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**INTERRELATIONS BETWEEN THE
CONSTITUTIONAL COURT AND
ORDINARY COURTS**

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REPORT

**The decisions of the German Federal Constitutional Court
and their binding force for ordinary courts**

by
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Mr. President, dear Colleagues,

1. It is a great honour and pleasure for me to speak at an International Conference organised by the Azerbaijan Constitutional Court and the Venice Commission of the Council of Europe on a topic regarding the relationship between Constitutional Court and ordinary courts, a relationship which can be of particular tension, especially in states having transformed their systems into rule of law based democracies where ordinary courts with a long tradition are now confronted with a Constitutional Court jurisdiction examining legislation and interpreting laws in the light of the Constitution: Here often, as manifestly in Poland and Czech Republic, the ordinary courts regard themselves as exclusively competent to interpret the laws they have to apply and are often reticent to recognize the constitutional perspective to which the Constitutional Court adheres.

My contribution is dedicated to one important problem in the context of the relationship between the Constitutional Court and ordinary courts: the question of the binding force of Constitutional judgments on the civil and penal law courts, seen from a German standpoint.

2. The Federal Constitutional Court in Germany, with a 55 years existence, has developed a detailed system of well-interpreted constitutional norms, above all fundamental rights which have a particular impact on all branches of law, civil as well as penal law.

The first question is: What is the binding force of constitutional court decisions? The basic provision in the Constitutional Court Act is Article 31. Quite generally it is said that the decisions bind all constitutional institutions.

The decisions of the Constitutional Court have the effect of a final judgment, that means it is not submitted to a further repeal (which does not exclude that the Court of Strasbourg will be involved), and – besides this formal aspect – there is also in substance a binding effect as to the decision in this particular case.

Beyond these two dimensions of final judgment effect which are also common to decisions of other courts quite in general, Article 31 § 1 of the Constitutional Courts Act establishes a specific binding force of Constitutional Court decisions on all constitutional organs, public authorities and courts themselves. This far-reaching binding effect covers the tenor of the judgment and the leading arguments of the decision. This reflects the self-understanding of the Constitutional Court as an authentic interpreter of the Constitution, a doctrine which was already formulated even at the beginning of the Constitutional Court's existence (vol. 1, 14, 37) and – as to the scope of the binding interpretation effect – redefined not long ago (Schlaich/Korioth, BVerfG⁶, Rn. 485/486).

What the leading arguments of a decision are, is not very easy to define. A definition attempt was made in the recent jurisdiction: The Constitutional Court worked out the concept that only those arguments in the court's motivation are leading which are essential; if one of these arguments were eliminated the whole argumentation would be no longer understandable.

This binding effect is extended beyond the parties of the case, having an effect "erga omnes". What is much debated in Germany, is that by this extension of the binding effect the legal reasoning of the Constitutional Court as such is also binding, no longer submitted to scientific debate. This can lead to a doctrinal petrification. This also explains the high influence of the Court's jurisprudence on the German constitutional law doctrine which is much more intensive than the influence of the ordinary, especially civil law courts' jurisprudence on the scientific debate. It is true, however, that the possibility of separate opinions to constitutional decisions sometimes are a starting-point for doctrinal controversies.

3. Beyond this first point let us have a look on Article 31.2 of the CCA: Corresponding to a concept dating even from the pre-war period of the Weimar Constitution decisions of the Federal Constitutional Court challenging legislation (annulling it, declaring it unconstitutional or confirming it), have "force of law" themselves. These decisions are published in the Official Journal where also legislation is published. When annulling a law, the Court is not, as Hans Kelsen formulated, a "negative legislator"; the piece of legislation concerned is void for its contrariety to the Constitution; The CC is only confirming its nullity ((Schlaich/Korioth⁶, Rn. 496). This formal confirmation is necessary to have security of law.

Article 31.2 goes beyond Article 31.1 establishing even the force of law for judgments examining legislation. This means that – as it is the normative effect of a law – not only state institutions but also every private person is bound. This concept has been developed in the early period of the last century and had a different constitutional context than today. Nevertheless this concept had been accepted and commonly used by the Constitutional Court.

Summarizing up to here: The binding force of Constitutional Court decisions is normatively based on Article 31 I and II CCA which gives sufficient effect to the Court's decisions also in regard to the ordinary courts.

