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THE CONCEPTION OF THE FEDERAL CONSTITUTIONAL COURT OF GERMANY IN COMPARISON TO THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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Table of Content

page ....

I. Introduction

Germany as well as South Africa have established Constitutional Courts.
The Federal Constitutional Court of Germany, located in Karlsruhe (cf. § 1 II BVerfGG), commenced its work in September 1951. Up to 1995 the Federal Constitutional Court heard more than 120,000 cases[1].

The South African Constitutional Court was established in 1994 in terms of the country's first democratic constitution - the interim Constitution of 1993. In terms of the 1996 Constitution the Court established under the interim Constitution continued to hold office. The Court, situated in Johannesburg, began its first sessions in February 1995[2].
In its first year of operation, the Constitutional Court heard 22 cases and gave judgement in 14. By December 1996 it had decided a total of about 40 cases[3].

Constitutional Courts are called upon to prevent the state from violating the constitution. Since Germany and South Africa are constitutional states by now, the constitutions are their supreme law (Art.20 III GG respectively s.1 (c) of the SA-Constitution). It means inter alia, that all laws and executive actions have to comply with the requirements laid down in the Constitution[4].
In cases where this does not happen, the courts and the Constitutional Courts in particular will provide the necessary "judicial remedies".
In the final instance the Constitutional Courts are thus the guardians of the Constitution[5]. The Constitutional Courts are supposed to ensure that state institutions act only as they are required to do - in accordance with the constitution - by controlling all their activities[6] Thus, the Courts' highly responsible task is only one part of the whole functioning of the state organisation and requires co-

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1 Wöhrmann, p.22
2 Constitutional Court's Homepage
3 Sarkin, p.135
4 Kotzé, p.19
5 BVerGE 6, 300 (304); Wöhrmann, p.7; Devenish, p.220; Kotzé, p.19; Executive Council, Western Cape Legislature, & others v President of South Africa & others 1995 (10) BCLR 1289 (CC), at para 122
6 Brinkmann, p.87

operation with these other organs of state[7]. On the other hand, they need sufficient independence from and sufficient authority over the institutions they are supposed to control. Were these institutions enabled to interfere in any way, the safeguarding of the constitution would not be effective.

Hence, the Constitutional Courts at the same time require and safeguard the separation of powers.

However, the division-of-powers principle implies not only the distinction between legislative, executive and judicial functions and their allocation to specific organs (separation of powers) but also mutual checks and curbs of those organs (balance of powers) to prevent the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another[8].

Nevertheless, the Constitutional Courts are enabled to supervise every activity of all state organs:

1. All organs of the state are controlled regarding the strict observance of their competence.
2. The legislature is controlled with the effect that a statute can be annulled.
3. The executive is controlled with the effect that a governmental action or any administrative action can be abolished when incompatible with the constitution.
4. The judicial power of all ordinary courts is controlled with the effect that any judgement can be abolished due to its unconstitutional result[9].

That puts them in a way in a position above all the other states' organs and in tension with the division-of-powers-principle; the Constitutional Court might transform itself from a guardian of the Constitution to the master of the Constitution[10]. Indeed, no constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation[11].

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7 Rupp- v.Brünneck, p.401

8 Wöhrmann, p.6;
In re: Certification of the Constitution of the Republic of South Africa 1996, 1996 10 BCLR 1253 (CC)

9 Doehring, p.22

10 Lamprecht/ Malanowski, p.11

11 In re: Certification of the Constitution of the Republic of South Africa 1996, 1996 10 BCLR 1253 (CC)

However, although the legislature has the primary legislative powers, those powers are not exclusive, since the courts play a secondary legislative role[12]. All the same the Constitutional Courts of both countries as the guardians of the constitutional values are certainly not allowed to take over the constitutional role of the legislature[13]. In Germany the criticism went even so far to call the Constitutional Court the "Third Legislative Chamber", "Negative Legislator" or "Superlegislator"[14].

In any case, constitutional jurisdiction presents a problem to the doctrine of the separation of powers, in distinguishing it from the democratically legitimised

Not only as secondary legislator the Constitutional Courts are inevitably in tension between law and politics.In theory, the function of a court is only to uphold the law and not to interfere in politics. This supposedly neutral position, however, does not mean that the Constitutional Courts would be kept outside politics, since in the background of every constitutional controversy there stands a political problem which may develop into a question of power[16]; in the sphere of constitutional law a political question becomes the object of a legal controversy and decision[17].

Besides that, constitutional law is by its very nature political law[18]: with its broad general clauses and its vague conceptions of values, it offers a particularly wide scope for interpretation. Any wish to keep political considerations out of this interpretation would be doomed to failure from the outset. It is obvious that concepts such as freedom and equality, the dignity of man and personality, among many others, cannot be interpreted without recourse to the social and political ideas of the contemporary body of law[19].

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[12] Botha, p.116
[13] Botha, p.118
[14] Brinkmann p.83, 89 with further references
[15] Brinkmann, p.89
[16] Brinkmann, p.87
[17] Leibholz, p.273
[18] Brinkmann, p.83
[19] Bachof, p.409

Not even the most precise regulations of the procedures and competencies, hence, are able to prevent, that the decisions of Constitutional Courts have a more political impact than the decisions of other courts[20].

Apart from that political struggles are shifted to the courts for resolution. Use and threatened use of the courts to solve political conflict have already occurred in South Africa as well as in Germany, political parties may use the courts to fight their political battles[21]. It is equally the political parties and governmental institutions which attempt to circumvent and obstruct the democratic process by clothing highly political questions in a legalistic form, so laying the groundwork for the judicialisation of politics[22].

Thus, the Constitutional Courts play a highly responsible role in the structure of the states not only as courts but also as political instruments. Furthermore, in order to fulfil their function as guardians of the constitutions they are vested with extraordinary powers. The combination of both suggests an enormous influence on the states' ruling.

This work will try to find out whether, and if, how the conceptions of the courts took into account the tensions between the states' powers and politics. In comparing the German and the South African conception the implications of different means will be considered. For that the work at first monitors the courts as institutions. All the same, not only the design of the courts determines the courts' significance. To a very considerable extent it also depends on the judges giving the decisions and judgements. Therefore the role of the judges will be taken into consideration as well.

In the end it might be possible to conclude and evaluate how the courts are integrated in the states' structure.

II. The Courts as Institutions

In this chapter it shall be examined what kind of institutions the Constitutional Courts of Germany and South Africa actually are. The Courts' authority depends substantially, besides their reputation, on their design. The Constitutional Courts'

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[20] Pestalozza, p.1

[21] Sarkin, p.135

[22] Brinkmann, p.103

design means their legal framework, their status, and their internal structure. These aspects determine, whether the courts can comply with their task to safeguard the constitutions on the one hand, but do not have a position which is impossible to integrate in a balanced state's structure on the other.

A. The Legal Framework

The legal framework of the courts are formed by the laws and statutes which govern the courts' conduct of work. The legal framework is the overall-determination of the courts' power. In both states the legal framework is provided for in different bodies of law:

The German as well as the South African court are provided for in the constitutions of the respective states. However, additional to the constitutional provisions, the parliaments have passed laws dealing with the courts specifically. In Germany it is the *Bundesverfassungsgerichtsgesetz* (BVerfGG), in South Africa the Constitutional Court Complementary Act, 1995 (CCCA). Furthermore both courts are authorised by means of law (§ 1 III BVerfGG respectively s.16 CCCA) to adopt rules prescribing their internal matters.

Accordingly the German Court established the *Geschäftsordnung für das Bundesverfassungsgericht* (GOBVerfG), the South African court has got the Constitutional Court Rules, 1998 (CCR), which supersede the Constitutional Court Rules, 1995.

Not only the content of the provisions dealing with the Constitutional Court determine the range of the courts' powers. Notwithstanding, it also matters to which body of law the provisions are allocated, since they all have divergent general significance and accordingly divergent implications for the courts as institutions.

1. The Significance of the Different Regulations

Each of these three bodies of law are passed by different organs. These organs differ in their consistence, their dependence on and responsibility to the state and the people, and their attitude towards the courts. Furthermore, the possibilities of amendments differ between these bodies of law.

a) The Role of Constitutional Provisions

The Constitutions were passed by the *Parlamentarischer Rat* (i.e. Parliamentary Council) in Germany and the Constitutional Assembly in South Africa. Both organs were established only to construct a constitution and were not dependent on any later election, party discipline or polls. They exclusively had the task to create a constitution for their states, which does not serve any particular interest but only for the sake of a stable democracy. Therefore it lay in the hands of these organs' members to balance the powers of the state. Their provisions are meant to furnish the Constitutional Courts with the appropriate power which is compatible with the other powers of state. Hence, the more exact the constitutional provisions are, the more the Constitutional Court's power is presumably balanced against the other state's powers.

As amendments of constitutional provisions need qualified majorities and particular proceedings in Germany as well as in South Africa (Art.79 GG respectively s.74 of the SA-Constitution), it is furthermore rather unlikely that the Constitutional Courts' powers will be too far extended. Thus, all provisions dealing with the Constitutional Court are their essentials, which are supposed to remain unchanged.

b) The Role of Legislative Provisions

The legislative provisions dealing with the constitutional courts lie in the responsibility of the German *Bundestag* and *Bundesrat*, and the South African National Assembly and the National Council of Provinces. These are elected bodies, which are mainly party based. Consequently the major party or ruling coalition is able to shape the Constitutional Court according to their ideas in between the scope the Constitution sets out. Therefore it is important to what extent the constitution delegates legislative power dealing with the Constitutional Court to the parliaments. If the legislature's power is as broad as to be able to undermine the authority of the Constitutional Court, the independence then is not sufficient and the Courts' function at stake: as the courts' task is to control inter alia the parliaments' activity there could be a government once who would try to diminish the Constitutional Courts' ability to function accordingly.

However, the more the constitutions regulate, the more limited is the scope for the major party, alternatively the ruling coalition, to influence the Constitutional Court.

As these regulations are matters of ordinary legislation, they are likewise subject to amendments. In concrete it means that the legislature may attempt to curb the Court's powers when it opposes a decision of the Constitutional Court.
Thus, the Constitutional Courts' authority and independence cannot be evaluated without considering the scope of parliamentarian legislation.

c) The Role of Provisions of the Courts' Self-Governing

The scope of the self-governing power of the courts is dependent on the regulations of the aforementioned laws. The Courts can only regulate matters which are not provided for by neither the constitutions nor parliamentarian legislation provide. The remaining gaps of legislation are supposed to be filled by provisions passed and amended by members of the Courts. Most probably these provisions will serve the interests of the Court at first. Thus, in general a broad scope of self-government brings the Court in a stronger position as a small scope.

After showing the implications of the different bodies of law on the Constitutional Courts' authority, it shall be taken into closer consideration, which matters were regarded as that substantial to provide for constitutionally, which were delegated to the legislature and which remain in the Courts' own sphere.

2. The Particular Constitutional Provisions

Both constitutions require the existence of a Constitutional Court and set out something about the composition. Furthermore both Constitutions are providing for the Courts' jurisdiction. For regulating further aspects and details, the Constitutions empower the legislatures (respectively the Court itself) accordingly.

a) Constitutional Establishment of the Courts

Indeed the Constitutions provide for the existence of a Constitutional Court.
The ninth chapter of the German *Grundgesetz* (GG, i.e. Basic Law) is dealing with the "Administration of Justice". Within this chapter the legal basis for the Federal Constitutional Court is provided by Art.92-94, 99, 100 and 115 (g) and (h) GG.
The South African Constitution also contains a specific chapter, the eighth, titled, much alike the German one, "The Courts and the Administration of Justice".

S.166 of the SA-Constitution declares the existence of five different categories of courts. Here the existence of a Constitutional Court is provided for.
Whether or not the Constitutions actually establish a Constitutional Court, is in fact questionable, as the establishment requires certain prerequisites.
Indeed, the *Grundgesetz* of 1949 had provided the existence of such a court and transfers some certain jurisdictional tasks to the Federal Constitutional Court in Art.93 I GG[23]. However, the actual establishment is required to be provided by federal legislation. Art.94 II GG instructs the legislature to pass a federal law[24], which sets out the constitution and the procedures of the Federal Constitutional Court. Without such a law a constitutional court could neither exist nor be legally claimed and imposed[25].

Though, in contrast to the German *Grundgesetz* the South African Constitution also contains a provision, which actually constitutes the Constitutional Court.
S.167 (1) of the SA-Constitution determines the composition of the court, and subsec.2 even sets out a quorum of how many judges must hear a matter before the Constitutional Court.
These basic regulations make it possible to enforce at least the mere existence of a constitutional court in South Africa.
Hence, a law in terms of national legislation just to establish a constitutional court, is not needed in South Africa. In Germany on the other hand the establishment of the Constitutional Court needed legislative participation. This participation caused a delay of the Court's coming into being: It took almost two additional years of debate to pass the German 'Bundesverfassungsgerichtsgesetz" (BVerfGG) which actually created the Constitutional Court[26].

b) Constitutional Dealing with the Courts' Composition

In this part
Here it shall be investigated what the Constitutions provide for the Courts' consistence and structure.

