to the distribution of competences among the state organs reviewed even if the majority of the organ does not consider its rights to have been violated (see Schlaich/Korioth, *Das Bundesverfassungsgericht*, 8th ed. 2010, marginal no. 94; Stern, in: *Bonner Kommentar zum GG –Zweitbearbeitung* -, Art. 93, marginal no. 76).

Practical significance has come to attach to the assertion of organ rights, in particular for the parliamentary groups which can complain of breaches of competence against the *Bundestag* as an overall organ (see BVerfGE 1, 351 <359>; 2, 143 <165>; 68, 1 <65>; 90, 286 <336>; 100, 266 <268>; 104, 151 <193>).

d) Possibility of a breach of rights

Within the bounds of the admissibility of disputes between organs, the applicant must only claim an impairment of a right and, if this is disputed, must present it as being possible. It is sufficient, but also necessary, for the applicant to be specifically affected in his or her legal sphere (see BVerfGE 1, 208 <228-229>). The empowerment to file a motion applies if it cannot be ruled out from the outset that the opposing party has violated or directly endangered rights of the applicants which exist with regard to the opposing party by means of the impugned, legally material act (see BVerfGE 94, 351 <362-363>; 99, 19 <28>; 104, 14 <19>). Whether a violation or impairment of the applicant's legal interests has actually taken place remains reserved for the examination of the merits (Umbach, in: Umbach/Clemens/Dollinger, *BVerfGG*, 2nd ed. 2005, § 67, marginal no. 142).

2. Correct opposing party

In a dispute between organs structured as a contradictory procedure, the applicant must determine the correct opposing party. Against which organ the application is to be addressed depends on who has caused the impugned act or omission and has to bear the legal consequences (see BVerfGE 62, 1 <33>; 67, 100 <126>; Stern, in: *Bonner Kommentar zum GG – Zweitbearbeitung* –, Art. 93, marginal no. 164).

If the issuance of a legal provision is impugned, the application is to address the legislative body, that is as a rule the *Bundestag*; this also applies if another act in the parliamentary sphere is to be impugned (Umbach, in: Umbach/Clemens/Dollinger, *BVerfGG*, 2nd ed. 2005, §§ 63, 64, marginal no. 155 et seq.).

If, by contrast, an act of the executive is impugned, a distinction should be made in terms of its attribution: to the Federal Government as a whole (see BVerfGE 88, 173 <180> – Federal Armed Forces' participation in AWACS deployments of the UNPROFOR in the airspace over Bosnia-Herzegovina–; 90, 286 <338> – Federal Armed Forces' participation in NATO and WEU deployment against the Federative Republic of Yugoslavia), to an individual Federal Minister (see BVerfGE 40, 287 – constitution protection report of the Federal Ministry of the Interior) or both at once (see BVerfGE 67, 100 <126> - refusal of the Federal Ministry of Finance – because of a fundamental order of the Federal Government – to release files to a committee of inquiry –). If provisions contained in rules of procedure are to be raised to the subject-matter of the proceedings, the application is to target the organ which has issued the rules of procedure for itself (Umbach, in: Umbach/Clemens/Dollinger, *BVerfGG*, 2nd ed. 2005, §§ 63, 64, marginal no. 164).

3. Form and deadline

The application to initiate disputes between organs must be made in writing according to § 23.1 of the Federal Constitutional Court Act, and requires substantiated reasoning. According to § 64.2 of the Federal Constitutional Court Act, the application is to state the provision of the Basic Law which has been infringed by the act or omission of the opposing party complained of. However, the designation does not need to take place explicitly; it is sufficient if it can be derived from the content of the reasoning for the application (see BVerfGE 4, 115 <123>; 68, 1 <64>).

According to § 64.3 of the Federal Constitutional Court Act, the application must be made within six months after the impugned or omitted act has become known. This takes into consideration legal clarity and legal certainty. Firstly, violations impugned in disputes between organs may "fade" in the passage of time, and secondly the frequently rapid, hectic parliamentary procedure is not to be paralysed with the constitutional clarification of a backlog of facts.

In the event of the issuance of a legal provision, the deadline commences on the promulgation of the latter (see BVerfGE 24, 252 <257-258>; 27, 294 <297>; 67, 65 <70>), in the case of an order, at the time when it becomes known (BVerfGE 71, 299 <303-304>); if an omission is complained of, on the refusal of the requested act by the opposing party (see BVerfGE 4, 250 <269>; 21, 312 <319>; 92, 80 <89>); or with individual acts, when they take effect to the detriment of the opposing party.

The application deadline of disputes between organs is final and does not permit the restoration of the status quo ante (see BVerfGE 92, 80 <89>; 104, 310 <322>; 110, 403 <405>).

