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Judicial Activism in the Practice of the German Federal Constitutional Court:

Is the GFCC an Activist Court?

The question of whether the Federal Constitutional Court is an activist court cannot simply be answered 'yes' or 'no'. In Germany, lawyers have a standard answer to questions that cannot be answered with a mere 'yes' or 'no'. That answer is: 'It depends.' This is also the first way in which I would like to reply to the key question I will address here. Of course, however, I will as the discussion progresses try to answer it in a differentiated manner and to substantiate my answer by making reference to some selected examples from the Federal Constitutional Court's case law. In this context, one must differentiate matters according to the reasons for the Federal Constitutional Court's scope for formative action, which means that one must differentiate among the following aspects:

1. the Federal Constitutional Court's competencies;
2. the content of the Federal Constitutional Court's decisions; and
3. the effect of the Federal Constitutional Court's decisions.

1. The Federal Constitutional Court's competencies

A constitutional court's possibilities of taking an active part in the shaping of policy are determined above all by the competencies that have been designated for it. In Germany, these competencies are set out in the Basic Law (*Grundgesetz*)[*1], in the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*)[*2], and in other laws. What is inherent to all of the provisions concerning competencies is that they restrict the Federal Constitutional Court's tasks to examining the following, **with the Basic Law as its sole standard of review**: firstly, the compatibility of an act of state with the Basic Law (the compatibility of a law, for instance, can be examined by means of a constitutional complaint, or through proceedings for the abstract or concrete review of statutes, and the compatibility of a court ruling can be examined by lodging a constitutional complaint);

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[1] Basic Law (*Grundgesetz*) from 23 May 1994 (BGBl. (Federal Law Gazette), p. 1); in the version of the amendment from 28 August 2006 (BGBl. I, p. 2034 ff).

[2] Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*, or BVerfGG) in the version from 11 August 1993 (BGBl. I, p. 1473), last amendment from 5 September 2006 (BGBl. I, p. 2098).

secondly, the scope of rights and obligations of supreme federal organs or other parties (in so-called *Organstreit* proceedings); and, thirdly, the scope of rights and obligations in the case of disputes about the rights and obligations of the federation and the *Länder* (states).[*3] It is true that the Federal Constitutional Court is a constitutional organ; it is, however, not a political organ but a court of justice, bound by the strict standard of the Basic Law in its decision-making.

Another restriction of the 'political activities' of the Federal Constitutional Court is due to the fact that the Federal Constitutional Court has no right of initiative whatsoever; thus, it has no possibilities of becoming active without the initiative of another constitutional organ, or of organs of the federation or of the *Länder*, without either a submission by a court or an application by a citizen. The Basic Law and the Federal Constitutional Court Act confer on the Federal Constitutional Court only the competence to decide in cases where the Basic Law, the Constitutional Court Act (which is founded on the Basic Law), and other laws provide the right to make applications for constitutional organs, for sections of such organs, for organs of the federation or of the *Länder*, or for citizens and also contain provisions concerning the courts' right to make referrals to the Federal Constitutional Court. In no event can the Federal Constitutional Court become active of its own accord. In this meaning — that is, in the meaning of the question of whether the Federal Constitutional Court can take the initiative where a political question is at issue — the answer to the question as posed is a simple 'no'.

For the sake of completeness, I would, however, like to mention that the Federal Constitutional Court, or, to be more precise, the Plenum, consisting of all 16 judges (both chambers) sitting together, does have a right of initiative, which can at most exert an indirect political effect: Its right of initiative consists in the possibility for the Plenum to initiate, pursuant to § 105 of the Federal Constitutional Court Act, the retirement or dismissal of a Federal Constitutional Court judge by authorising the Federal President accordingly. Such a procedure has not yet taken place in the 56 years of the Federal Constitutional Court's existence. Moreover, the right of initiative of the Federal Constitutional Court Plenum is restricted to cases in which a Federal Constitutional Court judge is to be removed because of permanent unfitness for service or where a Federal Constitutional Court judge has been sentenced in a final and unappealable judgment because of a dishonourable act or to more than six months' imprisonment, or where he has committed a breach of duty that is so gross that his remaining in office is ruled out. Thus, the right of initiative has no politically motivated starting point. All in all, this right of initiative is completely apolitical as regards its motive, and it is virtually insignificant; as noted at the outset, I have mentioned it only for the sake of completeness.

