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THE LIMITS OF CONSTITUTIONAL REVIEW OF ORDINARY COURT´S DECISIONS IN CONSTITUTIONAL COMPLAINT PROCEEDINGS

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REPORT

CONSTITUTIONAL REVIEW OF DECISIONS OF NON CONSTITUTIONAL COURTS BY THE GERMAN FEDERAL CONSTITUTIONAL COURT

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1. Introduction

According to a well-known witticism, the judiciary has, in the last decades, drained the cup of responsibilities and competences to the last drop and has poured itself more without having been asked to. Such criticism, which is aimed at denouncing an alleged development towards a state dominated by judges or by the judiciary, has probably also, and especially, been intended for the Federal Constitutional Court. While the constitutional jurisdiction in Germany as such enjoys high reputation in the body politic, it meets with criticism as concerns two lines of development: What is complained about is, on the one hand, "intervention" in politics and in legislative the competences, and on the other hand, "interference" with the competences and jurisdictions of the nonconstitutional courts, or courts having general jurisdiction, and this kind of criticism comes above all from some sectors of legal science and from some branches of nonconstitutional jurisdiction. In my part of the presentation, I will restrict myself to dealing with the second point, and in doing so I would like to show that the review of rulings of the nonconstitutional courts is performed according to a rather "reduced" standard of review, at least in constitutional complaint proceedings.

2. Types of proceedings before the Federal Constitutional Court, with particular reference to constitutional complaint proceedings

In its Article 93, the German Basic Law (*Grundgesetz – GG*) enumerates the competences of the Federal Constitutional Court. Pursuant to this Article, the Federal Constitutional Court rules, *inter alia*, on disputes between Federal bodies, on disputes between the Federation and the *Länder* (states) and on disputes about the compatibility of Federal or *Land* (state) law with the Basic Law. Apart from this, the provision regulates constitutional complaint proceedings. In Article 93 of the Basic Law, it says literally: "The Federal Constitutional Court shall rule on constitutional complaints, which may be filed by any person alleging that one of his or her fundamental rights … has been violated by public authority."

a) Function of the constitutional complaint

This means that any subject of a fundamental right can allege any form of violation of his or her fundamental rights. This sets broad limits to the competence of filing a constitutional complaint, and it is therefore not surprising that more than 96 per cent of all proceedings brought before the Federal Constitutional Court are constitutional complaints. The vast majority of constitutional complaints, however, are unsuccessful. More than 97 per cent of all constitutional complaints are not admitted for decision by the Federal Constitutional Court's Chambers. What is the reason for this low success rate?

The main reason why most constitutional complaints are unsuccessful is that many complainants misjudge the function of the constitutional complaint. This applies above all to those complainants who are not represented by a lawyer. The constitutional complaint is not another appeal, just as the Federal Constitutional Court is not an instance of ultimate review. Instead, the constitutional complaint is an extraordinary legal remedy that can only challenge the violation of specific constitutional law. Later on, I will explain in greater detail what this means. Let me first of all make some brief remarks about the constitutional complaint proceedings.

b) Subject of the complaint and subsidiarity of the constitutional complaint

As I have just mentioned, the constitutional complaint can be filed by any person alleging that he or she has suffered a personal and direct violation of a fundamental right or of a right

equivalent to a fundamental right by an act of state authority. In its Articles 1 to 19, the Basic Law enumerates the fundamental rights, starting with the guarantee of human dignity as the Basic Law's most important value decision, end ending with the right to effective legal protection against acts of public authority. Rights that are equivalent to fundamental rights include, for example, the right to one's lawful judge and the right to a hearing in court. In contrast, the constitutional complaint cannot be based on the allegation that objective constitutional law, such as regulations of competence in the legislative process, have been violated. It is true that a fundamental right can only be encroached upon by a law or on the basis of a law that itself is constitutional. Accordingly, the Federal Constitutional Court also reviews whether this law is in harmony with the regulations of objective constitutional law. However, in the case of a mere violation of regulations of competence, just to stick to the example that I have mentioned before, no violation of fundamental rights will become apparent so that, if no further submissions are made, no competence for filing a constitutional complaint will be established and the constitutional complaint will not be admitted for decision because it is inadmissible.

The vast majority of constitutional complaints are directed against judicial decisions, a fact that can easily be explained. The prerequisite of a constitutional complaint that is brought before the Federal Constitutional Court is that all regular legal remedies have been exhausted before (see Section 90, subsection 2 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*)); this means that the constitutional complaint is subsidiary in every respect. This is supposed to ensure in particular that a comprehensive previous review of the points of complaint has been performed by the nonconstitutional courts and that in this manner, the Federal Constitutional Court is conveyed the legal opinion of the nonconstitutional courts so that it can pass its decision on a viable basis. The principle of subsidiarity contains a general statement on the relation between the nonconstitutional courts and the Federal Constitutional Court. According to the distribution of competences that is established in the Basic Law, it is first of all the task of the instance courts to safeguard and to enforce the fundamental rights. The precept of the exhaustion of all other legal remedies corresponds to the courts' obligation to remedy violations of fundamental rights themselves that may have occurred in the different stages of appeal. This means that every court has the obligation to provide, in the scope of its responsibilities, legal protection in the case of violations of the constitution. On the other hand, the principle of subsidiarity requires that the complainant exhausts all procedural possibilities in the initial proceedings in order to prevent the violation of the constitution in the first place, or to remedy the violation of a fundamental right that has occurred. This ensures at the same time that the Federal Constitutional Court is submitted not only the abstract legal issue but also the assessment of the factual and legal situation that has been made by a court that has particular jurisdiction for the legal matter. An exception from the principle of subsidiarity applies if a legal matter is of general importance or if the complainant would suffer especially serious and unavoidable detriment by first having to exhaust all legal remedies.