4. Need of legal protection

The need of legal protection is indicated as a matter of principle by the existence of the empowerment to make an application (Voßkuhle, in: v. Mangoldt/Klein/Starck, *GG*, Vol. 3, 5th ed. 2005, Art. 93, marginal no. 114). In particular, it is not made null by the passage of time or correction of the impugned act or omission of the opposing party. Disputes between organs can hence have as their subject-matter the right violation of a completed fact (see BVerfGE 10, 4 <11>; 41, 291 <303>; 49, 70 <77>) or a statute which has been declared null and void by means of an abstract review of statutes (see BVerfGE 20, 134 <141>). Also the fact that the applicant has not tackled the impugned acts by parliamentary means (see BVerfGE 90, 286 <338>) does not obviate the need for legal protection. Having said that, disputes between organs are to be inadmissible if the applicant could have avoided the violation of his or her rights by acting in good time (see BVerfGE 68, 1 <77>).

5. Accession to the proceedings

Unlike for instance in civil proceedings before the non-constitutional courts, the binding effect of the constitutional decision in the dispute between organs applies not only to the applicant and to the opposing party, but to all constitutional organs over and above the case that has been ruled on (see § 31.1 of the Federal Constitutional Court Act). So that a legal dispute is accompanied with extensive argument, and the arguments for and against can be particularly carefully put forward, § 65 of the Federal Constitutional Court Act makes it possible for both the applicant and the opposing party to be joined at any stage of the proceedings by the other parties entitled to file a motion, designated in § 63.

The party joining takes up the position of a party to the proceedings (see BVerfGE 20, 18 <25>; Löwer, in: Isensee/P. Kirchhof, *Handbuch des Staatsrechts* Vol. III, 3rd ed. 2005, § 70 marginal no. 25), and hence has a separate right to file a motion insofar as the connection with the subject-matter of the dispute which is initially outlined by the motion is still maintained (see BVerfGE 6, 309 <326>; 12, 308 <310>). In order to prevent a splintering of the dispute between organs, the acceding party – by its own declaration in the proceedings – must already be among the potential group of parties to disputes between organs (§ 63 of the Federal Constitutional Court Act); by contrast, no separate injury or affectedness in the respective proceedings is required on the part of the acceding party (Umbach, in: Umbach/Clemens/Dollinger, *BVerfGG*, 2nd ed. 2005, § 65, marginal no. 8). The acceding party does not however personally become a party to the dispute, given that he or she does not determine the subject-matter of the proceedings in subjective terms (Bethge, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, *Bundesverfassungsgerichtsgesetz*, § 65, marginal no. 3). The party joining is, rather, restricted in his or her procedural role to supporting the main party concerned which he or she has joined (see BVerfGE 12, 308 <310>; 20, 18 <23>; 63, 346 <348>).

E. Decisions in disputes between organs

In disputes between organs, the Federal Constitutional Court finds in its ruling whether the act or omission of the opposing party complained of infringes a provision of the Basic Law (§ 67.1 sentence 1 of the Federal Constitutional Court Act). It hence neither finds on the legal invalidity of an act, nor does it rule on the validity of an impugned norm. The opposing party "only" receives an indication of an impugned constitutional condition; they remain responsible for eliminating it (see BVerfGE 24, 300 <351>; 85, 264 <266, 326>).

If the Federal Constitutional Court finds that there has been a violation of the Basic Law, it can also grant to the legislature a transitional period to remedy the unconstitutional condition. Particularly when an unconstitutional provision would lead to a regulatory vacuum and to a state which would be even less compatible with the Constitution than the current one, it affords the legislature the opportunity to ensure a remedy within a specifically defined deadline. The defects in the existing legal situation

which have been complained about by the Federal Constitutional Court are to be accepted until a new provision is handed down (see BVerfGE 85, 264 <326>).

The provisions contained in Article 93.1 no. 1 of the Basic Law in conjunction with § 67.1 sentence 1 of the Federal Constitutional Court Act are conditional, within the interrelationship with the constitutional organs, on the organs observing the finding of unconstitutionality of an act made by the Federal Constitutional Court without the need for the pronouncement of an obligation and its execution. This state of respect (*Interorganrespekt*) between the constitutional organs, emerging from the principle of the rule of law contained in Article 20.3 of the Basic Law and the obligation of the executive and of the legislative to not commit acts that are in breach of the Basic Law, offer a sufficient guarantee that all parties to the proceedings submit to the legal findings of the Federal Constitutional Court (Umbach, in: Umbach/Clemens/Dollinger, *BVerfGG*, 2nd ed. 2005, § 67, marginal no. 17; Schlaich/Korioth, *Das Bundesverfassungsgericht*, 8th ed. 2010, marginal no. 83; Voßkuhle, in: v. Mangoldt/Klein/Starck, *GG*, Vol. 3, 5th ed. 2005, Art. 93, marginal no. 115).

The Federal Constitutional Court is also entitled to hand down a temporary injunction in disputes between organs (see BVerfGE 89, 38 <44>; 96, 223 <229>; 98, 139 <144>). In such cases, the Federal Constitutional Court may impose conduct-related obligations on the opposing party over and above a finding (Bethge, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, *Bundesverfassungsgerichtsgesetz*, § 67, marginal no. 36); Where necessary, the Federal Constitutional Court may also ensure the enforcement of its ruling via an execution order according to § 35 of the Federal Constitutional Court Act (Voßkuhle, in: v. Mangoldt/Klein/Starck, *GG*, Vol. 3, 5th ed. 2005, Art. 93, marginal no. 115).

