

THE CONSTITUTIONAL REVIEW OF LAWS - GERMAN EXPERIENCES

I. Introduction

- constitutional review as an essential instrument to enforce the primacy of the constitution
- constitutional review as a motor for the development of constitutional law doctrine
- the triumph of the constitutional review of laws in modern constitutional states
- constitutional review of laws on federal and Land level

II. Types of the constitutional review of laws

1) Abstract constitutional review (art. 93(1) no. 2 BL)

a) General remarks

- The abstract constitutional review is the most important instrument to enforce the constitution in the political process. It makes sure that the political majority cannot misuse its power to overcome the constitutionally agreed common values. Furthermore, it provides some basic legal orientation, which is important for the discussions in society. Since it is not linked to individual cases, the use of this instrument is rare. In Germany, there have only been 178 abstract reviews in total (since 1951), 3 in 2013, 3 in 2012, 7 in 2011.² However, these cases are often not only spectacular but also particularly complex or difficult. Some have led to decisions up to 300 pages which are intellectual masterpieces.
- The Federal Constitutional Court reviews the compatibility of federal and Land law with the Basic Law (the German constitution) and of Land law with other federal law. For Land law there may be an additional constitutional review by the Constitutional Court of the Land limited to its compatibility with the Constitution of the Land.

b) Admissibility of the application (sect. 76 FCC Act)

- The application can be filed by the Federal Government, a Land Government or one Fourth (until 2009: a Third) of the members of the Bundestag (the German parliament) but not by parliamentary groups or political parties.
- The applicant can ask for the review of federal or Land law but not of European Union law. A Land Government can ask for the review of a law of another Land. The review can be on statutes (including constitutional amendments), statutory regulations or by-laws. Law passed by local government may be reviewed by the administrative courts.
- The law must have been certified and promulgated. The Federal Constitutional Court makes an exception for acts ratifying international treaties, in order to prevent unconstitutional treaties from coming into force.
- The application is only admissible if the applicant considers the law void for its incompatibility with the Basic Law (or, in the case of Land law, with other federal law) or if he considers it valid even though a court, authority or constitutional body did not apply it because it deemed it incompatible with the Basic Law (or other federal law).
- There are no parties to the proceedings but the involved constitutional bodies will be heard (sect. 77 FCC Act).

c) Decision of the Federal Constitutional Court

- If the reviewed provisions are unconstitutional, the Federal Constitutional Court shall declare them void. It may declare void further provisions of the same law, which are unconstitutional for the same reasons (sect. 78 FCC Act). In practice, the Court often declares the law "incompatible" with the Basic Law and sets a generous time limit for its revision in order to avoid an even worse situation or other serious trouble that the immediate invalidity of the provisions might cause. Sometimes it also declares them "barely constitutional" implying that they should be revised in the future. For this problem, a satisfying solution still needs to be found.
- The decision has a limited retroactive effect: With the exception of criminal convictions, final decisions based on the provisions declared void remain unaffected but will not be executed (sect. 79 FCC Act).

2) Concrete constitutional review (art. 100(1) BL)

a) General remarks

- The concrete constitutional review proceedings are the second most frequent proceedings before the Federal Constitutional Court. There have been 3.557 cases in total, 18 in 2013, 28 in 2012, 35 in 2011. These proceedings are usually less spectacular; often they concern provisions on details. They serve to eliminate inconsistencies with the constitution, which have been overlooked in the legislative process or could not become visible before the law was applied in practice. However, they are essential for an effective protection of the fundamental rights in practice and crucial for a smooth judicial application of law in line with the constitution. The courts are not allowed to discard unconstitutional statutes on their own authority. Therefore, collegial cooperation with the constitutional court is important. In Germany, unfortunately, this is not always the case.

