Strasbourg, 22 May 2003

CDL-JU (2003) 18
English only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

THE BINDING EFFECT OF FEDERAL CONSTITUTIONAL COURT DECISIONS UPON POLITICAL INSTITUTIONS

Report by Ms Anke Eilers
Federal Constitutional Court, Karlsruhe

Seminar on "The effects of Constitutional Court decisions"
(Tirana, 28-29 April 2003)

Dr. Anke Eilers
presently, Law Clerk at the Federal Constitutional Court
(Bundesverfassungsgericht), Karlsruhe, department of
Federal Constitutional Court Judge Rudolf Mellinghoff

Overview

- -
-
- Ladies and gentlemen!

I. Introduction

I am very glad that I have been given the opportunity to speak to you on behalf of the German Federal Constitutional Court, the *Bundesverfassungsgericht*, in today's conference, and I thank you very much for your interest. The subject which I will talk about is the binding effect of Federal Constitutional Court decisions upon political institutions (that is, [i.e.] on parliament and government.)

1. First of all, I would like to briefly introduce myself. I am a judge at the Regional Court *(Landgericht)* Bonn and have so far dealt with civil-law disputes there. Since 1 October 2001, I have been a law clerk at the Federal Constitutional Court. At first, I worked for our former president, Prof. Dr. Limbach. Since her retirement from office in spring 2002, I have been working for Federal Constitutional Court judge Mr. Mellinghoff, who had the pleasure of speaking to you about constitutional law here in Tirana in November last year. He told me to give you his best regards.

2. The Federal Constitutional Court, which celebrated its 50th anniversary two years ago, is an essential institution in the social and legal system of the Federal Republic of Germany. On the one hand, it is the highest court, on the other hand, it is the supreme constitutional body. It is no ordinary court of appeal in civil-law, criminal-law or administrative-law proceedings. Its task consists in reviewing whether the legislative, the executive or the judiciary have violated the Constitution.

The Federal Constitutional Court's competencies are specified in our Constitution, the Basic Law *(Grundgesetz)*, which was adopted in 1949 and complemented in 1990 on the occasion of German reunification, and they are specified in ordinary law, namely in the Federal Constitutional Court Act.

The Federal Constitutional Court has comprehensive competencies to control all three state powers on the basis of the Constitution. This means that the Federal Constitutional Court does not apply ordinary law, like, for instance, criminal law, administrative law or civil law, but that it reviews whether statutes, decisions of other courts and sovereign acts of German administrative authorities or of the German government are compatible with the Constitution. The Federal Constitutional Court does not act *ex officio*. An application in one of the specific types of proceedings that exist before the Federal Constitutional Court is always required for the Court to act.

To better understand the binding effect of the Federal Constitutional Court's decisions, it is necessary to briefly describe the relevant types of proceedings:

The Federal Constitutional Court reviews whether legislative acts comply with the Constitution. This type of proceedings is called "review of statutes." Here, it must be distinguished between

a) the so-called concrete review of statutes, which is performed on account of a specific case in judicial referral proceedings pursuant to Article 100 subsection 1 [Article 100.1] of the Basic Law, Section 13 subsection 11 [§ 13.11] and Sections 80 *et seq.* [§§ 80 *et seq.*] of the Federal Constitutional Court Act;
b) the abstract control of statutes pursuant to Article 93 subsection 1 numbers 2 and 2a [Article 93.1.2 and 93.1.2a] of the Basic Law, Section 13 subsections 6 and 6a [§ 13.6 and 13.6.a] and Sections 76 *et seq.* [§§ 76 *et seq.*] of the Federal Constitutional Court Act; and
c) the constitutional complaint pursuant to Article 93, subsection 1 number 4a [Article 93.1.4a] of the Basic Law, Section 13 subsection 8a [§ 13.8a] and Sections 90 *et seq.* [§§ 90 *et seq.*] of the Federal Constitutional Court Act.

a) The first group of cases is the request of a so-called "concrete review of statutes" pursuant to Article 100 subsection 1 [100.1] of the Basic Law, which arises from an ordinary lawsuit. Every German court which is convinced that a relevant federal or state law that is applicable to its case violates the Basic Law must refer the question of constitutionality to the Federal Constitutional Court and suspend the proceedings until a decision of the Federal Constitutional Court has been reached. The Federal Constitutional Court is the only court in Germany which is vested with the power to declare a law unconstitutional. No ordinary German court may decide on the unconstitutionality of a law. But of course every German court has to reflect on the constitutionality of the laws that are applicable to cases that are brought before it, because the Basic Law says in its Article 1 subsection 3 [Article 1.3]:

"The following fundamental rights are binding upon legislature, executive, and judiciary as directly valid law."