F. Disputes between organs within a Land

According to Article 93.1 no. 4, 3rd alt. of the Basic Law in conjunction with § 13 no. 8 of the Federal Constitutional Court Act, the Federal Constitutional Court also rules on public disputes within a *Land* unless there is recourse to another court (see on this Pietzcker, in: Festschrift *50 Jahre Bundesverfassungsgericht* Vol. I, 2001, 587 <611 et seq.>; Löwer, in: Isensee/P. Kirchhof, *Handbuch des Staatsrechts* Vol. III, 3rd ed. 2005, § 70, marginal nos. 26-27). This "intra-*Land* dispute" is a constitutional dispute between two constitutional organs of a Federal *Land* in which the Federal Constitutional Court is only called upon in subsidiary terms to remedy the dispute, but in principle the respective *Land* Constitutional Courts have jurisdiction (see BVerfGE 111, 286 <288>). If, for instance, the respective *Land* constitution does not open up a path to the *Land* Constitutional Court, it imposes even more stringent conditions as to the prerequisites of proceedings than § 71.1 no. 3 of the Federal Constitutional Court Act (see BVerfGE 60, 319 <323-324.>; 62, 194 <199>; 93, 195 <202>), or if there is (as yet) no *Land* Constitutional Court (see BVerfGE 102, 224 <227, 231> regarding the Thuringian Constitutional Court not yet in existence in 1991), the Federal

Constitutional Court guarantees seamless legal protection for those involved in the constitutional life of a *Land* against all violations of their rights enshrined in the *Land* constitution (see BVerfGE 93, 195 <202>; 102, 245 <250>).

The intra-*Land* dispute is an expression of the Federation's concern for the system of the formation of the State's will based on the division of powers also at *Land* level (for instance Löwer, in: Isensee/P. Kirchhof, *Handbuch des Staatsrechts* Vol. III, 3rd ed. 2005, § 70, marginal no. 26). It constitutes the "federal" counterpart to contradictory disputes between organs, the single difference being that it is not the supreme state organs of the Federation or their sections that are parties to the proceedings, but the supreme organs of a (Federal) *Land* and the parts of these (*Land*) organs vested with rights of their own in the *Land* constitution or in the rules of procedure of a *Land* supreme organ (§ 71.1 no. 3 of the Federal Constitutional Court Act). Just as with disputes between organs, political parties and *Landtag* deputies also enjoy the ability to be a party in intra-*Land* disputes (Voßkuhle, in: v. Mangoldt/Klein/Starck, *GG*, Vol. 3, 5th ed. 2005, Art. 93, marginal no. 160; Löwer, in: Isensee/P. Kirchhof, *Handbuch des Staatsrechts* Vol. III, 3rd ed. 2005, § 70, marginal no. 27). The applicants' rights and jurisdictions must be directly affected by the subject-matter of the dispute.

The subject-matter of the review by the Federal Constitutional Court in an intra-*Land* dispute is not the Basic Law, but the respective *Land* constitution. According to § 72.2 of the Federal Constitutional Court Act, the Federal Constitutional Court establishes in its ruling whether the disputed act or omission on the part of the opposing party is in violation of a provision within the *Land* constitution.

An example of an admissible "intra-*Land* dispute" is the judgment of the Federal Constitutional Court of 21 July 2000 (BVerfGE 102, 224) in which it had to deal with § 5.2 sentence 1 nos. 2 and 3 of the Thuringian Deputies Act (*Thüringer Abgeordnetengesetz*) and its compatibility with the Preliminary *Land* Statutes (*Vorläufige Landessatzung*) (comparable with the *Land* constitution) for the *Land* Thuringia. The applicants were several *Landtag* deputies who objected to the bonuses to the basic remuneration for deputies which were granted to the parliamentary group chairpersons, the deputy parliamentary group chairpersons, the Secretaries of the parliamentary groups and the committee chairpersons.

The Federal Constitutional Court impugned the payment of the bonuses to the deputy parliamentary group chairpersons, to the Secretaries of the parliamentary groups and to the committee chairpersons – but not to the parliamentary group chairpersons –, since the number of functional posts vested with bonuses was to be restricted to a small number of parliamentary functions with particular political prominence.

III. ENFORCEMENT OF CONSTITUTIONAL COURT'S DECISIONS

Prof. Dr. Reinhard Gaier
Justice of the Federal Constitutional Court

1. **The Constitutional Court's decisions are:**
   a) **final;**
   b) **subject to appeal; if so, please specify which legal entities/subjects are entitled to lodge appeal, the deadlines and procedure;**
   c) **binding *erga omnes;***
   d) **binding *inter partes litigantes.***

a) Decisions of the Federal Constitutional Court are final. They take on formal force of law on their pronouncement or on being notified to the parties; a final decision is handed down in the respective proceedings in the interest of legal peace. That this also applies to decisions of the Chambers of the Federal Constitutional Court is explicitly stipulated by § 93d.1 sentence 2 of the Federal Constitutional Court Act – referred to below as: BVerfGG).

