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Avrupa Birliđi - Avrupa Konseyi Ortak Projesi



SUPPORTING THE EFFECTIVE IMPLEMENTATION OF TURKISH CONSTITUTIONAL COURT JUDGMENTS IN THE FIELD OF FUNDAMENTAL RIGHTS

European Union - Council of Europe Joint Project



REPORT ON THE BEST EUROPEAN PRACTICES OF REDUCING CASE-LAW BACKLOG

Report on the best European practices of reducing case-law backlog (including constitutional and international courts)

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The German Federal Constitutional Court

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A. Introduction and overview

Courts and constitutional courts around the world are suffering from heavy workloads they are not able to tackle as fast and as effective as they would like to, thereby not being able to pay attention to every case as is needed. For most courts the cases newly registered to the court are almost every year higher than the cases decided by the court within the same year. The reasons for the high number of cases pending at the courts are manifold. They range from court's structures, practices and administrative support which might not be sufficient to tackle those high numbers, to judges who are not experienced enough for a workload this high, and the law containing no procedural tools to tackle those numbers. Finally, in some countries lower courts, state authorities and individuals tend to not implement the decisions of the courts, higher courts or constitutional courts and as such fostering an increase of cases brought to the courts repeatedly.

Against this background this report is intended to indicate some practices which might be able to help reducing the high numbers of cases by giving an inside into how the German Federal Constitutional Court works. The report is intended to show how the work of the German Federal Constitutional Court, the structure of the Court and the Court's practices are helping to reduce the backlog of cases brought to the Court. For the purpose of this report the term "backlog" means to describe the number of cases which are steadily pending at court and are about to decrease only when a court permanently manages to decide on more cases than are brought to the court within the same period of time. The annual statistics published by the German Federal Constitutional Court serve as a tool indicating the backlog of cases within periods of a year for several years at a time. Thus, this report will first take a look at the annual statistics published by the Court, and especially at the number of cases brought to the Court in different kinds of proceedings, as well as at the number of cases the Court manages to decide on in comparison (→ B. Cases and backlog statistics, p. 2). Following, it will illustrate the Court's structure, practices and administration in order to determine the best practices to tackle the backlog of cases (→ C. Court's structure and administration, p. 9). While the Court's structure, practices and administration play a key role in reducing the backlog of cases, there are also certain procedural solutions

embedded in the law which are essential to bringing down the number of pending cases (→ D. Procedural solutions, p. 23). Moreover, since coming into force in 1951 the Court itself has over the last 70 years shaped a case-law which until now has or has not been able to reduce the backlog of cases by strictly applying this self-induced jurisprudence, especially regarding the criteria for the admissibility of cases, other examples being the jurisprudence regarding the so called hearing complaint as well as the case law on the implementation of international and EU jurisprudence (→ E. The court's jurisprudence, p. 40). Finally, the report will conclude with a summary of the Court's practices which have or have not been effective in reducing the case-law backlog and therefore may or may not be recommended to be implemented by other courts (→ F. Summary and recommendations, p. 44).

However, regarding those recommendations one has to keep in mind that the number of cases brought to the German Federal Constitutional Court (→ B. Cases and backlog statistics, p. 2) is by far not as high as the number of cases brought to other courts. Therefore, not all recommendations deriving from the practices of reducing case-law backlog at the German Federal Constitutional Court might be suitable for courts with a much higher workload.

B. Cases and backlog statistics

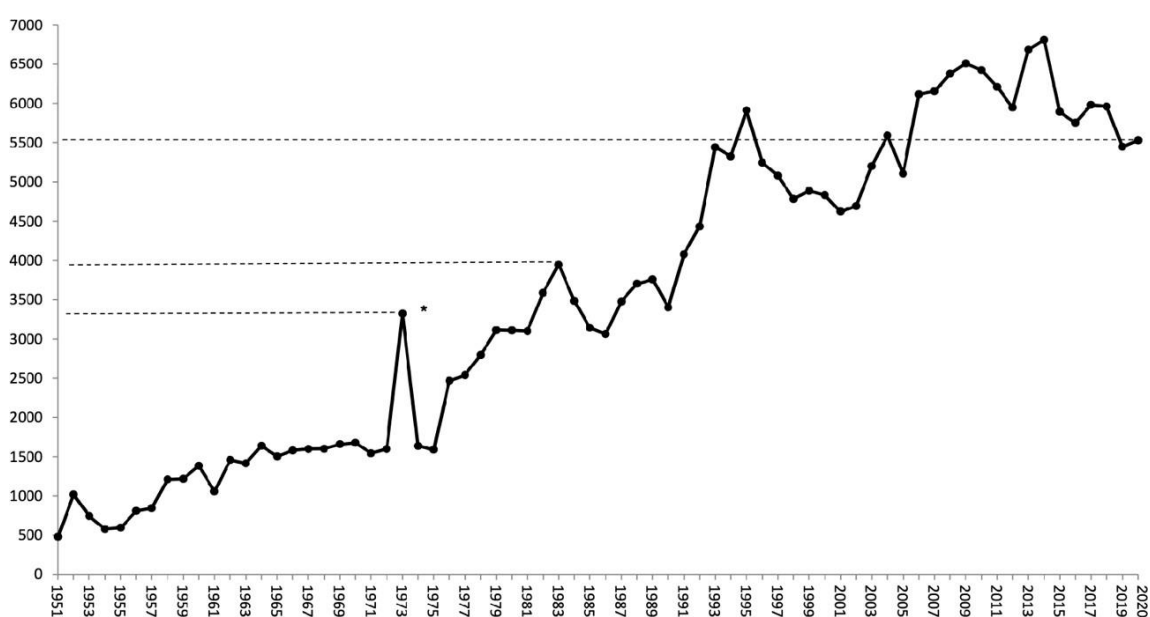
Publishing annual statistics might in itself already be a tool in tackling a court's workload. The German Federal Constitutional Court's statistics are available to the public and to the media and are intended to make transparent how heavy the workload of the Court is and how the Court works in order to reduce this workload (→ B. I. Annual Statistics, p. 2). A small tool in tackling the Court's backlog might also be the annual preview, where the Court at the beginning of each year publishes a list of important cases it intends to decide on over the course of the year (→ B. II. Annual Preview, p. 9).

I. Annual statistics

Since coming into force in 1951, the number of new cases lodged with the Constitutional Court has become considerably higher. While between 1951 and 1975 there were annually between 500 and 1,700 new cases brought to the Court (with the exception of 1973 where over 1,700 cases were lodged regarding the same subject alone), from 1976 until 1983 there were already between 1,700 and 4,000 cases annually lodged with the Court. While between 1984 and 1990 from about 3,000 up to

3,700 cases were brought to the Court each year, the Court over the next five years saw an increase of cases per year from slightly over 4,000 cases in 1991 up to almost 6,000 cases in 1995. From 1996 until 2005 between 4,600 and 5,600 cases were brought to the Court each year. Since 2006 the Court has almost always received more than 5,500 cases a year (with the exception of 2019 with only 5,446 cases), including even over 6,000 cases a year between 2006 and 2014 (with the exception of 2012 with only 5,947 cases). When in 2021 the German Federal Constitutional Court celebrated its 70th birthday, there were 5,352 new cases lodged with the Court.

Development of the Court's caseload since 1951¹

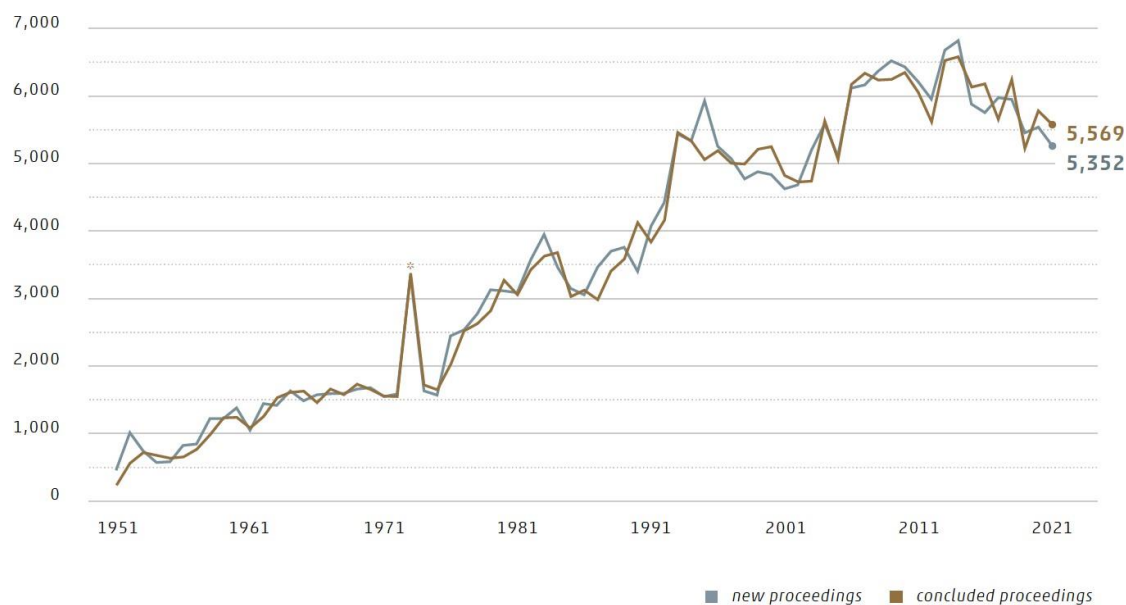


* There were 1.700 cases lodged regarding the same subject.

Over the last decades the Court managed to nearly balance the number of cases annually brought to the Court with the number of cases the Court annually decided on.

¹ This chart and more comprehensive information can be found in the Court's detailed annual statistics for the year 2020 (German only), https://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2020/gb2020/Gesamtstatistik%202020.pdf?_blob=publicationFile&v=2.

Development of the Court's caseload since 1951 (new proceedings and concluded proceedings)²



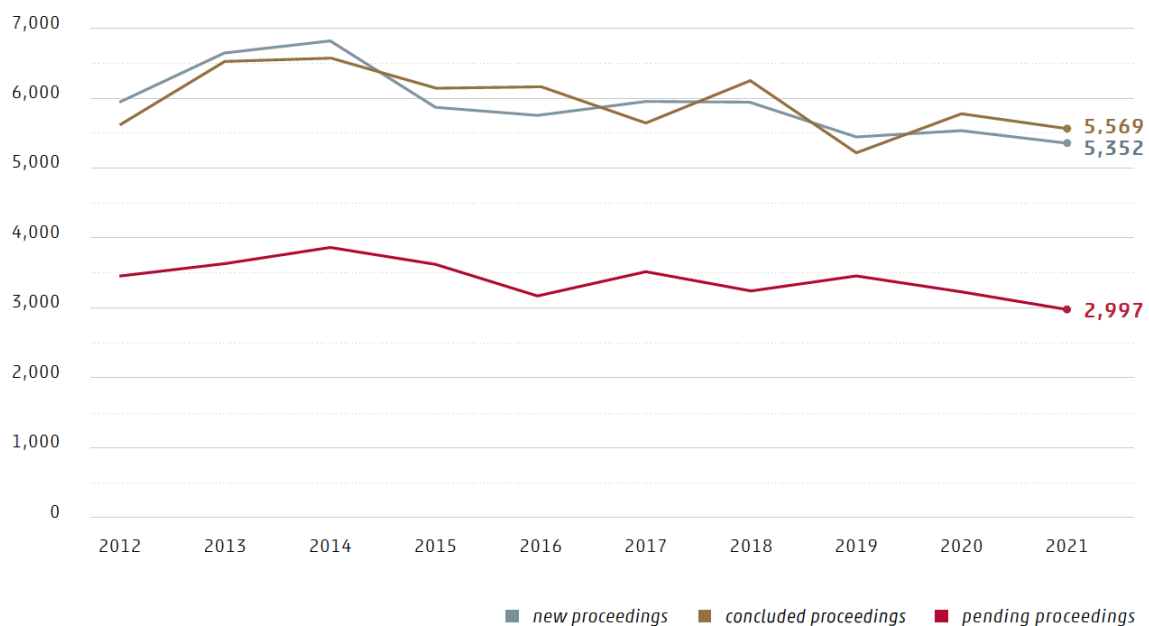
*** There were 1.700 cases lodged regarding the same subject.**

Therefore, the backlog of cases (indicating the number of cases which are constantly pending at the Court at the end of each year) was almost balanced as well, the number of cases pending over the last ten years fluctuating between 4,000 and 3,000 cases each year. Between 1951 and 2021, the German Federal Constitutional Court received a total of 254,375 cases of which the Court concluded 251,378 cases within the same time period.³ Thus, at the end of 2021 there were 2,997 cases still pending. With 2,997 cases pending at the end of 2021, the backlog of cases annually registered – looking at the annual statistics for the last ten years – for the first time could be brought slightly under 3,000 proceedings.