If doubts about the constitutionality of the statute are raised but the court concludes that there is a way to interpret the statute in conformity with the Basic Law, it can do so. It is only the "negative declaration" of a court - concluding that a statute cannot be interpreted in conformity with the Basic Law - that is reserved exclusively to the Federal Constitutional Court.

The submitting court has to explain in detail why it considers the relevant legal provision to be in conflict with the Constitution, why the outcome of the case depends on the validity of the law, and why there is absolutely no acceptable way of interpreting the statute in accordance with the Constitution. The submitting court has this obligation whether or not the issue of constitutional conformity has been raised by one of the parties. If the Federal Constitutional Court accepts the request for the review of the statute, it provides the parties an opportunity to be heard and permits the highest federal bodies or the government of the *Land* (state) concerned, if the law of a *Land* is challenged, to enter the proceedings.

Proceedings that involve the concrete review of statutes are frequently brought before the Federal Constitutional Court. They account for the second largest share of the Federal Constitutional Court's activities. From the beginning of its work in 1951 until the end of 2002, the Federal Constitutional Court has found over 300 statutory provisions unconstitutional.

b) The so-called "abstract review of statutes", however, does not stem from court proceedings. It is instituted at the request of the federal government, of a *Land* government or of one third of the members of the *Bundestag* (the lower House of the German parliament.) In such cases, the Federal Constitutional Court is asked to decide differences of opinions or doubts about the compatibility of Federal or *Land* law with the Basic Law. The requesting party has to submit written briefs and the relevant federal bodies or *Land* governments are asked to participate.

While the Federal Constitutional Court can refuse to decide a case that involves the concrete review of a statute on the ground that the submitting court has not plausibly asserted its concern about the unconstitutionality of the challenged statute, or because the Constitutional court finds that the decision of the case does not necessarily depend on it, there is "no easy way out" in the case of the abstract review of statutes. Here the Federal Constitutional Court has to deliver an opinion which is binding upon every state body, including the legislature. Once the request is submitted, the party who started the proceedings no longer has the power to withdraw it. The Federal Constitutional Court will analyse the statute in question under every constitutional aspect; in its review, it is not restricted to objections raised by the parties.

A good example for proceedings that involve the abstract review of statutes are the abortion cases (Decisions of the Federal Constitutional Court [*Entscheidungen des Bundesverfassungsgerichts*, BVerfGE] 39, p. 1 and BVerfGE 88, p. 198.) In 1974 and again in 1992, the *Bundestag* passed abortion reform statutes. Both times, a number of members of the *Bundestag* as well as the *Land* government of Bavaria (and in the first case, 4 more *Land* governments) petitioned the Federal Constitutional Court to review Section 218a [§ 218a] of the Abortion Reform Act on the ground that it violated several provisions of the Basic Law, including its clauses on human dignity and the right to life.

c) The other instrument of control that the Federal Constitutional Court has, which is important for its relation to other courts and which accounts for the largest share of its workload, is the constitutional complaint: More than 4,900 constitutional complaints were lodged by individuals and legal persons in 1999 alone. After exhausting all other available means to find relief in the ordinary courts, any person who claims that "public authority" has violated his or her fundamental substantive or procedural rights under the Basic Law can file a constitutional complaint. Fundamental rights are rights of protection against the state. They guarantee individuals a sphere of rights that is enshrined in the Constitution; any intervention with this sphere by the state requires justification.

In this context, "public authority" means all acts of government including judicial decisions, administrative decrees and legislative acts.

In any case, the complainant has to be affected personally, directly and presently by the act of public authority. As most legislative acts require implementation by the administration, the complainant will frequently have to wait for an administrative act addressed to him or her to bring an action against this act.

In some cases, however, it has been found that a law itself presently and directly affects the fundamental rights (Section 95 subsection 3 [§ 95.3] of the Federal Constitutional Court Act.) As no ordinary judicial remedy is available against legislative acts, a constitutional complaint has been considered admissible in these cases.

In this context, the proceedings that related to the Census Act (BVerfGE 65, p. 1) may serve as an example. The Census Act obliged all citizens to take part in a census. In this case, there was no act of the executive power against which the citizens could have brought legal action.