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[23] v.Münch - Meyer, art.94 s.no.4
[24] v.Münch - Meyer, art.94 s.no.4
[25] v.Münch - Meyer, art.94 s.no.4
[26] Robbers, s.no.10; Kommers, p.11

The *Grundgesetz* does not provide for the composition of the Constitutional Court in detail. Only in Art.94 I GG is set out, that some of the constitutional judges must be federal judges.
"Federal judges" are the judges who are firmly employed by one of the supreme federal courts[27] (Federal High Court, Federal Administrative Court, Federal Labour Court, Federal Social Court and Federal Tax Court). The other members of the Federal Constitutional Court are ordinary judges of other courts[28]

The *Grundgesetz* does not provide for a specific number of judges. However, the second sentence of Art.94 I GG states that the *Bundestag* as well as the *Bundesrat* shall each elect half of the members of the Constitutional Court. From that one can conclude that it must be an even number of judges. Thus, only a basic condition is determined by the Grundgesetz, it leaves open the regulation of the actual proceedings.

In that regard the South African Constitution is more comprehensive.
The first two subsections of s.167 of the SA-Constitution determine, that the Constitutional Court shall consist of eleven judges, and that at least eight of them must hear the cases brought before the Court.
Furthermore, the South African Constitution deals quite in detail with the appointment of judicial officers and ~~their conditions.~~ The proceeding of the appointment of the President, the Deputy President and the other judges of the Constitutional Court is exhaustively prescribed by s.174 (3) and (4) of the SA-Constitution and s.176 (1) of the SA-Constitution determines the judges' term of office.
However, there is no provision setting out any incompatibilities with other functions the judges might have, whereas the German Grundgesetz is concerned about the judges independence and therefore states that they cannot be members of the Bundestag, Bundesrat, the Federal Government or any corresponding institution of a Land concurrently (cf. Art.94 I GG).
Hence, the Grundgesetz provides indeed for certain important criteria but the

composition relies also to a certain degree on the legislature. The South African Constitution, in contrast, prescribes the composition of the Court very exactly; further regulations in this respect are not necessary.

[27] v.Münch - Meyer, art.94 s.no.11

[28] v.Münch - Meyer, art.94 s.no.12

c) Constitutional Assignment of Jurisdiction

Of particular interest is of course, which competencies are constitutionally assigned to the courts and in what way. Jurisdiction is the power or competence of a court to adjudicate upon, determine and dispose a matter[29].

Nearly all of the Constitutional Court's powers are laid down in ten different articles of the German Grundgesetz[30], most of the Court's jurisdictional tasks are transferred by Art.93 I GG[31]. There is not an overall clause which would authorise the court universally to pass decisions in disputes regarding constitutional law[32]. Instead the allocation of competencies to the Constitutional Court follows the so-called enumeration principle. It means that the Court's competencies are not outlined by means of a general clause, but each proceeding is particularly set out by law[33].

Art.93 I Nr.1-4b GG forms the main catalogue, and Art.93 I Nr.5 GG refers to the other nine articles of the Grundgesetz, where further assignments of competence to the Constitutional Court are to be found. However, Art.93 II GG also grants the possibility that federal legislation might provide for other cases to be heard and decided by this Court.

From these constitutional provisions it results that the Constitutional Court is a specialised tribunal empowered to decide only constitutional questions and a limited set of public-law controversies (Its non-constitutional jurisdiction is confined largely to conflicts between levels of government and to certain disputes arising under international law)[34]. The final and exclusive jurisdiction over constitutional matters always lies in the Federal Constitutional Court[35]. Hence, to a very considerable extent the court exclusively determines the interpretation of the *Grundgesetz*[36].

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[29] de Waal/ Currie/ Erasmus, p.75
[30] Kommers, p.11
[31] v.Münch - Meyer, art.94 s.no.4
[32] Wöhrmann, p.9
[33] Pestalozza, p.234
[34] Kommers, p.3
[35] Wöhrmann, p.7
[36] Brinkmann, p.83

Such an exclusiveness does not apply for the South African Constitutional Court. The South African way of allocating jurisdiction to its Constitutional Court compared to the German is utterly different.

For instance, the South African Constitution provides in s.172 (1) (a) of the SA-Constitution that every court, if it discovers an inconsistency with the Constitution within its power, must declare the law or the conduct at hand invalid. In contrast to that Art.100 GG expressly determines that if a court considers a law, which is decisive for the pending case, incompatible with the constitution, it must seek a ruling of the Constitutional Court.

S.167 (4) and (5) of the SA-Constitution set out some certain cases which are exclusively in the Constitutional Court's competence. However, this catalogue is not comprehensive. S.167 (3) of the SA-Constitution confines the court's jurisdiction to constitutional matters, and issues connected with decisions on constitutional matters. Anyhow, the legal term "constitutional matters" is completely indefinite, and the extension on "issues connected with decisions on constitutional matters" even broadens the scope of application. This general clause is scarcely specified by the brief definition in s.167 (7) of the SA-Constitution. This general clause still needs interpretation for application. The final decision about the interpretation is given to the Court itself in terms of s.167 (3) (c) of the SA-Constitution[37].

That leads to the suggestion that the court is in charge for matters other than those mentioned in s.167 (4) and (5) of the SA-Constitution. This appears to broaden the court's power immensely, because it is up to the Court to decide which cases are to be dealt with. In terms of these provisions the court can determine the scope of its competence to a great extent by itself.

d) Constitutional Delegation to Legislate

Both Constitutions, the German as well as the South African one, leave open some important issues for the Constitutional Courts' functioning. Therefore they contain some delegation-clauses which empower respectively instruct other institutions to pass according regulation.

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[37] Devenish, p.223

Art.94 II GG is such a clause. It instructs the legislator to pass a federal law which specifies the cases in which the Federal Constitutional Court's decisions have the force of law. Besides that Art.94 II GG allows the legislator that such law may make a complaint of unconstitutionality conditional upon the exhaustion of all other legal remedies and provide for a specific admissibility procedure. This provision also implicates that a full discretion to decide upon applications by the Constitutional Court itself would not be compatible[38] It has to be the legislator who determines the conditions of admissibility.

However, similar to the German regulation, the SA-Constitution also requires national legislation for the functioning of the Constitutional Court (s.171 of the SA-Constitution) and instructs the national legislator to pass a law providing the rules and procedures inter alia of the Constitutional Court. S.171 of the SA-Constitution does not further specify the matters which shall be governed by the law of national legislation. There is for instance no constitutional order to provide for the competence more precisely.
The only condition for the delegated law is set out in terms of s.167 (6) of the SA-Constitution. In contrast to the German ruling s.167 (6) of the SA-Constitution requires a provision (either in terms of national legislation or by means of rules in the inherent power of the court) which allows direct access to the Constitutional Court and direct appeal from any other court[39]. Though, apart from that, s.173 of the SA-Constitution grants (inter alia) to the Constitutional Court "the inherent power to protect and regulate" its own process. Ultimately it means, that the South African Court not only can determine its own jurisdiction, but also the admissibility of access.

Insofar, the South African Constitutional Court is, at least constitutionally, considerably less influenced or may be even restricted by the legislature than the German Court.

3. The Matters Dealt With by the Legislative Law

At this stage it shall be taken into consideration in what areas the legislators have exercised their power and influenced the Constitutional Courts.

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[38] Jarass/ Pieroth, Art.94 s.no.3

[39] Devenish, p.224

After almost two years of debate the German "Bundesverfassungsgerichtsgesetz" (BVerfGG, i.e. Law on the Federal Constitutional Court) was passed, required in Art.94 II GG. First of all it actually created the Federal Constitutional Court[40].
The first part of the *Bundesverfassungsgerichtsgesetz* declares the Court's independence and its seat (§ 1 I respectively II BVerfGG) and establishes two panels of eight judges and their composition (§ 2 I respectively II BVerfGG). § 3 BVerfGG repeats the prerequisites for the judges to become a member of the Constitutional Court and adds, that any other professional occupation is precluded (save that of a lecturer of law). It was contended that the legislator had overstepped its powers with that provision, as in this regard the Grundgesetz were exhaustive. However, by now it is unanimous that this provision makes sense.

The second part sets out general procedural rules, such as representation of the parties of the case (§22 I BVerfGG), written applications for the institution of proceedings (§ 23 I BVerfGG) or oral pleadings (§ 25 I BVerfGG) for example.

Whereas the *Grundgesetz* in Art.93 just enumerates the cases in the competence of the Federal Constitutional Court comprehensively[41], the *Bundesverfassungsgerichtsgesetz* codifies the cases provided by Art.93 GG[42]. According to Art.94 II GG it contains in its third part specific procedural provisions for all mentioned cases of Art.93 GG. Just the number of provisions (§§ 36 -96 BVerfGG) indicates that the law regulates all the procedures exactly and differently. The BVerfGG provides for 15 different procedures before the Constitutional Court, all listed in § 13 BVerfGG[43].
After all it is obvious that the German legislator not only created the Constitutional Court by means of the BVerfGG, but also exercised severe influence on the procedure before the Court. Indeed, the legislature was constitutionally obliged to pass a corresponding law. Anyhow, a broad discretion remained, in what way the Bundestag and Bundesrat actually convert their obligation: The legislator could have chosen to regulate these issues by means of general clauses or just brief descriptions for instance.

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[40] Robbers, s.no.10; Kommers, p.11
[41] v.Münch - Meyer, Art.93 s.no.8
[42] Kommers, p.11
[43] Kommers, p.11

The South African legislature, in comparison, confined itself to some basic provisions and passed the Constitutional Court Complementary Act, 1995 (CCCA). This Act shall "regulate matters incidental to the establishment of the Constitutional Court by the Constitution of the Republic of South Africa and matters connected therewith", as the preamble sets out. As the Constitution has already established the Constitutional Court, the Act is not concerned with that. It indeed contains some remarkable provisions, inter alia, like s.5 (1) CCCA, which establishes civil immunity for the members of the Constitutional Court, or s.14 CCCA, which delegates the fundamental power to appoint officers and staff to the President of the Court and the Minister of Justice.

Furthermore s.15 CCCA determines that those expenditures in connection with the administration and the functioning of the Court shall be defrayed from moneys appropriated by parliament, addressed to Parliament by the Minister of Justice. Nonetheless, the is no legislative provision for any specific procedures; thus, the power to regulate the proceedings remains at the Court itself.

That is in any case a great difference to the German legal framework. The Federal Constitutional Court's power to regulate its own internal affairs does not encompass the competence to provide for the procedures. In Germany it is the Parliament who determines how the Court has to rule the cases before it.

4. The Self-Government of the Constitutional Courts

The Courts' self-government results in regulations passed by themselves. Their scope is also a parameter which indicates the significance of the Courts as institutions.

The Federal Constitutional Court's internal affairs are governed by the *Geschäftsordnung für das Bundesverfassungsgericht* (GOBVerfG). By authorization of § 1 III BVerfGG the GOBVerfG is adopted by the plenum of the Court's members. As an interpretation of 'internal affairs' clearly shows, the GOBVerfG's scope is restricted to organisational matters and the administration of the court without external effect, whereas some of the corresponding South African Constitutional Court Rules, 1998 (CCCR 1998) have in fact external effect.

The Court's constitutionally assigned "inherent power" to "protect" and "regulate" its process certainly affects all applicants and parties of cases. By authorisation of s.16 CCCA the President of the South African Constitutional Court in consultation with the Chief Justice regulated matters relating to the proceedings of and before court (Preamble of the CCCA). Though, the Constitutional Court itself stated, that this power has to be exercised with caution and by taking into account the interests of justice. Furthermore the exercise must be in accordance with the requirements of the Constitution and as far as possible with the procedures ordinarily followed by the Court in similar cases[44].

The most important rules in regard to the Court's power are No.13 - 20 CCR. They set out the prerequisites for altogether seven different procedures similar to the German BVerfGG. However, as easily recognisable by just considering the number of seven in South Africa versus 15 different procedures in Germany, the procedures in South Africa are either not as differentiated as in Germany or the South African Constitutional Court has less competencies. That will be subject to later investigation.

At this stage, anyhow, the conclusion can be drawn that the German Constitutional Court in this regard is considerably more dependent on the legislature than the South African Court.

B. The Status

The status of the Courts' means their legally assigned position in the structure of the state as well as their relation to other institutions of the state.
In keeping with their function as the supreme guardian of the constitution, the Constitutional Courts have a prominent position in the structure of the state[45].
The German Court is at the same time a court and a supreme constitutional organ[46].
Constitutional organs are supreme bodies directly established under the *Grundgesetz* performing essential functions: the legislative bodies Bundestag and Bundesrat, the Federal President, the Federal Government and, in fact, the Federal

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[44] S v Pennington and Another 1997 (10) BCLR 1413 (CC), para.22 A, 23 D
[45] Böttcher/ Umbach, § 1 s.no.8
[46] Böttcher/ Umbach, § 1 s.no.8

Constitutional Court[47]. Insofar this Court is regarded on an equal footing with the other mentioned organs set up under the *Grundgesetz*[48], consequently it belongs to the state-leading organs[49].

§ 1 I BVerfGG provides that the Federal Constitutional Court is separate and independent from all other constitutional organs. Therefore the Federal Constitutional Court is not attached to a particular ministry (for example, the Federal Ministry of Justice)[50] and has its own budget which the court administers autonomously[51]: The Federal Constitutional Court draws up its own budget which appears as a separate item in the Federal Budget and manages its funds itself[52].

