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The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms

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In the Federal Republic of Germany, the Federal Constitutional Court is the principal body of constitutional jurisdiction.¹ The Court's exclusive jurisdiction is to decide constitutional questions arising under the Federal Republic's Constitution, the Basic Law (*das Grundgesetz*). A constitution, particularly one that contains an extensive catalogue of basic rights binding on all public authority, will necessitate a greater degree of interpretation than other legal norms. Unlike other courts of last resort, access to the Federal Constitutional Court is limited, except in the case of constitutional complaints, to state and federal governments, state and federal courts, and parliamentary groups such as party factions and minorities in national and state legislatures. The role of the Federal Constitutional Court, therefore, is particularly significant, considering the potential far reaching effect of its decisions.

This Article briefly examines the decisions of the Federal Constitutional Court, with particular emphasis on the categories, content and effect of the Court's opinions on the constitutionality of legal norms. Specific examples of prior Court decisions are provided to aid in the understanding of various concepts.

I. Categories of Disputes

Nearly all of the Federal Constitutional Court's jurisdiction, covering fourteen types of disputes, is defined in the Basic Law.² The most significant areas of review involve abstract and concrete judicial review and constitutional complaints. There are no statutory provisions for a

* This Article is adapted from the report on the Federal Constitutional Court delivered by President Zeidler at the 7th Conference of European Constitutional Courts in Lisbon, Portugal, April 26-30, 1987. The English version of President Zeidler's paper, translated by Albert K. Wimmer, is the sole responsibility of the *Notre Dame Law Review*. President Zeidler kindly authorized the translation but has not reviewed the English text. All rights reserved by Wolfgang Zeidler.

1 In addition to the Federal Constitutional Court most individual states have state constitutional courts which primarily safeguard the observance of state constitutional law. The state constitutional courts are particularly responsible for deciding disputes concerning the laws regulating schools and their organization and for cases of constitutional examination of legally required consolidations of municipalities and other municipal reorganizations. Because of its special status, Berlin does not have a state constitutional court. Schleswig-Holstein took advantage of the opportunity to refer to the Federal Constitutional Court any decision involving state constitutional disputes. For a comprehensive treatment of state constitutional courts, see LANDESVERASSUNGSGERICHTSBARKEIT (Baden-Baden 1983).

2 See GRUNDGESETZ art. 13.

preventative or an advisory judicial review of legal norms.³ The Law Concerning the Federal Constitutional Court originally provided for the possibility of obtaining advisory opinions. The provision was soon dropped, however, in view of the difficulties that arose in conjunction with the binding nature of such decisions.⁴

A. *Abstract Judicial Review*

The federal government, a state government, or one-third of the *Bundestag* may require the Federal Constitutional Court to determine the compatibility of federal or state law with the Basic Law as well as the compatibility of state law with any other federal law. All legal norms, including laws properly passed by Parliament, statutory orders, by-laws adopted by municipalities or other types of corporate bodies may be subjected to this review. This procedure may also be used to ascertain the validity of a norm after a court of law, an administrative authority, any body of the Federal Republic or a state has refused to implement the law because it was not compatible with the Basic Law.⁵ In practice, the party requesting an abstract judicial review is frequently the political opposition in the *Bundestag* or a state government ruled by the opposition party. Commentators critically note that it is only the political disputes which were unsuccessfully resolved in the *Bundestag* that are continued in the courtroom. Because an abstract judicial review forces the Federal Constitutional Court to decide the constitutionality of a legal norm without access to sufficient information regarding the implementation of the norm or its implications, this review procedure has been subject to criticism.

B. *Concrete Judicial Review*

Any court that employs a legal norm, upon which its decision depends, must first examine the compatibility of this norm with a higher norm, especially the Basic Law. If a court reaches the conclusion, mere doubts will not suffice, that a law passed by Parliament, a formal law, is not compatible with the Basic Law then the court must discontinue the proceedings and certify the question of compatibility to the Federal Constitutional Court.⁶ The Court will only decide whether or not the submitted legal norm is compatible with the Basic Law.⁷ Subsequently, a concrete ruling on the matter must be made by the proper specialized court. The exclusive power of the Federal Constitutional Court to proclaim a formal law unconstitutional is intended to foreclose a lower court

3 Notwithstanding the absence of specific statutory authority, the Federal Constitutional Court will review international treaties. Judicial review occurs as soon as the legislative procedures have been completed, but before the (internal) consent law has been enacted, thus avoiding international commitment to a treaty prior to a decision by the Federal Constitutional Court. See 1 BVerfGE 396, 410 [BVerfGE denotes the official reporter of the Federal Constitutional Court].

4 BVerfGG § 97 (version of March 12, 1951) (repealed July 21, 1956) [BVerfGG denotes the Law Concerning the Federal Constitutional Court].

5 BVerfGG § 76.

6 This applies also if a state law violates the Basic Law or any other Federal law.

7 In practice, the original issue is often concretized—in the form of restrictions or enlargements—by the Federal Constitutional Court.

from bypassing the will of the democratic legislature by means of declaring a law unconstitutional.⁸

C. *Constitutional Complaints*

Unlike the other methods of judicial review, a constitutional complaint can be lodged by any person asserting a violation by a public authority of either basic rights or certain other constitutional rights (such as the right to be heard). The constitutional complaint can be lodged against any act of public authority, including measures taken by administrative agencies or court decisions. However, available legal recourse must be exhausted prior to any such review by the Federal Constitutional Court.⁹ A constitutional complaint lodged directly against a law or legal norm is only admissible if certain restrictive conditions are met. The complainant himself must above all be presently and directly affected by the law. Furthermore, the Court increasingly requires that it must be unreasonable for the complainant to first seek relief by following the ordinary recourse of law.¹⁰

Regardless of the context of the constitutional complaint, the Federal Constitutional Court examines the constitutionality of the legal norms, whether express or implied. As a result, numerous decisions of the court on constitutional complaints concern the compatibility of laws or other legal norms with the Basic Law. One must note here, however, that a review of the constitutionality of a norm, within the framework of a constitutional complaint proceeding, would be precluded when there remains no question whatsoever about the subjective legal position of the complainant but only about other objective rules and regulations of constitutional law.¹¹ The practical impact of this limitation is curtailed by the fact that the Federal Constitutional Court interprets the Basic Law to include not only the grant of a general freedom to develop one's personality but also as to incorporate the constitutional right to remain unencumbered by public authority exercised with no constitutional basis.¹² As such, one must also examine within the framework of a constitutional complaint objections claiming a deficiency of legislative authority of the Federal Republic or citing a faulty drafting process.¹³

8 The Federal Constitutional Court did not infer that its monopoly power to proclaim a formal law unconstitutional was limited to laws becoming effective after the enactment of the Basic Law (post-constitutional laws) or laws enacted by post-constitutional legislators which incorporated laws before the enactment of the Basic Law (pre-constitutional laws). See 63 BVerfGE 181, 188; 66 BVerfGE 248, 254-55; 70 BVerfGE 126, 130.