² This chart is part of the Court's 2021 annual report, p. 51, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Jahresbericht/jahresbericht_2021.pdf?_blob=publicationFile&v=8.

³ See the 2021 annual preview, p.

Number of proceedings between 2012 and 2021⁴

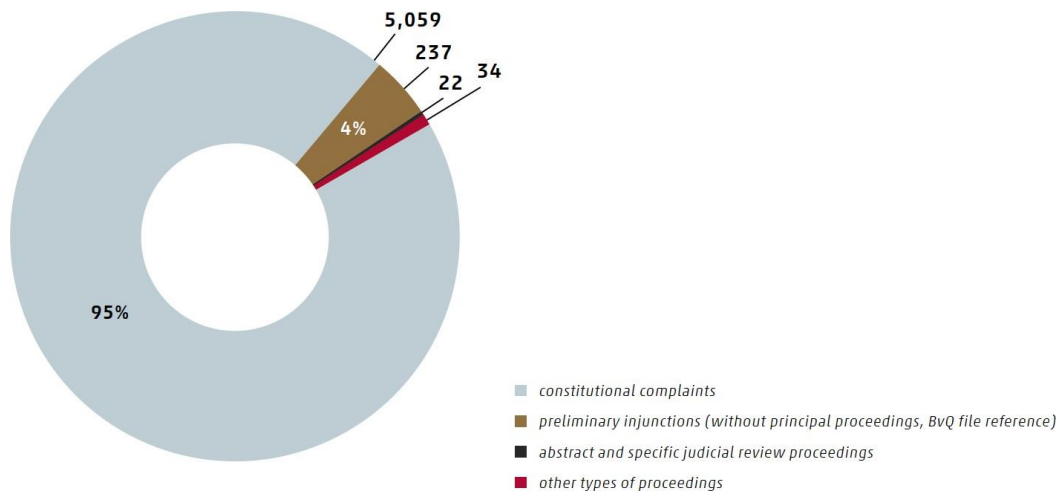


The majority of proceedings brought to the Constitutional Court have always been constitutional complaints. Of the 254,375 cases lodged with the Court since 1951, 245,310 cases were constitutional complaints (constituting about 96% of the cases), followed by 4,011 preliminary injunctions (without principal proceedings, making about 1.6% of the cases) and 3,977 judicial review proceedings (constituting about 1.6% of the case load as well, among them specific judicial review proceedings accounting for the majority of cases).⁵ While always accounting for the highest case numbers, the average success rate for constitutional complaints over the last ten years was about 1.85% only. Of the 5,352 new cases brought to the Court in 2021, 5,059 cases were constitutional complaints (constituting about 95% of the cases), 237 cases were preliminary injunctions (constituting about 4% of the cases) and 22 cases were judicial review proceedings (constituting 0.4% of the cases).

⁴ This chart is part of the Court's 2021 annual report, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Jahresbericht/jahresbericht_2021.pdf?__blob=publicationFile&v=8.

⁵ See the Court's 2021 annual preview, p. 51, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Jahresbericht/jahresbericht_2021.pdf?__blob=publicationFile&v=8. For the number of specific judicial review proceedings see the comprehensive annual statistics for 2020, p. 6, with more detailed information, https://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2020/gb2020/Gesamtstatistik%202020.pdf?__blob=publicationFile&v=2 (in German).

New proceedings brought to the Court in 2021⁶



Acts challenged by constitutional complaints are for the most part directed against decisions of the state authorities or the courts, such as judgments or administrative decisions. The most common type of constitutional complaints are complaints challenging decisions of the ordinary courts. Constitutional complaints directly challenging legislation are less common.

Constitutional complaints against acts of public authority (2021)⁷

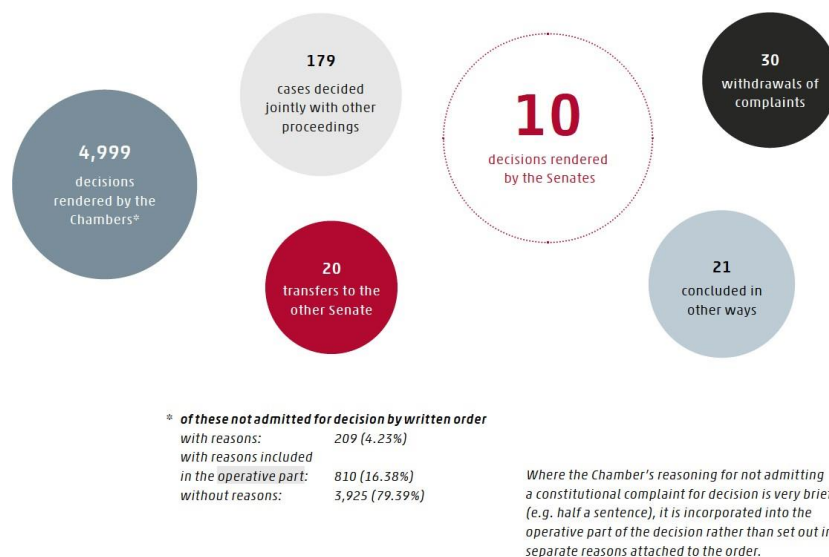


⁶ This chart is part of the Court's 2021 annual report, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Jahresbericht/jahresbericht_2021.pdf?__blob=publicationFile&v=8.

⁷ This chart is also part of the Court's 2021 annual report, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Jahresbericht/jahresbericht_2021.pdf?__blob=publicationFile&v=8.

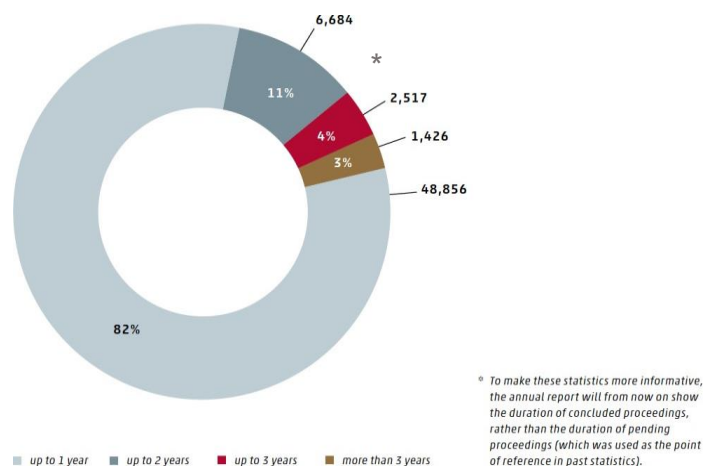
In 2021, the majority of constitutional complaints were as usual decided on by the Court's Chambers (→ C. II. Chambers and chamber decisions, p. 12), which concluded 4,999 proceedings in total. Ten decisions were rendered by the Senates, which in general decide on proceedings fewer in number, but more comprehensive and therefore more time-consuming (C. I. Senates and Senate decisions, p. 10).

Concluded proceedings in 2021⁸



Since 2012, the duration of proceedings has been up to one year in 82% of the proceedings.

Average duration of proceedings between 2012 and 2021⁹



⁸ This chart is part of the Court's 2021 annual report, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Jahresbericht/jahresbericht_2021.pdf?__blob=publicationFile&v=8.

⁹ This chart is part of the Court's 2021 annual report, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Jahresbericht/jahresbericht_2021.pdf?__blob=publicationFile&v=8.

The persistent popularity of the constitutional complaint, being a proceeding for all citizens alike, continues to show that the German Federal Constitutional Court is above all and also in its own perception a “Citizens’ Court”. Allowing unhindered individual access to the Court (→ D. V. No costs, no requirement of a lawyer, abuse fee, p. 38) is also reflected in the total number of submissions received by the Court each year. The numbers shown above only take into account the number of proceedings which are actually recorded in the Court’s Register of Proceedings. However, most submissions received by the Court will not be recorded in the Register of Proceedings but remain with the General Register for further processing. In 2021 the General Register recorded 10,265 submissions.¹⁰ As the General Register among other things records all submissions which are not (directly) referred to the Register of Proceedings it is key to handling the Court’s case load. Remaining in the General Register the Court e.g. does not have to decide on cases where proceedings are obviously not admissible or where submissions are indeed no proceedings at all (for the importance of the General Register → C. IV. 1. Judicial administration, including the General Register, p. 17).

Unfortunately, there are no statistics stating the number of complaints concerning the non-compliance with decisions of the Court (for the reasons → D. III. Effect of decisions, p. 29), and there are no statistics showing the number of decisions taken under § 35 of the Constitutional Court Act (for the reasons → D. IV. Enforcement of Decisions, p. 37). For 2020 and 2021, selected statistics on proceedings are presented in the Court’s annual reports (some of which were already shown above), which may be found on the Court’s website.¹¹ Comprehensive annual statistics from before 2020 are archived and may also be found on the Court’s website.¹² Comprehensive annual statistics for 2020 (some of which were already shown above) may also be found on the Court’s website, though in German only.¹³ Unfortunately, comprehensive annual statistics for 2021 are not available yet.

¹⁰ See the the Court’s 2021 annual report, p. 49, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Jahresbericht/jahresbericht_2021.pdf?__blob=publicationFile&v=8.

¹¹ https://www.bundesverfassungsgericht.de/EN/Presse/jahresberichte/jahresberichte_node.html. The annual reports for 2020 and 2021 are available in German and English.

¹² <https://www.bundesverfassungsgericht.de/EN/Verfahren/Jahresstatistiken/Archiv/Archiv.html>. The comprehensive statistics are available in German and English.

¹³ https://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2020/statistik_2020_node.html.

II. Annual preview

At the beginning of every year the Federal Constitutional Court publishes a list of important cases the Court intends to decide on over the course of the year.¹⁴ For some time, this list was called “the list of lies” because the Court didn’t decide on all of these cases within this year after all. Thus, some cases appeared again and again on every year’s list. However, the Court nowadays holds true to the list and decides most cases within the year they were first indicated for. As such, the annual preview has proven to be a small tool for speeding up important cases to be decided within the year they first appeared on the list. No reporting Justice (→ p. 11) likes to see a case that was put on the list not to be decided within the year stated but instead encounter it again on another list. However, the reporting Justices usually decide on their own which cases are added to the list. Naturally, Justices will only add a case to the list when they are confident in having the case prepared in a way the Court will be likely to decide on it within the year. Therefore, the list is no help in speeding up cases which are not already on the list. However, prominent cases of great importance to the public and to the media might from a certain point on be expected to appear on the list.

The annual preview for 2022 may be found on the Court’s website (German only)¹⁵. Annual previews from before 2022 are archived and can also be found on the Court’s website (German only).¹⁶

C. Court’s structure and administration

Since the German Federal Constitutional Court started its work in 1951, managing the Court’s case load would have been impossible without structuring the court in a way where all departments would work together in a well-oiled manner and as such ensuring that the Court can fulfil its constitutional duties. According to its own jurisdiction the German Federal Constitutional Court is both a court and a constitutional body. As a constitutional body the German Federal Constitutional Court other than ordinary courts is not subject to administrative supervision by a ministry. The Court decides autonomously on matters concerning its administration and organisation. It has its own budget (in 2021 approximately EUR 37 million), which is approved by the

¹⁴ See https://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresvorausschau/vs_2022/vorausschau_2022_node.html vorausschau_2022_node.html for 2022.

¹⁵ https://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresvorausschau/vs_2022/vorausschau_2022_node.html vorausschau_2022_node.html.

¹⁶ https://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresvorausschau/Archiv/archiv_node.html.

Bundestag.¹⁷ The Court's Plenary consisting of all 16 Justices of the Court decides on all organisational issues, the Committee on Budgetary and Personnel Matters, which is appointed by the Plenary, draws up the draft budget. The President heads the administration of the Court and represents the Court to the outside world. The Court not being subject to supervision by a ministry might not lead to an increasing number of cases decided by the Court in order to please the supervising ministry. However, the lack of supervision is essential in securing the independency of the Court and its proceedings.

In order to deal with the high case numbers and to ensure that the Court renders its decisions timely and conscientiously the German Federal Constitutional Court is structured into Senates and Chambers, the 16 Justices of the Court having the full support of their personal secretaries, their personal law clerks and the Court's administration. The Court consists of two Senates with eight Justices each (→ C. I. Senates and senate decisions, p. 10). Each Senate forms three Chambers, which are smaller panels deciding on certain cases with three Justices each (one Justice per Senate is party to two Chambers, → C. II. Chambers and chamber decisions, p. 12). Each Justice is assisted by a personal secretary and four law clerks who together form the so called department of a Justice (→ C. III. Justices and their departments, p. 14). Essential in managing the high workload of the Court also is the Court's administration which consists of the judicial administration (including the General Register, → C. IV. 1. Judicial administration, including the General Register, p. 17), the general administration, the IT/documentation department, the protocol and the library (→ C. IV. Administration, p. 16). Since 1996 the Court also has a press office lead by the press secretary, which is key for the outside communication of the Court (→ C. V. Press office, p. 22). In 2021, more than 270 people worked at the Federal Constitutional Court furthering the decision making of the Court and as such managing the Court's case load.

