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Questionnaire

For the national reports

I. Non-justiciable questions and deference intensities - Part 1

Question 1

In your jurisdictions, what is meant by "judicial deference"?

1. The principle of judicial self-restraint

a) No technical scope of application

While an established principle in Anglo-American constitutional case-law, the principle of judicial self-restraint is not recognised in Germany. It is only very rarely that the Federal Constitutional Court has actually mentioned the term.There is one decision, rendered in 1973, where the Constitutional Court stated that this principle would also be applicable in Germany and that the Court would self-impose judicial restraint.[2] Moreover, the term is occasionally used in dissenting opinions. Dissenting Justices may use the term when voicing the opinion that the majority opinion exceeds the Constitutional Court's competences in the individual case.[3] The fact that the principle has only been mentioned on these very few occasions proves that the principle itself – unlike its underlying idea – generally has no importance in Germany.

The Constitutional Court's case-law does not specifically recognise the term 'judicial self-restraint' because it is not consistent with the structure and legal principles of the Federal Constitutional Court for several reasons. The limits of jurisdiction follow directly from the interpretation of the applicable rules governing the allocation of competences and from constitutional law, which in turn lays down and guarantees the decision-making rights and competences of other state organs. The idea that the term judicial self-restraint is meant as a prompt for the Constitutional Court to delimit its jurisdiction is objectively integrated into the system of the Basic Law (*Grundgesetz* – GG) through the provisions governing the competences of the constitutional organs.

Therefore, the German Constitutional Court is not concerned with the question of whether it should exercise self-restraint or not but with the interpretation of legal provisions. The Constitution obliges the Federal Constitutional Court to fully exercise its competences but to not exceed them. The Court is not

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2 Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 36, 1 <1>.

3 BVerfGE 115, 320 <371 (381)>; 93, 121 <149 (151)>; 48, 127 <158 (201)>.

empowered to self-impose limitations within the scope of its competences because this would amount to a partial waiver of its competences. This is prohibited by the order of competences. The principle of self-restraint is not consistent with the German understanding of the allocation of competences between constitutional organs.

b) Hermeneutical term

Even if the term cannot be found in the Constitutional Court's case-law, it is commonly used as a hermeneutical term, i.e. a collective term for a specific legal phenomenon. The exact meaning of this term can have different nuances depending on the context of the argument. When the Constitutional Court interprets the rules governing its own competences and substantive constitutional law, it is, in each instance, called upon to respect the leeway to design that the Constitution attributes to other constitutional organs. Within this meaning, the term certainly has its justification. It calls on the Justices interpreting the individual provisions of the Constitution to have due regard to the fact that constitutional law always starts from the premise that it provides state organs with several options for solving and further developing the legal order and that not all questions derive directly from constitutional principles or are pre-determined by constitutional law.

2. The limits of the Federal Constitutional Court's jurisdiction

a) Correlation between jurisdiction and competences

From the above, it follows that in Germany it is the order of competences and its observance that assume the role that the principle of judicial self-restraint plays in other jurisdictions. The Federal Constitutional Court exercises its jurisdiction based on the competences provided for in the Constitution. Most competences are laid down in Art. 93 of the Basic Law, other important ones in Art. 100 of the Basic Law. In addition, there are individual competences set out in several other parts of the Constitution (cf. Art. 93(1) no. 5 of the Basic Law).[4] In exceptional cases, the Federal Constitutional Court's jurisdiction can arise from a federal act of Parliament (Art. 93(3) of the Basic Law). However, these competences are of no particular significance in practice.[5] The competences are procedural and laid down in the Constitution or the law. Unwritten competences of the Federal Constitutional Court are not recognised.

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4 Cf. Art. 18 second sentence of the Basic Law, Art. 21(4) of the Basic Law, Art. 41(2) of the Basic Law, Art. 61 of the Basic Law; Art. 98(2, 4) of the Basic Law; Art. 99 of the Basic Law; Art. 126 of the Basic Law.

5 See, for example, § 16(3) of the Act on the Scrutiny of Elections (*Wahlprüfungsgesetz* – WahlPrG), §§ 97a ff. of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG); § 105 of the Federal Constitutional Court Act; § 26(3) of the European Elections Act (*Europawahlgesetz* – EuWG), § 32(3, 4) of the Political Parties Act (*Parteiengesetz* – PartG), § 33(2) of the Political Parties Act, § 50(3) of the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung* - VwGO), § 39(2) of the Social Courts Act (*Sozialgerichtsgesetz* – SGG), § 18(3) of the Parliamentary Committee of Inquiry Act (*Untersuchungsausschussgesetz* – PUAG), § 36(2) of the Parliamentary Committee of Inquiry Act.

The so-called principle of enumeration applies,[6] according to which the Court can only decide if the specific application for legal protection can be based on a written competence.[7] The Federal Constitutional Court's jurisdiction must not be extended beyond the scope of the legal framework by way of an analogous application of the provisions on competences.[8] The competences have very different meanings and requirements. The most significant types of proceedings in practice are constitutional complaints pursuant to Art. 93(1) no. 4a of the Basic Law, specific judicial review proceedings pursuant to Art. 100(1) of the Basic Law and *Organstreit* proceedings (disputes between constitutional organs) pursuant to Art. 93(1) no. 1 of the Basic Law.

The Federal Constitutional Court's jurisdiction extends as far as the applicable scope of competences in the specific proceedings. If the Federal Constitutional Court has no jurisdiction to scrutinise a specific legal dispute, it must not conduct a judicial review. Therefore, the limit of the Federal Constitutional Court's jurisdiction results, by implication, from the scope of its competences in the respective proceedings. There are no specific areas in which the Federal Constitutional Court is not allowed to adjudicate per se. There is no prohibition of judicial review. There are only areas in which the Federal Constitutional Court lacks competence and is, thus, not allowed to act.[9]

Disputes concerning the scope of the Federal Constitutional Court's jurisdiction are, therefore, always disputes on the interpretation of the respective rules of competence and standards in the specific case. The Federal Constitutional Court's jurisdiction is determined by the respective procedural and substantive requirements of the respective request.

b) Procedural Requirements

The procedural requirements include, in particular, the legal ability to file an application, the question whether the application requires a respondent and, if so, whether the right respondent has been chosen, the admissibility of the subject matter of the proceedings, the question whether a subjective legal position needs to be affected, and the question of time limits and certain forms.

The question whether the type of application is admissible by its nature in the respective proceedings is also essential.[10] For instance, the constitutional complaint as the most common type of proceedings is generally only formally admissible as an application for a declaratory judgment[11] which is supplemented by the Court's competence to reverse unconstitutional court decisions and repeal unconstitutional laws.[12] Beyond that, the Court does not make any further pronouncements on the challenged acts.

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6 Cf. Federal Constitutional Court, Order of the Third Chamber of the Second Senate of 23 July 2002 – 2 BvR 403/02 –, NVwZ 2002, 1366 f.

7 BVerfGE 2, 341 <346>; BVerfGE 21, 52 <53>.

8 Cf. BVerfGE 1, 396 <408 f.>; BVerfGE 21, 52 <53>.

9 Clearly in this sense, for example, BVerfGE 2, 341 <346>.

10 Cf. § 13 of the Federal Constitutional Court Act.

11 § 95 of the Federal Constitutional Court Act.

12 § 32(1) of the Federal Constitutional Court Act.

These procedural requirements ensure that the Court's actions are judicial in nature. The judicial nature of actions is primarily characterised by the following general standards:[13] (a) The Federal Constitutional Court only takes action upon application and not on its own initiative.[14][15] (b) The Court's decisions are declaratory in nature and it can reverse decisions or repeal laws. However, it does not permanently lay down how a gap in the law should be regulated;[16] (c) it applies and specifies existing law but does not create law in the way a legislative authority can;[17] (d) it reacts to cases it did not create itself; (e) its perspective on the facts of the case is generally retrospective; (f) its decisions are generally limited to the respective case. There are, however, some particularities with regard to the scope of the binding effect pursuant to § 31 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG). (g) Furthermore, the Federal Constitutional Court cannot revise its decisions on its own initiative. This is only possible in the context of a further case which concerns the same point of law.

c) Substantive requirements

Besides the procedural requirements, the competence of the Federal Constitutional Court is determined by the relief sought by the applicant which is in turn shaped by the type of proceeding.

Ordinarily, the Court examines whether the subject matter is compatible with the standard of review. This process can be subdivided into three steps: Firstly, the determination and specification of the relevant subject matter (subject matter), secondly, the abstract interpretation of the standard of review (standard of review), and thirdly, the application of that standard of review to the specific subject matter, i.e. the determination whether the state measure in question is compatible with the standard of review or not (application of the law to the specific case).

In all three steps, the Federal Constitutional Court will generally encounter decisions by other state authorities. The Constitutional Court respects the decision-making prerogative of the previously involved authorities to varying degrees. The second step, i.e. the interpretation of the standard of review, is the one in which the Constitutional Court grants the least leeway to the other authorities. In contrast, the Constitutional Court frequently adopts the specifications of other authorities with regard to the determination of the subject matter. When it comes to applying the law to the specific case, the Court gives specific shape to the leeway to design granted to other authorities depending on the context.

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13 See in this respect Philipp Austermann, Die rechtlichen Grenzen des Bundesverfassungsgerichts im Verhältnis zum Gesetzgeber, DÖV 2011, 267 <269>.

14 Cf. § 23 of the Federal Constitutional Court Act.

15 There is an exception for cases where the Federal Constitutional Court issues a preliminary injunction to secure the subject matter of pending proceedings - cf. § 32 of the Federal Constitutional Court Act.

16 Cf. BVerfGE 140, 211 <219>.

17 BVerfGE 3, 225 <236>.

aa) Standard of review

The Court will only examine the compatibility of the measure in question (subject matter) with the standard of review to the extent that the respective standard contains legal requirements.

(1) Constitutional law as the principal standard of review

For most types of proceedings the applicable standard of review will be German constitutional law. Depending on the type of proceedings, this may only mean part of the Constitution. For example, in disputes between constitutional organs (*Organstreit* proceedings) the Court will only review whether the respective rights of the organs have been violated. Given that only the law explicitly laid down in the Basic Law amounts to written constitutional law (Art. 79 of the Basic Law), the standard of review is derived from the specific provisions of the Basic Law and supplemented by unwritten provisions.

(2) Autonomous interpretation of constitutional law

The principle

If the standard of review for the subject matter of the proceedings is, as per usual, limited to provisions of the Constitution, the Federal Constitutional Court will interpret these constitutional provisions autonomously.

The exception

This principally autonomous and – within the limits of the respective methodological rules – rather independent interpretation of the standard of review by the Federal Constitutional Court is subject to context-specific modifications. In the context of provisions governing the organisation of the state, the Federal Constitutional Court will consult state practice as a first relevant additional aspect for the interpretation of the Constitution. The understanding other constitutional organs have of the respective constitutional provision provides certain indications for the Federal Constitutional Court in the context of provisions governing the organisation of the state. The previous state practice has a particularly significant weight with regard to the interpretation of legislative competences.[18] The Court will consider state practice in other respects as well. State practice may be the object rather than the standard of review when the Constitutional Court examines acts of public authority. However, tradition and practice as they have been shaped in the course of historical and political developments must be considered when interpreting rules of procedure.[19] Thus, it is necessary to take state practice into account when there are doubts about the meaning of a provision.[20] Having said that, state practice cannot replace the requirements of a constitutional provision if they are unambiguous or can be determined by the standard methods of interpretation.[21] In cases where the Constitution provides for the cooperation of multiple state organs for state measures regarding organisational matters,

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18 Cf. BVerfGE 134, 33 <55 para. 55>; 109, 190 <213 f.>; BVerfGE 33, 125 <152 f.>; 61, 149 <175>; 68, 319 <328>; 106, 62 <105>; 109, 190 <213> with regard to the interpretation of provisions on legislative competences.

19 Cf. BVerfGE 1, 144 <149>.

20 BVerfGE 91, 148 <171 f.>.

21 Cf. BVerfGE 62, 1 <38 f.>.

the Federal Constitutional Court pays increased regard to state practice. In these cases, the Federal Constitutional Court will take the understanding of the other state organs into account when interpreting the provision. As an example, the Court has reduced its standard of review in the context of the so-called constructive vote of no confidence. The Constitutional Court will only examine whether there are evident errors in the other organs' assessment as to whether there is the constitutionally required instability within the parliamentary majorities. The reason for this is that the sophisticated mechanism to safeguard the separation of powers in the event of the dissolution of the Bundestag pursuant to Art. 68 of the Basic Law can only unfold its effect if the Federal Constitutional Court respects[22] the previously involved constitutional organs' political assessment of the situation and grants them the constitutionally guaranteed leeway to design and assume political responsibility.[23]

(3) Interpretation of constitutional provisions

Constitutional provisions are often phrased in a broad and general manner. It is not unusual that they only lay down principles and objectives, as for instance do the constitutional provisions relating to the principles of federalism, the rule of law, democracy or the social state.[24] The Constitution contains further specifications of some but not all aspects of these objectives and principles. Therefore, the exact legal scope of the respective constitutional provisions, in particular of the constitutional principles and objectives, may well be in dispute. The dispute on the scope of the constitutional provisions is primarily a methodological question. However, it simultaneously concerns the question of the Federal Constitutional Court's corresponding jurisdiction.