As I have already mentioned before, the vast majority of constitutional complaints challenge court rulings. In contrast, constitutional complaints that directly challenge laws are very rare. Apart from this, they are only admissible if the complainant is personally, presently and directly affected already by the challenged legal provision, that is, if no further act of execution is required. Even where these prerequisites are met, the constitutional complaint is inadmissible if the complainant can reasonably obtain legal protection against the legal provision by recourse to the courts (for example if the legal provision that is challenged is an ordinance, or by means of temporary relief proceedings). You can see from this that the barriers for the admissibility of constitutional complaints that directly challenge laws are high. What occurs frequently,

however, is that a constitutional complaint indirectly alleges the unconstitutionality of the legal provision on which the challenged ruling is based.

c) Scope of review in the case of constitutional complaints that challenge rulings

In the following, I will assume the normal case of a constitutional complaint that challenges a court ruling. The Federal Constitutional Court has developed detailed and differentiated standards against which it examines whether a constitutional complaint that challenges a ruling is well-founded. First of all, it must be distinguished between the review of the *contents* of rulings issued by nonconstitutional courts, and the review of the *court proceedings*.

aa) Review of the contents of rulings

When reviewing the contents of court rulings, the Federal Constitutional Court faces the problem that on the one hand, it must guarantee the protection of the fundamental rights of the individual, which is prescribed by the Basic Law, and that it must lend effect to the fundamental rights, but that on the other hand, it may not go down too much onto the level of nonconstitutional law. This already touches upon an essential aspect of the completeness of the Federal Constitutional Court's review: The Federal Constitutional Court is not the guardian of nonconstitutional law. This means that if a ruling violates nonconstitutional statute law, this does not automatically make it constitutionally objectionable. If, for instance, a complainant challenges the violation of substantive fundamental rights and substantiates this challenge exclusively by submitting that *ordinary* statute law has been applied or interpreted in an erroneous manner, the constitutional complaint will, as a general rule, not have any prospects of success. This occurs very often and is one of the reasons for the low rate of success of constitutional complaints that I have mentioned at the beginning of my presentation.

The Federal Constitutional Court refers to the general rule of the limited possibility of review of decisions of nonconstitutional courts also by using the term of "specific constitutional law". Allow me to quote in this context from a Federal Constitutional Court decision:

> "The organisation of the proceedings, the finding and the assessment of facts, the interpretation of nonconstitutional law and its application to the individual case are solely for the courts that have general jurisdiction for the matter; they are removed from the Federal Constitutional Court's review; the Federal Constitutional Court can intervene on the basis of a constitutional complaint only where specific constitutional law has been violated by the courts. Specific constitutional law is, however, not violated already where a ruling is objectively erroneous measured against ordinary law; the error must be precisely the non-observance of fundamental rights. Admittedly, the boundaries of the Federal Constitutional Court's possibilities of intervention cannot always be delimited generally and clearly; a certain margin that makes it possible to take the special circumstances of the individual case into account must be left to judicial discretion. In general, it will be possible to say that the normal procedures of the subsumption of a matter [to the appropriate legal principles] within nonconstitutional law are removed from the Federal Constitutional Court's review as long as no errors of interpretation become apparent that are due to a fundamentally erroneous view of the meaning of a fundamental right, in particular of the scope of its protection, and that carry considerable weight for the specific case also as concerns their substantive significance. Unconstitutionality cannot yet be established where the application of nonconstitutional law by the competent judge has led to a result whose "correctness" (in the general meaning of "appropriateness" or "reasonableness") can be disputed, especially where

> the assessment made by a judge in a process of weighing of conflicting interests, which the judge is obliged to perform by general clauses in laws, may be doubtful because the assessment attaches to much or too little weight to the interests of one or the other party."

Let me summarise again the essential contents of this ruling: In its review, the Federal Constitutional Court restricts itself to examining whether specific constitutional law has been violated. To comply with this prerequisite, it is not sufficient that the ruling is objectively incorrect; instead, the court ruling must contain a fundamentally erroneous view of the meaning of the fundamental rights.

In legal literature, there has been considerable criticism of the formula of "specific constitutional law". One of the major points of criticism has been that this formula is not sufficiently precise to allow an exact delimitation between violations of constitutional law and violations of nonconstitutional law, and that it is therefore an empty formula; this is the current objection against it.

The Federal Constitutional Court has recognised this problem and has tried to express the formula of specific constitutional law more in more concrete terms. In the following, I will deal with the case groups that are most important in this context.

(1) Errors in the interpretation and application of ordinary law which are relevant with regard to the fundamental rights

On the one hand, the following question arises here: When is a court ruling based on a fundamentally erroneous view of the meaning of the fundamental rights? The answer is evident where the judge has not recognised in the first place in his or her ruling that fundamental rights have been impaired, that is, where the court has not been aware at all of its being active in an area that is of relevance with regard to fundamental rights. In this case, specific constitutional law has been violated. Let me give you an example from the Federal Constitutional Court's case-law:

The complainant had been sentenced in criminal proceedings for defamation on account of statements that he had made on a pamphlet. Although his statements were value judgments, the sentence did not deal at all with Article 5 of the Basic Law, which guarantees freedom of opinion. The constitutional complaint was therefore successful; the ruling of the criminal court was overturned.