4. A further question is how these decisions are executed: Article 35 CCA is very general and gives power to the CC to decide on who shall execute and where this execution shall take place. This means that all types of decisions, even declaratory decisions, can be executed by measures foreseen by the CC itself (E 6, 300, 303 f.; 93, 362, 372). The Court can take these measures by its own or order them to be taken by state institutions of the Federation and the Federations's member states. The power, in practice seldom used, is very wide, without real limits, entrusted to the Court in the confidence not to abuse it (Schlaich/Korioth⁶, Rn. 474). Far-reaching measures have been taken in the two decisions on abortion (Schlaich/Korioth⁶, Rn. 474).
5. How is the impact on ordinary jurisprudence?

In general, CC decisions can have impact in two ways: in particular by the application of fundamental rights (FR) and by the annulment of legislation which is relevant in a court proceeding. This second type is not difficult to understand: The law annulled or declared unconstitutional cannot be applied by the courts, civil, penal, administrative courts. Sometimes, the CC is not directly annulling or declaring unconstitutional a piece of

legislative but upholding it with the (binding) invitation of the legislator to amend this act until a certain deadline ("Appellentscheidungen"). If the legislator fails to act within this time period the yet existing law will be void.

The first mentioned type is more difficult: Fundamental rights which can be invoked by the individual, after exhaustion of the legal remedies, directly before the CC, are relevant for public, general and civil law matters. The most delicate problem is that of defining the limit between a violation of constitutional law and that of ordinary law. These competences are clearly distributed: the latter to the ordinary courts, the first to the constitutional court. The doctrine has elaborated some formula for resolving this problem. The Constitutional Court, however, resolves this in a pragmatic way. The dogmatic proposals made by the literature could not satisfy completely but it seems not possible to find a quite generally accepted solution. To cite an example: The formula of Professor Schumann, my colleague from Regensburg, whose famous doctoral thesis has developed such a concept which has found widespread observance: He proposes that a violation of the Constitution being not only a violation of ordinary law can be stated in the following way: If the decision of the ordinary court which is challenged before the Constitutional Court can be transformed into a piece of legislation and this legislation is conform to the Constitution, the decision of the ordinary court is also in conformity with the Constitution. If not, on the contrary, the decision of the ordinary court violates the Constitution.

The Constitutional Court itself uses more vague, flexible terms to indicate the limit between equality and unconstitutionality. So, the ordinary judge violates the Constitution when, deciding his case, does not think at all of the impact of fundamental rights. Or, the judge thinks of it, but does not recognise fully the impact of the fundamental right.

It can easily be seen that this issue is one of the most controversial problems which has not found and cannot find an adequate solution in the future. Nevertheless, the pragmatism of the Constitutional Court is widely accepted.

6. It must also be underlined that the Constitutional Court feels itself competent to interpret legislation in the light of the Constitution. This is a well accepted, steadily exercised practice of the Court to determine, with binding force for other institutions and also with the force of law, the contents of a piece of legislation seen from the standpoint of the Constitution. Here a potential conflict with ordinary courts takes place. But in Germany, the ordinary courts accept the function of the Constitutional Court as an authentic interpreter of the Constitution which realises, by such judgments, the supremacy of the Constitution over ordinary law.
7. In this context it is also important to give a short answer to the question: How are fundamental rights influencing civil law? There is a well-established German doctrine of an only indirect effect of private law which is the basis for the judgment of ordinary courts. Besides one explicit case to be found in the Constitution, in Article 9 § 3 of the Basic Law, concerning negotiations on working conditions and membership in trade unions, the fundamental rights are influencing the provisions of civil law, especially the general clauses. The legal effects of a violation of fundamental rights in these fields are transformed into the mechanisms of civil law. Thus, a private person's action not conform to a fundamental right can be qualified as against morals what affects indeed the validity of a private contract.

The ordinary courts have to take adequately into consideration this impact when deciding on civil matters. The Constitutional Court, after the exhaustion of the civil court's remedies, can annul ordinary court's judgment for not respecting the influence of fundamental rights on the civil law provisions applied by the civil courts. Thus, also ordinary courts are very closely linked to the Constitution. This is in the line of the modern concept of supremacy of constitutional law as the supreme law of the land, expression of a two days valid concept of rule of law.