Additionally the German Federal Constitutional Court is a true court[53]: It does not act ex officio but only when called upon by an authorised party and it decides upon questions of law in an independent capacity[54]. Thus, the Constitutional Court belongs to the judicial power. This is also confirmed by Art.92 GG, that states that the Constitutional Court is one of the courts which shall exercise the judicial power. Though, as the court underlined itself, the constitutional status of the Constitutional Court is different from the other federal courts[55], it is detached from the remaining court structure. It is not the last stage of appeal in a sequence of courts. It is rather a court of first and final instance. By virtue of the substance and impact of the decisions it is the head of the federal judiciary[56].

The status of the South African Constitutional Court differs from the status of the German one.
Indeed the South African Constitutional Court functions as a court as well. S.166 in combination with s.165 (1) of the SA-Constitution assigns the judicial authority inter alia to the Constitutional Court. Thus, there is no doubt that the Court belongs to the judiciary.

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47 Wöhrmann, p.8
48 Brinkmann, p.81
49 Böttcher/ Umbach, § 1 s.no.32
50 Wöhrmann, p.8
51 Böttcher/ Umbach, § 1 s.no.9
52 Wöhrmann, p.8
53 Jarass/ Pieroth, Art.93 s.no.2
54 Wöhrmann, p.8
55 BVerfGE 7, 1 (14)
56 Wöhrmann, p.8

S.167 (3)(a) of the SA-Constitution confirms its status as the highest court in all constitutional matters.

However, the Constitutional Court is not only the highest court in constitutional matters, but also manifestly intended to be the most esteemed court in the land[57]. Like the German one, the South African Constitutional Court has Republic-wide jurisdiction[58]. As the ultimate guardian of the supreme law of the Republic, the Constitution, to which all state organs are bound, the Constitutional Court can interfere with all their actions and conduct. That gives the Court the prominent position in the judiciary. This is underlined by s.167 of the SA-Constitution, which presents the categories of courts in order of their rank in the judicial hierarchy[59]. The Constitutional Court is the first one named and accordingly is the highest court in South Africa.

Notwithstanding its supreme position, the Constitutional Court is not detached from the remaining court structure like the German Court.

By empowering the Supreme Court of Appeal and any High Court to decide on the validity of a parliamentary or provincial statute or any conduct of the President, the Constitutional Court from a conceptual and procedural point of view is increasingly positioned as an appellate court[60]. Only in very few and exceptional cases will the Constitutional Court hear a matter at first instance[61].

Besides that the Constitutional Court is closely linked to the Department of Justice and does not manage its funds autonomously, although Principle VII of the interim Constitution had required to give an appropriate qualified, independent and impartial judiciary the power and jurisdiction to safeguard and enforce the Constitution. This in effect means that the judiciary must be endowed with original constitutional competence, thus elevating it to the status of an autonomous organ of the state[62]. In fact s.239 (2) of the SA-Constitution declares that courts cannot be seen as "organs of state". However, the wording "despite subsection (1)" indicates that the courts actually fall under the legal definition of s.239 (1) of the

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[57] Devenish, p.223

[58] de Waal/ Currie/ Erasmus, p.78

[59] Devenish, p.221

[60] Klug, p.13

[61] de Waal/ Currie/ Erasmus, p.83

[62] Venter, p.41

SA-Constitution and are indeed institutions which exercise power and perform function in terms of the Constitution respectively any other legislation[63].
Principle VII of the interim Constitution also implies that the judiciary may in no way be made subject to undue interference by legislatures, executives and administrations, and may even require provision for at least the highest court or courts to dispose over their own separate budgets[64].

Consequently, by assigning the Constitutional Court a position as an appellate court under the authority of the Department of Justice the South African Court has a lower status than the German Court and is institutionally not as independent as the Federal Constitutional Court. Hence, one cannot define the South African Constitutional Court as a supreme constitutional organ which has state-leading functions.

C. *The Internal Structure*

To evaluate the actual power of a Constitutional Court, an important factor is the internal structure, or, one could also say, the "equipping" of the Court. Whether the Constitutional Courts in both countries can actually cope with their aims, basically depends on the budgets available for the Courts. Certainly it is impossible to compare the German and the South African Constitutional Court in this regard directly, not only because of the different economic conditions of the countries. It also has to be taken into account, that the personnel, financial and other needs of such an institution depends on the duties which have to be fulfilled, i.e. the competencies of the Courts, as well as the actual demand, i.e. the number of cases brought before the court.
Whether the financial equipping of the Courts is sufficient, cannot be evaluated comprehensively in this context.
However, the internal structure will be at least monitored by considering the organisation of the courts. It relates to their staff and the allocation of business.

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[63] other opinion: Pienaar, p.27
[64] Venter, p.41

The German Constitutional Court consists of two panels of eight judges (§ 2 I, II BVerfGG). Both so-called senates are equal in rank and rights[65], therefore the Federal Constitutional Court is considered as a twin-court[66].

According to § 2 III BVerfGG three federal judges have to be in each senate; the other five are the so-called "other members". All the judges are appointed to only one of the two senates[67].

Both panels have separate competencies and are completely independent of one another; within the scope of its competence each panel is "the Federal Constitutional Court". The independence is also reflected by the fact that each judge is elected to one panel only; a judge from the other panel may, on principle, not deputise for him[68].

The competencies of the panels are laid down by law (§ 14 BVerfGG): The first panel is competent for legal review proceedings and constitutional complaints in which questions regarding the interpretation of substantive basic rights (Art.1-17, 19,101 and 103 I GG) predominate (so-called "basic right panel"). The second panel is primarily responsible for proceedings involving the forfeiture of basic rights (Art.18 GG), complaints relating to the scrutiny of elections, impeachment of the Federal President and judges, disputes between organs, disputes between the Federation and the Länder, and party-prohibition proceedings (so-called "constitutional law panel") and certain other matters assigned to it by a plenary decision of the Court[69].

§ 15 II BVerfGG determines that each panel has a quorum if at least six judges are present.

The South African Constitution requires that a matter before the Court is heard by at least eight judges (s.167 (2)). In practice, all eleven judges hear every case.

According to s.167 (1) of the SA-Constitution the Constitutional Court consists of a President, a Deputy President and nine other judges, presently nine men and two women[70].

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[65] BVerfGE 7, 17 (18)

[66] Umbach/ Clemens, § 2 s.no.5

[67] Umbach/ Clemens, § 2 s.no.9, 10

[68] Wöhrmann, p.26

[69] Wöhrmann, p.26

[70] Constitutional Court's Homepage.

They are concerned with all issues raised before the Court, there is no distinction and specialisation.

Decisions of the Court are reached by majority vote of the judges sitting in a case. Each judge must indicate his or her decision. The reasons for the decision are published in a written judgement[71] and edited in collections. The same applies for the German decisions of the Constitutional Court.

Hence, in Germany as well as in South Africa the Constitutional Courts' rulings are likewisely considered as significant: At least six professional judges in Germany and eight in South Africa decide on the matters before the Court and all decisions are published.

From that one can conclude that both Courts insofar are sufficiently equipped to safeguard the respective Constitution.

D. *Competence of the Courts*

To evaluate the conception of the Constitutional Court their competence has to be considered. Above all the Courts' competence is expressed by their jurisdiction. Though the competence is not only dependent on the cases the Constitutional Courts has to rule on, but in particular with Constitutional Courts it is of highly important what consequences their decision actually have. Therefore after showing the Courts' jurisdiction, the consequences of their ruling will be taken into account.

1. Jurisdiction

At this stage it shall be shown, for what kind of cases the Constitutional Courts are responsible for.

Jurisdiction is defined as "the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision"[72].

The German Constitutional Court's powers range from repealing decisions made by authorities or courts in contravention of the *Grundgesetz* and nullifying unconstitutional legislation to passing non-appealable decisions on disputes

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[71] Constitutional Court's Homepage

[72] Mozley & Whiteley's Law Dictionary, Keyword "jurisdiction"

between the highest governmental organs of the Federation and the Länder[73]. Due to the enumeration principle all possible constellations before the German Constitutional Court are laid down by means of law.
The different procedures of the German Constitutional Court can be grouped into five main categories: the quasi-political, and the quasi-penal procedures, the control of legislation, the true constitutional controversies and finally the complaints of unconstitutionality[74]. Additionally the federal legislature is empowered in terms of Art.93 II GG to assign further jurisdiction to the Constitutional Court. Nowadays these only play a very secondary role[75], hence they are not considered in more detail. Though, this provision underlines that the assignment of jurisdiction to the Constitutional Court is a constitutional respectively a legislative matter and the Court itself has no influence on that.

In contrast to that the South African Constitutional Court has to interpret on its own whether certain issues belong before it. In the following it shall be investigated whether the South African Constitutional Court has also jurisdiction for all the particular issues in the categories, merely parts of them, or even a broader scope of jurisdiction. Where no corresponding jurisdiction to the German one is provided for, it will be examined whether such a constellation might comply with one of the general terms circumscribing the jurisdiction of the South African Constitutional Court.
Its jurisdiction can be divided into concurrent jurisdiction (exercised concurrently with the High Courts and the Supreme Court of Appeal) and exclusive jurisdiction[76]. Whereas the field of the exclusive jurisdiction is set out quite clearly in the Constitution, the concurrent jurisdiction is just circumscribed by general terms. Hence, the principles relating to the requirements of a referral of an issue to the Constitutional Court are mainly set out in two cases[77], *S v Zuma*[78] and *S v Mhlungu*[79]. However, there are also other considerable cases dealing with referrals

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73 Brinkmann, p.83
74 Hase/ Ruete, p.268
75 Pestalozza, p.240
76 de Waal/ Currie/ Erasmus, p.81
77 Devenish, p.225
78 1995 (4) BCLR 401, 1995 2 SA 642 (CC)
79 1995 (7) BCLR 793, 1995 3 SA 867 (CC)

to the Constitutional Court. By considering them it will be examined whether the South African Constitutional Court has jurisdiction corresponding to the German one.

a) The Quasi-Political Procedures

Quasi-political procedures encompass these which can be instituted to ban a political party or remove the protection of certain fundamental rights from an individual. They have as their legal basis the concept of militant or protective democracy[80].

Both procedures play a quantitatively very secondary role in Germany:
Up to 1995 there were only four applications for the forfeiture of individual rights, none of which succeeded; and five to ban a party, of which two actually resulted in a prohibition[81].

(1) Forfeiture of Basic Rights

The Federal Constitutional Court's jurisdiction for a decision on the forfeiture of basic rights is provided for in §§ 13 No.1, 36-41 BVerfGG in conjunction with Article 18 GG.

The protection of the individual basic rights is guaranteed only as long as they are not abused to eliminate the free democratic basic order which has made them possible in the first place. If someone abuses certain basic rights, in order to combat the free democratic basic order, the Bundestag, the Federal Government or a Land government can file the case to the Federal Constitutional Court and apply for a decision on the forfeiture of the basic rights.

(2) Prohibition of Parties

According to §§ 13 No.2, 43-46 BVerfGG in conjunction with Art.21 II GG the Constitutional Court can ban a party in order to preserve and protect the democratic order. Art.21 II GG makes provision for the suppression of the activities of parties hostile to the constitution. The free play of political forces in the democracy shall be restricted in those cases where opponents of the democracy seek to eliminate it by democratic means. Parties which, by reason of

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[80] Hase/ Ruete, p.268

[81] Wöhrmann, p.10

their aims or the behaviour of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany are declared unconstitutional by the Federal Constitutional Court and consequently banned. Moreover, to minimise any abuse of this procedure[82], only the Bundestag, the Bundesrat and the federal government (i.e. the chancellor and his cabinet) are authorised to initiate it (cf. § 43 I BVerfGG). It is left to their discretion whether they make such an application. They may decide not to do so if they consider it better to combat a party they regard as unconstitutional by political means, above all by public discussion during an election campaign[83].

South Africa has no particular provision assigning corresponding jurisdiction to the Constitutional Court. Anyhow, it has to be examined, whether jurisdiction could ensue from the general clause in s.167 (3) (b) of the SA-Constitution.
S.167 (7) of the SA-Constitution states that a constitutional matter includes any issue involving the protection of the Constitution. Insofar one could conclude that the Constitutional Court might have jurisdiction in such cases. Though, s.1 (c) of the SA-Constitution sets out that South Africa is governed by the rule of law. That means that every state's action needs a legal basis, in other words, there must be a law providing for the forfeiture of rights contained in the Bill of Rights as well as for the prohibition of political parties. If such provisions existed, their application would in any case be an issue involving the interpretation, protection or enforcement of the Constitution. A forfeiture of basic rights can only be justified as an action in order to protect the Constitution, and the prohibition of a party concerns directly the political rights granted by s.19 (1) of the SA-Constitution. Hence, such matters would belong before the Constitutional Court in South Africa as well.

b) The Quasi-Penal Procedures

The procedures allowing the removal from office of the Federal President and Federal judges belong to this category[84].

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[82] Kommers, p.13
[83] Wöhrmann, p.10
[84] Hase/ Ruete, p.268

Until now there have not been any proceedings for impeachment of the Federal President or a judge, neither in Germany nor in South Africa.

(1) Impeachment of the Federal President

An impeachment of the Federal President is set out in §§ 13 No.4, 49-57 BVerfGG in conjunction with Art.61 GG.

Pursuant to that constitutional provision, the Bundestag or the Bundesrat may impeach the Federal President before the Federal Constitutional Court for wilful violation of the *Grundgesetz* or any other federal law. For that it needs a two thirds majority of the applying body[85].