What is also decisive according to the Federal Constitutional Court's formula is whether the courts "fundamentally" misjudge the meaning of the fundamental rights. But where can the boundary to a simple violation of the law be established here? To put it differently: When does a court *misjudge* the meaning of the fundamental rights, and when does it "*fundamentally*" misjudge it? It is evident that no precise definition is possible in this context. It will be possible to state, however, that a court ruling fundamentally misjudges the meaning of the fundamental rights where under constitutional law, guidelines for the nonconstitutional courts' weighing exist that have been infringed in the individual case. Let me mention here as an example the "three-step theory", which has been developed by the Federal Constitutional Court with regard to the fundamental right of occupational freedom. What is decisive for justifying restrictions of the fundamental right of occupational freedom is, according to this theory, whether the freedom to *choose* an occupation or profession or the freedom to *practice* an occupation or profession is concerned; moreover, as regards encroachments upon the freedom to choose an occupation or

profession, it is decisive whether the restriction is based on subjective or objective criteria. According to these principles, an objective restriction to the freedom to choose an occupation or profession – for instance, a limitation of the number of persons permitted to practice specific occupations or professions – is only justified if it serves to avert serious dangers to a public interest of overriding importance. If a nonconstitutional court based its review of such an encroachment on a different standard of justification, that is, on a lower standard of justification, a violation of specific constitutional law could be assumed.

(2) Arbitrary court rulings

Let us now look at a different type of cases. A constitutional complaint that challenges a court ruling is also successful where the challenged ruling is arbitrary. In this context, the standard of review is the principle of equal treatment, which is enshrined in Article 3, subsection 1, of the Basic Law, in the shape of the ban on arbitrariness. However, as can be easily inferred from the formula of specific constitutional law, a ruling that violates nonconstitutional law is not automatically arbitrary. Another prerequisite that must be met is that the application of the law, or the proceedings, can under no conceivable aspect be legally justified and that therefore, the conclusion imposes itself that the ruling is based on considerations that are irrelevant and therefore arbitrary. This is to be established according to objective criteria and does not presuppose culpable conduct on the part of the judge. Let me give you an example:

In a recent Chamber decision, the Federal Constitutional Court overturned a court ruling that denied the complainant legal aid. In the grounds of its ruling, the competent Regional Court (*Landgericht*) had stated that the complainant was unemployed through his own fault. The court further stated that because the complainant could take up employment without any problem, he was to be treated as if he had an income of his own, and that the complainant was therefore not in need of legal aid. In other words: The Regional Court had answered the question about the complainant's need in the negative and had assumed a fictitious earned income. The Regional Court, however, did not specify the fictitious income. The challenged ruling did not contain a statement about the amount of the fictitious income. According to German law, however, the mere existence of earned income or property income does not automatically exclude the grant of legal aid. What is decisive instead is the relationship between earned income or property income and the costs of the legal action for which legal aid is sought. Only where these costs are covered completely or at least to a certain amount by the applicant's income may the grant of legal aid be denied for economic reasons. In the specific case, the costs of litigation amounted to several tens of thousands of euros. Because the amount of the fictitious income had not been indicated by the court, no relation between the income and the costs of litigation could be established. It was therefore not understandable from an objective point of view why the application for legal aid had been denied. The Regional Court ruling was therefore overturned on account of a violation of the ban on arbitrariness.

(3) Additional aspects: Intensity of the encroachment upon a fundamental right

To give its scope of review more concrete shape, the Federal Constitutional Court has sometimes also focused on the intensity of the encroachment upon a fundamental right. The more intensive the encroachment upon a fundamental right is, the more detailed can the Federal Constitutional Court's review be. One could therefore say that the completeness of the Federal Constitutional Court's review correlates with the seriousness of the encroachment upon a fundamental right. A more detailed review is therefore found in particular in the Federal Constitutional Court's case-law concerning the freedom of opinion and the freedom of art and concerning the fundamental right to asylum.

The Federal Constitutional Court had to rule, for instance, on a criminal sentence for insult in the context of a political street theatre play. The complainants were political adversaries of the Bavarian Minister-President, who was the candidate for the office of chancellor of the Christian Democratic Union and the Christian Social Union in the 1980 election campaign for the German *Bundestag*. The complainants performed a poem by Berthold Brecht as a theatre play in which the Minister-President was portrayed how he tried in vain to fight grievances such as deceit and oppression, which were symbolised by puppets. The complainants were thereupon sentenced to pay a fine for insult. The Federal Constitutional Court overturned the sentence and stated in the grounds of its ruling *inter alia*:

> "The constitutional complaint is directed against rulings under criminal law, which, in principle, are not to be reviewed by the Federal Constitutional Court as regards the finding of facts and the interpretation and application of criminal law. The Federal Constitutional Court must ensure, however, that the ordinary courts observe the norms and standards of the fundamental rights. In this context, the boundaries of its possibilities of intervention depend particularly on the intensity of the alleged impairment of fundamental rights … In and of itself, a criminal conviction as a sanction for criminal wrongdoing is of greater intensity that a civil-law conviction for forbearance, revocation or damages. In criminally sanctioning an action that may be covered by the guarantee of freedom of art, there is the added danger that the negative effects for the exercise of this freedom, which is guaranteed without a proviso of legality, could resonate beyond the case at issue. When faced with such cases, review by the Federal Constitutional Court cannot be restricted to the question whether the challenged decisions are based on a fundamentally erroneous view of the meaning of Article 5 subsection 3 sentence 1 of the Basic Law, in particular of the extent of its scope of protection."