9 BVerfGG § 90(II).

10 See, e.g., 71 BVerfGE 305 (Order to Guarantee Milk Allotment); Judgment of February 25, 1986, 1 BvR 1384/85 and 30/86 (times set for survivors' upbringing).

11 66 BVerfGE 39, 64.

12 "Everyone shall have the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code." GRUNDGESETZ art. 2(I).

13 11 BVerfGE 105, 110; 40 BVerfGE 371, 378; Decision of May 13, 1986, 1 BvR 99/85 and 461/85.

D. *Other Methods of Procedure*

The incidental review of legal norms has arisen in the context of judicial disputes between public bodies concerning the respective rights and duties of not only the highest federal bodies but also of parliamentary groups and parties as well.¹⁴ For example, the authority of the Federal Constitutional Court to rule on complaints against decisions by the *Bundestag* pertaining to the validity of elections led to a review of the constitutionality of the Federal Election Laws.¹⁵

E. *Legislative Omissions*

Legislative omissions can also be the subject of a ruling by the Federal Constitutional Court.¹⁶ Such cases pose many problems, including the determination of the unconstitutionality of a present legal condition and appeals to the legislature. Although not intended to be exhaustive, the following examples may serve as illustrative: Constitutionally required mandates, the constitutional duty to regulate by law the basic rights and duties of a certain group of people, the constitutional duty of the legislature to take into consideration changes in actual conditions, as well as disparities which are incompatible with the principle of equality. These examples range from cases involving genuine omission (the legislature does not act in defiance of a specific constitutional mandate) and lack of implementation (the legislature has not acted for a long time) to discrimination (the legislature acted, but failed to consider a certain group).

F. *Standards of Review*

The standard by which the Federal Constitutional Court reviews legal norms is the Basic Law and/or any federal law in so far as it concerns the compatibility of a state law with federal law.¹⁷ Accordingly, the Basic Law must not only be understood as the sum total of individual guarantees and organizational regulations, but also as a unity, as a system which is characterized by certain value judgments, especially those concerning basic human rights and the principles of constitutionality and democracy. The constitutional rights not only serve as defenses against the State but also as objective principles. The existence of constitutional

14 For instance, the Federal Constitutional Court handed down decisions on the tax treatment of donations and contributions to political parties. Furthermore, it decided procedural rules (rooted in law) concerning the formation of a special panel for handling sections of the budget plan which needed to be kept secret, and on comprehensive subsidies for certain foundations which were closely affiliated with political parties. Even such cases may lead to a limitation of review standards because the Federal Constitutional Court is called upon to merely examine whether the contested measure—which can also be a law—violates or threatens directly any constitutional rights of the petitioner. *See, e.g.*, Judgment of July 14, 1986, 2 BvE 2/84 and 2 BvR 442/84.

15 16 BVerfGE 130. *See infra* note 39 and accompanying text.

16 The problems involved in such cases are discussed *infra* at notes 19-65 and accompanying text.

17 The Federal Constitutional Court, in accordance with the constitution, had to decide independently whether a rule of international law represents a component of Federal law (which ranks below the constitution) or whether it will directly generate rights and duties for the individual citizen. *See* GRUNDGESETZ art. 11(II). No constitutional complaint can be based on the assertion that the European Convention of Human Rights has been violated. *See* 64 BVerfGE 135, 157.

rights can influence the procedures and organization of the political decision process and, within certain limitations, can also guarantee the subjective right to share in Government services.¹⁸

II. Subject Matter of the Decisions

A. Nullity—Compatibility

If the Federal Constitutional Court comes to the conclusion that a law is not compatible with the Basic Law, the Court "nullifies the law."¹⁹ This legal regulation is based on the traditional German doctrine which states that a norm which violates a higher norm is void *eo ipso* and *ex tunc*.²⁰ The law also provides the Federal Constitutional Court with the opportunity to nullify particular provisions of the same law as long as these are incompatible with the constitution for the same reasons.²¹ The Law Concerning the Federal Constitutional Court already restricts the effects of the nullity of an unconstitutional norm. For example, a new trial is permissible in a criminal case if the final decision was based on an unconstitutional legal norm. In all other cases, however, incontestable decisions are sustained although they can no longer be enforced.²²

In the event the Federal Constitutional Court determines that the law subject to its review is compatible with the Basic Law, the Court proclaims the constitutionality of the contested legal regulation. Even in the context of constitutional complaint procedures, the Federal Constitutional Court may hold that a law is constitutional.²³ Frequently, a determination of constitutionality by the Court is stated only in the reasons which refute a constitutional complaint.²⁴

B. Partial Nullity

Rarely is there a need for the complete nullification of a law or other legal norm. Nullification would be proper, however, when the authority to decree a law is completely absent from the public body (for example, the Federal Republic or a state)²⁵ and/or if the remaining, constitutionally compatible provisions no longer possess any individual significance. Such would be the situation where the unconstitutional provision is so intimately connected with the entire law that it forms a comprehensive, inseparable unit which cannot be divided into individual components without losing its meaning and its justification.²⁶

18 See 1978 EuGRZ 426 (validity and significance of the basic rights); Rupp v. Brunneck, *Verfassungsgerichtsbarkeit und gesetzgebende Gewalt*, 102 AoR I (1977).

19 BVerfGG § 78 (first sentence). The original version of the law did not specify this as clearly when it stated that the court "ascertains the nullity." See BVerfGG § 78 (first sentence) (version of March 12, 1951).

20 It is interesting to note that this doctrine had its historical merits in that it managed to establish and to legitimize judicial review by courts.

21 BVerfGG § 78 (second sentence).

22 BVerfGG § 79.

23 See, e.g., 68 BVerfGE 193 (constitutional); 68 BVerfGE 176, 185 (unconstitutional).

24 Concerning the different effects, see *infra* notes 70-84 and accompanying text.

25 See, e.g., 61 BVerfGE 149, 151 (Government Liability Act).

26 57 BVerfGE 295, 334; 65 BVerfGE 325, 358.

