

The Federal Constitutional Court of Germany – a “super-appellate court” in civil law cases?

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A. Introduction

Early in the year 2011, the German Federal Constitutional Court banned the at the time current method to calculate the divorcé’s claim for maintenance. This calculation method resulted from the Federal Supreme Court’s interpretation of section 1578 of the German civil code and it infringed – anyway after the Federal Constitutional Court – the German Basic Law.¹⁾ This case refueled the long-term debate whether or not the German Federal Constitutional Court acts as a so called “super-appellate court” in civil law cases, a debate occurring whenever the Court presumes to review judgments in civil law matters. The doubters accuse the Court of simply replacing the civil judges’ understanding of fairness by its own one and thereby exceeding its review power.²⁾

The Court, of course, refuses all of those accusations. It routinely points out that the civil courts were in charge to interpret as well as to practice the rules of civil law.³⁾ The Federal Constitutional Court could only intervene if a civil court infringes the German Basic Law by judging arbitrarily⁴⁾ or by generally underestimating the relevance of the fundamental rights.⁵⁾

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1) BVerfGE 128, 193 marginal ref. 55.

2) For instance *Reinecke* FamFR 2011, 97, 100; *Rieble* NJW 2011, 819, 822.

3) BVerfGE 18, 85, 93; 30, 173, 196 f.; 74, 102, 127; 113, 88, 103; 108, 129, 137; 113, 154, 166; 115, 320, 367; 128, 193 marginal ref. 51; BVerfG NJW 1993, 321; 1993, 1909, 1911; 1998, 745; 2002, 2378; 2004, 1236; 2008, 3556 marginal ref. 11; 2012, 141 marginal ref. 28; 2012, 513 marginal ref. 21; 2012, 1863 marginal ref. 20; NJW-RR 2008, 200, 201; 2010, 1063, 1064; NVwZ 2010, 954 marginal ref. 48; NVwZ-RR 2010, 555, 556.

4) BVerfG NJW 1998, 745; 2004, 1236; 2006, 3411, 3412; 2012, 141 marginal ref. 28; WM 2007, 472; FPR 2004, 402.

5) BVerfGE 18, 85, 92 f.; 42, 143, 148 f.; 66, 116, 131; 67, 213, 223; 68, 361, 372; 97, 12, 27; 95, 96, 128; 103, 89, 100; 111, 307, 328; BVerfG NJW 1989, 2679, 2680; 1992, 1219; 1992, 1496; 1992, 2077; 1994, 783; 2001, 2531; 2003, 500; 2004, 2371, 2372; 2004, 2513; 2005, 352; 2006, 3411, 3412; 2008, 2170 marginal ref. 28; 2008, 3556 marginal ref. 11; 2013, 1293 marginal ref. 21; NJW-RR 2007, 860, 861; 2007, 1053, 1054; 2008, 200, 201; 2008, 1069, 1070; 2010, 1063, 1064; WM 2007, 472; NVwZ 1991, 358; FPR 2004, 402.

However, these pretty vague statements do not lead to the heart of the topic. Rather, the key point is the following: The Federal Constitutional Court certainly does not review the accurate application of the civil code as such. But there are a certain number of cases where the inaccurate application of a civil law's rule infringes the Basic Law at the same time.

To define why, when and within which scope the Federal Constitutional Court permissibly acts as a "super-appellate court" in civil law cases it thus is necessary to differ three sub-topics: (i) the unconstitutionality of the statutory rule as such, (ii) the unconstitutionality of the statutory rule's interpretation and finally (iii) the unconstitutionality of the statutory rule's practice.

