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## › PROBLEMS OF ENFORCING CONSTITUTIONAL COURT DECISIONS

### I. THE “CLASSICAL” ALTERNATIVE: COMPATIBILITY WITH THE CONSTITUTION OR NULLITY OF THE LAW

Initially, only two alternatives were open to the Federal Constitutional Court for the dictum in proceedings that involve the review of statutes: the declaration that the statute reviewed is *compatible* with the Constitution or the statement that the statute infringes the Constitution and is therefore null and void. Some quite difficult questions are hidden even beneath these alternatives that at first sight seem to be very simple.

#### 1. Declaration of compatibility and interpretation in conformity with the Constitution

When it comes to reviewing whether a statute is compatible with the Constitution, it is above all the principle of interpretation in conformity with the Constitution (*verfassungskonforme Auslegung*) that has acquired eminent importance. Pursuant to the Federal Constitutional Court’s case-law, the precept of interpretation in conformity with the Constitution requires that “out of several possible interpretations of a statute, some of which lead to the result that the statute is unconstitutional while others show that it is in conformity with the Constitution, an interpretation which is in accord with the Basic Law”, i.e. with the Constitution “is to be preferred”. If this applies to a specific case, the statute reviewed is declared compatible with the Constitution, but only with the proviso that the interpretation in conformity with the Constitution which results from the decision is followed. Such interpretation is binding upon all constitutional bodies, courts and public authorities (Section 31, subsection 1 of the Federal Constitutional Court Act – *Bundesverfassungsgerichtsgesetz*).

The principle of interpretation in conformity with the Constitution has the positive effect that it decreases the number of laws which are declared unconstitutional. As compared to the declaration of nullity of a law, the interpretation in conformity with the Constitution is, in principle, the more considerate approach vis-à-vis the legislature because it means that the legislature does not have to enact a new regulation. Nevertheless, the constitutional court may

not impose upon the legislature a regulation that the legislature never intended to exist in this form. The principle of interpretation in conformity with the Constitution may also not become a general repair tool with which the Federal Constitutional Court ultimately relieves the legislature from its responsibility to enact a regulation that is constitutional in every respect.

## 2. Scope of the declaration of nullity

Also the second alternative for decisions, that is, the declaration of nullity of the statute, is by no means as clear-cut as it may seem at first sight. What does “*nullity*” mean in the first place? Most states follow the model pursuant to which the Constitutional Court annuls an unconstitutional law by way of a *constitutive* decision; the annulment, in principle, only becomes effective *upon the pronouncement of the decision*, i.e. *ex nunc*. In contrast, German legal dogmatics parts from the assumption that an unconstitutional law, is, in principle, invalid from the beginning (*ex tunc*), that is, retroactively until the point in time of the enactment of the law.

The logical consequence of the German approach would be that all decisions which are based on the statute that is null and void have been adopted without a legal basis and have therefore been wrongfully adopted. For obvious reasons, the German legislature has sought to avoid such a far-reaching consequence. The legislature has therefore provided, in the Federal Constitutional Court Act, that new proceedings may be instituted against a final conviction which is based on a statute that was declared null and void. In all other respects, however, unappealable decisions that are based on the invalid norm shall remain unaffected (Section 79 of the Federal Constitutional Court Act). Ultimately, the results that are thus achieved are strikingly similar to the ones that are achieved by means of the other approach.

## II. THE DECLARATION OF INCOMPATIBILITY WITH THE CONSTITUTION

Another type of decision, which has been developed by the Federal Constitutional Court and which is frequently applied by it, consists in that the Federal Constitutional Court does not declare an unconstitutional Act null and void but only declares the *incompatibility* of the Act with the Constitution. The declaration of incompatibility with the Constitution is most frequently applied in decisions that deal with the violation of the principle of equality before the law.

