Rethinking Judicial Review: The Latest Decision of the Plenum of the Federal Constitutional Court

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A. Introduction

In the past few years, almost half of the *Verfassungsbeschwerden* (individual constitutional complaints) brought before the *Bundesverfassungsgericht* (BVerfG --Federal Constitutional Court) claimed a violation of the *Recht auf rechtliches Gehör* (right to a hearing in court), guaranteed in Art. 103 para. 1 of the *Grundgesetz* (GG -- German Basic Law). These constitutional complaints do not only constitute the largest number of all constitutional complaints, they are also the most successful ones: If such a violation is plausible, then the Court usually does not make use of its discretion to refuse to hear the case, but rules on the merits in favor of the complainants.[1]

With the latest decision on impairments of Art. 103 para. 1 GG,[2] the Constitutional Court has demanded a genuinely new approach to appeals aimed at redressing such violations: Within the procedural codes, legislation will now have to provide for judicial recourse, even if such impairments take place in last-instance decisions. Informal appeals opposing such violations are held to be unconstitutional. This reverses the Court's *ständige Rechtsprechung* (permanent jurisprudence). But the Court's decision goes further than that. It also strengthens the parties' right to judicial review if courts have committed violations of rights themselves by not adhering to their specific procedural duties. The German court system and the procedural codes will have to adapt to this turn-around in the decision of the Constitutional Court.

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[1] *See*, Wagner, Der Anspruch auf rechtliches Gehör, 2nd edition, Cologne 2000, at 498.

[2] Bundesverfassungsgericht (BVerfG), decision of April 30th, 2003, 1 PBvU 1/02; http://www.bundesverfassungsgericht.de/entscheidungen/frames/up20030430_1pbvu000102.html, NJW 2003, 1924 A commentary on the decision gives Voßkuhle, NJW 2003, 2193.

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B. The Decision of the Constitutional Court

I. The History of the Case in Civil Courts

The history of the decision of the Constitutional Court dates back to the mid-1990s. Then, the five complainants were pursuing their rights in a civil case about the execution of a sales contract.[3] Both the Court of the first instance, the *Landgericht* (LG -- Regional Court), and of the second instance, the *Oberlandesgericht* (OLG -- Court of Appeals), had struck down their claim.[4] However, section 546 para. 1, sentence 1 of the then valid *Zivilprozeßordnung* (ZPO -- Civil Procedure Act) provided for a third instance at the *Bundesgerichtshof* (BGH --Supreme Court of Civil Law), if the amount of the claim was higher than DM 60,000[5] or if the deciding Court of Appeals expressly so permitted. Although the Court of Appeals had continuously pointed out to the claimants that it would permit the appeal to the Supreme Court, in the final decision it refused to do so – surprisingly and without prior notice to the parties. Hence, the complainants had not made efforts to extend their claim to a sum above DM 60,000 to make the suit reviewable by the Supreme Court of Civil Law. A review of the judgment according to the provisions of the Civil Procedure Act was thus made impossible.

The claimants appealed to the Supreme Court for review, nevertheless. They claimed that the Court of Appeals had violated their legal right to a hearing in court by failing to inform the parties of its intent not to permit the appeal to the Supreme Court in spite of prior announcements to allow such an appeal.[6] The Supreme Court refused to grant review.[7] It argued, according to the provisions of the Civil Procedure Act, it was bound by the decision of the lower court not to permit it.[8] The Court also refused to grant the review as an extraordinary relief.[9] It had previously developed such an extraordinary relief for cases in which a preceding, non-reviewable decision was completely incompatible with the legal system, *i.e.* because

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[3] Reported in BGH NJW 1999, 290.

[4] Reported in BGH NJW 1999, 290.

[5] About € 30,000. The case was decided before the introduction of the Euro to Germany and the change of the Civil Procedure Act. Now, the revision is only possible with the permit from the Court of Appeals or the Supreme Court in Civil Matters according to sect. 543 para.1 ZPO.

[6] So reported in BGH NJW 1999, 290.

[7] BGH NJW 1999, 290.

[8] BGH NJW 1999, 290.