This description of the Federal Constitutional Court's limited scope of political action is not intended to negate or to disguise the fact that many proceedings, especially those in which the Federal Constitutional Court acts as a court judging state matters and thus rules on disputes between constitutional organs or other organs of the federation or of the *Länder*, are caused by a political issue and a political dispute. This was the case, for instance, in the *Organstreit* proceedings on the question of the constitutionality of the German Armed Forces' missions abroad and on the question of their requiring the consent of the German *Bundestag*[*4]; this was also the case in the *Organstreit* proceedings that were initiated by some members of the *Bundestag* against the amendment of § 44a (1) of the Act on the Legal Status of Members of the German *Bundestag* (*Abgeordnetengesetz*), pursuant to which holding a seat in the Parliament is the focus of the professional activities of a member of the German *Bundestag*, and against the obligation thus imposed for the members of the *Bundestag* to disclose their additional income.[*5] The ruling in the *Organstreit* proceedings undertaken by some members of the *Bundestag* concerning the question of whether the dissolution of the German *Bundestag* on 21 July 2005 by the Federal President had been compatible with the Basic Law was also based on a political issue.[*6] Time and again, issues that have been subject to intensive discussion before in the political sphere, or that will be intensively discussed afterwards, have to be finally settled by the Federal Constitutional Court also by means of constitutional complaint proceedings or of proceedings for the review of statutes.[*7] Examples of this are cases of proceedings for the abstract review of a statute, and I could cite many cases in this connection — for instance, in recent case law, the proceedings for the review of a statute that had been initiated by the opposition at the time concerning the question of the constitutionality of the 2004 Budget Act and of the procedure of its adoption.[*8] Another example can be found in the proceedings addressing the question of the constitutionality of the Civil Partnerships Act (*Lebenspartnerschaftsgesetz*), and especially of its compatibility with § 6 (1) of the Basic Law, which places marriage and family under the special protection of the state.[*9] The Lifetime Partnerships Act has recognised same-sex partnerships in important respects and has in some respects accorded these partnerships a status that previously had been reserved for marriage.

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3 E. Benda, E. Klein. Verfassungsprozessrecht. 2nd ed. 2001, marginal number 26.

4 Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 90, pp. 286–394.

5 Decision, dated 4 July 2007 — 2 BvE 1/06; 2 BvE 3/06; 2 BvE 9/06 — thus far published only on the Web site http://www.bundesverfassungsgericht.de/.

6 BVerfGE 114, pp. 121–195.

7 E. Benda, E. Klein (Note 3), marginal number 9.

8 Decision, dated 9 July 2007 — 2 BvF 1/04 — thus far published only on the Web site http://www.bundesverfassungsgericht.de/.

9 BVerfGE, 105, pp. 313–365. English version available at http://www.bundesverfassungsgericht.de/.

Another prominent example of the Federal Constitutional Court's competence to take an active part, with far-reaching consequences, in the shaping of policy is its competence, which is set out in § 21 (2) of the Basic Law, to rule on the unconstitutionality of a political party. Through its decision to ban a political party or to deny a motion to this effect, the Federal Constitutional Court seriously intervenes in the course of politics. This statement, must, however, be put into perspective by describing the facts: in the 56 years of the Federal Constitutional Court's existence, only eight party-ban proceedings have been brought before it, and five judgments have been passed in party-ban proceedings.[*10]

What must be mentioned in this context is the Federal Constitutional Court's competence to declare laws that have been adopted by the *Bundestag* and by the parliaments of the *Länder*, or individual provisions of such laws, unconstitutional or even void. Legislation is the political decision per se. Its result, the law, marks the end of a process of policy-shaping, perhaps even of the most important such process. The fact that the Federal Constitutional Court can declare laws, in whole or in part, unconstitutional and even void and that the Federal Constitutional Court's decisions have the force of law, and that they are even published in the Federal Law Gazette in the manner of a law[*11], makes it unmistakably evident that the Federal Constitutional Court, by means of its competence and in the shape of its decisions, is also active in the political sphere in this respect, even if its activity is restricted, as I have already described, by the framework for its review, which is the Basic Law.

Through every decision in which the Federal Constitutional Court declares a law unconstitutional, it also exerts a political effect. A quite recent example of this is the Federal Constitutional Court's decision on the Aviation Security Act (*Luftsicherheitsgesetz*), which declared § 14 (3) of the Aviation Security Act unconstitutional and void.[*12] This provision authorised the Federal Minister of Defence, in the event that an aircraft with citizens on board is hijacked by terrorists above German territory and the aircraft is recognisably intended to be used as a weapon to kill more people, to have the armed forces shoot down the aircraft. In its judgment, the Federal Constitutional Court found the following: Not only does the Basic Law not provide authorisation to employ the Federal Armed Forces (*Bundeswehr*) in such a situation but, above all, it is a violation of § 1 (1) of the Basic Law, and thus a violation of human dignity, to decide about human lives in the manner provided for by § 14 (3) of the Aviation Security Act in favour of other human lives. This decision has met with criticism in the political arena, and the Federal Constitutional Court's judgment has given rise to a discussion in the federal government and in the parliamentary sphere about how the political concern of protecting citizens who are not in the aircraft but who are threatened all the same can nevertheless be addressed in such a situation.