Even an individual legal provision must not always be entirely proclaimed unconstitutional and void. Restrictions on judicial review may result from the issue of constitutional procedures. In the context of concrete judicial review, the limited range of the introduced issues—which are often more clearly specified by the Federal Constitutional Court—restricts the Court's ability to nullify an entire law.²⁷ The Federal Constitutional Court may arrive at the conclusion that only part of a linguistically divisible provision is unconstitutional.²⁸

Finally, partial nullity may be assumed in the case of a requirement not specifically mentioned in a particular law, or with respect to a particular application of the law. In 1982, for example, the Federal Constitutional Court nullified legal provisions which conditioned "admission to medical school for the purpose of studying medicine as [a second academic major] on the requirement that [the study of medicine] meaningfully compliment the [first academic major], even in the case of applicants who had begun their studies prior to the 1974-75 winter semester in the belief that the possibility for such [a second academic major] existed."²⁹

C. *Interpretations which Conform with the Constitution*

Ever since the Federal Constitutional Court was impanelled, it practiced interpretations which conformed to the Basic Law. Such interpretations are functionally similar to partial nullification of a norm; they specifically avoid the declaration of nullity. By engaging in this type of interpretation, the legislature is spared from having the Federal Constitutional Court pronounce the unconstitutionality of a provision—an act which is often excessively valued by the political public.

If the wording of a law permits several interpretations, then the Federal Constitutional Court must choose the one which produces results harmonious with the Basic Law. There is no room for any interpretation that would lead to an unconstitutional result.³⁰ The constitutionally acceptable interpretation also must not conflict with the wording and the clearly expressed intent of the legislature. Accordingly, the normative content of the law to be interpreted must not be determined anew and the essential legislative goals must not be missed in the process.³¹ Admittedly, this applies only to those basic principles, determinations of

²⁷ See, e.g., 70 BVerfGE 115, 116.

²⁸ Such might be the case if the Court determined that one of several alternative requirements for a particular act by the Government was unconstitutional or that the combination of several regulations gave rise to an unconstitutional result. Specific examples include cases involving the constitutionality of a requirement that nominations to a personnel committee be signed by one-tenth of the eligible voters and where admission to the certification exam for tax accountants was conditioned upon resignation from the Internal Revenue Service. 67 BVerfGE 369, 370; 69 BVerfGE 209, 210.

²⁹ 62 BVerfGE 117, 119.

³⁰ One must distinguish from this the duty of all courts and appliers of the law to lend in a given case the greatest possible force to the fundamental rights established by the constitution. For example, courts must enforce freedom of speech while interpreting rules concerning civil law and professional rules and regulations. Occasionally, this is referred to as an interpretation which takes its cues from the constitution. See, e.g., Simon, in GENERAL REPORT FOR THE 2ND CONFERENCE, 1974 EuGRZ 85, 86.

³¹ See 54 BVerfGE 277, 299 with its additional references.

value and regulative purpose, which are recognizably expressed by the law.

The statements by legislative committees or individual members of the legislative bodies concerning the significance of a normative component or concept (or scope of an individual provision), its handling, and result do not constitute binding guidelines for the courts, no matter how illuminating they might be in determining meaning. The existence of adverse legislative history, however, occasionally proves problematic. In 1980, such a quandary resulted in a fairly rare decision by the plenum session of the Federal Constitutional Court.³² Rather briefly, the full court found that restricting the language of a statutory provision which revised the legal recourse to the Federal High Court of Justice in its function in civil matters as a Court of Appeals was proper, in light of the *de minimis* restriction on legislative intent.³³

In another decision, the Federal Constitutional Court interpreted as constitutionally conforming, a provision in the tax laws which afforded unwed mothers and foster parents certain special benefits. The Court concluded that fathers of illegitimate children—who are not specifically covered by the wording of the law—could, in certain circumstances,³⁴ be considered “foster parents,” in view of the constitutional requirement of equality of illegitimate children.³⁵ The Court premised its decision on the assumption that the legislature would have augmented the provision accordingly if it had recognized the omission.

By comparison, the Federal Constitutional Court rejected as an interpretation which did not conform with the constitution, a National Socialist administrative order—that is, an order that reflected a totalitarian administrative philosophy—which did not meet the constitutional requirement of definiteness. It was deemed impossible to reinterpret such a vague regulation without simultaneously examining whether the subsequent effect agreed at all with the intentions of the democratic legislature. A constitutionally conforming interpretation would have essentially redefined the normative content, and to do so would not have been within the purview of the Federal Constitutional Court.³⁶ Indeed, by employing a constitutionally acceptable interpretation one must not disregard the danger of shouldering the legislature with results it did not intend.

Equally, and only slightly less problematical, is the functional relationship between the Federal Constitutional Court and the specialized courts, especially the highest. In certain instances, the Federal Constitutional Court may prescribe a constitutionally conforming interpretation of a provision which a specialized court did not support in an earlier deci-

32 The Federal Constitutional Court is divided into two chambers, called senates, which have exclusive memberships and exclusive jurisdiction over certain constitutional cases. The plenum, an *en banc* session of the Court, meets only to address matters concerning the internal administration of the Court as a whole, the disputes arising out of the wish of one senate to depart from a formal ruling by the other, or the transfer of jurisdiction from one senate to another.

33 54 BVerfGE 277, 298.

34 36 BVerfGE 126.

35 GRUNDGESETZ art. 6(V).

36 8 BVerfGE 71. *See also* 20 BVerfGE 150, 160.

sion despite careful deliberations. Furthermore, the Federal Constitutional Court's specific mission authorizes it only to proclaim that a certain interpretation is incompatible with the Basic Law. To do so, the Court must demonstrate that an interpretation which is different from the one held unconstitutional is indeed possible. The Court, however, must leave undecided whether only the specified interpretation is possible or whether there is the possibility for additional constitutional interpretations. Also, the Federal Constitutional Court is not authorized to decide for the specialized courts whether only one of several differing interpretations is legitimate.