To begin with, the interpretation of constitutional provisions follows the methodological rules on the interpretation of the Constitution.[25] First of all, the methodological rules are based on four rules of interpretation (grammatical, systematic, historical and teleological). The grammatical interpretation seeks to determine the meaning of a constitutional provision based on its wording. The historical interpretation consults the debate during the respective provision's genesis, compares it to any previous provision it replaced or examines to which historical problem the provision was supposed to react. The systematic interpretation analyses the overall context into which the respective provision is embedded within the Constitution. By contrast, the teleological interpretation focuses on the spirit and purpose of the provision. There is no hierarchy between the different methods of interpretation.[26]

These main methods of interpretation are supplemented by independent sub-principles. It is uncertain in how far these can strictly be attributed to one of the respective methods of interpretation. It is common for the Federal Constitutional Court to subsequently deliberate on further consequences of the respective interpretation. It is important that the interpretation is embedded

22 Cf. BVerfGE 62, 1 <51>; 114, 121 <158>.

23 Cf. BVerfGE 36, 1 <14 f.>; 114, 121 <160>.

24 See in particular Art. 20 of the Basic Law.

25 See in this respect BVerfGE 11, 126 <129 ff.>; 35, 263 <279>.

26 BVerfGE 105, 135 <157>; 133, 168 <205 para. 66>.

into the context of international law, EU law and comparative law. An understanding of constitutional law as a uniform order that does not recognise hierarchical relationships between the different provisions is also of relevance. In case of a conflict between different provisions, a solution must be chosen that allows all constitutional provisions to unfold to the greatest extent possible. Given the broad character of the constitutional provisions, mere interpretation oftentimes does not suffice to determine the specific constitutional requirements. The Federal Constitutional Court occasionally tries to clarify this terminologically by referring to the 'specification of the Constitution'.[27]

The Federal Constitutional Court points out that the content of constitutional provisions is substantially determined by the terms used therein. However, the literal meaning by itself is not sufficient to determine their significance and scope. Rather, it is necessary to take into account the legal and historical context in which the provisions came into being as well as their purpose and aim as they were outlined in the historical consultations and eventually expressed in the statutory context. The meaning of these constitutional provisions can only be determined by such an overall assessment.[28] It is not possible to consider and interpret an individual constitutional provision in isolation. Constitutional provisions are embedded into a contextual meaning with the other provisions within the uniform order of the Constitution. Certain constitutional principles and fundamental decisions can be derived from the overall content of the Constitution. Individual constitutional provisions are subordinate to these overall principles and decisions.[29] The Constitution must be interpreted as a uniform order with the aim of avoiding contradictions between the individual provisions.[30] The Federal Constitutional Court also emphasises that the interpretation of terms in the Basic Law is open to international law and the European Convention on Human Rights (ECHR). The possibilities of interpretation in a manner open to the ECHR find their limits where such an interpretation no longer appears tenable according to the recognised methods of interpretation of the law and of the Constitution.[31] There is a constitutional duty to use the ECHR in its specific manifestation as a guideline for interpretation even when applying German fundamental rights.[32] In cases of doubt, fundamental rights provisions should in principle be interpreted in the way allowing them to take effect to the greatest extent.[33]

(4) Other provisions as a standard of review

Application scenarios

In exceptional cases, the applicable standard of review is derived from other provisions (outside of constitutional law). Three exceptions will be mentioned here. (a) Firstly, ordinary law can be the applicable standard of review. The most important example is the abstract judicial review of *Land* law. The Federal

27 BVerfGE 55, 274 <333>; see also BVerfGE 101, 158 <219>.
28 BVerfGE 74, 102 <116>.
29 BVerfGE 1, 14 <32>.
30 Cf. BVerfGE 33, 23 <27>.
31 Cf. BVerfGE 128, 326 <370 f.>.
32 BVerfGE 111, 307 <329>.
33 Cf. BVerfGE 6, 55 <72>; 39, 1 <37 f.>.

Constitutional Court will also review the compatibility of *Land* law with ordinary federal law.[34] However, these cases are of no particular significance in terms of constitutional procedure. (b) Secondly, according to the case-law of the Federal Constitutional Court, the fundamental rights enshrined in the EU Charter of Fundamental Rights can be the applicable standard of review. This is possible in the event of a constitutional complaint against a decision by a German court where secondary EU law provides an exhaustive legal framework.[35] (c) Thirdly, ordinary law may be indirectly reviewed in proceedings concerning the determination of the existence of a general rule of international law within the meaning of Art. 25 of the Basic Law. The Federal Constitutional Court does not directly decide the question whether a federal law is compatible with a general rule of international law in proceedings pursuant to Art. 100(2) of the Basic Law. Rather, it only determines whether such a general rule of international law exists. In other words, the proceedings under Art. 100(2) of the Basic Law are designed to verify whether a rule exists rather than to review provisions of German law. As the decision may, however, also concern the 'scope' of general rules of international law,[36] the Federal Constitutional Court can examine whether, depending on the scope of a particular rule of international law, such rule is capable of influencing domestic law in the individual case. As a result, the verification proceedings under Art. 100(2) of the Basic Law in effect replace the legislative process.[37] Furthermore, *Land* law must also be examined for its compatibility with rules of international law that are part of federal law (Art. 59(2), Art. 25 of the Basic Law) in abstract judicial review proceedings.[38]

Interpretation of ordinary law

In the rare cases where provisions that are not constitutional law constitute the applicable standard of review, the Federal Constitutional Court is more willing to base its decision on the interpretation and understanding previously applied by the ordinary courts instead of replacing the ordinary courts' interpretation of ordinary law with an interpretation of its own. It is, however, not bound by the ordinary courts' interpretation. Rather, the Federal Constitutional Court may review the meaning and effectiveness of these provisions as a preliminary question.[39]

(5) Legal standard of review

Only legal standards can be applied as the standard of review. These must, therefore, be provisions which emerged from a recognised law-making process. Other provisions than those based on official law-making procedures such as

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34 Cf., e.g., with regard to the interpretation of the Framework Act for Higher Education (*Hochschulrahmengesetz* – HRG) as a federal law BVerfGE 66, 270 <282 ff.>.

35 BVerfGE 152, 216 ff. (*Right to be forgotten II*).

36 Cf. BVerfGE 15, 25 <31 f.>; 16, 27 <32 f.>; 18, 441 <448>.

37 Cf. BVerfGE 23, 288 <318>.

38 Rozek, in: Schmidt-Bleibtreu/Klein/Bethge, Bundesverfassungsgerichtsgesetz, Loseblatt, § 76 BVerfGG (Version September 2017), para. 65.

39 Rozek, in: Schmidt-Bleibtreu/Klein/Bethge, Bundesverfassungsgerichtsgesetz, Loseblatt, § 76 BVerfGG (Version September 2017), para. 66.

moral, ethical or religious standards cannot be the applicable standard of review in any proceedings.

bb) Subject matter of the proceedings

Specifying the subject matter of the proceedings is also a many-faceted process that depends on the context. The first relevant question is what the subject matter of the proceedings is and whether this subject matter is legally valid in itself (notwithstanding the question of whether it is compatible with the applicable standard of review).

(1) Interdependence with the application

The Federal Constitutional Court starts from the premise that the subject matter of the proceedings is for the most part determined by the specific application. The application has a binding effect, the precise extent of which depends on the specific type of proceedings. Compared to the binding effect of applications addressed to other courts, the Constitutional Court can make rather generous additions with regard to the applications addressed to it. The Federal Constitutional Court assumes that it is entitled, to a certain extent, to interpret the respective applications in a manner ensuring effective legal protection. Under special circumstances, the Federal Constitutional Court even assumes that it is competent to address questions raised in applications that have since been withdrawn. It also assumes that it is entitled to examine questions that go beyond the original application in specific cases when constitutional reasons suggest these should also be decided.

(2) Facts of the case

The Court will generally take the applicant's submissions as a basis for determining the facts of the case to which the subject matter of the proceedings relates. However, the Court feels entitled to review the facts of the case under exceptional circumstances where a specific situation potentially has an acute impact on fundamental rights. The specifics will be discussed in the answer to Question 18.

(3) Legal Acts

General information

If the proceedings concern a legal act, the Constitutional Court will usually exercise judicial restraint and typically base its decision on the interpretation of the legal act applied by the referring body. Only in obvious cases does the Constitutional Court deviate from the referring body's interpretation.

Legal questions with regard to the subject matter of the proceedings

As a general rule, the Federal Constitutional Court will not examine whether the subject matter of the proceedings is compatible with law that is not subject to the Court's review in the specific type of proceedings. Exceptions apply if the preliminary question itself is directly linked to constitutional law. For example, in abstract judicial review proceedings, the Federal Constitutional Court will generally only review an ordinance's compatibility with the Constitution. It will not examine whether the ordinance is compatible with ordinary federal law even though the latter ranks higher in the hierarchy of norms. Despite this general rule, the Federal Constitutional Court will still review the compatibility

of an ordinance with its legal basis in ordinary law as a preliminary question because the German Constitution links an ordinance's effectiveness to the requirement of a legal basis in parliamentary law (Art. 80 of the Basic Law).[40]

Many types of proceedings require an answer to further legal questions that go beyond the compatibility of the subject matter of the proceedings with the applicable standard of review.

Specific judicial review proceedings pursuant to Art. 100(1) of the Basic Law serve the purpose of ensuring a constitutional decision in a specific legal dispute. Accordingly, these interim proceedings are necessary and admissible if the decision in the initial proceedings depends on the validity of the provision in question. The provision's validity must be relevant for the outcome of the initial proceedings. That is only the case if the matter would have to be decided differently if the provision were invalid.[41] When determining whether this is the case, the Federal Constitutional Court will exercise great restraint. Only if the incorrectness of the referring court's assessment is evident, will the Constitutional Court not follow the referring court.[42] If, however, constitutional questions arise in this context, the Constitutional Court assumes a similarly strict and autonomous approach as with regard to the specification of the applicable standard of review.

A court may only refer a law for review to the Federal Constitutional Court if it believes it to be unconstitutional. As a rule, this will only be the case if it is not possible to interpret the law in conformity with the Constitution.[43] If the ordinary court can resolve its constitutional concerns by interpreting the provision in conformity with the Constitution, it lacks the necessary conviction of the law's unconstitutionality, at least with regard to the specific case.[44] As a rule, the Federal Constitutional Court will review whether an interpretation in conformity with the Constitution is plausible.

Some proceedings require that the applicants or complainants have no procedural possibility to seek legal protection other than appealing to the Federal Constitutional Court. To determine whether this is the case, the Federal Constitutional Court has to interpret the existing avenues of legal redress before other courts. With regard to the most important proceedings, the Federal Constitutional will not follow the applicant's or complainant's assessment but examine the question itself. The general formula is: Whether a certain legal remedy has to be filed in order to satisfy the requirement of exhausting all available legal remedies even if its formal admissibility is in question, depends, according to the Federal Constitutional Court's case-law, on the prospects of success from the point of view of a reasonable party to the proceedings.[45]

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40 BVerfGE 101, 1 <30 f.

41 Cf. BVerfGE 46, 268 <283>; 58, 300 <317 f.>.

42 Cf. BVerfGE 143, 38 <50 para. 25>; established case-law.

43 Cf. BVerfGE 80, 68 <72>; 85, 329 <333 f.>; 87, 114 <133>; 124, 251 <262>.

44 Cf. BVerfGE 138, 64 <89 para. 75>.

45 Cf. Chamber Decisions of the Federal Constitutional Court, *Kammerentscheidungen des Bundesverfassungsgerichts* – BVerfGK 11, 203 <206>.

Accordingly, a particular legal remedy may still be part of the relevant avenue of recourse to the courts if its prospects of success are doubtful, e.g. because different courts or jurisprudence and legal scholarship disagree on its formal admissibility.[46] A different conclusion is merited if filing the legal remedy in question appears futile from the outset in view of opposing case-law of the ordinary courts.[47]

cc) Application of the law to the specific case

When applying the law to the specific case, the rigour of the Constitutional Court's judicial review varies in many respects. At times, the Federal Constitutional Court explicitly addresses the varying rigour of its judicial review but frequently it will simply implement it without making it an explicit issue.

(1) Functional perspective

With regard to the application of the law to the case at hand, the Federal Constitutional Court specifies the consequences of a particular interpretation giving specific shape to a provision by interpreting it in a functional way. The Federal Constitutional Court considers its own role to be that of an actor within the constitutional order that has been assigned a particular function by the Constitution. It must exercise its function in a way that allows other constitutional organs to still exercise their own respective function in turn. This functional aspect becomes particularly clear in relation to the supreme federal courts, i.e. the Federal Court of Justice for civil and criminal matters, the Federal Labour Court, the Federal Social Court, the Federal Administrative Court, and the Federal Finance Court. In this respect, the Federal Constitutional Court has stated that it does not serve as an additional court of last instance, i.e. it is not an "ultimate court of appeal".[48]

The functional delimitation of competences is, however, also relevant in relation to other constitutional organs. The Federal Constitutional Court sees itself as the guardian of the Constitution and thereby as an essential element of the substantive rule of law as shaped by the Constitution and as juxtaposed to the principle of democracy. By contrast, Parliament is the key actor giving shape to the principle of democracy. When exercising its jurisdiction, the Constitutional Court must therefore consider whether the leeway the Constitution affords to Parliament, as the legislative branch, can be upheld.