Although the parties before court might be the same, a distinction must be made between impeachment of the President and a dispute between organs involving the Federal President. The latter relates to the interpretation of the constitution, whereas the impeachment deals with the question of whether a culpable act has been committed[86].

Under s.89 (1) of the SA-Constitution the conditions for a removal of the President are determined. For that it also needs a two thirds majority in the National Assembly, but nothing says that a ruling of a court is additionally necessary. Though, if the President wants to defend himself against a removing resolution, he can make an application before the Constitutional Court pursuant to s.167 (4) (e) of the SA-Constitution; the determination whether the President has failed to comply with a constitutional duty lies in the exclusive jurisdiction of the Constitutional Court[87].

(2) Impeachment of Federal judges

§§ 13 No.9, 58-61 BVerfGG in conjunction with Art.98 II GG provide for the Constitutional Court's competence to impeach federal judges[88], if the Bundestag - with a majority of the votes cast - had applied for it. Though, according to the definition, the judges of the Constitutional Court do not belong to the group of federal judges.

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[85] Umbach/ Clemens, § 49 s.no.7

[86] Wöhrmann, p.11

[87] de Waal/ Currie/ Erasmus, p.81

[88] look at footnote 27 for definition

Under Art.98 II GG the *Bundestag* may impeach a judge if he has infringed the principles of the *Grundgesetz* or the constitutional order of a Land.
The impeachment of judges must be seen in conjunction with the constitutional guarantee of the independence of judges (Art.97 GG): The professional and personal independence of a judge is not designed to protect him if he contravenes the principles of the free democratic order[89].

For the removal of judges it is provided by s.177 of the SA-Constitution. The provision does not differentiate to what court the judges belong. There is no requirement for any court's ruling in case of the removal of judges. In the end it is the President, who actually removes the particular judge. Hence, it is questionable whether the judge, if he wants to defend himself against his removal, can apply for a proceeding based on s.167 (4) (a) of the SA-Constitution. Therefore the federal judges must be able to considered as organs of the state. The Constitutional Court indeed and maybe the other courts as well have constitutional status, powers and functions, but not the judges themselves. Thus, they cannot be seen as organs of state.
For them the provision of s.167 (6) (a) of the SA-Constitution might apply, if the judge's defence is a genuine constitutional matter. That could be assumed if the constitution specified the condition upon which a removing resolution could be adopted and a removal thus were a matter of constitutional interpretation.
Though, a judge who offends his removal, will rather bring forward that the circumstances which lead to his removal were wrongly evaluated. Hence, it might only be a constitutional matter, if the judge bemoans the conduct of procedure, which is actually set out in s.177 of the SA-Constitution. Such a case is, anyhow, nearly unimaginable. Therefore one can conclude that in principle the Constitutional Court's jurisdiction does not encompass decisions on the removal of judges.

c) The Control of Legislation

Under this category fall the claims to declare a law void as repugnant to the constitution. It is also called judicial review[90].

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[89] Wöhrmann, p.12
[90] Karpen, p.79

These procedures can be instituted in Germany by the judiciary in pending cases or by the Federal government, governments of the Länder, or one third of the members of the *Bundestag*[91]. The Constitutional Court then has to decide whether any form of either original, i.e. parliamentary, or of delegated legislation is in accordance with the *Grundgesetz*[92].

Federal and Land legislation is subject to the constitutional order (Art.20 III GG). A law which is adopted by the correct procedures is not automatically compatible with the constitution. Its substance must also be in conformity with the constitution; in particular, it must not violate the basic rights of the individual. Art.1 III GG expressly states that the basic rights listed in it are binding upon the legislature. The Federal Constitutional Court must check that the legislature acts in accordance with the provisions of the *Grundgesetz* when issuing legal rules. The *Grundgesetz* envisages various types of procedure for this purpose.

Also in South Africa legislation must accord to the Constitution. As s.2 of the SA-Constitution states expressly, the supremacy of the Constitution implies that law and conduct inconsistent with it is invalid. The South African Constitutional Court is also in charge to review laws under this aspect. The eleven judges of the South African Constitutional Court emphasised that the Court 'must not shrink from this task"[93] of review, otherwise South Africa would be back to parliamentary sovereignty and, by implication, back to unrestrained violation of rights so common under previous Parliaments[94].

(1) Review of Law in General

Review of law in general, or abstract review, means the referral of a Bill to the Constitutional Court, before it is enacted into law[95].

(a) The German Model

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[91] Hase/ Ruete, p.268
[92] Hase/ Ruete, p.268
[93] S v Makwanyane & another, 1995 (3) SA 391 (CC), para.22
[94] Klug, p.14
[95] Klug, p.4

Review of law in general is called in Germany *abstrakte Normenkontrolle*. It is provided for in §§ 13 No.6, 76-79 in conjunction with Art.93 I 2 GG. Up to the end of 1995 an amount of 126 cases of this kind had been pending before the Federal Constitutional Court and 71 decisions passed[96].

In proceedings of this type, the Federal Constitutional Court decides independently on a specific dispute on the compatibility of federal law or Land law with the *Grundgesetz* or on the compatibility of Land law with other federal law.

Only the Federal Government, a Land government or at least one third of the members of the *Bundestag* may apply for such proceedings. By this it means in particular the opposition in the *Bundestag*, provided that it holds at least one third of the seats, has recourse to the Federal Constitutional Court if it considers a law adopted by the majority of the deputies to be unconstitutional[97].

The subject of such review may be any legal rule of the Federation or of a Land; in other words, not merely laws adopted by parliament but also government ordinances or the by-laws of independent public bodies. It is immaterial whether the rule was issued before or after the entry into force of the *Grundgesetz*[98].

A variation of the *abstrakte Normenkontrolle* is contained in Art.93 I No.2a GG, according to which the Federal Constitutional Court shall rule also in case of disagreement as to whether a law meets the requirements of Art.72 II GG which gives the Federation the right to legislate concurrently with the Länder. Applicants for that procedures may be the Bundesrat, a Land government or a Land parliament.

(b) The South African Model

Firstly to mention in this context is the Court's responsibility to certify the text of the final constitution of 1996. This task was assigned to the Court in terms of s.71 (2) of the interim constitution. Accordingly the Court was empowered to let the Constitution come into force and effect. That gives the Court a peculiarly superior position.

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[96] Wöhrmann, p.16
[97] Wöhrmann, p.16
[98] Wöhrmann, p.16

As in Germany the South African Constitutional Court has exclusive jurisdiction for review of law in general[99]. The responsibility of the Court for these issues is established by s.167 (4) (b) and (c) of the SA-Constitution. No.13 and 14 CCR set out some formal prerequisites for lodging such a case before the Court. Corresponding to the German regulation, the Court has to decide on national as well as provincial legislation.

Sub-Subs.b refers to s.79 respectively s.121 of the SA-Constitution, whereas s.167 (4) (c) of the SA-Constitution highlights s.80 respectively 122 of the SA-Constitution. These provisions determine the possible applicants for reviewing certain bills. Acts and Bills

Pursuant to the first mentioned ones, the President for national Bills and the Premier of a Province are entitled to refer a Bill to the Court for a decision on its constitutionality before assenting to that Bill[100], if they have reservations about the constitutionality of the Bill.

The latter ones lay down, that at least one third of the National Assembly and at least 20 percent of a provincial legislature can apply to the Constitutional Court for legal review as well.

In contrast to the German provision, decisions on conflicts between national and provincial legislation are not assigned to the Constitutional Court, but to other courts, as s.146 (4), 148-150 of the SA-Constitution indicate. that

Moreover, s.167 (4) (d) provides for the Court's responsibility on the constitutionality of any amendment to the constitution. The legislative process for Bills amending the Constitution is determined by s.74 of the SA-Constitution. S.74 (9) of the SA-Constitution states that, like all other national bills, must be referred to the President. Hence, he can initiate a decision of the Constitutional Court pursuant to s.79 (4) (b) in conjunction with s.84 (2) (c) (4) (b) of the SA-Constitution.

Parliamentary applications in that regard are in effect restricted: According to s.74

(1) of the SA-Constitution amendments of s.1 and 74 (1) of the SA-Constitution itself need a supporting quorum of at least 75 percent of the National Assembly's members. It is highly unlikely that members, who voted in favour of the

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[99] de Waal/ Currie/ Erasmus, p.81

[100] Constitutional Court's Homepage

amendment would also support an application to the Constitutional Court. Yet the remaining part of the Parliament consists of at highest 25 percent of the members, which is not enough to apply for a Constitutional Court's ruling, although it might be of particular importance in such cases.

The Bill of Rights and the other Chapters of the South African Constitution can be amended by a supporting vote of at least two thirds of the National Assembly's members. Only if the minimum quorum was achieved and the remaining share of the members agree on an application to the Constitutional Court, a review-procedure of the constitution-amendment can be filed in accordance with s.80 (2) of the SA-Constitution. As any amendment of the Constitution and especially amendments of the Bill of Rights are always very crucial matters, it appears not without reason, to let the Constitutional Court rule on the constitutionality of it by a parliamentary motion.

It is, in addition, in contrast to s.144 of the SA-Constitution (in conjunction with s.16 CCR, providing for certain formal parameters). There it is laid down that at least provincial legislature which has passed or amended a provincial constitution, must submit the text to the Constitutional Court for certification. One could argue that the national Constitution effects even more people than a provincial constitution and should therefore be checked and approved by the legal experts of the Constitutional Court, like it was provided in s.71 (2) of the interim Constitution. However, certification is not required for each amendment to the Constitution, but other, perhaps less efficient review mechanisms still exist[101].

Nonetheless, if one considers it as a gap of constitutional check and balance, that Parliament cannot apply to the Constitutional Court in regard to constitutional amendments, this gap also exists in Germany, where constitutional amendments need a minimum quorum of two thirds of the *Bundestag's* members as well (c.f. Art.79 II GG). Although, amendments affecting the division of the Federation into Länder, their participation in the legislative process, or the principles laid down in Art.1 and 20 GG are prohibited by means of Art.79 III GG anyway.

Another considerable difference to the German regulation in that regard is the fact that the South African constitution provides a narrow time limit: The application

[101] Butler, p.6

by the President respectively by the Premier of a Province can only be filed when they are in charge to assent and sign the Bill at hand, and the legislative right to apply is restricted to 30 days after the date the President respectively the Premier assented to and signed the Act. Therefore it is excluded to refer to an established act for legal review by the South African Constitutional Court. Hence, legal review in general concerning acts issued before the entering into force of the constitution, is not possible in South Africa.

(2) Review of specific laws (*konkrete Normenkontrolle*)

For this kind of procedure §§ 13 No.11, 80-82 BVerfGG in conjunction with Art.100 I GG lays down the conditions.

Such procedures arise out of an ordinary law suit[102]. Cases of this type occur when a court considers a law to be unconstitutional the validity of which is relevant to its decision in a specific case. Every court in Germany is entitled and duty-bound to examine whether legal provisions are compatible with the constitution. The courts must stay their proceedings and obtain a decision from the Federal Constitutional Court if it considers a statutory provision to be incompatible with the constitution or a Land law incompatible with a Federal law (Art.100 I GG).

It is intended that only the Federal Constitutional Court as a constitutional organ should be able to declare that a law enacted by the democratic legislature is unconstitutional and hence null and void. This procedure serves to ensure confidence in law and uniform administration of justice; this might not be possible if each individual court were authorised to ignore a statutory provision which it deems unconstitutional[103].

The court must transmit to the Federal Constitutional Court the files of the case and state in detail why its decision in that case depends on the validity of the statutory provision submitted for review and why it considers that provision to be unconstitutional. The Federal Constitutional Court merely decides whether or not

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[102] Kommers, p.14

[103] Wöhrmann, p.18

the legal rule submitted is compatible with the constitution; it does not decide on the legal dispute itself which was the cause of the submission.

Since this method of reviewing specific laws is to take account of the authority of the democratic legislature, it applies only to laws which have been enacted by legislative bodies bound by the *Grundgesetz*. Laws which were passed before the *Grundgesetz* came into force in May 1949 (so-called pre-constitutional law) as well as legal provisions not enacted by the parliament (such as government ordinances) may be reviewed by individual courts themselves, who may choose not to apply them in the dispute before them.

Proceedings involving the review of specific laws account for the second largest share of the Federal Constitutional Court's activities. Up to the end of 1995 2,955 cases had been pending before the court and 973 decisions passed. The court has found over 300 statutory provisions to be null and void or incompatible with the *Grundgesetz* (or a Federal law). It has taken numerous important decisions in various fields, e.g. access to higher education[104], nuclear energy[105], marital and family affairs[106], on social affairs[107], taxation[108], and on the constitutionality of life imprisonment[109].

The review of specific laws provided for in South Africa is fundamentally different from the German regulation. The enquiry into the constitutionality of law does not lie in the Constitutional Court's exclusive jurisdiction like in Germany, but is a matter of concurrent jurisdiction.

A dispute over the constitutionality of an Act of Parliament, provincial legislation or delegated legislation and conduct of the President can be heard, according to s.172 (2) (a) of the SA-Constitution, by the Supreme Court of Appeal, a High Court or a court of similar status[110]. They are entitled to declare an order of constitutional invalidity. Yet, this declaration has no force unless it is confirmed by

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[104] BVerfGE 33, p.303
[105] BVerfGE 49, p.89
[106] BVerfGE 53, p.224
[107] BVerfGE 87, p.234
[108] BVerfGE 87, p.153
[109] BVerfGE 45, p.187
[110] de Waal/ Currie/ Erasmus, p.81

the Constitutional Court. Meanwhile, s.8 (1) of the CCCA requires that an order of constitutional invalidity shall be referred to the Constitutional Court for confirmation. Thus, the application for confirmation has become superfluous, as the referral of an order of invalidity will automatically be done by the Court concerned[111].