[9] BGH NJW 1999, 290.

it had no legal basis and was thus materially foreign to the law.[10] However, as the Supreme Court pointed out in its decision, this remedy was not able to be applied to judgments, only to other types of judicial decisions.[11] In any case, the court concluded, the violation of the right to a hearing in court did not constitute a severe enough offence to the law to trigger this exceptional remedy.[12]

II. The Procedural History of the Case at the Constitutional Court

The original five plaintiffs of the civil case then filed an individual constitutional complaint at the Constitutional Court.[13] The complaint asserted a violation of the constitutionally protected procedural subjective right of Art. 103 para. 1 GG[14] by both the judgment of the Court of Appeals and the decision of the Supreme Court of Civil Law.

The constitutional complaint has thus far been successful.[15] Beyond the individual fate of the complainants' law suit, the case was the basis for a turn-around in the interpretation of and an exceptional increase in the importance of a substantial individual right, the *allgemeine Justizgewährungsanspruch* (general right to judicial recourse). But the procedural road taken at the Constitutional Court was unusually long. Not only the first senate, in charge of most complaints asserting individual rights' violations, but also the second senate and finally the entire bench of the Constitutional Court ruled in a rare *Plenumsentscheidung* (plenary decision) on the foundations of the case.[16]

Plenary decisions of the Constitutional Court are intended only as an exception under very strict conditions. Section 16 para. 1 of the *Bundesverfassungsgerichtsgesetz* (BVerfGG -- Procedural Code of the Constitutional Court) provides for one alterna-

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[10] *See, e.g.*, BGHZ 109, 41 = NJW 1990, 840.

[11] BGH NJW 1999, 290.

[12] BGH NJW 1999, 290.

[13] According to Art. 93 section 1 Nr. 4a GG, sect. 13 Nr. 8a and sect. 90 ff. BVerfGG.

[14] This article reads: "*Vor Gericht hat jedermann Anspruch auf rechtliches Gehör*", that is "Everybody has a right to hearing in court".

[15] Although the first senate still has to deliver a final decision on the complaint, it will have to do so based on the plenary decision. The violation of the right to a hearing in court was not doubted; thus cancellation of the judgment of the Court of Appeals will be the legal consequence, compare sect. 95 para. 2 BVerfGG.

[16] BVerfG v. 30.04.2003 – 1 PBvU 1/02.

tive. If one senate wants to change an existing rule of law against the will of the other senate, the plenum has to decide whether to change the law. Plenary decisions under this provision of the BVerfGG are extremely rare; only very few cases have been decided using this particular procedure.[17]

The first senate of the Constitutional Court found that the decision of the Court of Appeals constituted a violation of Art. 103 para. 1 GG.[18] Prior to this decision, such a finding of a violation of the right to a hearing in court would regularly have lead to the cancellation of the judgment according to section 95 para. 2 BVerfGG. The Constitutional Court would have invalidated the decision of the lower court; the lower court then would have had to once again decide on the merits. In ruling on violations of Art. 103 para. 1 GG, the Constitutional Court thus took up a position it usually explicitly refuses to assume, that of a "*Superrevisionsinstanz*" (Superior Court of Appeals) above the regular court system, redressing an incorrect interpretation of the law at lower instances.

Surprisingly, the first senate did not follow this well-established path of precedents this time. Instead, it tested whether the lack of a formal remedy might not itself constitute a violation of the constitution.[19] As an argumentative basis, the Court looked into the right to judicial protection against state acts, as stated in Art. 19 para. 4 GG. Because such an interpretation would conflict with precedents of not only the first senate, but also the second one, the BVerfGG required the permission of the other senate to change the law. However, the second senate refused to accept such a change. The requirements of sect. 16 BVerfGG were thus fulfilled. The plenum had to decide.[20] All 16 judges decided on the issue in the plenary decision. Ten of them ruled with the majority opinion; six voted against it.[21] The minority refrained from publishing a dissenting opinion.

III. The Decision

The majority opinion of the plenary session of the Constitutional Court did not follow the reasoning of the first senate. However, the plenum majority and the first senate opinion agreed on the result. The lack of established *fachgerichtliche Rechts-*

[17] *See, e.g.*, BVerfGE 4, 27, and BVerfGE 54, 277.

[18] Sub A II 1 of the decision.

[19] Sub A II 1 b) of the decision.

[20] *Vorlagebeschluss* (Submission Decision) of January 16th, 2002, - 1 BvR 10/99 - BVerfGE 104, 357.