(2) Originator of the measure

Legislator

An important factor for determining the intensity of review is who the originator of the state measure subject to the Constitutional Court's review is. When reviewing acts of Parliament or other organisational measures of Parliament, the Federal Constitutional Court will exercise a certain degree of judicial restraint. It describes this as reflecting the legislator's leeway to design and decision-making prerogative.

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46 Cf. BVerfGE 47, 168 <175>; 128, 90 <99 f.>.

47 Cf. BVerfGE 20, 271 <275>; 49, 24 <51>; 68, 376 <380 f.>; 70, 180 <186>.

48 BVerfGE 122, 248 <303>.

The Federal Constitutional Court is of the opinion that the legislator's leeway to design results directly from the Constitution. The powers the Constitution attributes to Parliament are of such nature that they allow for the exercise of political leeway and typically do not legally predetermine a single possible course of action. The Court commonly states that it is not for the Federal Constitutional Court to assess whether the legislator has chosen the most equitable, appropriate or reasonable solution.[49] Rather, a prudent judicial review of the ordinary law in question, limited to a standard of obvious unreasonableness, corresponds best to the legislator's broad leeway to design.[50]

The legislator's leeway to design may vary depending on the respective area of law. The Federal Constitutional Court assumes that the Constitution contains more rigorous requirements for some areas of law than for others. The Constitution per se grants constitutional organs a broad leeway to design in areas such as economic policy,[51] social policy[52]and foreign policy[53]. The Federal Constitutional Court takes a factual approach when determining the precise extent of the legislator's leeway to design and takes into account the respective regulatory matter. In many cases, it explicitly emphasised that the legislator's leeway to design is broad with regard to the relevant issues. When it comes to more recent decisions, the legislator's leeway to design was emphasised inter alia with regard to the fulfilment of fundamental national objectives,[54] the exercise of the *Bundestag*'s responsibility with regard to European integration (*Integrationsverantwortung*),[55] the statutory framework for ensuring an existential minimum in accordance with human dignity,[56] the principle of equivalence applicable to levies which compensate a benefit in fiscal law,[57] the determination of the public broadcasting fee,[58] the establishment and implementation of a concept to protect life and physical integrity,[59] legislation concerning civil servants,[60] the scope of fiscal and tax laws,[61] the resolution of

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49 BVerfGE 103, 310 <320>; 117, 330 <353>; 121, 241 <261>; 130, 263 <294>; 139, 64 <112 para. 95>; 140, 240 <279 para. 75>.

50 Cf. BVerfGE 65, 141 <148 f.>; 103, 310 <319 f.>; 110, 353 <364 f.>; 117, 330 <353>; 130, 263 <294 f.>; 139, 64 <113 para. 96>; 140, 240 <279 para. 75>.

51 Cf. BVerfGE 14, 105 <117>; 37, 1 <21>; 39, 210 <225 f.>; 51, 193 <208>; 70, 191 <201 f.>; 77, 308 <332>; 109, 64 <85>; 116, 164 <182>; 118, 79 <101>; 142, 268 <286>.

52 Cf. BVerfGE 36, 102 <117>; 48, 227 <234>; 52, 264 <275>; 54, 11, <38 f.>; 59, 231 <263>; 77, 308 <332>; 97, 169 <185>; 101, 331 <350>; 102, 254 <325>; 103, 172 <185>; 103, 271 <287>; 109, 64 <85>; 111, 160 <167>, 113, 167 <220>; 114, 167, <263>; 118, 79 <101>; 132, 134 <165>; 137, 34 <73>; 142, 268 <286>; 149, 126 <143>; 152, 68 <115>; 152, 68 <116>.

53 BVerfGE 51, 1 <25>; 53, 164 <182>; 66, 39 <61>; 142, 123 <210>.

54 BVerfGE 59, 231 <263>; 82, 60 <80>; 152, 68 <116> para. 125.

55 BVerfGE 151, 202 <299 para. 149>.

56 BVerfGE 125, 175 <222, 224f.>; 132, 134 <159ff. para. 62, 67>; 137, 34 <72ff. para. 74, 76, 78>; 142, 353 <370 para. 38>.

57 BVerfGE 149, 222 <259>; 144, 369 <398>.

58 BVerfGE 149, 222 <268 para. 95>.

59 BVerfGE 96, 56 <64> ; 121, 317 <356>; 133, 59 <76 para. 45>; 142, 313 <337 para. 70>.

60 BVerfGE 148, 296 <349>; 145, 1 <12 f. para. 27>.

61 BVerfGE 149, 222 <255 para. 68>; 148, 147 <212>; 145, 171 <182>.

the conflict between the *Bundestag*'s parliamentary right to ask questions and to obtain information on the one hand and the protection of the concerned companies' fundamental rights on the other hand,[62] the organisation of university admissions,[63] the design of atomic energy law,[64] the transition to a new legal regime,[65] limitations to contractual agreements on the compensation for provided services,[66] the design of a concept to protect against abuses of parental custody,[67] the design of effective legal protection,[68] the further definition and development of the constitutionally required protection of the right to know one's parentage,[69] the determination of effective sanctions for violations of rights,[70] the design of copyright-related rights.[71]

In other cases, the Federal Constitutional Court repeatedly held that it is not for the Court to assess whether the legislator has chosen the most appropriate, reasonable or equitable solution. This was in particular set out in cases relating to the general guarantee of the right to equality,[72] laws on the organisation of higher education,[73] the laws relating to the remuneration of civil servants,[74] the assessment of the existential minimum standard of living,[75] and tax law,[76] value assessment methods for individual assets,[77] organisation of elections,[78] the decision whether a certain conduct should be punishable,[79] the protection of marriage,[80] and the imposition of fees.[81]

Executive and judiciary

The Constitutional Court rarely reviews measures taken by the executive branch directly. In most cases the executive measures will have been the subject of a review by the ordinary courts first. The approach for reviewing judicial and administrative measures is largely similar. With regard to administrative measures that have already been subject to judicial review and approved by the ordinary courts, the main issue will generally be the application of ordinary law and the determination of the facts of the case. For these cases, the Federal Constitutional Court has established a limited standard of review. The Federal Constitutional Court's approach with regard to this limited standard of review

62 BVerfGE 147, 50 <145>.
63 BVerfGE 147, 253 <339 para. 188>.
64 BVerfGE 143, 246 <325>.
65 BVerfGE 143, 246 <384>.
66 BVerfGE 142, 268 <286>.
67 BVerfGE 142, 313 <337>.
68 BVerfGE 143, 216 <225 para. 21>.
69 BVerfGE 141, 186 <196 para. 21>.
70 BVerfGE 141, 220 <284 para. 139>.
71 BVerfGE 142, 74 <97>.
72 BVerfGE 147, 252 <293 para. 64>.
73 BVerfGE 149, 1 <22 para. 46>.
74 BVerfGE 149, 382 <393 para. 18>.
75 BVerfGE 152, 68 <115 para. 122>.
76 BVerfGE 135, 126 <148 para. 68>.
77 BVerfGE 117, 1 <36>.
78 BVerfGE 89, 291 >301>.
79 BVerfGE 90, 145 <202>; 80, 182 <186>.
80 BVerfGE 108, 351 <364>.
81 BVerfGE 80, 103 <106>.

varies. It refers to court decisions because these will generally be the subject matter of the proceedings.

The most common approach is as follows: The design of the proceedings, the determination and assessment of the facts, the interpretation of ordinary law and its application to the individual case fall into the sole remit of the competent ordinary courts and are excluded from the Federal Constitutional Court's review. The Federal Constitutional Court can only intervene if a constitutional complaint regarding the violation of "specific constitutional law" by the courts has been lodged.[82] However, the fact that a decision is objectively flawed with regard to the standards of ordinary law does not necessarily amount to a violation of specific constitutional law. Rather, the courts must have failed to observe fundamental rights.[83] The Federal Constitutional Court only reviews whether a challenged decision shows any errors of interpretation that are based on a fundamentally incorrect understanding of the significance of a fundamental right, in particular its scope of protection; and whether these errors had a material impact on the case at issue.[84]

With regard to decisions of the civil courts, the Court uses the following approach: In principle, the interpretation and application of civil law falls to the ordinary courts. It is generally not for the Federal Constitutional Court to direct the civil courts as regards the outcome of their decisions.[85] The threshold of a violation of constitutional law that the Federal Constitutional Court needs to correct is not reached until the interpretation of the civil courts reveals errors that are based on a fundamentally incorrect understanding of the significance of the affected fundamental rights. These errors must also be of some weight in their substantive significance for the case at issue, in particular because the balancing of the conflicting legal positions in the private law context is adversely affected by them.[86]

Apart from reviewing the application of ordinary law under the aforementioned circumstances, the Federal Constitutional Court also reviews whether the court decision at issue is arbitrary within the meaning of Art. 3(1) of the Basic Law. The application of the law or the procedure that is employed for such application are only arbitrary in this sense if they can under no conceivable aspect be considered legally tenable, which leads to the conclusion that the decision is based on irrelevant and therefore arbitrary considerations.[87] Furthermore, the Federal Constitutional Court will assume that decisions of ordinary courts

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82 Cf. BVerfGE 1, 418 <420>.

83 BVerfGE 18, 85 <92 f.>.

84 BVerfGE 97, 12 <27>; BVerfGK 6, 46 <50>; 10, 13 <15>; 10, 159 <163>; established case-law.

85 Cf. BVerfGE 129, 78 <102>.

86 BVerfGE 148, 267 <281 para. 34> (*Stadium ban*) with further references; established case-law; see also Federal Constitutional Court, Order of the Third Chamber of the First Senate of 9 July 2020 – 1 BvR 719/19.

87 Cf. BVerfGE 108, 129 <137, 142 f.>.

upholding state interferences violate the Constitution if they are not comprehensible from a methodological perspective.[88]

Moreover, a somewhat broader approach is employed in particular with regard to cases where ordinary law hardly provides any legal standards at all. In these cases, the exercise of judicial power is not tenable under constitutional law if a corresponding measure by the legislator would be unconstitutional.[89] Judges may not disregard the spirit and purpose of the law as determined by the legislator. Judicial development of the law must not override the clearly recognisable intent of the legislator and replace it with judges' own regulatory concept.[90] Judges are obliged to respect fundamental legislative decisions and assert the legislative intent under changed circumstances as reliably as possible.[91] In doing so, they must apply the recognised methods of legal interpretation.[92] An interpretation of statutory law that – by way of judicial development of the law – sets aside the clear wording of the law, is not supported by or reflected in the law and is neither expressly nor – in the case of an evidently unintended gap in the law – implicitly approved by the legislator amounts to impermissible interference with the competences of the democratically elected legislator.[93]

Beyond that, there are certain areas where ordinary law justifies and limits interferences that have a particularly acute impact on fundamental rights. In these cases, the Federal Constitutional Court explicitly or implicitly deviates from the limited general standard of review. An overview of these areas will be given in the answer to Question 18.

In relation to the judiciary, the Federal Constitutional Court generally conducts a somewhat stricter review regarding adherence to the principles relating specifically to the exercise of judicial power. However, in some cases the Federal Constitutional Court still applies the general standards of the so-called 'Heck formula' (cf. in this respect answer to Question 18) in relation to procedural law.

(3) Nature of measures

(a) Measures granting benefits

Furthermore, specific standards of review have been developed for particular scenarios. The general principle is that the state has more leeway with regard to measures granting benefits than with regard to interfering ones.

(b) Planning and prognoses

In the context of prognoses and planning, the Constitutional Court assumes that the planning powers primarily rest with the executive and the legislator. The Court only reviews the methods and the facts of the case as to their plausibility.

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88 Cf. Federal Constitutional Court, Order of the Third Chamber of the Second Senate of 18 May 2022 - 2 BvR 1667/20 -, para. 33 ff.

89 BVerfGE 122, 248 <286>. Federal Constitutional Court, Order of the Third Chamber of the First Senate of 28 September 2010 - 1 BvR 1660/08 -, juris, para. 11.

90 BVerfGE 149, 126 <127>.

91 BVerfGE 149, 126 <156 para. 73>.

92 BVerfGE 84, 212 <226>; 96, 375 <395>.

93 BVerfGE 118, 212 <243>; 128, 193 <210>.

The Federal Constitutional Court examines whether the prognoses are based on sufficiently reliable foundations.[94] Insofar as the Court has to decide on value judgments and prognoses of the relevant authorities when reviewing a planning decision, it has to limit its review to the questions whether these assessments and decisions are manifestly incorrect, clearly refutable or conflict with the constitutional order.[95]

However, not even the legislator is free to make any prognosis as it sees fit. When evaluating the means chosen as well as the required assessment of the risks or dangers to the individual or to the general public, the legislator has a margin of appreciation and leeway to design, in respect of which the Federal Constitutional Court's powers of review are limited. The precise extent of this margin of appreciation and leeway to design depends on the nature of the subject matter in question, the legislator's possibilities to draw sufficiently reliable conclusions, and the affected legal interests.[96] The Constitutional Court's review can range from a mere review of evident errors to a review of reasonableness or even to a more comprehensive substantive review.[97]. The more complex the subject matter in question is, the greater is the legislator's margin of appreciation and leeway to design.[98]

On the flip side, the recognition of a margin of prognosis entails the legislator's potential obligation to remedy any shortcomings. Even after adopting a law, the legislator must monitor subsequent developments, review and, if necessary, revise the legal provisions in question if it becomes clear that the assumptions on which they were based were erroneous or no longer apply.[99]

With regard to decisions based on an uncertain factual basis, e.g. in the context of pandemics or the impact of technology, the Court likewise assumes that it does not primarily fall to the Court to address factual uncertainties in the realm of medicine or science. However, the legislator is held accountable in these cases. With regard to the genetic engineering of plants, the Federal Constitutional Court has pointed out the following: In view of a highly controversial societal debate between proponents and opponents of genetic engineering of crops and the fact that the current state of scientific knowledge does not provide any definite answers, especially with regard to the assessment of causal links and long-term consequences of genetic engineering, the legislator has a special duty of care in this area.[100] Simultaneously, this duty to implement precautionary measures against health or environmental risks grants the legislator broad leeway to design.[101]

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94 BVerfGE 123, 186 <241>.