(3) Confirmation of public international law

Pursuant to §§ 13 No.12, 83, 84 BVerfGG in conjunction with Art.100 II GG the Federal Constitutional Court decides, when requested by a court, whether a rule of public international law is an integral part of Federal law and whether such rule directly creates rights and duties for the individual. This is designed to limit any impairment of the authority of the legislature and of confidence in law that might result from the incorporation of general rules of public international law into Federal law since such rules take precedence over national laws (Article 25 GG) (on this procedure cf. Articles 83 and 84 BVerfGG). Up to the end of 1995 twelve such cases had been pending before the Federal Constitutional Court and 6 decisions passed[112].

As s.231 (4) of the SA-Constitution sets out, international agreements in principle become law in South Africa when it is enacted by national legislation. Consequently the rules for the national legislative process laid down in s.73 et.seq. of the SA-Constitution apply. Thus, international law can be referred to the Constitutional Court pursuant to s.79 (4) (b) in conjunction with s.84 (2) (c) and 80 of the SA-Constitution.

(4) Submission by Constitutional Courts of a Land

According to §§ 13 No.13, 85 BVerfGG in conjunction with Art.100 III GG, the constitutional court of a Land which, in interpreting the *Grundgesetz*, proposes to deviate from a decision of the Federal Constitutional Court or of the constitutional

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[111] de Waal/ Currie/ Erasmus, p.94

[112] Wöhrmann, p.19

court of another Land must obtain a decision from the Federal Constitutional Court[113].

As South Africa's provinces indeed have their own constitutions but no Constitutional Courts, parallel cases cannot occur.

d) The True Constitutional Controversies

True constitutional controversies are those between different state agencies on their rights and duties[114]. This includes such disputes between highest federal organs as well as differences between the Federation and a *Bundesland*[115].
To the South African Constitutional Court may also be assigned corresponding jurisdiction by s.167 (4) (a) of the SA-Constitution.
After showing the German procedures, it will be investigated whether the particular procedure would also be possible before the South African Court.

(1) Disputes between organs (*Organstreitverfahren*)

These are disputes between governmental organs in which one organ claims that its constitutional rights under the *Grundgesetz* have been harmed or directly endangered by the conduct of another organ. These disputes are not very frequently brought before the Constitutional Court: Up to the end of 1995 112 cases involving disputes between organs had been pending before the Federal Constitutional Court and 53 decisions passed[116].
For these type of procedures it is provided for in §§ 13 No.5,63-67 BVerfGG in conjunction with Art.93 I 1 GG. The organs, which can be involved, are the Federal President, the Bundestag, the Bundesrat, the Federal Government and components of those organs, e.g. a group in the Bundestag or, under certain circumstances, individual deputies[117].

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[113] Wöhrmann, p.20
[114] Hase/ Ruete, p.268
[115] Karpen, p.79
[116] Wöhrmann, p.12
[117] v.Münch - Meyer, Art.93 s.no.26, 27

Corresponding cases in South Africa would be those, which occur between organs of state in the national sphere of government. These cases are in the exclusive jurisdiction of the Constitutional Court[118].

It has to be asked, which organs can actually be involved as well as who can lodge the procedure.

As s.167 (4) (a) of the SA-Constitution encompasses only disputes "concerning the constitutional status, powers or functions", only those organs which are actually furnished with that can be involved. These organs of state are the National Assembly and the NCOP as well as the Cabinet and the President, although an application to the Constitutional Court in that regard is not expressly mentioned in the fairly comprehensive list of the President's powers and functions of s.84 (2) of the SA-Constitution.

Noteworthy is also s.167 (4) (e) of the SA-Constitution in this context. It sets out that not only actions but also omissions (i.e. failures to fulfil an obligation) of the Parliament or the President can be subject of a case before the Constitutional Court.

Though, it remains open, who can actually initiate such procedures before court.

However, s.167 (4) (a) of the SA-Constitution speaks of "disputes between" the particular organs. That can only be interpreted, that it must be a controversy involving exclusively the above-mentioned organs. Consequently only these can apply for a ruling by the Constitutional Court.

Normally an application by one of the two legislative bodies needs the support of its majority. Notwithstanding, if a party or an individual member of one of the bodies claims an infringement of its (respectively his) constitutional rights, they may also file the case before the Constitutional Court. These cases could occur for instance, if a party is not allowed to send delegates to the NCOP in violation of s.61 (1) of the SA-Constitution or the Speaker respectively the Deputy Speaker is removed from office against s.52 (4) of the SA-Constitution.

The wording of s.167 (4) (e) of the SA-Constitution, however, does not give any hints to the possible applicants for a dispute between organs. Hence, one has to ask, which organs or individuals could actually be involved in such a dispute.

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[118] de Waal/ Currie/ Erasmus, p.81

A dispute can arise from overstepping powers and disobeying obligations. The Parliament's general obligations are prescribed in s.55 (2) of the SA-Constitution. Though, to maintain oversight of the exercise of national executive authority as well as any organ of the state, does not limit the group of possible applicants either: every single citizen and all state organs, too, could claim to be concerned if the Parliament lost oversight. Therefore the group of possible applicants cannot be described more precisely than those who can claim an infringement of rights caused by the failure to fulfil the Parliament's obligations.

The President's obligations are laid down in s.84 of the SA-Constitution. If he fails to fulfil them mainly the legislature is concerned. Therefore, it appears logical that the President's failure can only be brought before court by the National Assembly.

(2) Disputes between the Federation and the Länder

In a federal state disputes over rights and duties may occur not only between federal organs but also between the Federation and the Länder as well as between individual Länder. In particular, these disputes relate to the delimitation of competencies between the Federation and the Länder as established in the *Grundgesetz*.

Pursuant to §§ 13 No.7, and 8, 68-72 BVerfGG in conjunction with Art.93 I No.3 and 4 GG the Federal Constitutional Court decides on such disputes. Only the Federal Government and Land governments may be parties to them and are authorised to bring such suits[119].

Up to the end of 1995 101 such cases had been pending before the Federal Constitutional Court and 48 decisions passed[120].

For such proceedings s.167 (4) (a) of the SA-Constitution assigns exclusive jurisdiction to the Constitutional Court. It shall decide disputes not only between organs of state in the national but also the provincial sphere.

(3) Disputes within a Land

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[119] Kommers, p.14

[120] Wöhrmann, p.14

According to §§ 13 No.8 third alternative, 13 No.10, 71-75 BVerfGG in conjunction with Art.93 IV third alternative, and Article 99 GG the Federal Constitutional Court decides on disputes between organs within a Land unless recourse to another court exists (Art.93 IV, 3. alternative GG). This ensures that, if there are any gaps in the legal protection afforded by the constitutional court of a Land, a dispute between constitutional organs of the Land can still be brought before a constitutional court.
Furthermore the Federal Constitutional Court decides on constitutional disputes within a Land if such decision has been assigned to it by Land legislation (Art.99 GG). Schleswig-Holstein has made use of this possibility. The Federal Constitutional Court has thus decided on several disputes in that Land.

Up to the end of 1995 16 cases involving such disputes had been pending before the Federal Constitutional Court and 10 decisions passed[121].

As the South African provinces do not have their own constitutional courts, disputes between organs of state only in the provincial sphere fall under the Constitutional Court's jurisdiction by means of s.167 (4) (a) of the SA-Constitution as well.

e) The Complaints of Unconstitutionality

Complaints of unconstitutionality are to be understood as complaints made in the case of national elections and also individual complaints of unconstitutional state's action[122]. The latter is entered by individual citizens[123] and are by far the most frequent procedure:
Well over 95 percent of the Federal Constitutional Court's caseload consists of constitutional complaints[124]. It has been employed over 100,000 times from 1951 to 1995, whereas only a total of 89 cases involving the scrutiny of elections or the loss of seats had been pending before the Federal Constitutional Court[125].

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[121] Wöhrmann, p.15
[122] Hase/ Ruete, p.269
[123] Karpen, p.79
[124] Kommers, p.13
[125] Wöhrmann, p.22

The South African situation in that regard is almost the opposite: There is no assignment of jurisdiction to the Constitutional Court for scrutiny of elections and no such case was brought before the South African Constitutional Court until now. Anyhow, it will be taken into consideration, in which cases the South African court might be concerned with cases like that.

(1) Scrutiny of elections

§§ 13 No.3, 48 BVerfGG in conjunction with Art.41 II GG lay down the Federal Constitutional Court's jurisdiction for decisions on the validity of elections.
Elections to the Bundestag are first scrutinised by the Bundestag itself (Art.41 I GG), which has a special preparatory committee for this purpose. The Bundestag also decides whether a deputy has lost his seat in the Bundestag; the conditions under which such a loss occurs are laid down in the Federal Electoral Law. The persons affected may lodge a complaint with the Federal Constitutional Court against a decision of the Bundestag on the validity of an election or the loss of a seat.
The purpose of the election scrutiny procedure is to ensure the right composition of the Bundestag. A complaint can therefore be successful only in the case of an error which has actually had repercussions on the distribution of seats.

In general the scrutiny of elections is not a matter to be dealt with by the South African Constitutional Court. As the conduct of elections is not set out in the constitution, it is not a constitutional matter and therefore not within the Constitutional Court's jurisdiction.
However, one might think about the possibility to initiate a proceeding pursuant to s.167 (4) (a) of the SA-Constitution: Organs of states like the National Assembly or the Speaker respectively Deputy Speaker could lodge an according application to the Constitutional Court against the Electoral Commission, if this commission can be seen as an organ of state. All the same, s.190 (1) of the SA-Constitution assigns powers and functions to it. Consequently, if the Electoral Commission shall be attacked by another organ of state, the Constitutional Court might be responsible for a decision on that.

(2) Constitutional Complaints (*Verfassungsbeschwerden*) / Direct access

Constitutional complaints are provided for by §§ 13 No.8a, 90-96 BVerfGG in conjunction with Art.93 I No.4a and b GG. Such procedure may be lodged by any person who claims that one of his basic rights has been violated by an act or omission of public authority. Any person can petition the Constitutional Court directly and personally to declare a statute unconstitutional and void, to set aside an executive act or to reverse the decision of any other court[126]. However, the requirement for lodging such a complaint with the Federal Constitutional Court is that there is no other means of eliminating the violation of a basic right. In principle all remedies within the relevant branch of jurisdiction (e.g. civil, criminal, administrative) must therefore first be exhausted before having recourse to the Federal Constitutional Court (Principle of subsidiarity, cf. § 90 II BVerfGG). The Court highlighted on several occasions that it does not serve as a "Superrevisionsinstanz", in other words, it is not the superior instance of appellations. The Federal Constitutional Court is not a court of appeal which decides on questions of constitutional law arising in the course of civil or penal proceedings, for example. Its exclusive responsibility is to decide on questions of constitutional law; its task is to interpret the *Grundgesetz* with final binding force[127].

The South African Court does not hear evidence nor question witnesses. It does not decide directly whether accused persons are guilty or whether damages should be awarded to an injured person. These are matters for the ordinary courts. Its function is to determine the meaning of the Constitution in relation to matters in dispute[128].

South Africa's Constitutional Court has not got a corresponding jurisdiction. As other courts have constitutional jurisdiction as well, an individual person normally lodges ordinary procedures before these courts. The Constitution makes it possible for a wide range of individuals and public and private bodies to raise

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[126] Rupp-v. Brünneck, p.390

[127] Wöhrmann, p.5

[128] Constitutional Court's Homepage

constitutional questions in litigation before the High Court. Therefore, anyone wishing to bring a constitutional case before the Constitutional Court must usually start in the High Court[129].

The only way, an individual person can bring a case before the Constitutional Court is by an application for direct access.
Direct access means that a matter is heard by the Constitutional Court at first instance[130].
It will probably be possible in two instances: where the matter is one within the exclusive jurisdiction of the Court and in matters over which concurrent jurisdiction is exercised, where the matter is in the interest of justice[131].

In terms of s.100 (2) of the interim Constitution, the constitutional court should make provision for direct access to the court where it was in the interest of justice to do so, in respect to any matter within its jurisdiction. No.17 CCR 1995 had provided for formal prerequisites and that applications for direct access are permissible in exceptional cases only[132].
Yet, the final constitution states that any person or organ of the state with a sufficient interest might have direct access to the Constitutional Court (cf. s.172 (2)(d) of the SA-Constitution). It also demands provision for direct access to the Court for matters in the interest of justice. Furthermore s.167 (6) of the SA-Constitution sets out another prerequisite for direct access: the application must be "with leave" of the Constitutional Court. Neither No.17 CCR 1998 nor any other provision specifies the terms "interest of justice" and "with leave of the Court".
As the interpretation of these terms directly determines which cases are to be heard by the court, it appears to be worthwhile to take a closer look at the Court's findings.
The judges of the Constitutional Court will decide if an important question of principle relating to the interpretation of the Constitution has been raised in the application for leave to appeal, and will consider, whether there is a reasonable

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[129] Constitutional Court's Homepage
[130] de Waal/ Currie/ Erasmus, p.91
[131] de Waal/ Currie/ Erasmus, p.91
[132] Burns, p.38

prospect that the appeal may succeed[133]. Whilst the prospects of success are clearly relevant to applications for direct access to the Court, there are other considerations which are at least of equal importance. These factors have been referred to in decisions given by the Court on applications for direct access under the interim Constitution, and are clearly relevant to the granting of direct access under the 1996 Constitution[134]. However, the interpretation of the term "interest of justice" might have been influenced by the second condition, that direct access should only be granted in exceptional cases. By now there is no such provision any more, but instead the prerequisite of leave from the Constitutional Court. If the interpretation of interest of justice in conjunction with granting direct access in exceptional cases is still only valid for the regulation of the final Constitution, thus depends on the meaning of the prerequisite "leave of the Court".