[21] Under C IV 3) of the decision, final sentence.

behelfe (general judicial remedies) to last instance court decisions violates the constitution.[22] This is derived from an interpretation of the general right to judicial recourse and the principle of the *Rechtsstaat* (rule of law) [III 1], but also from of the constitutionally guaranteed right to a hearing in court of Art. 103 para. 1 GG [III 2]. Thus, the decision is primarily limited to violations of the right to a hearing in court. According to the plenary decision, only in these cases do the procedural codes have to provide for correcting remedies [III 3].[23] However, whether the holding might go further than the Court explicitly stated – and maybe even intended – will be discussed later [IV].

1. Art. 19 para. 14 GG versus general Right to Judicial Recourse

As the central issue, the Court rightly addresses whether there is a constitutional right to review last-instance decisions that violate the constitutional right of Art. 103 para. 1 GG. In answering that, the Court first unfolds the legal foundation of such a possible claim.[24] At first sight, Art. 19 para. 4 GG[25] seems to address this matter, as it guarantees legal recourse against all state acts. If the term "state act" can be understood as an act by any of the three branches of government, then the provision would give a right to recourse against court decisions, as well legislative and executive acts. However, courts – including the Constitutional Court – and literature in German law have widely interpreted the meaning of the term "state act" only as incorporating acts of administration.[26] Although the term "administration" has been construed more and more extensively over the years, the core domains of legislation and jurisdiction have not been included in this guarantee of

[22] Sub C of the decision, introductory sentence.

[23] Sub C II of the decision.

[24] Sub C I of the decision.

[25] The relevant part of Art. 19 para. 4 reads: "*Wird jemand durch die öffentliche Gewalt in seinen Rechten verletzt, so steht ihm der Rechtsweg offen. […]*", that is "Should any person's rights be violated by state acts, recourse to the courts shall be open to him. […]"

[26] BVerfGE 15, 275, 280; 65, 76, 90; so the present president of the Court, Hans-Jürgen Papier, in Josef Isensee/Paul Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, volume 6, 2nd edition, Heidelberg 2001, § 154 at 37 through 39: Rechtsschutzgarantie gegen die öffentliche Gewalt, at 37; Hans D. Jarass/Bodo Pieroth, Grundgesetz für die Bundesrepublik Deutschland, 6th edition, Munich 2002, Art. 19 at 31; Bodo Pieroth/Bernhard Schlink, Grundrechte, 14th edition, Heidelberg 1998, at 1082; Wolf-Rüdiger Schenke, in Bonner Kommentar zum Grundgesetz, 105th installment, Heidelberg May 2003, Art. 19 para. 4 at 275; differentiating Eberhard Schmidt-Aßmann in Maunz-Dürig, Grundgesetz Kommentar, 42nd installment, Munich February 2003, Art. 19 para 4 at 98, who almost anticipated the line of argumentation of the Constitutional Court, when commenting on the just published decision of the first senate.

judicial review. Judgments and decisions of courts made in their special judicial independence are not protected under Art. 19 para. 4 GG. It was precisely this interpretation that the first senate challenged.

In this request for a change of the line of precedent, the first senate of the Constitutional Court argued, that Art. 19 para. 4 GG should be understood to include judicial acts completely, even those where judges enact their basic independence.[27] It thus followed a recent development in the literature, arguing in favor of treating administrative and judicial acts alike.[28] Traditionally, the judicial branch of government has been considered immune from partiality, immune from acting under time pressure and political pressure, and immune from a tendency to impair the law. This view is primarily based on the courts' special, independent, uninterested position as a peacemaker as well as the special requirements in the education, training and self-understanding of judges. Thus, it is argued, judicial acts are in themselves unlikely to violate the law. Therefore, a special right to review is considered unnecessary. Such a right would be highly problematic to the court system, it is maintained, since a right to judicial recourse of judicial decisions would lead to endless appeals.[29] According to the argument, Art. 19 para. 4 GG was not designed to guarantee such an *Instanzenzug* (successive appeals).[30]

Some modern voices now see no reason to distinguish between the judiciary and the executive.[31] Since the judiciary is similarly bound to violate procedural and substantive law, it should not be treated differently. They assess the role, construction, and reality of the work of the judiciary differently from those who have the predominant opinion in legal theory. Their request is that both branches fall under the protection of Art. 19 para. 4 GG. The right to judicial recourse would grant only

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[27] Sub A II 1 of the decision.

[28] Compare Peter Michael Huber in Herman von Mangoldt/Friedrich Klein/Christian Starck, Grundgesetz, 4th edition, Munich 1999, Art. 19 para. 4 at 447; undecided Helmuth Schulze-Fielitz, in Horst Dreier (Ed.), Grundgesetz Kommentar, volume 1, Art. 19 para. 4 at 35; extensively Voßkuhle, Rechtsschutz gegen den Richter, München 1993, S. 255 ff.