In this context, the review that is performed is concrete because the complainant must demonstrate that the challenged statute affects him or her personally, presently and directly. However, the decision about the statute is detached from the original case, in its dictum and also as regards its legal consequences.

The constitutional complaint is an extraordinary legal remedy that is available to the individual for the protection of his or her fundamental rights. All remedies within the relevant branch of jurisdiction must therefore have been exhausted before the person affected can take the case to the Federal Constitutional Court. This restriction makes sense because all courts are obliged to consider constitutional values when deciding cases of ordinary law. This principle follows, as I have already mentioned, from Article 1 subsection 3 [Article 1.3] of the Basic Law. It provides that the fundamental rights that are set forth in the Constitution shall bind the legislature, the executive and the judiciary as directly enforceable law.

Most constitutional complaints challenge court decisions. Therefore the scrutiny of the case - and full review if the case is admitted for decision - necessarily has to include the evaluation of the preceding court decisions. The Federal Constitutional Court is restricted to the review of constitutionality. Usually the complainants claim the violation of fundamental rights in the findings of the competent courts, either because the courts have applied a statute in an unconstitutional manner or because the statute itself that is applicable to the case is unconstitutional. The Federal Constitutional Court, however, is only permitted to review whether the competent courts have violated the complainant’s constitutional rights. As long

as no fundamental right has been infringed, the Federal Constitutional Court is bound by the decisions of the competent courts.

However, if the Federal Constitutional Courts finds that the competent courts have applied a valid statute in an unconstitutional manner, it will overturn the decision. If it holds that the statute applied by a competent court is unconstitutional, it declares the statute in question null and void just like in the cases that involve the review of statutes and regular courts may no longer apply it. And if the Federal Constitutional court finds that a statute is only in compliance with the Basic Law if interpreted in a specific way, this specific interpretation is binding upon all the other courts, too.

The effect of the constitutional complaint on the constitutional law in Germany cannot be overestimated, although the rate of the successful complaints is very low. It is below 3%. Most landmark cases in Germany's constitutional history have originated from constitutional complaints by ordinary citizens.

II. Types of Binding Effect

The effect of the Federal Constitutional Court's work, and the importance that goes with it, essentially depend on the binding effect of its decisions.

Our Constitution does not contain a specific regulation to this effect. It just explicitly states the priority of the Constitution (Article 1 subsection 3 [Article 1.3] and Article 20 subsection 3 [Article 20.3] of the Basic Law.) In this respect, the legal situation in Germany is different from that in Albania. As far as I know, Article 132 subsection 1 [Article 132.1] of your Constitution provides that the decisions of the Constitutional Court are final and binding ("The decisions of the Constitutional courts have general binding force and are final. The Constitutional Court has only the right to invalidate the act it reviews.")

1. In Germany, Section 31 [§ 31] of the Federal Constitutional Court Act, that is, [i.e.] a regulation in ordinary law, determines the binding effect of Federal Constitutional Court decisions. Its wording is:

"The decisions of the Federal Constitutional Court are binding upon federal and *Land* constitutional bodies as well as upon all courts and authorities.

In cases pursuant to Section 13 number 6 [§ 13.6] [abstract review of statutes] and Section 11 [§ 11] [concrete review of statutes], ... decisions of the Federal Constitutional Court have the force of law. This also applies in cases pursuant to Section 13 number 8a [§ 13.8a] [constitutional complaint proceedings] if the Federal Constitutional Court declares an Act to be compatible or incompatible with the Basic Law or null and void ..."

2. As concerns the effects of Federal Constitutional Court decisions, it must be distinguished between *res judicata*, force of law and binding effect.

a) The so-called *res judicata* effect of Federal Constitutional Court decisions is not regulated by statute. As is the case also with all other judicial decisions, Federal Constitutional Court decisions are *res judicata* for the parties to the proceedings before the Federal Constitutional Court. The *res judicata* effect of Federal Constitutional Court decisions only applies *inter*

partes, which means that the decisions are only *res judicata* for the legislature if the legislature itself was party to the proceedings.

Res judicata means first and foremost the irrevocability of the decision for the ruling court. The court cannot revoke its decision once it has been issued. The legal consequences that are expressed in the operative provisions of a decision are no longer at the Federal Constitutional Court's disposal.