I. Senates and senate decisions

The German Federal Constitutional Court is a "twin court" consisting of two Senates with eight Justices each (see § 2(1) and (2) of the Federal Constitutional Court Act. One Senate is chaired by the President of the Court (currently the First Senate), the other is chaired by its Vice-President (currently the Second Senate). Each Senate

¹⁷ See the 2021 annual report, p. 7, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Jahresbericht/jahresbericht_2021.pdf?_blob=publicationFile&v=8.

has its own, precisely defined competences, but officially, the decisions of each Senate are always decisions of “the” Federal Constitutional Court. Which of the two Senates is competent to decide on a case follows from the Federal Constitutional Court Act as well as from a Plenary order, a decision jointly taken by all 16 Justices (→ D. I. Allocation of Competences, p. 23). In rare cases, the Plenary itself has to decide on a specific legal matter brought to it by one of the Senates. However, bringing a specific legal matter to the Plenary is only required when one Senate in one of its proceedings intends to deviate from the other Senate’s interpretation of a specific legal matter this Senate has already decided on (see § 16 of the of the Federal Constitutional Court Act). From the beginning, the First Senate has primarily dealt with constitutional complaints concerning citizens’ fundamental basic rights while the Second Senate has primarily dealt with disputes between constitutional bodies (e.g. between the Federal Government and the Parliament). The Second Senate has also always decided on the rights of members of Parliament and political parties. Since 1956, the Second Senate also decides on certain fundamental basic rights matters, as such sharing the workload of the First Senate (for sharing the workload between the two Senates → D. I. Allocation of competences, p. 23).

As the Chambers are only entitled to decide in constitutional complaint proceedings (see Art. 93(1) nos. 4a and 4b of the Basic Law, § 90 of the Federal Constitutional Court Act) and specific judicial review proceedings (see § Article 100(1) of the Basic Law, § 80 of the Federal Constitutional Court Act) all other proceedings brought to the Court must be decided by one of the Senates (see § 15a(2) of the Federal Constitutional Court Act). When the constitutionality of a law is in question the case has to be decided by the Senate as only a Senate can declare a law unconstitutional. Are the three Justices of a Chamber not able to agree upon a decision, the proceedings must also be brought to the Senate, as the Chambers are only entitled to decide unanimously (→ C. II. Chambers and chamber decisions, p. 12). All Senate decisions are drafted by the reporting Justice and/or by the law clerks of each Justice (→ C. III. Justices and their departments, p. 14). Which Justice is the reporting Justice of a case depends on an understating within the respective Senate at the beginning of each year (D. I. Allocation of competences, p. 23). Senate decisions do not have to be unanimously. However, as there are eight Justices forming one Senate it might come to a draw. Then, the decision is not decided by the vote of the presiding Justice but the case is decided in favour of the status quo, meaning for example that there are not enough votes to declare a law unconstitutional. However, proceedings on bans of political parties, have to be decided with a two-thirds majority

of the Senate, meaning that a ban is only possible when two-thirds of the Senate (being 3 Justices) are in favour of the ban (see § 15(4) of the Federal Constitutional Court Act).

The German Federal Constitutional Court being a “twin court” has not been without criticism. For example the former President of the Court Jutta Limbach said that she would never ever recommend the creation of a twin court, as several problems arise from the two Senates always deciding as “the” Federal Constitutional Court, and the Plenary requirement following it. However, being a twin court with two Senates and sixteen Justices in total leads to the Court managing (almost) double the amount of cases than eight Justices and their departments would (not counting the rare occasions when a Plenary proceeding is called upon which wouldn’t be necessary having only one Court without several Senates).

In cases decided by the whole Senate the Senate always deliberates in person. There, deliberations usually take several days and the Senate comes together for several times during the course of the proceedings. The Senate also plans for oral hearings and the pronouncement of judgements. In principle the Senate is bound by law to hold an oral hearing before deciding a case. However, in practice the Senates are generally deciding without holding an oral hearing (→ D. II. 4. Waiver of an oral hearing and a written justification, p. 28). Decisions uttered after an oral hearing was held are issued as “judgements” while decisions not preceded by an oral hearing are issued as “court orders” (see § 25(2) of the Federal Constitutional Court Act. Judgements always require a public pronouncement of the decision while there is no public pronouncement issuing a court order. The Chambers always decide without an oral hearing and therefore are issuing court orders only (→ C. II. Chambers and chamber decisions, p. 12).

II. Chambers and chamber decisions

Both Senates form three Chambers, which are smaller panels made up of three Justices (see § 15a of the Federal Constitutional Court Act). As there are eight Justices forming each Senate, one Justice of each Senate has to be party to two Chambers. Which Chamber is fit to decide on a case is determined by the competences allocated to the reporting Justices and their belonging to a certain Chamber. For the two Justices who are party to two Chambers the cases they report on are divided between the two Chambers. Which cases a Justice is to report on depends on a decision of the Senate

at the beginning of each year. Chambers can only decide in constitutional complaint and specific judicial review proceedings.

When the Court receives a constitutional complaint, it first examines whether the complaint is to be admitted for decision. This is generally done by the reporting Justice assisted by one of the law clerks. They prepare a comprehensive report in which they set out the case and make a (draft) proposal as to the Chamber's decision. Determining whether a constitutional complaint is admitted for decision is not at the Court's discretion (see § 93a of the Federal Constitutional Law Act): An admissible constitutional complaint must be admitted for decision if it has general constitutional significance or if admitting it is required to enforce the complainant's constitutional rights. Therefore, every decision not to admit a constitutional complaint is preceded by thorough legal analysis (→ D. II. 3. Acceptance procedure, p. 27). Law clerks assist the Justices with this analysis. Preparing a Chamber decision each constitutional complaint will be examined by three Justices whose decision must be unanimous.

If a law might be found unconstitutional or a case is of fundamental importance for other reasons the entire Senate sitting with eight Justices will decide. This is because by law only a Senate is entitled to find a law unconstitutional (see § 93c(1) of the Federal Constitutional Law Act). Therefore, the Chambers primarily decide cases that are not of general constitutional significance, as well as cases in which a constitutional complaint is inadmissible or fails to meet certain other requirements. Overall, Chamber decisions are amounting to up to 99% of all proceedings. In 2021 the Chambers decided on 4,999 cases, while the Senates issued ten decisions (→ B. I. Annual statistics, p. 2). The Chambers may grant constitutional complaints only when a Senate has already decided on the questions of constitutional law raised by the complaint. In all other cases the entire Senate sitting with all eight Justices will decide, in particular where admissible constitutional complaints raise new questions of constitutional law. The Senate also decides in all other types of proceedings (→ C. I. Senates and senate decisions, p. 10). Preceding a Chamber decision there in general is no oral deliberation between the Justices of the Chamber. The drafts including the case files will be handed from one Justice to another. Only when the Justices can't reach an unanimous decision and the case would otherwise go to the Senate they might deliberate on this case in person. The Chambers by law may only decide without an oral hearing and therefore are only able to render court orders. According to § 24 of the Federal Constitutional Court Act inadmissible or manifestly unfounded applications may be dismissed by unanimous order of the Court. No further

reasons for this order need be stated if the applicant was previously made aware of the concerns regarding the admissibility or the merits of the application. This regulation equally applies to Senate and Chamber decisions.

III. Justices and their departments (secretary and law clerks)

Half of the 16 Justices of the Federal Constitutional Court are elected by the Bundestag, and half by the Bundesrat (see § 5(1) of the Federal Constitutional Court Act). The President and Vice-President of the Court are also elected, in turns, by the Bundestag and the Bundesrat (see § 9 of the Federal Constitutional Court Act). A two-thirds majority is required for the election of a Justice in both electoral bodies (see §§ 6 und 7 of the Federal Constitutional Court Act). This is to ensure that the composition of the Senates is well-balanced and that the Court enjoys widespread acceptance among the general public and across the entire political spectrum. At least three Justices in each Senate must be elected from among the judges of the five federal courts (Federal Court of Justice, Federal Administrative Court, Federal Finance Court, Federal Labour Court and Federal Social Court, § 2(3) of the Federal Constitutional Court Act) Thus, the Federal Constitutional Court's decisions may benefit from their broad judicial experience. Justices not elected from among the judges of the federal courts usually come from different fields and legal professions. A majority of Justices have had careers in academia but the Court has also seen former politicians or very rarely lawyers serve as Justices. This variety of different backgrounds is meant to ensure that different perspectives are present at Court. It also is considered to be essential for the acceptance and quality of the Court's decisions. Anyone who is at least 40 years old, holds German citizenship, and is qualified to hold judicial office may be elected as a Justice to the Court (see § 3(1) and (2) of the Federal Constitutional Court Act). Justices are elected for a term of twelve years. However, when a Justice reaches the age of 68, their term of office ends even if they have served for less than twelve years (see § 4(1) and (3) of the Federal Constitutional Court Act). Justices may not be re-elected, which is considered to strengthen the personal independence of the Justices (see § 4(2) of the Federal Constitutional Court Act).

At the centre of the Justices' work lies the exercise of the judicial mandate of the Constitutional Court. Justices decide on constitutional complaints and all other cases pending before the Court. Since 1971, Justices who disagree with a decision issued by the Senate's majority have the option of writing a dissenting opinion that is published together with the Senate's decision (see § 30 of the Federal Constitutional

Court Act). That means extra work for a dissenting Justice taking up time which would otherwise be used for other tasks and cases. Also, introducing the possibility of writing a dissenting opinion has been criticised for putting into question the Courts authority as a decision maker. However, in the majority of the decisions of the Senate there is a voting ratio of the deciding Justices given at the end of the decision. Thus, the Senate is not giving an illusion of there being only one true decision anyway. So, with a dissenting opinion in writing there at least is a reason for the dissent given to the public which might be able to further the judicial dialogue. Given the widespread acceptance of the Court's decisions, there has been for quite some time no discussion to not allowing the Senate to give the voting ratio or to not allowing a written dissenting opinion. In addition to their judicial duties Justices perform certain organisational tasks. Moreover, they participate in visits from and to other institutions, aiming to foster interinstitutional relations and professional dialogue in Germany and abroad (→ C. IV. 5. Protocol, p. 20). For example, they engage in working sessions with other German constitutional bodies or with constitutional courts in other countries (→ E. III. International and EU jurisprudence and communication, p. 42). Furthermore, the Justices of the Federal Constitutional Court give lectures, attend events and contribute to academic publications. They have given themselves a Code of Conduct that guides their public conduct during and after their term of office.¹⁸ For transparency reasons, the income of the Justices from non-judicial activities may also be found on the Court's website.¹⁹

Each Justice is assisted by one or two personal secretaries who add the Justices in their day-to-day duties. As such, the personal secretaries are assisting a Justice not only with judicial but also with organisational tasks, such as managing the Justice's schedule as well as organizing and coordinating visits and activities outside the Court.

Additionally, each Justice is assisted by four law clerks, who aid the Justices with their demanding judicial tasks and their high workload. The President of the Court is supported by one additional clerk serving as his personal assistant. The main task of the law clerks is the drafting of written reports on pending cases. Law clerks usually have gained several years of professional experience at ordinary courts, with public authorities, law firms or universities. They are personally selected by the Justice they

¹⁸ <https://www.bundesverfassungsgericht.de/EN/Richter/Verhaltensleitlinie/Verhaltensleitlinie.html>.

¹⁹ https://www.bundesverfassungsgericht.de/EN/Richter/Einkünfte/Einkünfte%202021/Einkünfte_2021.html.

are working for. The law clerks prepare the drafts to all cases their Justices are reporting on (→ reporting Justice, p. 11), including Chamber and Senate decisions, and as such play a key role in reducing the high case load of the Court. Drafts for Chamber decisions (→ C. II. Chambers and chamber decisions, p. 12) are usually short, sometimes consisting of one or two pages or even one or two sentences only. Senate decisions (→ C. I. Senates and senate decisions, p. 10) usually are more comprehensive and therefore often take much longer to prepare. Some decisions are even prepared for several years, sometimes reaching the level and scope of a dissertation. To what extent a Justice participates in the drafting or supervises the drafting of the law clerks, analysing the drafts presented and making alterations, differs from Justice to Justice.

Again and again, there have been discussions about increasing the number of law clerks working for each Justice. However, there are only that many drafts and cases a Justice can seriously read and work through. Being part of a Senate all Justices have to read and work through all drafts prepared for the Senate including drafts from their own department. Additionally, being part of a Chamber the Justices have to read and work through all drafts presented by the members of the Chamber. As there are four law clerks working for each Justice the three Justices of a Chamber have to read and work through drafts prepared by the twelve law clerks of the Chamber including their own four law clerks. The two Justices being party to two Chambers have to even read and work through drafts presented by 20 law clerks including their own law clerks (divided on two Chambers). Those numbers show that the limit of what a Justice may seriously read and work through has already been reached. However, what might be possible is adding additional law clerks to work on Senate decisions only. Thus, the amount of drafts which need to be read and worked through will not inflate the already high work load of the Chambers.

