2020

REPORT

FEDERAL CONSTITUTIONAL COURT

Scarlet robes with white jabots as worn by the Justices

AS GUARDIAN OF THE CONSTITUTION, THE FEDERAL CONSTITUTIONAL COURT IS A CONSTITUTIONAL ORGAN AND, FOR THAT PURPOSE, VESTED WITH SUPREME AUTHORITY.

Gerhard Leibholz (1901-1982)
Status Memorandum of the Federal Constitutional Court of 27 June 1952

Contents

High caseload amid COVID-19 pandemic

Due to the COVID-19 pandemic, 2020 was an unprecedented year, not just for the Federal Constitutional Court but for many others as well. Overall, more than 880 matters brought before the Court, including 240 applications for preliminary injunction, concerned the pandemic. The pandemic-related proceedings, most notably the applications for preliminary injunction, significantly increased the Court's workload. Moreover, the Court had to adapt its work processes to maintain its proper functioning. Among other measures, a rotating shift system was introduced and possibilities of working from home were expanded. We are particularly grateful to our staff who went above and beyond to keep the Federal Constitutional Court running and fully operational under the unique circumstances of the COVID-19 pandemic.

For the first time, the 2020 annual report contains not only the Court's latest statistics but opens with a new chapter that looks at the Court's structure, its Justices and staff, and that portrays its daily work. Next, in keeping with tradition, the report presents statistics on the proceedings and the Court's caseload. 5,194 constitutional complaints were lodged in 2020. As regards the statistics on all types of proceedings combined, the 5,529 new cases brought in 2020 mark a slight increase in new proceedings compared to 2019, which saw less than 5,500 new cases. Submissions received by the General Register increased significantly, with matters recorded in the General Register reaching a record high of more than 10,000 submissions in total. Despite the challenging circumstances, the Court managed to tackle its continuously high workload, resulting in particular from constitutional complaints and the increase in preliminary injunction proceedings, by relying on the commitment and dedication of all staff members. Not only that, the Court actually managed to decrease the overall number of pending proceedings.

Lastly, the annual report provides an overview of the Court's decisions concerning measures taken to combat the COVID-19 pandemic, summarises other selected decisions rendered by the Senates and the Chambers, and closes with a brief outlook for 2021. Especially noteworthy cases decided by the First Senate include the judgment on the surveillance powers of the Federal Intelligence Service regarding foreign telecommunications as well as the orders on the obtaining of subscriber data by state authorities and on compensation for power plant operators in the context of the nuclear phase-out. As for the decisions rendered by the Second Senate, the judgments on the criminalisation of assisted suicide services and on the ECB's asset purchase programme PSPP deserve special mention, as does the order on the prohibition of wearing a headscarf for legal trainees. ■

Karlsruhe, February 2021

Prof. Dr. Stephan Harbarth, LL.M., President

Prof. Dr. Doris König, Vice-President

Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

Art. 1(1) of the Basic Law

Court and constitutional organ

The Federal Constitutional Court is both a court and a constitutional organ. It is a 'twin court' that consists of two Senates with eight Justices each.

The First Senate primarily deals with constitutional complaints concerning citizens' fundamental rights. The Second Senate primarily deals with disputes between constitutional organs (e.g. between the Federal Government and Parliament) or between the Federation and the *Länder*. It also decides on the rights of members of Parliament and of political parties as well as on certain fundamental rights matters. In rare cases, the Plenary – which consists of all 16 Justices – decides a case itself; a decision by the Plenary only becomes necessary if one Senate intends to deviate from the other Senate's interpretation of a specific question of constitutional law.

In order to deal with the Court's high caseload (including more than 7,000 constitutional complainants recorded in the Register of Proceedings and the General Register every year), and to ensure that the Court renders its decisions within a reasonable time period, both Senates form smaller panels – the Chambers – with three members each. The Chambers primarily decide cases in which the constitutional complaint is inadmissible or the prerequisites for admission set out in § 93a(2) of the Federal Constitutional Court Act are not met for other reasons. A Chamber can grant a constitutional complaint if the Federal Constitutional Court has already decided the questions of constitutional law raised by the complaint. In all other cases, the entire Senate, sitting with all eight Justices, decides, in particular where admissible constitutional complaints raise new questions of constitutional law; the Senate also decides in all other types of proceedings.

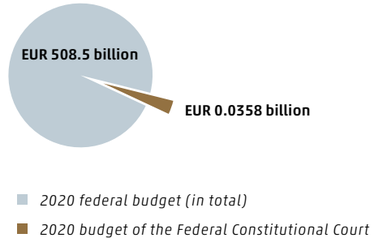
Pursuant to § 93a(2) of the Federal Constitutional Court Act, a constitutional complaint is only admitted for decision if it has general constitutional significance or if admitting it is necessary to enforce the complainant's fundamental rights or equivalent rights.

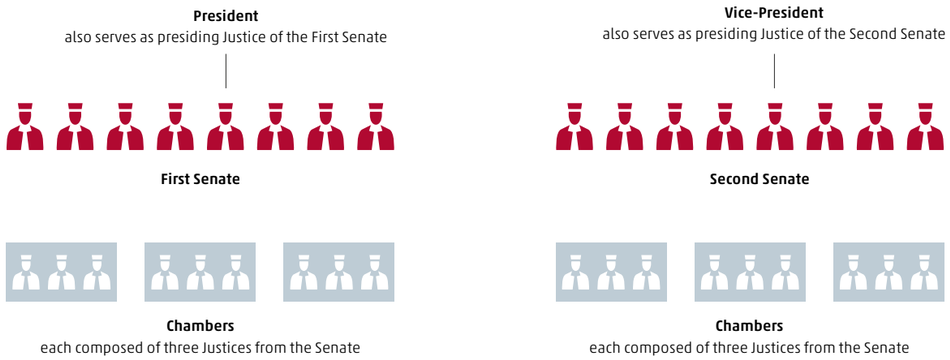
As a **court**, the Federal Constitutional Court forms part of the German judiciary, which also comprises the ordinary courts. As 'guardian of the Constitution', its role is to ensure adherence to the Basic Law; as the highest court in Germany, it has the final say on the interpretation of constitutional law. Moreover, it is the only court that can declare void acts of Parliament. Its decisions cannot be appealed and are binding on all other state organs. →

The state order is composed of three branches: the legislative branch (federal and state parliaments), the executive branch (government and administration) and the judiciary (the courts). All three branches are bound by fundamental rights (Art. 1(3) of the Basic Law).

No further possibilities of appeal or review exist in Germany.

As a **constitutional organ**, the Federal Constitutional Court is on a par with the other constitutional organs such as the *Bundestag*, the *Bundesrat* and the Federal Government. Unlike the ordinary courts, it is not subject to supervision by a ministry. Moreover, the Federal Constitutional Court itself decides on matters concerning its own administration and organisation; it has its own budget, which is approved by the *Bundestag* (EUR 35.8 million in 2020). With a collection of approximately 400,000 books, journals and databases, the Court's in-house library is one of the biggest specialised law libraries in Germany. The President of the Court heads the administration and represents the Court in external relations. ■





*Half the Justices of each Senate are elected by the **Bundestag** while the other half is elected by the **Bundesrat**.*


BUNDESVERFASSUNGSGERICHT

The Justices

Half of the 16 Justices of the Federal Constitutional Court are elected by the Plenary of the *Bundestag*, and half by the Plenary of the *Bundesrat*. The President and the Vice-President are also elected, in turns, by the *Bundestag* and the *Bundesrat*.

A two-thirds majority is required for the **election** of Justices to ensure that the Court enjoys widespread acceptance among the general public and across the entire political spectrum. All parliamentary groups in the *Bundestag*, the Federal Government and the *Land* governments can propose candidates. At least three Justices of each Senate must be elected from the supreme federal courts so that the decisions of the Federal Constitutional Court can benefit from their special judicial experience. The other Justices come from different fields and legal professions, including, in particular, academia, but the Court has also seen former politicians or lawyers serve as Justices. This ensures that different perspectives shape the Court's work and is a very important factor for the acceptance and quality of its decisions.

Anyone who is at least 40 years old, holds German citizenship, and has passed the First and Second State Examination in Law or has been appointed law professor at a German university may be elected. Thus, only persons qualified to hold judicial office can become Federal Constitutional Court Justices as the Court is not called upon to decide on the basis of political considerations, but strictly on the basis of legal standards. The Justices are elected for a term of twelve years. To ensure their personal independence, Justices cannot be re-elected. They may not be older than 68. When Justices reach that age, their term of office ends even if they have served for less than twelve years. The Federal President appoints and swears in the Justices.

In June 2020, Prof. Dr. Harbarth, LL.M., was appointed **President of the Federal Constitutional Court** as successor to Prof. Dr. Dres. h. c. Voßkuhle, while Prof. Dr. König was named the Court's new Vice-President and presiding Justice of the Second Senate (→ pp. 16/17).

The **exercise of the judicial functions** of the Federal Constitutional Court is at the centre of the Justices' work: they decide constitutional complaints and other cases pending before the Court. In addition to their judicial duties, the Justices also perform certain organisational tasks. They participate in visits from and to other institutions, aiming to foster inter-institutional relations and professional dialogue in Germany and abroad, for example by engaging in working sessions with other German constitutional organs or constitutional courts in other countries. →

The supreme federal courts are the Federal Court of Justice, the Federal Administrative Court, the Federal Finance Court, the Federal Labour Court and the Federal Social Court.

Moreover, 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. The Justices of the Federal Constitutional Court are particularly well known for their **scarlet robes** and white jabots, which they wear during oral hearings and the pronouncement of judgments. The robes are inspired by traditional attire worn by judges in 15th-century Florence and were designed by a Karlsruhe costume designer. ■

The Code of Conduct can be accessed at: https://www.bundesverfassungsgericht.de/EN

These are white lace or silk ruffles attached to the collar of the Justices' robes.

First Senate

Prof. Dr. Ines Härtel

since 2020

Dr. Josef Christ

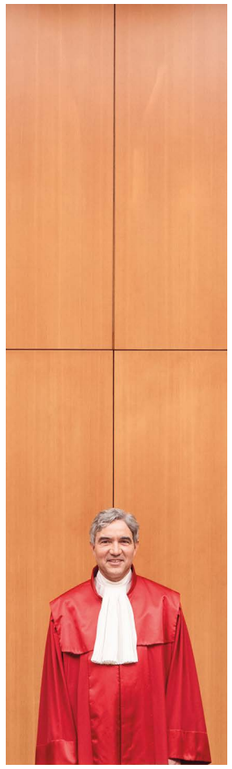
since 2017

Prof. Dr. Gabriele Britz

since 2011

Prof. Dr. Andreas L. Paulus

since 2010



Prof. Dr. Stephan Harbarth, LL.M.

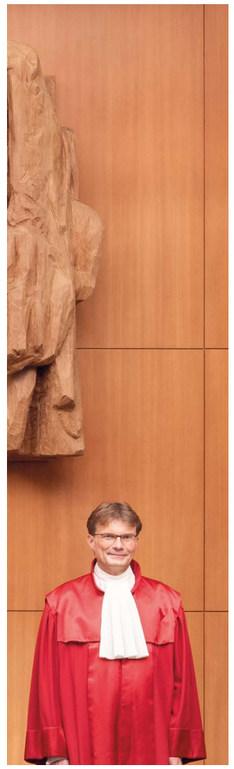
since 2018,
President since 2020

Prof. Dr. Susanne Baer, LL.M.

since 2011

Dr. Yvonne Ott

since 2016



Prof. Dr. Henning Radtke

since 2018

Second Senate

Prof. Dr. Astrid Wallrabenstein

since 2020

Dr. Ulrich Maidowski

since 2014

Peter Müller

since 2011

Prof. Dr. Peter M. Huber

since 2010

Prof. Dr. Doris König

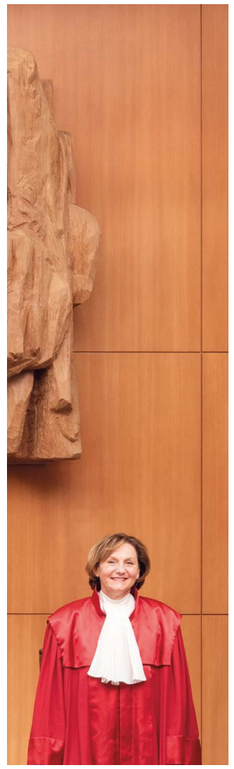
since 2014,
Vice-President since 2020

Monika Hermanns

since 2010

Dr. Sibylle Kessal-Wulf

since 2011



Prof. Dr. Christine Langenfeld

since 2016

Change of Presidency and new Justices at the Federal Constitutional Court

The year 2020 saw significant personnel changes at the Court.

On 22 June 2020, after ten years as President of the Federal Constitutional Court, the term of office of Prof. Dr. Dres. h. c. Andreas Voßkuhle came to an end. This was marked by an official ceremony at *Schloss Bellevue*, with measures in place accounting for the realities of the pandemic, in which Federal President Dr. Steinmeier honoured the outgoing President. The Federal President presented Prof. Voßkuhle with the Grand Cross of the Order of Merit of the Federal Republic of Germany for his services to the country. During his twelve years as President, Vice-President and presiding Justice of the Second Senate, Prof. Voßkuhle served as reporting Justice in almost 40 Senate proceedings. Moreover, he initiated numerous meetings with foreign constitutional courts, supreme courts, the European Court of Human Rights and the Court of Justice of the European Union.

The Federal President appointed Prof. Dr. Stephan Harbarth, LL.M., the Court's Vice-President at the time, as new President of the Court. He is the tenth President of the Federal Constitutional Court. Prof. Dr. Doris König, who had already been serving as Justice of the Second Senate, became the new Vice-President and presiding Justice of her Senate. Moreover, Federal President Dr. Steinmeier presented Justice Prof. Dr. Johannes Masing with the certificate of honourable discharge on 10 July 2020. During his term of office, Prof. Masing served as reporting Justice in numerous Senate proceedings concerning data protection, the general right of personality and freedom of expression. He was awarded the Grand Cross of the Order of Merit of the Federal Republic of Germany for his services to the country.

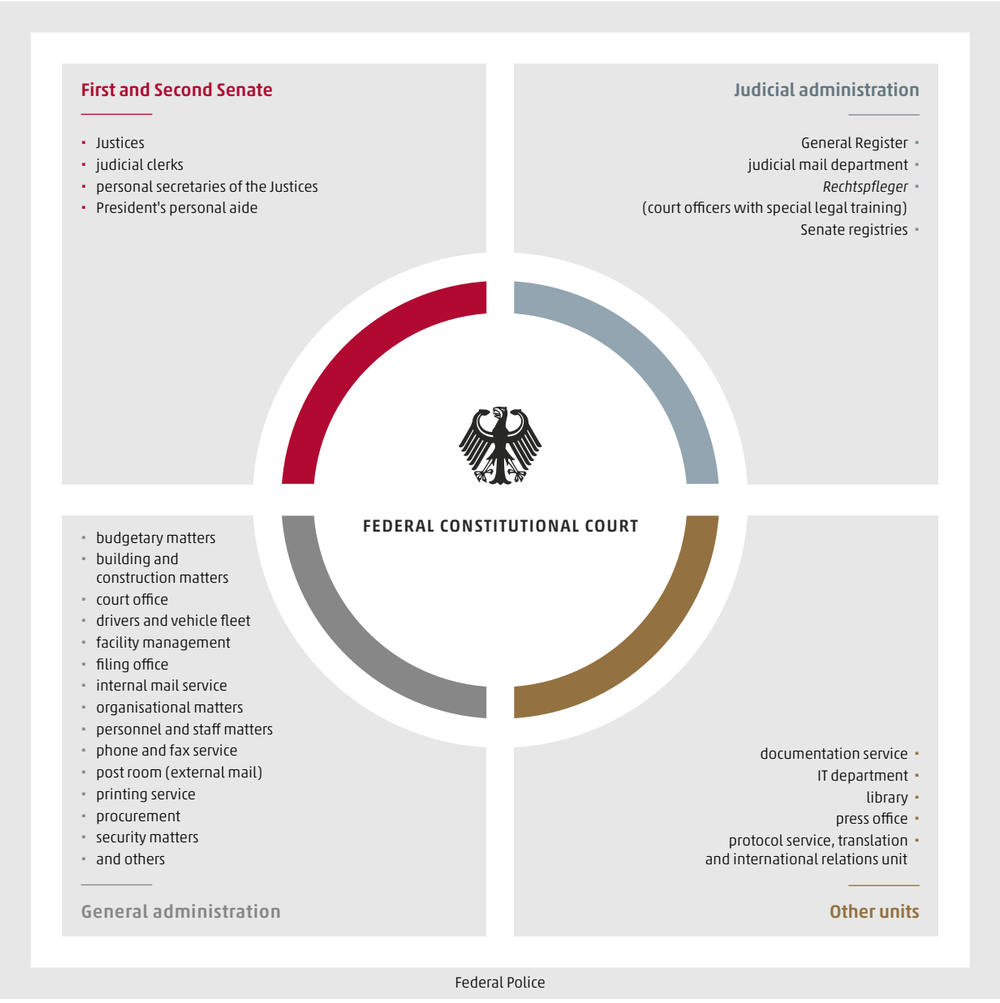
His successor in the First Senate is Prof. Dr. Ines Härtel, professor of law at the European University Viadrina (Frankfurt/Oder), who was appointed as Justice by the Federal President. The Federal President also appointed Prof. Dr. Astrid Wallrabenstein, professor of law at Goethe University (Frankfurt/Main) to succeed President Voßkuhle as Justice of the Second Senate. ■

Press Releases
of 22 June and 10 July 2020

Federal President Steinmeier and outgoing President Voßkuhle

Federal President Steinmeier and outgoing Justice Masing

More than 270 staff members



Managing the Court's high caseload would be impossible without the *Rechtspfleger* (court officers with special legal training), the staff in the Senate registries, the Justices' personal secretaries, the court office staff and other administrative staff. Overall, more than 270 staff members ensure that the Federal Constitutional Court can fulfil its duties.

Each Justice is assisted by **four judicial clerks**, who help the Justices with their demanding tasks and high workload. The President of the Court is supported by one additional clerk serving as his personal aide. One of the main tasks of judicial clerks is drafting written reports on cases in which the Justice they clerk for serves as reporting Justice. Judicial clerks usually have several years of professional experience at ordinary courts, public authorities, law firms or university, and are typically seconded to the Federal Constitutional Court for two or three years. In addition, the Justices are each assisted by a **personal secretary** (the position can be split between two secretaries working part-time).

The Federal Constitutional Court's administration is divided into different parts and headed by the **Director** of the Federal Constitutional Court on behalf of the President.

The **judicial administration** consists of the two Senate registries, the court officers with special legal training, the General Register as well as senior legal officers who are fully qualified lawyers and authorised signatories of the Court. In the **judicial mail department**, these officers are responsible for ensuring that incoming documents related to proceedings are processed and distributed correctly and in a timely manner. The two Senate registries create and manage the case files. They handle the correspondence with the parties to the proceedings, serve court orders (e.g. summonses) and decisions, and make sure that the certified copies of court orders and decisions sent to the parties match the original. The **court officers with special legal training** proofread Senate decisions, including all references to legal sources contained in the decisions. They fix legal fees, manage correspondence concerning concluded proceedings and process submissions received by the General Register. The **General Register** sorts and examines approximately 10,000 submissions and procedural applications every year (*General Register* → p. 54).

The **general administration** has a wide range of responsibilities: budgetary/organisational matters and personnel matters make up the bulk of its work, but it is also in charge of building and construction matters, the central phone and fax service, the court office, the drivers and vehicle fleet, facility management, the filing office, the internal mail service, the post room, the printing service, procurement, and security matters.

The Court also has its own **documentation service**, which records and documents decisions of the Federal Constitutional Court and other important documents such as legal publications. The Court's **library**, which has a collection of approximately 400,000 books, journals and databases, is one of the biggest law libraries in Germany.

For its work, the Court depends on a reliable and secure IT network. The Court's **IT department** is independent of the Federation's central IT services. It is responsible for maintaining and developing the necessary technical infrastructure, ensuring that the Court is digitally connected. During the COVID-19 pandemic, it helped maintain the proper functioning of the Court by providing the equipment and infrastructure to allow many staff members to work from home to curb the spread of the virus.