B. The unconstitutionality of the statutory rule as such

I. Concretion of this type of cases

In the first type of cases, the civil court's judgment is based on a rule that is unconstitutional in each and any of its theoretically thinkable interpretations. Such situations may rarely arise. However, sometimes they do, namely if the rule's legal consequence is clearly fixed and inconsistent with explicit constitutional requirements.⁶⁾ For instance, the former German provisions on the heirs due to intestate succession distinguished between legitimate children on the one hand and illegitimate children on the other hand. Namely the former section 1934c para. 1 of the civil code accepted an illegitimate child as the decedent's heir at law only provided that at the decedent's death his paternity was acknowledged, judicially established or the procedure to clarify the natural parentage of the child was pending on court. This was contrasted by the legitimate child having not to fulfill such conditions. Since article 6 para. 5 of the Basic Law explicitly requires the legally equal treatment of legitimate and illegitimate children, it is quite evident that the former section 1934c para. 1 of the Civil Code was not in compliance with the Basic Law.⁷⁾ The same goes, of course, for provisions on child support differing between legitimate and illegitimate children.⁸⁾

II. The binding effect of the constitutional order

This constitutional value decision binds not only the legislator but also the civil judge.⁹⁾ This binding effect is set out in articles 1 para. 3 and 20 para. 3 of the Basic Law.¹⁰⁾ From that it follows that with regard to the constitutional order a civil judge is prohibited to apply a statutory rule such as the former section 1934c para. 1 of the Civil Code. He may neither

6) BVerfGE 25, 167, 184.

7) BVerfGE 74, 33, 40; Maunz/Dürig/Badura, GG (69th edition 2013), article 6 marginal ref. 192.

8) BVerfGE 26, 206, 213 f.; BeckOK GG/Uhle, Beck's online commentary on the Basic Law fort he Federal Republic of Germany (19th edition November 2013), article 6 marginal ref. 79.

9) BVerfGE 81, 242, 253; Rennert NJW 1991, 12, 13.

10) See only *Canaris* JuS 1989, 161, 162.

be able to simply neglect nor even to legally void the unconstitutional rule.¹¹⁾ But according to article 100 of the Basic Law he has got to ask the Federal Constitutional Court to decide on the unconstitutionality of the relevant rule. A judgment nonetheless handed down on the basis of the unconstitutional statutory rule will necessarily infringe the fundamental rights of the losing party.¹²⁾

III. The consequences for the Federal Constitutional Court's review power

The enforcement of the Basic Law's provisions, especially of the fundamental rights, is the Federal Constitutional Court's main purpose.¹³⁾ For this reason it is imperative to accept the Federal Constitutional Court to act as a super-appellate court at least in such civil law cases where the judges perform statutory rules infringing the Basic Law in each and any of their theoretically thinkable interpretations.

C. The unconstitutionality of the statutory rule's interpretation

I. Judicial interpretation and further development of the law

Under the headline "unconstitutionality of the statutory rule's interpretation" the second sub-topic essentially covers two methodological phenomena. Part of this type of cases at first is the usual judicial interpretation of the law. This can be described as the process of uncovering and expressing more concretely a statutory rule's true meaning.¹⁴⁾ The further development of the law by means of court decisions is the second part of this type of cases. This kind of judicial activity usually is denominated as the process of recognizing and closing gaps of the law.¹⁵⁾

Regardless of the different terms and descriptions both phenomena often overlap.¹⁶⁾ Any methodological details indeed are secondary. For the Federal Constitutional Court's prospective review power it is rather important that the respective statutory rule can be understood and interpreted in various ways. Hence, the crucial question is this: Can the Federal Constitutional Court permissibly quash the civil court's interpretation of the rule and replace it by its own one?

11) See only BeckOK GG/*Morgenthaler* (footnote 8) article 100 marginal ref. 1.

12) *Rennert* NJW 1991, 12, 14.

13) *Kloepfer*, Verfassungsrecht I (2011), § 19 marginal ref. 32; *Isensee/Kirchhof/Roellecke*, Handbuch des Staatsrechts (3rd edition 2005), § 68 marginal ref. 6.