95 BVerfGE 76, 107 <107>; see also BVerfGE 95, 1 <22>-; 134, 242 <278>.

96 BVerfGE 77, 170 <215>; 88, 203 <262>; 90, 145 >173>; 150, 1 <88 para. 173>.

97 BVerfGE 50, 290 <332 f.>; see also BVerfGE 123, 186 <241>.

98 BVerfGE 122, 1 <34>.

99 BVerfGE 56, 54 <79>; 65, 1 <56>; 88, 203 <309 f.>; 95, 267 <313>; 107, 266 <296>; 111, 333 <360>; 132, 334 <358 para. 67>; 143, 216 <244 para. 71>; established case-law).

100 BVerfGE 128, 1 <36>.

101 Cf. BVerfGE 121, 317 <356 f.>.

(c) Factual uncertainties and precautionary measures

In the context of its review of measures taken to combat the COVID-19 pandemic, the Federal Constitutional Court pointed out that the Constitution gives the legislator a certain leeway, which limits judicial review. The Federal Constitutional Court has to review whether the legislator's assessment and prognosis of the impending dangers to the individual or the general public are based on sufficiently reliable foundations. Depending on the nature of the subject matter in question, the significance of the affected legal interests, and the legislator's possibilities to draw sufficiently reliable conclusions, the Court's review can range from a mere review of evident errors to a review of reasonableness or even to a more comprehensive substantive review. If serious interferences with fundamental rights are at issue, it is, in principle, not permissible for uncertainties in the assessment of the facts to simply be interpreted to the detriment of fundamental rights holders. However, the state's duty of protection can be guided by 'urgent needs for constitutional protection' – as is the case here. Where scientific knowledge is tentative and the legislator's possibilities to draw sufficiently reliable conclusions are therefore limited, it is enough for the legislator to proceed on the basis of a context-appropriate and tenable assessment of the available information and evidence. This leeway is based on the legislator's responsibility to decide on conflicts between high-ranking and highest-ranking interests despite uncertainties – a responsibility that the legislator, with its unique form of democratic legitimation, is accorded by the Basic Law.[102]

(d) Mass phenomena and typification

Mass phenomena form another relevant group of cases. When setting out a framework dealing with mass phenomena, the legislator is authorised to generalise many individual cases into an overall framework, provided that it accurately reflects the subject matter in need of regulation based on the available information.[103] On this basis, the legislator may, in principle, adopt generalising, standardising and typifying rules, which do not as such violate the general guarantee of the right to equality merely because they give rise to inevitable hardships in individual cases.[104] The unequal impact may, however, not exceed a certain degree. Rather, the advantages of such typifications must be in adequate proportion to the inequalities they entail. Furthermore, the legislator may not choose an atypical case as its model for statutory typification; it must realistically base its determination on a typical case.[105]

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102 Federal Constitutional Court, Order of the First Senate of 19 November 2021 - 1 BvR 781/21 inter alia -, para. 171 with further references; Federal Constitutional Court, Order of the First Senate of 27 April 2022 - 1 BvR 2649/21 -, juris, para. 152.

103 Cf. BVerfGE 11, 245 <254>; 78, 214 <227>; 84, 348 <359>; 122, 210 <232>; 126, 268 <278>; 151, 1 <21>.

104 BVerfGE 113, 167 <236>; 126, 268 <278 f.>; 151, 1 <21>.

105 BVerfGE 27, 142 <150>; 110, 274 <292>; 112, 268 <280 f.>; 117, 1 <31>; 122, 39 <569>.

(e) Transition to a new legal regime

When redesigning complex systems, the legislator has broad leeway in creating transitional rules for existing legal frameworks, entitlements, and legal relationships. Various nuances are conceivable between the immediate enactment of a new law without a transitional period and the undiminished continued existence of subjective legal interests. The Federal Constitutional Court only examines whether, in consideration of all relevant circumstances, the legislator exceeded the limits of what is reasonable in the overall balancing between the severity of the interference on the one hand, and the weight and urgency of the reasons invoked to justify the interference on the other.[106]

3. Effect of decisions

The varying reach of the Constitutional Court's decisions also manifests itself with regard to their effects. In view of individual provisions of its procedural law, the Federal Constitutional Court assumes that both the binding effect of its decisions beyond the parties to the proceedings and the subsequent ramifications of a court decision can vary from case to case.

There are areas in which the Federal Constitutional Court limits declarations of voidness for constitutional reasons. The Constitutional Court's differentiation between declaring an unconstitutional provision void, or merely declaring it incompatible with the Constitution, or compatible with the Constitution for a transitional period, is well-known and of considerable practical significance. The Constitutional Court's case-law commonly differentiates as follows: The incompatibility of a law with the Basic Law generally entails the consequence that the respective law is to be declared void.[107] However, under the Federal Constitutional Court Act the unconstitutionality of a law does not always result in the law being declared void.[108] Rather, it also allows for a mere declaration that the law is incompatible with the Basic Law.[109] It is usually necessary to merely declare an unconstitutional provision incompatible with the Basic Law if the unconstitutional part of the law cannot be clearly separated from the rest of the legal framework or if the legislator has different options to remedy the violation of the Constitution.[110] In general, this is the case where the right to equality has been violated.[111] Not declaring a law void (§ 82(1) in conjunction with § 78 first sentence of the Federal Constitutional Court Act) is also necessary if declaring it void resulted in a situation which was even further from the constitutional order than the unconstitutional provision. This is the case if the disadvantages that result from the law immediately ceasing to have effect outweigh the disadvantages associated with its preliminary continued

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106 BVerfGE 43, 242 <288 f.>; 67, 1 <15 f.>; 125, 1 <18>; Federal Constitutional Court, Order of the Second Senate of 24 November 2022 - 2 BvR 1424/15 -, para. 121.

107 Cf. BVerfGE 33, 303 <347>.

108 § 95(3) first sentence of the Federal Constitutional Court Act.

109 § 31(2) third sentence of the Federal Constitutional Court Act.

110 Cf. BVerfGE 90, 263 <276>.

111 Cf. BVerfGE 99, 280 <298>; 105, 73 <133>; 107, 27 <57>; 117, 1 <69>; 122, 210 <245>; 126, 400 <431>; 138, 136 <249 para. 286>; established case-law.

application.[112] A declaration of incompatibility must also be considered if the legal situation that is deemed unconstitutional arises from the combined effect of individual provisions and the constitutional shortcomings could be remedied by revising any one of those individual provisions, meaning that there is a possibility that the challenged provision may ultimately remain in force.[113] Another specific exception applicable to decisions with financial implications results from the principle of annuality governing budgetary law. If laws affecting the budget, such as, in particular, the laws relating to the remuneration of civil servants, do not comply with constitutional standards and are therefore void, the consequences of this unconstitutionality are generally limited to the respective fiscal year and are not extended to all years during which the unconstitutional provision was in force.[114] In particular with regard to provisions governing the remuneration of civil servants, it must be taken into account that, in substance, the alimentation of civil servants represents the satisfaction of a current funding requirement with funds from the current budget. Therefore, a general retroactive remedy of the constitutional violation is not necessary in view of the particularities of civil service.[115]

Question 2

Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (e.g. questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

Sub-question 1

Is there a spectrum of deference for your Court?

The Federal Constitutional Court assumes that its jurisdiction extends as far as its competences; it does not recognise a general or subject-specific duty of deference.

Sub-question 2

Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (e.g. questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

The German Basic Law and the procedural law applicable to the German Constitutional Court (the Federal Constitutional Court Act) provide criteria for determining when and how the Federal Constitutional Court should decide a case. Whether the Federal Constitutional Court decides a case depends on the

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112 Cf. BVerfGE 33, 303 <347 f.>; 61, 319 <356>; 83, 130 <154>; 85, 386 <401>; 87, 153 <177 f.>; 100, 313 <402>; 128, 282 <321 f.>; established case-law.

113 Cf. BVerfGE 82, 60 <84>.

114 Cf. BVerfGE 93, 121 <148>; 105, 73 <134>; 117, 1 <70>; 130, 263 <312 f.>; 139, 64 <148>.

115 Cf. BVerfGE 81, 363 <383 ff.>; 99, 300 <330 f.>; 130, 263 <313>; 139, 64 <148>.

so-called procedural prerequisites of the respective type of proceedings. If the respective prerequisites have been met and the application is therefore admissible, the Court has to decide the case. In this regard, there are no so-called “no-go” areas for the Federal Constitutional Court. If the Constitution or ordinary law assigns the competence to review the question at issue to the Court, it will decide the question to the extent required by the competence of review.

The competence of review follows from legal provisions, which set the legal framework for the respective state actors in different ways. Therefore, the intensity of constitutional review can vary significantly with regard to different contexts and proceedings. This must not, however, be construed as meaning that the Constitution predefines areas that are exempt from review by the Federal Constitutional Court.

The standard of review and the subject matter of the proceedings determine how the Court decides. If the subject matter does not meet the requirements of the standard of review, the application is well-founded. Otherwise, the application is unfounded. The respective factors thus result from the interpretation of the respective provision.

In relation to the examples in the question, the specific answer is:

The Federal Constitutional Court does not apply a moral standard of review when deciding on questions of moral controversy. If the constitutional standard of review is unambiguous and the application of the standard of review to the case at hand is sufficiently clear, it is irrelevant whether the result is morally controversial or not. The Federal Constitutional Court does not measure its decision against ethical standards because it is unclear how such ethical standards should be defined. It can, however, be assumed that the majority of the population will not develop any moral standards that are contrary to constitutional requirements within a free and democratic basic order like the order under the Basic Law.

Whether a question is politically sensitive or not is also irrelevant for the Federal Constitutional Court. Decisions are only problematic when the constitutional standard of review is unclear. However, the Constitution generally grants the parliamentary legislator broad leeway to design with regard to highly contested political matters that can be described as politically sensitive. The Federal Constitutional Court will have due regard to this leeway in its decisions. However, this respect does not depend on the question of whether the parliamentary decision in a politically sensitive matter was controversial or not.

With regard to the allocation of scarce resources, scarcity does not, by itself, create a standard that would influence the Federal Constitutional Court’s standard of review either. The decisive factor is to whom the Constitution assigns the decision on the allocation of scarce resources. With regard to budgetary resources, the Court respects the fact that the executive and Parliament decide on the budget in cooperation.

The Constitutional Court will, however, enforce financially relevant constitutional claims irrespective of how scarce the resources are in the individual case. The Constitutional Court assumes that the Constitution only predefines financial claims to such a small extent that the legislator still has enough leeway to decide on essential budgetary matters. Thus, the Constitutional Court is not obliged to examine the financial implications of a decision of its own accord.

With regard to presidential pardons based on Art. 60 of the Basic Law, the Federal Constitutional Court assumes that its review is limited as such pardons are not granted on the basis of legal standards.[116]

Question 3

Are there factors to determine when and how your Court should defer (e.g. the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

Pursuant to the methodological rules of interpretation, certain factors that influenced the creation of a provision may also be of relevance in interpreting that provision. For example, historical experiences of a state will strongly feed into its constitutional legislation and constitutional changes.[117] As a rule, the conditions of a state's existence have to be taken into account when interpreting a provision teleologically. The culture of the respective state can influence the grammatical interpretation of certain terms. However, this is subject to significant changes which are commonly referred to as "constitutional shift" (*Verfassungswandel*).[118]

Whether a fundamental right is subject to a limitation clause or not plays a significant role with regard to the strength of that right.[119] The subject matter of the question at issue significantly limits judicial review. Changing social conditions and attitudes can also influence both the standard of the constitutional provision and the application of the law to the specific case. For example, the Federal Constitutional Court assumed that criminalising male homosexuality[120] was constitutional in 1957, which it no longer maintains today.[121]

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116 BVerfGE 25, 352 <363>; 30, 108 <111>.

117 A clear link to previous experiences exists with regard to the guarantee of human dignity in Art. 1(1) of the Basic Law, the concept of militant democracy (Art. 9(1), Art. 18, Art. 21(1) and Art. 20(4) of the Basic Law), the eternity clause (Art. 79(3) of the Basic Law) and the constructive vote of no confidence (Art. 67 of the Basic Law).

118 BVerfGE 142, 25 <65>.

119 Cf., e.g., BVerfGE 146, 71 <118 f. para. 141>.

120 BVerfGE 6, 389 ff.

121 BVerfGE 133, 59 <79 f.>.

Question 4

Are there situations when your Court deferred because it had no institutional competence or expertise?

In cases where the Constitutional Court has no institutional competence, the respective application is inadmissible. Cases in which the relief sought was not granted due to a lack of expertise on part of the Constitutional Court are inconceivable. Insofar as the Constitutional Court decides, it does so on the basis of constitutional standards for the interpretation of which it possesses sufficient expertise.