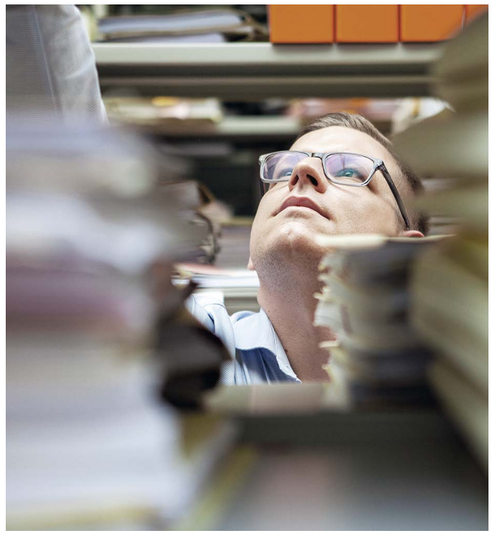
The **protocol service** handles the Court's contacts with other constitutional organs and domestic institutions, and maintains and furthers its relations with constitutional courts abroad as well as with the Court of Justice of the European Union and the European Court of Human Rights. It also organises major internal and external events. The head of protocol is also responsible for the **translation and international relations unit**. In this unit, lawyers work together with translators to translate decisions into English, create other foreign-language materials, and monitor and document legal developments in other jurisdictions (*International perspectives* → p. 36).

The Court's **press office** publishes press releases, responds to inquiries from journalists and handles media accreditation for oral hearings and pronouncements of judgments. Moreover, it is responsible for the Court's website and, in cooperation with the protocol service, organises guided tours of the Court. The **Federal Police** is in charge of security on the premises of the Federal Constitutional Court. ■

A detailed presentation of the Court's administrative structure can be found at www.bundesverfassungsgericht.de/en (see organisational chart).

Daily work in pictures

Office of the General Register



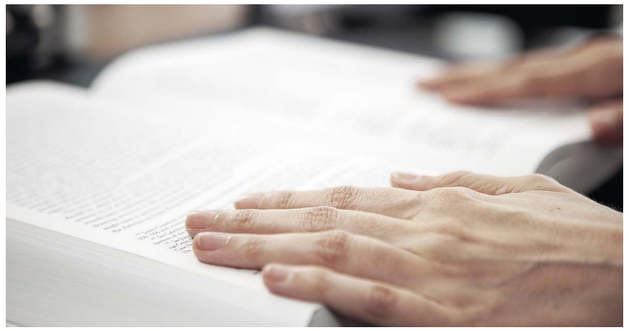
Justice Kessal-Wulf

Justice Radtke discusses a case with his judicial clerks

Deliberations of the First Senate

Deliberations of the Second Senate

Deliberations of the Third Chamber of the Second Senate, with Justices Hermanns, Langenfeld and Maidowski



Deliberations of the Court's Plenary

Visit from the Public Prosecutor General

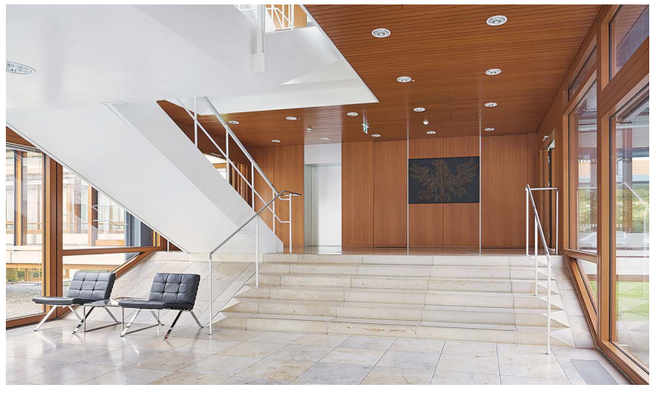
As court and constitutional organ, the Federal Constitutional Court cultivates relationships with the highest courts from the German judiciary and with the other constitutional organs. The Justices are committed to fostering mutual understanding between the institutions. Meetings with other institutions to exchange views therefore take place regularly, albeit not necessarily at short intervals.

In 2020, however, there were only very limited opportunities to hold such meetings due to the COVID-19 pandemic. On 3 February 2020, a delegation from the Office of the Public Prosecutor General, headed by Public Prosecutor General Dr. Peter Frank, visited the Federal Constitutional Court. Prof. Dr. Dres. h. c. Andreas Voßkuhle, then President of the Court, and other Justices welcomed the guests. The working session held during the visit provided an opportunity to discuss current focal points of the institutions' work. The visit is part of bilateral meetings that take place every three to four years. ■

| Press Release of 4 February 2020

The other constitutional organs are the Federal President, the German Bundestag, the Federal Government and the Bundesrat.

The Public Prosecutor General is the public prosecution office at federal level with jurisdiction over terrorist offences, espionage and offences under international criminal law. Moreover, it represents the prosecution in appellate cases before the Federal Court of Justice.



20th *Karlsruher Verfassungsgespräch*

The year 2020 saw the 20th edition of the *Karlsruher Verfassungsgespräch* ('constitutional conversations'). Held under the auspices of the President of the Federal Constitutional Court, the *Karlsruher Verfassungsgespräch* is an event that takes place annually on 22 May, marking the eve of the Basic Law's promulgation in 1949.

It is organised jointly by the City of Karlsruhe, the Karlsruhe *Juristische Studiengesellschaft* (legal research society), the Karlsruhe Forum for Culture, Law and Technology, the German Section of the International Commission of Jurists and the Friends of the *Forum Recht*.

Under the theme "**Towards a digital state – where will the pandemic lead us?**", Thomas Strobl (Deputy Premier of the *Land* Baden-Württemberg, Minister of the Interior, Digitalisation and Migration), Dr. Konstantin von Notz (Member of the *Bundestag*, Deputy Chairperson of the *Bündnis 90/Die Grünen* parliamentary group), Prof. Dr. Katharina Zweig (Kaiserslautern University) and Prof. Dr. Jens-Peter Schneider (Albert Ludwig University, Freiburg) participated in a panel discussion moderated by Jörg Schönenborn (Director of Television at *Westdeutscher Rundfunk*). While the *Verfassungsgespräch* usually draws large crowds of invited guests and citizens to the Federal Constitutional Court, the courtroom remained empty this year due to the COVID-19 pandemic. Yet for the first time in the history of the event, a livestream hosted by TV channel Phoenix was made available to the public, allowing anyone who was interested to take part virtually. As in previous years, Phoenix also broadcast a recording of the event in its regular programme at a later date.

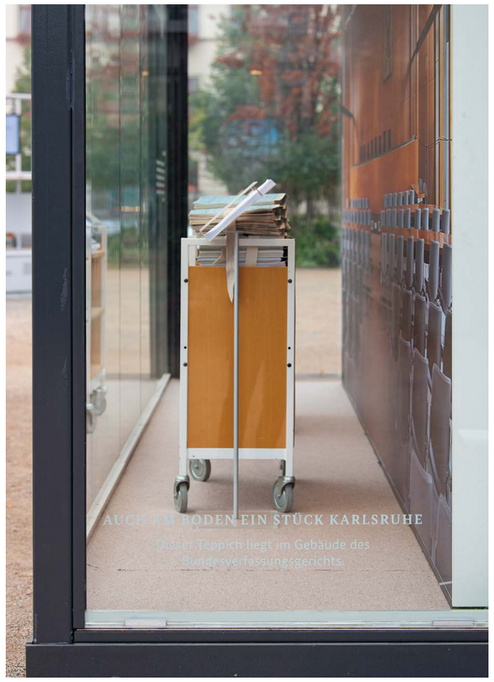
Issues discussed at the *Verfassungsgespräch* included the risks and benefits of Germany's corona app and the possible effects of the pandemic on the digitalisation of social life. Yet the main focus of the discussion was on whether, in the course of the measures taken to contain the spread of the virus, a fair balance had been struck between different fundamental rights affected by these measures. Incorporating questions from the livestream audience, the panellists also discussed the fact that many restrictions of fundamental rights were imposed merely by executive ordinance. In this regard, the panel participants discussed to what extent decision-making on measures to fight the pandemic lacked sufficient participation by the *Bundestag* and the parliaments of the *Länder*. ■

Day of German Unity

Every year on 3 October, the Federal Republic of Germany celebrates reunification with an official ceremony and a large citizens' fair. In 2020, these celebrations were organised by the *Land* Brandenburg. Its challenge was to provide an adequate framework for celebrating the 30th anniversary of German reunification while also minimising infection risks in the context of the COVID-19 pandemic.

The citizens' fair was turned into a Unity Expo with the slogan '30 years – 30 days – 30x Germany'. Under this motto, the *Länder*, constitutional organs of the Federation and the Commission on the 30th Anniversary of the Peaceful Revolution and German Reunification presented their displays and exhibits for 30 days as part of an open-air exhibition held in the City of Potsdam.

The Federal Constitutional Court, too, presented itself with a multimedia exhibition in two glass cubes on Potsdam's *Luisenplatz*. At the centre of one of the displays were eight Justices' robes, framed by a red curtain and highlighted by light installations. In addition, visitors were directly and personally addressed by all Justices of the Federal Constitutional Court and several staff members with short video statements shown on eight screens. This helped visitors of the Unity Expo virtually connect with the people behind the Federal Constitutional Court. →



In order to also provide visitors with a glimpse of the iconic court building, the second glass cube showed large-scale photos of the courtroom and the building's exterior. These were supplemented by the installation "Input/Output" as well as an informative segment called "A number and its meaning". A conveyor with short keywords concerning milestones in the Federal Constitutional Court's history completed the exhibit. In front of the cube, placards with statements relating to fundamental rights invited visitors to take a stand by taking a photo of themselves with the statement of their choice. At night, hashtag projections on the ground in front of the cubes made the exhibit come alive.

The Unity Expo ended one day after the official ceremony marking the Day of German Unity on 3 October 2020, in which the Court's President and Vice-President participated. ■

Input/Output
Presentation of two trolleys representing two proceedings: the case files for the respective proceedings are displayed on the trolley (input) while the corresponding decisions are displayed next to it (output).

International perspectives

Openness to Europe and the world is one of the defining features of the Basic Law. The Federal Constitutional Court, too, embraces this notion as it exercises its mandate within the international legal order and as part of a global community of constitutional courts.

The legal environment in which the Federal Constitutional Court operates comprises three main bodies of law: in the interpretation and application of **domestic constitutional law**, the Court takes account of **international law** and its guiding influence on the domestic legal order – which is especially true for the European Convention on Human Rights; the work of the Court is furthermore informed by **European Union law**, which is directly applicable in Germany and shapes domestic legislation on a wide range of subject matters. Decisions rendered by the Federal Constitutional Court in turn provide impetus for legal developments at the European and international level.

Over the past decades, the Federal Constitutional Court has developed, in its case-law, various mechanisms and standards of review designed to reconcile and balance the German legal order with international law and EU law to the greatest extent possible. This is achieved, inter alia, by relying on the principle of the Basic Law's openness to international and European law in the interpretation of the Constitution. Affirming the **multi-level cooperation of European courts** *(Europäischer Gerichtsverbund)* in the exercise of its judicial mandate, the Federal Constitutional Court maintains a cooperative relationship with the Court of Justice of the European Union and the European Court of Human Rights. At the same time, the Federal Constitutional Court seeks to safeguard the inviolable core of the Basic Law – the constitutional identity –, which is enshrined in the eternity clause and is thus beyond the reach of constitutional amendment, and to protect essential national competences, ensuring that these constitutional values and interests are not undermined in the context of advancing globalisation and European integration. In 2020, the Federal Constitutional Court reiterated the applicable constitutional standards in several decisions, as discussed further in the chapter → *Cases*.

Recognising the challenges of a globalised world, the Federal Constitutional Court is committed to promoting international exchange. By providing English translations of important decisions and press releases, the Court seeks to facilitate the dissemination of its case-law beyond the German-speaking discourse, and to foster mutual understanding and reception within the legal communities in Europe and beyond. Thematic collections of the Court's decisions, published in English translation in the print series "Decisions of the *Bundesverfassungsgericht*", provide access to distinct lines of case-law. The Court also monitors developments in constitutional, international and European law in other jurisdictions. Moreover, the Federal Constitutional Court takes on an active role in different multilateral networks, such as the Conference of European Constitutional Courts, and maintains good working relations at bilateral level to foster the ongoing **institutional and professional dialogue** with the Court of Justice of the European Union, the European Court of Human Rights and constitutional courts in other countries, especially other EU Member States. There are normally ample opportunities for exchange as the Justices of the Federal Constitutional Court regularly visit their counterparts at foreign and international courts and tribunals, or welcome delegations in Karlsruhe.

In 2020, the COVID-19 pandemic made such personal exchanges across borders all but impossible, at least in their traditional format. Numerous visits abroad and meetings in Karlsruhe could not go ahead as planned, and the parties involved agreed to postpone them.

Against this backdrop, the Federal Constitutional Court was all the more grateful for the opportunity to continue its dialogue with the Court of Justice of the European Union by hosting a meeting in Karlsruhe. In October, the Federal Constitutional Court welcomed a delegation from the Court of Justice of the European Union headed by its President Prof. Dr. Koen Lenaerts. The main topics of discussion in the working sessions held during the one-day visit were judicial independence and the multi-level cooperation of European courts. The discussions promoted mutual understanding and further strengthened the relations between the two Courts. Such meetings take place regularly, with Luxembourg and Karlsruhe taking turns in hosting the exchange. ■

Press Release of 20 October 2020 on the delegation visit from the Court of Justice of the European Union

A newsletter provides regular updates on new English-language content published on the Court's website. The newsletter is available upon subscription.

Delegation visit from the Court of Justice of the European Union

Take a look behind the scenes

What is the importance of fundamental rights in citizens' everyday lives?
What is the role of the Federal Constitutional Court in this regard?
And what values embraced by the Court are reflected in its building architecture?

Guided tours provide answers to these and many other questions. As a citizens' court (*Bürgergericht*), the Federal Constitutional Court opens its doors to a large number of visitors from Germany and abroad every year. While touring the building, visitors have a unique opportunity to learn more about the functions, work and organisation of the Federal Constitutional Court.

Over the years, guided tours have become increasingly popular. On average, more than 300 guided tours with **over 8,000 visitors** take place every year (as of 2019; due to restrictions related to the COVID-19 pandemic there were only 1,390 visitors in 2020). In addition, the Court holds open days on special occasions such as major anniversaries, inviting thousands of visitors to take a look behind the scenes.

Given the high demand for guided tours, the Federal Constitutional Court would not be able to meet the standards of transparency and public accessibility it has set for itself without the dedication and commitment of its staff members, who volunteer to answer citizens' questions about the Federal Constitutional Court and also offer guided tours in English upon request. During a guided tour, visitors get the chance to discover different parts of the court building, including the **courtroom, the reception room, the plenary room and the exhibition on display in the entrance hall to the library "The Court's first twenty years".**

The plenary room

Portrait gallery of former Justices

Entrance hall to the Court's library

Generally, any group of 10 to 40 people can arrange for a guided tour. The Court receives all sorts of groups ranging from field trips of pupils in ninth grade and higher, university students, company and staff outings, different clubs and associations and many other groups. Individuals and groups of fewer than 10 people can join a public tour; such public tours are very popular and take place approximately six times per year.

Persons interested in visiting the Federal Constitutional Court can register for a tour on the Court's website under "Visitors' service", as soon as tours are possible again in view of the pandemic. ■

Every person
shall have the right
to free development
of his personality
insofar as he does not
violate the rights of others
or offend against
the constitutional order
or the moral law.

Art. 2(1) of the Basic Law

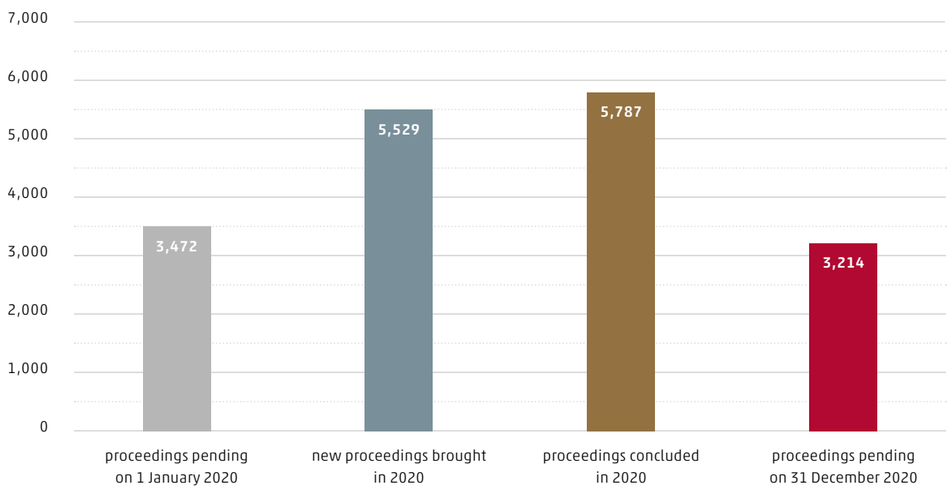
2020 judicial year

The Federal Constitutional Court's caseload remained high in 2020. The number of new cases in the Register of Proceedings rose to 5,529. The General Register, too, saw a significant increase in cases. The submissions and procedural applications entered into the General Register, some of which are typically transferred to the Register of Proceedings at a later stage, even reached a record high of more than 10,000 submissions in total.

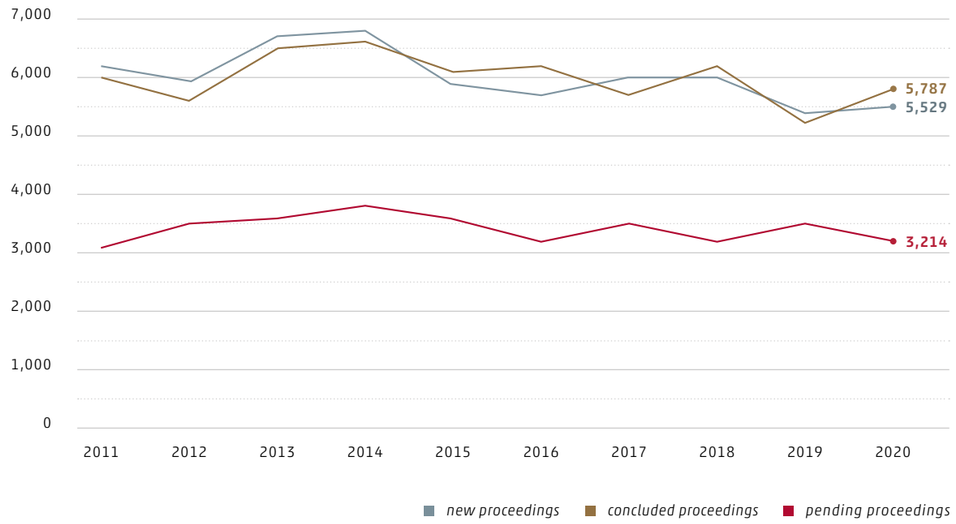
Once again, the Court's day-to-day work was dominated by numerous proceedings decided in the Chambers. The Chambers concluded 5,320 proceedings, a considerable share of which concerned measures to curb the COVID-19 pandemic. Overall, more than 880 matters related to COVID-19 were recorded in the Register of Proceedings and in the General Register. Moreover, the Senate proceedings, which are more comprehensive in scope and therefore time-consuming, also contributed significantly to the Court's high workload. Selected decisions rendered by the Senates and by the Chambers are presented in the chapter *Cases* (→ p. 59).

Despite the rising number of new proceedings, the Court succeeded in concluding significantly more proceedings than were recorded as new cases in the Register of Proceedings. Thus, the overall number of pending proceedings decreased from almost 3,500 to about 3,200 proceedings.