14) *Larenz*, Methodenlehre der Rechtswissenschaft (6th edition 1991), 313; *Müller/Christensen*, Juristische Methodik I (9th edition 2004), marginal ref. 275; *Jacobi*, Methodenlehre der Normwirkung (2008), 80; *G. Hager*, Rechtsmethoden in Europa (2009), marginal ref. 7/3; *Rennert* NJW 1991, 12, 14.

15) *Kramer*, Juristische Methodenlehre (3rd edition 2010), 174 f.; *Pawlowski*, Methodenlehre für Juristen (3rd edition 1999), marginal ref. 465.

16) *Larenz* (footnote 14) 366 f.

II. The constitutional-based interpretation of the statutory rule

1. The previous German provisions on testamentary dispositions by notarized acts

Let's clarify this with an illustrative task: Previous versions of the provisions on testamentary dispositions denied such persons' right to testate who were unable both to write and to speak. Under German law, someone who is unable to write will draw up his last will by a notarized act. After section 2232 of the civil code such act is accomplished either by the testator declaring his last will to the notary or by the testator handing the notary a document with the statement that the document contains his last will.

People suffering from speech impediments, of course, can only choose the second alternative. In cases where such persons moreover are unable to write, the legal problem arose from the previous section 31 of the authentication act. This rule stipulated that the testator had to write down the required statement by his own hand.

2. The possible interpretations

If one understood this stipulation in a strict sense, people who were neither able to speak nor able to write could generally not testate. In keeping with this strict interpretation, one argued that people suffering from these impediments were generally unable to testate in a way meeting the minimum requirements relative to legal certainty.

However, this strict interpretation is not necessarily the appropriate one. In cases where legal certainty is ensured regardless of the testator's disability, the scope of section 31 of the authentication act could be reduced for teleological reasons. Section 24 of the authentication act therefore could serve as a model. This stipulation refers to other legal transactions by notarized act such as property deals. Undoubtedly, legal certainty is required in those cases too. However, section 24 of the authentication act provides regulations which take account of the restrictions imposed upon persons unable both to speak and to write. In order to conclude the respective legal transactions, such persons can be assisted by a special confidant. Maybe, one can extend this regulation also to testamentary dispositions.

3. The influence of the constitutional order

Which of the possible interpretations of section 31 of the authentication act is preferable? Since article 14 of the Basic Law guarantees the right to testate and since article 3 para. 3 of the Basic Law stipulates that no person shall be disfavored because of disability, the answer is pretty obvious. Any interpretation, that denies a disabled person's right to testate solely because of the disability, does not comply with the Basic Law.¹⁷⁾ According to the binding effect of article 1 para. 3 of the Basic Law, it further results from this: If a statutory rule can be understood and interpreted in various ways, the civil court in charge of the case is obligated to choose an interpretation that does not infringe one of the parties' fundamental rights.¹⁸⁾ This is what is usually called "the principle of constitutional-based

17) BVerfGE 99, 341, 353.

18) BVerfGE 88, 187, 194; 103, 89, 100; *Schlaich/Korioth*, Das Bundesverfassungsgericht (9th edition 2012), marginal ref. 442; *Zippelius*, Juristische Methodenlehre (11th edition 2012), § 10 III. b).

interpretation". If a civil court nevertheless chooses an interpretation contrary to the Basic Law, the Federal Constitutional Court as the guardian of the Basic Law can quash the civil court's decision.¹⁹⁾

However, if there remain several interpretations each of them confirming to the Basic Law, the principles of the constitutional-based interpretation of statutory rules are irrelevant.²⁰⁾ The reason for that is pretty simple. There doesn't exist any scale that could declare one interpretation of a statutory rule to be more constitutional relative to other methodologically possible interpretations.²¹⁾