D. *Recent Variations in the Decisions*

The Federal Constitutional Court went beyond these *quasi* classic decision techniques by creating an additional set of instruments which make it possible to avoid the often undesirable *ex-tunc* effect of nullity without having to accept for any period of time a condition which would be considered unconstitutional. For example, the Court has proclaimed a law or legal situation not "yet" unconstitutional, and therefore still tolerable, while appealing to the legislature for change, possibly within a specified period of time. In other circumstances, the Court merely determined that a law was incompatible with the Basic Law but not simultaneously void.³⁷

The reasons for such judicial actions vary.³⁸ First, one ought to avoid a deficiency in the regulation (and the prospect of legal chaos) which results from nullifying a law. A decision by the Federal Constitutional Court must not lead to a situation which could turn out to be constitutionally even less compatible than the present one. Second, the creative leeway of the legislature constitutes an important factor in the deliberations of the Federal Constitutional Court. This aspect occasionally is combined with dogmatic and systematic reasoning. Essentially, it is not the task of the Federal Constitutional Court to reach relevant decisions in those cases affecting areas of the law which the legislature neglected, despite its constitutional duty to regulate through the enactment of laws. In any event, it is rather difficult to construe an omission as "void." Third, a similar approach applies to those cases where the legislature violates the Basic Law by granting to one group a benefit—in violation of the constitution—which it denied to another. Fourth, gradual economic, technical, social, or legal developments may lead to situations where a norm which was conceivably unobjectionable at the time of its passage—possibly as a result of interaction with other norms—becomes unconstitutional. In all these cases, the general rule is that the Federal Constitutional Court proclaims that the current legal situation must be changed, but allows the legislature to make the political decision which will determine the nature of a future regulation.

³⁷ This variation has been adopted by the legislature and included in the Law Concerning the Federal Constitutional Court. See BVerfGG § 31(II)

³⁸ See *infra* notes 39-65 and accompanying text.

E. *Appeals Decisions*

1. Avoiding Deficiencies in the Law and Constitutional Claims

a. *Redrawing Electoral Districts*

Within the context of the Federal Constitutional Court's authority to ultimately review the validity of the *Bundestag* elections, the Court had to struggle with the complaint that a shift in the population had gradually led to an unconstitutional imbalance of the election districts. The Court found that the shifts in population had developed gradually over time. As such, it would be difficult to determine when the original constitutional districting became unconstitutional. Accordingly, the Court determined that the situation was *still* tolerable. At the same time, the Court declared that it was the legislature's constitutional duty to pass new districting laws during the current legislative session so that the next elections would be held in properly apportioned districts.³⁹ Had the Federal Constitutional Court nullified the election laws with respect to the essential apportionment and ultimately allowed a contest of the elections, the Court would have been confronted immediately with the difficult task of determining which legislative subcommittee would have been authorized to pass new election laws regarding proper districting.

b. *The Sales Tax Case*

In contrast to the current value added tax system, the prior sales tax system, which imposed a four percent levy on each sales transaction, distorted competition by favoring larger businesses which, unlike smaller businesses, had the ability to combine several stages of production and distribution. The legislature had intended to avoid this inequality by authorizing the Federal Government, through the use of legal orders, to exempt certain transactions from taxation. However, the Federal Constitutional Court, several years prior to this authorization, had determined that such legal orders were void for failure to meet the constitutional requirements regarding the precision of an authorization to pass legal orders.⁴⁰

To nullify the entire sales tax law would have meant national bankruptcy. To declare unconstitutional only portions of the regulations was practically impossible because of the difficulty of separating the nullified sections from the valid sections. In the meantime, Parliament had pushed for a reform of the Sales Tax Law. Unfortunately, the reform movement was further complicated by the influence of a recent trend among European Communities to streamline regulations. In view of this, the Federal Constitutional Court arrived at the conclusion that the existing inequality had to be temporarily accepted by the disadvantaged businesses. In addition, the legislature was to be granted a certain grace period until it passed a new law. The Court assumed that the legislature, absent unforeseen problems, could bring the initiated reform to a con-

³⁹ 16 BVerfGE 130.

⁴⁰ 7 BVerfGE 282.

clusion and eliminate the objectionable inequality without any further delay.⁴¹

2. Appealing to the Legislature for Change

Several of the decisions by the Federal Constitutional Court holding the legal situation constitutionally acceptable but requiring action by the legislature involved the recodification of entire legal areas.

a. *Defining the Rights of Illegitimate Children*

One of the first decisions dealt with the specific constitutional task—without a preemptory order for time—to create equal conditions for legitimate and illegitimate children alike.⁴² In 1969, twenty years after the passage of the Basic Law,⁴³ the Federal Constitutional Court concluded that enough time had elapsed to now permit the legislature to fulfill this unmistakable constitutional mandate. The Court stated that the inequality which existed would only be acceptable until the end of the legislative session. The Court further noted that the mandate for equality was sufficiently clear, especially since it concerned family and inheritance law, to be implemented directly by the courts should the legislature not act. The *Bundestag* had already in hand a bill which was ready for adoption and which was to accommodate the constitutional mandate. Thus the six month deadline imposed by the Court (the time remaining in the session) was not prohibitive.

The Federal Constitutional Court's announcement that courts were to implement the will of the Basic Law in the event the Legislature failed to fulfill the constitutional mandate within a specified period of time was likely based on prior experience. Briefly, the Basic Law specifically mandated that any law which contradicted the principle of equality between men and women was to remain in effect until its adaptation to the changed legal status, but no later than March 31, 1953.⁴⁴ Once this date passed, the civil courts, which dealt with family matters, directly implemented the principle of equal treatment in many areas of family law. They did so for a period of three years until the emergence of legal reform. As early as 1953, the Court had demanded the implementation of this practice, the constitutionality of which had been questioned by one court.⁴⁵

b. *Defining the Rights of Prisoners*

Later decisions by the Federal Constitutional Court concluded that the absence of legal regulations regarding the rights and duties of prisoners was not compatible with the Basic Law. Parliament, the Court found, would need to pass laws concerning their basic legal rights. The present state of affairs, however, was to be accepted for a certain interim

41 21 BVerfGE 12, 42.

42 GRUNDGESETZ art. 6(V). See also 25 BVerfGE 167.

43 Article 121 of the Constitution of 1919 contained a similar mandate.

44 GRUNDGESETZ art. 117(I).

45 3 BVerfGE 225.

period. Traditionally, courts upheld directives issued by administrative agencies which encroached on prisoners' rights. The applicability of the principle of legal reservation to status situations (prisoners and students, for example) was debated in the legal literature. Increased acceptance of the principle, which provides that any encroachment on constitutional rights must be authorized by law, had already led the legislature to impanel a subcommittee to draft such legislation. The Court stated that the transitional period would expire at the end of the legislative session, which, at the time, was still one and a half years hence.⁴⁶ In view of the subsequent early dissolution of the *Bundestag*, the Court extended the period in a later ruling.⁴⁷

As for the interim period, the Court made it clear that the powers of the authorities and courts to encroach upon constitutional positions were reduced to what was indispensable in a specific case in order to maintain and conduct in an orderly fashion the enforcement of sentences. In both cases, the Court based its review of material constitutionality on the examination of concretely contested measures of law enforcement. The constitutional complaint was successful.

c. *Defining the Rights of Pupils*

The Federal Constitutional Court reached a similar decision concerning the legal status of pupils. In the area of education, essential issues, such as the fundamental requirements for graduation, must be regulated by law. The existing regulatory scheme, established through state administrative decrees issued by the Minister of Education, was only acceptable for a transitional period.⁴⁸ The Court achieved its constitutional objective by demanding that specific legislation must authorize encroachments of basic rights. In the meantime, the states that were authorized to do so expanded their school laws to contain the essential regulations, especially with reference to far reaching encroachments on pupils' rights. The Court left to the federal and state legislatures the task of discharging the functions required by law, a responsibility properly falling on the legislatures and not the courts.