On the basis of this delimitation of its scope of review, the Federal Constitutional Court made its own assessment of the theatre play that had been staged and, differently from the court that had originally ruled on the matter, came to the conclusion that the performance was to be appraised as "art" within the meaning of Article 5 subsection 3 of the Basic Law.

This means that the effective protection of the fundamental rights guaranteed by Article 5 of the Basic Law can also require a review of the actual findings of facts and the actual assessment of facts. This applies not only to the freedom of art but also to the area of the freedom of opinion. Here, the Federal Constitutional Court examines, for example, whether the nonconstitutional courts have erroneously assessed a specific statement as an allegation of facts, as a statement that is defamatory upon its face or as insulting criticism, with the consequence that because of this, the statement does not enjoy the same protection of the freedom of opinion as statements that are to be regarded as value judgments without an insulting or defamatory character. Findings of facts and applications of the law of this kind can from the outset bar access to the area that is protected by the freedom of opinion. They must therefore be open to full review by the Federal Constitutional Court if the protection of the freedom of opinion is not supposed to be curtailed in a detrimental manner.

bb) Fundamental rights that concern the administration of justice

At the end of my presentation, let us take a brief look at the procedural fundamental rights. Constitutional complaints cannot solely be aimed a review of the contents of the challenged rulings but can also challenge a violation of fundamental rights that has been caused precisely by the court proceedings themselves. In such cases, the so-called fundamental rights that concern

the administration of justice are the standard of review. I will to this subject only very briefly refer because it will be the main subject of the second part of the presentation, which will be given by my colleague.

As a general rule, review by the Federal Constitutional Court against the standard of the fundamental rights that concern the administration of justice is more intensive than the review of a ruling on the merits. Especially as concerns the allegation of the violation of the right to a hearing in court, the provisions of the respective codes of procedure, that is, of nonconstitutional law, are of decisive importance. Because the observance of the code of procedure is often of direct relevance to the fundamental rights, with the consequence that a violation of nonconstitutional law, for instance the erroneous denial of a motion for the admission of evidence, may lead to a violation of the right to a hearing in court.

That this, however, is not necessarily the case and that the Federal Constitutional Court does not completely refrain from requiring the violation of constitutional law also in the area of the fundamental rights that concern the administration of justice, will be explained to you in the following by my colleague. I hope that I have been able to give you a rough overview of the standard of review that the Federal Constitutional Court applies when reviewing decisions of nonconstitutional courts, and I now come to the end of my presentation.

3. Final remarks

You will certainly have noticed that the principles according to which the Federal Constitutional Court determines the scope of review of the rulings of nonconstitutional courts are often rather abstract and hardly lend themselves to a precise definition. Critics of the relevant case-law reproach the Federal Constitutional Court of impairing legal certainty and the predictability and rationality of judicial decisions. What is important here is to find a sound middle course between, on the one hand, the acknowledgment of the nonconstitutional courts' competences of decision and assessment, including the nonconstitutional court's task of finding the facts, and on the other hand, the Federal Constitutional Court's task of lending practical efficiency to the fundamental rights. However, it remains difficult to establish boundaries in this context that are of general validity and that are predictable for all those who apply the law and those who are subject to the law. Also, and particularly, the formula of the specific constitutional law cannot easily be subsumed to the appropriate legal principles. Such principles and formulae, however, and this seems the essential point to me, are never an end in itself. Instead, they are supposed to serve the realisation of justice in the individual case. Because also the Federal Constitutional Court always examines violations of the constitution in constitutional complaint proceedings only on account of the specific case that is submitted to it for decision, and it safeguards the practical relevance of the fundamental rights precisely in the individual case. For this, a review is required which on the one hand does not interfere, as an "instance of ultimate review" would do, with the nonconstitutional courts' competences, but which, on the other hand, ensures the practical relevance of the fundamental rights. I think that the Federal Constitutional Court's case-law to date has enforced the commitment of the state authorities to the constitution rigorously, so to speak, but at the same time showing the required restraint towards the nonconstitutional courts. Not least the high reputation that the Federal Constitutional Court enjoys among the citizens shows that the tightrope walk between the encroachment upon the nonconstitutional courts' competences and the enforcement of the protection of the individuals' fundamental rights has been highly successful so far.

Second Part

My colleague has given you an explanation about the general legal framework that determines the scope of the Federal Constitutional Court's competence of review with regard to the review of rulings of the nonconstitutional courts. In the second part of our presentation, I will now expand on some details. In doing so, I will first of all touch upon the specific fundamental-rights guarantees and constitutional guarantees that apply to all types of court proceedings. Subsequently, I will deal with some special rights in criminal proceedings and with the constitutional review of the judicial evaluation of evidence.

I would like to start, however, with some observations on general fundamental rights that concern the administration of justice. They are procedural guarantees that apply to all parties to the proceedings. These rights apply irrespective of the type of proceedings. This means that they must be observed in every phase of the proceedings not only in criminal proceedings or in proceedings before the administrative courts but also in civil actions. In principle, they can be invoked not only by natural persons but also by legal persons, in particular by business enterprises.