IV. Administration

Managing the high workload of the Federal Constitutional Court wouldn't be possible without the Court's administration. The Court's administration consists of the judicial administration, including the General Register which is key in managing the Court's workload (→ C. IV. 1. Judicial administration, including the General Register, p. 17), the general administration (→ C. IV. 2. General administration, p. 19), the IT/Documentation department (→ C. IV. 3. IT-Solutions and documentation, p. 19), the protocol (→ C. IV. 4. Protocol, p. 20) and the library (→ C. IV. 5. Library, p. 21). The

Federal Constitutional Court's administration is headed by the Court's Director on behalf of the President.²⁰

1. Judicial administration, including the General Register

The judicial administration consists of two Senate registries, judicial officers with special legal training, the General Register and the senior legal officers who are fully qualified lawyers. The two Senate registries open and manage the case files, maintain the database of proceedings (→ C. IV. 3. IT-Solutions and documentation, p. 19), and manage the diary of deadlines and hearings. They handle the correspondence with the parties to the proceedings, serve court orders (e.g. summonses and notices of hearings) and decisions, and make sure that the certified copies sent to the parties match the original. They also manage outside access to the case files. The judicial officers with special legal training help prepare oral hearings and pronouncements of judgments. They proofread judgments and orders and check all legal citations included in the Court's decisions. As such they are a great help to the Justices and law clerks drafting a decision (→ C. III. Justices and their departments, p. 14). Moreover, the judicial officers finalise the documents required to close a case, determine costs and fees, manage correspondence concerning concluded proceedings and process submissions received by the General Register. The senior legal officers are managing the judicial mail and therefore are responsible for ensuring that incoming and outgoing documents related to proceedings are processed and distributed correctly and in a timely manner.

The General Register plays perhaps the most essential role in managing the Court's workload. While constitutional complaints and other procedural applications are directly recorded in the Register of Proceedings the General Register foremost records all non-procedural submissions. Non-procedural submissions are submissions which neither contain a specific procedural application nor assert a claim falling within the jurisdiction of the Federal Constitutional Court. These submissions are treated as matters of judicial administration (see § 63(1) of the Rules of Procedure of the Federal Constitutional Court). They include inquiries regarding pending proceedings and the case-law of the Federal Constitutional Court. The General Register also records letters from persons sharing their opinions on pending or concluded proceedings, seeking legal information or other forms of assistance. All submissions are read by the staff of

²⁰ For an organizational chart see: https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Organigramm_Verwaltung.pdf?_blob=publicationFile&v=12.

the General Register and, where appropriate, receive a response. Since 1951, the number of submissions recorded in the General Register has steadily increased. While in 1951 about 350 submissions were recorded in the General Register the General Register now records and manages about 10,000 submissions each year, while only about 2,300 submissions are directly recorded in the Register of Proceedings. Senior staff qualified to hold judicial office are in charge of the General Register.

Constitutional complaints may be also recorded in the General Register. First, when based on the preliminary assessment that they cannot be admitted for a decision (see § 93a of the Federal Constitutional Court Act). That is either because a complaint is clearly inadmissible or, in light of past decisions of the Federal Constitutional Court, has virtually no prospect of success. This mainly concerns cases in which all legal remedies have not been exhausted yet or where an application has been brought to the Court past the relevant deadline as well as applications which do not sufficiently set out the facts of the case, the challenged act of public authority or the asserted fundamental rights violation (→ E. I. Admissibility requirements, p. 40). The reasons why the constitutional complaint is without prospect will then be communicated to the complainant.²¹ In cases where a complainant of such an application still wishes to go forward with the complaint it is possible to request a judicial decision nonetheless. The case will then be transferred to the Register of Proceedings and assigned to the competent reporting Justice. However, in practice, after having been informed about the lack of prospects, about half of the complainants refrain from requesting a judicial decision. In that case, the case file is stored in the General Register for another five years and will then be destroyed. In cases where it cannot be directly determined which Senate is competent to deal with a certain case, it may preliminarily be recorded in the General Register (→ D. I. Allocation of competences, p. 23). Constitutional complaints where further legal recourse is still available or still pending before an ordinary court (e.g. a complaint seeking remedy for a violation of the right to be heard, → E. II. The hearing complaint, p. 41), may be temporarily recorded in the General Register as well, either upon request or ex officio. In handling the preliminary assessment of incoming

²¹ The Court has compiled important information on constitutional complaints, in particular on the requirements that must be met when lodging a constitutional complaint, in an information sheet. This sheet will be send to an complainant by the General Register to help understand their reasoning and to allow the complainant to the next time file an admissible complaint, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/merkblatt.pdf?_blob=publicationFile&v=17

cases as well as the information provided to complainants, the General Register plays a crucial role in managing the Court's caseload indeed.²²

2. General administration

The general administration has a wide range of responsibilities, including budgetary and organisational matters as well as personnel matters which make up the majority of its work. Furthermore, it also is responsible for construction matters, the central phone and fax service, the court office, the post room, where all incoming correspondence is sorted, the internal mail service, the drivers and vehicles, the facility management, the internal mail service, the printing service as well as for procurement and inhouse security matters. However, the Court's safety outside the Court's building (and especially outside the court room) is generally guaranteed by the federal police. The Court does not entertain its own police service.

3. IT-Solutions and documentation

The Federal Constitutional Court uses modern information technology to support almost all tasks that arise in the course of proceedings. Therefore, the Court depends on a reliable and secure IT network which is integral to internal data exchange. The Court's IT department is independent of the central federal IT services. It is responsible for maintaining and developing the necessary technical infrastructure, ensuring that the Court is digitally connected. In addition, it ensures that channels for external communication work without disturbances, either through secure internet access or by maintaining the technical equipment for telecommunications.

The documentation as part of the IT-department records and documents decisions of the Federal Constitutional Court as well as other important documents such as constitutionally relevant legal literature. After having been processed by the documentation department, decisions are published in the juris database.²³ All decisions of the court may be also found on the Court's website.²⁴

²² For further information see the statistics overleaf in the Court's 2021 annual report, p. 49.

²³ <https://www.juris.de/jportal/nav/index.jsp#/>. This database is not free of charge.

²⁴ https://www.bundesverfassungsgericht.de/SiteGlobals/Forms/Suche/Entscheidungensuche_Formular.html?language_=de (in German) https://www.bundesverfassungsgericht.de/SiteGlobals/Forms/Suche/EN/Entscheidungensuche_Formular.html?language_=en (for decisions in English).

Among other databases (e.g. beck online²⁵, providing decisions from different courts and a great variety of law literature) the Court's database of decisions of the Court is integral for the work of the law clerks drafting the opinions. For internal use there are additional databases provided by the Court. One of them, the Register of Proceedings database, includes all former and present proceedings, stating the file numbers, the kind of the proceedings, the parties to the proceedings, the decisions from ordinary courts challenged, the laws challenged as well as the asserted fundamental (basic) rights. Another internal database supports the drafting of opinions by including all drafts issued at the constitutional court. Although access might be restricted in certain cases, this database is of great help for Justices and law clerks when drafting an opinion. There Justices and law clerks may see for similar cases on what argumentation the decisions were based and may include the arguments in their drafts. Thus, they don't have to research for each case anew answers to questions which in other cases have already been answered. This database also includes a function where you may see which Justices and law clerks are present at court in this moment, and regarding a case you may write instant messages to a person or all persons present which will right away appear on their computers. Some Justices and their departments are using a database containing common arguments and sentences the Justices and law clerks may choose from to conclude drafts for cases clearly inadmissible and/or for cases concerning a variety of frequently occurring problems, some for some very common problems (e.g. decisions where a complaint is clearly inadmissible because for example the deadline for filing the complaint had already expired) even using an electronical list where one might tick boxes to draft a certain decision electronically. The IT-department further ensures that the Court has all the hard- and software needed to process literature needed for drafting a decision electronically (→ C. IV. 5. Library, p. 21).

4. Protocol

The protocol's main responsibility is handling the Court's contacts to other constitutional bodies and national institutions, as well as maintaining and furthering relationships to constitutional courts abroad. Moreover, it organises major events at the Court and translates selected decisions into English (and sometimes in to French). The meetings organised by the protocol include meetings with members of the government and the parliament as well as with colleagues from federal courts, the Court of Justice of the European Union (ECJ) and the European Court of Human Rights

²⁵ <https://beck-online.beck.de/Home>.

(ECtHR). Regarding the translation of selected decisions, the Court's lawyers work together with translators not only translating decisions but also creating other foreign-language materials. They also monitor and document legal developments in other jurisdictions (→ E. III. International and EU jurisprudence and communication, p. 42). Translating the decisions and organising meetings the protocol fosters the judicial dialogue between the Court and the outside world including a dialogue with the government and the legislator, which are especially effected by the courts decisions when related to the constitutionality of a law.

5. Library

With a collection of about 400,000 books, journals and databases, the Court's library is one of the biggest specialised law libraries in Germany. From the beginning the Court's library has been essential to the Court's judicial work. The Court's library is an academic in-house library not open to the public that specialises in literature on public, constitutional and administrative law, the general theory of state and society, and on politics and contemporary history. In addition, the library acquires books covering a broad range of subjects, which allows the Court to consider a case from a non-legal viewpoint as well. The library's collection grows by about 5,000 volumes a year. The library has subscriptions to about 800 periodicals which besides parliamentary publications and the official publications of the Federal Government and the German Länder include about 450 legal and social science journals from Germany and abroad. In recent years, more and more of the libraries publications have become available electronically (→ C. IV. 3. IT-Solutions and documentation, p. 19) which is a great help in tackling the workload of the Court. Also, Justices and law clerks in most cases don't have to get publications from the library in person anymore. They will merely send for the publication needed and it will be brought to them as an original or a copy or even an electronical copy, electronical copies being the most helpful (→ C. IV. 3. IT-Solutions and documentation, p. 19). This particularly holds true for publications cited in drafts for Senate decisions as all citations have to be uploaded to a file (→ C. IV. 3. IT-Solutions and documentation, p. 19) where they are made available to all Justices of the Senate who have to work through the draft.

Another part of the library is the press archive, which was set up from the beginning for collecting all materials concerning the Court (see § 18 of the Rules of Procedure of the Federal Constitutional Court). Daily press clippings are made using about 40 newspapers and magazines.

The Baden-Württemberg Library Service Centre maintains a catalogue which lists all publications available at the Court's library. Users can browse this catalogue online which comprises all books and journals available at the library as well as all essays that have been catalogued since 1996. At present, about 640,000 titles (including 330,000 essays) are listed, making it one of the largest online legal catalogues in the German-speaking area (→ C. IV. 3. IT-Solutions and documentation, p. 19). There are two online catalogues which are available to the public (the Catalogue of the Federal Constitutional Court's Library and the Joint Catalogue of the Federal Court of Justice, the Federal Constitutional Court and the Federal Administrative Court). Users may order publications from those catalogues at least at the Federal Court of Justice and collect their order there.

V. Press office: Promotion of standards (briefly, as already covered)

Following some highly controversial decisions uttered by the Court in 1995 (see the so called Crucifix case²⁶ and the "Soldiers are murderers" decision²⁷) the Court following up on the media and public echo in 1996 for the first time installed its own press office. Ever since, the press office of the Court has been the contact for all matters concerning media representatives. It writes and publishes press releases and is available for media inquiries regarding the Court's work. It also handles media accreditation for oral hearings and pronouncements of judgments. Moreover, the press office led by the press secretary is responsible for the Court's website and, in cooperation with the protocol (→ C. IV. 4. Protocol, p. 20), for its public relations work and guided tours. As such it plays an essential role in raising awareness for the Courts decisions, communicating them to the outside world. A controversial practice which has recently been discussed in the media is the practice to inform media representatives on the outcome of a decision already on the evening prior to the pronouncement of a judgement. However, this practice is meant to allow media representatives more time to write about a certain decision with a deeper understanding. All press releases of the German Federal Constitutional Court as well as information on upcoming oral hearings and decisions are available on the Court's website.²⁸

²⁶ See FCC, Order of the First Senate from 16th May 1995 - 1 BvR 1087/91 -, <https://www.servat.unibe.ch/dfr/bv093001.html> (= BVerfGE 93, 1).

²⁷ See FCC, Order of the First Senate from 10th October 1995 - 1 BvR 1476, 1980/91 und 102, 221/92 -, <https://www.servat.unibe.ch/dfr/bv093266.html> (= BVerfGE 93, 266).