3. The Doctrine of Equality

The Federal Constitutional Court has held legal regulations to be constitutionally acceptable, while at the same time clearly stating that a change was constitutionally required. Changing economic conditions have led to increased constitutionally relevant disparities. Such situations generally involve complex regulatory matters whose—possibly fundamental—reorganization should be primarily a task for the legislature and not for a court.

46 33 BVerfGE 1.

47 40 BVerfGE 276.

48 41 BVerfGE 251.

a. *Discriminatory Valuation Techniques for Taxable Assets*

In 1968, the Court decided a case involving the discriminatory valuation and taxation of various types of assets. The dispute involved the differing valuations of securities, assessed on the basis of fair market value, and real estate, assessed on the basis of historical cost. As a result of this disparity, a temporary surge in the economy would raise the value of the securities for tax purposes, while leaving the value of real estate unaffected. Because of the potential for a legislative response, the Court found that the constitutional complaint initiated by the owner of securities could not succeed. Because of the finality of judicial proceedings, a finding of past discrimination against the owner of differently assessed assets would not be possible. It is the legislature's duty to remove in due time any doubtful discrepancies.⁴⁹ This unmistakable appeal by the Court, however, has as yet not brought about a fundamental revision of asset valuation.⁵⁰

b. *Income Taxation*

The Court also noted inequalities regarding the taxation of civil servant pensions, which are fully taxable, and workers' social security income, taxable only in part. The favorable tax status of social security recipients vis-a-vis retired civil servants was originally insignificant because of the relatively small amount of social security income involved. In time, however, the situation changed. Social security increased nominally, reaching a level where it would be subject to tax had it not been for the contested provision. In its decision in 1980, the Federal Constitutional Court had to decide on taxation for the years 1969-70. The Court concluded that, for this period, the discrepancy was not significant enough to constitute a violation of the general principle of equality, as the actual conditions had changed only gradually. The Court insisted that because the matter concerned relatively complicated regulatory provisions, amendment could be effected neither quickly nor simply; fundamental reform was necessary. The Court stated that the legislature, free to choose the means for removing the existing distortions, was obliged to institute the necessary reform measures. The Court did not stipulate any date by which such reform was to be effected.⁵¹ No legal regulation is currently being planned.⁵²

c. *The Social Security Act*

Unlike the taxation of social security benefits, another appeals decision produced far reaching reform. The Social Security Act (*Rentenversicherung*) provided that, regardless of circumstances, widows would receive widow's benefits following the death of the husband. A widower,

49 23 BVerfGE 242.

50 See 65 BVerfGE 160.

51 54 BVerfGE 11.

52 Panels composed of experts dealt with a still more far-reaching alignment of the retirement system which also included similar issues. Individual experts and interested parties insist that the distortion which had been found by the Federal Constitutional Court has again abated.

on the other hand, was to receive benefits only if his wife had been primarily responsible for the family's support.

As late as 1963, the Federal Constitutional Court had reached the conclusion that this discrepancy did not constitute a violation of the principle of equality between men and women. During this period of the twentieth century, wives, if gainfully employed at all, generally earned much less than their husbands. Consequently, the surviving wife would be much more dependent on the widow's benefit than would a surviving husband on a widower's benefit. The small number of exceptions could be disregarded as atypical.⁵³

In 1975, the Federal Constitutional Court was confronted with a legally as well as factually changed situation. Family law no longer defined the roles of marriage partners but left them largely for the individuals to decide. More importantly, the portion of gainfully employed wives had risen to thirty percent—and continued to rise. The Court reviewed the provisions in the Social Security Act and found that they remained compatible with the constitutional principle of equal treatment of men and women. The Court stated, however, that an amendment was needed by the end of the following legislative session, allowing the legislature ample time to respond to the changing social environment and to regulate anew this difficult matter.⁵⁴ The legislature complied with little delay, implementing extensive reform.⁵⁵

F. *Mere Declaration of Unconstitutionality: Practical Limitations
on Striking Incompatible Provisions*

In certain circumstances, a nullification of legal norms would be even less compatible with the Basic Law than retaining a law that was per se unconstitutional. For example, the Federal Constitutional Court found provisions regulating the salaries of civil servants to be incompatible with the constitution. Declaring the provisions unconstitutional, however, would have eliminated the legal basis for paying such salaries.⁵⁶ The Court's decision was based on similar treatment of a prior legal regulation. The regulation allowed widows, under certain conditions, to demand a refund for contributions made to social security; orphans, however, were not permitted the same option. Basically, the State granted services or benefits to certain groups while members of another group claimed that the grant or denial of such services or benefits violated the principle of equality and created an unconstitutional loophole in the law. If the Court were to nullify the favorable provisions—as in the case of widows—then the inequality would be removed. However, the petitioners would not be helped. Instead of being as equally well off as the other group, they would have been worse off. Yet, dogmatically speaking, it would be nearly impossible to nullify a loophole.

⁵³ 17 BVerfGE 1.

⁵⁴ 39 BVerfGE 169.

⁵⁵ The expediency may be attributable to the interim solution offered by the *Bundestag*.

⁵⁶ See, e.g., 8 BVerfGE 1, 19; 26 BVerfGE 79; 32 BVerfGE 199; 40 BVerfGE 296; 56 BVerfGE 146; 56 BVerfGE 175; 64 BVerfGE 367.

In these situations, several options are available for the legislature to rectify the constitutional violation. First, it could deprive benefits to those who had previously received them. Even though this may be politically unrealistic, it has been done. Second, the legislature could grant benefits to those previously excluded by even going beyond the target group. Finally, it could draft an entirely new regulation.