[29] *See, e.g.*, Hans-Jürgen Papier, in Josef Isensee/Paul Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, volume 6, 2nd edition, Heidelberg 2001, § 154 at 37; Georg Nolte in Hermann von Mangoldt/Friedrich Klein/Christian Starck , Grundgesetz, Art. 103 para. 1 at 81; Wolf-Rüdiger Schenke, in Bonner Kommentar zum Grundgesetz, Art. 19 para. 4, at 275.

[30] See only Wolf-Rüdiger Schenke, in Bonner Kommentar zum Grundgesetz, Art. 19 para. 4, at 275.

[31] So e.g Peter Michael Huber in Herman von Mangoldt/Friedrich Klein/Christian Starck, Grundgesetz, 4th edition, Munich 1999, Art. 19 para. 4 at 447; undecided Helmuth Schulze-Fielitz, in Horst Dreier (Ed.), Grundgesetz Kommentar, volume 1, Art. 19 para. 4 at 35; extensively Voßkuhle, Rechtsschutz gegen den Richter, München 1993, S. 255 ff.

one instance, and this only once. Such a limitation would prevent extending interpretation of the article as leading to an endless succession of appeals.

The plenum of the Constitutional Court does not follow the appraisal of the first senate and these novel voices.[32] It sees no reason to change the Court's view on Art. 19 para. 4 GG. Rather, it explicitly confirms the traditional understanding. Judicial acts are only covered by this article's guarantee to judicial recourse if they fulfill administrative duties, not if they are an expression of the typical independence of judicial decision-making.[33]

In its reasoning, the Constitutional Court looks into the "indecisive" legislative history of Art. 19 para. 4 GG[34] and succinctly points at the ongoing discussion.[35] But its core argument for holding up the traditional view relies on a systematic view on the constitution. The Court argues that the right to judicial recourse against "state acts" need not be extensively interpreted because the constitution already has other means of providing the right to judicial review of court decisions.[36] This right, which is derived from the principle of the rule of law, is the proper legal foundation for anchoring a constitutional right to legal recourse in cases in which court decisions violated Art. 103 para. 1 GG.[37] Because of its existence, the Court sees no vacuum in the enforcement of procedural rights that might lead to favoring the extension of Art. 19 para. 4 GG.[38] The Court goes so far as to state that Art. 19 para. 4 GG and the right to judicial recourse both have the same content, but that they are only derived differently within the provisions of the constitution:[39] While Art. 19 para. 4 GG explicitly guarantees the right to judicial recourse against acts of the administration, the line of reasoning for this is based on an interpretation of general values of the constitution, centrally the principle of the rule of law.

This line of reasoning, in which the general right to judicial recourse is understood to function as a complementary provision to Art. 19 para. 4 GG, takes this right

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[32] Sub C I 3 b) of the decision.

[33] Sub C I 3 b) of the decision.

[34] Sub C I 3 b) aa) of the decision.

[35] Sub C I 3 a) of the decision.

[36] Sub C I 3 b) bb) of the decision.

[37] Sub C I 3 b) bb) of the decision.

[38] Sub C I 3 b) bb) of the decision.

[39] C I 3 of the decision, introductory sentence.

beyond its traditional area of application. It was originally established by the Constitutional Court in order to protect civil rights in civil cases.[40] It draws on the idea of checks and balances within the German constitution. Its goal is to provide a constitutional counter-balance to the state's monopoly of power. If the state requires its citizens to entrust the enforcement of their rights to the state, there must then be a complementary right to exact the enforcement of this right from the state. The monopoly of power requires that rights of enforcement be resigned to the state in exchange for a right to their enforcement. The principle of the rule of law can only be realized if an independent institution, like the courts, enforces the law against those who break it.[41] This understanding is also the foundation of Art. 19 para. 4 GG. Thus, the general right to judicial recourse ensures in the opinion of the Constitutional Court – just as the specialized Art. 19 para. 4 GG does in administrative matters – that at least one court will decide on the existence and the application of civil rights and duties.[42]

With the present decision, the Court expands the general right to judicial recourse beyond the traditional reversal of the monopoly of power.[43] So far, the Constitutional Court has been motivated to open court procedures to enforce *private* individual rights between private parties by relying on the general right to judicial recourse. Now, it is motivated to open court procedures to enforce one particular individual *public* right by relying on the general right to judicial recourse.