Sometimes, the federal legislature refrains from active policy-shaping in a specific area because proceedings in this area are pending before the Federal Constitutional Court and the legislature wishes to wait for the Federal Constitutional Court to issue its decision. Such was the situation underlying the Federal Constitutional Court's decision on the unconstitutionality of inheritance tax and gift tax on real property. By its order of 22 May 2002, the Federal Finance Court had submitted to the Federal Constitutional Court the question of whether, as far as inheritance tax and gift tax are concerned, the fact that different methods of value ascertainment (i.e., valuation methods) are applied, especially as regards real property in contrast to capital assets and operating assets, is compatible with the principle of equality under § 3 (1) (the value of real property is sometimes ascertained according to the capitalised value, not according to current market value, as is the case with other assets). The federal government and the *Bundestag* had been provided with the Federal Finance Court's submission. The political bodies were aware of the misgivings that existed on account of constitutional law. In spite of the fact that the proceedings were pending before the Federal Constitutional Court for several years, and despite the broad political debate about an inheritance tax and gift tax reform, the Federal Finance Court's misgivings were not taken up by the legislature in a change of the assessment of inheritance tax and gift tax for real and immovable property; instead, the legislature deliberately waited for the outcome of the proceedings before the Federal Constitutional Court. At the end of last year, the Federal Constitutional Court found the relevant provisions unconstitutional due to their violation of the principle of equality.[*13] Now a similar situation and a similar debate have arisen in a slightly different area. Constitution-oriented complaints have been lodged with the Federal Constitutional Court against the Act Concerning the Protection of the Constitution (*Verfassungsschutzgesetz*) of the *Land* North-Rhine/Westphalia. Said act provides authorisation, under specified conditions, to perform online searches of citizens' computers. Also the federal government is considering introduction of similar authorisation as a bill in the Parliament. In view of the pending proceedings, however, the federal government is now considering waiting for the Federal Constitutional Court's decision.[*14] This shows the esteem and respect that the Federal Constitutional Court

[10] BVerfGE 2, pp. 1–79; BVerfGE 5, pp. 85–393; BVerfGE 91, pp. 276–294; BVerfGE 107, pp. 339–305.

[11] Subsection 31 (2) of the Federal Constitutional Court Act.

[12] BVerfGE 115, pp. 118–166.

[13] The decision has not yet been published in BVerfGE, but it has been published in Neue Juristische Wochenschau (NJW) 2007, p. 573 ff and on the Web site http://www.bundesverfassungsgericht.de/.

[14] Wir sollten auf Karlsruhe warten. – Die Tageszeitung, 29.06.2007; Abwarten, wie Karlsruhe entscheidet. – Stuttgarter Zeitung, 14.07.2007.

enjoys, although one could interpret the federal government's conduct as being the political sphere reducing the room it has in which to manoeuvre.

It must be emphasised, however, that, as regards declaration of the unconstitutionality, or even nullity, of statutes, the Federal Constitutional Court has acted with great restraint (and still does). Through 31 December 2006, the Federal Constitutional Court handed down more than 160,000 decisions. According to the Federal Constitutional Court's statistics, laws or ordinances were declared entirely or partly unconstitutional in only 423 cases; in many of these, only individual provisions were declared entirely or partly unconstitutional. Nullity was declared in very few cases: As regards laws and ordinances of the *Länder*, the number is even lower: In the 56 years of the Federal Constitutional Court's existence, 165 such laws or individual provisions thereof have been declared unconstitutional.

To sum up, the following can be said concerning the question of 'activism' from the point of view of the Federal Constitutional Court's competencies: the Federal Constitutional Court's possibilities of taking an active part in the shaping of policy are limited by its standard of review being the Basic Law, and by the fact that the Federal Constitutional Court has no right of initiative. The Federal Constitutional Court's competencies themselves empower the court to take an active part in the shaping of policy. This stems from the Federal Constitutional Court's competence as a court for state matters, which confers on it jurisdiction in proceedings between constitutional organs and other organs of the federation and of the *Länder*. As a general rule, there is a political dispute at the root of such proceedings. Also the court's competence to declare laws unconstitutional or even void always results in a decision being taken in the political sphere. Through these competencies, the Basic Law and the Federal Constitutional Court perform, historically speaking, the task conferred on them after the Second World War and after the National Socialist regime of injustice: The Federal Constitutional Court is intended to guarantee that the political decision-makers in Germany will never again step onto the wrong track in a similar manner as between 1933 and 1945.