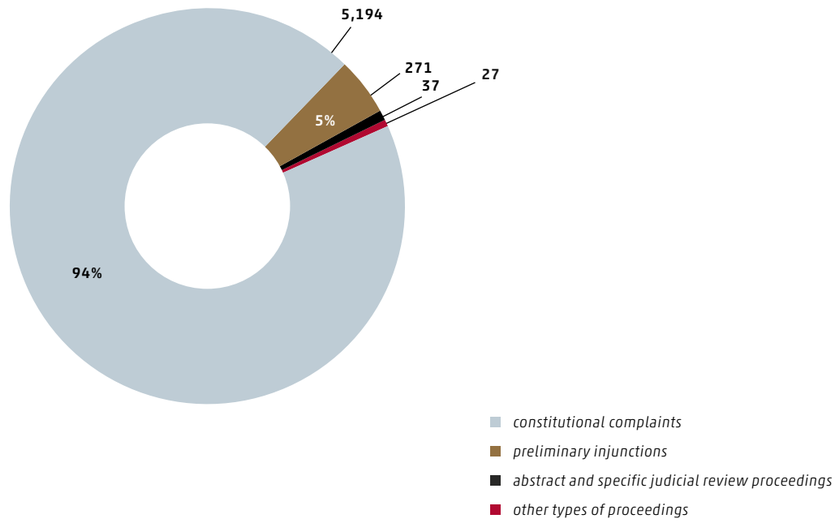
Overview of proceedings 2020



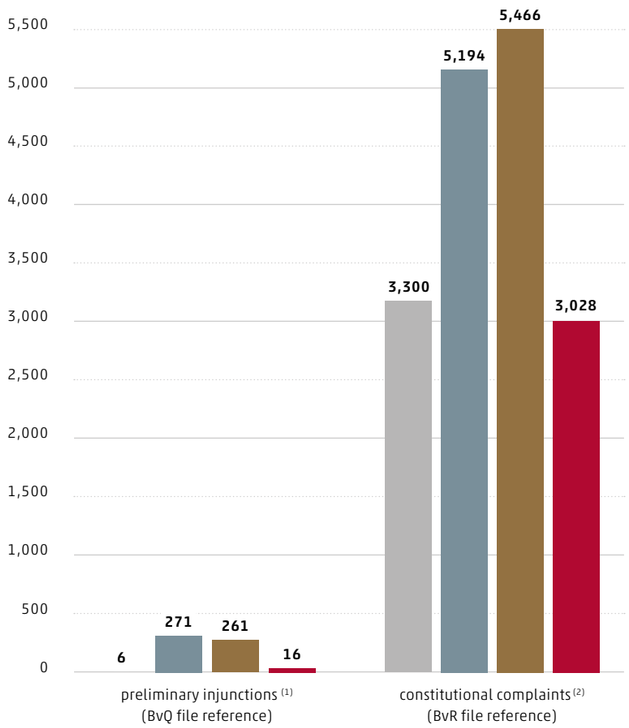
Number of proceedings over the last ten years



New proceedings brought in 2020 by type of proceedings

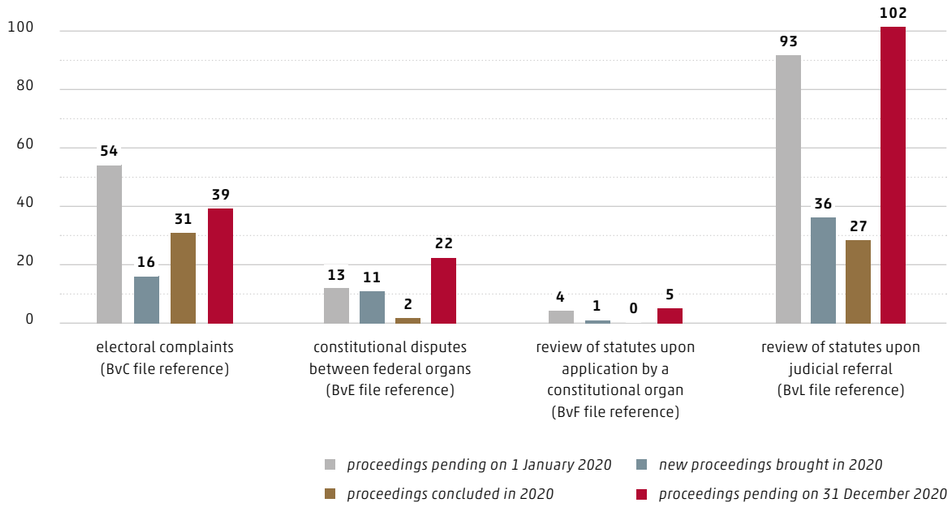


Breakdown of cases by type of proceedings

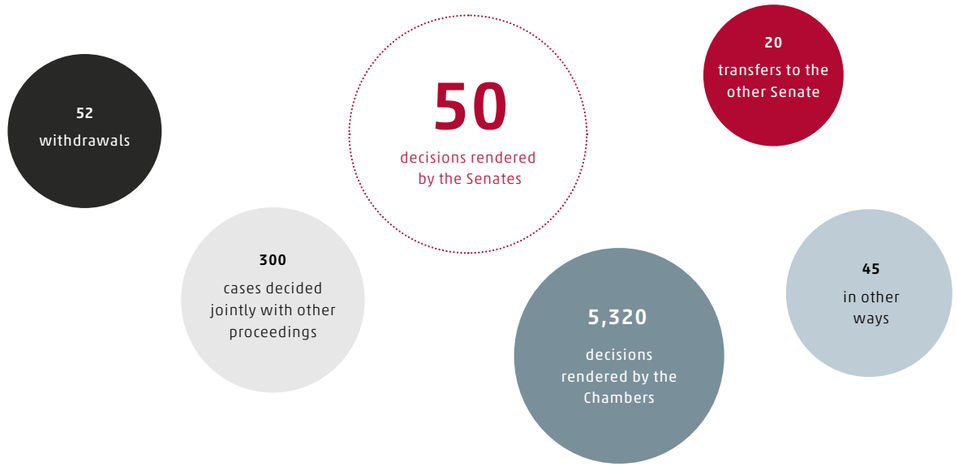


(1) Before rendering its final decision in the principal proceedings, the Federal Constitutional Court may provisionally decide a matter by way of preliminary injunction, for instance if this is urgently required to avert severe detriment.

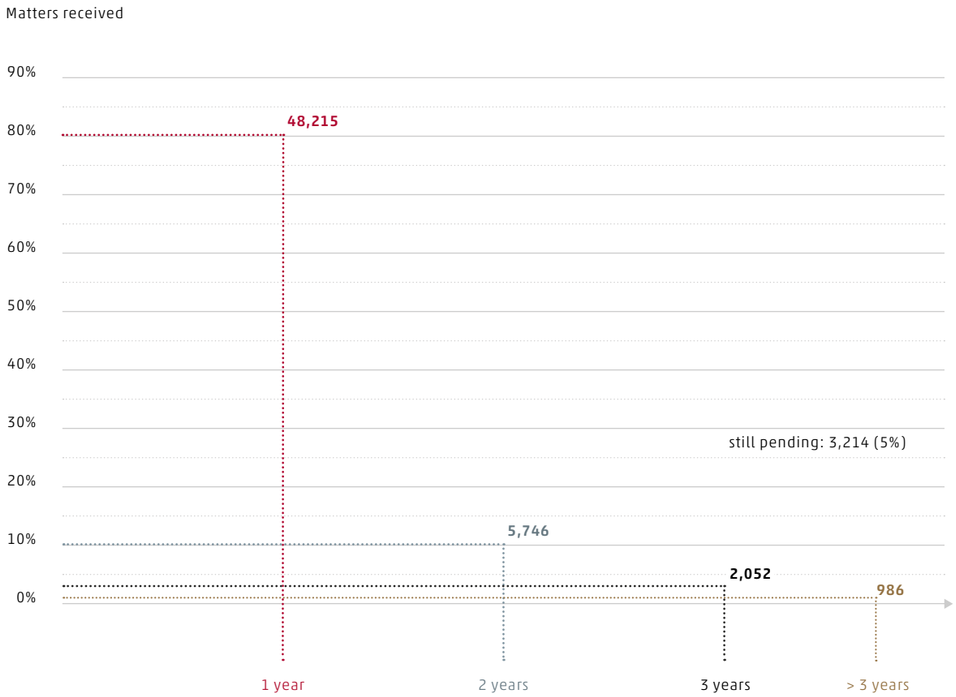
(2) constitutional complaints lodged with legal representation: 2,209 (43%), constitutional complaints lodged without legal representation: 2,985 (57%)



Conclusion of proceedings



Average duration of proceedings 2011 to 2020



The constitutional complaint

The Federal Constitutional Court is a citizens' court. This is how it is perceived by the public, and also how it sees itself. The Court's role as a court for ordinary people has been cemented by one type of proceedings in particular: the constitutional complaint.

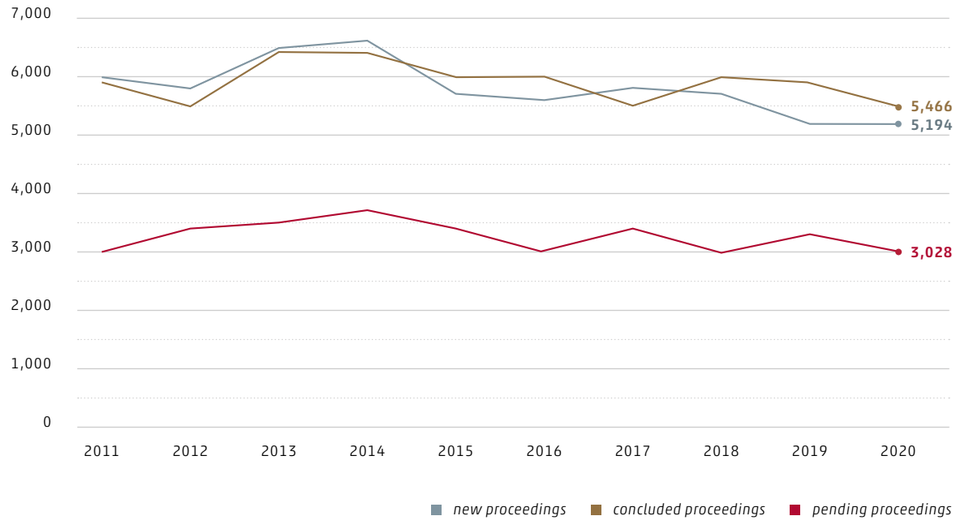
Any person may lodge a constitutional complaint claiming that their fundamental rights or equivalent rights have been directly violated by an act of public authority. No court fees are charged in constitutional complaint proceedings, nor do complainants have to be represented by a lawyer. The Federal Constitutional Court thus has a dual role, serving as both a **court for state matters** deciding on disputes between state organs, and a **fundamental rights court granting direct access to individuals** – a right that is widely used. Constitutional complaints make up the vast majority of all cases received. This distinguishes the Federal Constitutional Court from many other jurisdictions, and it is precisely for this reason that it has often served as a model for other countries, which have introduced the constitutional complaint into their judicial systems.

The 'acts of public authority' challenged by constitutional complaint are for the most part decisions of the authorities or the courts, such as judgments or administrative decisions. The most common type of constitutional complaint are complaints challenging decisions of the ordinary courts (usually judgments rendered by the final courts of appeal). These complaints are known as ***Urteilsverfassungsbeschwerden*** ('complaints challenging judgments'). Constitutional complaints directly challenging legislation – known as ***Rechtssatzverfassungsbeschwerden*** – are less common. The Court generally only decides on a constitutional complaint – i.e. the complaint is only 'admissible' – if all possibilities of legal recourse before the ordinary courts have been exhausted. It must also appear possible, based on the complainant's assertions, that the challenged act is not merely incompatible with ordinary law but specifically in breach of constitutional law.

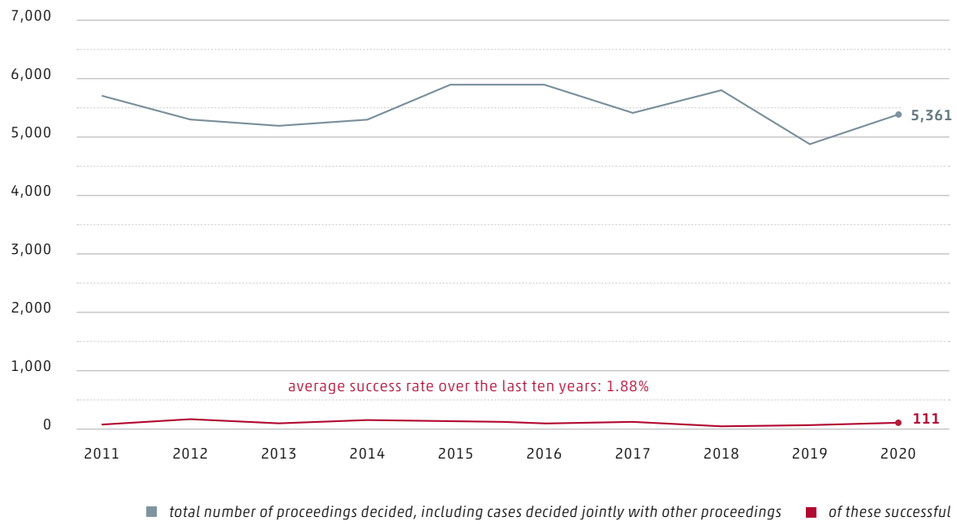
When the Federal Constitutional Court receives a constitutional complaint, it first examines whether the complaint is to be admitted for decision. This is generally done by one of the **Chambers** of the Federal Constitutional Court. A Chamber is made up of **three Justices**, with one Justice designated as the reporting Justice, which means that this Justice prepares 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: an admissible constitutional complaint must be admitted for decision if it has general constitutional significance or if it is necessary to enforce the complainant's constitutionally protected rights. Therefore, every decision not to admit a constitutional complaint is preceded by thorough legal analysis. Judicial clerks assist the Justices with this analysis. Each constitutional complaint will be examined by at least three Justices; their decision in the Chamber must be unanimous.

If a constitutional complaint is successful, the Federal Constitutional Court can issue various declarations or orders: it can declare an act of public authority to be unconstitutional, reverse an unconstitutional decision and remand the matter to a competent court or declare a law void – however, this latter declaration can only be made by the Senate, sitting with eight Justices.

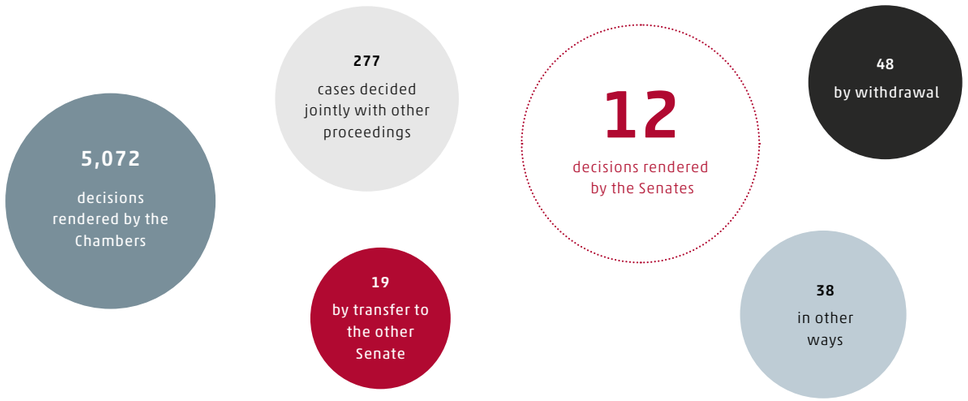
Constitutional complaint proceedings over the last ten years



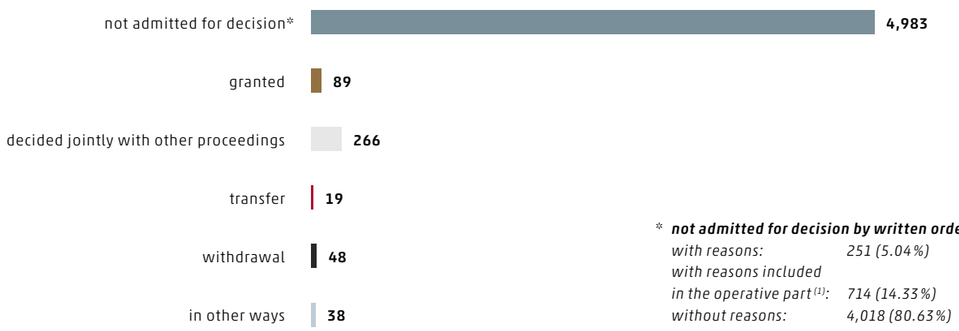
Successful constitutional complaints in relation to the total number of constitutional complaint proceedings decided per year



Proceedings concluded



Proceedings concluded by the Chambers



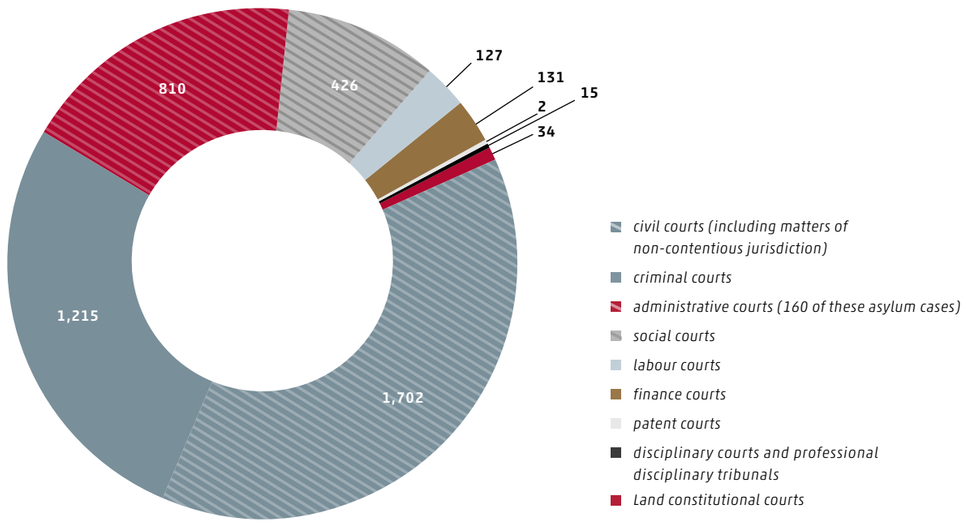
* ***not admitted for decision by written order***

with reasons:	*251 (5.04%)*
with reasons included in the operative part [1]:	*714 (14.33%)*
without reasons:	*4,018 (80.63%)*

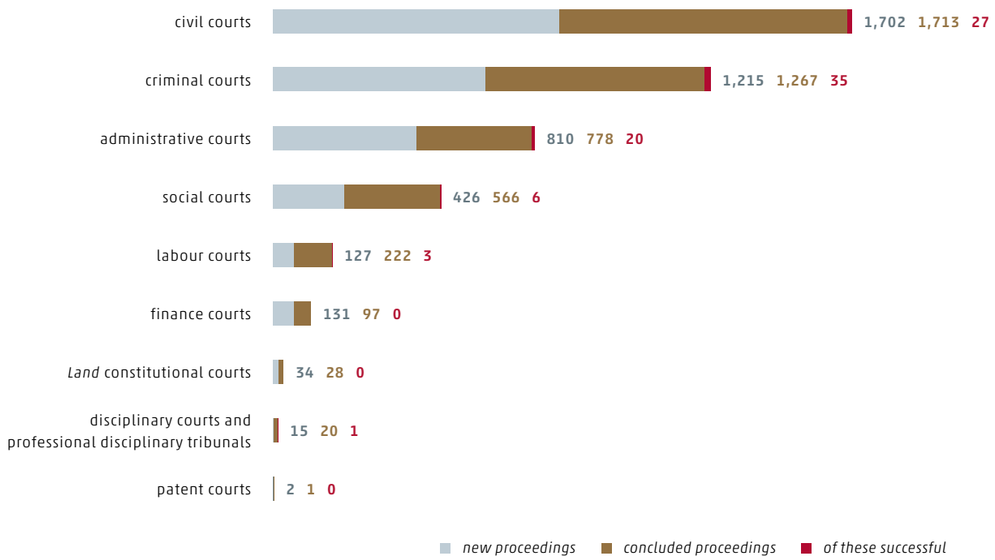
(1) Where the Chamber's reasoning for not admitting a constitutional complaint for decision is very brief (e.g. half a sentence), it is incorporated into the operative part rather than set out in separate reasons attached to the order.