Before dealing with individual procedural rights, I would like to make a brief general remark. If the constitutional complaint challenges violations of those fundamental rights that will be specified in the following, the Constitutional Court must comprehensively review the allegations of facts for possible violations of the constitution. What must, however, be borne in mind is that in many cases, violations of the law are remedied in the further course of the proceedings before the nonconstitutional courts by rulings of higher courts. This is the case where the higher courts refer the matter back to the court that is responsible for the procedural error for a new decision or if they establish that the procedural error has not affected the challenged ruling. If, however, the infringement of procedural law is not remedied but the original error continues in the subsequent rulings, the Federal Constitutional Court will overturn the rulings affected.

The general fundamental rights which concern the administration of justice and which can be asserted by means of a constitutional complaint include first of all the right to one's lawful judge, which is laid down in Article 101 subsection 1 sentence 2 of the Basic Law. This constitutional norm provides that already before the beginning of the judicial proceedings, it has to be certain, on account of specific, abstract characteristics, who will be the judge competent to rule on the individual case. What judge is competent to rule on a specific case may not be subject to discretion. The incoming matter must reach the competent judge "blindly". Manipulations as concerns the competent jurisdiction are supposed to be ruled out.

Two obligations arise from this: On the one hand, the legislature must enact sufficiently clear regulations as concerns competences and responsibilities. As concerns factual competence, this is done, for instance, in civil matters by making a connection to specific ceilings concerning the value of the matter in dispute, and in criminal matters by making a connection to the expectation of a specific measure of punishment. Apart from this, also within the court it must be certain, on account of definite characteristics, which individual judge is actually competent to rule on the matter. For this purpose, the courts draw up internal schedules that determine competences and responsibilities according to objective characteristics. The assignment of cases to specific judges can take place, for instance, according to the initials of the parties or according to the date on which the matter is received by the court. Any influence on which specific judge will rule on the case must always be excluded.

From this it follows that the Constitutional Court will possibly have to deal with details of a court's internal regulations on competences. The starting point of the constitutional review is first and foremost whether the court has given itself a schedule of responsibilities that is in conformity with the constitution. Where this is the case but the internal regulations on competences have merely been incorrectly applied in the individual case, a constitutional complaint will only be successful in particularly serious cases, namely if the matter has been dealt with in an arbitrary manner.

However, I now do not want to trouble you any longer with further details about issues of competence, but I would like to direct your attention to another fundamental procedural right, namely the right to a hearing in court. This right results from Article 103 subsection 1 of the Basic Law. It has several aspects, the most important of which I will briefly explain to you.

The central element of this fundamental right that concerns the administration of justice is the right of every party to the proceedings to make a statement on the subject matter of the proceedings before a court ruling is issued. This right covers questions of fact as well as questions of law. Before the court decides, it must, in principle, give the parties to the proceedings sufficient opportunity of making statements on the merits. In expedited proceedings, there is a possibility of subsequently making objections by filing an appeal against the court ruling. From this fundamental procedural right, obligations for conduct that must be complied with by the courts arise in several respects; these obligations have largely been given concrete expression in the codes of procedure. Where corresponding procedural errors are committed, this, as a general rule, results not only in a violation of procedural law but also in an infringement of the constitution that must be established by the Constitutional Court.

As a consequence of the right to a hearing in court, not only criminal proceedings and convictions in the absence of the accused or his or her mandatory defence lawyer are, in principle, impermissible. Apart from this, the courts must give the parties to the proceedings also in written proceedings, such as for instance in civil and administrative proceedings, sufficient opportunity of making statements on all essential aspects. The periods of time that are set for making statements must be sufficiently long.

That the Federal Constitutional Court, however, does not refrain from requiring a specific violation of the constitution also in the area of the fundamental rights that concern the administration of justice is illustrated by a ruling from the year 1997. The ruling dealt with the application of a provision that made it possible for the nonconstitutional court to set the plaintiff a time-limit for making a written reply to the statement of defence and to disregard submissions that were made out of time (preclusion). In its ruling, the Federal Constitutional Court emphasised the far-reaching consequences of such provisions for the party in default and stated that the interpretation and application of provisions of procedural law which restrict the right to a hearing in court are subject to a review by the Constitutional Court which is more intensive than the one that is customary when nonconstitutional law is applied. According to the Federal Constitutional Court, a stricter standard of review by the Constitutional Court is to be applied here than the one that is used with regard to the examination of arbitrariness. In a restrictive statement in the ruling, however, the Court established that the right to be granted a hearing in court would only be violated where a constitutionally required hearing did not take place on account of the challenged regulation. In the specific case, the Federal Constitutional Court then ruled that Article 103 of the Basic Law permitted to mandatorily exclude a party and its submissions because it had had sufficient opportunity for making submissions in the time-limit that it had been set.

This line of argument shows that the constitutional right to a hearing in court will largely correspond to the guidelines that exist under procedural law but that it can also differ from them. What is decisive according to this ruling is that the person affected had had sufficient opportunity to make a statement before the ruling was issued.

This also includes that there must be a possibility for the parties to the proceedings to actually make use of their right to be heard. They are therefore entitled to receive comprehensive information about the subject matter of the proceedings. The court may not be superior in terms of information. Files of other cases that have been obtained in the proceedings, expert opinions and other documents are to be made available for unrestricted inspection. There is a right to comprehensive access to the files.