III. The further development of the law and the separation of powers

1. The Basic Law and the necessary further development of the law

Reducing the scope of a rule for constitutional reasons certainly is at least close to the further development of the law. Anyway, the law is clearly further developed if civil judges create new decision-rules.²²⁾ Such further development of the law is not a priori inadmissible; it is rather one of the noblest judicial tasks.²³⁾ Ensuring respect for the Basic Law, especially for the fundamental rights, sometimes requires a creative intervention by the civil judges.²⁴⁾ After the basic principle of private autonomy, for instance, contracts become effective regardless of any imbalance in the parties' rights and obligations.²⁵⁾ However, that is only justified to the extent that the contracting parties negotiated at eye level, anyway more or less.²⁶⁾ If this requirement cannot be met, the adversely affected party does not act in exercise of its private autonomy.²⁷⁾ The imbalance in the rights and obligations set out in the contract hence could unduly restrict the adversely affected party's freedom of action.²⁸⁾ This hit inter alia for non-competition-clauses without any compensation²⁹⁾ and also for warranties provided by close relatives without any means.³⁰⁾

If now a civil court has to hand down a judgment based on a contract concluded in the above circumstances, the court is – as a result of article 1 para. 3 of the Basic Law – authorized and obliged to declare the contract null and void for constitutional reasons. The

19) BVerfGE 103, 89, 100.

20) *Canaris* JuS 1989, 191, 193 f.; *J. Hager* JZ 1994, 373, 375; dissenting *Larenz* (footnote 14) 339.

21) *Canaris* JuS 1991, 193 f.

22) *Maunz/Dürig/Hillgruber* (footnote 7) article 92 marginal ref. 62.

23) BVerfGE 71, 354, 372; *Larenz* (footnote 14) 366; *Wank*, *Die Auslegung von Gesetzen* (5th edition 2012), § 11 I. 2.

24) BVerfGE 34, 269, 287; *Staudinger/Looschelders/Olzen*, BGB (2009), § 242 marginal ref. 461.

25) BVerfGE 81, 242, 254; 89, 214, 232; 103, 89, 100; BVerfG NJW 2006, 596, 598; *Staudinger/Looschelders/Olzen* (footnote 24) § 242 marginal ref. 460.

26) BVerfGE 81, 242, 254 f.; 89, 214, 232; 103, 89, 100 f.; BVerfG NJW 2006, 596, 598; *Staudinger/Looschelders/Olzen* (footnote 24) § 242 marginal ref. 461.

27) BVerfGE 81, 242, 255; 103, 89, 101; BVerfG NJW 2006, 596, 598.

28) BVerfGE 81, 242, 255; 103, 89, 101; BVerfG NJW 2006, 596, 598.

29) BVerfGE 81, 242, 260 f.

30) BVerfGE 89, 214, 234 f.

general clauses such as sections 138 and 242 of the German Civil Code hereby serve as vectors to implement the constitutional value decision.³¹⁾ If the civil court in charge of the case does not fulfill this task, the Federal Constitutional Court once more acts as the Basic Law's guardian and – pursuant to the aggrieved party's constitutional appeal – quashes the civil court's judgment.³²⁾

2. The further development of the law and its constitutional boundaries

a) The general rules

However, the further development of the law is not only justified to enforce the constitutional value decisions on the civil level, but also to fill gaps within the legal framework.³³⁾ Such gaps occur especially in cases where a rule indicates a certain value decision, but does not completely implement it in the civil law. Provided that such gap is convincingly demonstrated, the further development of the law in order to fill this gap, cannot be criticized for constitutional reasons.³⁴⁾

But if this condition is not met, that is to say: if the civil court's conclusion does obviously not respect the generally recognized rules of legal methodology, the civil judge creating a new decision - rule transforms himself into the legislator.³⁵⁾ He thus disrespects the principle of separation of powers which is set out in article 20 para. 3 of the German Basic Law.³⁶⁾ Consequently, not only the private law is incorrectly applied but also the Basic Law is infringed.³⁷⁾ Also in these cases the Federal Constitutional Court is entitled to quash the civil court's decision based on the inaccurately created decision - rule. Unfortunately, there aren't any reliable guidelines to determine whether or not a civil court's approach – from a constitutional point of view – is according with legal methodology. Just as the Federal Constitutional Court pointed out in the Soraya case:³⁸⁾ The boundaries within the further development of the law could be carried out, cannot be reduced to an easy formula with a universal scope. However, two contrasting examples might give an idea of the Federal Constitutional Court's approach.