An exception is only seemingly constituted by the possibility of an objection if the Federal Constitutional Court has handed down its decision in the expedited temporary injunction proceedings without a prior oral hearing (§ 32.2 and § 32.3 BVerfGG). This is in fact not a challenge with an appeal in the literal sense of the word; the objection has no devolutive effect, and therefore does not refer the proceedings to another instance. Rather, it is the Federal Constitutional Court which rules after the objection; the challenge only has the effect that the oral hearing which had previously not been carried out is subsequently held.

b) The decisions of the Federal Constitutional Court are binding *erga omnes* in those cases which are most important in practice. This however does not already emerge from general procedural principles, but only on the basis of specific provisions for the proceedings before the Federal Constitutional Court.

aa) According to general procedural law, the formal force of law accruing to court decisions by virtue of their finality leads to their taking on substantive force of law. The Federal Constitutional Court also claims this force of law for its decisions (established case-law since BVerfGE 4, 31 <38-39>). As reasoning, the Court points out that, according to the Constitution (Article 92 of the Basic Law), it is also structured as a court regardless of its position as a constitutional body, so that the exercise of judicial power has been transferred to it (see BVerfGE 104, 151 <196> with further references). Although there is no explicit statutory provision in this respect, indications are contained in various provisions concerning the procedural law of the constitutional courts that the law also presumes the substantive force of law to be accrued (see BVerfGE 33, 199 <204>).

Substantive force of law indicates the content-related materiality of a court decision for future proceedings. It is important to comply with the boundaries of the force of law. According to the customary principles of procedural law, the Federal Constitutional Court also stresses that the substantive force of law is determined solely by the decision, but not by the statements contained in the grounds for the decision; the grounds for the decision may however be consulted as an interpretation aid when ascertaining the meaning of the decision (see BVerfGE 4, 31 <38-39>; 78, 320 <328>). In factual terms, the substantive force of law is limited by the concrete subject-matter of the proceedings or of the dispute (see BVerfGE 4, 31 <39>; 78, 320 <328>; 104, 151 <196>), which is derived in turn from the motion initiating the proceedings and the underlying circumstances. In personal terms, the substantive force of law however only acts *inter partes*, in other words only between the parties to the respective set of proceedings (see BVerfGE 4, 31 <39>; 78, 320 <328>; 104, 151 <196>) and their legal successors.

bb) Whilst the substantive force of law is one of the general institutions of procedural law, the law creates two important provisions in § 31 BVerfGG specifically for the proceedings of the constitutional court. They cause the decisions of the Federal Constitutional Court to exert a far-reaching binding effect.

(1) First of all, according to § 31.1 of the BVerfGG the Federal and *Land* constitutional organs, as well as all courts and authorities, are bound by the decisions of the Federal Constitutional Court. The binding effect also applies to Chamber decisions which allow an application according to § 93c BVerfGG (Chamber Decisions of the Federal Constitutional Court (*Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK) 7, 229 <236>), whilst Chamber orders with which a constitutional complaint was not accepted for adjudication are not binding (§ 93b BVerfGG) because they do not constitute a decision handed down on the merits of the case itself (BVerfGE 92, 91 <107>). The binding effect is not a mere expansion of the force of law (see BVerfGE 20, 56 <87>; 77, 84 <104>), but has a specific impact. According to the case-law of the Federal Constitutional Court, which is however disputed in the literature, the binding effect hence comprises in factual terms not only the decision, but also the essential reasoning of the decision (see for instance BVerfGE 1, 14 <37>; 104, 151 <197>). In personal terms, over and above the parties to the proceedings all constitutional bodies, courts and authorities are covered. In this regard, there is therefore a binding effect *erga omnes*, which however applies only to the state agencies designated, and therefore not also to private third parties. The binding effect obliges the state agencies to comply with the decisions of the Federal Constitutional Court, to orientate their future conduct in line with these and to indeed enforce concrete decisions in the context of their jurisdiction (see BVerfGE 2, 139 <142>).

A further provision additionally applies only to the constitutional complaint. If a constitutional complaint is successful, according to § 95.1 sentence 2 BVerfGG the Federal Constitutional Court can order a ban on repetition by finding that any repetition of the measure impugned as unconstitutional in the concrete case also constitutes an infringement of the Constitution. The Court may therefore already preventively declare repetition of the measure to be unconstitutional. The Federal

Constitutional Court understands the provision such that it facilitates an extension of the fact of being bound by a constitutional court decision to the disadvantage of other state agencies and also to the advantage of other individuals beyond the scope of the complainant (BVerfGE 7, 99 <109>). These are however effects which in any case occur on the basis of § 31.1 of the BVerfGG, which also explains why the ban on repetition has been unable to take on any major significance in practice.