There may be preliminary questions, such as the existence of general rules of international law, questions concerning the interpretation of ordinary law, or questions of validity in the context of international law, for which the Federal Constitutional Court will seek external expertise.

As far as legal acts of other states are relevant as preliminary questions, the Federal Constitutional Court takes into account that it is not authorised to review such decisions. For example, the Federal Constitutional Court did not review the Soviet occupying power's decisions to confiscate private property after 1945.[122] If, however, these legal acts are not justifiable under any aspect, not even with due regard to a lack of responsibility on the part of the Federal Republic of Germany, they will not be recognised, as in the case of shots fired by GDR border guards at the border between the Federal Republic of Germany and the former German Democratic Republic (GDR).[123]

Question 5

Are there cases where your Court deferred because there was a risk of judicial error?

There is no known case in which the Constitutional Court refused to make a decision out of fear to make mistakes. The standard of review is strictly tied to the questions submitted, which substantially limits the risk of a decision triggering irreversible consequences.

Question 6

Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

There has never been a case in which the Court refused to make a decision due to the democratic legitimation of the decision maker. However, when interpreting the specific constitutional provisions at issue and applying the relevant constitutional standard to the specific case, the Federal Constitutional Court has on several occasions taken account of whether the Constitution affords broad discretion to the decision maker or not.[124] The margin of discretion afforded is heavily dependent on the scope and directness of the democratic legitimation that the decision maker enjoys in the specific case. This

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122 Cf. BVerfGE 84, 90 <122 f.>; 112, 1 <29>.

123 Cf. BVerfGE 84, 90 <122 f.>; 112, 1 <29>.

124 See BVerfGE 95, 96; see also Federal Constitutional Court, Second Chamber of the Second Senate, Order of 21 July 1997 – 2 BvR 1084/97.

is not considered a limitation of judicial powers. Rather, the margin of assessment is directly determined by the way in which the Court interprets the respective standard of review.

In principle, the Federal Constitutional Court can only examine acts of German sovereign authority that is bound by the German Constitution. Consequently, the Court's competence to review acts of international organisations is limited, especially when Germany has transferred sovereign powers to these organisations. In that case, the acts of international organisations themselves are not reviewed against the standards set out in the Basic Law. Rather, judicial review only focuses on whether, in transferring sovereign powers, the German authorities stayed within the applicable constitutional limits. These limits are, in particular, set out in Art. 23 of the Basic Law with respect to the European Union and in Art. 24(1) of the Basic Law with respect to other organisations. Acts of international organisations, however, are subject to indirect review, given that they can only come into effect in Germany if there has been an effective transferral of sovereign powers. The Constitutional Court has the competence to make such finding.

The Federal Constitutional Court is also competent to examine whether sovereign acts of German – as opposed to European – authorities that are fully determined by European law are in conformity with European fundamental rights.[125]

Question 7

> **"The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?**

The Federal Constitutional Court assumes that the stringency of constitutional requirements varies across policy areas. As far as social policy is concerned, constitutional requirements are generally not particularly stringent.[126] The social state principle leaves the legislator considerable leeway to design unless questions of equality, the general right of personality or human dignity are at stake. Hence, it is correct that – compared to areas in which legislative acts come with more intense interferences, such as legislation in the areas of criminal law and the right of assembly – constitutional review of legislative decisions in the area of social policy is less strict. Ultimately, the same applies to the areas of economic policy[127] and foreign policy.[128]

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125 BVerfGE 152, 216 ff. (*Right to be forgotten II*).

126 See *supra* note 52.

127 Cf. BVerfGE 14, 105 <117>; 37, 1 <21>; 39, 210 <225 f.>; 51, 193 <208>; 70, 191 <201 f.> 77, 308 <332>; 109, 64 <85>; 116, 164 <182>; 118, 79 <101>; 142, 268 <286>.

128 BVerfGE 51, 1 <25>; 53, 164 <182>; 66, 39 <61>; 142, 123 <210>.

The Federal Constitutional Court does not subscribe to the view that political questions be decided through democratic processes alone. Rather, the Court is of the view that the answers to political questions must remain within the constitutional limits. If this is not the case, the Federal Constitutional Court is authorised and obliged under procedural law to make a finding to that effect and to do so regardless of whether the decision maker is more directly democratically legitimised than the Court or not.

The Court stresses that within the constitutional limits, however, decisions on political questions are not to be made by the Court but by Parliament or by the executive as authorised by Parliament. If the term 'political question' were interpreted as pertaining to questions that are not pre-determined by the Constitution, it would follow that the Constitutional Court is not authorised to make political decisions. Such a definition of 'political questions' would, however, run contrary to the way in which the term is commonly used. Generally, political questions are understood to be questions that concern and specify the common good. Requirements on how to answer questions understood in that way also arise from the Constitution.

Question 8

Does your Court accept a general principle of deference in judging penal philosophy and policies?

The Federal Constitutional Court does not decide on questions pertaining to the philosophy of criminal law or criminal law policy. Criminal law policy is bound to the constitutional framework and the philosophy of criminal law does not specify any direct legal standards and is thus not subject to constitutional review. The German Constitution includes certain specific requirements relating to criminal law. In particular Art. 101 to 104 of the Basic Law set out procedural rights that concern criminal proceedings and are equivalent to fundamental rights. However, numerous principles of criminal (procedural) law are not expressly spelled out, leaving a relatively broad constitutional margin for specification through ordinary legislation.[129]

In the area of criminal law, the Federal Constitutional Court has derived several unwritten specifications from the rule of law principle in order to slightly compensate for the fact that the German Constitution exercises more restraint in this area when compared internationally. Relevant examples for such specifications are the general principle of individual culpability[130] as well as the presumption of innocence[131] and the principle of fair trial.[132]

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129 See *supra* note 79.

130 BVerfGE 20, 323 <331>; 25, 269 <286>; 27, 18 <29>; 45, 187 <228>; 86, 288 <313>; 95, 96 <140>; 120, 224 <253 f.>; 130, 1 <26>; 133, 168 <197 para. 53, 54>.

131 BVerfGE 19, 342 <347>; 22, 254 <265>; 35, 311 <320>; 74, 358 <370 f.>; 82, 106 <114>; 110, 1 <23>; 133, 1 <31 para. 90>.

132 BVerfGE 26, 66 <71>; 38, 105 <111>; 46, 202 <210>; 118, 212 <2312>; 122, 248 <271>; 130, 1 <25>.

Question 9

There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

The Federal Constitutional Court Act only includes basic rules as far as intelligence gathering is concerned. Pursuant to § 26(1) of the Federal Constitutional Court Act, the Federal Constitutional Court takes the evidence necessary to establish the truth. This provision emphasises that the Federal Constitutional Court is not limited to reviewing questions on points of law but that the Court can also decide on points of fact. This is particularly important in the rare cases in which the Court decides both as a court of first and last instance (proceedings on the forfeiture of fundamental rights and the prohibition of political parties, disputes between constitutional organs, all disputes between the Federation and the *Länder*, electoral scrutiny proceedings and impeachment proceedings against the Federal President and federal and *Land* judges).

In those proceedings that are preceded by decisions of lower instance courts, the Court generally relies on the points of fact as established by the lower instance courts. Pursuant to § 33(2) of the Federal Constitutional Court Act, the Federal Constitutional Court may base its decision on the findings of facts of a final judgment rendered in a case in which the truth was to be established *ex officio*. The Federal Constitutional Court itself stresses that 'generally', 'principally' or 'primarily' it is for the ordinary courts to establish the points of fact.[133] Exceptions apply in cases which concern the compliance with fundamental rights in ordinary court proceedings, i.e. cases in which the ordinary court proceedings themselves are the main subject matter. In this respect, there necessarily is a comprehensive obligation to establish the facts.

There are two provisions in the Federal Constitutional Court Act that pertain to the question of limiting the taking of evidence for reasons of national security. The first provision concerns evidence given by witnesses and experts. Pursuant to § 28(2) of the Federal Constitutional Court Act, in those cases in which a witness or expert may only be examined with the permission of a superior authority, such permission may only be refused if the welfare of the Federation or of a *Land* so requires. Should the permission to testify be refused, the Federal Constitutional Court can, by a two-thirds majority, declare such refusal unfounded. Similar rules apply under the provision concerning documentary evidence set out in § 26(2) of the Federal Constitutional Court Act. Pursuant to that provision, the Court may, by a two-thirds majority vote, refrain from requesting or using individual documents if their use would be contrary to national security interests. There are no known published decisions in which these provisions have been formally applied. Rather, the Court takes account of the interest in maintaining secrecy by means of a 'soft' approach.

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133 BVerfGE 18, 85 <92>; 32, 311 <316>; see also Federal Constitutional Court, Third Chamber of the Second Senate, Order of 6 August 2003 – 2 BvR 1071/03.

So far, the Court has not allowed for facts that were not disclosed to the parties to the proceedings to be taken into account. The Court made its only statement pertaining to this question in a decision concerning the prohibition of a political party. In the first proceedings on the prohibition of the right-extremist National Democratic Party of Germany (NPD), the Federal Constitutional Court made clear that taking evidence in camera is excluded at least when it has been established that the principle of freedom from state influence has been violated at the party leadership level and the applicant aims to fix any procedural defects by means of disclosure in camera.[134]

Question 10

Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

As a general principle, the annulment of valid legal acts by the courts is understood as being an interference that is lower in intensity compared to the obligation incumbent on state organs to adopt a certain conduct. Consequently, the Federal Constitutional Court assumes that the constitutional rights of citizens are to be understood in such a way as to only require direct acts by state organs in exceptional cases. In such exceptional cases, the rights in question can then be enforced before the Federal Constitutional Court to the extent that a formally admissible type of proceedings exists. However, cases in which the Court obliges the state to take action are rare. When the duty to protect fundamental rights is at stake, the Federal Constitutional Court refers to the prohibition of insufficient state action (*Untermaßverbot*),[135] meaning that a violation of the duty to protect, which can be challenged by way of constitutional complaint, is only to be assumed if public authority does not put in place any safeguards to protect the fundamental right at issue at all, or if the measures adopted are entirely unsuitable or inadequate. [136]

II. The decision maker

Question 11

Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

In our view, there is no relevant distinction to be drawn between the two sub-questions. As outlined in our answer to Question 2 above, the Federal Constitutional Court assumes that the constitutional provisions pertaining to state organs that enjoy a high degree of democratic legitimation generally afford a broad leeway to design and that judicial review in these cases is thus less intense. As a result, the Court in principle affords Parliament a greater

134 BVerfGE 107, 339 <371>.
135 BVerfGE 88, 203 <254>.
136 BVerfGE 77, 170 <215>.

prerogative of assessment and broader margin of appreciation compared to the executive.

Question 12

What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

Sub-question 1

The Federal Constitutional Court holds the view that the law-making procedure is particularly suited to make decisions that fall under the scope of the legislative competence.

According to the Court, the defining characteristics of the law-making procedure are the participation of different organs, the openness of parliamentary processes to the public and the parliamentary debate including the minority rights applicable therein. The principle that parliamentary processes are open to the public is of particular importance in this respect. Decisions of considerable significance must therefore be preceded by a process that allows the public to form and express opinions and that requires Parliament to hold a public debate on the necessity and scope of the envisaged measures.[137] The law-making procedure is considered a sub-element of this larger process and is of particular importance for the democratic legitimation of decisions made by the legislator. While a sub-element, the law-making procedure is not independent from the larger parliamentary process and it is not separated from the competence of the legislator itself. Rather, the legislative procedure adds particular weight to the democratic legitimation of decisions made by the legislator.

Sub-question 2

With respect to the legal relevance of parliamentary analysis, one needs to differentiate between two questions. We will first consider the question concerning the extent to which the facts on which the legislator based its decision are subject to review. Subsequently, we will turn to the question concerning the extent to which the legislator must have examined the factual circumstances before adopting any provisions.

The Federal Constitutional Court examines the facts on which the legislator based its decision as to their methodological foundations and their plausibility.[138] The Court accepts 'the facts available to the legislator' and 'prior experience' as a basis for reviewing laws.[139]

The legislator is under a general obligation to inform itself in a correct and sufficient manner about the factual situation at the time the law was adopted.[140] According to the Federal Constitutional Court's case-law, the legislator has a

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137 BVerfGE 85, 386 <403 f.>; 95, 267 <307 f.>; 108, 282 <312>; 130, 318 <344>; 150, 204 <233 para. 82>; 150, 345 <369 para. 59>.