Challenged acts of public authority

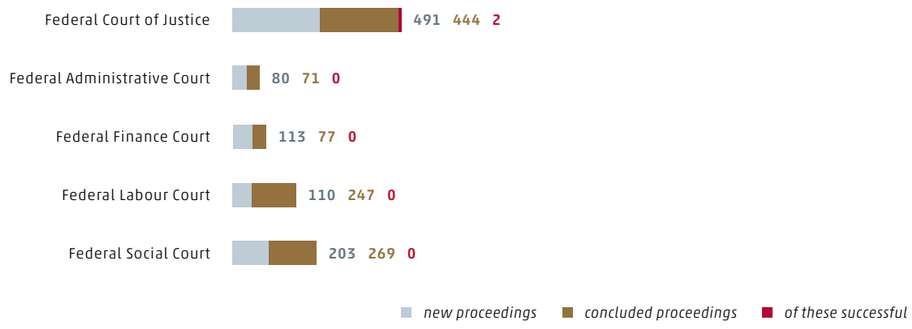
Challenged decisions rendered by the ordinary courts



New proceedings, concluded proceedings and success rates for all constitutional complaints directed against court decisions



New proceedings, concluded proceedings and success rates for constitutional complaints directed against decisions of the supreme federal courts



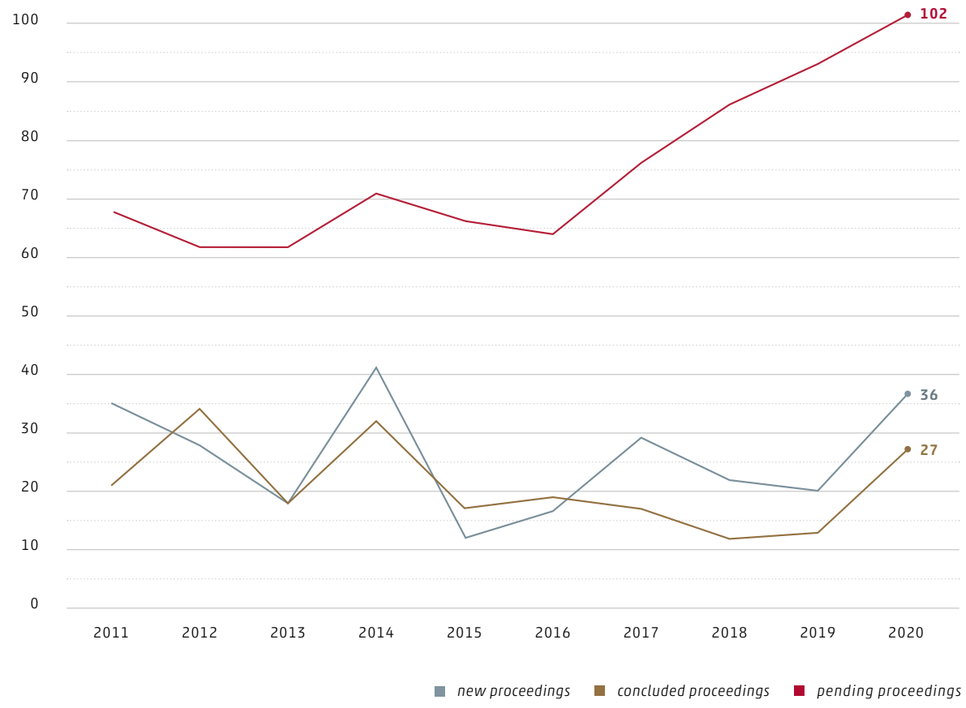
Judicial review of statutes

In judicial review proceedings, the Federal Constitutional Court is called upon to decide whether federal or *Land* legislation is compatible with the Basic Law.

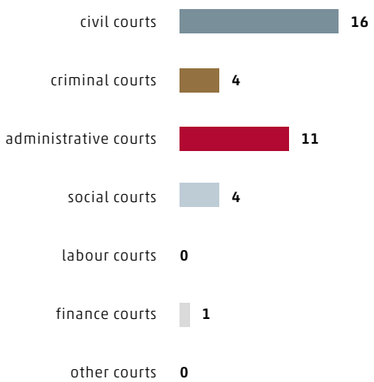
Specific judicial review proceedings are governed by Art. 100(1) of the Basic Law. This type of proceedings can be initiated by the ordinary courts, for example by criminal or civil courts or by administrative, social, finance or labour courts. These proceedings are called "specific" because they are always linked to a specific legal dispute. If a judge, in a case before the ordinary courts, would have to apply a law that they consider to be unconstitutional, they may not decide on the validity of the law themselves. Rather, they must refer the matter to the Federal Constitutional Court for a decision as to that law's compatibility with the Basic Law. Only the Federal Constitutional Court can make a binding decision declaring an act of Parliament unconstitutional.

Another type of judicial review are **abstract judicial review** proceedings, which are governed by Art. 93(1) nos. 2 and 2a of the Basic Law. In this type of proceedings, the Federal Constitutional Court is called upon to decide on the constitutionality of legislation at the request of the Federal Government, one quarter of the members of the *Bundestag* or a *Land* government. In certain special cases, review proceedings may also be initiated by the *Bundesrat* or a *Land* parliament. Abstract judicial review proceedings allow for a review of legislation that is not triggered by any pending legal dispute. Such proceedings do not occur very often, but when they do, they typically raise very important questions.

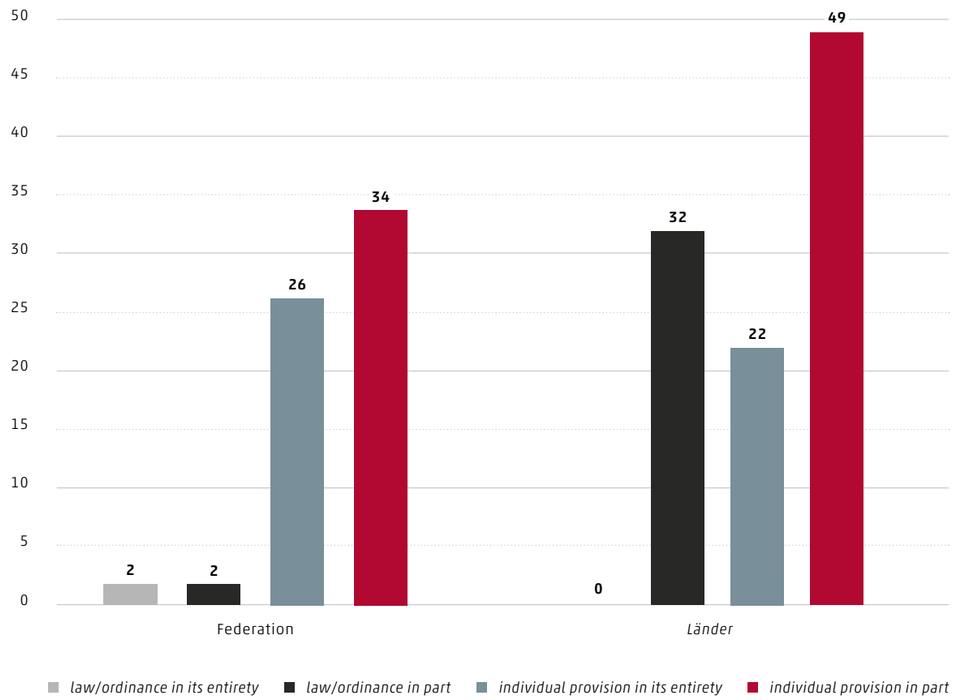
Specific judicial review proceedings over the last ten years



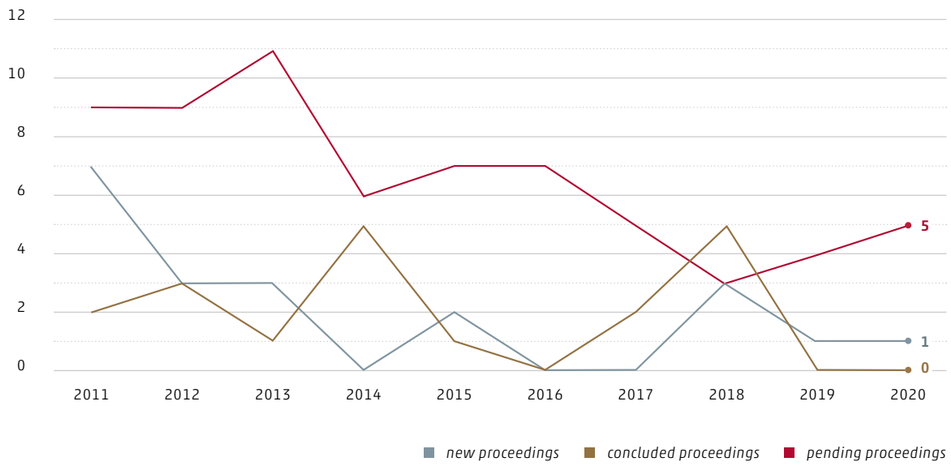
Referring jurisdiction in specific judicial review proceedings



Legal provisions found to be unconstitutional in the last ten years



Abstract judicial review proceedings over the last ten years



Role of the Court's General Register

Every year, the Federal Constitutional Court receives thousands of procedural applications and submissions. Within 24 hours, all new submissions are sorted and carefully assessed by the senior legal officers in charge of screening and assigning incoming mail, who have to be 'qualified to hold judicial office'*. As part of this process, it is determined whether a submission is to be entered into the Register of Proceedings or the General Register.

Constitutional complaints and other procedural applications are directly recorded in the Register of Proceedings and assigned to the competent Senate. However, in some cases they are first entered into the General Register, namely if they evidently have no prospects of success or if the internal allocation of competence is not straightforward.

The General Register records all **non-procedural submissions**, such as inquiries regarding pending or concluded proceedings and general correspondence. General correspondence accounts for about 4,000 submissions per year, for instance letters from persons that merely share personal opinions, ask for legal information or advice, or seek some other form of assistance. All these submissions are read by court staff and, where appropriate, receive a response.

Moreover, the General Register records **constitutional complaints** in cases where questions regarding the allocation of competence need to be resolved before the matter can be assigned internally. These constitutional complaints are provisionally entered into the General Register and transferred to the Register of Proceedings once the internal competence has been determined.

There are also cases where, in the same matter, a remedial action is pending before the ordinary courts, for instance a complaint seeking remedy for a violation of the right to be heard (*Anhörungsrüge*). In these cases, the matter brought before the Federal Constitutional Court will be recorded, or "shelved", in the General Register, either upon request or *ex officio*, until the proceedings before the ordinary courts have been concluded or the matter is transferred to the Register of Proceedings for other reasons.

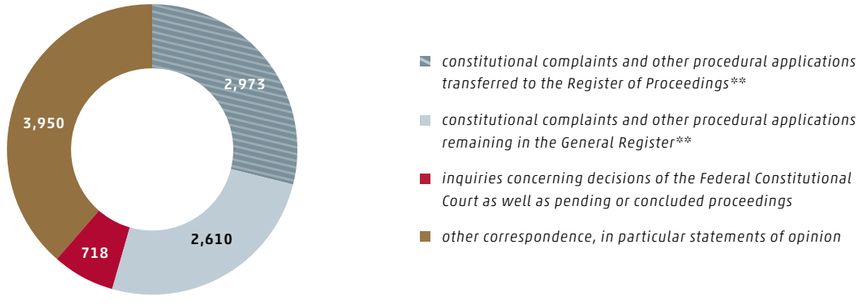
The General Register serves an important purpose with regard to constitutional complaints that have virtually no prospects of success. Such cases are handled by the senior legal officers heading the General Register, who again must be 'qualified to hold judicial office'. The legal officer in charge will contact the complainant and **provide information** explaining the Court's preliminary legal assessment regarding the prospects (or lack thereof) of the constitutional complaint. Before the senior legal officers conclude their assessment, the files are prepared and reviewed by court staff with special legal training (*Rechtspfleger*) in order to determine whether the constitutional complaint is clearly inadmissible or has no prospects of success for other reasons. This is the case, for instance, if the complaint was not filed within the statutory time limit, if the complainant failed to exhaust other legal remedies or if they did not sufficiently substantiate the asserted fundamental rights violations. The reasons why the constitutional complaint was found to be without prospects of success are then communicated to the complainant. It is up to the complainant to decide whether they want to pursue the matter further. If they wish to go ahead with the proceedings and request a judicial decision, the matter is transferred from the General Register to the Register of Proceedings and assigned to the competent Senate. However, after being informed about the lack of prospects, many complainants refrain from requesting a judicial decision (see statistics overleaf). In that case, the files are stored in the General Register for another five years, starting from the last procedural decision taken in that matter, and then destroyed.

In handling the preliminary assessment of incoming cases as well as the information provided to complainants, the General Register plays a crucial role in managing the Court's caseload, in particular as regards complaints that evidently have no prospects of success, as the following statistics** show:

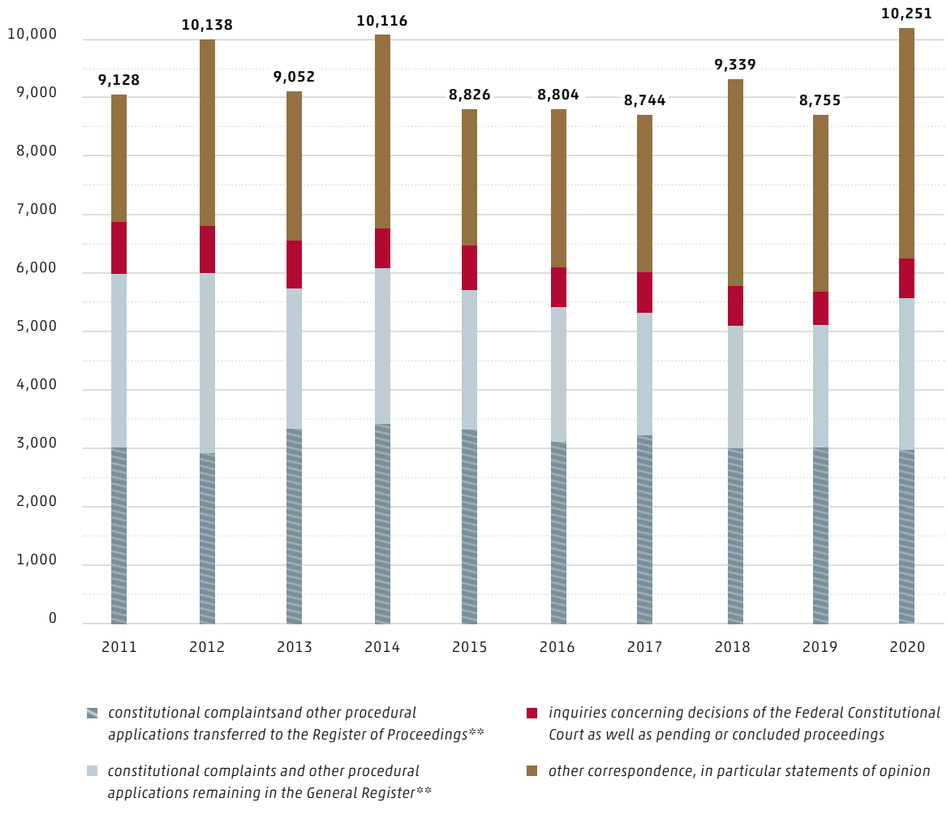
* *In Germany, 'qualification to hold judicial office' means that the person in question graduated from law school and completed a mandatory two-year traineeship (Rechtsreferendariat), and has passed both the First and the Second State Examination in Law. Upon attaining this qualification, they may call themselves Volljurist (fully qualified lawyer).*

** *These statistics on the General Register do not reflect constitutional complaints and other procedural applications that have been directly entered into the Register of Proceedings without being first recorded in the General Register. In 2020, these were 2,556 matters in total.*

Submissions received by the General Register 2020 – 10,251 in total, of these:

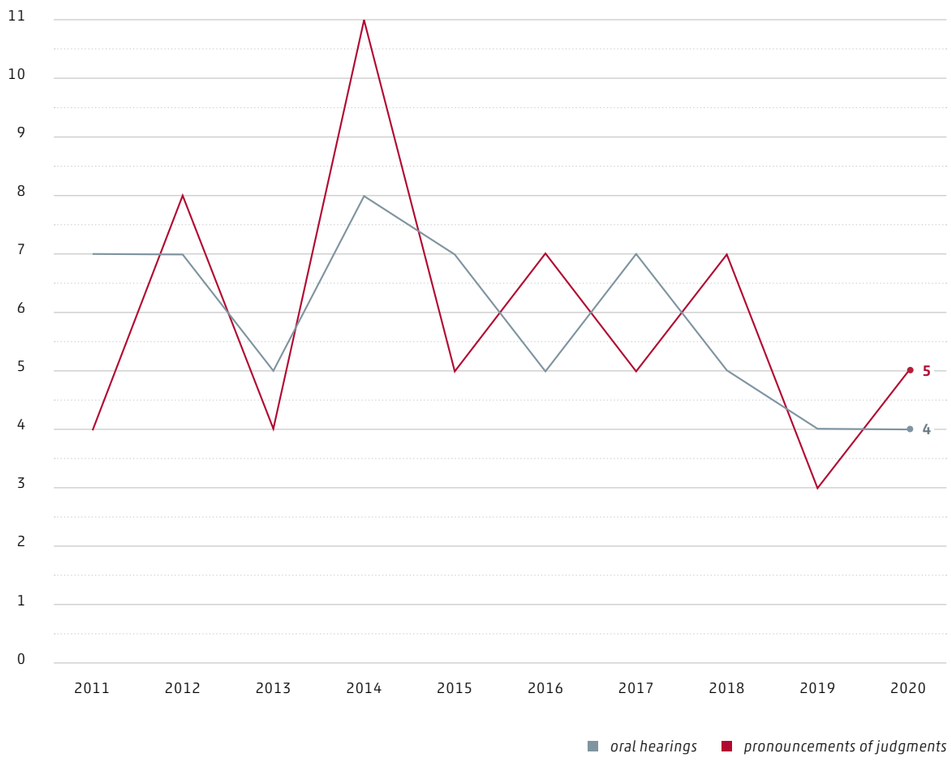


Submissions received by the General Register 2011 to 2020

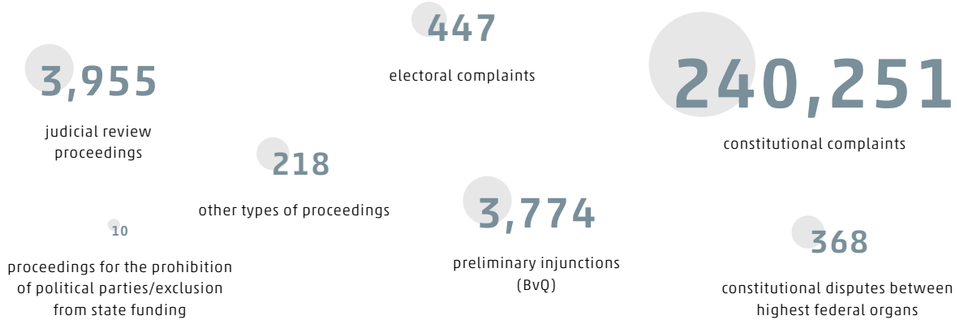


Oral hearings

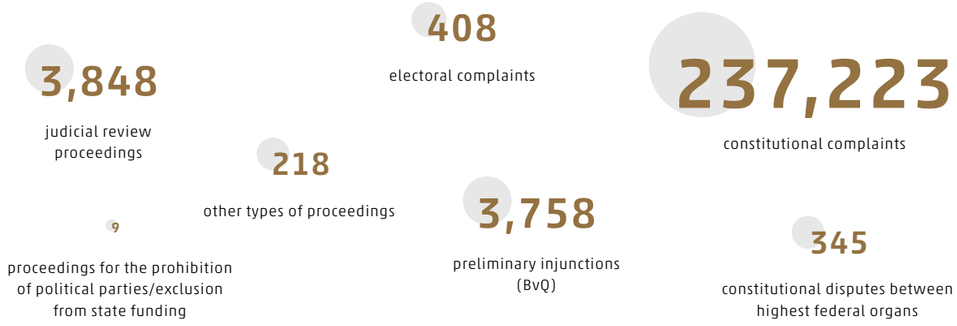
Overview of oral hearings and pronouncements of judgments



Proceedings brought since 1951



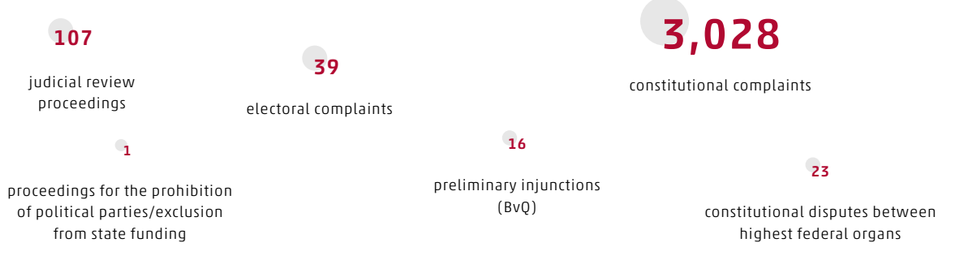
Proceedings concluded since 1951



Overall statistical trends since 1951

Total caseload since the establishment of the Federal Constitutional Court (September 1951)

Pending on 31 December 2020



All Germans shall have the right to assemble peacefully and unarmed without prior notification or permission. In the case of outdoor assemblies, this right may be restricted by or pursuant to a law.