Respect for the creative leeway of the legislature demands that the Federal Constitutional Court only determine that the alleged discrimination violates the Basic Law.⁵⁷ This requires the specialized court dealing with the case to stay the proceedings and await the decision of the legislature.⁵⁸ The decision concerning the taxation of heads of household, or half families, is illustrative. After an in-depth analysis of the applicable legal provisions, the Federal Constitutional Court concluded that relative to the taxation of married couples (with or without children) the tax treatment of heads of household was discriminatory. The discrepancy had become gradually aggravated after nominal wages increased considerably.⁵⁹ The tax structure not only violated the principle of equality, but also conflicted with the constitutional mandate that marriage and family be protected and promoted.⁶⁰

The Federal Constitutional Court specifically emphasized that the legislature had various possibilities—by employing means outside of the tax laws if necessary—to remove the unconstitutional discrimination, but that it had to be given sufficient time to institute legal reform. Thus, in the interest of legal security, the norms, albeit unconstitutional, would remain in effect.⁶¹ If no new regulations were enacted by December 31, 1984, the unconstitutional provisions could no longer be employed for purposes of taxing heads of households.⁶² The legislature enacted a new regulation only days prior to the deadline.

At times, systematic reasons, coupled with the need to guard the creative freedom of the legislature, prevented the Federal Constitutional Court from nullifying legal norms in cases involving other constitutional violations. For example, the Court concluded that the restrictions on property owners whose land, pursuant to certain regulations, was used for allotment gardens violated the principle of protection of property.⁶³ The allotment gardens provided a substantial amount of food for certain segments of the population during the two World Wars and the World Economic Crisis. Because of the financial reliance of the tenants operating the gardens, the legislature enacted regulations restricting eviction

57 See, e.g., 62 BVerfGE 256, 289 (terms of notice which differ for workers and employees); 57 BVerfGE 335, 346 (difference in the amount of lump-sum retirement payments); 52 BVerfGE 369, 379 (day off to do housework only for women).

58 22 BVerfGE 349.

59 In this way an increasingly larger group of people became subject to progressive income taxation. Married couples benefited from the law because of the so-called splitting procedure, whereas the exemptions granted to heads of household with children had become less and less valuable.

60 GRUNDGESETZ art. 6(I).

61 Preliminary Assessments, a form of assessment provided by the revenue code, would be necessary in the interim period.

62 61 BVerfGE 319.

63 52 BVerfGE 1.

and instituted rent control. Today, the gardens no longer possess the same vital significance. In many instances, the property used for allotment gardens has attracted investors interested in developing the land for apartment housing and the like. Against this background, the Court decided that the landowners' constitutional right to the protection of their property had been violated. Rectifying the situation would be difficult, as the violation was the result of a great number of interconnected provisions, whose combination ultimately went beyond reasonable encumbrance. Consequently, respect for the creative leeway of the legislature concerning a new regulation prevented nullification.

Another illustration is provided by the decision concerning revenue sharing among individual states.⁶⁴ According to the provisions of the Basic Law, revenues are to be shared equitably among the Federal states.⁶⁵ The Federal Constitutional Court found that several provisions of the law were not compatible with the Basic Law. Because the individual state regulations pertaining to revenue sharing are determined by law, the Court extended its declaration of incompatibility to the entire pertinent section of the law. Otherwise there would only remain a torso of a law which would be incapable of adequately equalizing the financial resources of the states. Nullification of the pertinent legal provisions would have been particularly inappropriate. The declaration of incompatibility signaled the legislature that reform of the revenue sharing laws was necessary. Moreover, the Court specified in detail what particular effects the declaration of incompatibility was to have on the past. For reasons of legal security and in the interest of effective budget planning, a retrospective treatment of the matter was not needed. However, the reforms would need to be in effect by the 1988 fiscal year. An interim compensatory plan would also be necessary.

III. Temporal Effects of Decisions

A. Cases of Nullity

If the Federal Constitutional Court either entirely or partially voids a norm the effect will be *ex tunc*. The Law Concerning the Federal Constitutional Court, however, severely restricts the legal significance of this effect.⁶⁶ Pursuant to this provision, a new trial is permissible only in *criminal* cases, where the final sentence was based on a norm subsequently voided. The law also includes those cases involving norms which are declared *incompatible* with the Basic Law and cases where the criminal sentence was based on the *interpretation* of a norm later declared incompatible with the Basic Law by the Federal Constitutional Court.

In all other areas, decisions which can no longer be appealed must stand. Practically speaking, this legal regulation means that those people who harbor doubts about the constitutionality of a norm must proceed against the decisions of courts and authorities by resorting to the appeals

⁶⁴ Judgment of June 24, 1986, 2 BvF 1/83.

⁶⁵ The enactment of any legislation affecting revenue sharing is customarily preceded by detailed negotiations between the Federal states and the Federal Government.

⁶⁶ BVerfGG § 79.

process. If a similar case is already pending before the Federal Constitutional Court, the specialized courts frequently suspend court proceedings in order to await a ruling by the Federal Constitutional Court.

B. *Appeals Decisions*

At first, pure appeals decisions have no direct legal effect, except for the announcement that a certain unconstitutional condition will no longer be tolerated in the future and occasionally a directive regarding which legal situation should later apply. Such announcements have been made by the Federal Constitutional Court for cases of incompatibility.

C. *Declaration of Incompatibility*

If a norm is declared incompatible with the Basic Law, then it can no longer be implemented as extensively as was originally intended. Accordingly, the specialized courts must set aside their pending cases and wait until the legislature has passed a new regulation.⁶⁷ A provision which has been declared unconstitutional only can be implemented, entirely or partially, if constitutional reasons, especially those of legal security, necessitate continued implementation during the transitional period. However, the situation may require further clarification by the courts.⁶⁸ To avoid potential ambiguity, the Federal Constitutional Court increasingly enumerates which legal consequences are to be valid in the period pending passage of a new legal regulation.

Should a law be declared incompatible, the legislature is obligated to establish a legal situation which is in agreement with the Basic Law. In the case of a new regulation, the legislators are obligated to promulgate legislation which also takes into account constitutional principles for the past, especially in cases that violate the principle of equality.⁶⁹

IV. Binding Nature of the Decisions

A. *Res Judicata and Legal Force*

Like the decisions of any other court of law those of the Federal Constitutional Court also become *res judicata*.⁷⁰ *Res judicata* applies only to the holding and not to the reasoning employed by the Court, even though such reasoning may be the basis for determining the meaning of the holding. An earlier decision will have *res judicata* effect on an issue in a subsequent proceeding only if the matter in dispute is the same and not merely when only essential legal questions are identical. The principle of *res judicata* not only has an effect *inter pares* but also binds the Federal Constitutional Court itself.