²⁸ https://www.bundesverfassungsgericht.de/DE/Presse/presse_node.html (German). https://www.bundesverfassungsgericht.de/EN/Presse/Pressemitteilungen/pressemitteilungen_node.html (English).

D. Procedural solutions (as provided by the law)

There are several procedural solutions to reducing the Court's workload which may be identified in the Federal Constitutional Court Act. Essentially, the regulations regarding the allocation of competences are intended to ensure a balanced workload between the two Senates (→ D. I. Allocation of Competences, p. 23). Furthermore, there are several regulations regarding the constitutional complaint proceedings which are affecting the Court's workload as so the Court may exercise its jurisdiction in due course (→ D. II. Regarding the constitutional complaint, p. 25). According to § 31 of the Federal Constitutional Court Act the decisions of the Court are not only binding to the parties of the proceedings but for all public authority including all courts as well as the legislator. Therefore, there shouldn't be any cases in which any state authority including the ordinary courts and the legislator is not acting in compliance with the decisions of the Constitutional Court (→ D. III. Effects of decisions, p. 29). To secure the enforcement of its decisions the Constitutional Court is according to § 35 of the Federal Constitutional Court Act theoretically entitled to add all kinds of enforcement instructions to a decision. However, apart from instructions regarding the implementation of decisions where the Court has held a law to be incompatible with the Basic Law the Court almost never makes use of this provision (→ D. IV. Enforcement of decisions, p. 37). Proceedings may be brought to the court free of charge and without being represented by a lawyer. This both is furthering the picture of the Constitutional Court as a "Citizen's Court". However, both regulations increase the number of proceedings brought to the Court while at the same time those applications in many cases lack in quality of the written argument. However, where an application is obviously abusive (as to obviously not required or e.g. the Court has been lied to) the Court may impose an abuse fee on the applicant (→ D. V. No costs, no requirement of a lawyer, abuse fee, p. 38). While a lack of quality is usually leading to the Court declaring an application inadmissible, finding an application inadmissible does not necessarily mean that there is less work to be brought to the case (→ E. I. Admissibility requirements, p. 40). There is no law indicating an expected length as to the proceedings of the Court. However, when the Court is taking too much time for a decision the applicant is allowed to file a complaint of delay to the Court (→ D. VI. No legal time frame, complaint of delay, p. 39).

I. Allocation of competences

The competences of the two Senates of the Federal Constitutional Court are in principle laid down in the law (see § 14(1) to (3) of the Federal Constitutional Court

Act). According to the legislative concept, the First Senate primarily deals with fundamental rights matters while the Second Senate mainly serves as a court for state matters. In the first couple of years, the First Senate saw a considerably higher caseload than the Second Senate (→ B. I. Annual statistics, p. 2). That is why the allocation of competence was revised in 1956 to transfer certain matters initially assigned to the First Senate to the Second Senate. According to § 14(4) of the Federal Constitutional Court Act, the Plenary of the Federal Constitutional Court can therefore change the allocation of competences when this becomes imperative due to a work overload in one of the Senates that is not merely temporary. The Plenary of the Federal Constitutional Court regularly uses this option, given that the caseload of the First Senate, being competent to decide constitutional complaints, would otherwise be considerably heavier than the caseload of the Second Senate. The new allocation of competences takes effect at the beginning of the next judicial year and may also apply to pending proceedings subject to certain requirements. It is published in the Federal Law Gazette. This is because in Germany the allocation of competences of a court not only serves to divide cases according to their caseload but also to ensure the constitutional guarantee of one's lawful judge laid down in Art. 101(1) of the Basic Law. Under the German Basic Law all applicants seeking legal protection before any court including the Constitutional Court have the right to know in advance which will be the deciding judicial body at a certain Court in a certain case. The order issued by the Plenary on 24 November 2015 pursuant to § 14 (4) of the Federal Constitutional Court Act as well as the five orders issued between 2016 and 2021 amending this order are available on the Court's website.

Currently, taking into account the statutory framework and the Plenary orders modifying this framework, the First Senate is competent for judicial review proceedings and constitutional complaints, unless the Second Senate is competent in the specific case. Accordingly, the Second Senate is primarily competent for disputes between constitutional bodies, disputes between the Federation and the Länder, proceedings for the prohibition of political parties and electoral complaints. With regard to judicial review proceedings and constitutional complaints, the Second Senate is competent for specific areas of the law (including asylum law, the right of residence, nationality law, the law pertaining to the civil service, military service law and alternative civilian service law, material and procedural criminal law including the enforcement of measures for the deprivation of liberty, proceedings on administrative fines, income and church tax law and proceedings that mainly deal with the interpretation and application of international law). At present, the Second Senate is also competent for several judicial

review proceedings and constitutional complaints (dealing with the law on displaced persons from the territories of the former German Reich, the right to petition, the law on execution sales and compulsory enforcement, corporate tax law and law on the tax on corporate transformations, insolvency law, the law on home ownership and the law on contracts for work and labour and contracts for services). Constitutional complaints dealing with private law matters are divided between the two Senates according to the respective area of law. If it is unclear which Senate is competent in a specific case, a committee consisting of the President, the Vice-President and four Justices decides on the question of competence (the so called Committee of Six, see § 14(5) of the Federal Constitutional Court Act).

The internal allocation of competences within the Senates determines who will be the reporting Justice in a certain case and sets out the composition of the Chambers (→ C. II. Chambers and chamber decisions, p. 12). Before the beginning of every judicial year, which in Germany is the same as the calendar year, each Senate decides which Justice is to act as reporting Justice for each case to be decided. During the judicial year, it is only possible to deviate from these decisions if this is necessitated by a Justice's work overload or a Justice's inability to exercise their duties for a prolonged period of time. Before the beginning and for the duration of the judicial year, each Senate appoints several three-member Chambers and decides which Justices serve as substitute members. Within their competences, the Chambers decide on the cases that are assigned to one of their members as reporting Justice (→ C. II. Chambers and chamber decisions, p. 12).

II. Regarding the constitutional complaint

There are several regulations regarding constitutional complaint proceedings which are affecting the Court's workload. First, the Constitutional Court Act allows the filing of a constitutional complaint only for a very short period of time (in most cases one month, → D. II. 1. Short period for a complaint, p. 26). Another requirement which in some cases might lead to a reduction of the Court's workload is the admissibility requirement regarding the exhaustion of all legal remedies before a complaint may be brought to the Court (→ D. II. 2. Exhaustion of legal remedies p. 27). Regarding constitutional complaints the acceptance procedure which has been only implemented for constitutional complaint proceedings was originally meant to reduce the Court's workload (→ D. II. 3. Acceptance procedure, p. 27). Finally, the possibilities of waiving an oral hearing as well as a written justification have an effect on the Court's workload

saving time and resources for the Court (→ D. II. 4. Waiver of an oral hearing and a written justification, p. 28).

1. Short period for a complaint (1 Month in most cases)

Constitutional complaints against judicial and administrative decisions must be brought to the Court within one month after the challenged decision was issued. Within this period, the complainant must submit a fully reasoned application, including all required documents. The reasons substantiating a constitutional complaint are subject to strict requirements (→ E. I. Admissibility requirements, p. 40). Complaints must be submitted in writing. They may be submitted by fax but not by email. In practice, regarding the short period of time in combination with the substantiating requirements it turned out that for most complainants filing an admissible complaint is more than difficult. Complaints against laws must be brought to the Court within one year after the law entered into force. Meaning, that a law which has been unchallenged for a year cannot be challenged with a complaint anymore in the future. However, its constitutionality might still be indirectly assessed when filing a complaint against a judicial or administrative decision.

The short period of time for challenging a judicial or administrative decision tends to discourage complainants to file a case especially when they are not represented by a lawyer. At the same time, the short period of time to file a complaint often leads to a decrease in quality especially when not filed by a lawyer. Representation by a lawyer is not mandatory to file a complaint (→ D. V. No costs, nor requirement of a lawyer, abuse fee, p. 38). However, some complainants feel that when represented by a lawyer their complaint might be more likely to be successful while at the same time they might fear the costs of a lawyer. Fearing the costs of a lawyer is exactly why a lawyer is not mandatory to file a complaint. However, you need to be represented by a lawyer or a professor of law when in very few cases there is an oral hearing to be held by the Senate (see § 22(1) of the Federal Constitutional Court Act).

Discouraging complainants to file a case leads to a lower workload while at the same time it doesn't comply with the Court's recognition as a "Citizen's Court" (→ p. 23). Complaints which lack in quality might lead to a decrease of the workload when clearly inadmissible. Otherwise, the lack in quality might also complicate the work on the case. In practice, the short period of time to file a complaint is one of the main reasons why the Court finds a constitutional complaint to be inadmissible. Other main

reasons being the non-exhaustion of all legal remedies to the ordinary courts before filing a complaint (→ D. II. 2. Exhaustion of legal remedies, p. 272. Exhaustion of legal remedies) or not giving a substantiated justification for a complaint (→ E. I. Admissibility requirements, p. 40).

2. Exhaustion of legal remedies

Generally, the constitutional complaint is only admissible if all legal remedies before the ordinary courts have been exhausted (see § 90(2) of the Federal Constitutional Court Act). Moreover, according to the Court's jurisprudence all other available possibilities to remedy or prevent the challenged violation of the Constitution must have been used (so called subsidiarity of the constitutional complaint → E. I. Admissibility requirements, p. 40). It follows from these principles that, as a general rule, all remedies available before the ordinary courts (e.g. appeals on points of fact and law, appeals on points of law, immediate complaints, complaints on points of law, complaints against denial of leave to appeal) must have been unsuccessfully invoked before a constitutional complaint may be lodged. If a violation of the right to be heard (Art. 103(1) of the Basic Law) is challenged, such remedies may also include complaints against such a violation. In exceptional cases, statutes, ordinances or by-laws may be challenged with a constitutional complaint. In general, however, legislation can only be challenged if it has been executed through decisions made by public authorities or courts; persons affected by such decisions must first exhaust all legal remedies before the competent courts. In such cases, a constitutional complaint is generally only admissible once the court of last instance has issued a decision. The hope there is that the case might already be decided in favour of the complainant before even reaching the Constitutional Court. Furthermore, the requirement is meant to ensure that the ordinary courts have dealt with the ordinary law to exhaustion while the Constitutional Court will only examine whether the ordinary courts applied the ordinary law in accordance with the Basic Law and whether the ordinary law is or is not in violation of the Basic Law. Failure to exhaust all legal remedies before filing a complaint to the Court results in the complaint being inadmissible (→ E. I. Admissibility requirements, p. 40).

3. Acceptance procedure (not at liberty though)

A constitutional complaint is subject to acceptance for decision (see § 93a of the Federal Constitutional Court Act). However, this does not mean that admission is

at the discretion of the Court. The Federal Constitutional Court must admit the constitutional complaint for decision if it has general constitutional significance, or if its admission appears necessary in order to enforce the complainant's own rights under the Constitution. Therefore, each decision to admit or not to admit a complaint for decision is preceded by thorough legal analysis. Thus, the procedure was initially meant to lessen the workload of the case, but in fact it didn't. On the contrary, working out the details of applying the aforementioned criteria took quite some time and has not even come to an end yet. In order to decide whether the admission of a complaint appears to be necessary in order to enforce the complainant's own rights under the Constitution the Court has to decide a case nonetheless. In practice, the Court has found a complaint to be necessary in this respect when being admissible and justified. Therefore, the examination requires the same thoroughness as examining a case without this provision regarding the admission of a complaint being in force. On the other hand, under that provision the Court might decide on cases where a decision otherwise wouldn't be necessary anymore (e.g. the complainant died or was in the meantime awarded what he originally filed for by the administration) because it finds the case to be of great importance. This would be creating an even higher workload, even though for a good reason.

4. Waiver of an oral hearing and a written justification

In certain cases the Court might waive the in some proceedings otherwise mandatory oral hearing. When there are no new facts nor arguments expected this waiver being a huge factor in lessening the courts workload indeed. The Constitutional Court Act sees an oral hearing as generally mandatory in almost all cases (see § 25(1) of the Federal Constitutional Court Act) while in practice only very few decisions are made following an oral hearing. The Senate might decide without an oral hearing when the parties to the proceedings have expressly waived their right thereto (see § 25(1) of the Federal Constitutional Court Act). Further, in constitutional complaint proceedings that constitute the majority of cases (B. I. Annual statistics, p. 2) an oral hearing is not mandatory (see § 94(5) of the Federal Constitutional Court Act).

Chamber decisions always have to be made without an oral hearing. Decisions preceded by an oral hearing are uttered as judgements while decisions without being preceded by an oral hearing are issued as court orders (→ C. II. Chambers and chamber decisions, p. 12). Therefore, decisions of the Chambers are only issued as court orders. A waiver of an oral hearing also means that there will be no

pronouncement of a judgement as pronouncement of a judgement is only mandatory for judgements issued after an oral hearing. Court orders are not to be pronounced. They will be sent to the parties of the proceedings by mail only. Refraining from an oral hearing where not necessary and therefore refraining from the pronouncement of the judgement as well decreases the workload of all Court members by far.