(a) Leave of the Court

This prerequisite indicates that the Court itself has the power to grant permission or to reject hearing a case. All the same, it could be contented that "leave of the Court" indicates there might be circumstances beyond the interests of justice to grand direct access[135]. In other words, either direct access is granted because it is in the interests of justice, or because it is with leave of the Court.
The Court itself, nonetheless, considered "Leave to appeal" as a requirement needed to "protect" the process of the Court against abuse by appeals which have no merit[136]. S.167 (6) makes clear that the Constitutional Court is to have both original and appellate jurisdiction, and the power to control access to it by granting leave only in cases where it is in the interest of justice[137].

Consequently, "leave of the Court" does not open another gate for direct access to the Court, but is dependent upon the interest of justice; the latter is a condition sine qua non for granting leave. Hence, considering the protectoral aspect of granting leave, one can assume, that "interests of justice" will be interpreted quite

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[133] Constitutional Court's Homepage

[134] Bruce and Another v Fleecytex Johannesburg CC and Others 1998 (4) BCLR 415 (CC), para.7

[135] Bruce and Another v Fleecytex Johannesburg CC and Others 1998 (4) BCLR 415 (CC), para.4 E

[136] S v Pennington and Another 1997 (10) BCLR 1413 (CC), para.26 I, A

[137] S v Pennington and Another 1997 (10) BCLR 1413 (CC), para.11

narrowly. That corresponds with the narrow interpretation by the Court because of the then valid provision of No.17 CCR 1995, that only in exceptional cases direct access should be permitted.

Thus, direct access to the Constitutional Court appears still to be mainly depending upon the interpretation of "interests of justice". Consequently, "Leave of the Court" has in fact a similar meaning like "direct access in exceptional cases only" and therefore influences the interpretation of "interests of justice" at least in a similar manner.

Hence, one can assume, that the interpretation of "interests of justice" remains without change under the final Constitution.

(b) Interest of Justice

Numerous judgements have dealt with the interpretation of this general legal term, which statements produced some general principles to be shown in the following:

It will only be in the interest of justice for a constitutional issue to be decided firstly, where there are compelling reasons that this should be done. It will only be necessary for this to be done where the appeal cannot be disposed of without the constitutional issue being decided[138].

In matters over which concurrent jurisdiction is exercised, the matter must be of sufficient public importance or urgency to necessitate direct access[139]. If another remedy or procedure is available, it cannot be said that urgency or the interests of justice necessitate circumventing the ordinary procedures and requiring the Constitutional Court to adjudicate the matter at first instance. Only in very unusual and exceptional cases will the issues raised to be of sufficient urgency and public importance to justify direct access to the Constitutional Court[140].

There might be cases where the circumstances are so exceptional and the public interest, or the ends of justice or good government, are of such overriding importance, that the Court might be disposed to grant direct access under No.17 CCR 1995[141]. This rule had permitted direct access only in exceptional

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[138] Zantsi v Council of State and Others 1995 (10) BCLR 1424 (CC) para.4 A

[139] de Waal/ Currie/ Erasmus, p.91

[140] de Waal/ Currie/ Erasmus, p.93

[141] Hekpoort Environmental Preservation Society and Another v Minister of Land Affairs and Others 1997 (11) BCLR 1537 (CC), para.10 H

circumstances, which in fact means, that in addition to the importance of the matter, there be proof 'that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government"[142]. In several cases the Court has confirmed that it has a discretion to allow direct access and that it will not allow direct access to it in the absence of exceptional circumstances[143].

Implicit within the requirement that the matter be in the interest of justice is a consideration of whether there are reasonable prospects of success upon referral[144]. The reasonable prospect of success is to be understood as a sine qua non of a referral, not as in itself a sufficient ground. It is not always in the interest of justice to make a reference as soon as the relevant issue has been raised[145]. The 'interest of justice" even requires such a consideration, for if appeals without merit were allowed, justice would be delayed[146].

Furthermore, there is no doubt that time, costs and public importance are important considerations[147]. However, these are not the only factors that have to be taken into account in deciding what is in the interest of justice in any given case[148]. In considering the question whether it is in the interest of justice that the Constitutional Court should exercise its jurisdiction directly, it is also relevant to have regard to the nature of the issue concerned[149]. If the constitutional matter involves the development of the common law, it is a jurisdiction which ought not

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[142] Transvaal Agricultural Union v Minister of land Affairs and Another 1996 (12) BCLR 1573 (CC) para.18

[143] Tsotetsi v Mutual and Federal Insurance Company Ltd.1996 (11) BCLR 1439 (CC) para.11 E (with numerous references)

[144] Tsotetsi v Mutual and Federal Insurance Company Ltd.1996 (11) BCLR 1439 (CC) para.4 J, A;
S v Mhlungu and Others 1995 (7) BCLR 793 (CC) para.59

[145] S v Mhlungu and Others 1995 (7) BCLR 793 (CC) para.59

[146] S v Pennigton and Another 1997 (10) BCLR 1413 (CC), para.26 I, A

[147] De Freitas and Another v Society of Advocates of Natal 1998 (11) BCLR 1345 (CC), para.20

[148] Member of the Executive Council for Development Planning and Local Government in the Provincial Government of Gauteng v Democratic Party and Others, 1998 (7) BCLR 855 (CC), para.31

[149] De Freitas and Another v Society of Advocates of Natal 1998 (11) BCLR 1345 (CC), para.21 B

ordinarily to be exercised without the matter having first dealt with by the Supreme Court of Appeal[150].

These statements lead to the conclusion, that direct access to the Constitutional Court, applied for by anybody, is rather the exception than the rule. In contrast to the German Court the South African one is not open for constitutional complaints by anybody in general.

2. The Jurisdictional Differences

In summary one can say, that the Courts' scope of jurisdiction in general is quite similar. The constellations which in Germany are set out by means of law as matters of constitutional jurisdiction, might presumably be heard by the South African Constitutional Court as well. However, some peculiar differences appear to be interesting.

For constellations of the quasi-political procedures, if they indeed could occur in South Africa, the jurisdiction of the Constitutional Court might correspond to the German one, but the jurisdiction concerning quasi-penal procedures differ:

Whereas in Germany it is obligatorily the Federal Constitutional Court's turn to decide over the removal of the President, the South African President can be removed without a ruling by a court. In that regard a high responsibility is assigned to the German Court, which lacks the South African. The same applies insofar for the removal of judges. Though, even if such a move is brought before a court, it would not be preferable the South African Constitutional Court to deal with that matter.

Some noteworthy differences exist in the control of legislation. The review of law in general, what is called in Germany *abstrakte Normenkontrolle*, is regulated to a great extent similarly. An unknown phenomenon for the Constitutional Court in Germany, nonetheless, is the obligation of the South African Constitutional Court to certify provincial constitutions and in terms of the interim Constitution the certification of the present final Constitution. The South African Court is thus not only a guardian of the Constitution, but also involved in the creating process and therefore in a way a creator of the Constitution.

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[150] Amod v Multilateral Motor Vehicle Accidents Fund 1998 (10) BCLR 1207 (CC) para.33

The jurisdiction for review of specific law, i.e. the *konkrete Normenkontrolle*, is differently because of the exclusive constitutional jurisdiction of the German Court. The Federal Constitutional Court's power results from the fact, that it is the one and only court which can decide on constitutional matters with binding force. The South African Constitutional Court, in contrast, only has an appellate function. The jurisdictional power in that context is confined to a confirmation respectively non-confirmation of the decision of the previous instance.
Another noteworthy power, which lacks in the South African Court, is the Federal Constitutional Court's to direct Constitutional Courts of the Länder. Their dependence on the Federal Constitutional Court's permission, if they want to deviate from a decision of the Federal Constitutional Court, shows the superior position of the German Constitutional Court.
The true constitutional controversies are not handled very differently, but the complaints of unconstitutionality are very unusual for the South African Constitutional Court. Indeed, also in South Africa such constellations might be brought before the Constitutional Court, but the quantitative extent of the German cases differs radically from the South Africa situation, where such cases are heard only in exceptional cases by the Constitutional Court.

3. The Consequences of the Courts' Ruling

Here the impacts of the Courts' decisions shall be shown.
It is a salutary rule, not only for the South African Constitutional Court, that a court should generally decide no more than what is absolutely necessary for the adjudication of a case. It is also undesirable that the courts should anticipate constitutional questions or decide them in advance of the necessity of such a decision[151]. The Courts are therefore obliged to exercise judicial self-restraint[152].
On the other hand, in deciding on the relative powers of state organs, a Constitutional Court faces the threat that any of these sites could ignore or publicly disregard its decision[153].
Nonetheless, the Constitutional Courts' findings about a decisive constitutional matter of a particular case do not only concern the parties involved directly but at

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[151] Devenish, p.225
[152] Rupp-v.Brünneck, p.398
[153] Klug, p.15

least reflect upon all subjects who are dependent on the law involved. Yet, the results for the parties participating in a case will less be taken into consideration, but rather the implications on the legal and political system in general.

The *Verfassungsbeschwerden* usually have a relatively small effect on the legal and political system. Mostly they bring relief to the complainant, if successful, of an unconstitutional administrative conduct or an unconstitutional interpretation of law of a court during a pending case. Though, the decision on the particular case implies the order to the administration respectively the courts to act in future times in compliance with it. Nonetheless, as the scrutiny of constitutionality is comprehensive during such proceedings, it sometimes turns out, that the legal basis for the attacked action is unconstitutional. Then the decision gets a legislative and thus a political implication.

The impeachment proceedings, in contrast, have rather political than legal implications, and, in a way, the decisions on the forfeiture of rights as well. Regarding the latter ones, the Federal Constitutional Court decides which basic rights the person concerned has forfeited and for what length of time. Besides that the Court can, for the duration of the forfeiture, deny the right to vote and to be elected as well as the capacity to hold public office. Such a decision does mainly concern the particular individual involved. Though, since a person who has forfeited his rights, must have in some way agitated against the state in front of a certain audience, a proclamation of unconstitutionality by the Constitutional Court effects at least the people who paid attention. Therefore the forfeiture of basic rights is definitely a political affair.

Also the Federal Constitutional Court's declaration of the forfeiture of the Federal President's or a judge's office is more than just the confirmation of a dismissal. The impeachment of the federal President or judge are of peculiar political interest only because of the fact that the political organs have to elect a successor.

Usually a decision, whether an organ has stayed within the limits of the functions assigned to it or has exceeded its competencies, has also a far-reaching impact on

constitutional law and political affairs[154]. In its decision the court states whether the act or omission complained of infringes a provision of the *Grundgesetz*. In future the organ has to comply with the principles which result from the Court's decision. As only state-leading organs can participate in such cases, the court thus interferes in their politics and eventually with the manner of state-leadership.

However, the cases of law review have probably the severest impact on politics. The question whether or not a statute is in accordance with the constitution may theoretically arise in nearly all constitutional proceedings before the Federal Constitutional Court. Practically it arises only in the cases of constitutional complaints (Verfassungsbeschwerden), and the procedural avenues of *abstrakten* and *konkreten Normenkontrollen*[155].

Indeed, the application for proceedings of an *abstrakte Normenkontrolle* need not serve the purpose of having a legal rule declared null and void; rather, the court may also be asked to state expressly that a provision is compatible with the *Grundgesetz*, for instance if doubts exist in practice about the compatibility of Federal or Land law with the *Grundgesetz* or of Land law with Federal law[156].

Though, in any event, the question of the law's validity is squarely before the court in these proceedings, and a decision against its validity renders the law null and void[157].

Notwithstanding, judicial law-making in the form of judicial review is fundamentally different from making law by legislation[158]; the Court's role is far more limited than that of Parliament. The court can decide only after it has been asked[159]. However, through its jurisdiction a Constitutional Court stimulates and even demands legislation and thus substantially influences society as a whole[160].

Though, the judicial process of judicial review is not partisan in the sense that it is initiated by the lawmakers itself. Judges do not initiate litigation; individual

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[154] Wöhrmann, p.12

[155] Rupp-v.Brünneck, p.389

[156] Wöhrmann, p.16

[157] Kommers, p.15

[158] Matiso v Commanding Officer, Port Elisabeth Prison, and Another (SE), excerpt in: 1995 (112) SALJ p.44

[159] Brinkmann, p.89; Wöhrmann, p.16

[160] Brinkmann, p.83

litigants do[161]. Furthermore, the Constitutional Court can decide only on the question of constitutionality and not for example, on expediency. It can annul, but not usually redraft[162].