Apart from this, *res judicata* means the unappealability of the issued decision. Unappealability arises at the point in time when the decision is issued because there are no legal remedies against the decision of a highest court (formal *res judicata*.)

Res judicata also means substantive *res judicata*, which means that the parties to the proceedings are also bound beyond the proceedings themselves, in particular in later proceedings, by a decision that is formal *res judicata*. As concerns the content of the decision, substantive *res judicata* is restricted to the facts that are of relevance to the decision. As concerns time, substantive *res judicata* is valid as long as the facts that are of relevance to the decision do not change in comparison to the point in time when the decision was issued. Substantive *res judicata* serves legal certainty and the undisturbed administration of the law.

Only decisions on the merits are substantive *res judicata.* The so-called non-admission orders pursuant to Section 93b [§ 93b] of the Federal Constitutional Court Act, by which the Federal Constitutional Court decides that a constitutional complaint is not admitted for decision, are no such decisions. Decisions in proceedings that involve the review of statutes, however, are *res judicata*.

b) The force of law pursuant to Section 31 subsection 2 [§ 31.2] of the Federal Constitutional Court Act is restricted to specific types of proceedings (abstract and concrete review of statutes, review of statutes in constitutional complaint proceedings.) It is binding *inter omnes* upon all public authorities and private individuals. The fact that it is also binding upon private individuals distinguishes the force of law from the binding effect pursuant to Section 31 subsection 1 [31.1] of the Federal Constitutional Court Act.

Res judicata and force of law only apply to the operative provisions of the decision, which means that in proceedings that involve the review of statutes, they apply to the decision about the validity or the nullity of the specific statute that has been reviewed. The historical root of the force of law is the aim to lend the law of the German Reich authority against the law of the individual German states, which was pursued in the 19th century. Today, the importance of the force of law lies in the priority of the Constitution.

The special impact of the Federal Constitutional Court's decisions on the legislature becomes apparent if the fact is taken into account that the legislature is bound by the Federal Constitutional Court's decisions even in proceedings to which it is no party. As a general rule, the Federal Constitutional Court aims at taking the interests of public authorities (the federal government, the Federal Court of Justice [*Bundesgerichtshof*]) into account by asking them to submit written opinions.

c) The binding effect pursuant to Section 31 subsection 1 of the Federal Constitutional Court Act extends to all Federal Constitutional Court decisions and concerns all constitutional bodies of the Federal and *Länder* governments, all courts and authorities, that is, [i.e.] the

entire public authority. These bodies, which hold sovereign power, are bound by the decisions of the Federal Constitutional Court irrespective of the type of proceedings. This means that the binding effect goes beyond the *res judicata* effect. The legislature is also a constitutional body. For the legislature, both the force of law and the binding effect are relevant, but the binding effect alone would be sufficient because it goes beyond the force of law. Only decisions on the merits have binding effect.

As concerns the binding effect, two complexes of problems can be distinguished: on the one hand, there is the question to which parts of the decision the binding effect applies, on the other hand, there is the issue of the ban on repeating a statute, that is, [i.e.] the question to what extent the legislature is bound in a specific case.

aa) What is important first of all in order to answer the question which parts of the decision have a binding effect are the types of decisions that exist in the Federal Constitutional Court.

The Federal Constitutional Court can state that a statute is null and void because it violates the Constitution. If the nullity of a statute is stated, no further act of implementation is required. The legal effect arises *eo ipso*. Normally, the statute is declared null and void *ex tunc*, that is, [i.e.] from the beginning of the collision between the statute and the Constitution. As a general rule, the statute is declared null and void in its entirety, but partial declarations of nullity of specific parts of a statute are also possible.

In its Section 78 [§ 78], the Federal Constitutional Court Act expressly regulates the declaration of nullity in proceedings that involve the abstract review of statutes: "If the Federal Constitutional Court comes to the conclusion that Federal law is incompatible with the Basic Law or that *Land* law is incompatible with the Basic Law or other Federal law, it declares the law to be null and void. If further provisions of the same law are incompatible with the Basic Law or other Federal law for the same reasons, the Federal Constitutional Court may also declare them to be null and void."

Apart from declaring unconstitutional regulations null and void, the Federal Constitutional Court has occasionally confined itself to stating the unconstitutionality of a statute while setting at the same time a deadline for the legislature to take corrective legislative action.