In certain cases the Court may also waive the otherwise mandatory written justification of a decision. This, being also a huge factor in lessening the Court's case load. According to § 24 and § 93d(1) of the Federal Constitutional Court Act a decision may only include the operative part of the decision. The court makes mostly use of this provision in cases decided by the Chambers, sometimes adding a reasoning of a view words or sentences to the operative part of the decision. The Senate only makes use of this waiver when rejecting a case. However, in preliminary injunction proceedings the reasoning needs to be submitted sometime later after all (see § 32(5) of the Federal Constitutional Court Act. Not giving a written justification of a decision does not mean that there has been no thorough examination of the complaint. The waiver only extends to the justification in writing not to the intensity of an examination of the complaint.

III. Effects of decisions

There are general binding effects of decisions of the Court (→ D. III. 1. General binding effects, p. 29), there is the specific binding effect of § 31 (1) of the Federal Constitutional Court Act, according to which decisions of the Federal Constitutional Court are binding upon the constitutional bodies of the Federation and the Länder, as well as upon all courts and public authorities (→ D. III. 2. Binding effect of § 31(1) of the Federal Constitutional Court Act, p. 29) and there is the force of law awarded to certain decisions of the Constitutional Court (→ D. III. 3. Force of law, § 31(2) of the Federal Constitutional Court Act, p. 35).

1. General binding effects (including formal and substantive legal force)

Based on general procedural principles the decisions of the German Federal Constitutional Court have inner-procedural binding effects binding the parties to the proceedings. One of these inner-procedural binding effects is the formal legal force (formal *res judicata*) of the decisions of the Court, meaning that the decisions of the Court cannot be challenged with domestic legal remedies. There is no law expressly stating that decisions of the Court cannot be legally challenged. However, there simply

is no law, including the Federal Constitutional Court Act, that would provide for domestic legal remedies against decisions of the Court. Senate and Chamber decisions both have formal legal force, Chamber decisions in particular not being subject to review by the Senate (e.g. see § 93d (1) 2 of the Federal Constitutional Court Act). This differs from Chamber decisions of the ECtHR which, in certain cases, may be reviewed by the Grand Chamber (see Article 44(2) of the ECHR). However, the Federal Constitutional Court Act sees two exceptions where legal remedies to the Court itself are available. Applicants may object to decisions of the Court in preliminary injunction proceedings (see § 32(3) of the Federal Constitutional Court Act) or demand reinstatement in the previous status, which is only provided for in constitutional complaint proceedings (see § 93(2) of the Federal Constitutional Court Act).

Another inner-procedural binding effect of decisions of the Court is the substantive legal force (substantive *res judicata*) of a decision.²⁹ The substantive legal force of a decision unfolds a binding effect for subsequent proceedings not only exclusively with regard to the same subject, but also exclusively between the same parties.³⁰ As such the substantive legal force of a decision ensures the binding nature of a decision *inter partes*. Covered are the parties to the proceedings itself, including the constitutional bodies that joined the proceedings (see § 94 (5) 1 and § 65 of the Federal Constitutional Court Act). The substantive legal force of a decision means that the parties to the proceedings are bound by the decision in the future and may not repeat behavior that violates the decision. Moreover, the substantive legal force of a decision also extends to the Federal Constitutional Court itself, meaning that the Court may not deviate from a decision in subsequent proceedings including the same parties. Generally, only substantive decisions of the Court have substantive legal force, while procedural decisions³¹ and non-acceptance decisions in constitutional complaint proceedings (see § 93a of the Federal Constitutional Court Act) do not have substantive force. Furthermore, the substantive legal force of a decision not only extends to the specific subject matter of a case³² but also only to the operative part of a decision. However, the operative part of a decision often may only be deduced taking into account the reasons for the decision.³³

²⁹ See BVerfGE 104, 151 (196).

³⁰ See BVerfGE 104, 151 (196); 78, 320 (328).

³¹ See BVerfGE 78, 320 (328).

³² See BVerfGE 104, 151 (196).

³³ See BVerfGE 78, 320 (328).

In a broader sense, the inner-procedural binding effect of a decision also extends to the ordinary courts where a case will be referred back to after the original decision of the ordinary court has been set aside (see § 95 (2) of the Federal Constitutional Court Act). The same applies for specific judicial review proceedings when the Court has answered a preliminary question asked by an ordinary court in accordance with § 80 (1) of the Federal Constitutional Court Act.

The German Federal Constitutional Court is not authorized to amend its own decisions. While § 31 (1) of the Federal Constitutional Court Act and the legal force of a decision have a binding effect for future proceedings in general (see § 31(1) of the Federal Constitutional Court Act) or regarding the parties to the proceedings, the general legal principle laid down in § 318 ZPO (inner-procedural self-commitment) has a binding effect on the decision that has just been concluded. Therefore, following the general legal principles expressed in §§ 319 to 321 ZPO only alterations to correct certain procedural errors are permissible. However, the Federal Constitutional Court itself does not always comply with these principles. Instead, the Court occasionally has found that upon application of one of the parties to the proceedings (e.g. upon a counter appeal) certain changes to a decision must be possible, even after the conclusion of the proceedings. While this jurisprudence originated from the case-law of certain Chambers, this is now also generally recognized in the case-law of the Senates.³⁴

Some general effects for certain decisions of the Federal Constitutional Court are specifically laid down in the Federal Constitutional Court Act. For example, when the Federal Constitutional Court has declared a law void, § 79 of the Federal Constitutional Court Act lays down legal consequences for criminal proceedings that have already been concluded on the grounds of this law (see § 79(1) of the Federal Constitutional Court Act) as well as for other final decisions (see § 79(2) of the Federal Constitutional Court Act) that are based on the law rejected. Another example for the binding effect of certain decisions which are provided for in the Federal Constitutional Court Act is the possibility of declaring a law void (see § 95(2) of the Federal Constitutional Court Act) and the removal from office of the Federal President (see § 56 of the Federal Constitutional Court Act).

³⁴ See FCC, Order of the Second Senate from 1st April 2019 - 2 BvC 4/18 -, bverfg.de.

2. Binding effect of § 31(1) of the Federal Constitutional Court Act

Decisions of the Federal Constitutional Court also have a binding effect that goes well beyond the binding effect for the parties to the proceedings. According to § 31(1) of the Federal Constitutional Court Act decisions of the Federal Constitutional Court are binding upon the constitutional bodies of the Federation and the Länder, as well as upon all courts and public authorities. This binding effect also goes beyond the effect of decisions of the European Court of Human Rights. Art. 46(1) of the ECHR only states that the contracting parties involved are bound by the final judgment in relation to a specific subject matter, and there is no provision comparable to § 31(1) of the Federal Constitutional Court Act. Without § 31(1) of the Federal Constitutional Court Act the binding effects of decisions of the Court going beyond the individually decided case in question would have to be based on their de facto guiding and orientation function, as is the case-law of the European Court of Human Rights.

As already has been shown, other general effects of decisions of the Federal Constitutional Court are not based on § 31 of the Federal Constitutional Court Act but on general procedural principles (→ D. III. 1. General legal effects. p.). As with the substantive legal force of a decision the binding effect of § 31(1) also only applies to substantive decisions and not to procedural decisions or refusals to accept a constitutional complaint. When a refusal to accept a constitutional complaint contains a statement regarding the constitutional requirements for the interpretation or application of ordinary law the Court does so in hopes that the ordinary courts will follow the reasoning of the Court, not because they are legally bound to, but because they allow themselves to be persuaded by the reasoning of the Court (or at least do not want to risk being overturned at the next opportunity). Otherwise, approving Chamber and Senate decisions (see § 93c (1) of the Federal Constitutional Court Act) have the binding effect of § 31(1) of the Federal Constitutional Court Act.³⁵ Decisions in preliminary injunction proceedings according to § 32 of the Federal Constitutional Court Act may also have the binding effect of § 31(1) of the Federal Constitutional Court Act, while taking into account the only summary nature of the legal review.³⁶

Deviating from the scope of the substantive legal force, the binding effect of § 31(1) the Federal Constitutional Court Act extends beyond the operative part of a

³⁵ See for example FCC, Order from 5th December 2005 - 2 BvR 1964/05 -, bverfg.de.

³⁶ See FCC, Order from 27th January 2006 - 1 BvQ 4/06 -, bverfg.de.

decision to the “fundamental reasons” of a decision.³⁷ However, the binding effect of the fundamental reasons for a decision only extends to the specific subject matter of a decision. That even being true when a decision may in substance be transferable to other constitutional questions. Therefore, the fundamental reasons for the assessment of one law have no binding effect for the assessment of another law, even with regard to corresponding provisions of the law. What is true for corresponding provisions of different laws is also true for corresponding provisions of the same law. The fundamental reasons for a decision on one provision have no binding effect for another provision of the same law. This is, unless the Court itself extends its decision to another provision of the law, in accordance with § 78(2) of the Federal Constitutional Court Act (→ D. IV. Enforcement of decisions, p. 37). The inclusion of the fundamental reasons in the binding effect of § 31(1) of the Federal Constitutional Court Act is deemed necessary so the effect of the relevant case-law of the Federal Constitutional Court interpreting the Basic Law is not limited to the fragmentary statements the operative part of a decision offers. However, although the Federal Constitutional Court is both a constitutional body and a court, the Federal Constitutional Court always found that the binding effect of § 31(1) of the Federal Constitutional Court Act does not extend to the Federal Constitutional Court itself.³⁸ Therefore, there is no risk of a petrification of the constitutional interpretation by the Court even if the binding effect of a decision extends to the fundamental reasons. The fundamental reasons for a decision are those legal clauses that cannot be thought away without the specific result of the decision being lost according to the line of thought expressed in the decision. Thus, legal statements made on the occasion of the decision that are outside the context of the reasoning are no fundamental reasons.

Addressing the constitutional bodies of the Federation and the Länder as well as all courts and public authorities § 31(1) of the Federal Constitutional Court Act achieves a comprehensive binding of all state authority to the decisions of the Federal Constitutional Court. As such § 31(1) of the Federal Constitutional Court Act serves both, to ensure the primacy of the Basic Law as well as the effectiveness of the Constitutional Court's jurisdiction. All state authority is bound by the decisions of the Court, which means that they have to follow the decisions of the Court even if they do not have the force of law (→ D. III. 3. Force of law, § 31(2) of the of the Federal Constitutional Court Act, p. 35). Disregarding the binding effect of § 31(1) of the Federal Constitutional Court Act is considered to be a violation of Art. 2(1) and Art. 20(3) of the

³⁷ See BVerfGE 40, 88 (93f.).

³⁸ See BVerfGE 104, 151 (197).

Basic Law, a violation which may be successfully challenged by constitutional complaint.

Legislative bodies do not only have to follow the decisions of the Court but at all times have to also maintain constitutional conditions in accordance with the decisions of the Court. However, the maintenance of constitutional conditions does not extend to parallel laws to laws the Constitutional Court has already decided on. Neither is a specific judicial review (see Art. 100(1) of the Basic Law and § 80 of the of the Federal Constitutional Court Act) regarding a parallel law inadmissible. However, the binding effect of § 31(1) of the Federal Constitutional Court Act does not lead to a general ban of law repetitions. Nonetheless, for repeating a law the Constitutional Court has already declared to be unconstitutional the legislator has to give significant reasons. A mere repetition is considered to be a violation of the principle of loyalty of constitutional bodies deriving from the Basic Law. However, when the legislator decides to repeat a law nonetheless, the Constitutional Court can do nothing about it besides declaring the law to be unconstitutional again. As the Court only decides upon application there must be an application addressing the repetition. Otherwise, the Court wouldn't be able to find the law unconstitutional again. However, until now no legislator has ever merely repeated a law the Court had already declared unconstitutional.

In some cases the binding effect of § 31(1) of the Federal Constitutional Court Act is also limited. One limitation results from the basic division of competences between the Constitutional Court and the ordinary courts. Following Art. 100 of the Basic Law the Federal Constitutional Court is the only court deciding on the interpretation and application of the Basic Law. Therefore, elements of a decision that are not related to the Basic Law do not have the binding effect of § 31(1) of the Federal Constitutional Court Act. However, since the Federal Constitutional Court only decides on the interpretation and application of the ordinary law when deciding on the constitutionality of this law or their specific constitutional interpretation and application, there should be no elements of a Constitutional Court decision not related to the Basic Law. Furthermore, there is a limitation to the binding effect of § 31(1) of the Federal Constitutional Court Act when the ECtHR finds a decision of the German Federal Constitutional Court to be in violation of the ECHR. In accordance with Art. 46 (1) ECHR the binding effect of § 31(1) of the Federal Constitutional Court Act does not limit German state authorities and especially the German courts to follow and enforce the decision of the ECtHR. From a German point of view this is possible under the Basic Laws general openness to international law (see Art. 25 of the Basic Law).