2. The content of the Federal Constitutional Court's decisions

The decisive standard for answering the question of whether the Federal Constitutional Court is an activist court is the interpretation of the provisions of the Constitution that confer competencies on the Federal Constitutional Court, and the interpretation of the Code of Procedure (specifically, of the Federal Constitutional Court Act), which casts the competence provisions in concrete terms. It has rightly been pointed out in this respect that the Federal Constitutional Court is, on the one hand, the addressee of these provisions whilst being, on the other, their interpreter with ultimate jurisdiction.*[15] Such interpretation, however, is what is performed in the court's decisions, and thus the Federal Constitutional Court's room for manoeuvring is decisively influenced also by the court's understanding of itself. In the legal literature, the court's decisions and its understanding of itself are discussed under a broad variety of headings. They range from reproaching the court for acting as a 'substitute legislature'*[16] to a warning that the court's acting with judicial self-restraint may be tantamount to denial of justice. According to some opinions expressed in the literature, self-restraint is "self-authorisation, or even unwarranted assumption of competencies, if not even usurpation of competencies, and, apart from this, denial of justice".*[17] This overstatement must be seen against the background that German law does not provide the Federal Constitutional Court with the possibility of not settling a dispute on grounds of its political nature. In German constitutional law and law of constitutional procedure, the political question doctrine, which applies in United States law, does not exist.*[18] The political question doctrine makes it possible for the United States Supreme Court not to become active in a matter in which the extralegal factors — that is, the political ones — are of such relevance that it would not be possible to issue a decision on the basis of the legal standards alone.

In some of its decisions (perhaps in too few of them?), the Federal Constitutional Court deals with the question of judicial self-restraint and thus with its own role in the political system; in doing so, it partially discloses the understanding that it has of itself. This has been done, in a fundamental and detailed manner, in the judgment on the Basic Treaty with the German Democratic Republic. In its judgment, the Federal Constitutional Court established the following: "[T]he principle developed in general by the Federal Constitutional Court with regard to the responsibility of the other constitutional bodies in the free democratic state under the rule of law set up by the Basic Law applies to constitutional review of a Treaty too: that among several possible

[15] H. Bethge. – T. Maunz, B. Schmidt-Bleibtreu, F. Klein, H. Bethge. Bundesverfassungsgerichtsgesetz. Kommentar, § 31, marginal number 18.

[16] H.-P. Schneider. 'Gesetzes vertretende Notverordnungen' of the Federal Constitutional Court. – NJW 1994, p. 2591.

[17] See H. Bethge (Note 15), § 31, marginal number 15.

[18] See E. Benda, E. Klein (Note 3), marginal number 43.

interpretations, the one to choose is that through which the Treaty can stand up to the Basic Law. […] Among the interpretive principles important particularly in connection with the constitutional review of treaties is also that in interpreting constitutional provisions relating to the Federal Republic's relationships with other states, their demarcatory character, that is the room for manoeuvre they allow in policy-making, ought not to be left out of account. In this demarcation the Basic Law sets legal limits to every political power, in the area of foreign policy too; this is the essence of the rule of law constituted by the Basic Law."*[19] These statements, which relate to the decision and to the constitutional issue of the proceedings at hand, are followed by another two essential sentences, which express the Federal Constitutional Court's understanding of itself as regards its role within the "structure of the state under the rule of law" that has been described by it before but also concerning its understanding of judicial self-restraint*[20]: "The implementation of this constitutional order is incumbent ultimately on the Federal Constitutional Court. The principle of judicial self-restraint that the Federal Constitutional Court imposes upon itself does not mean a curtailment or weakening of its powers as just set out, but refraining from 'playing politics', that is, intervening in the area of free policy-making set up and demarcated by the constitution."