In some of these proceedings, the Federal Constitutional Court has explicitly ordered the continued applicability of the unconstitutional regulation. Such a decision that orders the continuance in force of an unconstitutional regulation has the force of law.

Apart from such declarations of unconstitutionality, the Federal Constitutional Court has adopted admonitory decisions in which it has appealed to the legislature to act and amend the unconstitutional statute at a specific point in time at the latest (for example in the so-called Prison Correspondence Case, BVerfGE 33, p. 1.)

There is also the possibility of an interpreting a statute in conformity with the Basic Law; in such cases, the Federal Constitutional Court regards a specific interpretation of the statute as the only one that is constitutional. There have been a few cases in which the court itself has ordered specific legal practices to be implemented. Such admonitory decisions have a binding effect but they do not have the force of law.

bb) It is exactly the different content of the three types of decisions that shows how important the scope of the binding effect of Federal Constitutional Court decisions is.

It is undisputed that the objective scope of the binding effect extends to the operative provisions of a decision. Apart from this, the Federal Constitutional Court itself also assumes in its established case-law that the binding effect extends to the essential reasoning of its decision (BVerfGE 1, p. 14 [at p. 37]; 79, p. 256 [at p. 264].) This is understandable in view of the highly differentiated content of the Federal Constitutional Court's decisions.

This opinion, which is not undisputed in legal literature, is based on the idea that the Federal Constitutional Court is the authoritative and only interpreter and guardian of the Constitution. The Federal Constitutional Court determines what constitutional law is. The binding effect must therefore also extend to the grounds of its decisions. Only they contain a concretisation of the Constitution that can gain importance beyond the individual case. In this way, a uniform and consistent interpretation of the Constitution is achieved. A standstill in the evolution of the law would seem out of the question because the Federal Constitutional Court itself is exempt from the binding effect pursuant to Section 31 subsection 1 [§ 31.1] of the Federal Constitutional Court Act. It can therefore change its interpretation of the law and thus exempt the government bodies that are bound by its decisions from the binding effect of the decisions. This is demonstrated in some decisions in which the Federal Constitutional Court has departed from its former case-law.

It is problematic to distinguish what forms part of the essential reasoning of a decision and what does not. As regards this distinction, there is a variety of opinions. The Federal Constitutional Court itself has ruled that such reasoning is essential which cannot be left out of the decision without the concrete conclusion of the decision being lost (BVerfGE 20, p. 56 [at p. 87; 96, p. 375 [at p. 404].) Non-essential are the reasons that are only given *obiter*, and that do not form part of the connection between the general legal rule and the concrete decision that is established in the reasoning.

cc) Another problem is posed by the question whether, when the Federal Constitutional Court has stated the nullity of a statute due to its unconstitutionality, the legislature can adopt another statute the content of which corresponds to the one that had been turned down by the Federal Constitutional Court (ban on the repeated adoption of statutes.)

The Federal Constitutional Court has dealt with this question in three decisions. As early as in 1951, it ruled as follows:

The Federal Constitutional Court has to state the nullity of a legal provision if the provision contradicts the Basic Law. This ruling, together with its essential reasoning, is binding upon all federal constitutional bodies pursuant to Section 31 subsection 1 of the Federal Constitutional Court Act in such a way that a federal law with the same content cannot again be deliberated and adopted by the entities with legislative power and cannot again be promulgated by the federal president (BVerfGE 1, p. 14 [at pp. 36-37].) For a long time, this opinion seemed to be unchallenged. The Second Panel of the Federal Constitutional Court confirmed its own ruling in 1985 (BVerfGE 69, p. 112 [at pp. 115 *et seq*.].) (The Federal Constitutional Court consists of two Panels, or Senates, with eight judges each, each Panel is the Federal Constitutional Court.)

It was surprising that only two years later, the First Panel of the Federal Constitutional Court disassociated itself from the ban on the repeated adoption of statutes. The Court held that Section 31 [§ 31] of the Federal Constitutional Court Act, and the fact that Federal Constitutional Court decisions that declare the nullity of statutes are *res judicata,* do not prevent the legislature from adopting new statutes whose content is the same as, or similar to, the statutes that were declared null and void. In support of its decision, the Federal Constitutional Court explained: Article 20 subsection 3 [Article 20.3] of the Basic Law (the principle of the rule of law) is binding upon the legislative power solely as regards the constitutional order but not as regards ordinary law. The binding effect set forth in Section 31 subsection 1 [§ 31.1] of the Federal Constitutional Court Act, that is, [i.e.] in ordinary law, therefore cannot prevent the legislature from making use of its legislative discretion, and from assuming its legislative responsibility by adopting a new statute with the same content if the legislature considers this necessary.