138 BVerfGE 125, 141 <154>.

139 BVerfGE 102, 197 <218>; 115, 276 <309>; 116, 202 <225>; 126, 112 <145>.

140 BVerfGE 39, 210 <226>.

prerogative to assess facts and their further development.[141] Hence, the Federal Constitutional Court does not object to the legislator basing its decisions 'on a context-appropriate and tenable assessment of the obtainable information',[142] 'on the current state of experiences and insights',[143] 'on a sufficient factual basis'[144] and assessments that are not 'evidently deficient'.[145] By contrast, constitutional concerns arise if 'the factual circumstances relevant for legislative decisions have not been sufficiently investigated, necessarily entailing a lack of a constitutionally sound balancing of countervailing arguments'.[146] The legislator's assessments are also insufficient 'if they contradict economic laws or practical experiences to an extent that they can provide no reasonable basis for legislative measures'.[147]

To the extent that a change in factual circumstances could be relevant for the constitutionality of a law, the legislator may be under an obligation to monitor further developments.[148] In case of 'scientific uncertainties in particular with respect to the causal relationships and long-term consequences' of a measure, 'the legislator [...] is under a special duty of care'.[149] The legislator may, however, base its measures on uncertain factual circumstances and prognoses if the legislator's possibilities to draw sufficiently reliable conclusions are limited due to factual uncertainties, as in case of the COVID-19 pandemic.[150]

In terms of 'objectives, factual considerations, value judgments and prognoses', the legislator has a particular margin of appreciation and discretion, which is only exceeded if assessments and decisions are 'manifestly incorrect or can be unambiguously rebutted or contradict the constitutional system of values'.[151]

Under special circumstances, requirements may apply that are stricter compared to these general rules. In cases in which the constitutional standard is particularly dependent on legislative design and which are of immediate relevance for fundamental rights, the Constitutional Court sets out a particular requirement for legislative acts to be plausible. This is especially true when it comes to guaranteeing the minimum social subsistence level. According to the case-law by the Federal Constitutional Court, every individual has a right to an existential minimum in accordance with human dignity.[152]

Given that the Basic Law itself does not prescribe a precise amount of benefits for the right to an existential minimum in accordance with human dignity to be guaranteed, the substantive review of any amount specified by the legislator is

141 Cf. BVerfGE 111, 333 <356>; 115, 276 <309>; 116, 202 <224>; 134, 242 <342>.
142 Cf. BVerfGE 57, 139 <160>.
143 Cf. BVerfGE 50, 290 <335>.
144 Cf. BVerfGE109, 96 <116>.
145 Cf. BVerfGE 126, 112 <142>.
146 Cf. BVerfGE 86, 90 <114>.
147 Cf. BVerfGE 126, 112 <141>.
148 Cf. BVerfGE 39, 169 <191 ff.>; 54, 11 <34 ff.>; 78, 249 <288 f.>; 125, 175 <225>; 159, 355 <439 para. 198>.
149 BVerfGE 128, 1 <37>.
150 Cf. BVerfGE 159, 355 <407 para. 115>, <439 para. 198>.
151 Cf. BVerfGE 50, 50 <51>.
152 Cf. BVerfGE 125, 175 <222 ff.>.

limited to examining whether the benefits are evidently insufficient.[153] Apart from a review of evident errors, the Federal Constitutional Court also examines whether the determination of benefits by the legislator is justifiable based on current and reliable data as well as coherent calculation methods. If the benefits, including any differentiations, are based on and can be explained by comprehensible, objective and overall sound reasons, they are compatible with Art. 1(1) in conjunction with Art. 20(1) of the Basic Law.[154]

Question 13

Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

Sub-question 1 – Obligation to state reasons

In line with the Court's case-law, the legislator generally is under no obligation to justify laws. In principle, the Constitution only obliges the legislator to adopt effective laws.[155] In this context, the Federal Constitutional Court, among other things, held:

'*The claim that insufficient reasons have been stated for the challenged law is unfounded. The constitutional requirements generally do not pertain to the stating of reasons for a law, but to the results of legislative proceedings [...] The Basic Law, however, generally, does not prescribe which parts of legislative proceedings require justification, when and how. The Basic Law leaves room for negotiations and political compromise. What is decisive is that the legislator ultimately does not fail to satisfy constitutional requirements.*'[156]

The legislator thus is, at most, under an obligation to satisfy burdens of substantiation. If the legislative materials do not include any reasons for laws that restrict fundamental rights, this can lead to a finding of unconstitutionality if no sufficient reasons are discernible otherwise.[157] This is of consequence if the legislator, as in most cases, states reasons for a law. Given that generally there is no obligation to state reasons, no disadvantages should arise for the legislator if it still chooses to state reasons. Hence, when the Constitutional Court reviews laws, it does not merely examine the reasons actually stated by the legislator in the legislative materials. The decisive point is whether it is possible to state reasons that justify the legal provision in question and not just whether the legislator actually did state reasons in the legislative materials.[158]

There are, however, exceptions to the rule that the legislator generally is not obliged to state reasons. Under specific circumstances, the Constitutional Court

153 Cf. BVerfGE 125, 175 <225 f.>; 132, 134 <165 para. 78>; 137, 34 <75 para. 81>.

154 Cf. BVerfGE 125, 175 <225 f.>; 132, 134 <165 f. para. 79>; 137, 34 <75 para. 82>; 142, 353 <372 para. 42>.

155 Cf. BVerfGE 130, 263 <301>.

156 Cf. BVerfGE 139, 148 <179 para. 61>.

157 Cf. BVerfGE 139, 148 <179 para. 61>.

158 Cf. BVerfGE 137, 34 <74 para. 80>; Federal Constitutional Court, Order of the First Senate of 22 March 2022 - 1 BvR 2868/15 -, para. 138.

(in this case, mostly the Second Senate) assumes the legislator to be under an obligation to state reasons:

a) In case of legislative planning decisions, which are only permissible on exceptional grounds, the decision on how different interests should be balanced must be substantiated by the legislator.[159]

b) In case of decisions by the legislator, in which extraordinary circumstances must justify exceptions, the Federal Constitutional Court explicitly held that the legislator is under an obligation to state reasons.[160]

c) When the legislator decides on budgetary matters, the Constitutional Court at least assumes there to be a burden of substantiation for specific aspects of the legislative process.[161]

d) With respect to prognosis-based decisions by the legislator, the Constitutional Court, in line with the legislator's prerogative of assessment, demands that the grounds for such a decision be substantiated in a way that goes beyond an obligation of substantion and comes close to an obligation to state reasons.[162]

e) To safeguard compliance with constitutional requirements at the procedural level, the Federal Constitutional Court considers the legislator to be under an obligation to state reasons for the upper limit for state financing of political parties. In this respect, a mere possibility of justification does not suffice.[163]

f) As to the legislator's margin of appreciation in regard to statutory provisions on the remuneration of civil servants and judges, the Second Senate of the Federal Constitutional Court assumes that, procedural safeguards must apply, including an obligation to state reasons.[164] The Second Senate explicitly states that a mere justifiability of the provision should not suffice in these cases either: '*The determination and assessment of the factors that are and can be taken into account for the constitutionally required adjustment of remuneration levels must be reflected in an according substantiation and justification during the legislative process. A mere justifiability does not satisfy the procedural requirements under the Basic Law.*'[165]

g) By contrast, the First Senate of the Federal Constitutional Court currently assumes, with respect to the comparable question of the methodologically adequate way of determining the amount of social benefits guaranteed by fundamental rights, that the constitutional requirements do not refer to the legislative process but to its results.[166] The Court emphasises the legislator's leeway to design in assessing the existential minimum and the corresponding

159 Cf. BVerfGE 95, 1 <22 ff.>.

160 Cf. BVerfGE 101, 158 <224 f., 235>.

161 Cf. BVerfGE 79, 311 <344 f.>.

162 Cf. BVerfGE 111, 226 <255>.

163 Cf. Federal Constitutional Court, Judgment of the Second Senate of 24 January 2023, 2 BvF 2/18, paras. 128 ff.

164 Cf. BVerfGE 130, 263 <302>.

165 BVerfGE 149, 382 <395 para. 21>.

166 Cf. BVerfGE 132, 134 <162 para. 69 f.>; BVerfGE 137, 34 <73 f. para. 77>; still different in this respect BVerfGE 125, 175 <226>.

restraint on the part of the Federal Constitutional Court when exercising judicial review. What is decisive, is that overall, the amount of benefits to guarantee the existential minimum can be justified based on sound reasons.[167]

h) The First Senate, in turn, assumes fundamental rights law to impose an obligation on the legislator to state reasons for its decision on the amount of public broadcasting fees ('*an obligation to state reasons enshrined in fundamental rights law*').[168]

In summary, pursuant to the case-law of the Federal Constitutional Court it is only in specific situations that the legislator has a constitutional obligation to state reasons. Especially when the legislator has a margin of appreciation, the Federal Constitutional Court, however, assumes that the legislator is under procedural obligations, such as a burden of substantiation that, in the individual case, may amount to an obligation to state reasons.

Question 14

Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

Sub-question 1

There is no abstract standard developed by the Federal Constitutional Court according to which the intensity of review is dependent on the thoroughness of the previous analysis by the legislator. However, as a rule, the more thorough the legislator's analysis, the more thorough the reasons for its legislative proposals will be. This, in turn, increases the comprehensibility of the justification for interferences with fundamental rights or the solutions proposed by the legislator. There is a tacit link between a thorough analysis by the legislator on the one hand and a lack of objections raised by the Federal Constitutional Court on the other.

Sub-question 2

There is no general doctrine requiring the legislator to meet a specific level of thoroughness in its analysis that goes beyond what has been stated in our answer to Sub-question 1 of Question 13.

Question 15

Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

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167 Cf. BVerfGE 137, 34 <74 para. 80>.

168 BVerfGE 119, 181 <229>; BVerfGE 158, 389 <426 para. 99> (*State Treaty on the Financing of Public Broadcasting*).

Sub-question 1
The Federal Constitutional Court does not examine whether the parliamentary debate on a legislative proposal was exhaustive or whether all arguments discussed in society and scholarship were mentioned.

Sub-question 2a
The Federal Constitutional Court requires that a debate appropriate to the matters at hand is conducted in Parliament but the Court does not set general standards for reviewing whether the parliamentary debate met the minimum requirements. So far, there has been no case in which the Federal Constitutional Court found the parliamentary debate on a legislative proposal to be insufficient and therefore repealed the law in question. However, just recently the Court held that a substantive debate appropriate to the matters at hand must precede parliamentary decisions of substantial significance.[169]

Sub-question 2b
The Federal Constitutional Court does not separately examine whether the parliamentary debate paid particular regard to the effects on fundamental rights. If the parliamentary debate, however, does not consider the question of how to justify interferences with fundamental rights, this may suggest that the legislator either overlooked any interferences with fundamental rights or that the legislator itself assumes that a substantive justification cannot be given. However, this is not a necessary conclusion.

Question 16

Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

The Federal Constitutional Court assumes that weighty state measures require a sufficient level of legitimation.[170] Decisions with the highest level of democratic legitimation are those which the parliamentary legislator made through the regular parliamentary process, i.e. by upholding the public nature of parliamentary deliberations, the rules of parliamentary debate and minority rights. As a rule, the competence of the legislator and compliance with democratic procedure are considered a joint source of democratic legitimation. Tacitly, however, the competence of the legislator is considered the more weighty factor in ensuring a high degree of democratic legitimation, compared to the compliance with procedural rules.

Only the Parliament elected by the people can confer democratic legitimation upon the organs and public officials of state administration at all levels. For the exercise of state authority by officials and state organs that have not been directly elected to be democratically legitimised it is generally required that the appointment of public officials be attributable to the sovereign people and that they carry out their functions with sufficient functional-substantive legitimation. In personal terms, a sovereign decision is democratically legitimised if the

169 BVerfG, Judgment of 24 January 2023 – 2 BvF 2/18 –, para. 94.
170 Cf. BVerfGE 147, 50 <126 f. para. 198>.

appointment of the respective person can be traced back to the sovereign people in an uninterrupted chain of legitimation.[171] Factual and substantive legitimation is conveyed through the binding nature of statutes and of government mandates and instructions. The latter has a legitimising effect due to the government's responsibilities vis-à-vis Parliament.[172]

III. Rights' scope, legality and proportionality

Question 17

Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

This has already been answered under Question 1. With regard to the question whether the legislator has a margin of appreciation, it is necessary to differentiate between the interpretation of fundamental rights and the question of whether a specific measure violates fundamental rights. The Federal Constitutional Court interprets fundamental rights autonomously (and as the final authority). Other state authorities are not afforded any margin of appreciation in this respect. When it comes to assessing whether fundamental rights have been sufficiently considered in the specific case, the Federal Constitutional Court affords a margin of appreciation and assessment to the ordinary courts, as long as the courts do not fail to recognise the significance and scope of an applicable fundamental right.

Question 18

Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others? Do you have determinative factors for the nature of the fundamental right in question?

Sub-question 1

The extent of judicial review can vary depending on the subject matter and, in particular, depending on the fundamental rights affected and the intensity of the fundamental rights violation at issue.