What are the consequences of such a declaration of incompatibility? Well, the legislature is of course obliged to immediately achieve compatibility of the legal situation with the Basic Law; I will come back in a moment to how such an obligation is enforced. But what regulation is valid until a new regulation is enacted? In Germany, there are no statutory provisions to this effect. The Federal Constitutional Court essentially follows three approaches:

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The first approach is that *from the very moment* in which the Federal Constitutional Court pronounces its decision, the law that is incompatible with the Constitution may *no longer be applied*. The courts must *stay pending* proceedings whose decision depends on the unconstitutional statute until the new regulation enters into force.

Or the statute that is incompatible with the Constitution can be *continued to be applied for the time being*. This is based on the consideration that in some situations, the transitional application of an unconstitutional statute is more acceptable than a completely unregulated situation.

Thirdly, and finally, there are also cases in which neither of the two approaches leads to satisfying results. In such cases, the Federal Constitutional Court itself enacts *its own transitional regulation*, whose wording is similar to that of a law.

### III. THE ENFORCEMENT OF THE LEGISLATURE'S OBLIGATION TO ENACT A NEW REGULATION THAT IS IN CONFORMITY WITH THE CONSTITUTION

This leads me to the final, and most difficult, question of how the Constitutional Court can enforce the legislature's obligation to enact a new regulation that is in conformity with the Constitution.

#### 1. Appeal to the legislature

A first measure, which, admittedly, is not very severe, is the *appeal* to the legislature to remedy the unconstitutional situation. Especially in the initial phase of its activity, the Federal Constitutional Court restricted itself to making such appeals. In doing so, the Court showed a trustful expectation, which was, in principle, justified, that the legislature would fulfil its constitutional obligation of its own accord.

#### 2. Setting of a time-limit for a new regulation

For quite some time, the Federal Constitutional Court has been complementing its *appeals* to the legislature by precise *time-limits*, that is, it determines a calendar date by which a new regulation that is constitutional must be enacted. The length of the time-limit depends on the urgency of the new regulation, but also on the difficulty and complexity of the matter that is to be regulated.

The Federal Constitutional Court is free to determine the time-limit, which means that *no statutory regulations* or restrictions exist in this context. In such cases, the Federal Constitutional Court decides autonomously, but of course not regardless of the consequences.

### 3. Sanctions that apply when the time-limit is overstepped

Even if the legislature does not become active within the time-limit that has been set to it, the Federal Constitutional Court is by no means powerless. Depending on the circumstances of the specific case, it has resorted to different means.

In one of its decisions, for instance, it pronounced an instruction and at the same time an authorisation to the courts: In the event that the legislature did not remedy the infringement of the Constitution within the time-limit, the courts would have to continue the proceedings that were pending before them and would have to decide in conformity with the Constitution if they themselves did not intend to act contrary to the Constitution.

In other cases, however, the Federal Constitutional Court not only declared the existing legal situation incompatible with the Constitution but at the same time established a regulation that was to enter into force if the legislature did not comply with its obligation to remedy the infringement of the Constitution within the time-limit.

In many cases, however, the Constitutional Court does not have to become active at all because at the latest the expiry of the time-limit that is set to the legislature ends the maximum period of time in which the unconstitutional statute can be continued to be applied.

## IV. FINAL REMARKS

At the end of this overview, which is incomplete due to the constraints on time, I would like to give you a brief summary of what I have just explained:

The basis of all types of decision is the Federal Constitutional Court's task to preserve the constitutionality of the legal system and to enforce the legislative power's commitment to the Constitution. This task legitimises the Federal Constitutional Court's practice but at the same time, it sets limits to such practice. The Federal Constitutional Court can, on the one hand, not content itself with issuing well-founded decisions that are not put into practice but only exist on paper; constitutional jurisprudence must also assert itself vis-à-vis the legislative bodies. On the other hand, the Federal Constitutional Court must always remain aware of the fact that it finds its standard of review exclusively in constitutional law; in particular, it must not interfere with the legislature's competence, and privilege, to take political decisions. To comply with both requirements at the same time is a difficult, but also a fascinating task, which sometimes requires a certain extent of creativity and imagination when it comes to pronouncing the decisions.

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