b) Concretion I: The Soraya case – BVerfGE 34, 269

In 1958, the Federal Court of Justice first awarded compensation for immaterial damages due to a violation of personality rights. According to section 253 para. 1 of the civil code, immaterial damages are only compensated the cases stipulated by law. For the violation of

31) BVerfGE 89, 214, 233.

32) BVerfGE 89, 214, 235; see also *J. Hager* JZ 1994, 373, 376.

33) *Larenz* (footnote 14) 366; *Zippelius* (footnote 18) § 10 III. b); *Wank* (footnote 23) § 11 I. 2.

34) BVerfGE 128, 193 marginal ref. 53.

35) BVerfGE 49, 304, 320 f.; 69, 315, 371 f.; 71, 354, 362 f.; 96, 375, 394 f.; 113, 88, 103; 128, 193 marginal ref. 51; BVerfG NJW 2009, 499 marginal ref. 20; BeckRS 2012, 48172; consenting *Rüthers* NJW 2011, 1856, 1857.

36) BVerfGE 128, 193 principle; BVerfG NVwZ-RR 2013 marginal ref. 8; *Larenz* (footnote 14) 427; *Wank* (footnote 23) § 11 II.

37) BVerfGE 128, 193 marginal ref. 79.

38) BVerfGE 34, 269, 288.

personal rights, however, such stipulation was not provided at the time and still is not today. The judicial law from 1958 hence created a completely new claim, even contrary to the law, anyhow if one refers to what is literally set out in the civil code.

Nevertheless, the Federal Constitutional Court accepted this new damage claim in the Soraya case from 1973. Inspired by and based on articles 1 and 2 of the Basic Law, the general right of personality in matters of civil law was recognized only in 1954, that is to say: more than fifty years after the civil code entered into force. Moreover, the general right of personality was implemented into civil law by means of judicial law. And from that it further follows that this right was not sufficiently protected on the level of civil law. Against this backdrop, the Federal Constitutional Court concluded that articles 1 and 2 of the Basic Law did not necessarily require compensation for immaterial damages due to a violation of personality rights; but article 20 para. 3 would permit it anyway. This new damage claim thus was carried out within the scope of justifiable further development of the law.

c) Concretion II: The “changeable marital living conditions” – BVerfGE 128, 193

Considering the Court’s generous attitude from the Soraya case, it might surprise that it judged much more rigorously in the second example. This one refers to the case mentioned above. According to section 1578 para. 1 of the civil code, the divorce’s claim to maintenance is calculated on the base of the marital living conditions. Post-marital occurrences influence the marital living conditions only within very narrow limits. The Federal Court of Justice now extended section 1578 para. 1 of the civil code and judged that the marital living conditions would be influenced even and especially by a remarriage of the maintenance debtor. This extent regularly reduces the divorce’s claim for maintenance which is why it is considered a new decision - rule.

This further development of the law usually is presented under the catchword “changeable marital living conditions” and the reason given for it is the legal equality of marriages following one after another. After a detailed analysis and evaluation of the rules on post-marital maintenance, however, the Federal Constitutional Court concludes that the required legal equality of the first and the second marriage was already sufficiently considered elsewhere in the legal context. Therefore the Federal Constitutional Court further concluded that the boundaries of constitutionally justifiable further development of the law were overstepped.