The Court further argued that it was the legislature's task to adapt the law to changing social requirements and to changing concepts of the social order. Because the Federal Constitutional Court was not allowed to correct itself on its own initiative, a codification of the Federal Constitutional Court's case-law would lead to a paralysation in the evolution of the law that was incompatible with a democratic state under the rule of law and with a social welfare state (BVerfGE 77, p. 84 [at pp. 103-104].)

However, good reasons are required for the repeated adoption of a statute. The principle of mutual loyalty between constitutional bodies *(Verfassungsorgantreue)* sets limits to it. This principle prohibits the legislature from adopting the same statute unchanged immediately after it has been declared unconstitutional by the Federal Constitutional Court, thereby openly affronting the Federal Constitutional Court.

d) As I have already mentioned, the Federal Constitutional Court itself is not bound by Section 31 subsection 1 [§ 31.1] of the Federal Constitutional Court Act. This is supposed to prevent the fossilisation of the Basic Law. Although the Federal Constitutional Court is not bound by its own case-law but can depart from its previous conclusions with the corresponding grounds being given, only very few decisions can be found in which such a departure is apparent. The Federal Constitutional Court regards it as an intrinsic value to preserve its continuity as far as possible and to make reference, in the case of innovations, to traditions in legal dogmatics that have proven their worth. As a general rule, this is done in the headnotes that precede the decisions. This approach is based on the correct idea that continuity strengthens confidence in the legal system. In this respect, the factual binding effect of the Federal Constitutional Court's case-law on its own decisions is considerable.

The factual binding effect also exist *vis-à-vis* all other state bodies. The state bodies voluntarily submit to the standards which are set by the Federal Constitutional Court and which can be taken from the grounds of the decisions.

Normally the parliamentary legislature also strives to take account of the Federal Constitutional Court's directives and of its hints for the interpretation of its decisions to the letter. The courts also follow the Federal Constitutional Court's grounds for its decisions as exactly as possible so that their decisions will be proof against constitutional complaints. The same applies to the administration.

Ultimately, the Federal Constitutional Court's strong position is based on the rational predictability of its case-law, which is designed for continuity, and in the degree of acceptance of its decisions and the great factual authority that goes with it. To enforce the Federal Constitutional Court's case-law, and this seems particularly remarkable to me, hardly any legally binding orders are required, if only because of the fact that law-making bodies have to draw the political conclusions from the Federal Constitutional Court's declaratory decisions. The secret of the effectiveness of Federal Constitutional Court decisions must be their conclusiveness and, ultimately, the legal culture that has developed in Germany since 1949.

e) If nevertheless, in exceptional cases, the binding effect is not observed, this does not go unsanctioned. The non-observance of the Federal Constitutional Court's decisions can constitute an infringement of the Constitution pursuant to Article 20 subsection 3 [Article 20.3] of the Basic Law; such an infringement can, if appropriate, be challenged by way of a constitutional complaint pursuant to Article 2 subsection 1 [Article 2.1] of the Basic Law. the Federal Constitutional Court, however, cannot itself impose sanctions. The disregard of the fact that a decision in proceedings that involve the review of statutes has the force of law can be seen as a possible perversion of the course of justice, which is punishable.

Apart from these sanctions, it must also be mentioned that pursuant to Section 35 [§ 35] of the Federal Constitutional Court Act, the Federal Constitutional Court may state by whom the decision is to be enforced; in individual instances, it may also specify the method of enforcement. The Federal Constitutional Court has no official bodies of enforcement of its own. Interim regulations by the Court itself that substitute statutes are part of the order of enforcement; the same, however, already applies to the order of the continuance in force of a law that has been declared unconstitutional.

As examples, the abortion cases should again be mentioned. In 1975 the time-phase solution, which made an abortion within 12 weeks of conception permissible, and which had been adopted as a law, was declared unconstitutional because it infringed the right to life of the *nasciturus*, which was protected by fundamental rights. For the same reasons, the Federal Constitutional Court could not order that the law continue in force even temporarily. The old regulations in criminal law could not be revived because they were not in keeping with the times and were contrary to the will of all political camps. An unregulated situation was not acceptable because to protect unborn human life, even criminal law was required. In this situation, the Federal Constitutional Court held that for a transitional period, abortion in the first 12 weeks of pregnancy would be punishable, but it established conditions under which abortion would be exempt from punishment (these conditions made abortion permissible for instance on grounds of the embryo's severe handicap or for medical reasons.) This approach had so far only been favoured by the parliamentary opposition, which had been outvoted. This means that criminal liability was based on an order of enforcement issued by the Federal Constitutional Court, not on a statute adopted by the democratically legitimated legislature.