(2) A complete *erga omnes* effect is taken on by the most important decisions of the Federal Constitutional Court by virtue of the general binding nature emerging from the fact of their having the force of law according to § 31.2 BVerfGG. The force of law ensures most effectively the enforcement of constitutional court decisions, given that directly applicable law is created. The provision applies to sets of proceedings listed in detail in which the Court in the broadest sense of the word examines the constitutionality of statutes, that is particularly for the proceedings of abstract and concrete review of statutes and for constitutional complaint proceedings which directly or coincidentally target statutes. If such proceedings declare a law to be compatible or incompatible with the Basic Law, or a law is declared to be null and void, the decision is published in the Federal Law Gazette by the Federal Ministry of Justice (§ 31.2 sentence 3 BVerfGG).

According to § 31.2 BVerfGG, only those decisions achieve the force of law with which a legal provision is found to be constitutionally null and void, compatible or incompatible. The grounds for the decision do not assume the force of law, but are to be consulted to interpret the operative provisions of the decision. A declaration of the nullity of unconstitutional statutes was originally the only legal consequence regulated by the Act, and is still to constitute the standard case today (see § 78 BVerfGG). The Federal Constitutional Court however soon recognised that the nullity of a statute cannot always be the appropriate reaction because of the far-reaching consequences (see BVerfGE 13, 248 <260-261>). Initially outside of written procedural law, but now also recognised by the legislature, the Court has hence developed the declaration of incompatibility, the pronouncement of which also takes on the force of law according to § 31.2 BVerfGG.

2. **As from publication of the decision in the Official Gazette/Journal, the legal text declared unconstitutional shall be:**
   a) **repealed;**
   b) **suspended until when the act/text declared unconstitutional has been accorded with the provisions of the Constitution;**
   c) **suspended until when the legislature has invalidated the decision rendered by the Constitutional Court;**
   d) **other instances.**

a) If the Federal Constitutional Court finds that a law is compatible or incompatible with the Basic Law, or if it declares a law to be null and void, the decision is published in the Federal Law Gazette by the Federal Ministry of Justice (§ 31.2

sentence 3 BVerfGG). This publication however only has declaratory significance, given that the decisions of the Court on the incompatibility or nullity of a statute also only have a declaratory impact because of the "nullity dogma". The tradition of German constitutional law has it that a provision which violates higher-ranking law is null and void *ipso iure* and *ex tunc* (see BVerfGE 115, 51 <62>), from which one can derive the *eo ipso* nullity of unconstitutional statutes. The decision of the Federal Constitutional Court rejecting the provision therefore has no constitutive effect; it has neither a quashing, nor an invalidating nor a reforming impact, but only makes a finding and at most eliminates the legal appearance of the validity of a statute. It however follows from the material provisions on judicial jurisdiction that this finding – at least for formal post-constitutional statutes – can only be handed down by the Federal Constitutional Court and the provisions are to be complied with by all parties until such a finding.

According to § 31.2 BVerfGG, the force of law is only accrued by those decisions with which the Federal Constitutional Court declares laws to be compatible or incompatible with the Basic Law or null and void; only those decisions are published in the Federal Law Gazette. These provisions hence particularly do not apply if, on the basis of a constitutional complaint, the Court regards not also a statute, but only measures taken by authorities or decisions of courts to be unconstitutional. In such cases, the Federal Constitutional Court finds which provision of the Basic Law was violated by the concrete act or omission (§ 95.1 sentence 1 BVerfGG). The binding effect according to § 31.1 BVerfGG already links to this finding of a breach of the Constitution. Furthermore, the Federal Constitutional Court quashes the impugned decision and, in court proceedings, refers the matter back to a competent court (§ 95.2 BVerfGG). Quashing directly eliminates the impugned decision. The court to which the case was remitted is already bound for its further proceedings by the finding of a breach of the Constitution.

b) Deviating legal consequences emerge if the Federal Constitutional Court declares an unconstitutional statute not to be null and void, but avails itself of the possibility to declare the statute to be incompatible with the Basic Law. This declaration of incompatibility also takes on the force of law according to § 31.2 BVerfGG and has the consequence that the statute in question may no longer be applied (see BVerfGE 73, 40 <101>; 100, 59 <103>). In this respect, there is initially no difference to a declaration of nullity. The material advantage rather lies in the circumstance that, unlike with the declaration of nullity, no direct facts are created, but the Federal Constitutional Court can link the declaration of incompatibility on the basis of § 35 BVerfGG with execution orders in the shape of transitional arrangements. Hence, the legal consequences of the declaration of incompatibility are materially determined by the content of an execution order simultaneously issued by the Federal Constitutional Court itself.

The incompatibility declaration may be required in order to give the legislature handing down the statute a margin of appreciation and time to consider a new

provision. There are hence two major case groups in which this decision variant applies: (1.) If the legislature handing down the statute is to have diverse possibilities to eliminate the breach of the Constitution (see BVerfGE 61, 43 <68>; 99, 280 <298>; 121, 317 <373>), as is the case in particular when it comes to breaches of the principle of equality from Article 3 of the Basic Law (see BVerfGE 22, 349 <361>; 99, 280 <298>; 117, 1 <69>; 122, 210 <245>) and (2.) if in the interest of the common good a gentle transition from the unconstitutional to the constitutional legal situation is required (see BVerfGE 91, 186 <207>), in particular if a state were to be created in the case of nullity which would be even less compatible with the Constitution than the current one (see BVerfGE 83, 130 <154>; 92, 53 <73>; 111, 191 <224>; 117, 163 <201>).