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² See the statistics published by the Federal Constitutional Court, www.bundesverfassungsgericht.de/organisation/gb2013/A-I-4.html.

b) Admissibility of the judicial referral

- The judicial referral can be filed by every court of the state (but not by private arbitral "courts" or religious "courts"). The court must be acting in its function as a court, not in other functions attributed by the law.
- The concrete constitutional review is *limited* to federal or Land *statutes* (acts of parliament). Land statutes can also be submitted for the review of their compatibility with federal statutes. Statutory regulations, by-laws and customary law cannot be submitted for review (but can be discarded by the ordinary courts in case of unconstitutionality). Legal acts of the European Union can not be submitted for review since they are not part of the German legal order and the European Court of Justice has exclusive power to review them. The question, under which exceptional circumstances the national constitutional courts may be entitled to review their "applicability" in their country, is highly controversial; the relevant jurisprudence of the Federal Constitutional Court has been rejected by many scholars and even by other national constitutional courts.
- The judicial referral is only admissible under restrictive conditions:
 - (aa) The referring *court must be convinced that the relevant law is unconstitutional*. It must give reasons for this opinion and in particular exclude any possibility to interpret and apply the provisions in line with the constitution.
 - (bb) In the case before the referring court, the *decision of the court must depend on the validity of the provisions* in question. If the court is not sure about that because of uncertain facts of the case, it may first need to take evidence and then file the referral.

If these conditions are met, there is no discretion: The court *must* suspend the proceedings and obtain the decision of the Federal Constitutional Court.

The judicial referral must be *thoroughly reasoned*. The court must explain the facts and the legal situation and explore the relevant jurisprudence and legal literature. In practice, the Federal Constitutional Court takes these requirements very seriously, often brusquely rejecting the referral for insufficient reasons. Unlike some East European constitutional courts, it does not encourage the courts but tries to keep the number of referrals down. The Federal Constitutional Court Act facilitates this practice by allowing a Chamber (composed of 3 of the 8 judges of the Senate) to determine the inadmissibility of the referral unanimously in preliminary proceedings (sect. 81a FCC Act).

- The concerned constitutional bodies may join the proceedings. The Federal Constitutional Court may also hear the parties to the proceedings before the referring court and hear or consult the supreme courts (sect. 82 FCC Act).

c) Decision of the Federal Constitutional Court

- The Federal Constitutional Court decides solely on the point of (constitutional) law. The decision and its effects are the same as in the case of abstract constitutional review.

3) Constitutional review of laws in constitutional complaint proceedings (art. 93(1) no. 4a BL)

a) General remarks

- The constitutionality of legal provisions can also be reviewed in the constitutional complaint proceedings initiated by citizens. These are the by far most frequent proceedings, causing by far most of the workload of the Federal Constitutional Court. There have been 200.482 cases in total, 6.477 cases in 2013, 5.818 in 2012 and 6.036 in 2011.

b) Admissibility of the constitutional complaint (sect. 90 et seq. FCC Act)

- A constitutional complaint is admissible if a person alleges that one of his fundamental rights (or enumerated similar rights) has been infringed by an act of public authority. It must be lodged and substantiated within one month or, if it is lodged against a law, within one year. The infringement must not be evidently impossible.
- The complainant must be affected directly and currently himself and must first have exhausted all legal remedies. For these reasons, a *direct complaint against a law is only admissible in exceptional cases* where the law affects the citizen directly, without any executive act being necessary (e.g. in the field of criminal law). However, whenever a constitutional complaint is directed against a measure executing or applying a law, the constitutionality of these *legal provisions will be reviewed incidentally* (parenthetically).
- The constitutional complaint must be reasoned, specifying the right which is claimed to be violated.

c) Acceptance procedure (sect. 93a et seq. FCC Act)