Art. 8(1) and (2) of the Basic Law

Decisions on measures taken to combat the COVID-19 pandemic

The COVID-19 pandemic, and the measures taken to contain it, give rise to exceptional challenges in virtually all areas of life and society. The Federal Constitutional Court, too, adopted special measures to maintain its proper functioning.

The Federal Constitutional Court consists of two Senates, each of them with eight Justices. Both Senates have several Chambers, which are made up of three Justices. It is generally the Chambers that review whether or not constitutional complaints are to be admitted for decision (The constitutional complaint → p. 46).

Most notably, these measures ensured that, at all times, applications for preliminary injunctions could be submitted to the Court and were processed and decided by the competent Chambers. More than 880 matters recorded in the Register of Proceedings and the General Register (→ p. 54) concerned measures taken by the Federation and the *Länder* to contain the pandemic. These measures served the purpose of averting dangers to life and limb resulting from the spread of COVID-19, in line with the state's duty of protection as derived from the fundamental **right to life and (physical) integrity** under Art. 2(2) of the Basic Law. Even though the measures were aimed at protecting fundamental rights, they also led to interferences with other fundamental rights. In light of the resulting tension between opposing fundamental rights interests, the Federal Constitutional Court was called upon to exercise its power of constitutional review in relation to various subject matters.

As regards the applications for preliminary injunctions seeking to suspend social distancing rules and restrictions on movement, most applications were ultimately rejected by the Federal Constitutional Court on the basis of a weighing of consequences. The Court did recognise as particularly severe the detriment that would arise if the challenged measures were allowed to remain temporarily in force but were later found to be unconstitutional. However, the danger to life and limb that the measures sought to prevent was found to outweigh the resulting impairment of personal freedom.

A vast number of applications concerned **prohibitions of assemblies** issued by the authorities based on infection prevention and control legislation. In many of these cases, the Federal Constitutional Court dismissed as inadmissible the application to set aside a prohibition order on the grounds that the complainant had failed to first seek injunctive relief before the ordinary courts. In several cases, the Court found, on the basis of the weighing of consequences, that the interest in allowing the assembly to take place had to stand back behind the constitutionally protected interests of others in protection of life and limb, which concerned a large number of fundamental rights holders.

→

Yet other applications were successful, namely in cases where the Court found that the authorities issuing the challenged prohibitions had either entirely failed to recognise that the law actually affords them discretion or had failed to properly take into account the fundamental right to freedom of assembly in the exercise of their statutory discretion.

Prohibitions of religious services in churches, mosques and synagogues were another matter brought before the Federal Constitutional Court in preliminary injunction proceedings. Following a weighing of consequences, the Court rejected several applications seeking provisional suspension of such prohibitions. Nonetheless, the Court emphasised that the prohibition of religious services amounts to a particularly serious interference with freedom of faith, requiring that the authorities closely monitor the situation and continually re-evaluate their decision based on up-to-date information and a strict proportionality assessment. In a later decision, the Court did in fact object to a prohibition of religious services laid down in a coronavirus-related *Land* ordinance. The reason why the Court found the challenged provision to be unconstitutional was that the *Land* ordinance did not allow the possibility of granting exceptional permissions upon application on a case-by-case basis.

In other proceedings, the Federal Constitutional Court had to decide on pandemic-related restrictions imposed on schools and childcare facilities like nurseries and day care centres. Furthermore, a constitutional complaint was lodged to challenge the fact that *Abitur* (school-leaving) exams in physical education were being held despite the ongoing COVID-19 pandemic and despite the impact of containment measures on exam conditions. Other applicants sought preliminary injunctions against prohibitions and restrictions imposed on certain establishments, for instance the state-mandated **closure of restaurants and pubs** as well as gym facilities. Ultimately, these applications were unsuccessful, as were applications challenging the requirement to wear **face masks** in certain situations.

The Federal Constitutional Court did not admit for decision a constitutional complaint against a federal law limiting the grounds on which landlords can terminate rental contracts to provide protection in cases where tenants fall behind with rent payments due to the effects of the pandemic. The Court held that the constitutional complaint did not meet the procedural requirement to provide sufficient reasons.

Yet some citizens also filed complaints against the easing of restrictions related to the coronavirus – ultimately, these complaints, too, were unsuccessful. It is true that the fundamental right to life and physical integrity implies a **duty of the state to defend and protect human life**, and to protect the individual against impairments of their health. At the same time, the state is afforded a broad **margin of appreciation, assessment and manouevre**. Thus, the Federal Constitutional Court may only find that the state has violated its duty of protection if the state completely fails to take action, or if the measures taken are manifestly unsuitable or evidently fall short of achieving the aim of protection. Based on these standards, the Court held that a violation of the state's duty of protection was not ascertainable.

The ordinary courts, too, faced great challenges, especially with regard to trial hearings conducted in the midst of a pandemic. This concerned, in particular, proceedings in which elderly persons or persons with relevant pre-existing conditions had filed motions to have trial hearings to which they had been summoned postponed on the grounds that participating in the hearing would expose them to the risk of infection and the risk of suffering a severe case of COVID-19. In this context, the Federal Constitutional Court held that the Basic Law does not guarantee absolute protection against any potential health risk associated with criminal proceedings and trials. While the courts do have an obligation to provide protection against health risks, they also have a considerable margin of appreciation, assessment and manouevre in deciding which measures to take. ■

Freedom of faith and of conscience and freedom to profess a religious or philosophical creed shall be inviolable. The undisturbed practice of religion shall be guaranteed.

Art. 4(1) and (2) of the Basic Law

Decided 2020

In 2020, the Federal Constitutional Court rendered 50 Senate decisions, some of which are presented in this chapter.

Headscarf worn by legal trainee

Second Senate
File reference 2 BvR 1333/17
Press Release of 27 February 2020

In its order of 14 January 2020, the Federal Constitutional Court held that the ban on wearing an Islamic headscarf for legal trainees is constitutional.

Legal training in Germany is based on a two-tiered system: upon completing their law degree, aspiring lawyers undergo a two-year practical training programme (legal traineeship). In the course of the training, legal trainees also serve in the court system, performing judicial tasks and tasks of the public prosecution office. It is for the *Länder* to enact legislation setting out the specific structure of legal traineeships.

The complainant was a legal trainee in the *Land* Hesse. She wears a headscarf in public. As the law stands in Hesse, legal trainees have a duty of neutral conduct in respect of religious matters when they interact with the public, insofar as they are perceived as representatives of the judicial system or of state administration. With her constitutional complaint, the legal trainee challenged the ban on wearing a headscarf when performing judicial tasks and representing the public prosecution office. The Federal Constitutional Court held that the ban amounted to an interference with the trainee's freedom of faith, as guaranteed by Art. 4(1) and (2) of the Basic Law, and her freedom of occupational training. However, the Court considered this interference to be justified under constitutional law. It held that the state's ideological and religious neutrality, the proper functioning of the judicial system and the negative freedom of religion of other fundamental rights holders could justify the interference. Given that the state can only act through individuals, the state's duty to be neutral de facto implies a duty of neutral conduct for public officials. The **proper functioning of the judicial system** requires that society not only place trust in individual judges, but also in the judicial system as such. With regard to the negative freedom of religion of others, the Court posited that in the judicial system, the state wields public authority vis-à-vis the individual in the classic hierarchical sense, which can result in more serious impairments than public authority exercised in interdenominational state schools that are meant to reflect society's pluralism in religious matters. It is true that the Constitution accords high standing to freedom of faith. Yet the ban imposed on legal trainees, which prevents them from wearing a headscarf as a religious symbol, is limited to very few specific tasks in the course of their training. Moreover, trainees have no legal claim to be assigned the tasks in question, and the tasks are not included in the trainees' evaluation. It is therefore possible to complete a legal traineeship without performing any of these tasks. Ultimately, none of the conflicting legal interests outweighs the others to such an extent that the Constitution would require either that the trainee be prevented from wearing a headscarf, or that she be allowed to do so. Thus, the decision of the Hesse legislator must be respected.

Justice Maidowski submitted a **dissenting opinion**. In his view, the interference with the trainee's freedom of faith and freedom of training cannot be justified under the Constitution. He contends that the headscarf ban cannot be upheld, at least with regard to situations where it is evident for parties to proceedings and the public that the person they are facing is not actually a judge or prosecutor, but a person in training. According to Justice Maidowski, the challenged ban specifically concerns tasks that are particularly significant, in terms of quality, for the training objective pursued. He argues that the trainee's right to comply with a religious requirement and the right to complete the necessary legal training in full must therefore take precedence over the opposing interests. In his opinion, the provisions on which the ban is based must thus be interpreted in conformity with the Constitution. ■

The two-year legal traineeship is a prerequisite for admission to the Second State Examination in Law, and is thus mandatory for anyone seeking to become a judge or a practising lawyer.

Assisted suicide

Second Senate
File reference 2 BvR 2347/15 inter alia
Press Release of 26 February 2020

In 2015, the German Parliament adopted § 217 of the Criminal Code, which criminalised "assisted suicide services" ("*geschäftsmäßige Förderung der Selbsttötung*"). In Germany, assisting in another person's suicide is not punishable as long as the person wanting to commit suicide makes a free and autonomous decision and remains in control until the end. The new law made it a criminal offence to provide, procure or arrange the opportunity for another person to commit suicide, in the form of a professionalised service *(geschäftsmäßig).*

Constitutional complaints against that law were lodged by German and Swiss assisted suicide associations, seriously ill persons wanting to end their life with the help of such an association, as well as several doctors.

On 26 February 2020, the Federal Constitutional Court pronounced its judgment following a two-day oral hearing: the criminalisation of assisted suicide services is unconstitutional given that the prohibition renders it de facto impossible to commit suicide with the help of others. The Federal Constitutional Court was not called upon to decide on ethical, moral or religious views of suicide and suicide assistance. Its decision was based, in particular, on the fundamental rights of persons wanting to die and the fundamental rights of persons that potentially commit a criminal offence under the new law in the context of their work with an assisted suicide association or of their professional activities. In its judgment, the Federal Constitutional Court confirmed for the first time that the general right of personality (Art. 2(1) in conjunction with Art. 1(1) of the Basic Law) encompasses a **right to a self-determined death**, which protects the freedom to take one's own life. Its protection also extends to the freedom to seek assistance provided voluntarily by third parties for this purpose. This right applies in all stages of life and illness. Therefore, the right to a self-determined death is not contingent upon having reached a certain age or suffering from certain illnesses.

At the same time, the Federal Constitutional Court also emphasised that the rationale behind prohibiting assisted suicide services was understandable. The legislator wanted to prevent a situation where assisted suicide is considered normal in society; it also sought to protect elderly and ill persons from social expectations and pressure. In this respect, the Federal Constitutional Court reaffirmed the mandate of protection arising from the Basic Law, which requires that the state protect the **life of the individual** and avert risks to personal autonomy and free decision-making.

However, according to the Federal Constitutional Court's judgment, a general prohibition of assisted suicide services is excessive. Such a general prohibition renders it de facto impossible to make use of professionalised suicide assistance in Germany. This is because no doctor can be obliged to provide suicide assistance, and only very few doctors are willing to provide such assistance to begin with. The risk of committing a criminal offence under the challenged law makes it even less likely that doctors will be willing to help others in committing suicide. Individuals who want to make use of suicide assistance are left with no actual prospect of pursuing this option. Thus, § 217 of the Criminal Code largely vitiates the constitutionally protected right to take one's own life and to seek assistance from third parties to this end. The **freedom of personal self-determination and the autonomy of the individual**, which also encompass the right to a self-determined death, are thus no longer afforded sufficient protection. Based on these considerations, the Federal Constitutional Court concluded that the law in question amounts to a disproportionate interference with the right to a self-determined death and violates the Basic Law. Therefore, it declared the law void.

The general right of personality protects the "closer personal sphere", which is of special significance to the identity, self-determination and free development of the individual and thus merits special protection. This protection encompasses different elements, such as the right to one's own image and the right to informational self-determination in respect of personal data. The Federal Constitutional Court derives the general right of personality from two fundamental rights guarantees: Art. 2(1) of the Basic Law (general freedom of action) and Art. 1(1) of the Basic Law (human dignity).

Yet the judgment does not bar the German legislator from enacting a new framework governing suicide assistance in the future (e.g. requirements to obtain approval, obligations to provide information and counselling or a prohibition of dangerous practices). In particular, the legislator can set different requirements, depending on the relevant circumstances, with regard to establishing that the individual's resolution to commit suicide is sincere and lasting. Moreover, general suicide prevention and the further development of (palliative) care remain important and legitimate aims of the state. No one – **neither doctors nor anyone else** – can ever be obliged to provide suicide assistance **against their will**.

Where an individual decides to end their own life, having reached this decision based on how they personally define quality of life and a meaningful existence, their decision must ultimately be respected by state and society as an act of autonomous self-determination. ■

The ECB's asset purchase programme

Second Senate
File reference 2 BvR 859/15 inter alia
Press Release of 5 May 2020

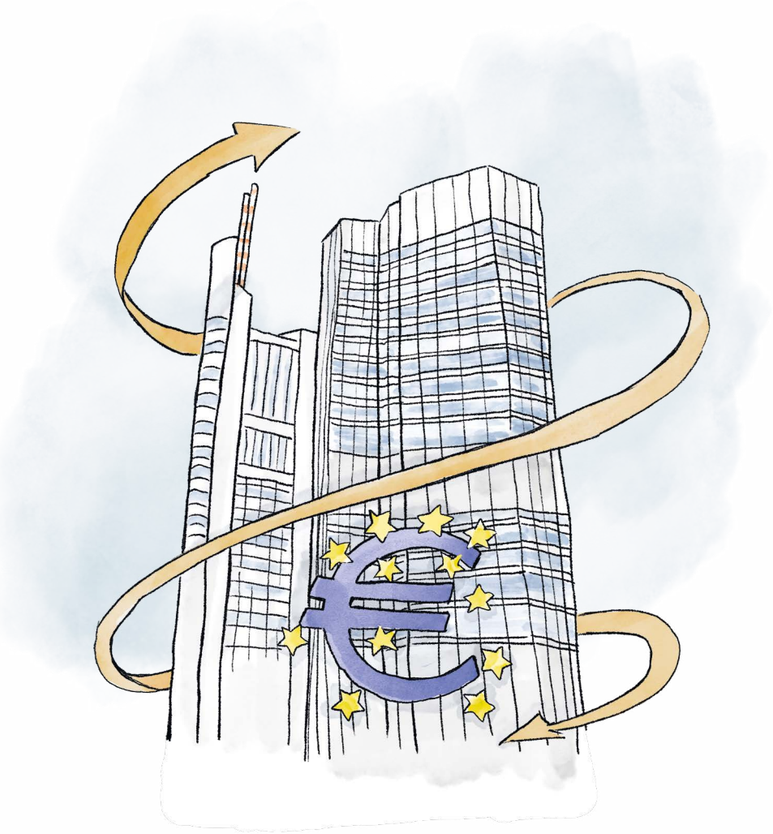
In its judgment of 5 May 2020 on the Public Sector Purchase Programme (PSPP), a bond-buying programme of the European Central Bank (ECB), the Federal Constitutional Court held, for the very first time, that a measure of an EU institution is not in line with the European order of competences and thus not binding on Germany.

The PSPP was launched by the ECB in 2015. Under the PSPP, the ECB, together with the national central banks of the euro area, purchased government bonds in the amount of roughly 2.5 trillion euros in order to increase money supply in the markets *(quantitative easing)*, aiming to stimulate consumption and investment spending in the euro area and ultimately raise inflation rates to levels of approximately 2%.

Based on the **right to democratic self-determination** enshrined in Art. 38(1) first sentence of the Basic Law, several citizens lodged constitutional complaints. In their view, the bond-buying scheme exceeds the ECB's mandate, which they argue is limited to monetary policy (e.g., interest and exchange rates) but does not cover economic policy.

It is, in principle, for the Court of Justice of the European Union (CJEU) to decide on the lawfulness of EU measures. Yet the Federal Constitutional Court may, in exceptional cases, object to measures taken by EU institutions, which includes the CJEU, if they act *ultra vires* – i.e. beyond their competences – and thus exceed the limits of the integration agenda assigned to them. The Federal Constitutional Court conducts this review with restraint and in a manner that is open to European law. Hence, the Court only determines whether there has been a **manifest and structurally significant exceeding of competences.** The *ultra vires* review aims to ensure that EU institutions cannot unilaterally expand their competences to the detriment of Member States and without the latter's consent, thereby depriving the *Bundestag* of its powers and undermining citizens' right to vote. Ultimately, this review serves to safeguard the core of the principle of democracy to which the Constitution affords absolute protection.

In 2017, the Federal Constitutional Court requested a preliminary ruling from the CJEU, raising concerns as to the lawfulness of the PSPP. By judgment of 11 December 2018 (*Weiss and Others*, C-493/17), the CJEU held that the purchase programme was within the scope of the ECB's mandate. →



The principle of proportionality is a general principle of law that is not only a cornerstone of German constitutional law but has also been recognised in European law and numerous foreign jurisdictions.

Under the proportionality test, the Federal Constitutional Court examines whether the challenged measure serves a legitimate aim and whether it is suitable, necessary and appropriate for achieving this aim. The last element (appropriateness) entails a balancing of the different interests affected by the measures.

In the context of European integration, proportionality informs the delimitation of competences between the EU and the Member States.

Yet the Federal Constitutional Court held that the CJEU's decision amounted to a manifest and structurally significant exceeding of competences, i.e. an *ultra vires* act, on the grounds that the CJEU **had failed to conduct an effective judicial review** of the PSPP. The CJEU had basically accepted the ECB's contentions without further scrutiny, in particular without determining whether the bond purchases were actually necessary to achieve the ECB's proclaimed objectives, and whether the resulting economic effects were excessive in relation to the aims pursued. The CJEU found these considerations to be irrelevant in its review. Given that EU institutions must adhere to the principle of proportionality (Art. 5(1) second sentence of the Treaty on European Union) in the exercise of their competences, this approach is not comprehensible and objectively arbitrary. As a result, the judgment rendered by the CJEU is, exceptionally, not binding on Germany, which is why it was incumbent upon the Federal Constitutional Court to conduct its own review of the PSPP's compatibility with the EU integration agenda.

The Federal Constitutional Court found that the ECB had exceeded its mandate, which means that the ECB, too, had acted *ultra vires*: it is not ascertainable that the ECB, in its decisions on the PSPP, did in fact consider effects of the bond purchases on economic policy matters (pensions, real estate prices, companies, banks etc.), an area for which the Member States have competence, nor can it be determined that the ECB balanced these effects against its monetary policy aims. It is, in other words, not ascertainable that any proportionality assessment was carried out at all.

Thus, the Federal Constitutional Court decided that, following a transitional period of no more than three months, the *Bundesbank* (German Central Bank) may no longer participate in the purchase of bonds or an increase of the monthly purchase pace, unless the ECB Governing Council demonstrates, in a comprehensible manner, that the PSPP satisfies the principle of proportionality. ■

Surveillance of foreign telecommunications by the Federal Intelligence Service

First Senate
File reference 1 BvR 2835/17
Press Release of 19 May 2020

Following disclosures by former US intelligence service employee Edward Snowden regarding global surveillance practices, the intelligence services in Germany, which had until then largely operated outside the public eye, became the subject of public debate. The NSA Committee of Inquiry established by the German *Bundestag* in response to these developments also examined the activities of the Federal Intelligence Service. The political debate led to an amendment of the Federal Intelligence Service Act, creating a statutory basis for the strategic surveillance of telecommunications of foreigners in other countries – the Federal Intelligence Service had engaged in this practice before, but the amendment spelled out these powers for the first time.