As has already been stated (→ B. I. Annual statistics, p. 2) there unfortunately are no statistics indicating the number of complaints concerning the non-compliance with decisions of the Court. This in general is owed to all state authority being bound by § 31(1) of the Federal Constitutional Court Act acting almost always in accordance with this binding and generally following the decisions of the Court (for the enforcement of decisions otherwise → IV. Enforcement of decisions).

3. Force of Law, § 31(2) of the Federal Constitutional Court Act

Certain decisions of the Federal Constitutional Court, in particular decisions concerning the constitutionality of a law³⁹, have the force of law (see § 31(2) of the Federal Constitutional Court Act). Decisions which have the force of law have to be published in the Federal Law Gazette (see § 31(4) and (5) of the Federal Constitutional Court Act). As does the binding effect of § 31(1) of the Federal Constitutional Court Act the force of law goes well beyond the formal and substantive legal force of a decision, which are limited to the parties of a proceeding. However, other than the binding effect of § 31(1) of the Federal Constitutional Court Act the force of law triggers an even more general validity of a decision. The force of law leads to a duty to observe the decisions of the Court not only for all state authority but also for all private individuals. Other than the binding effect of § 31(1) of the Federal Constitutional Court Act the force of law extends only to the operative part of a decision. Additionally, the reasons for a decision may only be used for the interpretation of the operative part. Decisions in constitutional complaint proceedings have the force of law when the Federal Constitutional Court declares a law to be either compatible or incompatible with the Basic Law or alternatively, to be null and void. This holds true for constitutional complaints directly filed against a law as well as for constitutional complaints lodged against decisions of ordinary courts on the grounds of a law, and therefore indirectly against a law (see § 95(3) of the Federal Constitutional Court Act).

When the Constitutional Court finds a law to be unconstitutional declaring the law to be void is the only operative assessment mentioned by the Federal Constitutional Court Act (for constitutional complaint proceedings see § 95(3) of the

³⁹ Which is especially the case in judicial review proceedings such as abstract judicial review proceedings (see § 13 Nr.6 und 6a of the Federal Constitutional Court Act) and specific judicial review proceedings (see § 13 Nr.11 of the of the Federal Constitutional Court Act). This is true for constitutional complaints against a decision of a court on grounds of a law as well as for constitutional complaints directly filed against a law (see § 95(3) of the of the Federal Constitutional Court Act).

Federal Constitutional Court Act, for abstract judicial review proceedings see § 78(1) of the Federal Constitutional Court Act and for specific judicial review proceedings see § 78(1) and § 82 of the Federal Constitutional Court Act). However, deviating from the wording of the Constitutional Court Act the Court considers itself authorized to declare laws not only to be void but also to be compatible or incompatible with the Basic Law. It does so following the wording of § 31(2) of the Federal Constitutional Court Act which relates to the “incompatibility” of a law. Normally, declaring a law to be incompatible with the Basic Law should have the same effect as declaring a law to be void. However, declaring a law to be void applies retroactively and has the same legal effect as if the law had never been enacted. As such, acts on the grounds of such a law have no legal backing anymore while laws which have been declared to be incompatible with the Basic Law are merely not applicable for the future. Also, the Courts feels that the non-applicability of an incompatible law may even be suspended. Then, the Federal Constitutional Court in connection with a declaration of incompatibility may declare a law to continue to apply temporarily, often together with certain stipulations, until a new law is made. Often the Court determines a date after which the law may no longer be applied. In particular, this is done if the legislator has different options to remedy the violation of the Basic Law, or if the disadvantages that result from the law immediately ceasing to have effect outweigh the disadvantages associated with its preliminary continued application. This often applies to tax laws, or electoral laws given that the statutory basis for levying a tax or holding an election would otherwise be completely or partially set aside. In the transitional period, the legislator may enact a provision that is compatible with the Basic Law. In rare cases, the Federal Constitutional Court itself has announced to be able to determine transitional arrangements when needed. However, stipulations on how a law should continue to apply temporarily are not owed to the force of law of a decision according to § 31(2) of the Federal Constitutional Court Act but are questions of the enforcement of a decision (→ D. IV. Enforcement of decisions, p. 37).

Finally, according to § 31(2) of the Federal Constitutional Court Act not only declarations of incompatibility or declarations where a law has been declared void have the force of law but also declarations of compatibility of the law. As for the declaration of incompatibility and the decision to declare a law void the declaration of compatibility must be included in the operative part of the decision to have the force of law. However, the same applies when the operative part of a decision only states that the complaint was to be rejected as long as the reasons contain a statement on the constitutionality of the law. In this case it is possible to interpret the operative part by taking into account

the reasons. Otherwise, the Court would always have to include the declaration of compatibility in the operative part of its decisions. Unless it wouldn't want to create a legally binding decision regarding the incompatibility of a law. In that case, it would be left to the discretion of the Court whether a legally binding decision regarding the law in question is created. Besides finding a law compatible or incompatible with the Basic Law the Constitutional Court may also find a law to be only compatible with the Basic Law when applying a specific interpretation of the law. These decisions also have the force of law according to § 31(2) of the Federal Constitutional Court Act both when being part of the operative part of the decision or when included in the reasons.

Apart from acts and decisions challenged in the specific proceedings, decisions based on legislation that has been declared to be void remain unaffected (see § 79(2) of the Federal Constitutional Court Act). Decisions which can no longer be appealed remain effective but may no longer be executed. Given the serious consequences they entail, this does not apply to criminal proceedings. Where criminal judgments are based on laws that have been declared to be void or incompatible with the Basic Law, the proceedings may be reopened even after the judgments have become final.

IV. Enforcement of decisions (briefly, as already covered)

Another provision regulating the consequences of decisions of the Federal Constitutional Court is § 35 of the Federal Constitutional Court Act. Just as § 31(1) of the Federal Constitutional Court Act enforcement measures according to § 35 of the Federal Constitutional Court are also meant to ensure future compliance with the decisions of the Court. While § 31 (1) of the Federal Constitutional Court Act regulates effects of the decisions that those have automatically stated by law, § 35 of the Federal Constitutional Court Act regulates effects that the court itself may stipulate in a certain case (→ D. III. Effects of decisions, p. 29). The Court may declare an act of public authority to be unconstitutional, reverse an ordinary court's decision and may hand back a matter to the competent ordinary court, as well as declare a law void or to be incompatible or even compatible with the Basic Law. Declaring a law to be incompatible with the Basic Law the Court often gives stipulations as to applying the law temporarily until the legislator has issued a new constitutional law (→ D. III. 3. Force of law, p. 35). The Court does not alter the decisions of the ordinary courts but hands back the case to the competent court and to render subsequent decisions where necessary falls to the ordinary court. Apart from these measures the Court does not award damages nor does it order any other enforcement measures. Theoretically, § 35 of the Federal

Constitutional Court Act grants the court the ability to order infinite enforcement measures. However, apart from stipulations regarding the temporary applicability of a law the Court never makes use of them. When any public administration refuses to follow a Court's decision the Court in such a very rare case will call upon the next level authority, the overseeing ministry to deal with the failure to act according to the Court's decision. There is no law stating that the legislature could not repeat a law declared to be incompatible or even to be void by the Court (→ D. III. Effects of decisions, p. 29). There is no explicit law for the ordinary courts either stating that they could not refrain from following the Constitutional Court's decision when deciding the case again. However, eventually the failure to issue a new decision in accordance with the decision of the Court might lead to a punishable offence. As has been already stated (→ B. I. Annual statistics, p. 2) there are no statistics showing the number of decisions taken under § 35 of the Constitutional Court Act, which besides the decisions regarding the applicability of an incompatible law would be none. There are also no statistics showing the number of cases where public authorities failed to follow the decisions of the Court. This is probably owed to the view that the Court general stands in high regard and that dealing with the rare cases where a decision is not being followed may be left to the executive and/or the ordinary courts. In a case where a German mayor on behalf of the city refused to rent the city hall to a certain political party for a meeting even after the Constitutional Court decided the city was under a constitutional obligation to do so, the Court issued a preliminary injunction stating that the city had to rent the city hall to the political party in question.⁴⁰ Further measures were not taken.

V. No costs, no requirement of a lawyer (to file a case), abuse fee

All Court proceedings are generally free of charge (see § 34(1) of the Federal Constitutional Court Act). This is because no one should be deterred from asserting their fundamental basic rights for financial reasons. Legal aid may only be granted if complainants cannot adequately assert their rights themselves, if they are unable to cover the cost of hiring a lawyer, and if the constitutional complaint has sufficient prospects of success. Applicants may be represented by a lawyer but they don't have to (see § 22 of the Federal Constitutional Court Act). However, when an oral hearing is held representation by a lawyer or a professor of law is mandatory. Parties to the proceedings can be reimbursed for their expenses – in particular lawyer's fees – if their application was successful (cf. § 34 a of the Federal Constitutional Court Act).

⁴⁰ See FCC, Order of the Third Chamber of the First Senate from 24th March 2018 - 1 BvQ 18/18 -, bverfg.de.

Expenses are always reimbursed for successful constitutional complaints; for other types of proceedings reimbursement is at the discretion of the Federal Constitutional Court. Only the statutory fees pursuant to the Lawyers' Remuneration Act can be reimbursed, while higher fees agreed individually with lawyers cannot. In addition, all necessary expenses may be claimed. Moreover, expenses may completely or partially be reimbursed on grounds of equity. This may be the case for successful electoral complaints or if an unsuccessful constitutional complaint contributed to the clarification of a question of fundamental significance.

Where the free recourse to the Federal Constitutional Court is misused in an irresponsible manner by filing applications that clearly have no prospects of success from the outset or to pursue purposes that are unrelated to the proceedings an abuse fee of up to EUR 2,600 may be imposed on the parties to the proceedings (see § 34 (2) of the Federal Constitutional Court Act). Over time, several types of abuse have been identified by the Court including for example procedural applications that contained deceiving or indiscriminate and random submissions especially when filed by a lawyer. While the Court's proceedings being free of charge naturally leads to an increase of the Court's workload the threat of imposing an abuse fee in general does not lead to a reduction of the workload. Therefore, in addition to an abuse fee the implementation of a mischief fee has been discussed. While implementing an abuse fee is only possible when deciding a case, the mischief fee was supposed to be implemented before a decision even was attempted making the attempt to conclude a decision dependable on paying the mischief fee in advance. However, the legislator refrained from implementing such a fee stating again that no one should be deterred from asserting their fundamental basic rights for financial reasons.

VI. No legal timeframe, complaint of delay (dealings for a special chamber)

There is no regulation stating a certain time frame for the decisions of the Court. However, when the Court is taking too much time for a decision the applicant is allowed to file a complaint of delay to the Court (after six months) on which a special Chamber consisting of the President and the two most senior Justices of each Senate will decide on. The Court in general is aiming to conclude all proceedings within a year (for the success → B. I. Annual statistics, p. 2). For now, it has not been apparent that introducing the complaint of delay has been speeding up the proceedings. However, at least the Justices being party to the special Chamber do not want to see their own

cases being brought to them. That might lead to a small acceleration of proceedings within the departments of those Justices.

E. The court's jurisprudence

Apart from procedural solutions already implemented in the law the Court itself in its case-law created several requirements which were meant to or by chance did lower the case load of the court. A first prominent example is the Court's admissibility jurisprudence where the court has found other requirements than already stated by the law to be applicable for the admissibility, especially of constitutional complaints (→ E. I. Admissibility requirements, p. 40). The implementation of a hearing complaint before the ordinary courts was found by the Court's Plenary to be a procedural requirement deriving directly from the Basic Law. However, other than the Court originally had hoped for this requirement in retrospective led to a higher caseload than it was ever able to lower the caseload (→ E. II. The hearing complaint, p. 41). The Court takes into account European and international law and its guiding influence on the German legal order. Furthering the judicial dialogue around the world, the Court participates in international and European conferences meeting colleagues from the ECtHR and the ECJ as well as from other Constitutional Courts, paying particularly close attention to the case law of the ECtHR and the ECJ (→ E. III. International and EU jurisprudence and communication, p. 42).