With regard to execution, orders of unchanged or indeed modified further application of the statute which is unconstitutional as such can initially be considered. For instance, the Federal Constitutional Court very recently continued to permit the application of unconstitutional provisions on inheritance tax in order to safeguard reliable financial and budget planning (BVerfGE 117, 1 <2, 70>). There were various options for the constitutional revision of the law on inheritance tax from which the legislature could select. By contrast, an only modified further application was ordered for instance for the *Land* statutes on the smoking ban in pubs and restaurants, the court having added to the statutory provision further exceptions for small establishments (BVerfGE 121, 317 <318, 373, 376 et seq.>). Modified further application was furthermore also ordered for the provisions on the state monopoly on sports betting, which had to be applied in a more consistent manner after the Court's execution order (BVerfGE 115, 276 <277, 317, 319>). The intention in both cases was above all to achieve a gentler transition to the new law: By virtue of the continued application, it was to be ensured that dangers posed by tobacco smoke or by gambling addictions can be avoided in the transitional period until new legislation is handed down.

If the Federal Constitutional Court is unable to accept the unconstitutional provision as a transitional provision, even in a modified form, the Court itself formulates in turn a transitional or catch-all provision on the basis of § 35 BVerfGG. This took place, for instance, when the Court declared the provision to be unconstitutional in accordance with which the surname of the husband was to become the spouses' joint name if they were unable to agree on one of their names. Here, the Court stipulated that each spouse was to retain his or her name and, until there was new legislation, a joint child was to receive a double name consisting of the names of both spouses, the sequence of which was to be drawn by the registrar by lots (BVerfGE 84, 9, <10, 22 et seq.>). In its judgment on the liability of abortion for punishment, the Court in fact went so far as to formulate by itself a comprehensive transitional arrangement containing detailed advisory obligations for pregnant women as a prerequisite for abortion that is exempt from punishment (BVerfGE 88, 203 <209 et seq., 328, 334>).

Finally, in the event of a declaration of incompatibility, the Federal Constitutional Court can also refrain from ordering the continued application of the unconstitutional statute altogether. This possibility however only makes sense – in contradistinction to a declaration of nullity – if the Court also imposes a deadline on the legislature with the decision on incompatibility for the new constitutional legislation, whilst considering a transitional arrangement to be unnecessary until that time. The unconstitutional provision then remains inapplicable in the interim period until the entry into force of the new statute; any court proceedings already pending remain suspended (see BVerfGE 88, 203 <209 et seq., 328, 334>).

3. **Once the Constitutional Court has passed a judgment of unconstitutionality, in what way is it binding for the referring court of law and for other courts?**

As was already stated re Question 1, it follows from § 31.1 BVerfGG that all courts – in other words the referring court and all other competent national courts – are bound by decisions of the Federal Constitutional Court. The binding effect covers all decisions on the merits, that is, not only decisions rejecting provisions, whilst purely procedural decisions are not binding (see BVerfGE 78, 320 <328>). The binding effect also covers decisions of the Chambers of the Federal Constitutional Court allowing an application according to § 93c BVerfGG (BVerfGK 7, 229 <236>), as well as the execution orders according to § 35 BVerfGG. The courts are also bound by temporary injunctions of the Federal Constitutional Court (BVerfGK 7, 229 <236>).

4. **Is it customary that the legislature fulfills, within specified deadlines, the constitutional obligation to eliminate any unconstitutional aspects as may have been found– as a result of *a posteriori* and/or *a priori* review?**

If the Federal Constitutional Court declares a legal provision to be incompatible with the Constitution, it frequently also sets the legislature a deadline within which it must make a new constitutional provision. There is no explicit constitutional or statutory provision for this; the Court is however entitled to issue such demands on the basis of and in the context of its power to review the constitutionality of statutes. The Court itself sometimes speaks of an "admonitory decision" (*Appellentscheidung*) (BVerfGE 86, 369 <379>), but the content of such demands is better described with the terms "legislation directive" (*Rechtssetzungsdirektive*) or "mandate to create provisions" (*Normsetzungsauftrag*). It is customary for the legislature to comply with such a mandate to create provisions in a timely fashion. This applies even if the subject-matter for which legislation is to be made is politically highly controversial. Thus for instance, the Court set the legislature a deadline to adopt a new regulation by 31 December 2008 after it had declared major provisions of the law on inheritance tax to be incompatible with the Basic Law, but ordered that this law was to continue to apply. The Reform Act thereafter required was adopted just in time on 24 December 2008 and published in the Federal Law Gazette on 31 December 2008.

5. What happens if the legislature has failed to eliminate unconstitutional flaws within the deadline set by the Constitution and/or legislation? Give examples.