67 37 BVerfGE 217, 261.

68 See Heubner, *Golgen der Verfassungswidrigkeit eines Gesetzes ohne Nichtigerklaerung*, NJW art. 257 (1982).

69 55 BVerfGE 100. There remains, however, a degree of uncertainty. The legislature promulgated transitional regulations in a few cases guided by the above-mentioned differentiation in BVerfGG § 79(II). See Heyde, *Gesetzgeberische Konsequenzen aus der Verfassungswidrig-Erklärung von Normen*, in Festschrift Faller, at 53 (Muenchen 1984).

70 4 BVerfGE 31, 38; 20 BVerfGE 56, 86.

The legal force of a decision by the Court may be either negatively nullifying, in the case where incompatible provisions are voided, or positively determining, in the case where the Court rules on the compatibility of a law with the Basic Law. The Minister of Justice is obligated to publish the holding in the Federal Law Gazette.⁷¹ This also applies to cases where a specific declaration concerning the constitutionality of a norm has been made within the context of a constitutional complaint.⁷² Thus the Court determines simultaneously for itself the possible legal force of its decisions.

B. *Binding Nature*

The Law Concerning the Federal Constitutional Court explicitly requires that the decisions of the Court bind the constitutional bodies of the Federal Republic and the Federal states, as well as all courts and public authorities.⁷³ In an early decision, for example, the Court held that the principles governing the allocation of air time by radio and television stations for political campaigns are binding on all stations (not merely those involved in the original lawsuit) and with respect to all political parties.⁷⁴ Once the Court declares a norm unconstitutional, the legislature is prevented from repromulgating the same provision.⁷⁵

The binding effect extends to the holding and its essential reasoning but not to every single statement made by the Court in its often comprehensive explanations. Accordingly, canonizing individual sentences, possibly taken out-of-context, from the decisions of the Federal Constitutional Court is inappropriate. In one instance, however, the Court stipulated that all the arguments of a particular opinion were essential. The case involved the Basic Treaty with the German Democratic Republic and was strongly criticized in legal literature.⁷⁶ Since then, the Court has refrained from making such stipulations.

The binding effect of decisions by the Court does not extend to arguments which pertain only to the interpretation of so-called simple laws. This is a matter for the more practically oriented specialized courts. It is the proper task of the Court, however, to declare binding the criteria utilized in interpreting such laws. If the Court declares that certain interpretations of a norm are not compatible with the Basic Law then no other court may consider this interpretation constitutional. This also applies in the context of successful constitutional complaints alleging that certain court decisions interpreting simple laws, otherwise justifiable and possible, are in violation of the Basic Law.⁷⁷

71 BVerfGG § 31(II).

72 As mentioned earlier, the Federal Constitutional Court does not make a specific declaration of the constitutionality of a provision in cases where constitutionality is only indirectly tested. In deciding constitutional complaints, the Court rules only on the disputed decision. Consequently, the resulting incidental judicial review can be gleaned only from the reasons given in the decision.

73 BVerfGG § 31(I).

74 7 BVerfGE 99, 109; similar results are found in 8 BVerfGE 122, 141.

75 1 BVerfGE 14, 36.

76 36 BVerfGE 1, 36.

77 40 BVerfGE 88. See also 69 BVerfGE 112 (concerning the limitations of the binding effect).

C. *Is the Federal Constitutional Court Bound by Its Own Decisions?*

The decisions of the Federal Constitutional Court are not binding on the Court itself.⁷⁸ The Court has explicitly declared that it is permitted to dismiss legal opinions stated in earlier decisions, whether essential to the earlier decision or not.⁷⁹ Realistically, however, the Court departs from its own precedent only with great reluctance. Because of its unique ability to establish binding interpretations of the Basic Law, the Federal Constitutional Court, as the highest court, must be authorized to correct legal opinions which are later found inappropriate, excessively far reaching, or based on false precepts.⁸⁰ In accord with this authority, the Court recently corrected fixed guidelines for building development plans which were too general. After a detailed analysis of the *res judicata* effect in each individual case, the Court arrived at a more differentiating solution, explicitly stating that it would no longer adhere to earlier case law.⁸¹

One must distinguish from the above, decisions of the Court involving interpretations of the Basic Law which are based on express or implied facts subject to change. Early on, the Court decided that constitutional provisions may undergo a change of meaning "if new previously unpredictable facts surface or if known facts appear in a new light, or assume new significance as a result of their inclusion in the total history of a development."⁸² The Court emphasized that the specialized courts, within the framework of concrete judicial review procedures, are permitted to resubmit questions regarding the constitutionality of a legal provision. The specialized courts, however, must identify the changing conditions which prompted a renewed constitutional review of an already decided issue.⁸³ The following examples illustrate how changes in the social, economic, technical, moral, or simple legal conditions may lead to different constitutional assessments.

In the case involving widowers' benefits, the Federal Constitutional Court arrived at a different result twelve years after its first ruling on the matter because of changes which had occurred in the simple legal rules of family law and in the number of people affected by the original decision.⁸⁴ In addition, the Court worked to redefine the nature of constitutional protection afforded property owners in light of changing socio-economic conditions. Today, an increasing majority of the population derives its economic security from gainful employment and shared retirement benefits, relying less on material assets. From the above discussion, it is evident that not even decisions by the Federal Constitutional Court are meant to last in all eternity; rather, the decisions must be sub-

78 The Court must, however, observe the *res judicata* effect.

79 4 BVerfGE 31, 38; 20 BVerfGE 56, 86.

80 Within certain (not easily established) limitations, the interpretation of the Basic Law must also take into account a change in legal consciousness. The decisions discussed above involving prisoners and pupils are illustrative.

81 70 BVerfGE 35, 53.

82 2 BVerfGE 380, 401.

83 65 BVerfGE 179, 181.

84 See *supra* notes 53-55 and accompanying text.

jected to careful scrutiny and if necessary must be open to appropriate correction.

V. The Authority of the Federal Constitutional Court

A. *Statutory Law and Judicial (Judge-Made) Law*

The constitutional decision to create a constitutional tribunal with the task of deciding, as a court of last resort, how the Basic Law is to be interpreted, necessarily produces the potential for far reaching political repercussions. The Federal Constitutional Court cannot resort to a "political question doctrine" in the sense that it can refuse a decision because it would touch on issues of the highest political order. However, in the interest of the political common good the Court has avoided or softened the consequences resulting from the traditional doctrine of *ex tunc* nullity, which proved to be untenable. While doing so, the Federal Constitutional Court was obliged to recognize that the laws concerning the Court merely regulated connected procedural issues in a fragmentary and rudimentary fashion and that it had to largely create its own procedural law. Later, the Legislature, in the Law Concerning the Federal Constitutional Court, partially enacted the judicially created procedures.