3. Binding Effect and Ruling Bodies of Judges

It must be mentioned that apart from the Panels, which have already been described, there are also Chambers within the Panels in the Federal Constitutional Court. The Chambers, which consist of three judges, decide about the admissibility of a constitutional complaint. A constitutional complaint can also be granted in a Chamber decision. Such decision also has

binding effect (Section 93c subsection 1 sentence 1 [§ 93c.1.1] of the Federal Constitutional Court Act.)

4. Special Type of Effect

Pursuant to Section 79 [§ 79] of the Federal Constitutional Court Act, new proceedings may be instituted in accordance with the provisions of the Code of Criminal Procedure against a final conviction that is based on a rule which has been declared incompatible with the Basic Law or null and void, or on the interpretation of a statute that has been declared incompatible with the Basic Law by the Federal Constitutional Court. In all other cases, the unappealable decisions that are based on a statute that has been declared null and void remain unaffected. However, the enforcement of such a decision is impermissible.

Thus Section 79 subsection 1 [§ 79.1] of the Federal Constitutional Court Act establishes an exception to the protection of the legal validity of unappealable sovereign acts. The principle of *res judicata* is departed from in favour of justice.

III. Specific Cases - The Influence of Landmark Decisions

Certain landmark decisions of the Federal Constitutional Court have had a particularly strong binding effect. Especially in the first years of its existence, the Federal Constitutional Court has issued important decisions that have had a lasting influence on its own case-law and thus on the Federal Constitutional Court itself.

In the so-called Elfes Decision (BVerfGE 6, p. 32) the Federal Constitutional Court decided that the broad concept of the "general freedom of action" set forth in Article 2 sub-section 1 [Article 2.1] of the Basic Law guarantees a seamless protection of fundamental rights, with the consequence that any state action that is contrary to the law can be controlled by the Federal Constitutional Court in the framework of a constitutional complaint.

In the Lüth Decision (BVerfGE 7, p. 198) the Federal Constitutional Court for the first time gave grounds for substantiating the prominent role of the freedom of opinion in conflicts of fundamental rights and also for substantiating the so-called indirect effect on third parties *(mittelbare Drittwirkung),* which means that the fundamental rights not only have to be complied with by public authority but also by private parties. Civil-law statutes are to be interpreted in conformity with the Constitution in the light of the fundamental values of the Basic Law.

Finally, I would like to mention the Federal Constitutional Court decisions that relate to Article 2 sub-section 1 [Article 2.1] of the Basic Law. On the basis of this statute, the Federal Constitutional Court has developed a "general right of personality", and, as another manifestation of this right, the "right to informational self-determination". Encroachments upon this right require a precisely defined statutory basis. With all restraint that the Federal Constitutional Court exercises in other decisions, the effect of this decision corresponds to the activity of a constitutional legislature that reacts to new problems.

These decisions have influenced the work of parliamentary legislature and the work of the courts to this day. From them, it becomes evident that the effects of the Federal Constitutional Court decisions live up to a sufficient extent to the task that is assigned to the

Court by the Basic Law and to its importance in the constitutional system of the Federal Republic of Germany.

IV. Outlook: The Effect of the Federal Constitutional Court's Work on the Public

In the perception of the public, the Federal Constitutional Court has a special status. Its decisions, but also the opinions given by individual judges in the media, are perceived and quoted with, one could almost say, particular respect. The Court is held in high esteem by the population although not all of its decisions are accepted without criticism. Although the Federal Constitutional Court is a constitutional body, which places it in the sphere of politics, it is, on the other hand, the highest German court, whose jurisdiction can be invoked by all citizens. This is why politicians and citizens frequently announce that they will "go to Karlsruhe", the seat of the Federal Constitutional Court, to submit their cases there. For some, this prospect is a threat, for others, it is their last hope.

In the more than 50 years of its existence, the Federal Constitutional Court has become a power factor. This shows that its decisions have had considerable effects.