However, this decision of the Federal Constitutional Court does not necessarily convince. Though the judicial law on the “changeable marital living conditions” must truly be criticized under the perspective of civil law, it is arguable if this error on the level of civil law constitutes an infringement the principle of separation of powers. Using the principles laid down in the Soraya case, such an infringement requires that the civil judge obviously overstepped his constitutional competences.³⁹⁾ And in fact, large parts of the doctrine agreed

39) BVerfGE 34, 269, 291.

with the new formula of the “changeable marital living conditions”.⁴⁰⁾

D. The unconstitutionality of the statutory rule’s practice

I. Differentiation of this type of cases

It remains to consider under which conditions the inaccurate practice of a civil law’s rule infringes provisions of the Basic Law at the same time. Two types of cases shape this group: The first one refers to the classification of a fact falling under one specific rule: Could it cause an infringement of the Basic Law if this classification fails? The second case concerns the concrete balancing of interests based on undetermined legal terms such as “legitimate interest”: Could it cause an infringement of the Basic Law if a civil court does not correctly balance the respective interests?

II. The principle

1. The dilemma with article 2 para. 1 of the Basic Law

According to a first instinct, one would answer both questions in the negative. But because of article 2 para. 1 of the Basic Law in conjunction with the rule of law, this first instinct is not necessarily true. Article 2 para. 1 of the Basic Law grants to anyone the freedom of action. After article 2 para. 2 this right may be interfered with only pursuant to a law. This clarifies the dilemma: If a civil court inaccurately applies the respective law, at least article 2 para. 1 of the Basic Law is infringed.⁴¹⁾ Consequently the Federal Constitutional Court as the guardian of the Basic Law should intervene.

2. The inaccurate classification of a fact falling under one specific rule

However, this argumentation based on article 2 para. 1 of the Basic Law is misleading. The Basic Law as such namely cannot define if a certain fact objectively should be classified falling under one specific rule. Nothing within the Basic Law, for instance, could indicate whether or not a drawer is a cupboard’s essential part in the sense of section 93 of the civil code.⁴²⁾ And even if the objectively accurate classification exists and otherwise is provided, neither the civil code nor the constitutional order guarantees that it will be performed in each and any case. This can be seen from section 543 of the civil procedure code. This rule stipulates that an appeal to the Federal Court of Justice is not admitted solely on points of inaccurate classification. And the Federal Constitutional Court recently confirmed that this rule complies with the Basic Law.⁴³⁾

Consequently, based upon the Basic Law it can only be analyzed if the nature and

40) *Stelzer* FPR 2008, 573 F.; *Mleccko* NJW 2008, 3220; *Herrler* MittBayNot 2009, 110, 115; *Kemper* FuR 2009, 372, 378; *Bißmaier* FamRZ 2010, 849, 850.

41) *Canaris* JuS 1989, 161, 162 f.

42) See BeckOK BGB/*Fritzsche*, Beck’s online commentary on the German civil code (28th edition, May/2013), § 93 marginal ref. 15.

43) BVerfG NJW 2012, 1715 marginal ref. 18.

content of the legal effects laid down by the judgment infringe the concerned party's fundamental rights. And such infringement can only be ascertained if the legal effects laid down in the judgment as a hypothetical statutory rule would not be in compliance with the Basic Law's provisions.⁴⁴⁾ In any other case, an inaccurate classification of a fact falling under one specific rule might be contrary to the civil code but it complies with the Basic Law.⁴⁵⁾

3. The inaccurate balancing of the parties' legal interests

The inaccurate balancing of the concerned parties' legal interests constitutes evidence of an infringement of the Basic Law only under even stricter conditions. For instance: Shall the client – in the sense of section 282 of the civil code – reasonably be expected to accept ongoing painting works by the obligor, if the obligor strongly soiled the client's furniture?⁴⁶⁾ It is pretty obvious that the Basic Law cannot directly answer this question. And even the civil law itself cannot provide the one accurate result. The civil judge in charge of the case rather has to respect certain guidelines for the correct balancing of the concerned legal interests. If he judges by means of those guidelines the balancing is performed *lege artis*.