B. *The Authority of the Federal Constitutional Court in Relation to Other National and International Bodies*

1. The Legislature

The Constitution of the Federal Republic, with all its fundamental rights, necessitates a greater degree of concrete interpretation than other legal norms. However, the fact that the Federal Constitutional Court, in its capacity as a court of last resort, is charged with the interpretation of the Basic Law does not suggest that the Court will always be required to replace the opinions of other bodies, especially those of the legislative authority and the specialized courts, with an opinion of its own. In this context, the concept of judicial self-restraint describes a virtue to be courted by the judge, yet not so binding as to replace an approach that is both required and differentiating. Ultimately, even the functional limitations of constitutional jurisdiction follow the entirely different provisions of the Basic Law which vary in their intensity, their range, and their need for concretization.

The task of the Federal Constitutional Court to safeguard the Basic Law may well require the very opposite of restraint; that is, it may demand the determined interference of the Court—even if there is danger of conflict with another authority.⁸⁵ For example, in the context of the Court's duty to safeguard the legislative authority between the Federal Republic and the individual states, the Court properly declared unconstitutional, for lack of federal authority, a federal law concerning the liability of the State for its employees, even though the law had been welcomed enthusiastically by many people.⁸⁶ Additionally, the Basic Law

85 Hesse, *Funktionelle Grenzen der Verfassungsgerichtsbarkeit*, in Festschrift Huber, at 261 (1981).
86 61 BVerfGE 149.

can demand protection for minorities in a variety of situations, including, for example, the protection of a small, financially weak state in the case of revenue sharing as well as the protection of the parliamentary minority in an investigative committee of the *Bundestag*.⁸⁷ Basic human rights may also mandate the protection of minorities who may have lacked a sufficient lobby for the purpose of asserting themselves politically.⁸⁸

On the other hand, it is not the task of a court to formulate basic political evaluations by replacing the decisions of the legislature with those of its own. Accordingly, where the Federal Constitutional Court concluded that there could be no dispute regarding how the legislature regulated a certain matter, the Court upheld an otherwise narrowing interpretation of the Basic Law on the basis of compatibility. Where, however, the result of value judgments by the legislature led to discrepancies no longer compatible with the principle of equality—even when observing a large leeway—the Court left to parliamentary panels the task of removing the unconstitutional discrimination.

In those instances where the legislature could not ascertain what the actual effect of a certain legal regulation might be, the Court maintained the “prognostic leeway” of the legislature. The Court stressed the fact that it was not the task of the courts, the Federal Constitutional Court included, to replace the decision of a designated political body with its own. There would be no legal criteria for such an action. This deference had an important role in the evaluation of risks involved in the construction of nuclear power plants,⁸⁹ as well as in the case concerning the effects of a law regulating the codetermination of workers in a company.⁹⁰

Depending on the intensity of the constitutional restriction in question, the Federal Constitutional Court has established differentiating criteria for the evaluation of legislative prognoses ranging from evidential control to a control of justifiability and an intensive control of contents. The Court determines whether the legislative bodies made an effort to ascertain adequately the current and future relevant facts and to incorporate them in their decision. For example, the Court determined that the legislature prohibited a particular form of shipment in the Animal Protection Act without realizing that for years a small sector of the economy regularly employed the same form of shipment for certain animals without being criticized.⁹¹

2. The Specialized Courts

As to its relationship with the specialized courts, the Federal Constitutional Court adheres to the policy that in any individual case the design of the procedures, the ascertainment and evaluation of the facts, as well as the interpretation and the application of constitutionally unobjectionable simple legal regulations fall within the province of the authorized

87 67 BVerfGE 100.

88 Another example is the professional regulations which assist the *beati possidentes* in protecting their profession against undesirable competition.

89 49 BVerfGE 89.

90 50 BVerfGE 290.

91 36 BVerfGE 47.

specialized courts, effectively precluding a review by the Court. The Court may interfere only in a situation where the decision is based on a fundamentally incorrect opinion about the significance and the range of a constitutional right. The limitations of such an interference by the Court cannot always be clearly determined. To provide for the special circumstances of a particular case, a certain degree of leeway must be reserved for judicial discretion.⁹² Therefore, the Court strives to avoid becoming a super court of last resort, taking jurisdiction of the case only in the event a specific constitutional right is violated. It is important to differentiate in this context, as well, the extent to which the measures or decisions of a public authority or court encroach upon the basic rights of the parties involved. If a decision by a specialized court turns out to be clearly incomprehensible or untenable, and therefore objectively arbitrary, then the court will be overruled by the Court on the basis of inequality.⁹³

The Federal Constitutional Court will review the procedures implemented by a specialized court in order to determine whether or not they violate a constitutional principle such as the right to be heard or the right to a fair criminal trial. Not every violation of simple legal regulations will prove to be a violation of the Basic Law. Rather, there must be an examination in every individual case as to whether the constitutionally guaranteed right had not already been curtailed.⁹⁴

3. International Courts

The problems and issues are somewhat different when trying to determine the relationship between the Federal Constitutional Court and the international, or supra-national, courts. It is not the mandate of the international tribunals to preserve and implement national constitutional law but rather to safeguard the legal order with which the courts have been charged. In the case of the Court of the European Communities such order is the multilayered legal system of the members of the European Community, and in the case of the European Court for Human Rights such order is the Human Rights Convention. To be sure, the increased judicial activity of the European Court for Human Rights makes conceivable a certainly deplorable trend according to which decisions diverge more and more from the content of the basic human right.

The Federal Constitutional Court emphasized, as early as 1974, at a time when basic rights were hardly talked about in the legal systems of the European Communities, its authority to measure the legal norms of the derivative law of the European Communities against the national constitutional rights of the Federal Republic. Nevertheless, it remained uncertain in 1979 the extent to which (if at all) the Federal Constitutional Court was required to adhere to such a law in view of changes in the

92 18 BVerfGE 85, 92; 42 BVerfGE 143, 149.

93 42 BVerfGE 64; 70 BVerfGE 93.

94 60 BVerfGE 305, 310.

political and legal development.⁹⁵ The Federal Constitutional Court's resolution of this complex matter has yet to be finalized.

⁹⁵ 37 BVerfGE 271, 277 (1974); 52 BVerfGE 187, 202-03 (1979).