The **amended Federal Intelligence Service Act** allows the Federal Intelligence Service to intercept data from telecommunications networks (such as Internet hubs or satellite networks). From the entire data collected, the Federal Intelligence Service then tries to identify telecommunications that are of interest to the intelligence service by using search terms (selectors). This so-called **strategic surveillance** is not tied to specific grounds or suspicions; rather, in relation to communications between foreigners in other countries, these surveillance powers can generally be used to obtain information indicating situations of danger or general intelligence that is of interest to Germany in foreign or security policy matters. In practice, the Federal Intelligence Service primarily uses formal search terms (such as phone numbers or email addresses) that allow for the targeted surveillance of the telecommunications of specific individuals. Moreover, the Federal Intelligence Service Act provides a basis for cooperation with foreign intelligence services, including through search terms determined by a foreign intelligence service that are used by the Federal Intelligence Service, which automatically shares the resulting matches with the foreign service.

This form of foreign surveillance was challenged with a constitutional complaint by journalists whose work includes reporting on human rights violations in conflict zones abroad. They asserted that they could be subjected to such surveillance measures and that this violated their fundamental rights. In the two-day oral hearing open to the public, the Federal Constitutional Court had participants, including the President of the Federal Intelligence Service, explain in detail the practice of foreign surveillance conducted by the Federal Intelligence Service.

On 19 May 2020, the Federal Constitutional Court rendered its judgment, deciding that the current legal framework is **unconstitutional**. At the same time, it emphasised that there is an exceptionally significant public interest in effective foreign surveillance. Providing intelligence to the Federal Government for its decision-making on matters of foreign and security policy allows Germany to assert itself in the realm of international power politics and can prevent erroneous decisions that could have serious consequences. Therefore, **strategic telecommunications surveillance** is in principle **compatible with the Basic Law**. However, fundamental rights substantially limit the legislator's actions in this context, setting **specific requirements regarding the design** of such surveillance. The challenged amendment of the Federal Intelligence Service Act does not satisfy these requirements.

Formally, the Federal Intelligence Service Act violates the constitutional requirement that the law expressly specify affected fundamental rights. The legislator had wrongly assumed that the fundamental rights of the Basic Law were not applicable vis-à-vis foreigners abroad and thus did not include a reference to the **privacy of telecommunications** (Art. 10 of the Basic Law) in the amended Act. However, telecommunications privacy and freedom of the press do **protect foreigners**. The Court's decision concerning the Federal Intelligence Service Act affirms for the first time that these rights are not merely applicable within Germany. Under Art. 1(3) of the Basic Law, German state authority is comprehensively bound by the fundamental rights of the Basic Law, including when it acts **in other countries**. In any event, this holds true for the fundamental rights at issue in the present case, which, in their dimension as rights against state interference, protect against surveillance. The binding effect of fundamental rights on German state authority, including with regard to state action abroad, ensures that fundamental rights protection is not undermined in an internationalised world.

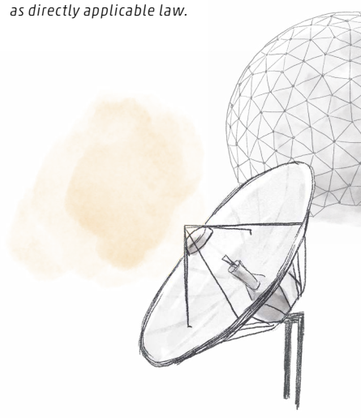
Substantively, too, the Federal Intelligence Service Act is **unconstitutional**, because the legislator failed to restrict the statutory powers of strategic foreign surveillance in accordance with the principle of proportionality. The Basic Law does not allow for global and sweeping surveillance. Therefore, the legislator must provide for restrictions limiting the data volume and geographical area covered by surveillance. The legislator must determine the purposes of surveillance with sufficient precision and clearly provide for the removal of telecommunications data of Germans and persons within Germany. Moreover, safeguards are required to protect the core of private life, as well as relationships of trust, for instance with lawyers, clerics or journalists. The legislator must also set clear and limiting rules for the cooperation with foreign services, which is in principle permissible, and ensure that shared data is handled in accordance with the rule of law. Furthermore, the legislator must ensure that intelligence obtained through strategic surveillance of foreign telecommunications may only be shared with and used by other domestic and foreign bodies for particularly weighty purposes, unless intelligence is used solely to provide information to the Federal Government.

In relation to surveillance of foreign telecommunications, it is almost impossible for individuals to obtain effective legal protection. This is because they are usually not aware of covert measures targeting them. Given the need for secrecy in intelligence work, this is in principle permissible under constitutional law. Yet to compensate for this, the constitutional requirements for effective oversight of the Federal Intelligence Service's work are especially stringent. The legislator must ensure both oversight resembling judicial review and administrative oversight through independent and autonomous oversight bodies. The work of these bodies must not be obstructed by the third party rule.

Given that intelligence provided by the Federal Intelligence Service is of great significance for ensuring the Federal Government's room for manoeuvre, the Federal Constitutional Court ordered that the challenged provisions continue to apply provisionally, until 31 December 2021 at the latest. ■

According to the requirement to specify affected fundamental rights (Art. 19(1) second sentence of the Basic Law), where a fundamental right is restricted "by" or "pursuant to" a law, the law must specify this fundamental right and state the constitutional article in which the right is enshrined.

Art. 1(3) of the Basic Law
The following fundamental rights shall bind the legislature, the executive and the judiciary as directly applicable law.



The third party rule is a rule of conduct in the context of international intelligence cooperation. According to this rule, information shared with a partner service must not be disclosed to third parties by the receiving service without the consent of the source, i.e. the intelligence service providing the data.

Impact of divorce on workplace pensions

First Senate
File reference 1 BvL 5/18
Press Release of 26 May 2020

One of the defining features of marriage, as a bond meant to last for life, is that both partners enjoy equal rights (Art. 6(1) and Art. 3(2) of the Basic Law)*. In this context, the contributions both spouses make with regard to housekeeping, childcare and employment are considered to be of equal value. For that reason, both spouses are in principle entitled to an equal share of the assets generated jointly over the course of their marriage.

In case of divorce, the **pension sharing** system serves to ensure that the old-age or disability pension entitlements (in particular future pension benefits) acquired by the spouses over the course of their marriage are **divided equally**. In practice, the family courts must ensure that such pension sharing actually results in the equal division of all pension entitlements.

Generally, this is achieved through internal division within the pension fund: A direct pension entitlement for the receiving spouse is established vis-à-vis the pension fund of the spouse obligated to transfer a share of their pension. If, for instance, the spouse obligated to transfer a share of their pension has an entitlement vis-à-vis a statutory or private pension scheme, a part of this pension entitlement is transferred, by way of internal division, to the other spouse following divorce. Ultimately, both divorced spouses then have their own pension entitlement vis-à-vis the same pension fund.

The entitlement is only transferred to a different pension fund, by way of **external division**, in exceptional cases. If the external division method is applied, the entitlement is not established vis-à-vis the pension fund of the spouse who is obligated to transfer a share of their pension, but vis-à-vis another pension fund. In that case, receiving spouses can choose how they want to use their share (i.e. the capital value of their share from the pension entitlement of the spouse obligated to transfer a share) for their retirement provision, for example whether they want to pay this share as a contribution into an existing pension scheme, the statutory pension scheme or a direct insurance scheme. If the share to which a spouse is entitled is rather small, the pension fund can request that the external division method be used to avoid the costs of managing small entitlements. Apart from such cases of small entitlements, § 17 of the Pension Sharing Act authorises the use of the external division method to a far greater extent for certain forms of **workplace pensions**. This is meant to reflect the fact that companies have no interest in including divorced spouses of their employees in their workplace pension schemes, which they would be required to do in case of internal division, as the employer would have to dedicate additional resources to managing the transferred entitlement even though the benefitting spouses do not work for their company at all.

This statutory provision was referred to the Federal Constitutional Court in specific judicial review proceedings (→p. 51). The order of referral revolves around so-called transfer losses. Such losses arise when capital is transferred from a workplace pension scheme to another pension fund. Especially when interest rates are low, such a transfer leads to substantial losses due to the way in which the capital value is calculated. The spouse making contributions to a workplace pension scheme loses half of the pension entitlement they acquired over the course of their marriage, while the other spouse ultimately receives substantially less than half of that entitlement. In practice, these transfer losses particularly affect women, since they are more often the ones not gainfully employed or only working part-time, especially because of childcare, while their husbands are typically the ones who work full time and pay into a workplace pension scheme, and who can therefore remain in that pension scheme after divorce.

The Federal Constitutional Court held that this statutory framework is compatible with the spouses' fundamental right to property if it is **applied in conformity with the Constitution.**

However, if transfer losses arise, the spouse obligated to transfer a share of their pension makes a sacrifice that misses its purpose given that the reduction in their entitlement is not reflected by the acquisition of a corresponding entitlement by the other spouse. The **fundamental right to property of the receiving spouse** is also restricted by external division. This is because they must expect that their pension entitlements are lower than the amount deducted from the share of the obligated person and lower than what they would receive themselves if an entitlement vis-à-vis the original pension fund were transferred to them by way of internal division.

The fundamental right to property of the spouses must be balanced against the **legitimate interests of employers** that offer workplace pension schemes. Employers usually wish to be spared any additional burdens brought about by internal division, and **any further costs** in case of external division.

The Federal Constitutional Court held that the legal framework does not preclude the courts from striking an adequate balance between these conflicting interests, nor does it prevent them from carrying out pension sharing by way of external division in a manner that is in conformity with the Constitution. It is **for the courts** to determine the transfer amounts payable in **the individual case** in a way that avoids **excessive transfer losses** and thus upholds the spouses' fundamental rights. The Basic Law does not set out the exact amount up to which a foreseeable reduction of pension payments can be tolerated under constitutional law, in which case the respective company may use the external division method to avoid further costs. Nor does the Basic Law prescribe how the transfer amount must be determined in the individual case. If transfer losses are excessive, the family court can set higher transfer amounts to compensate for these losses while allowing the employer to opt for internal division (and thus avoid any transfer losses). ■

Art. 14(1) of the Basic Law
Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.

* *Art. 6(1) of the Basic Law: Marriage and the family shall enjoy the special protection of the state.*
Art. 3(2) of the Basic Law: Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.

Subscriber data II

First Senate
File reference 1 BvR 1873/13 inter alia
Press Release of 17 July 2020

For the purposes of averting dangers to public security and fighting crime, security authorities may access personal data stored by mobile phone and Internet providers on their customers. However, the Federal Constitutional Court held that the legislator must set stricter requirements restricting such data access.

The possibility of requesting access to subscriber data allows security authorities to obtain certain information from telecommunications providers for the purposes of investigating crime (**law enforcement purposes**) and of preventing crime or averting dangers to public security (**public security purposes**). In the context of the manual procedure for obtaining subscriber data, a security authority can request data from a telecommunications provider, which must then transfer the stored subscriber data.

Subscriber data is personal data on customers stored by telecommunications providers. It may include a customer's name, address, date of birth, bank details, but also their phone numbers or IP addresses. By contrast, traffic data (e.g. location, time and duration of a call) or communication contents do not form part of subscriber data – thus, from the outset, such information cannot be accessed through the procedure for obtaining subscriber data at issue.

The legislator had enacted new provisions in relation to obtaining subscriber data; under the new framework, the transfer of such data was governed by the Telecommunications Act, while access to the data was governed by the individual federal laws applicable to the respective federal security authority. This new framework was enacted following an earlier decision of the Federal Constitutional Court from 2012, in which the Court had declared unconstitutional the provisions governing the procedure for obtaining subscriber data at the time (Subscriber data I). One of the complainants from the 2012 proceedings and several other individuals lodged constitutional complaints against the new provisions because, as mobile phone and Internet users, they believed their fundamental rights to be violated.

In its order of 27 May 2020, the Federal Constitutional Court held that the new provisions are also **unconstitutional** because the powers granted to the authorities result in disproportionate interferences with the fundamental rights of affected persons.

The Federal Constitutional Court emphasised that data access by the state through the procedure for obtaining subscriber data can be permissible because the aims pursued – public security and fighting crime – are legitimate interests that can in principle justify restrictions of fundamental rights. However, it held that the interferences with the **privacy of telecommunications** (Art. 10(1) of the Basic Law) and the **right to informational self-determination** (Art. 2(1) in conjunction with Art. 1(1) of the Basic Law) resulting from the measures must not be disproportionate. Therefore, the legislator must ensure that data access is sufficiently limited. The legislator must create two statutory bases that satisfy the requirements of proportionality – one for data transfer by the telecommunications providers and one for data access by the security authorities, similar to the image of a double door.

The federal security authorities include the Federal Police, the Federal Criminal Police Office, the Customs Criminal Investigations Office, the Federal Intelligence Service as the German foreign intelligence service, the Office for the Protection of the Constitution as the German domestic intelligence service and the Military Counter-Intelligence Service as the intelligence service of the Federal Armed Forces.

Order of the First Senate of 24 January 2012
File reference 1 BvR 1299/05
Press Release of 24 February 2012
(Subscriber data I)

The legislator did not give sufficient effect to these constitutional requirements when it set out a new legal framework for obtaining subscriber data. In particular, the statutory thresholds for the exercise of powers – that is, the conditions under which data transfer and access may take place – are not strict enough. In principle, it is only permissible to obtain subscriber data for public security purposes if there is a **specific danger**; for law enforcement purposes, there must at least be an **initial suspicion of criminal conduct**. While the legislator may provide for lower thresholds for preventive public security measures, for example by requiring only indications that a specific danger may emerge (so-called identifiable danger), it must limit these lower thresholds to cases which concern at least the protection of considerable legal interests or the prevention of considerable criminal offences. Repressive law enforcement measures – such as the investigation and punishment of crime – require at least an initial suspicion of criminal conduct; for such measures, a further lowering of the threshold is not permissible. It must generally be ensured that the authorities only request subscriber data where such requests are based on specific grounds and not made on a merely speculative basis.

In addition, the Constitution sets special requirements for data concerning dynamic IP addresses, as such data makes it possible to draw conclusions regarding individual user behaviour. Given that the matching of dynamic IP addresses to individual subscribers allows for significant insights into the private sphere, security authorities may only use this tool for protecting legal interests or prosecuting criminal offences of increased weight. By contrast, matching dynamic IP addresses to prosecute minor administrative offences is disproportionate and thus impermissible.

Since the federal laws challenged by the complainants do not contain sufficiently clear and restricted thresholds, the powers to transfer and obtain subscriber data violate the Basic Law. Nevertheless, the provisions continue to apply temporarily, so that the **legislator can remedy** the constitutional shortcomings – it must do so by the end of 2021. During the transitional period, the provisions may only be applied subject to restrictions that ensure the proportionality of state access to subscriber data. ■

The European Court of Human Rights (ECtHR) also held that the matching of dynamic IP addresses to individual subscribers affects the right to respect for private life (Art. 8(1) of the Convention). The Federal Constitutional Court took into consideration this and other relevant decisions in the present constitutional complaint proceedings.

Regarding the principle of openness to international law and the multi-level cooperation of European courts, see International perspectives → *p. 36*

The right of members of the Federal Government to issue political statements

Second Senate
File reference 2 BvE 1/19
Press Release of 9 June 2020

In Germany's parliamentary democracy, several political parties compete against each other. The Basic Law guarantees their right to equal participation in this competition (Art. 21(1) first sentence of the Basic Law).

This right is violated if state organs, such as the Federal Government, unilaterally take sides in a partisan manner or direct positive or negative publicity at a political party (**requirement of state neutrality**). At the same time, holders of political office, who are typically also party members, may participate in the political debate outside of their official role. This raises the question to what extent and via which communication channels members of the Federal Government may issue political statements to the benefit or detriment of a political party.

On several occasions, the Federal Constitutional Court has had to decide cases in which statements made by members of the government in the context of political debate clashed with political parties' right to equal opportunities. It continued this line of case-law with its judgment of 9 June 2020.

These proceedings were prompted by an interview given by the Federal Minister of the Interior, Horst Seehofer, to the German Press Agency (dpa), in which the Minister described conduct by members of the party *Alternative für Deutschland* (AfD) and of the AfD parliamentary group in the *Bundestag* as "corrosive to the state" and "simply despicable"(1). The interview was temporarily available on the Ministry's website but has since been taken down. The AfD party challenged the publication of the interview on the Ministry's website by way of an application in *Organstreit* proceedings.

In a first step, the Federal Constitutional Court established that government ministers, too, can in principle not be barred from participating in the competition between political parties when acting in their capacity as party politicians, outside of their official role, and cannot be prevented from criticising other political parties in this context. When a person assumes government office, this does not mean that they are no longer allowed to engage in party politics. If this were the case, the parties in government would be at a disadvantage.

However, equal opportunities of political parties are impaired where members of the government, when participating in the political debate, make use of the possibilities and means that are available to them precisely because of their government position and that are not available to their political competitors. Thus, a statement by which a federal minister takes sides in the political debate violates the principle of equal opportunities of political parties if the person making the statement **uses resources connected with ministerial office** or recognisably **refers to the government office** in order to lend it special credibility or weight.

The highest federal organs and certain other bodies, such as the German Bundestag, individual parliamentary groups and members of the Bundestag, the Federal Government or political parties can lodge an application in Organstreit proceedings (dispute between constitutional organs) if they disagree on their rights and obligations arising from the Basic Law.

Therefore, where statements made by someone who is both a federal minister and a party politician are concerned, it must always be examined in what capacity that person made the statement. A statement must generally be considered as having been made in their capacity as government official if they issue this statement in the form of an official publication, press release or on the website of their department, or if state symbols and national emblems are used.

In the present case, the **interview itself** was **not objectionable** under constitutional law given that it can be qualified as participation in the political debate. Most of the questions in the interview concerned general political issues without a specific connection to the Federal Ministry of the Interior; they were thus directed at Horst Seehofer in his capacity as party politician of the *Christlich-Soziale Union in Bayern* (CSU), not as federal minister. Therefore, the statements themselves were permissible.

However, the publication of the interview on the **Ministry's website** violated the right to equal opportunities of political parties deriving from Art. 21(1) first sentence of the Basic Law given that the Ministry's website is a government resource not available to opposition parties. Therefore, the publication of the interview that included statements directed against the AfD party on the Ministry's website violated the requirement of strict state neutrality. ■

(1) The Federal Minister of the Interior made the following statement in the interview: *"They are against this state. It does not matter if they say they are democrats a thousand times. You could see this for yourself on Tuesday in the Bundestag when they attacked the Federal President head-on. This is extremely dangerous for our state. It must be strongly condemned. One cannot get up in the Bundestag and berate the Federal President like at the fair. That is corrosive to the state. [...] The direct attack on the Federal President in the Bundestag was simply despicable."*

Municipal Education Package

Second Senate
File reference 2 BvR 696/12
Press Release of 7 August 2020

The allocation of administrative tasks for implementing the needs-based benefits scheme for education and social participation set out in §§ 34 and 34a of the Twelfth Book of the Code of Social Law in the version of 24 March 2011 (so-called Municipal Education Package) is for the most part incompatible with the Basic Law, given that the federal legislation in question impermissibly allocates tasks to the municipalities. Therefore, the legislator must amend the provisions on the competences for implementing the benefits scheme by 31 December 2021.

§§ 34 and 34a of the Twelfth Book of the Code of Social Law were enacted in response to the "Hartz IV" judgment of the Federal Constitutional Court of 9 February 2010, in which the Court held that the legislator must determine the benefits necessary to ensure an existential minimum for children on the basis of a realistic assessment. That is why the Education Package is to provide children and young people with additional financial support for education and participation in social and cultural life. According to the allocation of competences in § 3(2) first sentence of the Twelfth Book of the Code of Social Law, which has not been amended, these benefits are administered by the municipalities as the local bodies responsible for social welfare.

In its judgment of 9 February 2010 (1 BvL 1/09), the Federal Constitutional Court declared unconstitutional the then standard benefit rate paid to recipients of unemployment benefits II ("Hartz IV"). The so-called Hartz IV Act did not sufficiently guarantee that all persons concerned received benefits ensuring an existential minimum in accordance with human dignity. Under constitutional law, the right obliging the state to guarantee an existential minimum derives from the guarantee of human dignity (Art. 1(1) of the Basic Law) in conjunction with the principle of the social state (Art. 20(1) of the Basic Law).

Several cities in North Rhine-Westphalia had lodged a municipal constitutional complaint against those provisions. They did not object to the Education Package as such, but challenged the fact that the allocation of tasks provided for by the Federation ultimately meant that the municipalities had to bear the financial burden associated with implementing the programme. They claimed that this violated their right of municipal self-government (Art. 28(2) of the Basic Law).