An example of judicial self-restraint is the judgment of 9 July 2007*[21] on the constitutionality of the 2004 Budget Act, which has already been mentioned. Here, the majority of the Second Senate (one of the two bodies of the court in question) has refrained from interpreting the relevant sections (115 and 109) of the Basic Law in a more restrictive manner; in such an interpretation, it would have deviated from the case law existing to date. The Senate explicitly set forth the following: "Even today, fundamental revisions of the concept of regulation set out in the second sentence of § 115 (1) and § 109 (2) of the Basic Law are reserved to the constitution-amending legislature"*[22], although, some sentences later, it maintained: "It is true that, at present, the need for revision of the applicable constitutional provisions can hardly be doubted any longer."*[23] It went on to say: "The conclusion, which at first sight seems evident, that here the intensity of the constitutional court's review — which obviously has not been sufficiently effective in the past — must be increased leads one astray. To replace the legislature's assessment of whether there is a disturbance of the overall economic equilibrium with the constitutional court's assessment of the existence of such a disturbance, and of the appropriate budgetary reaction to this, does not increase the prospects for adequate decisions that correspond to the objectives of the constitutional rules governing public finances in the best possible manner. What is necessary instead is to develop mechanisms that ensure the necessary compensation for given debt margins over several budget years. The selection and the institutionalisation of rules that achieve this and that in doing so counteract, in an appropriate manner, the incentive to shift the burden of compensation to subsequent legislatures is a complex task, for the solution of which the applicable constitutional law does not provide any sufficiently specific directives. This task is reserved to, and mandated for, the constitution-amending legislature."*[24] Two dissenting opinions have been added to the decision. One of them begins with the following words: "The Senate interprets the relevant provision of the Basic Law on the Federation's debt limitation in such a way that it cannot exert an effect. This corresponds neither to the wording and the purpose of the provision nor to the structure of the Basic Law."*[25] The other dissenting opinion starts as follows: "The Senate majority does not show any effort to set limits to the policy of excessive state borrowing by applying the provisions of § 109 (2) and the second sentence of § 115 (1) of the Basic Law in a more restrictive manner, which would be indicated."*[26] It is a question of interpretation whether from the constitutional or from the political point of view the decision of the Senate majority is to be criticised in accordance with the dissenting opinions.

Particularly in decisions about applications for temporary injunctions in *Organstreit* proceedings, the Federal Constitutional Court specifies whether a temporary injunction would encroach on another constitutional organ's room to manoeuvre.*[27] The same applies to applications for temporary injunctions in proceedings for the abstract review of a statute*[28] or in constitutional complaint proceedings that challenge laws.*[29] In one of these proceedings for the review of a statute, the Federal Constitutional Court has laid down the following: "[…] because the issuance of a temporary injunction is always a considerable encroachment on the legislature's room to manoeuvre. Invoking the Federal Constitutional Court's jurisdiction may not become a means

[19] BVerfGE 36, pp. 1–37 (especially 14). The English version is published in Decisions of the Bundesverfassungsgericht. Nomos Verlag 2005 (3), pp. 1–25.

[20] *Ibid*.

[21] See Note 8.

[22] See Note 8, marginal number 132 on the Web site.

[23] See Note 8, marginal number 133 on the Web site.

[24] See Note 8, marginal number 135 on the Web site.

[25] See Note 8, marginal number 161 on the Web site.

[26] See Note 8 marginal number 204 on the Web site.

[27] For example, BVerfGE 99, pp. 57–69 (especially p. 69); BVerfGE 105, pp. 51–62 (especially p. 61); BVerfGE 106, pp. 253–265 (especially p. 254).

[28] See BVerfGE 104, p. 27.

[29] J. Berkemann. – D. Umbach, T. Clemens, F.-W. Dollinger. Bundesverfassungsgerichtsgesetz. 2nd ed. 2005, § 32, marginal number 162.

by which parties to the proceedings that have been unsuccessful in the legislative process can delay the law's entry into force."*[30]

Sometimes, external critics of the court, but also internal ones, are of the opinion that in individual decisions the Federal Constitutional Court does not observe the restraint that it has imposed on itself. Especially after the so-called abortion decisions*[31], the Federal Constitutional Court was criticised for acting as a 'substitute legislature'.*[32] The decisions were based on the question of whether the 'time-phase' solution (that is, the exemption from punishment for pregnancy terminations performed until the twelfth week) that had been newly provided in the Criminal Code (*Strafgesetzbuch*) was compatible with the Basic Law. The Federal Constitutional Court declared the provision unconstitutional because the legislature was under an obligation to make a pregnancy termination subject to punishment if no special reasons for an abortion existed. Because the relevant provision was declared void by the decision, the Federal Constitutional Court laid down in its decision a transitional arrangement with validity until the enactment of an amended provision.*[33] It has already been mentioned that the decision as such and the transitional arrangement have been criticised, in the legal literature but also within the court itself, in the dissenting opinion.*[34]