Consequently, neither the executive nor the judiciary can apply the law further on and the regulation looses its validity for citizens as well. General opinion quite clearly assume that a decision declaring a statute null and void has retroactive effect[163]. It follows that statutes with a constitutional "congenital defect" are considered never to have existed at all. This theory - once unconstitutional always unconstitutional- would, if followed strictly, bring chaos and justice at the same time[164]. Therefore the § 79 I BVerfGG tries to strike a balance between the principle of justice and the principles of legal security and predictability. It gives full retroactive effect only in one singular case: a person convicted under a criminal statute which is later declared void may demand a new trial. According to § 79 II BVerfGG all other decisions or administrative acts which have become final before the statute was declared void stand as they are: they may not be enforced in the future, but there is no provision for damage sustained by anyone in the past. Furthermore, the legislator is supposed to regulate the matter differently and to pass another law, which complies with the constitutional requirements.

However, in a considerable number of occasions the German Constitutional Court has given a so-called admonitory decision: Instead of declaring a statute unconstitutional and void, the Court chooses to declare it for the time being still constitutional, but announces at the same time, that the statute would become unconstitutional in near future, unless the legislature should repeal or amend it. In nearly all instances this appeal has been fruitful[165].

Very similar to the German situation in this regard is the South African.

The judgements of the Court are based on the Constitution, which is the supreme law of the land. They guarantee the basic rights and freedoms of all persons. They are binding on all organs of government, including Parliament, the Presidency, the

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[161] Matiso v Commanding Officer, Port Elisabeth Prison, and Another (SE), excerpt in: 1995 (112) SALJ p.44

[162] Brinkmann, p.89

[163] Rupp-v.Brünneck, p.391 with several references

[164] Rupp-v.Brünneck, p.391

[165] Rupp-v.Brünneck, p.387

police force, the army, the public service and all courts. This means that the Court has the power to declare an Act of Parliament null and void if it conflicts with the Constitution and to control executive action in the same way[166].

All the same, questions of retrospectivity, prospectivity and the conditional suspension of orders of invalidity often present difficult choices[167], as is borne out by several judgements of the Constitutional Court[168]. An unqualified retrospective order could easily have undesirable consequences. Persons might act directly under the order to have convictions set aside without adequate judicial supervision or institute claims for damages[169].

All courts competent to make declarations of constitutional invalidity have the power to make an appropriate order under section 172(1)(b)(i) if such order, in the circumstances of a particular case, is "just or equitable"[170]. The real issue is whether, in the circumstances of this case, an order limiting the retrospectivity of the declaration of invalidity would indeed be just and equitable, on a proper construction of that concept in the context of the section and the Constitution as a whole[171].

The principal features which have to be considered when contemplating the possibility of a retrospective order had been crisply summarised in the following passage[172]:

"Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. It is only when the interests of good government outweigh the interests of the individual litigants that the court will not grant relief to successful litigants. In principle too, the litigants before the court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants (see US v Johnson 457 US 537 (1982); Teague v Lane 489 US 288 (1989))[173]. On the other hand, the

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[166] Constitutional Court's Homepage

[167] S v Ntsele 1997 (11) BCLR 1543 (CC), para 13

[168] S v Bhulwana; S v Gwadiso 1995 (12) BCLR 1579 (CC), paras.30-33

[169] National Coalition for Gay and Lesbian Equality v Minister of Justice and Others 1998 (12) BCLR 1517 (CC) para.97

[170] S v Ntsele 1997 (11) BCLR 1543 (CC) para.12

[171] National Coalition for Gay and Lesbian Equality v Minister of Justice and Others 1998 (12) BCLR 1517 (CC) para.87 B

[172] S v Ntsele 1997 (11) BCLR 1543 (CC), para.14

[173] S v Bhulwana; S v Gwadiso 1995 (12) BCLR 1579 (CC), para.32

Court should be circumspect in exercising its powers under section 98(6)(a) of the interim Constitution so as to avoid unnecessary dislocation and uncertainty in the criminal justice process[174].

As a general principle an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity"[175].

Indeed, it was not the intention in Ntsele's case to suggest that the tests for retrospectivity or non-retrospectivity were identical under the interim and the 1996 Constitutions[176]. Moreover, s. 172 (1) (b) of the final Constitution differs in various respects from section 98 (5), (6) and (7) of the interim Constitution[177]. The criterion for the order which a court is competent to make under section 172(1)(b) of the 1996 Constitution pursuant to a declaration of constitutional invalidity is that it must be "just and equitable". The criterion under section 98(6) of the interim Constitution was "the interests of justice and good government". There has as yet been no comprehensive judgement of this Court on the meaning of "just and equitable" in section 172(1)(b) of the 1996 Constitution, although it has already been alluded to[178].

Some significant differences are the following:

(a) In regard to a declaration of constitutional invalidity of a law or a provision thereof, section 98(6) of the interim Constitution regulated the consequences of such a declaration differently, depending on whether the law was in existence at the time the interim Constitution came into effect or whether it was passed thereafter. The 1996 Constitution draws no such distinction.

(b) The effect of a declaration of invalidity (subject to the Constitutional Court's power to order otherwise) is dealt with more extensively under the interim Constitution in subparagraphs (a) and (b) of section 98(6). Under the 1996 Constitution, and in the absence of a contrary order by a competent court, nothing more is provided other than that it has retrospective effect.

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[174] S v Zuma 1995 (4) BCLR 401 (CC), para.43

[175] S v Bhulwana; S v Gwadiso 1995 (12) BCLR 1579 (CC), para.32

[176] National Coalition for Gay and Lesbian Equality v Minister of Justice and Others 1998 (12) BCLR 1517 (CC) para.93 B

[177] National Coalition for Gay and Lesbian Equality v Minister of Justice and Others 1998 (12) BCLR 1517 (CC) para.84

[178] S v Ntsele 1997 (11) BCLR 1543 paras.12-14; De Lange v Smuts NO and Others 1998 (7) BCLR 779 (CC) paras.104-105

(c) The power of a competent court to make an order deviating from that provided for by the Constitution is formulated differently. Under the interim Constitution the provisions of section 98(6)(a) and (b) were dominant, the Constitutional Court being empowered to order otherwise than as provided in these paragraphs "in the interests of justice and good government". Under the 1996 Constitution the dominant provision is section 172(1)(b)(i)[179].

Despite of the differences the principle features are still "directly in point" under the 1996 Constitution[180]; the interests of good government will always be an important consideration in deciding whether a proposed order under the 1996 Constitution is "just and equitable", for justice and equity must also be evaluated from the perspective of the state and the broad interests of society generally[181]. As in Ntsele's case, it might ultimately be decisive as to what is just and equitable. At the same time the test under the 1996 Constitution is a broader and more flexible one, where the concept of the interests of good government is but one of many possible factors to consider[182].

Although the long perpetuation of an unconstitutional scheme is admittedly unfortunate, the Court must provide the opportunity for it. It is indeed "in the interest of justice" to remove the objectionable parts and replace them by ones that are sound and realistic. To avoided fresh problems, that has to be both thorough and thoughtful[183] and therefore inevitably needs some time.
Consequently it is recognised by the Constitutional Court that, notwithstanding the importance of the rights, time should be allowed to remedy the defect[184]. A typical result insofar is an order by the Court requiring legal remedy by Parliament due at a certain date and the suspension of the declaration of invalidity up to this date[185]. In another case the Court held that the declaration shall invalidate any

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[179] National Coalition for Gay and Lesbian Equality v Minister of Justice and Others 1998 (12) BCLR 1517 (CC) para.84
[180] S v Ntsele 1997 (11) BCLR 1543 paras.14
[181] National Coalition for Gay and Lesbian Equality v Minister of Justice and Others 1998 (12) BCLR 1517 (CC) para.94
[182] National Coalition for Gay and Lesbian Equality v Minister of Justice and Others 1998 (12) BCLR 1517 (CC) para.93, 94
[183] S v Ntuli 1996 (1) BCLR 141 (CC), para.28 C
[184] Minister of Justice v Ntuli 1997 (6) BCLR 677 (CC), para.35
[185] S v Ntuli 1996 (1) BCLR 141 (CC), para.30

application of the said section in any (criminal) trial which commenced on or after a certain date[186] or the Court orders that the unconstitutional act shall be invalid, and of no force and effect from the date of this judgement[187].

Notwithstanding, the Constitutional Court held that it has the responsibility of ensuring that the provisions of the Constitution are upheld and enforced. It should not be assumed that it will lightly grant the suspension of an order made by it declaring a statutory order to be invalid and of no force and effect, or if it does so, that it will allow more time than is necessary for the defect in the legislation to be cured[188]. It is the duty of the Minister responsible for the administration of the statute, who wishes to ask an order of invalidity to be suspended to place sufficient information before the Court to justify the making of such an order, and to show the time that will be needed to remedy the defect in the legislation[189].

Although initially there was considerable scepticism about the Constitutional Court, recent findings by the Court have created a stronger perception of its independence[190].

However, both in Germany and in South Africa nearly all the Constitutional Courts' rulings have considerable political implications which often interfere with the law-making process.

III. The Role of the Judges

It is contended, that the most important factor determining interpretation is the composition of the adjudicating court, since the orientation of individual judges has a profound effect on their interpretation of such issues as which right to give superior weight to and how various rights ought to be balanced[191]. It might be debatable whether it is actually the most important factor, however, it is in any case a very important one, as the weighing of constitutional values, competing for hierarchical status, is influenced inter alia by the personal values to which the

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[186] S v Zuma 1995 (4) BCLR 401 (CC), para.46

[187] Case and Another v Minister of Safety and Security; Curtis v Minister of Safety and Security 1996 (5) BCLR 609 (CC), para.89
S v Mbatha; S v Prinsloo 1996 (3) BCLR 293 (CC) para.34

[188] Minister of Justice v Ntuli 1997 (6) BCLR 677 (CC), para.42

[189] Minister of Justice v Ntuli 1997 (6) BCLR 677 (CC), para.41

[190] Kotzé, p.19

[191] Sarkin, p.149

adjudicating judges subscribe[192]. It is inevitable that judges will interpret and apply the Constitution according to their own subjective insights[193].

Therefore the conception of the Constitutional Courts in Germany and South Africa is also dependent on the role of their judges. Hence, it shall be examined how the appointment procedure is provided for and what status is assigned to the judges.
Like in all previous chapters, the German situation shall be described first and then the South African compared to that.

1. The Procedure of Appointment

The question of who is appointed to a Constitutional Court is clearly critical, since individual judges play a large part in determining the decisions that will emanate from that court[194]. Who the judges are and the manner in which they are appointed is highly relevant to the outcome of a decision[195]. Of particular importance is, hence, who actually determines the decisive members of the Court and how the procedure works.

Because of the paramount and even political significance of the Federal Constitutional Court the election of the judges is also an important political matter[196].
The Federal Constitutional Court shall have a democratic legitimisation[197]. As already mentioned, Art.94 I GG provides that half of the judges shall be elected by the Bundestag and the other half by the Bundesrat. §§ 5 et seq. BVerfGG set out the carrying out in detail and determine a complicated election procedure[198].
According to § 5 I BVerfGG one of the two electoral organs (electoral committee of the *Bundestag* and the *Bundesrat*) shall elect one federal judge and three other judges, whereas the other electoral organ elects two federal judges and two other judges for each panel. The legislator did not determine, which electoral organ

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[192] Sarkin, p.137
[193] Froneman, p.9
[194] Sarkin, p.136
[195] Sarkin, p.149
[196] Degenhardt, s.no.488
[197] Brinkmann, p.91
[198] Degenhardt, s.no.488

undertakes which election. Meanwhile the Bundesrat is responsible for the first named election and the Bundestag for the latter one[199]. On the other hand, as § 9 I BVerfGG sets out, the election of the Constitutional Court's President and Vice-President alternates between the two electoral organs.
Whereas pursuant to § 7 BVerfGG the Bundesrat elects directly, for the Bundestag an indirect election procedure is provided (cf. § 6 I BVerfGG). § 6 II lays down that the Bundestag has to elect a twelve-man electoral committee, which shall proportionally represent the groups in parliament.
The judges to be elected need a supporting vote of two thirds (cf. §§ 6 V and 7 BVerfGG). This dependence on high majorities in the electoral bodies leads to decisions based on consensus between the dominating parties in the political spectrum, and attempts to achieve parity[200]. In practice the political parties agree on arrangements corresponding to proportional representation[201], or, like others put it, "the selection procedure can be reduced to a matter of haggling"[202].

However, if the election of a judge fails, the electoral organs have to request the Court to propose candidates (cf. § 7a I BVerfGG). For the election of just one judge the Court has to submit a list of three candidates, and for the election of more judges the Court shall propose twice as many candidates as needed. Though, the electoral organs are not obliged to follow the Court's proposals. Twice of five times, when the Constitutional Court had to make proposals, other judges than these proposed by the Constitutional Court were in the end elected[203].
This described election procedure is the Parliament's only possibility to influence the court directly. Neither Parliament nor any other body can remove a judge from the bench[204].

The appointment procedure for the judges at the South African Constitutional Court is prescribed in the Constitution; it contains a particular section dealing with the appointment of judicial officers, s.174 of the SA-Constitution. Subs.3 provides

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[199] Umbach/ Clemens, § 5 s.no.8
[200] Hase/ Ruete, p.269
[201] Degenhardt, s.no.488
[202] Brinkmann, p.91
[203] Umbach/ Clemens, § 7a s.no.36
[204] Brinkmann, p.102

that the President as head of the national executive appoints the President and Deputy President of the Constitutional Court, after consultations with the Judicial Service Commission and the leaders of parties represented in the National Assembly.