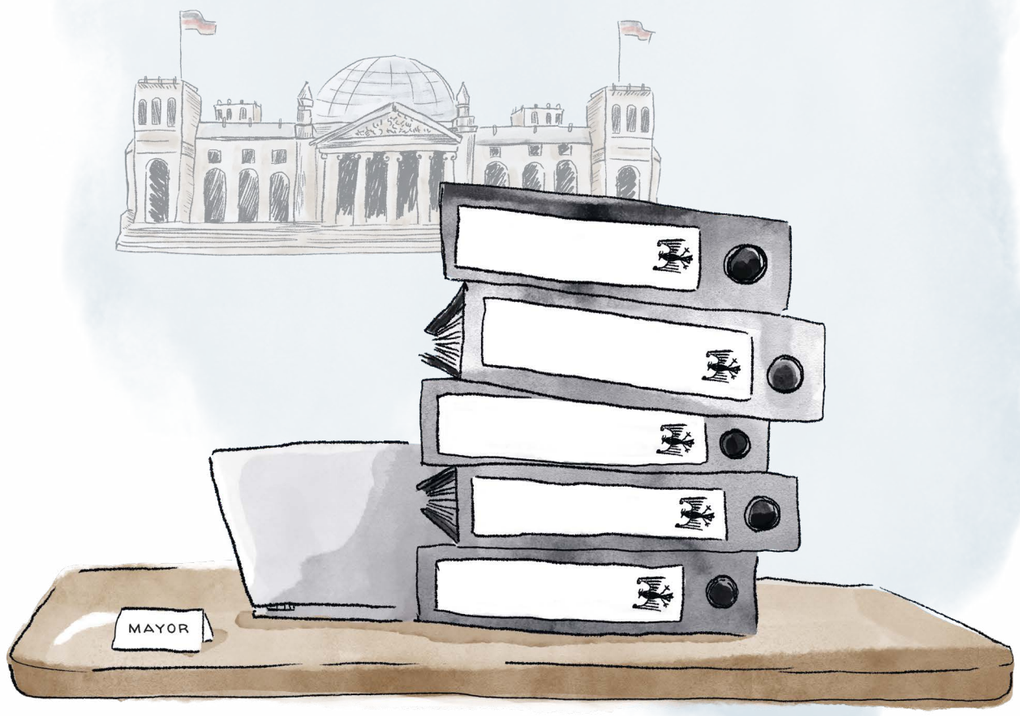
Constitutional complaints serve to give effect to fundamental rights. Fundamental rights afford protection against the state and by the state. Therefore, it is in principle only private individuals – as holders of fundamental rights – that can assert a violation of their rights by way of constitutional complaint. The municipal constitutional complaint is an exception to this rule and serves to safeguard the right of municipal self-government (Art. 28(2) of the Basic Law). It protects the right of the local community to manage its own affairs, taking into account the local interests of citizens.

The Federal Constitutional Court held that the legislation governing the Education Package violates Art. 84(1) seventh sentence of the Basic Law. The **prohibition of direct federal assignment**, enshrined in that provision since 2006, bars the Federation from allocating any new tasks to the municipalities. This is meant to prevent overburdening of the municipalities. By contrast, if a *Land* allocates tasks to the municipalities, the respective *Land* Constitution requires that the *Land* provide compensation for the additional financial burden (so-called principle of concomitant financing). Yet no such obligation on the part of the Federation is laid down in the Basic Law.

The prohibition of direct federal assignment safeguards the guarantee of **municipal self-government**. It protects municipalities not only against tasks being taken away from them, but also against being allocated tasks that could put a disproportionate strain on their financial, organisational and personnel resources. Therefore, the prohibition of direct federal assignment is violated not only where the Federation allocates new tasks to the municipalities, but also where federal laws modify existing responsibilities of the municipalities in a way that has considerable implications for **municipal autonomy in terms of organisation, personnel and finances**.

The Municipal Education Package entailed such a significant modification of existing tasks. It is true that the municipalities were responsible for the granting of certain allowances (e.g. for school trips) even before the challenged provisions were enacted. However, the Education Package recognises several new categories of eligible needs (e.g. for tutoring, school lunch and one-day school excursions). Moreover, the group of persons entitled to receive the allowances was expanded significantly. The benefits are no longer limited to schoolchildren; rather all children under 18, for instance children attending day care facilities, are eligible. In each case, the municipalities must conduct an individual appraisal and legal assessment of the eligibility criteria, **significantly increasing the (organisational) burden** imposed on them.

Even though the challenged provisions were declared unconstitutional, they may continue to apply until 31 December 2021. Otherwise, there would be no legal basis for granting benefits for education and social participation, which could therefore not be paid to recipients in need at all. As a result, the **existential minimum of children and young people**, as set out in the Federal Constitutional Court's decision of 9 February 2010, could no longer be ensured. ■



Compensation for operators of nuclear power plants in the context of nuclear phase-out

First Senate
File reference 1 BvR 1550/19
Press Release of 12 November 2020

In 2001, the Consensus on Nuclear Energy spelled the end of nuclear power in Germany. Based on this consensus, the 2002 phase-out law allocated specific residual electricity volumes to the nuclear power plants, which the plants were allowed to generate before being shut down. In 2009, following a change in government, a new law was enacted, extending the use of nuclear power by an average of twelve years for each power plant and increasing the electricity volumes that could still be generated.

In response to the nuclear accident at the Japanese plant in Fukushima in March 2011, the legislator abolished these additional residual electricity volumes and set fixed shut down dates for each nuclear power plant in the 13th Act Amending the Atomic Energy Act.

In its judgment of 6 December 2016, the Federal Constitutional Court declared that, in part, the 13th Act Amending the Atomic Energy Act was incompatible with the Basic Law. It held that the fixed shut down dates did not ensure that all operators could actually use up the electricity volumes that had previously been allocated to them by law. The legislator did not provide for adequate financial compensation for that scenario.

Judgment of the First Senate of 6 December 2016
File reference 1 BvR 2821/11 inter alia
Press Release of 6 December 2016

Therefore, the Federal Constitutional Court found that in this respect, the 13th Act Amending the Atomic Energy Act amounted to a disproportionate interference with the **fundamental right to property** under Art. 14(1) of the Basic Law. The Court gave the legislator until June 2018 to enact new provisions.

Art. 14(1) of the Basic Law
Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.

The legislator intended to implement the requirements arising from the Federal Constitutional Court's judgment of 6 December 2016 through the 16th Act Amending the Atomic Energy Act. In particular, this Act provides for financial compensation for operators of nuclear power plants. The Act was to **enter into force** on the date the European Commission either approved it under State aid law or issued a binding communication that such approval was not required. After receiving a letter from the European Commission dated 4 July 2018, the Federal Environment Ministry made the following announcement: The European Commission issued a binding communication that approval under State aid law is not required – thus, the 16th Act Amending the Atomic Energy Act entered into force on 4 July 2018.

The constitutional complaint lodged by individual operators of nuclear power plants against the Act was successful.

The Act did not enter into force given that neither condition regarding its entry into force has been fulfilled. Under EU law, the letter from the European Commission dated 4 July 2018 must be understood as a mere non-binding assessment. A different interpretation is ruled out under constitutional law. The condition of a "binding communication" from the European Commission set out in the Act would be incompatible with the constitutional principle of specificity if it were understood to also mean a non-binding communication from the European Commission, as such an interpretation would not be sufficiently foreseeable and clear.

Even if the Act had entered into force, it could not have remedied the violation of the fundamental right to property under Art. 14 of the Basic Law that was identified by the Federal Constitutional Court in its 2016 judgment. The legislator must provide adequate compensation to ensure the proportionality of the interference with the fundamental right to property. Yet the design of the newly inserted claim to compensation afforded affected companies is not appropriate to this end. This is because the compensation claim is tied to an **obligation on the part of the operators** to make serious efforts to transfer compensable electricity volumes, under "adequate conditions", to companies with under-utilised capacities (§ 7f(1) first sentence of the Atomic Energy Act). This is unreasonable because the complainants have no way of knowing, at the time they undertake the attempt to transfer their allocated volumes, the specific transfer conditions they might have to accept. Thus, the provision burdens them with either having to accept unfavourable conditions or having to bear the risk of receiving no compensation at all.

Moreover, while the exact prerequisites of the compensation to be paid by the state are complex, they are only set out in the Act in rudimentary form; therefore, they are not sufficiently specified in law. Given the special significance of such compensation under constitutional law, the legislator was not entitled to leave the responsibility of figuring out the specifics of the compensation scheme to the companies concerned. Therefore, the provision would in any case be unconstitutional for **lack of sufficient specificity**.

The legislator remains under an obligation to enact **new provisions** as soon as possible. ■

Counter-Terrorism Database Act II

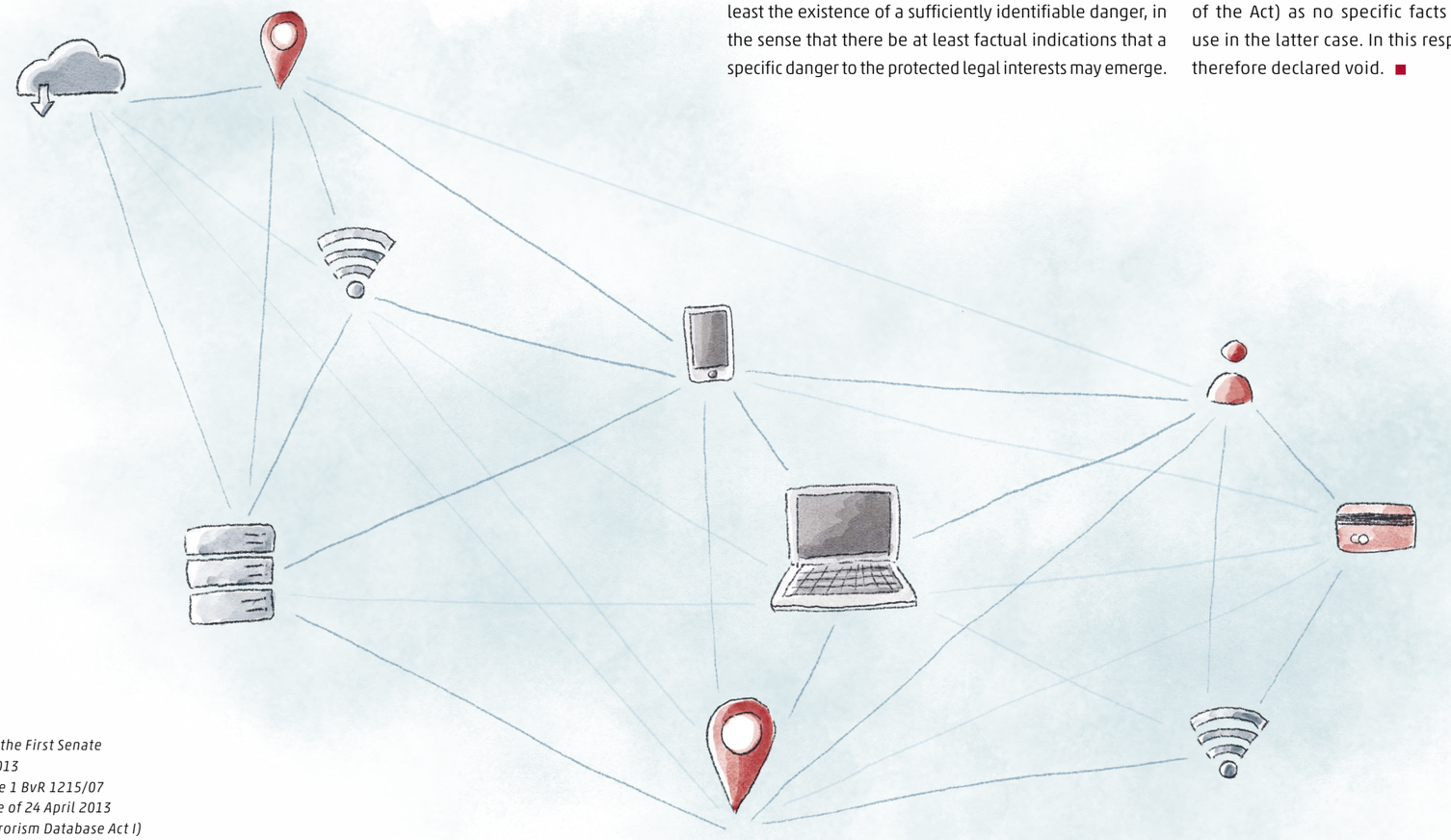
First Senate
File reference 1 BvR 3214/15
Press Release of 11 December 2020

Security authorities may use data stored in the counter-terrorism database for data mining ("extended use"). However, such use is only permitted if it serves to protect especially weighty legal interests and if it is tied to sufficiently specific and clear thresholds. The provision granting these powers, § 6a of the Counter-Terrorism Database Act, does not satisfy these requirements in all respects.

The counter-terrorism database is a joint database for police authorities and intelligence services of the Federation and the *Länder* that serves to combat international terrorism. The authorities can generally only access the basic data stored in the database, such as name, sex and date of birth. In principle, they cannot access the extended data also stored in the database, such as bank details, marital status and ethnicity; yet in the individual case, the authority responsible for the data entry can grant other authorities access upon request.

In 2013, the Federal Constitutional Court declared that the general structure of the counter-terrorism database was compatible with the Basic Law, but objected to some aspects of its design (Counter-Terrorism Database Act I).

When the Counter-Terrorism Database Act was amended following the Federal Constitutional Court's judgment, the legislator inserted § 6a into the Act, creating the basis for so-called "extended project-related data use". This is a typical case of **data mining**, i.e. generating new intelligence from the links and relationships between the different data.



Judgment of the First Senate of 24 April 2013
File reference 1 BvR 1215/07
Press Release of 24 April 2013
(Counter-Terrorism Database Act I)

In its order of 10 November 2020, the Federal Constitutional Court held that such extended data use was in principle compatible with the Basic Law, but that its specific design in part amounted to a disproportionate interference with the right to informational self-determination following from Art. 2(1) in conjunction with Art. 1(1) of the Basic Law and was unconstitutional in this respect.

As extended data use (data mining) entails a **heightened impact on fundamental rights**, new intelligence and facts obtained by combining data from different intelligence and police sources in this manner must serve an exceptionally significant public interest. Furthermore, the interference must be tied to sufficiently specific and clear thresholds.

Extended use of the counter-terrorism database for the purpose of **averting dangers to public security** requires at least the existence of a sufficiently identifiable danger, in the sense that there be at least factual indications that a specific danger to the protected legal interests may emerge. Extended use for the purpose of **intelligence analysis** requires that the measure serve the investigation of a specific action or group that warrants surveillance by intelligence services in the individual case; thus, it must at least be possible to determine the type of incident that might occur and that it will occur within a foreseeable timeframe.

Extended use for **law enforcement** purposes requires a suspicion based on specific facts; thus, specific circumstances supporting the suspicion must have taken shape.

The challenged provision satisfies these differentiated requirements to the extent that it permits extended use for the purposes of **averting dangers to public security** and of **intelligence analysis** (§ 6a(1) and (3) first sentence of the Act), but not with regard to extended use for **law enforcement** purposes (§ 6a(2) first sentence of the Act) as no specific facts are required for data use in the latter case. In this respect, the provision was therefore declared void. ■

Every person shall have the right to life and physical integrity. [...] These rights may be interfered with only pursuant to a law.

Art. 2(2) first and third sentence of the Basic Law

Cases in brief

The Federal Constitutional Court decides more than 5,500 proceedings every year. Decisions by the Senates and Chambers that are issued with reasons are published on the Court's website, www.bundesverfassungsgericht.de. Some of these cases are presented in brief here:

Decisions by the Senates

Unified Patent Court

Second Senate, Order of 13 February 2020, file reference 2 BvR 739/17, Press Release of 20 March 2020

In 2017, the German *Bundestag* approved the establishment of a Unified Patent Court as a court common to all participating EU Member States with the power to make binding decisions on certain patent disputes. The Federal Constitutional Court declared void this act of approval on the grounds that it had not been adopted with the necessary two-thirds majority of all members of the *Bundestag* (as opposed to only the members present for the vote). According to the Senate majority, any citizen can challenge decisions adopted in violation of a quorum requirement laid down in the Basic Law in cases concerning the transfer of sovereign powers; they can do so by lodging a constitutional complaint seeking a review of the formal lawfulness of the transfer.

Compensation for operators of offshore wind farms

First Senate, Order of 30 June 2020, file reference 1 BvR 1679/17 inter alia, Press Release of 20 August 2020

The Federal Constitutional Court found that the Offshore Wind Energy Act was in part unconstitutional. The Act had terminated ongoing planning approval procedures for offshore wind farms in order to transition to a new approval process. Moreover, approvals already granted ceased to have effect according to the new law. This quasi retroactivity is not fully justified under constitutional law because the legislator could have used less intrusive but equally suitable means to achieve its aims. Subject to certain conditions, operators of offshore wind farms should have been granted financial compensation for the necessary cost of planning work for projects started under the old legal regime.

A legal provision has quasi-retroactive effects if its future implications affect existing relationships and circumstances that have not yet been fully concluded, leading to a loss of value of the affected legal position. In principle, provisions that have quasi-retroactive effects are permissible under constitutional law. However, limits to such permissibility may arise from the principle of proportionality.

Romania II

Second Senate, Order of 1 December 2020, file reference 2 BvR 1845/18 inter alia, Press Release of 30 December 2020

The complainants were the subject of a European arrest warrant issued by a Romanian criminal court. The competent ordinary courts in Germany held that the surrender of the complainants to Romania was permissible. The complainants challenged these decisions, claiming a violation of Art. 1(1) of the Basic Law on grounds of poor detention conditions. Following the decision of the First Senate in the case Right to be forgotten II, the Second Senate, for the first time, relied on the fundamental rights of the European Union as the relevant standard of review: it held that the ordinary court decisions violated the complainants' fundamental right under Art. 4 of the Charter of Fundamental Rights of the European Union.

The fundamental rights of the Basic Law are not directly applicable as the Federal Constitutional Court's standard of review in matters concerning European extraditions, which are fully determined by EU law. Rather, the review conducted by the Court in such cases is in principle based on the fundamental rights of the European Union. According to Art. 4 of the Charter, ordinary courts reviewing a European transfer request must assess, in the individual case, whether there is a real risk that the affected person will be subject to inhuman or degrading treatment; to this end, the courts must investigate the facts of the case, including through the obtaining of additional information. Such an assessment requires an overall appraisal of the detention conditions communicated by the Romanian authorities; where necessary, further information must be requested. In this context, the courts must appraise the detention conditions of those prisons in which the complainants are sufficiently likely to serve their sentence. Therefore, the courts must also obtain information on conditions in semi-open detention, which, in the present case, do not meet the minimum standards recognised by the Court of Justice of the European Union and the European Court of Human Rights. As these minimum standards are equivalent to the requirements arising from Art. 1(1) of the Basic Law, no review on the basis of constitutional identity was required.

The European arrest warrant is a special type of alert for arrest within the EU. It serves to facilitate the arrest and surrender of criminal offenders or suspects to another EU Member State that has issued a national arrest warrant against the requested person.

Order of the First Senate of 6 November 2019
File reference 1 BvR 276/17
Press Release of 27 November 2019
(Right to be forgotten II)

Art. 4 of the Charter
No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Art. 1(1) of the Basic Law
Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

Did you know? Each matter before the Court is assigned a file reference.
File references are not just random numbers but actually contain a lot of information.

2 BvR 1845/18

The first digit (either 1 or 2) signifies whether the First Senate or the Second Senate is competent for the proceedings.
Next, a three-letter combination designates the type of proceedings, for instance:
BvR: constitutional complaint
BvQ: preliminary injunction proceedings
BvE: constitutional dispute between highest federal organs or parties afforded similar status
BvL: specific judicial review proceedings following a referral pursuant to Art. 100(1) of the Basic Law.
The number before the slash reflects the chronological order, regarding the same type of proceedings and the same judicial year, in which cases are entered into the Register of Proceedings.
The number after the slash shows in which year the proceedings were initiated.
In our example, the file reference belongs to the 1845th constitutional complaint entered into the Second Senate's docket in the Register of Proceedings in 2018.

Decisions by the Chambers

The majority of the Court's decisions are rendered by the Chambers, each formed by three Justices from one Senate. A Chamber can decide not to admit a constitutional complaint for decision. If the constitutional complaint is manifestly well-founded, the Chamber itself can grant the relief sought by the complaint, provided that the relevant issues of constitutional law have already been decided by the Court (→ p. 46).