I. Admissibility requirements

Admissibility requirements for all Court proceedings are laid down by the law. However, the Court in its case-law has found in some cases a very narrow interpretation of an admissibility requirement while in other cases it even added an additional requirement not laid down by the law. An example where the Court has found a narrow interpretation of a requirement is the substantiation of an application. According to § 23(1) of the Federal Constitutional Court Act an applicant has to file an application in writing and has to give reasons for filing the application. However, according to the jurisprudence of the Court a complainant has to not only file a complaint in writing and give reason but also has several unwritten obligations to fulfil (for further written obligations see § 93 of the Federal Constitutional Court Act). Applying the requirement in this way has made it very difficult for an applicant to file an admissible complaint in a short period of time (→ D. II. 1. Short period of a complaint, p. 26). Unfortunately, there is no statistic indicating the numbers of unsubstantial applications only. An example for a requirement where the Court added an additional

requirement not laid down by the law is the subsidiarity of a constitutional complaint. While the Federal Constitutional Court Act only contains a regulation where all legal remedies before the ordinary courts must have been exhausted (see § 90(2) of the Federal Constitutional Court Act) according to the Court's jurisprudence all other available possibilities to remedy or prevent the challenged violation of the Constitution must also have been used (so called subsidiarity of the constitutional complaint → D. II. 2. Exhaustion of legal remedies, p. 27).

Examining this case-law of the Constitutional court another court might consider to contribute with its own case-law to a decrease of its own workload. Applications which are already inadmissible usually require not that much work drafting an opinion compared to applications where one has to examine the admissibility and the justification of the case. However, a narrow interpretation of criteria already laid down by the law as well as adding new criteria not laid down by the law might reduce a court's acceptance as a "Citizen's Court" as well as lowering its judicial reputation. An example where the case-law of the Court was intended to reduce the workload of the Court but failed to do so is the founding of the requirement to file a hearing complaint to an ordinary court of last instance before invoking the right to be heard (Art. 103 of the Basic Law) before the Constitutional Court (→ E. II. The hearing complaint, p. 41).

II. The hearing complaint

In 2003 the Plenary of all 16 Justices (the first not regarding an administrative but a judicial matter) found that in order to invoke the right to be heard before the Constitutional Court (see Art. 103 of the Basic Law) a complainant first had to unsuccessfully file a hearing complaint to an ordinary court of last instance.⁴¹ Following this decision the legislator time after time created laws implementing the hearing complaint as new remedies before the ordinary courts. From then on a hearing complaint was the last remedy a complainant had to exhaust before filing a constitutional complaint on the grounds of a violation of Art. 103 of the Basic Law. Before uttering its decision, the Constitutional Court had seen a flood of proceedings regarding a violation of Art. 103 of the Basic Law. In all these cases it had seemed to the Constitutional Court that the ordinary court of last instance had easily been able to repair the hearing infringement itself had it been given the opportunity. Therefore, the Court originally has hoped for a much lower number of hearing cases reaching the Court in this respect. However, the requirement eventually turned out to not further a

⁴¹ See FCC, Plenary Order from 30th April 2003 - 1 PBvU 1/02 -, bverg.de (= BVerfGE 107, 395).

decrease of the workload of the Court at all. On the contrary, several problems arose from the implementation of this requirement. For once, the requirement turned out to be a trap snapping in two directions. Being an additional remedy which had to be exhausted before filing a complaint to the Court the complainant had to exhaust the remedy but as the Court later found, only when it was actually necessary to rule out a hearing infringement. When a hearing infringement is not in question a complainant does not have to file a hearing complaint to the ordinary court. As it is sometimes not clear whether there was a hearing infringement or not the complainant has the choice between not filing a hearing complaint and therefore not exhausting all remedies when such a complaint was necessary though or filing a hearing complaint when not necessary and not meeting the deadline for the constitutional complaint while waiting for an unnecessary additional decision of the ordinary court. Furthermore, the Court has not yet decided on how to handle cases where complainants originally filed a complaint regarding inter alia the right to be heard but after acknowledging that they failed to file a hearing complaint to the ordinary court of the last instance revoke the constitutional complaint only as far as the right to be heard is concerned. Other problems evolved to which the Court did not yet find consistent solutions either. Everything regarding this requirement got more than complicated and the Court in general was not able to build a consistent and comprehensive case law in this respect. Naturally, the hoped for reduction of cases didn't materialize and on the contrary the general confusion brought more cases to the court causing more work than before.

III. International and EU jurisprudence and communication

The German Federal Constitutional Court has always viewed itself as part of an international legal framework. When interpreting German constitutional law on the grounds of the Basic Law, the Court takes into account European and international law and its guiding influence on the German legal order. The European Convention on Human Rights (ECHR) is binding for all member states including Germany. Also, the decisions of the German Federal Constitutional Court are influenced by EU law, which in principle takes precedence over German law and shapes the German legislation in a wide range of subject matters. Over the last decades, the Court in its case-law developed various standards to take into account EU and international law. Implementing European and international law when assessing a case against the German constitution is possible on the grounds of the Basic Law's general openness to European and international law (see Art. 23 and 25 of the German Basic Law). According to the Court's jurisprudence the Basic Law requires all German courts

including the Constitutional Court itself to take into account the European Convention on Human Rights (ECHR), as interpreted by the European Court of Human Rights (ECtHR), when deciding a case. Otherwise, the Constitutional Court as the last domestic court deciding a case would take the risk of being overturned by the ECtHR deciding the same case on the grounds of the ECHR. Furthermore, when a German court including the Constitutional Court has doubts as to the correct interpretation of EU law they have to request a preliminary ruling from the ECJ. Reluctance in doing so is considered to be a violation of Art. 101(1) of the German Basic Law (right to a lawful judge). The Court monitors European and international legal developments and, through its decisions, adds to the development of common constitutional traditions. Monitoring European and international legal developments and taking into account European and international case-law doesn't lessen the workload of the Court. However, as Germany is a member to both, the ECHR and the EU, the Court had to find a way of taking into account the ECHR and EU law, and as such the case-law of the ECtHR and the ECJ.

Acknowledging the multi-level cooperation of European courts the Federal Constitutional Court maintains good working relations with the ECJ and the ECtHR. Also, the Court is in constant exchange with other constitutional courts when making visits around the world or welcoming foreign delegations. The Federal Constitutional Court is an active member of various multilateral networks. The Court is a founding member of the Conference of European Constitutional Courts, which has regularly taken place since 1972, and of the meetings with the German-language constitutional courts (Austria, Switzerland and Liechtenstein), the ECtHR and the ECJ, which have been held since 2006. Those meetings highlight the importance of judicial dialogues promoting international cooperation and exchange in Europe. The Federal Constitutional Court promotes the judicial dialogue on an international level by providing English (and sometimes French) translations of its decisions (→ C. IV. 4. Protocol, p. 20) as well as press releases and English-language information on various topics on its website (→ C. V. Press office, p. 22). Abstracts of selected decisions by the Federal Constitutional Court in English and French are available at the CODICES database, a database on constitutional case-law maintained by the European Commission for Democracy through Law (Venice Commission).⁴²

⁴² <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>.

F. Summary and recommendations

After having given an inside on how the German Federal Constitutional Court works, it is possible to identify several practices which might be able to help reducing the backlog of cases at other courts.

Regarding the Court's structure and administration (→ C. Court's structure and administration, p. 9) other courts should consider to implement more than one deciding body as well. As has been already shown the advantages of being a "twin court" with two Senates outweigh the disadvantages (→ C. I. Senates and senate decisions, p. 9). A court should also consider implementing smaller panels consisting of at least three Justices handling the majority of cases which are repeatedly coming to the court (→ C. II. Chambers and chamber decisions, p. 12). Each Justice should be assisted by a reasonable number of individually selected law clerks. At the German Federal Constitutional Court the law clerks of the Justices play an essential role in reducing the backlog of cases (→ C. III. Justices and their departments, p. 14).

A functioning administration is also key to reducing the backlog of cases (→ C. IV. Administration, p. 16). Probably the most important role in reducing the backlog of cases at the German Federal Constitutional Court has the so called General Register. When there is no General Register implemented at a court already, implementation is highly recommended. The General Register is key to reducing the workload of the Federal Constitutional Court, dealing with more than half of the submissions reaching the Court each year (→ IV. 1. Judicial administration, including the General Register, p. 17).

Also, an excellent working IT-department is essential to reducing the backlog of cases. A database for the Register of Proceedings and the General Register is needed as well as databases for the Justices and law clerks drafting the decisions. Solutions to common problems which are presenting themselves repeatedly should be made available in an electronical pool. For some very common problems there might even be an electronical list where one might tick boxes only to draft a certain decision electronically (e.g. decisions where a complaint is clearly inadmissible because for example the deadline for filing the complaint has already expired). Electronical access should be granted to all drafts of all Justices' departments. Furthermore, short and functioning ways of communication are needed inside the Court as well as functioning ways of communication outside the Court (→ C. IV. 3. IT-Solutions and documentation,

p. 19). An excellent library should be at the discretion of the Court, ideally working hand in hand with the IT-department. Preferable is a library where publications are available electronically. Justices and law clerks may order publications which are all sent to them electronically. All publications cited in a draft should be made available in electronic folders connected to the specific proceedings where all deciding Justices have access to (→ C. IV. 5. Library, p. 21).

For communicating the decisions of the Court to the outside world a functioning protocol (→ C. IV. 4. Protocol, p. 20) as well as a functioning press office (→ C. IV. Press office: promotion of standards, p. 22) are needed.

Regarding procedural solutions to reducing the backlog of cases (→ D. Procedural solutions, p. 23) every court should have a dynamic procedure for the allocation of competences, as to be able to react to the individual caseload of each deciding body and each Justice (→ D. I. Allocation of competences, p. 23).

As for the constitutional complaint which makes for the majority of cases at the German Constitutional Court, allowing only a short period of time for lodging a complaint works for the reduction of cases at the Court. However, it does not further the Court's attraction as a "Citizen's Court" (→ D. II. 1. Short period for a complaint, p. 26). Demanding the exhaustion of all legal remedies before filing an application works for the reduction of the cases at Court as well, as the ordinary courts already had the chance to decide the case in favour of the complainant and all facts are already established when the Court has to decide on the case (→ D. II. 2. Exhaustion of legal remedies, p. 27).

However, implementing an acceptance procedure where the main criteria for accepting a case is the admissibility and justification of an application (→ D. II. 3. Acceptance Procedure, p. 27) is not recommended. When the Court has to examine the admissibility and the justification of a complaint anyway, there is no need to further complicate the proceedings by adding an acceptance procedure. However, an acceptance procedure where the acceptance of an application truly is to the discretion of the Court (e.g. the United States Supreme Court) will lower the caseload eventually. An oral hearing is not by all means necessary to decide on a case. Therefore, a waiver of an oral hearing where appropriate will reduce the workload of the Court. A waiver of a written argument will lower the caseload as well, although the case internally has to

be carefully examined nonetheless (→ D. II. 4. Waiver of an oral hearing and of a written argument. p. 28).

When there is no binding effect for decisions of the respective court as in § 31(1) of the Federal Constitutional Court Act (→ D. III. 2. Binding effect of § 31(1) of the Federal Constitutional Court Act, p. 32) the legislator should implement such a provision. Only a binding effect for all state authority including the legislator and the ordinary courts stresses the supreme position a court where all state authority must follow its decisions. Decisions declaring a law void must have the force of law to make sure that decisions are not only binding for all state authority but for individuals as well (→ III. Effects of decisions, p. 29).

A regulation regarding the enforcement of decisions of a court as in § 35 of the Federal Constitutional Court Act might be needed as well. There is no limit to the imagination of the Court implementing its own decisions while making use of § 35 of the Federal Constitutional Court Act. However, the German Federal Constitutional Court never makes use of this provision as in general all state authority is following its decisions (→ D. IV. Enforcement of decisions, p. 37).

Allowing access to a court free of charge and without the requirement of a lawyer makes access to a court easier while on the same time increasing the workload of a court. Not only there are more submissions expected but also the quality of applications might be decreasing. However, low level access to a court increases the acceptance as well as the standing of a court in public. An abuse fee might be implemented. However, it doesn't seem that the exertion of such a fee has significantly reduced the caseload of the German Federal Constitutional Court so far (→ D. V. No costs, no requirement of a lawyer, abuse fee, p. 38).

With respect to the constitutional position of a Court there may be no timeframe for decisions of a court. However applying the possibility to file a complaint regarding the excessive length of the proceedings might be adding to a faster decision making (→ D. VI. No legal timeframe, complaint of delay, p. 39).

A narrow interpretation of the admissibility criteria for the proceedings of a court might lead to more cases which are inadmissible. A case already being inadmissible leads to a court not having to examine the justification of a case. However, narrowing the interpretation of the admissibility criteria by the Court itself should be by no means

be an end to itself only to bring down the number of admissible cases but should only be owed to the Court being able to decide on cases where the Court really is needed (→ E. I. Admissibility requirements, p. 40).

A court should by no means implement procedural solutions which are likely to turn against what the court was expecting them to achieve (→ E. I. The hearing complaint, p. 41).

All Constitutional Courts should have excellent relations with the ECHR and the ECJ as well as with all other Constitutional Courts around the world. Thus, furthering the judicial dialogue. Especially, when deciding on a case a court should also take into account the decisions of the ECHR. This way decisions of a court are less likely to be overturned by the ECtHR (→ E. III. International and EU jurisprudence and communication, p. 42).