The dissenting opinion says: "The authority of the Federal Constitutional Court to annul decisions of the parliamentary legislator demands restraint in its use in order to avoid a dislocation of power among the constitutional organs. The command of judicial self-restraint, which has been termed the 'life-giving elixir' of the judicial function of the Federal Constitutional Court, applies when a case does not involve warding off encroachments by governmental authority but rather involves the court issuing directives for the positive development of the social order to the popularly elected legislature by way of constitutional review. In this instance, the Federal Constitutional Court may not succumb to the temptation to assume the functions of the organ to be controlled if, in the long run, the status of constitutional jurisdiction is not to be endangered."*[35] The dissenting opinion goes on to state that, through the decision of the Senate majority, "the first time in the adjudication of a constitutional issue, an objective value decision is to serve the purpose of postulating a **duty** of the legislature **to issue penal norms**, therefore [postulating] the strongest imaginable interference with the citizen's sphere of freedom".*[36] Further on, the dissenting opinion substantiates that the Senate majority has exceeded the limits of judicial self-restraint in this decision. In the legal literature, the very far-reaching wording of the two 'abortion decisions' referred to above, especially the transitional arrangement, are justified as follows: "After the Federal Constitutional Court had declared the nullity of § 218 of the Criminal Code that was applicable at that time, it was in a difficult situation because it obviously also had constitutional misgivings concerning the previous solution, the continued applicability of which until the enactment of a new act of legislation would therefore hardly have been a consideration, and that this had been the reason the wording had been chosen."*[37]

The Federal Constitutional Court has created 'transitional arrangements' in other decisions but without their having resulted in similarly critical discussions in the legal literature. In its decisions concerning the ability to testify of persons who are unable to write and speak, for instance, the Federal Constitutional Court has declared the unconstitutionality of the strict requirements as to form for drawing up a will that were applicable at the time because these requirements deprived a person who is unable to write and speak but who is mentally and physically able to draw up a will of the possibility to do so. As the legislature had latitude for determining under which conditions a person who is unable to write and speak may create a will, the relevant provisions, however, were declared unconstitutional but not void. The Federal Constitutional Court ordered at the same time that, until the enactment of an amended provision, persons who are unable to write and speak could in future make testamentary dispositions (wills, contracts of inheritance, etc.) with the help of a notary. In this respect, the Federal Constitutional Court in this decision as well specified a transitional arrangement applicable until the legislature could resolve the matter via acts of its own.*[38] One possible reason that this decision and others that contain transitional arrangements have not met with criticism that was as harsh as the criticism after the abortion decisions may be that the abortion decisions were highly politically charged also as regards the question on which they were based.

As the examples that I have just cited show, the question of whether the Federal Constitutional Court has exceeded the limits of jurisprudence and has stepped onto the path of politics in a specific case is asked, as a

[30] BVerfGE 104, p. 27.

[31] BVerfGE 39, pp. 1–95; BVerfGE 88, pp. 203–366. English version available at http://www.bundesverfassungsgericht.de/.

[32] H.-P. Schneider writes about 'Gesetzes vertretenden Notverordnungen' of the Constitutional Court (NJW 1994, p. 2591). See also E. Benda, E. Klein (Note 3), marginal number 1358.

[33] BVerfGE 39, pp. 2–3.

[34] BVerfGE 39, p. 68 ff (namely, p. 69 ff).

[35] BVerfGE 39, pp. 69–70.

[36] BVerfGE 39, p. 73.

[37] E. Benda, E. Klein (Note 3), marginal number 1357.

[38] BVerfGE 99, p. 359.

general rule, not only externally but also internally — that is, by individual members of the court. Thus, dissenting opinions have been written on almost all of the decisions I mentioned at the beginning of this report as those brought before the Federal Constitutional Court after major political debate — for instance, on the decisions concerning the Civil Partnerships Act[*39], on the dissolution of the *Bundestag*[*40], and on the constitutionality of the 2004 Budget Act.[*41] Each of these three decisions had two dissenting opinions. As has been explained above, the dissenting opinions often directly or indirectly mention a lack of judicial self-restraint on the part of the Senate majority, or the Senate majority's exceeding the limits of judicial self-restraint. One dissenting opinion, for instance, says: "The Senate replies to questions that are not raised in the case with constitutional principles that are not contained in the Basic Law."[*42]

Another peculiarity of the Basic Law — namely, that the two Senates are composed of eight judges each and that therefore an equality of votes in the shape of a four-to-four decision is possible — sometimes reveals the political explosiveness of a constitutional issue to be decided by the Federal Constitutional Court. An example of this is formed by the *Organstreit* proceedings that have already been mentioned that were brought by members of the *Bundestag* against an amendment of § 44a (1) of the Act on the Legal Status of Members of the German *Bundestag* and against the obligation to reveal their additional income. In its judgment of 4 July 2007[*43], the Second Senate decided these proceedings with a result of four votes to four. According to the third sentence of § 15 (4) of the Federal Constitutional Court Act, in such a case the Basic Law cannot be declared to have been violated. In this four-to-four decision the court found, on the one hand, that the amendment of the act and also the disclosure of additional income are constitutional. On the other hand, the decision also presents the points of view of the four other members of the court — even if they were unsuccessful as regards the result — according to which the 'provisions concerning the centre of professional activities' and the provisions concerning the disclosure of additional income are incompatible with the German Constitution. Whilst there is an increase in the number of dissenting opinions, four-to-four decisions are extremely rare; in the Federal Constitutional Court's history, there have been only 24 of them.