Ban of guide dogs from medical facility

Second Chamber of the Second Senate, Order of 30 January 2020, file reference 2 BvR 1005/18, Press Release of 14 February 2020

The complainant, who is blind, had to pass through the waiting area of a doctor's practice with her guide dog to reach the practice of her physical therapist. The doctor's practice denied the complainant access to its premises with her guide dog, claiming that dogs were not allowed on the premises for reasons of hygiene. The complainant's challenge before the civil courts was unsuccessful. The Federal Constitutional Court granted her constitutional complaint against these decisions. It held that refusal to allow a guide dog on the premises did not sufficiently give effect to the prohibition of disadvantaging on the basis of disability (Art. 3(3) second sentence of the Basic Law) and to the right to personal mobility (Art. 20 of the Convention on the Rights of Persons with Disabilities); therefore, the ban of guide dogs is disproportionate, also given that only minor (if any) hygienic impairments are to be expected.

Asylum applications of converts

First Chamber of the Second Senate, Order of 3 April 2020, file reference 2 BvR 1838/15, Press Release of 22 May 2020

Where asylum seekers assert that they have converted to the Christian faith, the administrative courts must not only determine the objective severity of acts of persecution against converts in their country of origin; they must also ascertain that pursuing a religious practice that would lead to persecution in the country of origin is of central importance to the asylum seeker's religious identity. At the same time, the administrative courts may not call into question the church membership of affected persons confirmed by the Christian community. They are also precluded from conducting a "substantive evaluation of faith", based on their own judicial appraisal regarding the contents and significance of a belief. By contrast, the courts may examine whether the religious practice in question is essential to the religious identity of affected persons. Whether an asylum seeker is familiar with the teachings of their new faith is one indication for this. It is not for religious communities to assess an application for asylum; this responsibility falls to the Federal Office for Migration and Refugees and the administrative courts.

Criminal convictions for insults

Second Chamber of the First Senate, Orders of 19 May 2020, file reference 1 BvR 2459/19 inter alia, Press Release of 19 June 2020

With regard to the conflict between freedom of expression and the right of personality, the Federal Constitutional Court reaffirmed that the question whether a derogatory statement qualifies as a punishable insult must generally be determined by balancing the conflicting fundamental rights interests. This requires that the courts examine the specific circumstances and the meaning of the statement in question. The courts can only forgo this balancing of interests in exceptional cases subject to narrowly defined conditions: this concerns cases of calumny, profanity or attacks on human dignity.

Statements amounting to calumny do not have any discernible link whatsoever to a factual debate. Their sole purpose is to denigrate the affected person as such without any reason or basis for doing so. For instance, this is the case where persons – especially on the Internet – are subjected to baseless disparagement and denigration out of reprehensible motives, such as feelings of hatred or anger, without any discernible link to factual criticism.

Discrimination on the basis of parentage in the context of restoring citizenship

Second Chamber of the Second Senate, Order of 20 May 2020, file reference 2 BvR 2628/18, Press Release of 17 June 2020

In 2013, the complainant applied for German citizenship and moved to Germany. Her parents, who were not married, are a US citizen and a man who was born as a German citizen in 1921 and whose German citizenship was revoked in 1938 because he was Jewish. Descendants of former German citizens who were deprived of their citizenship by the Nazi regime are entitled to have their citizenship restored (Art. 116(2) of the Basic Law). In the present case, the administrative authorities and courts refused to grant the complainant's request, failing to give effect to this right, on the grounds that as a non-marital child, the complainant could not have acquired German citizenship through her father at birth in 1967 as the law stood at the time; the courts held that therefore, the deprivation of her father's German citizenship was not the cause for her non-recognition as a German citizen. The Federal Constitutional Court granted the constitutional complaint challenging these decisions. It held that the constitutional mandate to provide equal opportunities to children born outside of marriage (Art 6(5) of the Basic Law) and the prohibition of discrimination on the basis of the parents' sex (Art. 3(2) of the Basic Law) must also be observed with regard to the right to have one's citizenship restored.

Prohibition on using temporary workers as strike breakers

Third Chamber of the First Senate, Order of 19 June 2020, file reference 1 BvR 842/17, Press Release of 6 August 2020

The statutory prohibition on using temporary workers to fill in for employees on strike – as strike breakers – does not violate the freedom of labour coalitions. In principle, it is the parties to a collective agreement themselves that are responsible for adapting their measures taken in the context of industrial action to changing circumstances, in order to keep up with the opposing party and reach a balanced agreement. The proper functioning of free collective bargaining may not be jeopardised provided that the balance of power between the parties to the collective agreement is relatively equal, i.e. if there is parity. The prohibition on using temporary workers as strike breakers aims to ensure general parity between the parties. The legislator is not prevented from laying down different statutory requirements in the law on collective agreements in order to restore parity.

Employees who do not participate in a strike are called strike breakers.

Freedom of labour coalitions, Art. 9(3) first sentence of the Basic Law
The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession.

No compensation for property owners connected to utilities infrastructure in the former GDR

Second Chamber of the First Senate, Order of 1 July 2020, file reference 1 BvR 2838/19, Press Release of 11 August 2020

For decades the courts have grappled with the question whether connection fees for property owners whose property had been connected to the utilities infrastructure in the former GDR (*Altanschließer*) are lawful. Such court proceedings usually focus on the objection of limitation. According to case-law initially developed by the administrative courts, the date when the fees statute of a utility was first issued was decisive, regardless of whether the fees statute had legal effect or not. This interpretation tended to be favourable to affected property owners. In 2004, however, a statutory "clarification" came into force in Brandenburg, according to which the start of the limitation period required an *effective* fees statute.

In 2015, the Federal Constitutional Court objected to the unconditional application of the "clarifying" legal amendment to old cases on the grounds that it had impermissible real retroactive effects given that the administrative courts had interpreted the law differently before the clarification was adopted. Following this, property owners from the group of *Altanschließer* brought compensation claims on the basis of state liability. These claims were rejected by the civil courts, which did not follow the administrative courts' previous interpretation of the statute of limitation. The civil courts held that from the outset, i.e. even before the statutory "clarification" was adopted, an effective fees statute had been a necessary precondition for starting the limitation period. Therefore, requesting payment of the fee was not barred by limitation and had been lawful. The Federal Constitutional Court did not find a violation of constitutional law given that the civil courts were entitled to adopt an independent interpretation of the law on property fees; in this regard, the civil courts are not required to follow the case-law of the administrative courts.

Altanschließer are property owners whose property had been connected to the utilities infrastructure in the GDR era or when municipal utilities were established in the 1990s.

Dumpster diving as a criminal offence

Third Chamber of the Second Senate, Order of 5 August 2020, file reference 2 BvR 1985/19 inter alia, Press Release of 18 August 2020

The complainants had taken food items out of a locked waste container located on the premises of a supermarket. They were cautioned for theft by the criminal courts and had to do eight hours of community service at a food bank. The Federal Constitutional Court did not admit their constitutional complaint for decision. The Court held that the principle of proportionality and in particular the *ultima ratio* principle did not require that the scope of criminal liability for theft be restricted in the present case because it is in principle for the legislator to determine the scope of punishable offences. It is within the legislator's wide margin of appreciation to protect the owner's authority to decide what happens to property that is of no economic value and to protect the owner's interest in avoiding potential liability and litigation risks. It is for the criminal courts to sufficiently reflect the lesser culpability of offenders in their sentencing decision in the individual case.

According to the ultima ratio principle, criminal law, as the most severe sanction available, may only be used as a "last resort" to punish behaviour that is particularly reprehensible from a social and ethical point of view.

Shock images on tobacco products and prohibition of menthol cigarettes

Second Chamber of the First Senate, Order of 8 September 2020, file reference 1 BvR 895/16, Press Release of 16 October 2020

The Federal Constitutional Court did not admit for decision a constitutional complaint lodged by the tobacco industry. The obligation to put shock images on tobacco products and the prohibition of menthol cigarettes cannot be reviewed on the basis of the German fundamental rights as the challenged provisions implement binding EU law. In view of the case-law of the Court of Justice of the European Union as to the compatibility of such provisions with EU fundamental rights, there is also no reason to request a preliminary ruling from the CJEU.

Access to information in traffic fine proceedings

Third Chamber of the Second Senate, Order of 12 November 2020, file reference 2 BvR 1616/18, Press Release of 15 December 2020

In constitutional complaint proceedings concerning a traffic fine imposed for exceeding the speed limit, the Federal Constitutional Court held that the person charged with a traffic offence must be granted access to all existing data and documents, including the so-called raw measurement data, even if such data is not included in the files of the traffic fine proceedings. In this context, the right to access to information follows from the right to a fair trial, which is equivalent to a fundamental right (Art. 2(1) in conjunction with Art. 20(3) of the Basic Law); this right protects the equality of arms between law enforcement authorities and the person charged with an offence, including in administrative fining proceedings.

There is no official definition of the term 'raw measurement data'. Colloquially, it is understood to mean the data that is collected by a measuring device for the purposes of prosecuting traffic offences and used to obtain the final speed reading.

Air strike near Kunduz (Afghanistan)

Second Chamber of the Second Senate, Order of 18 November 2020, file reference 2 BvR 477/17, Press Release of 16 December 2020

In September 2009, a Colonel of the German Armed Forces ordered an air strike near Kunduz (Afghanistan). In three decisions, the Federal Court of Justice rejected actions relating to liability for breach of official duty brought by the complainants, who were injured in the air strike or are family members of persons killed in the air strike. The Federal Constitutional Court did not admit for decision the constitutional complaints challenging these decisions. In its decision, the Federal Constitutional Court expressed doubts as to the Federal Court of Justice's hypothesis that such claims would require the creation of a special statutory basis; the Federal Constitutional Court did not share this view, pointing to the obligation to interpret existing statutory bases in light of the fundamental rights to life (Art. 2(2) first sentence of the Basic Law) and property (Art. 14(1) of the Basic Law), and stating that such interpretation would likely lead to recognising at least a basis for possible compensation. However, in the proceedings at hand, the Federal Constitutional Court found that the Federal Court of Justice had rejected the actions also and primarily on the grounds that a breach of official duty by the commanding officer could not be established. This was not objectionable under constitutional law.

Preliminary injunction proceedings

The Federal Constitutional Court also receives applications for preliminary injunctions seeking provisional measures before a decision is rendered in the principal proceedings.

Measles vaccination for persons in childcare facilities

First Chamber of the First Senate, Order of 11 May 2020, file reference 1 BvR 469/20 inter alia, Press Release of 18 May 2020

The Federal Constitutional Court rejected an application for preliminary injunction seeking the provisional suspension of amendments to the Prevention and Control of Infectious Diseases Act. According to the new provisions, children may only attend facilities such as day care centres if their parents provide proof of sufficient vaccination or proof of immunity against measles. Given that the constitutional complaint in the principal proceedings appears to be neither inadmissible from the outset nor manifestly unfounded, the Court had to decide on the applications for preliminary injunction on the basis of a weighing of consequences. According to this weighing, the interest to let children that have not been vaccinated against measles attend a childcare facility must stand back behind the interest in avoiding risks to the life and limb of a large number of people.

Protest camps against the extension of the A49 motorway

First Chamber of the First Senate, Order of 21 September 2020, file reference 1 BvR 2146/20 inter alia, Press Release of 22 September 2020

The Federal Constitutional Court in part granted applications for preliminary injunction lodged by a person organising protest camps against forest clearings carried out to make way for the extension of the A49 motorway; the applicant had registered the envisaged protest camps whereupon the authorities had prohibited the planned protests. The Court in part restored the suspensive effect of the applicant's actions before the administrative courts against prohibitions of assembly issued by the authorities.

Rent cap legislation in Berlin

Third Chamber of the First Senate, Order of 28 October 2020, file reference 1 BvR 972/20, Press Release of 29 October 2020

The Federal Constitutional Court rejected an application seeking the provisional suspension of rent cap legislation in the *Land* Berlin until the Court renders a decision in the principal proceedings regarding the constitutional complaint lodged by the applicant. The complainant and applicant did not demonstrate that they risk suffering severe disadvantages of particular weight. The Court did not make any determination as to the prospects of success of the constitutional complaint in the principal proceedings.

To be decided in 2021

In 2021, the Court will continue to render numerous decisions.
Some of the proceedings which are expected to be decided next year are presented below.

Relevance of child rearing in assessing social insurance contributions

Several pending constitutional complaints and a referral for specific judicial review from the social courts concern the question whether child-raising periods are a relevant factor that must be taken into account when assessing contributions to statutory health insurance and pension schemes; the proceedings also touch on whether and to what extent it is necessary that parents benefit from lower mandatory care insurance contributions, depending on how many children they have.

Coercive medical treatment

This constitutional complaint concerns the question whether statutory provisions applicable to persons under custodianship, which provide that coercive medical treatment may only be administered in an in-patient hospital setting, are compatible with the Basic Law.

Climate protection

The NGOs *Deutsche Umwelthilfe* and *Greenpeace* as well as individual climate activists, some of which are active in the Fridays for Future movement, filed constitutional complaints, claiming that the Federal Republic of Germany has failed to take suitable legislative and other measures to combat climate change. The complainants assert a violation of their fundamental right to life and physical integrity (Art. 2(2) of the Basic Law) on the grounds that the state did not fulfil its duty of protection.

Berlin rent cap

Constitutional complaints lodged by landlords and landladies challenge 'rent cap' legislation enacted by the *Land* Berlin, with the complainants claiming a violation of their fundamental right to property (Art. 14 of the Basic Law).

Citizen shares in wind farms

The *Land* Mecklenburg-Western Pomerania enacted the Citizen and Municipality Participation Act with a view to strengthening public support for wind farm projects. The new law seeks to create opportunities for citizens and municipalities to participate in the economic value created by wind farms. To this end, wind farm operators are required to create a special purpose vehicle for each wind farm project and to offer 20% of company shares to residents and municipalities in the affected area. A constitutional complaint lodged by a wind farm operator challenges this statutory obligation.

Child marriages

The Federal Court of Justice referred the question to the Federal Constitutional Court whether it is compatible with Art. 6(1) of the Basic Law that the Act to Prevent Child Marriages automatically qualifies any marriage with a minor under the age of 16 concluded under foreign law, in a legal system that recognises the minor as being of legal age, as a non-marriage under German law, without providing for an assessment of the individual case.

Measles vaccination

Various constitutional complaints challenge the Measles Prevention Act, which entered into force in 2020 and provides, inter alia, that attendance of childcare facilities is contingent upon proof of sufficient vaccination or of immunity against measles. The complainants inter alia assert a violation of their fundamental right to life and physical integrity (Art. 2(2) of the Basic Law).

Remuneration for prison labour

These constitutional complaints concern the question whether the statutorily fixed remuneration rates for prison labour are compatible with the Constitution. Specifically, the complainants challenge provisions laid down in the prison acts of the *Länder* Bavaria, North Rhine-Westphalia and Saxony-Anhalt.

Advance care directives of offenders in psychiatric confinement

These proceedings concern the question whether coercive drug treatment with neuroleptics may be administered to a person with mental illness who is confined, as a forensic measure of protection and prevention, in a psychiatric hospital if the treatment serves to improve their medical condition but an advance care directive explicitly states that they do not wish to receive the medication in question.

European Patent Office's Boards of Appeal

The complainants challenge decisions rendered by the European Patent Office's Boards of Appeal, claiming a lack of effective legal protection.

Free Trade Agreement with Canada

The constitutional complaint and the application in *Organstreit* proceedings (dispute between constitutional organs) are directed against the signing, the conclusion and the provisional application of the Free Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (Comprehensive Economic and Trade Agreement – CETA).

Arbitration clause in bilateral agreement on investment protection

A Dutch company challenges as unconstitutional a decision rendered by the Federal Court of Justice. Following a preliminary ruling by the Court of Justice of the European Union, the Federal Court of Justice had held that an arbitration clause contained in a bilateral agreement on investment protection concluded between Slovakia and the Netherlands was not applicable in the case before it on the grounds that the clause violated the autonomy of European Union law. In the complainant's view, the judgment rendered by the Court of Justice of the European Union amounts to an *ultra vires* act and violates Germany's constitutional identity.

Berlin rent cap

284 members of the CDU/CSU and FDP parliamentary groups in the *Bundestag* have filed an application for abstract judicial review regarding the constitutionality of statutory provisions governing the Berlin rent cap; the Berlin Regional Court and the Berlin Mitte Local Court referred the same provisions to the Federal Constitutional Court for specific judicial review (*Judicial review of statutes* → p. 51). It is contested whether the *Land* Berlin had legislative competence to enact the challenged provisions.

Funding of political parties

The annual maximum amount of public funding that may be allocated to all political parties combined (absolute upper limit) was raised by 25 million euros. This legislative decision is at issue in *Organstreit* proceedings and abstract judicial review proceedings pending before the Court. The decision to increase the absolute upper limit is challenged on both formal grounds, asserting that the rights of a parliamentary group to equal participation in the formation of the political will have been violated, and on substantive grounds, asserting that the principle that parties be sufficiently free from state influence and interference has been violated.

Scope of churches' right of self-determination

This constitutional complaint concerns the question whether religious communities have the right to make the conclusion of an employment contract dependent on the employee's religious affiliation.

Political statements by members of the government

The applicant in these *Organstreit* proceedings challenges statements by the Federal Chancellor regarding the election of a new Minister-President in the Free State of Thuringia, which she made while visiting South Africa and which were later published on the Federal Chancellery's official website. In the applicant's view, the statements run counter to the right to equal opportunities guaranteed political parties.

Forfeiture of criminal proceeds

The Federal Court of Justice made a referral in specific judicial review proceedings, asking the Federal Constitutional Court to decide whether it is compatible with the principles of legal clarity and the protection of legitimate expectations that new statutory provisions governing the confiscation and forfeiture of criminal proceeds are also applicable in cases in which prosecution of the criminal acts generating the proceeds is barred by limitation.

Criminal offence of 'speed racing involving gross violation of road traffic regulations and careless driving'

In 2017, the Criminal Code was amended to include a new provision (§ 315d (1) no. 3), which makes it a criminal offence for drivers of motor vehicles to drive carelessly with inappropriate speed and in gross violation of road traffic regulations in order to achieve maximum speed. A local court referred the provision to the Federal Constitutional Court on the grounds of a possible violation of Art. 103(2) of the Basic Law due to lack of specificity.

'Handling of stolen data' as a criminal offence

In a case concerning the requirement of specificity in relation to criminal provisions, the complainant challenges § 202d of the Criminal Code, which entered into force in 2015 and criminalises the handling of stolen data while recognising an exemption from criminal liability that, according to the provision's wording, applies "in particular" to public officials and journalists.

Childcare allowance for non-EU nationals

Under German law, the eligibility for childcare allowance of non-German nationals that are neither citizens of another EU Member State nor entitled to freedom of movement on other grounds depends on their residency status (§ 62(2) of the Income Tax Act). The Lower Saxony Finance Court referred this provision to the Federal Constitutional Court for judicial review, because the eligibility of persons granted residency for humanitarian reasons (e.g. refugees of civil war) in particular is tied to stringent requirements whereas holders of permanent residence permits are for the most part eligible without having to meet any significant substantive requirements.

Federal Government's information obligations vis-à-vis Parliament regarding European financial assistance to Greece

The *Bündnis 90/Die Grünen* parliamentary group claims a violation of parliamentary rights to information, asserting that the Federal Government failed to provide timely information to the *Bundestag* on the Government's negotiation strategy, in July 2015, regarding the question whether Greece should remain in or temporarily exit the euro area.

Recall of the Chair of the *Bundestag* Committee on Legal Affairs and Consumer Protection

The AfD parliamentary group filed an application in *Organstreit* proceedings against the *Bundestag* and the *Bundestag* Committee on Legal Affairs and Consumer Protection. It challenges the removal of one of its members as chair of the committee. The parliamentary group asserts that the removal decision taken by the committee majority violates its constitutional rights, claiming that it was entitled to the position of chair on that committee.

Election of *Bundestag* Vice-President

The AfD parliamentary group filed an application in *Organstreit* proceedings against the *Bundestag*. The applicant asserts that its constitutional rights have been violated on the grounds that, to date, none of the members it had nominated as candidates for the position of *Bundestag* Vice-President have been elected to that position, and that the *Bundestag* failed to ensure, by means of adequate safeguards, that the applicant's candidates were not rejected on the basis of illegitimate reasons.

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