Apart from this, it follows from the fundamental right that the court may not make surprise rulings. The court must indicate essential changes of the legal situation and it must provide appropriate possibilities of making statements. The parties to the proceedings are to be informed of opinions and documents that have been received by the court.

The courts may also not disregard the submissions made by the parties to the proceedings. This can be the case for instance where pleadings have not reached the judge by mistake. This means that the Constitutional Court will possibly have to deal with quite ordinary procedures.

Moreover, the courts must take note of the submissions made by the parties to the proceedings and take them into consideration. As a general rule, the courts must give reasons for their decisions. This applies in particular where the judicial act can be challenged by appeals. It is true that it is not necessary for the courts to explicitly deal with every objection in their ruling; cases are conceivable, however, in which serious deficiencies in the reasoning suggest the conclusion that the court has ignored the statement of one of the parties and thus violated this party's right to be heard. Where, however, no particularly conspicuous grounds or tangible evidence to suppose such a grossly erroneous application of the law are apparent from the course of the proceedings or from the contents of the ruling, the Constitutional Court will assume that the court that issued the original ruling had taken note of the parties' submissions before passing its decision.

It is inevitable that time and again, infringements of the codes of procedure will occur in judicial practice which in turn will potentially result in a violation of the right to be heard that is guaranteed in the constitution. As the saying goes in my country: Everyone who works will also make mistakes. You will therefore possibly suppose now that the Constitutional Court gets lost in the review of individual proceedings in which the complainants are of the opinion that they must challenge that time-limits for making statements have been too short, that information has not been provided or that statements of reasons have been insufficient. Such challenges, which require a detailed analysis of the course of the proceedings before the instance courts, indeed account for a considerable proportion of constitutional complaints. Nevertheless, I cannot describe the situation as dramatic. On the one hand, many errors have already been disposed of in the course of the proceedings before the nonconstitutional courts, for example because the parties to the proceedings have had the opportunity of making comprehensive statements on the merits before the court of appeal. On the other hand, in many cases it is not submitted, or it is apparent, that something essential would have additionally been submitted if the procedural rights had been respected.

All this, however, does not change anything about the fact that in this area, the intensity of constitutional review is very high; one can even say that in this respect, the Constitutional Court's review comes close to a full review of the nonconstitutional courts' processing of the matter.

The procedural right that I will deal with next is also characterised by very intensive review by the Constitutional Court. I am referring to the fundamental right to effective legal protection and the right to have recourse to the courts, which is related to it. The starting point of this right is the possibility, which is guaranteed by the constitution, of having the legality of acts of public authority reviewed by an independent court. The citizen, however, has not only recourse to the courts as such; the realisation of this right must also be organised in an effective manner. The guarantee of legal protection therefore grants the right to review in fact and law, which is, in principle, comprehensive, of the matter in dispute, and the right to a binding decision by the judge. Apart from this, the guarantee of legal protection applies not only to the first access to a court, but to the organisation of the entire proceedings. Again, the effectiveness of legal protection is safeguarded first and foremost by the codes of procedure. Effective legal protection, however, is to be guaranteed in all instances that have been established by the code of procedure. It is true that the legislature can also enact regulations that place particular formal requirements on a petition for legal protection; the court, however, may not render ineffective an appeal that is provided by the code of procedure, thus depriving it of its effect. The higher courts must therefore exhaustively assess the appeal submitted. If the admissibility of appeals is contingent on certain formal requirements being met, if it is contingent, for instance, on compliance with certain requirements for the substantiation of objections in proceedings on appeal on points of law, the courts may not make demands that which cannot be complied with, which are unreasonable or which impede access to the appellate instance in a manner that is not factually justified.

This can be the case, for example, where a court of appeal on points of law wrongfully regarded an objection made in the proceedings before the nonconstitutional courts as inadmissible, thus denying the complainant his right to an examination on the merits. The concept "in a manner that is not factually justified" also requires transformation into concrete terms in the individual case. Where the rejection of a remedy is doubtful, but not untenable, this is not sufficient to meet this requirement. The situation can be different, however, if the appellate court bases its decision on non-compliance with such formal requirements where they could not be foreseen, or could not be complied with, by the complainant. This particularly applies, as has been ruled this year by the Federal Constitutional Court, where an appellate court places new requirements on the substantiation of appeals that are not necessary for making it possible to review the challenged judgment. A violation of the guarantee of legal protection will also occur where the appellate court in an incomprehensible manner places excessive requirements on admissibility.

In the relevant case, the question at issue was whether information about call data in telecommunications had been discussed by the court of decision during the trial. The appellant on points of law had submitted that the call data list in question had not been dealt with during the interrogation of an employee of the telecommunications enterprise. The Federal Court of Justice (*Bundesgerichtshof*) had rejected the objection as inadmissible because the appellant on points of law had not submitted information about the contents of the summons of the witness. The Federal Constitutional Court overturned this decision because here, the reason for rejection had been an admissibility requirement, namely submissions concerning the summoning of a witness, which is not customary; the admissibility requirement is not necessary for the review of the case on the merits and is thus not foreseeable for the complainant. As a consequence, the appellate court must perform a new review of the objection on a point of law.