Finally, the example of a case in which the Federal Constitutional Court has practised judicial self-restraint and was ultimately sanctioned for doing so should not go unmentioned.

Between 1993 and 2000, several proceedings had been brought before the Federal Constitutional Court that dealt with the question of the preconditions under which the Family Courts can, or must, assign joint custody to parents after divorce even if one parent objects. The constitutional complaints challenged several sections of the Civil Code (Bürgerliches Gesetzbuch). The Federal Ministry of Justice had been informed of individual constitutional complaints in 1994. In its opinion, the ministry had pointed out that, according to the federal government's plans, a reform of family law was intended to take place in the 13th legislative term, which lasted from 10 November 1994 to 26 October 1998. This legal reform was intended to include amendment of the provisions on joint custody. Ultimately, the Act on the Reform of Parent and Child Law entered into force only on 1 July 1998 — four years later. In view of the opinion set forth by the federal government, the Federal Constitutional Court had postponed its decisions in order to give the legislature the opportunity of autonomously shaping the reform. The constitutional complaints were decided only after the enactment of the Act on the Reform of Parent and Child Law, in which the possibility of joint custody was extended. A consequence of such judicial self-restraint, which was also political in its effect, on the part of the Federal Constitutional Court was that proceedings were brought before the European Court of Human Rights. As a result, the Federal Republic of Germany was sentenced to pay compensation for the excessive protraction of proceedings before the Federal Constitutional Court.[*44] In its decision, the European Court of Human Rights found that it is not appropriate if the Federal Constitutional Court lets almost four years elapse with a view to the legislature's expected activity concerning the matter.

Finally, what should not go unmentioned is the description of an area in which the Federal Constitutional Court is acknowledged to have 'quasi-political' latitude of decision. This concerns decisions in which a statute is merely declared unconstitutional, not void. Especially where an infringement of the principle of equality under § 3 of the Basic Law is established, the legislature, as a general rule, is granted room to manoeuvre as regards the shape that it wants to give to a statute that is in conformity with the principle of equality. In these cases, the Federal Constitutional Court frequently also decides how long the situation that has been declared unconstitutional may continue, by setting a time limit for the legislature. In the case related to inheritance and gift tax, which has already been cited[*45], the Federal Constitutional Court has given the legislature a time

[39] BVerfGE 105, pp. 357–359 and 359–365. English version on the Web site of the Constitutional Court, http://www.bundesverfassungsgericht.de/.

[40] BVerfGE 114, pp. 170–182 and 182–195.

[41] See Note 8.

[42] BVerfGE 112, p. 44. English version on the Web site of the Constitutional Court, http://www.bundesverfassungsgericht.de/ and in Decision of the Bundesverfassungsgericht, volume 3, pp. 183–217.

[43] See Note 8.

[44] Case of Wimmer v. Germany, application No. 60534/00.

[45] See Note 12.

limit for an amended provision. The deadline is 31 December 2008, approximately a year and a half from the date of service. But there have been shorter time limits specified as well — for instance, in the case in which § 1685 of the Civil Code was declared unconstitutional, and in which the legislature was given less than one year to enact an amended statute (the decision was served on 28 April 2003, and the legislature was given a deadline of 30 April 2004).*[46] Another interesting case in this respect is the order of the First Senate of 24 May 2000, according to which the principle of equality requires that remuneration in the shape of a one-off payment be taken into account in the calculation of short-term wage replacement benefits that are financed from contributions, such as unemployment benefits and sickness benefits, if the one-off payment is subject to social insurance contributions. Already in its order of 11 January 1995, the Federal Constitutional Court had established that this violation of the principle of equality existed, but it had accepted the continued applicability of the statute until its amendment without setting a time limit.*[47] The statute was not amended, and therefore the same issue had to be decided in the decision of 24 May 2000 due to the referral of a social court. In this case, the time limit that the Federal Constitutional Court set from the date of service, which was 20 June 2000, was only a little over a year, with a deadline of 30 June 2001; the Federal Constitutional Court added that in the event of no amended statute having been enacted by that date, the provision that violated the principle of equality should no longer be allowed to serve as a basis for subjecting one-off payments to social security contributions.*[48] It is evident that, because the legislature had not become active after the first decision, the Federal Constitutional Court now wanted to bring about a decision on the part of the legislature not only by allowing only a very short period of time for action but also by announcing a legal consequence, in the form of the non-applicability of the statute.