In applying the principle of proportionality, the Federal Constitutional Court generally assumes that the legislator is also entitled to a margin of appreciation when assessing the necessity of a measure.[173] This margin of appreciation includes, among other things, the prognosis as to the effects of the chosen measures in comparison with other, less intrusive measures. The margin may be narrower depending on the fundamental right affected or the severity of

171 BVerfGE 144, 50 <136 para. 222>.

172 Cf. BVerfGE 147, 50 <126 f. para. 198>.

173 Cf. BVerfGE 152, 68 <136 para. 179>; 155, 238 <280 para. 105>;

interference.[174] Conversely, the margin is broader the more complex the matter addressed by the legislator is.[175]

Sub-question 2
The differences applicable depending on the fundamental rights affected have been particularly elaborated on in decisions on constitutional complaints directed against court judgments. As a starting point for determining the scope of review, the Court generally applies a formula developed by and named after former Justice Karl Heck ('Heck formula'), which was already mentioned under Question 1 (see p. 14):

'The design of the proceedings, the determination and assessment of the facts, the interpretation of ordinary law and its application to the individual case are matters that exclusively fall within the remit of the competent ordinary courts and are excluded from the Federal Constitutional Court's review. Only if specific constitutional law has been violated by the ordinary courts, can the Federal Constitutional Court intervene, provided that a constitutional complaint has been lodged.'[176]

This formula describes the general scope of review. Deviations remain possible in certain scenarios and largely dependent on the specific case. Deviating standards of review are known and established within the scope of application of the right to equality, the freedom of expression, the freedom of the arts, the right to family life and the freedom of assembly. There have also been occasional deviations from the Heck formula in the area of custodianship law. More specifically, the following applies:

Art. 3(1) of the Basic Law also applies with respect to constitutional complaints directly challenging a law (*Rechtssatzverfassungsbeschwerde*)
Art. 3(1) of the Basic Law requires that all people be treated equally before the law. The resulting requirement to treat equally that which is essentially alike and to treat unequally what is essentially different applies to unequal burdens and unequal privileges. At the same time, Art. 3(1) of the Basic Law does not entirely prevent the legislator from differentiating. Differentiations, however, must always be justified by objective reasons commensurate with the aim and the extent of the unequal treatment. The standard of constitutional review applicable here is a fluid one that is based on the principle of proportionality. Its limits cannot be determined in the abstract but only on the basis of the particular subject matter and regulatory areas affected. Depending on the subject matter of the legislation and the criteria for differentiation, different constitutional requirements regarding the factual reasons justifying the unequal treatment will result from the general guarantee of the right to equality; the limits imposed on the legislator in this respect may range from a mere prohibition of arbitrariness to strict proportionality requirements. Stricter constitutional requirements may apply, for instance, where unequal treatment

174 Cf. BVerfGE 152, 68 <119 para. 134>.
175 Cf. BVerfGE 122, 1 <34>; 150, 1 <89 para. 173> with further references
176 Cf. BVerfGE 18*, 85* <92>.

also affects specific fundamental freedoms in the individual case. Moreover, the less the individual can influence the criteria on which the legislative differentiation is based, or the more closely such criteria resemble those listed in Art. 3(3) of the Basic Law, the stricter the constitutional requirements will be.[177]

Art. 5(1) first sentence (freedom of expression) and Art. 5(3) first sentence of the Basic Law (freedom of the arts)

The Court, however, has consistently defined the limits of its competences to intervene depending on the intensity with which the ordinary court decision affects the condemned party. In the areas of the freedom of expression and the freedom of the arts, the Federal Constitutional Court has therefore regularly conducted a strict review of criminal law sanctions for acts that the affected individual claimed fell under the freedom of expression or the freedom of the arts. The Court was not satisfied with the usual review,[178] focusing on whether the challenged decisions rested on a fundamentally incorrect interpretation of the significance and scope of the relevant fundamental right. Rather, the Court also examined the interpretation of ordinary law in its specificities as to its compatibility with fundamental rights.[179] The challenged decisions must not only be reviewed as to whether they rest on fundamentally incorrect interpretations of the significance and scope of the freedom of the arts.[180] Rather, the Court's constitutional mandate extends to reviewing the details of the way in which the authorities and ordinary courts have applied the law. In particular, the scope of review is determined by the intensity with which the challenged decisions interfere with the affected fundamental rights.[181] Criminal prosecution of conduct protected under Art. 5(3) first sentence of the Basic Law is not the only case in which there is a lasting interference that leads to a more intense constitutional review. Rather, such a lasting interference is also to be assumed in case of other decisions by state organs that are apt to give rise to preventive effects going beyond the specific case at hand, i.e. if they may reduce the readiness to exercise the affected fundamental right in future.[182]

Art. 6 of the Basic Law

In case of court decisions that withdraw custody from the parents for the purposes of separating the child from the parents, the Federal Constitutional Court saw reason to widen the usual scope of review, given the substantive weight of the interference with the fundamental rights of both parents and children.[183] Here the Federal Constitutional Court in particular examines the

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177 Federal Constitutional Court, Order of the First Senate of 22 March 2022 - 1 BvR 2868/15 and others -, para. 122 f. with further references (*Lodging taxes*); established case-law.

178 BVerfGE 18, 85 <92 f.>.

179 BVerfGE 75, 369 <376> (*Strauß Caricature*); cf. also BVerfGE 77, 240 <250 f.> (*Herrnburg Report*).

180 Cf. BVerfGE 18, 85 <92 f.>.

181 Cf. BVerfGE 42, 143 <147 ff.>; 66, 116 <131>.

182 Cf. inter alia BVerfGE 43, 130 <135 f.>; 67, 213 <222 f.>; 75, 369 <376>; 77, 240 <250 f.>; BVerfGE 83, 130 <145 f.> (*Josefine Mutzenbacher*).

183 Cf. BVerfGE 72, 122 <138>; established case-law.

reasonableness of the family court's assumption that the child's best interests were lastingly jeopardised and that such lasting threat could only be averted by separating the child from the parents. Given the considerable intensity of the interference in this context, constitutional review may, as an exception, also concern single errors of interpretation[184] as well as clear errors in the determination and assessment of the subject matter at hand.[185] Thus, the Court clarifies with respect to the protection of marriage, family and the child-parent relationship: *As a rule, the design of the proceedings, the determination and assessment of the facts, the interpretation and application of constitutionally unobjectionable provisions in the specific case are matters that fall to the competent ordinary courts and are not subject to review by the Federal Constitutional Court. The Federal Constitutional Court may only examine whether the challenged decision rests on errors of interpretation that are based on a fundamentally incorrect understanding of the significance of a fundamental right or of its scope of protection.[186] However, the limits of the Federal Constitutional Court's capacity to intervene when carrying out these tasks cannot be defined in an inflexible and rigid manner. Rather, this depends on the intensity of the interference with fundamental rights in the specific case.[187] In case of court decisions that withdraw custody from parents, the Constitutional Court sees reason to widen the usual scope of review, given the substantive weight of the interference with the parents' fundamental rights under Art. 6(2) first sentence and Art. 2(1) of the Basic Law and in particular considering that the interference with the parents' rights affects the children with the same intensity.[188] However, the same stricter scope of review must also apply in case of constitutional complaints against decisions that declared it lawful for children to remain with their parents against the children's will. Such a court decision is of equally existential significance for the children's future as is the separation from their parents.[189]*

In cases concerning the right of residence, the Federal Constitutional Court applies a comparable standard of review when parents are being separated from their children due to a measure terminating the parents' stay. Here the Federal Constitutional Court requires the public authorities and the ordinary courts to make a sound prognosis according to which the separation does not amount to a disproportionate interference with the family relationship protected under Art. 6(1) and (2) first sentence of the Basic Law. Particularly decisive factors are the children's age and thus their capacity to uphold the family relationship throughout the time of separation and physical distance.[190]

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184 Cf. BVerfGE 60, 79 <91>.

185 BVerfGE 136, 382 <391 Rn. 28> (*On the choice of a guardian*); established case-law

186 Cf. BVerfGE 18, 85 <92>; 42, 143 <147 ff.>; 49, 304 <314>.

187 Cf. BVerfGE 42, 163 <168>; established case-law.

188 Cf. BVerfGE 60, 79 <91>.

189 Cf. BVerfGE 72, 122 <138 f.> (*Withdrawal of custody*).

190 Cf. most recently Federal Constitutional Court, Order of the Second Chamber of 9 December 2021 - 2 BvR 1333/21 - paras. 48 ff.

Protection of the general right of personality in case of custodianship

Under constitutional law, the state does not have the right to restrict the freedom of its adult citizens who are capable of freely forming their own will unless they put themselves or others at risk. Appointing a custodian against the will of a person without there being a sufficient factual basis to assume their ability to form a free will is impaired hence violates the fundamental right of the affected person under Art. 2(1) of the Basic Law.[191] Given the severity of the interference with fundamental rights when ordinary courts order the appointment of a custodian against the will of the person concerned, constitutional review, at least of such court decisions, goes beyond a mere examination of the fundamental failure to recognise the effects that the challenged measures[192] have for fundamental rights. In particular, such constitutional review also concerns the question of whether the established facts provide a sound basis for the decision and whether they have been obtained without a considerable violation of procedural law. If the affected person refused to agree with the appointment of a custodian, it is, as a rule, constitutionally imperative that the person concerned be heard in person in the custodianship law proceedings.[193]

Art. 8 of the Basic Law

Any review of the fundamental right to freedom of assembly must consider that the assembly laws of the *Länder* and the Federation (cf. Art. 125a(1) first sentence of the Basic Law) apply the express limitation clause in Art. 8(2) of the Basic Law and define the legally permissible possibilities of restricting the fundamental right of assembly. The assembly laws implement constitutional requirements in ordinary law (*konkretisiertes Verfassungsrecht*). Thus a violation of these ordinary law provisions typically also amounts to a violation of fundamental rights. This is reflected in a stricter standard of review applied by the Federal Constitutional Court. In cases of constitutional complaints challenging court decisions, constitutional review may also encompass whether the individual requirements for restrictions of the freedom of assembly under the assembly laws (by means of prohibitions or conditions) have been met. For instance, the Court held: '*The obligation to guarantee the freedom of assembly in an optimal manner and the procedural requirements this obligation entails mean that a preventive prohibition of the entire assembly due to fears of riots by a minority of participants prone to violence is only permissible under strict conditions and when § 15 of the Assembly Act (Gesetz über Versammlungen und Aufzüge – VersG) is applied in conformity with the Constitution. These conditions require a risk prognosis showing a high likelihood of an immediate danger to public security or order and the previous exhaustion of all reasonable means to*

191 Cf. Federal Constitutional Court, Order of the Second Chamber of the First Senate of 2 July 2010 - 1 BvR 2579/08 -, para. 43.

192 On this rule, cf. BVerfGE 18, 85 <92 f.>; established case-law.

193 Cf. Federal Constitutional Court, Order of the First Chamber of the First Senate of 20 January 2015 - 1 BvR 665/14 -, para. 26 f.

give effect to the fundamental rights of peaceful protesters (e.g. by limiting a prohibition to a defined space).'[194]

Criminal convictions, measures under the Code of Criminal Procedure, remand detention, preventive detention, psychiatric confinement and others

Similarly to the freedom of assembly under Art. 8 of the Basic Law, criminal procedural law with its particularly acute potential impact on fundamental rights, especially in regard to the execution of sentences and other measures of deprivation of liberty, also amounts to ordinary law that implements constitutional requirements, the violation of which frequently also entails a violation of fundamental rights. For instance, if provisions of criminal procedural law concerning remand detention are disregarded, this generally also amounts to a violation of the fundamental right of liberty of the person. At the same time, Art. 104 of the Basic Law includes specific constitutional requirements applicable to measures of deprivation of liberty. Thus the ordinary laws that implement these requirements are also subject to specific constitutional review.

Reaching beyond criminal law, Art. 104 of the Basic Law also mandates the same intensity of review for deprivations of liberty under police and security law. Key examples in this respect are public security measures under various *Land* laws in case of mental illness or detention pending deportation enforcing the termination of foreign nationals' stay.

General considerations

There are no general factors that determine whether the Federal Constitutional Court also reviews compliance with ordinary law. What is decisive are the specificities of the fundamental right at issue and the severity of the interference with that fundamental right. As a tentative point of reference, one can say that there is a certain assumption in favour of stricter judicial review where fundamental rights are affected which are particularly dependent on being specified in ordinary law and which are of particular relevance for the general right of personality or for the design of democracy.

Question 19

> **Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?**

The Federal Constitutional Court has developed an elaborate and detailed case-law on specificity requirements that laws must satisfy. The specific requirements depend on different factors. For instance, a law that grants security authorities the power to carry out covert surveillance measures must meet particularly strict specificity requirements, given that state actions in this context are (more) difficult to review. In recent times, there has been a clear differentiation of requirements in this regard: The principle of legal specificity is geared towards state organs whose acts are limited and governed by sufficiently specific laws. By contrast, the principle of legal clarity is to ensure that the laws are also comprehensible for citizens, who are subject to the law, so that it is clear to

194 BVerfGE 69, 315 <362> (*Brokdorf II*).

them whether a law even concerns a subject matter that affects them. Both requirements derived from the principle of the rule of law are to be adhered to. Usually, the following applies:

The principles of legal clarity and specificity serve to make interferences foreseeable for citizens, to effectively limit the power of public authorities and to enable effective judicial review.

aa) The requirement of specificity mainly serves to ensure that the law provides standards that limit and direct the acts of government and the administrative authorities and that enable an effective judicial review of these acts. The legislator must ensure that laws are as specific as the particular nature of the underlying subject matter allows for and as the purpose of the respective legal provisions requires.[195] It suffices if, by applying the standard rules of interpretation, it is possible to determine whether the actual requirements for the legal consequence laid down in the legal provision have been met. Any remaining uncertainties must not go so far as to put at risk the predictability and justiciability of the actions by state authorities that have been granted power to act under the respective legal provision.[196]

bb) In terms of legal clarity, the primary focus is on the substantive comprehensibility of legislation, in particular so as to allow citizens to adapt to possible onerous measures.[197] It imposes particularly strict requirements with regard to the covert collection and processing of data, as these can profoundly intrude into the private sphere. Since the persons affected are usually not aware of their data being processed and can thus not challenge these measures, their substance can only be specified to a very limited extent in the interplay of practical application and judicial review. The requirements, however, vary depending on the severity of the interference in each case and are thus closely linked to the respective substantive requirements of proportionality.[198]

Because the administrative authorities, police and intelligence services restrict fundamental rights here without citizens having knowledge thereof and often without having access to judicial review, it must be possible for the content of an individual provision to be determined in a comprehensible manner and without any major difficulty by way of interpretation. While it may be possible to determine a rule's substance by interpreting it, or while it may be specific in constitutional terms because it can be interpreted in conformity with the Constitution, this does not necessarily mean that it is clear to its addressees.[199]

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195 Cf. BVerfGE 145, 20 <69 f. para. 125> with further references.