- The huge number of inadmissible or evidently unfounded constitutional complaints has been a problem from the beginning. The Federal Constitutional Court Act tries to solve it by submitting every complaint to a special acceptance procedure. The complaint only needs to be accepted if it is of fundamental constitutional significance or if this is indicated in order to enforce fundamental rights. A Chamber of 3 judges (out of the 8 judges of the Senate) may unanimously decide to refuse the acceptance, thereby terminating the proceedings. This happens in most cases. Nevertheless, the *Federal Constitutional Court* has been in danger to collapse for the last 20 years and just in February 2014 has issued another *cry for help*.³
- There has been a never ending discussion how to reform the constitutional complaint proceedings. In 1997 a commission appointed by the Federal Ministry of Justice proposed to follow the American example and leave it to the discretion of the Court whether to accept a complaint or not, but this solution was not popular among the scholars. Most East European constitutional states, watching carefully the development in Germany, have refrained from introducing a general constitutional complaint but instead introduced a special complaint limited to the constitutional review of laws ("unechte Verfassungsbeschwerde"). This solution, however, is not discussed in Germany.

d) Decision of the Federal Constitutional Court

- If a complaint against a law is successful, The Federal Constitutional Court will declare the law void. The same applies if an annulled decision was based on an unconstitutional law (sect. 95 FCC Act).

³ See the cry for help of the President of the Federal Constitutional Court, www.bundesverfassungsgericht.de/organisation/gb2013/vorwort.html.

III. The examination of the constitutionality of laws

- Preliminary remark: This presentation focusses on the compliance of federal laws with the Basic Law. The legislation of the Länder must also comply with the Constitution of the Land. However, this will not be monitored by the Federal Constitutional Court but in a separate constitutional review by the Constitutional Court of the Land.

1) A systematic approach for a thorough and comprehensive examination

- using examination schemes (check lists) that are reflecting the dogmatic structure of constitutional law
- using different methodological approaches for the application of different types of constitutional norms (constitutional principles, fundamental rights, constitutional rules)
- In most European constitutional states there is a comparable approach. However, the terminology and the structure of the examination are different, due to the different legal and constitutional traditions. The German doctrine has strongly inspired the development of the doctrine in Spain, Portugal and most East European countries, which have introduced similar ways of constitutional review.

2) The constitutionality in form ["formelle Verfassungsmäßigkeit"]

a) Legislative *competence* of the Federation

- according to an elaborated system of distribution of legislative competences between the Federation and the Länder, which provides for exclusive, concurrent and implied (unwritten) competences of the Federation (art. 70 et seq. BL)
- Note that this aspect is irrelevant in unitary states except in matters concerning regions enjoying constitutionally guaranteed autonomy.

b) No violation of constitutional requirements in the legislative *procedure*

- Constitutional review is limited to the compliance with constitutional norms. Therefore, violations of the rules of procedure of the Bundestag are irrelevant except if the violated rules mirror constitutional requirements.

aa) Correct introduction of the bill (art. 76 BL)

bb) Adoption of the law by the Bundestag (art. 77(1), 78 BL)

cc) Participation of the Bundesrat (art. 77(2-4), 78 BL)

dd) Certification of the law by the Federal President and promulgation in the Federal Law Gazette (art. 82(1) BL)

- The Federal President is entitled to review himself the constitutionality of the law and to refuse its certification in case of unconstitutionality.

c) No violation of constitutional requirements concerning the *form*

aa) Signature of the Federal President (art. 82 BL)

bb) Countersignature of the Federal Chancellor or the competent Federal Minister (art. 58 BL)

cc) Specification of affected fundamental rights and of the articles in which they appear (art. 19(1) 2 BL)

3) The constitutionality in substance ["materielle Verfassungsmäßigkeit"]

a) No violation of *fundamental rights*

- in most cases the focal point of the examination.

aa) No violation of defensive rights, in particular freedom rights

- see for details the materials "Basic elements of fundamental rights doctrine", p. 2 f.

bb) No violation of equality rights

cc) No violation of other fundamental rights

b) No violation of *fundamental constitutional principles* (art. 1, 20 BL)