If the legislature fails to comply with the demand by the Federal Constitutional Court for new legislation, the Court may enact execution measures according to § 35 BVerfGG. This took place, for instance, after the Court had twice called in vain on the legislature to increase the maintenance allowances for civil servants with three and more children. In a third decision, the Court set a final deadline and itself awarded a payment claim determined in terms of its amount in the event that the deadline were not to be adhered to (BVerfGE 99, 300 <304, 331-332>). Regarded in terms of the law on execution, this is a threat to impose a substitute measure; the Court would have acted as a substitute legislature here in the truest sense of the word. This however happily did not come to pass; as a reaction to this repeated decision, an Act was handed down in good time on the increased maintenance allowances and their subsequent payment.

The fact that the Federal Constitutional Court may avail itself of the possibilities for execution provided for in § 35 BVerfGG if the legislature fails to act does not however mean that it *must* do so. The abovementioned maintenance allowance case related to constitutionally founded rights of citizens for benefits vis-à-vis the State; the Court may not remain inactive in the enforcement of decisions in such cases; otherwise, it is refusing to provide citizens with effective legal protection. Where the Court however acts in order to avert encroachment by the State on constitutional rights – as in a standard case with constitutional complaints – and for this reason declares a statute to be incompatible, constellations are possible in which the enforcement of mandates to create provisions is neither in the interest of the complainant nor necessary to maintain the authority of the Court. This was the case with the Property Tax Act. The Court had declared in mid-1995 the evaluation provisions on which the assessment of the property tax was based to be incompatible with the Basic Law, instructed the legislature to adopt a new provision by 31 December 1996 and ordered that the previous law was to apply "until this time at most" (BVerfGE 93, 121 <122>). There was dispute in the political arena after this decision on the complete abolition of the property tax; the Government wished to do without this tax, but was unable to establish the necessary majority for this in the *Bundesrat*. For this reason, the *Bundestag*, which was dominated by the governing parties, simply remained inactive. The Government nonetheless reached its goal because after the continued application period set by the Federal Constitutional Court had expired at the end of 1996, there was no legal basis for the property tax, which has indeed not been levied in Germany since then. The Court also remained inactive in the ensuing period and did not make any efforts to enforce the legislative directive which it had handed down. This was the correct procedure to follow; execution acts would not have been in the complainants' interest, who were now spared any property tax whatever; moreover, the legislature was only obliged to create a constitutional state of affairs, and was indeed able to create one by waiving this type of tax altogether.

The case of the property tax shows that, in the wording of the order of continued application, the Federal Constitutional Court also ensures which legal consequences occur if the legislature fails to comply with the demand to create provisions, or does not do so within the deadline set for it. The Court had explicitly ordered that the Property Tax Act should continue to apply until 31 December 1996 "at most" (BVerfGE 93, 121 <122>). Had no new provision been created by then, it was clear that on expiry of this deadline the provisions of the Property Tax Act in question could no longer apply and that this tax could no longer be levied. In the order on the incompatibility of provisions in the Inheritance Tax Act, the Court had by contrast ordered the further application of the previous law "until a new provision" and set a deadline for this new provision of 31 December 2008 at the latest (BVerfGE 117, 1 <2>). Had the legislature remained inactive here, therefore, it would have been possible for old Inheritance Tax Act to continue to apply even after expiry of the deadline. In this case, however, both the interests of the tax-burdened citizen and the safeguarding of the authority of the Court would have required, at least after a certain time, the Court to take measures according to § 35 BVerfGG in order to enforce the mandate to create provisions. If necessary, the Court could have imposed a retroactive sunset clause on the ordering of the continued application and could have exerted pressure on the legislature by the threat of loss of tax revenue. No separate application would have been necessary for this; the Court takes measures according to § 35 BVerfGG *ex officio* on the basis of the autonomy of execution that it claims (see BVerfGE 6, 300 <303>).

6. **Is legislature allowed to pass again, through another normative act, the same legislative solution which has been declared unconstitutional? Also state the arguments.**

The significance of the binding effect regulated in § 31.1 BVerfGG on the legislature is disputed. It is a matter of the question of whether the legislature – after the Federal Constitutional Court has declared a provision to be unconstitutional – is affected by a "provision repetition ban", so that it may not re-issue a law with the same or similar content. There has been disagreement for more than twenty years here between the two Senates of the Court: Whilst the Second Senate, referring to the wording of § 31.1 BVerfGG, already affirmed a provision repetition ban at a very early date (BVerfGE 1, 14 <37>; also BVerfGE 69, 112 <115>), the First Senate rejected this in later decisions (BVerfGE 77, 84 <104>; 96, 260 <263>; 98, 265 <320-321>; 102, 127 <141>). The decisive argument of the First Senate in the respect consists in the structural freedom and creative responsibility of the democratically legitimated legislature. The special responsibility is incumbent on the latter for adjusting the legal system to changing social demands and changed ideas of order, and it can in principle also comply with this responsibility by adopting a new provision the content of which is identical. What is more, if the legislature were subject to an obligation, this would lead to the paralysis of the development of the law because the Federal Constitutional Court can correct its

case-law not on its own initiative, but only if it is seized of an admissible application. Decisions which have once been handed down would hence be established for all time, and would leave the legislature without any latitude to adjust as necessary to social and economic developments in a modern, free, dynamic society.