If he indeed disrespects those guidelines the above mentioned problem occurs in this context too: Neither the civil code nor the constitutional order guarantees that the guidelines for an accurate balancing of legal interests will be respected in each and any case.⁴⁷⁾ In other words: The Basic Law might protect the parties against judicial arbitrariness, but it does not guarantee an infallible judge.

III. The exceptional cases

As an intermediate conclusion one may notice that the inaccurate practice of a statutory rule regularly doesn't cause an infringement of the Basic Law at the same time. In so far, the Federal Constitutional Court thus cannot act as a super-appellate court. However, there are two exceptional cases to be mentioned.

1. The violation of the right to be heard

The first one concerns the right to be heard. On the one hand, each party before a court thus is entitled to be informed and to express her view; on the other hand, the court is obligated to consider the parties' statements.⁴⁸⁾ Provided that first the aggrieved party presented the accurate argumentation in a procedurally proper manner and second the court completely disregarded it, the Federal Constitutional Court will state a violation of this right

44) *Rennert* NJW 1991, 12, 14.

45) The same goes if a civil court interprets a rule contrary to the interpretation chosen by the Federal Court of Justice.

46) See *Staudinger/Otto/Schwarze*, BGB (2009), § 282 Rn. 34.

47) *Rennert* NJW 1991, 12, 16.

48) See for example BVerfG NJW 1978, 989; 1980, 278; 1980, 2698; 1982, 1636, 1637; 1993, 1461; 1998, 2273; 2001, 2531; 2003, 1924, 1926; 2004, 2443; 2007, 2242, 2243; NJW-RR 2004, 934.

to be heard; it then will pledge the civil court to newly decide upon the case.⁴⁹⁾ In these cases, however, solely the infringement of the aggrieved party's fundamental procedural rights is reviewed and not the practice of the statutory rule as such.

2. The balancing of legal interests on the constitutional level

The second exception refers to the cases where the balancing of the concerned legal interests is performed directly on the constitutional level. The following is significant for this type of cases: Two holders of reciprocally influencing fundamental rights are in opposition to each other.⁵⁰⁾ Each of both fundamental rights consequently can only be strengthened to the detriment of the other one. The legislator in matters of civil law somehow always finds himself in that situation. Therefore, it is further required that both of the concerned fundamental rights are that protectable that in the end only one possible result of such balancing remains.⁵¹⁾ In this context, the boundaries between civil law and constitutional law blur. Indeed, the decision - rule then is provided directly by the Basic law.⁵²⁾

However, such cases do not often arise. The certainly most famous example is the conflict between the general right of personality on the one hand and the free speech on the other hand.⁵³⁾

E. Summary

The Federal Constitutional Court's review power is limited to cases where the inaccurate application of a civil law's rule infringes the Basic Law at the same time. The Federal Constitutional Court permissibly acts as a super-appellate court in such civil law cases where the judges apply statutory rules infringing the Basic Law in each and any of their theoretically thinkable interpretations. The Federal Constitutional Court can quash the civil court's decision if the civil court chose an interpretation infringing the Basic Law whereas a constitutional interpretation existed. The Federal Constitutional Court is entitled to intervene if a further development of the law performed by a civil court is not in compliance with the principle of the separation of powers. The Basic Law does not guarantee the objectively accurate application of a statutory rule in each and any case. In this context, the Federal Constitutional Court can permissibly act as a super-appellate court only within very narrow limits.

49) Maunz/Schmidt-Bleibtreu/Klein/Bethge, BVerfGG (42nd edition 2013), § 90 marginal ref. 253.

50) Merten/Papier/Calliess, Handbuch der Grundrechte (2nd edition 2006), § 44 marginal ref 18.

51) Merten/Papier/Calliess (footnote 50) § 44 marginal ref 36.

52) J. Hager JZ 1994, 373, 375 f.

53) J. Hager JZ 1994, 373, 375 f.