The Working Draft reveals a difference of opinion about who should appoint the judges - the President on the advice of the Judicial Service Commission or the President after consultation with the Judicial Service Commission. In the latter case, it would mean that "political appointments" could occur much more easily[205].

What exactly "after consultations" means, is subject to interpretation. In contrast to the Interim Constitution the term is not defined any further. Whereas the Interim Constitution had provided that "in consultation with" means that consensus must have been reached with the other functionary before a valid decision could be taken, the term "after consultation" was defined as the duty to consult the other functionary but that the final decision rests with the functionary that made the decision in the first place. According to the latter one can conclude that the President is not bound by the recommendations given by the Judicial Service Commission. He or she is merely obliged to consult the commission in good faith[206].

This conclusion is underlined by the fact that the judges of all other courts are appointed by the President "on the advice" of the Judicial Service Commission (s.174 (6) of the SA-Constitution). The term "in advice of" has a clearly understood meaning in constitutional law. In contrast to the appointment of the President and Deputy President of the Constitutional Court the President must follow the advice of the Judicial Service Commission. It is submitted in this regard that he has no discretion[207].

Hence, if it were intended to give the Judicial Service Commission more significance in regard to the appointment of the President and Deputy President of the Constitutional Court, it would have been expressed correspondingly.

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[205] Kotzé, p.19

[206] Devenish, p.231, note 103

[207] Devenish, p.232, note 110

The other judges of the Constitutional Court are appointed by the President as well. As s.174 (4) of the SA-Constitution sets out, the President has to consult the Court's President and also the leaders of all parties represented in the National Assembly for their appointment.

However, the Judicial Service Commission has considerable influence on the President's choice and plays an important role in determining the judges of the Constitutional Court. Crucially, the Commission is and will in future be composed largely of members of the legal profession[208], it lacks a real representation of the people. Thus, the appointment of judges to the Constitutional Court is increasingly becoming a matter of public concern. The appointment of Mr Justice Tollie Madala was for example an event which generated much debate in the press[209].

Subs.4 (a), (b), and (c) describe in detail a three-step-procedure of co-operation between the President and the Commission. All the same, the last decision rests with the President:

Firstly the President has to choose the judges he wants to appoint out of a list prepared by the Judicial Service Commission, which contains three more candidates than are to be appointed. If he does not find enough acceptable candidates, he must indeed give reasons for his rejection of candidates, but then the Judicial Service Commission again has to submit a supplemented list. Out of this list the President finally has to appoint the missing judges and if any judge is absent for a long period or a vacancy arises, an acting judge may be appointed by the President of the Republic on a temporary basis.

To sum up, the German judges are determined by the vote of politicians representing the people in parliament. The South African judges, in contrast, are chosen by the President as head of the executive in - more or less intensive - co-operation with a commission consisting mainly of legal professionals.

2. The Prerequisites of Being a Constitutional Judge and their Status

Under this heading it shall be monitored on the parameters which qualify someone to be a constitutional judge and their position.

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[208] Sarkin, p.136

[209] Hlophe, p.22

In Germany the judges either have been a federal judge before their appointment to the Federal Constitutional Court, or they belong to the group of other members. Other members are ordinary judges of other courts[210], who, according to § 3 I BVerfGG, have to be older than 40 years of age, eligible for the Bundestag and must have declared in writing to be prepared to become judge at the Federal Constitutional Court.

According to § 4 I, III BVerfGG a judge is elected for a 12 years term of office, if he (or she) does not turn 68 during this period. § 4 II BVerfGG excludes the possibility of re-election to ensure the independence of the judges[211]. All the same, the term of office of the individual judges runs over twelve years. That means, the judges remain in office for a longer time than the electing parliament is in office, so it may be doubtful whether the judges are representatives of the actually existing parliament[212].

While in office they may not belong to the Bundestag, the Bundesrat, the Federal Government, nor any corresponding organs of a Land. Their functions as a judge preclude any other professional occupation except that of teaching law at a German university.

It is noteworthy that nearly all judges have a party affiliation[213], although the unequivocal command of Art.97 I GG that the judges be independent and subject only to law[214].

The *Grundgesetz* uses the term law (lex) in the sense of both statutory law and right or justice[215]. Hence, the judges might even decide on a basis beyond statutory law.

Besides that, the independence of the constitutional judges is so far-reaching that there is no provision for a removal from the bench[216]. Thus, whereas the parliament and the government are exposed to the control by the people, at least

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[210] v.Münch - Meyer, art.94 s.no.12
[211] Degenhardt, s.no.488
[212] Doehring, p.23
[213] Kommers, p.519
[214] Currie, p.153
[215] Kommers, p.42
[216] Brinkmann, p.102

so far as they must be re-elected when aiming to remain in office, the judges are not responsible to the people at all[217].

S.174 (5) of the SA-Constitution provides that at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court. S.176 (1) of the SA-Constitution determines that a judge is only eligible for the Constitutional Court once for a term of 12 years, and fixes the age for retirement at 70 years. They are all independent[218], but not unremovable: S.177 of the SA-Constitution sets out certain conditions for removing a judge from the bench.
The judges' duty is to uphold the law and the Constitution, which they must apply impartially and without fear, favour or prejudice[219].
For compliance with the Court's function as a guardian of the constitution it is important that the judges who serve in the Constitutional Court should be politically impartial[220].

In terms of s.35 interim Constitution respectively s.39 (1) (a) of the SA-Constitution the courts and specifically the judges are cast in the additional role of social engineers, social and legal philosophers in order to promote the values which underlie an open and democratic society based on freedom and equality[221].
The judges are instruments that must put law into effect. the activity of judges will not only be confined to the interpretation of existing laws, but they are obliged to engage in the more creative activity in generating new laws in terms of s. 35 interim Constitution respectively s.39 (1) (a) of the SA-Constitution. This constitutional provision gives judges an almost plenipotentiary judicial authority to decide according to a sense of natural justice; "equity", "jus naturale", "aequitas" all being enshrined in the Constitution[222].

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[217] Doehring, p.23
[218] Constitutional Court's Homepage
[219] Constitutional Court's Homepage
[220] Kotzé, p.19
[221] Baloro and Others v University of Bophuthatswana and Others 1995 (8) BCLR 1018 (B) p.1063 H
[222] Baloro and Others v University of Bophuthatswana and Others 1995 (8) BCLR 1018 (B) p.1064 A-C

Hence, the independence of the judges is highlighted in Germany as well as in South Africa by similar provisions. Not only the long but single term of 12 years in office but also the explicit orders to the judges not only to apply statutory law, grants them an extraordinary authority.

IV. Conclusion

The Federal Constitutional Court has gained a solid reputation: Political discussion in Germany is no longer concerned with the question of whether or not there should be a constitutional jurisdiction at all, but how the Federal Constitutional Court should exercise its comprehensive powers within the political system, i.e. the interplay of the Court with other governmental institutions[223].
It appears from the attitudinal patterns of the opinion-leaders that the South African Constitutional Court also has built up a high degree of legitimacy over a short period[224].

However, whether the conceptions of the Constitutional Courts of Germany and South Africa have provided for appropriate measures to resolve the tension between law and politics, remains highly questionable. The emphasised independence of the judges in both states in connection with the inevitable political implications of the application and interpretation of constitutional law seem rather to promote than to prevent the Courts' interference in politics. Party affiliations are neither in Germany nor in South Africa seen as incompatible with the profession as a constitutional judge. Indeed, it is contended that judicial officers are accountable for their actions by taking personal moral responsibility for their decisions[225]. However, while it sounds very idealistic, it is realistically considered rather doubtful, whether this is a sufficient and reliable measure.
All the same, one could doubt, whether there is in fact a tension between law and politics. Indeed, a court which has to apply constitutional law is always exposed to criticism from one side or another. Whatever a court called upon to interpret a written constitution may decide, it will be exposed to criticism from the Left, for

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[223] Brinkmann, p.84
[224] Kotzé, p.21
[225] Froneman, p.16-18

being reactionary and perpetuating out-of-date ideologies, or to criticism from the Right, for being subservient to the Government of the day[226].
However, positively approached one could contend that the judicialisation of politics is not the worst thing; maybe it takes out some irrational aspects of politics and helps to focus on the interests of justice rather than those of lobbies. Though, if one follows this approach, the judges should be determined to take the representation of the people into account. That cannot be guaranteed by a body like the Judicial Service Commission in South Africa, but rather by an election procedure of the legislature like in Germany.

On the other hand the Constitutional Courts' relation to the legislature in particular is still a crucial one. In theory the Constitutional Court could spoil every legislation by declaring it unconstitutional. The jurisdiction for legal review both in Germany and South Africa is comprehensive. Hence, the Courts could develop rather to masters than guardians of the Constitution.
In Germany the Parliament has at least an influence and control to a certain degree by electing the judges and creating the legal basis for the Court. South Africa's Constitutional Court, however, is established constitutionally and ruled mainly by itself. Though, the Court as an institution does not have the independence the German Court has: It cannot be seen as an independent organ of state, but is bound to the Department of Justice and the executive power by the fact, that the President appoints the judges. All the same, the President is obliged to co-operate with a neutral body of law experts, who, indeed, do not represent the people. Moreover, the South African Court is not separated from the courts' structure and has not the exclusive power to interpret the Constitution.

In fact, in Germany as well as in South Africa there are means to keep the Constitutional Courts' power under control.

Moreover, an important restriction of the Courts' power is the lack of enforcement measures; Constitutional Courts cannot enforce their decisions but must rely on convincing others[227]. Hence, if the Court permanently overstepped its

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[226] Brinkmann, p.83 with further references
[227] Brinkmann, p.103; Mahomed in 1998 SALJ p 111

powers, it would be faced with the only possible sanction: loss of its authority. By expanding its power too far, any institution can undermine its influence[228]. Additionally, substantive accountability results from the fact that judicial decisions are open to public debate and academic criticism[229].

Therefore, the convincing power is to a great extent based on a solid reputation and authority. Apparently, with both the Constitutional Courts of Germany and South Africa are sufficiently vested.

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[228] Brinkmann, p.103

[229] Froneman, p.16-18

COMMENTS ON THE MINOR DISSERTATION OF THOMAS REHM

1. STYLE

The style used in the footnotes (no italics, almost note style) is somewhat strange. It is however fairly consistently used. Sometimes reference is made to a case but not to the relevant paragraph (see footnotes 8 and 11).

2. LANGUAGE

I appreciate that the candidate's first language is not English, but the language is generally not up to standard. The candidate should have taken much more time to 'write' the dissertation.

3. STRUCTURE

The structure itself is perhaps not the problem, but the dissertation does not flow nicely to the conclusion. I think the problem is that it is not possible to look at the constitutional and legislative provisions relating to jurisdiction etc and then to determine how influential a court is in the political system. It is to look at the physical characteristics of a person and then to predict how fast he or she can run. It does not work like that. In order to determine the influence of the court one must look at the actual decisions, the way they have been (or not been) implemented. This is a task that Mr Rehm does not undertake.

4. CONTENT

I quite liked the idea of distinguishing between Concourt matters dealt with in the Constitution, in legislation and then in the rules of the Court itself. But I do not think that it says much about the independence of a Court. It is in any event difficult to compare the FCC with the SA Concourt in this way because the former is part of a codified system. There was no attempt to come to grips with the 'inherent' jurisdiction of superior courts in a common law system such as South Africa.

I didn't understand the part dealing with the 'status' of the courts. Apart from the points about the budget and the links to the Department of Justice, the arguments seem extremely formalistic. Mr Rehm comes close to drawing conclusions about status, competence and power from a title. It is almost like drawing conclusions about a person's competence from his or her title, which, as Mr Rehm will know, is an extremely dangerous thing to do!

There is a difference, at least in our system, between provisions dealing with jurisdiction and those dealing with referral and appeal. This is not always kept in mind. See top of page 24: while they are relevant to jurisdiction one cannot determine a court's jurisdiction with reference to the referral provisions.

Interestingly enough, we borrowed the German system of referral in cases of concrete review. Because this did not work, the referrals were largely rejected in the 1996 Constitution in favour of a system of appeals. Perhaps Mr

Rehm cold have considered why the referral system failed in SA and whether it is working in Germany.

The question of the Concourt's jurisdiction and the compatibility of international law with domestic law is an interesting one. Unfortunately Mr Rehm does not make enough of it. Is this a constitutional issue?

Generally, why is there such a discrepancy between the number of cases pending before the FCC and the number of decisions? Can they be that far behind?

In order to determine who may bring a dispute between organs of state to the Constitutional Court one must look at the rules of the Court, the rules relating to standing, the principle of co-operative government. This part of the dissertation is somewhat superficial.

I am not sure that if something is dealt with in legislation, such as elections, it ceases to be a 'constitutional issue'. It would very much depend on the dispute.

The closest thing we have to the constitutional complaint is not direct access, but the appeal. This part of the dissertation is, in my view, confused. Despite the FCC's objections, the constitutional complaint is a sort of appeal. am not sure whether there is a provision similar to direct access in Germany somehow recall that there is something about prisoners who may lodge a complaint directly with the FCC. In this part of the dissertation Mr Rehm is unfortunately comparing apples with pears.

Concerning the impact of the Courts' decisions, I think that both the FCC and the SAConcourt often deliberately opt for the least intrusive remedy. Nevertheless the effects of the Courts' decisions are far-reaching – think about the issue of the fight against crime in SA and the Concourt's decisions.

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