If a violation of the guarantee of legal protection is alleged, the Constitutional Court is consequently called upon to perform a detailed review of the rulings of the nonconstitutional courts. It must to a considerable extent directly retrace the considerations of the higher courts. Whether the Constitutional Court will intervene cannot be assessed in a general manner; this essentially depends on the circumstances of the individual case. Whether the Constitutional Court judges will grant the nonconstitutional courts a comparatively wide margin of appreciation or whether they will, in contrast, interpret their own competences of review in a more generous manner will decisively depend also on the Constitutional Court judges' own understanding because the standards of review that have evolved permit quite different approaches.

The constitutional review of court rulings is, however, not limited to the question whether the procedure chosen by the courts shows serious irregularities.

Also the *contents* of court rulings are not completely removed from review by the Constitutional Court. In exceptional cases, it is therefore possible that a violation of specific constitutional law is also caused by the application of substantive law. In this context, the ban on arbitrariness as an element of the general principle of equality, which is guaranteed by Article 3 of the Basic Law and which my colleague has already explained to you, must be mentioned. Whether the Federal Constitutional Court will perform a more intensive review of court rulings beyond the generally valid standard of the ban on arbitrariness decisively depends on the specific area of law in question. An area that is characterised by particularly profound encroachments upon fundamental rights and correspondingly, by a greater extent of review, is the area of law in which I am working at present, namely criminal law and law of criminal procedure. First of all some fundamental principles must be mentioned here which have constitutional rank and which are therefore subject to full review by the Federal Constitutional Court. These principles are "no punishment without a law authorising it" (*nulla poena sine lege*), the ban on double jeopardy (*ne bis in idem*) the ban on analogy, that is, the ban on creating charges for criminal offences by way of analogy with existing statutory definitions of crimes, and the principle of the definiteness of statutes (*nulla crimen sine lege*).

The allegation of an infringement of the ban on double jeopardy (*ne bis in idem*) can also force the Constitutional Court to very intensively deal with the details of a case. In such cases, the original court's assessment of the facts of the case will as a general rule be subject to unrestricted review.

The situation is different where a complainant challenges a criminal conviction from the perspective of the principle of the definiteness of statutes. Here, review focuses on whether the court's interpretation has departed so much from the wording of the criminal-law provision that punishable and permissible conduct are no longer sufficiently delimited. It is true that the principle of the definiteness of statutes is first of all directed at the legislature, which is to draft criminal-law provisions in a sufficiently clear manner; this principle can, however, also be violated by the courts. They may not interpret statutory definitions of crimes in such a broad and indefinite manner that the punishability of a specific act was no longer foreseeable. Here, the wording and the linguistic interpretation of the respective element of the offence are of decisive importance. A violation of the constitution will, however, only have occurred in special, exceptional cases. Nevertheless, the Federal Constitutional Court lays claim to submitting court rulings to a full review also with a view to this constitutional right.

The fundamental right to a fair trial plays an essential role in the constitutional review of rulings of the criminal courts. "Fair trial" is a generic term, which comprises several legal guarantees for the accused in criminal proceedings. Under constitutional law, the right to a fair trial is derived from the general freedom of action, which is protected by the Basic Law, and from the principle of the rule of law, which is enshrined in the Basic Law and which generally obliges the courts to act in accordance with the rule of law. The right to a fair trial, which is laid down in the Basic Law, considerably overlaps in some of its parts with the guarantees enshrined in Article 6 of the European Convention on Human Rights. Important elements of this comprehensive right, which I would like to briefly touch upon now, also presuppose the detailed review by the Federal Constitutional Court of previous court rulings.

The first element that must be mentioned here is the presumption of innocence, which is also guaranteed by the European Convention on Human Rights. In this context, an intervention by the Federal Constitutional Court is a possibility for instance where resolutions by the public prosecutor that conclude the proceedings contain not only descriptions of suspicions but establish guilt. The same applies to subsidiary court rulings. However, the presumption of innocence also has importance under substantive law, which I will deal with in the context of the constitutional requirements that are placed on the evaluation of evidence.

Another consequence of the right to a fair trial is the right of a suspect to remain silent. A typical combination of circumstances in which the Constitutional Court performs a detailed review of the procedure of a criminal court is that a witness, invoking the privilege against self-incrimination, asserts a comprehensive right to withhold information, which is not recognised by the criminal court. In such a case, the Constitutional Court could even be obliged to considerably intervene in pending proceedings, for instance where the criminal court, misjudging the scope of the privilege against self-incrimination, wants to obtain by compulsion the testimony of a witness who remains silent (yet).

Something similar can be considered where the restriction of rights of defence is alleged. The right to a fair trial also includes the right to effective defence. In this respect, however, a challenge *in proceedings of appeal on points of law* has priority. As a general rule, the Constitutional Court will only intervene where infringements of procedural law have not been remedied at the instance of appeal. Possible restrictions of the right to defend oneself can consist in the court having disregarded justified interests of the defence counsel without factual reason, for instance when assigning a day for trial, or on other occasions during the proceedings. A possible infringement of the right to a fair trial can also result from an accused being denied a court-appointed defence counsel contrary to factual requirements.