In the case of the unconstitutionality of *Land* laws that regulated the placement in preventive detention of highly dangerous offenders with a high risk of recidivism after their having served their prison sentences, the Federal Constitutional Court imposed a time limit of only about seven months for the enactment of a law that was in conformity with the nation's constitution.*[49]

3. The effect of the Federal Constitutional Court's decisions

Examples of political effects of the Federal Constitutional Court's decisions have already been cited, in the context of the Federal Constitutional Court's competencies. To the extent that the Federal Constitutional Court's competencies include the correction or even the reversal of political decisions by reason of their unconstitutionality, the Federal Constitutional Court's decisions always have a political effect. This becomes particularly clear as regards the Federal Constitutional Court's competence to declare a statute void. The same, however, applies to *Organstreit* proceedings, in which decisions of the majority of an organ can be corrected by the Federal Constitutional Court upon application by minorities. In this respect, the competence and the effect cannot be separated from each other.

Only in the past few months, a decision of the Federal Constitutional Court coincidentally, due to the point in time at which it was passed, exerted a very particular political effect. For several years, proceedings for the review of a specific statute had been pending before the Federal Constitutional Court in which the referring court submitted the question of whether it was compatible with the principle of equality that the provisions concerning the child-care maintenance paid to mothers (and sometimes, in specific cases, also to fathers) and the case law based on such provisions differentiated between legitimate and illegitimate children. The Civil Code provides that child-care maintenance paid to the custodial parent of an illegitimate child shall be restricted to three years whereas the provisions and the relevant case law provide that child-care maintenance for legitimate children shall be paid for a longer time. The Federal Constitutional Court declared the different provisions concerning child-care maintenance unconstitutional because child-care maintenance serves to maintain the child and here no distinction may be admitted between legitimate and illegitimate children.*[50] The decision was served on 23 May 2007. The parliamentary debate in the *Bundestag* on the reform of maintenance law had been scheduled for the very week in which the decision in the end was issued. Because the constitutional requirements made clear in this decision had not been taken into account in the bill, the bill was withdrawn from the agenda the day before its scheduled entry into law in a vote of the *Bundestag*.*[51] Due to

[46] BVerfGE 108, pp. 82–122. English version on the Web site of the Constitutional Court, http://www.bundesverfassungsgericht.de/.

[47] BVerfGE 92, pp. 53–74.

[48] BVerfGE 102, pp. 145–146.

[49] BVerfGE 109, p. 191.

[50] NJW 2007, pp. 1735–1737.

[51] Unterhaltsrecht gestoppt. – Süddeutsche Zeitung, 25.05.2007; Unterhaltsreform gestoppt. – Stuttgarter Zeitung, 25.05.2007; Koalition verschiebt neues Unterhaltsrecht. – Bild Zeitung, 25.05.2007; Reform des Unterhaltsrechts verschoben. – Frankfurter Allgemeine Zeitung, 25.05.2007.

the fact that the ruling coincidentally was handed down and served at the same time as the deliberations of the *Bundestag*, the decision had great influence on them. Also in this context, it must, however, be pointed out that the *Bundestag* and the federal government had known of the misgivings that were expressed in the suspension of proceedings and submission order of the Hamm Higher Regional Court (*Oberlandesgericht*) of 15 August 2004 for quite some time.

4. Conclusions

The conclusion of this discussion may be stated as follows. The Federal Constitutional Court's competencies empower the court to take an active part in the shaping of policy. Many proceedings are caused by political disputes. Consequently, many decisions exert political effects. The Federal Constitutional Court imposes upon itself judicial self-restraint. In some opinions of external and internal critics (the latter expressed in dissenting votes and the associated dissenting opinions), the Federal Constitutional Court does not pay enough attention to the restrictions it has imposed on itself. On the other hand, other criticism has claimed that self-restraint is, in fact, expressed by the court as self-authorisation, or unwarranted assumption of competencies, if not even usurpation of competencies. If a court decision is to be criticised, the result depends in most cases on the constitutional and political point of view. The most important issue is to have in Germany a public debate, review in the relevant media, and the opportunity to nurture the court's internal discussion of the question of whether or not the Federal Constitutional Court is or should be an activist court.