- These principles define the constitutional identity and constitute the absolutely protected core of the constitution.
- Most principles have several *sub-principles*, some of them anchored in different provisions.
- Unlike constitutional rules, constitutional principles do not follow a conditional approach ("if ... then") and therefore cannot be applied by way of subsumption. They are abstract norms which must be concretised in the specific context of the specific case.

aa) The guarantee of *human dignity*

- the highest constitutional value

bb) The *principle of democracy*

- with sub-principles for democratic elections (art. 38), the role of political parties (art. 21) etc.
- complemented by the *republican principle* (no re-introduction of monarchy)

cc) The *principle of the federal state* ["Bundesstaatsprinzip"]

- guarantees constitutional autonomy, political autonomy and own competences of the Länder and their participation in the legislative process in the Federation
- principle of federal loyalty

dd) The *principle of the social state* ["Sozialstaatsprinzip"]

- social security, social cohesion and social justice as constitutional values

- ee) The **principle of the rule of law** ["Rechtsstaatsprinzip"] (art. 20(3) BL)
- *principle of legality*
 - all public institutions bound to the constitution and the law
 - laws must be effectively enforced in practice (also against the citizen!)
 - *principle of legal reservation*
 - all decisions essential for the realisation of fundamental rights need a statutory legal basis
 - principle of *separation of powers* (art. 20(2) 2 BL)
 - in particular absolute protection of the core area of each power
 - *principle of proportionality*
 - categorical rejection of any absoluteness of any objective of the state
 - requires legitimate aim, suitability, necessity and proportionality in the strict sense for all measures unfavourable for the citizen
 - *principle of definiteness*
 - legal norms must be sufficiently clear and precise so that the acting of the state is calculable for the citizen
 - principle of consistency of the legal system (no contradictory laws or provisions)
 - *prohibition of retrospective legislation*
 - guarantee of *effective legal protection*
 - against measures of public authorities (art. 19(4) BL) and in matters of private law
 - principle of *state liability* for any illegal measures of public authorities
 - *special rule of law principles in criminal and criminal procedure law*
 - nulla poena sine lege (art. 103(2) BL): an act may be punished only if it was defined by law as a criminal offence before it was committed
 - ne bis in idem (art. 103(3) BL): no punishing for the same act more than once under criminal law
 - in dubio pro reo
- c) No violation of other constitutional principles
- promotion of the effective realisation of equality of women and men (art. 3(2) 2 BL)
 - protection of the natural foundations of life (art. 20a BL)
 - protection of animals (art. 20a BL)
 - principles concerning Germany's participation in the European integration (art. 23 BL)
 - fiscal and budgetary principles
 - other constitutional principles
- d) No violation of other constitutional norms
- in particular institutional provisions
 - in particular the *guarantee of local self-government* (art. 28(2) BL) ensuring the right of the communes and districts to regulate all affairs of the local community on their own responsibility

IV. Conclusion

Legal provisions

Excerpt of the Basic Law for the Federal Republic of Germany of 1949

Article 93 [Jurisdiction of the Federal Constitutional Court]

(1) The Federal Constitutional Court shall rule:

...

2. in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law ["Bundesrecht"] or Land law ["Landesrecht"] with this Basic Law, or the compatibility of Land law with other federal law, on application of the Federal Government, of a Land Government, or of one fourth of the Members of the Bundestag;

...

4a. on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under ... Article ... has been infringed by public authority;

4b. on constitutional complaints filed by municipalities or associations of municipalities on the ground that their right to self-government under Article 28 has been infringed by a law...;

5. in the other instances provided for in this Basic Law.

Article 100(1) [Concrete judicial review]

If a court concludes that a law ["Gesetz"] on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Land court with jurisdiction over constitutional disputes where the constitution of a Land is held to be violated, or from the Federal Constitutional Court where this Basic Law is held to be violated. This shall also apply where the Basic Law is held to be violated by Land law and where a Land law is held to be incompatible with a federal law.