Of ever-increasing importance is, finally, the obligation to expedite proceedings, which is enshrined in the right to a fair trial as well as in Article 6 of the European Convention on Human Rights. Also in this respect, just as in all other cases, it is first of all for the nonconstitutional courts to establish the existence of delays in the proceedings that are contrary to the rule of law, and it is for them to determine the extent of the necessary compensation. The nonconstitutional courts are to reduce to a certain extent the sentence that would have been justified if the infringement of procedural law had not occurred in order to thus compensate the delay in the proceedings that is attributable to the judiciary. The allegation that the courts did not take sufficient account of the actual extent of the delay in the proceedings is often the subject matter of constitutional complaints. This can be the case for instance because not all phases of the delay in the proceedings have been appraised. In this context, it is also alleged that more delays which are attributable to the judiciary have occurred in the proceedings of appeal on points of law that

have been disregarded. Apart from this, complainants argue that the extent of compensation has not been sufficient; sometimes they demand the dismissal of the proceedings.

Here, a distinction must be made: The *assumed duration of the delay in the proceedings* that has been contrary to the rule of law is subject to unrestricted review by the Federal Constitutional Court. If, however, solely the *extent of the compensation* granted by the criminal courts is at issue, the Constitutional Court must respect the judicial discretion of the criminal-court judge. Where solely the assessment of punishment, which has been performed on a correct factual basis, is at issue, the judgment being overturned will only be a consideration in the rare cases of arbitrariness.

This leads me to a combination of circumstances that is of major importance in the context of the fundamental right to a fair trial, namely objections against errors in the evaluation of evidence. It is in the nature of things that such challenges are the subject matter of many constitutional complaints because this is often a straw at which someone clutches who has been sentenced to many years' imprisonment.

Here, the starting point of constitutional review is, and with this, I take up what my colleague has said, that the finding and evaluation of facts and the application of the general laws to the individual case is solely for the courts of general jurisdiction. The Federal Constitutional Court can only intervene in the case of a violation of specific constitutional law.

Part of the constitutional law, however, is also the presumption of innocence. From the presumption of innocence, the principle can be inferred that a conviction under criminal law, especially the imposition of a prison sentence, must be based on a sufficient ascertainment of the facts. Apart from this, the findings made in proceedings conducted under the rule of law must provide a viable basis for the sentence imposed. Already according to the standards of the higher courts, the result of evidence must be plausible and objectively understandable. Also with a view to the grievance imposed by the sentence, the evaluation of evidence is not removed from any constitutional review. It is true that not all doubtful results of evidence will call the Federal Constitutional Court into action; it has, however, assumed a violation of the constitution where the criminal court has deviated from its obligation to also perceive, investigate and consider exonerating circumstances with every person accused, thus safeguarding the presumption of innocence; all in all, the conviction must have a viable basis. Thus, the Federal Constitutional Court performs a review of evident faultiness. At first sight, the standard of constitutional review shows common ground with the ban on arbitrariness. In fact, the dogmatic nexus with the presumption of innocence opens the way to a more intensive review of judicial evaluation of evidence. Thus, the standard of the "viable basis" potentially provides the Constitutional Court with the possibility of also examining in proceedings before the Federal Constitutional Court compliance with general rules of evaluation of evidence. This attains particular importance where problematic combinations of circumstances are at issue in which the German law of criminal procedure obliges the courts to perform a particularly thorough evaluation of evidence and to provide an especially detailed reasoning. An example for this is the situation, which frequently arises in the area of criminal law relating to sexual offences, in which, with the exception of the statements of the victims, there is no other evidence to prove the guilt of the accused, who denies to have committed the offence. In such a case, in which it is one person's word against another's, the requirements are higher. This, however, is not the case where even marginal aspects of the statement of the witness for the prosecution are corroborated by other evidence, for instance by other witnesses. This means that the details of the case can be very important. If the Federal Constitutional Court's standard of review is taken as the basis, the constitutional review would consequently also have to cover the specific circumstances of the

facts, because, if the court had committed a serious error as regards the methods applied, it would appear that a viable basis for conviction is lacking as well. This means that cases in which statements can only be indirectly evaluated by the criminal court because, for instance, direct appearance of witnesses in court would put them at risk (a situation that is not uncommon in proceedings that involve organised crime) are of potential relevance under constitutional law as well.

Finally, the Federal Constitutional Court can perform an intensive review of the evaluation of evidence still under another aspect, namely where it is alleged that evidence has been used that may not be used for constitutional reasons. In this case, the sentence will be overturned mainly with regard to the respective fundamental right affected, for instance human dignity or the inviolability of the home, and the violation of specific procedural rights will only take second place in the reasoning. This subject, however, would provide enough material for another conference; I will therefore restrict myself to merely mentioning it.

But I think I have said enough about crime and punishment, guilt and atonement. Instead, I will, at the end of my presentation, return to a general observation and make some brief remarks about the review of judicial evaluation of evidence. In criminal law, a special constitutional standard of review is derived from the presumption of innocence; in a similar manner, the interference of particular fundamental rights can result in special constitutional competences of review also in other areas of law. In this context, family law can be mentioned as an example; in family law, errors in the judicial finding or evaluation of facts can easily result in a violation of the parental right, which is protected by the Basic Law, or in a violation of the child's best interests. The same applies to the extent that civil proceedings bear a direct relation with fundamental rights, for instance if they are characterised by questions that involve occupational freedom or the protection of property. In the circumstances that have been mentioned, the Federal Constitutional Court may be obliged to perform a very intensive review of the court ruling that is challenged by the constitutional complaint. Where, however, such a special connection to a fundamental right cannot be established, the ban on arbitrariness remains the general standard of review, supported by the general fundamental rights that concern the administration of justice.

Thank you very much for your attention.