It is evident that one must fear that the legislature would be able to suppress any decision of the constitutional court at will were there to be no provision repetition ban. Having said that, the above reasons favour not seeking a solution by imposing a strict legal obligation on the legislature handing down the statute, but by reacting flexibly. In the case of the repetition of a provision, the First Senate hence demands that the legislature does not disregard the grounds found by the Federal Constitutional Court for the unconstitutionality of the original statute. Hence, special reasons are to be required, which may emerge above all from a major change to the factual or legal situation material to the constitutional evaluation or the views underlying it. If there are no such reasons, the Federal Constitutional Court does not consider itself to be obliged to re-discuss the constitutional questions which have already been ruled on (BVerfGE 96, 260 <263>); rather, there is no repeat examination of the content, reference being made to the repetition of the provision (see BVerfGE 102, 127 <141>). This can also be based on the unwritten constitutional principle of faithful co-operation between organs (*Organtreue*), which the Court applies in its case-law (see for instance BVerfGE 89, 155 <191>; 119, 96 <125>) and which is to lend expression to the fact that the constitutional organs are obliged to exercise mutual regard and not to disrespect one another. In concrete terms, this means for the legislature that it is constitutionally prohibited from calling the authority of the Court in question by once again handing down a statute with the same or similar content directly after a decision rejecting a provision.

The practical significance of the difference of opinion between the two Senates may not nevertheless be overestimated. Even the Second Senate is likely to place the ban on the repetition of provisions which it favours under the condition of the *clausula rebus sic stantibus*, so that changed factual circumstances, as well as new legal arguments for the legislature, are always likely to give rise to the re-adoption of a provision. The binding effect also does not apply to parallel provisions of the same or of another legislature; what is more, the binding effect does not give rise to any obligation incumbent on the legislature to rescind such provisions.

7. Does the Constitutional Court have a possibility to commission other state agencies with the enforcement of its decisions and/or to stipulate the manner in which they are enforced in a specific case?

It was originally planned to transfer the enforcement of constitutional court decisions to the Federal President, as was the case in the Weimar Reich Constitution, where the Reich President was responsible for the execution of the judgments of the *Staatsgerichtshof* (Supreme Court). This was however not done with regard to the

constitutional competences of the Federal President. Instead, the Federal Constitutional Court was given jurisdiction for also executing its decisions.

§ 35 BVerfGG provides that the Court itself may state in the respective decision by whom it is to be executed. Furthermore, the Court may also regulate the "method of execution" in individual cases in accordance with this provision. The Federal Constitutional Court availed itself of this broad general clause-type empowerment early in order to claim for itself the comprehensive dominance of execution. It stressed as early as in 1957 not only its special position as one of the highest constitutional bodies, but also declared that by means of § 35 BVerfGG the Court was granted "all jurisdiction necessary to implement its decisions" (BVerfGE 6, 300 <303>). The Court claims the right to indeed issue all orders required to "enforce" its decisions. At the same time, the Court expands the definition of "execution" such that it understands it to cover all measures that are "necessary to create circumstances that are needed to enforce the law found by the Federal Constitutional Court". The Federal Constitutional Court naturally does not claim limitless power over execution, but stresses as a precondition for concrete execution measures that they must be necessary, and hence in general terms that the Court is obliged to abide by the principle of proportionality. Within these confines, the Court regards itself as being entitled to carry out all measures to "achieve what is necessary in the respectively most expedient, quickest, most suitable, simplest and most effective manner" BVerfGE 6, 300 <304>).

Accordingly, the Federal Constitutional Court is also entitled on the basis of § 35 BVerfGG to task individuals, authorities or organs which are subject to German state power to carry out concrete execution measures. There is no need here for the tasked agency itself to have sovereign powers, in particular to use force; rather, by means of the court execution system private individuals may be furnished with sovereign powers as a private person exercising public functions. Against this background, it is explained why the Federal Constitutional Court knows two forms of tasking to execute decisions: The Court may either task an agency in general terms to execute decisions and leave it to implement the execution measures at its own discretion, or the Court may entrust an agency with a concrete execution measure which is precisely determined, and hence make the tasked party "the executing organ" of the Federal Constitutional Court (BVerfGE 2, 139 <142 et seq.>).

There is only a small number of decisions for the enforcement of which the Federal Constitutional Court must call for the support of other agencies. In standard cases, the Court itself may ensure the implementation of its decisions by means of independent transitional arrangements or orders on the further application of statutes which have been rejected. The situation is different for the party prohibition procedure, which is however very rarely put into practice. Here, the Court for instance mandates the *Länder* Ministers of the Interior to dissolve the party and to implement the ban on replacement organisations (BVerfGE 2, 1 <2>). It may also be necessary to commission other agencies to implement temporary injunctions. For instance, the

Federal Constitutional Court commissioned an investigating judge to inspect confiscated documents and to review their relevance for the evidence-taking of a parliamentary committee of inquiry (BVerfGE 74, 7). Also the order handed down in connection with the retention of telecommunications data, stating that the *Länder* have to provide the Federal Government with information on the practical impact of the provisions can be based on the power under § 35 of the BVerfGG (BVerfGE 121, 1 <28 et seq.>).