196 Cf. BVerfGE 134, 141 <184 para. 126>; 156, 11 <44 f. paras. 85 ff.> with further references.

197 Cf. BVerfGE 145, 20 <69 f. para. 125>.

198 Cf. BVerfGE 141, 220 <265 para. 94>; 155, 119 <181 para. 133> (*Subscriber data II*); Federal Constitutional Court, Judgment of the First Senate of 26 April 2022 - 1 BvR 1619/17 -, para. 273 (*Bavarian Protection of the Constitution Act*); each with further references; established case-law.

199 Cf. BVerfGE 156, 11 <46 para. 88> with further references.

Question 20

What is the intensity review of your Court in case of the legitimate aim tier?

The intensity of the review of the legitimate aim also depends on the requirements that the Constitution lays down for the legal provision at issue with respect to the purpose of serving the common good. With regard to fundamental rights that are not subject to an express limitation clause, i.e. do not expressly provide for the possibility of legislative intervention, interferences may only be pursued on grounds of a constitutionally recognised public interest (objectives inherent in the Constitution).[200] Interferences with fundamental rights that are subject to a limitation clause may also have to meet particular requirements relating to the common good. This is especially the case for interferences with the freedom of assembly. Here particular requirements in terms of the justification for interferences with Art. 8 of the Basic Law must be met. The same applies for the mandatory membership in associations governed under public law (relating to the general freedom of action under Art. 2(1) of the Basic Law). Other legislative initiatives can also concern the pursuit of constitutional objectives. When there is only one constitutional objective that may authorise the legislator to interfere with a fundamental right, e.g. the objective of averting acute dangers for public safety for interferences with the inviolability of the home under Art. 13(4) of the Basic Law, the Federal Constitutional Court examines whether the interference complies with this objective. The Federal Constitutional Court conducts a considerably less strict review of legislative provisions that are not subject to particular requirements in terms of compliance with a constitutional objective. The following applies here:

Given Parliament's democratic sovereignty, formal legislation may determine its own purposes as long as these purposes are not prohibited by the Basic Law or otherwise incompatible with constitutional objectives.[201] The interests of the individuals affected by the interference only serve as a legitimate purpose for state measures in exceptional cases.[202] In terms of the requirements relating to legally pursued objectives, the principles detailed above apply.

Executive measures are bound by the purpose of the respective provision.

Question 21

What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

The Federal Constitutional Court, generally, applies all four prongs of the proportionality test. Interferences with fundamental rights must pursue a legitimate aim, be suitable and necessary to achieve the legitimate aim and be

200 See *supra* note 119.

201 BVerfGE 138, 136 <188 para. 138>; see also 104, 357 <364 ff. >; 138, 261 <285 f. para. 57>.

202 BVerfGE 128, 282 <304>.

proportionate in the strict sense (i.e. appropriate).[203] When examining the appropriateness of an interference with fundamental rights, the Court engages in a balancing of the intensity of the interference, the importance of the common good or of conflicting constitutional goods and the extent to which the common good would benefit from the interference with the fundamental right at hand.[204]

Question 22

Does your Court go through every applicable limb of the proportionality test?

The Federal Constitutional Court generally engages in an analysis of all four prongs of the proportionality test.

Question 23

Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

When there is need for a prognosis or when there is insufficient scientific certainty on relevant causal effects, the Federal Constitutional Court only examines whether the methodological steps taken by the legislator and the factual basis on which it relies are plausible. When this is the case, the interference with fundamental rights remains constitutional, even if it later becomes clear that the legislator's assessment was incorrect. A relevant example in this context are the school closures during the COVID-19 pandemic. Should it become clear that the legislator's assessment at the time was incorrect, the legislator is then obliged to adjust the statutory provisions for the future. The fact that Parliament as the legislative branch is tasked with making decisions under uncertain factual circumstances and on the basis of prognoses necessarily entails that the legislator is also authorised to act when it is uncertain whether later developments will confirm that it acted correctly.[205]

Question 24

Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

There is no doctrine of judicial self-restraint in Germany (see answer to Question 1 above). Hence, the case-law on the proportionality principle has not been concomitant with any case-law on judicial self-restraint.

Question 25

Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation

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203 Cf. BVerfGE 67, 157 <173>; 141, 220 <265 para. 93>.

204 Federal Constitutional Court, Order of the First Senate of 9 December 2022 - 1 BvR 1345/21 -, paras. 87 ff.

205 See *supra* notes 94 - 101.

of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

In the context of judicial deference, it is not ascertainable that the Federal Constitutional Court clearly refers to case-law by the ECtHR when choosing the standard of review for examining decisions of the legislator. However, should the ECtHR apply a stricter standard of review to state interferences than the Federal Constitutional Court does vis-à-vis the legislator, this would likely induce the Federal Constitutional Court to examine its own case-law with a view to making adaptions.

For the Federal Constitutional Court, the ECtHR's doctrine on the margin of appreciation is not entirely equivalent, in legal terms, to the discretion that the Federal Constitutional Court affords to national organs. This rests on different points of view. When deciding on the margin of appreciation, the ECtHR differentiates according to state practice in the respective member states of the Council of Europe. While states are the point of reference for the ECtHR in this context, in the case of the Federal Constitutional Court it is state organs. However, the substantive criteria that the ECtHR recognises when affording a broad margin of appreciation may in specific cases also be transferrable to the granting of discretion to state organs by the Federal Constitutional Court.

There is no fundamental divergence concerning the standard of review applied by the ECtHR and that applied by the Federal Constitutional Court.

Question 26

Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

Given that there is no general principle of judicial self-restraint in Germany, so far there has been no case in which a measure of a German public authority has been reversed by the ECtHR due to the exercise of judicial self-restraint.

In all the cases in which the ECtHR reverses a German measure that was previously upheld as constitutional by the Federal Constitutional Court (in a decision on the merits, not just on admissibility), it must be examined whether the two Courts reached different conclusions because they apply different guarantees or because the guarantees, while comparable, are either generally interpreted in different ways or have been operationalised differently when applying the law to the specific case.

If the ECtHR reached stricter conclusions than the Federal Constitutional Court on comparable questions of law, this must not necessarily mean that the ECtHR applied a stricter standard of review. Rather, the reason could also be that the two Courts interpreted general standards in different ways. It is also conceivable that the standard of review was applied with varying degrees of strictness. In this case, the result would hence be comparable with differing degrees of judicial restraint. Methodologically, the differences between the case-law by the ECtHR and the Federal Constitutional Court, however, do not consist in a

different degree of judicial restraint but in a different understanding of the scope of the respective fundamental rights guarantees.

The ECtHR, in particular, ruled against Germany, inter alia, in cases concerning:

- the excessive length of court proceedings,
- the strict duty of loyalty to the Constitution (duty of political loyalty) owed by members of the German public service,[206] taking account of the so-called requirement of militant democracy as a response to the Nazi regime of terror,
- the weak position of the biological, but not legal, father under adoption law, due to a predominantly legal understanding of the family relationship in Germany, [207]
- the protection of personality rights of celebrities,[208]
- the protection against retrospective extension of preventive detention of offenders,[209]
- the admissible limits of the use of undercover police officers and agents provocateurs and in particular, the consequences of a violation of Art. 6(1) of the ECHR in this context,[210]
- the forced administration of emetics to make potential drug dealers regurgitate swallowed drugs[211].

The ECtHR rulings against Germany rest on the fact that it was not possible to assume congruence between the ECHR and the fundamental rights catalogue in the Basic Law, to begin with, in particular because the ECHR either includes express guarantees that are lacking in the Basic Law, such as in particular several procedural guarantees in Art. 6 ECHR or the protection of private life under Art. 8 ECHR, or that correspond to similar fundamental rights provisions in the Basic Law whose interpretation, however, is very specific in Germany due to

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206 ECtHR, Judgment of 26 September 1995, No. 17851/91, NJW 1996, 375 ff.

207 ECtHR, Görgülü / Germany, Judgment of February 2004, No. 74969/01; BVerfGE 111, 307 <330 ff.> (*Görgülü*); see also BVerfGE 127, 132 juris para. 74.

208 ECtHR, von Hannover / Germany, Judgment of 24 June 2004, No. 59320/00, para. 64; see also ECtHR, Karhuvaara and Iltalehti / Finland, Judgment of 16 November 2004, No. 53678/00, para. 45; BVerfGE 101, 361 <390 ff.> (*Caroline II*); earlier already BVerfGE 34, 269 <283>; 120, 180 <220 f.> (*Caroline III*).

209 Foundationally, ECtHR, Mücke / Germany, Judgment of 17 December 2009, No. 19359/09; BVerfGE 109, 133 <159> (*Preventive detention I*); BVerfGE 128, 326 <370> (*Preventive detention II*).

210 ECtHR, Judgment of 23 October 2014, No. 54648/09, NJW 2015, 3631; ECtHR, Judgment of 15 October 2020, No. 40495/15, NJW 2021, 3515; still different in Federal Constitutional Court, Order of the Second Chamber of the Second Senate of 18 December 2014 - 2 BvR 209/14.

211 ECtHR, Jalloh / Germany, Judgment of 11 July 2006, No. 54810/00, NJW 2006, 3117 ff.

certain historical or cultural circumstances and deviates considerably from the basic understanding of other contracting parties.

IV. Other peculiarities

Question 27

How often does the issue of deference arise in human rights cases adjudicated by your Court?

As outlined under Question 1 above, there is no explicit doctrine of judicial self-restraint in Germany. The question as to the applicable standard of review and the question as to which leeway to design the constitutional provisions afford to the acting state authority arise in every case the Court decides.

Question 28

Has your Court have grown more deferential over time?

Ever since the Court's existence, legal scholars in particular have critiqued individual decisions of the Court as either being too strict or not strict enough in their review of legislative, administrative or judicial acts. In the Court's case-law, there has been no development towards stricter or less strict judicial review.

Question 29

Does the deferential attitude depend on the case load of your Court?

The question as to whether constitutional law affords the acting state authority a margin of appreciation or leeway to design depends on the respective constitutional provision and not the number of cases before the Court. As such, the judicial standard applied is independent from the practical relevance of the question of constitutional law at issue. If the Court applied a stricter standard of review for scenarios that are so frequent that this would practically render the proper functioning of the Court impossible, the Court would, however, probably assume this to be an indication for its original assumption that the Constitution stipulates a stricter standard of review for such scenarios to not have been quite correct, given that the Constitution generally assumes that the Federal Constitutional Court maintains its proper functioning.

Question 30

Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

The question as to the extent to which the standard and scope of review are limited by the challenges raised, has not been uniformly answered in the Court's case-law. While the First Senate generally only analyses the challenges brought by the complainants, the Second Senate examines the challenged subject matter

in admissible constitutional complaints under every conceivable vantage point to ascertain whether it is unobjectionable under constitutional law.[212]

Question 31

Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

In principle, it is to be assumed that determining the subject matter in dispute falls to the applicant or complainant.[213] Meanwhile, this does not exclude extending the constitutional review beyond the explicitly challenged matter in dispute insofar as implicit challenges are discernible in interpreting the application.[214] With respect to constitutional complaints directly challenging laws, a constitutional review is also to be conducted of provisions that themselves are not being challenged if, under the regulatory context, this is necessary for reviewing the challenged legal provisions.[215]

In specific judicial review proceedings, extending the question referred to the Court is possible if it becomes clear from the overall context of the order of referral that the referring court has also considered other questions than those mentioned and considers them to be of significance. Extending the referred question to other aspects is also required if the question would otherwise not be accessible to a plausible review or if there is a close connection between the issues relevant for decision and another question, making it necessary for this other question to also be referred for review. When conducting specific judicial review proceedings, the Court also has the possibility to consider other provisions that are not specifically relevant for the decision but that arise from the factual context.[216]

The extension of the subject matter of review beyond the challenged provision is specifically regulated in § 78 second sentence of the Federal Constitutional Court Act with respect to abstract judicial review proceedings. Pursuant to this provision, if the Federal Constitutional Court is convinced that federal law is incompatible with the Basic Law or that *Land* law is incompatible with the Basic Law or other federal law, the Court cannot only declare the challenged provision void but, stating the same reasons, it can also declare other incompatible provisions of the same law void. The Court applies § 78 second sentence of the Federal Constitutional Court Act in constitutional complaint procedures accordingly.[217]

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212 Cf. with further references Hömig, in: Schmidt-Bleibtreu/Klein/Bethge, BVerfGG, § 92 para. 15; Barczak, in: Barczak, BVerfGG, § para. 94 f.

213 Cf. on the constitutional complaint, Magen, in: Burkiczak/Dollinger/Schorkopf, § 92 para. 3; Hömig, in: Schmidt-Bleibtreu/Klein/Bethge, BVerfGG, § 92 para. 15; Barczak, in: Barczak, BVerfGG, § 92 para. 96f.

214 Cf. Scheffczyk, in: BeckOK BVerfGG, Walter/Grünewald, § 92 para. 18; Magen, in: Burkiczak/Dollinger/Schorkopf, § 92 para. 6.

215 Cf. BVerfGE 109, 279 <374>.

216 Moradi Karkaj, in: Barczak, BVerfGG, § 80 para. 118.

217 Cf. BVerfGE 18, 288 <300>.