The Court asserts its holding by arguing on the basis of the principle of the rule of law and by making use of the special status of Art. 103 para. 1 GG as a constitutionally guaranteed procedural right. As such, it takes part in the minimum guarantees under the principle of the right to judicial recourse, and it deserves special protection.[44] Because it is addressed at the judiciary with regard to its special position as independent decision-making institution, the right cannot be violated by the administration. Hence, Art. 19 para. 4 GG is not applicable.[45] This could lead to a constitutionally non-tolerable deficit in legal protection, if it were not for the general right to judicial recourse. This right requires procedural remedies to violations of

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[40] BVerfGE 88, 118, 123; 93, 99, 107; 97, 169, 185.

[41] Eberhard Schmidt-Aßmann, in Maunz-Dürig, Grundgesetz Kommentar, 42nd installment, Munich February 2003, Art. 19 para.4 at 16.

[42] Sub C I 3 b) bb) (1) of the decision.

[43] C I 3 b) bb) (2) of the decision.

[44] C II 1 of the decision.

[45] C I 3 b) bb) (2) of the decision.

constitutionally guaranteed procedural rights. Both Art. 103 para. 1 GG and the general right to judicial recourse are therefore involved in the realization of the principle of the rule of law, strengthening and assisting each other in safeguarding its validity. Even if the Court does not extend the application of Art. 19 para. 4 GG by using the detour of the general right to judicial recourse, the effects are almost as ground-breaking. A right to the review of judicial decisions is thus established, even if only under certain circumstances.

The Court opposes the frequently posed argument that the acknowledgment of judicial recourse against judicial decisions would lead to endless court proceedings.[46] In the plenum's view, the right to judicial recourse only grants a right to *one* court decision for the asserted independent violation of *one* right. Whether this right is a public one – like Art. 103 para. 1 GG – or a private one does not matter. It is an impairment of the Basic Law, and thus an independent violation of rights by the original court, that triggers the general right to judicial recourse. For its application, as long as the impairment concerns separate and individual rights, the circumstances under which the violation has taken place are insignificant – whether it is the Supreme Court in Civil Matters or a local court. Since the right the parties dispute about has already been violated, only the violation of another, independent right can lead to another judicial recourse. Thus, the violation of a constitutional procedural right opens another venue indeed, but only against this one particular impairment.

The line of reasoning is quite elegant. The Court avoids the ever-present argument over the interpretation of the range of application of Art. 19 para. 4 GG, because it grants the general right to judicial recourse the position of an unwritten individual procedural right within the constitution, based on the principle of the rule of law. On the other hand, the Court is still free to employ the well-known arguments from the discussion about the interpretation of this constitutional provision. Consequently, the Court also addresses possible counter-arguments, well-known from the discussion of Art. 19 para. 4 GG, to secure its view on the right to judicial recourse.[47]

Although the Court does not rely on arguments that employ the modern view of the term "state acts" in Art. 19 para. 4 GG it is difficult not to read the different appraisal of the judiciary into this decision. By establishing a right to judicial recourse in cases in which the judiciary has newly violated an independent right of the par-

[46] Under C II 5 of the decision.

[47] Sub C I 4 of the decision.

ties, such as the right to a hearing in court, the Constitutional Court silently acknowledges that all education, training, and independence do not serve as protection against wrong-doing as such. Thus, with this decision, another strong line of reasoning within Art. 19 para. 4 GG (and now the general right to judicial recourse, too) – aside from the argument of endless court proceedings – severely looses ground.

2. The Relationship between the General Right to Judicial Recourse and the Right to a Hearing in Court of Art. 103 para. 1 GG

If the Court had relied only on the general right to judicial recourse, the decision would have been even more ground-breaking. Any violation of any substantive or procedural law would then have opened judicial recourse. However, the Constitutional Court was very careful to set strict rules about the circumstances under which the general right to judicial recourse is triggered. It explicitly restricted its ruling to violations of Art. 103 para. 1 GG, and only if there is no prospect of correcting the violations through the use of the regular remedies of the procedural code.[48] Only under these circumstances, where the constitutionally guaranteed minimum standard is violated, does the constitution require a remedy to redress the impairment.[49] The Court leaves open whether other procedural rights – be they constitutional or not – might also trigger the right to judicial recourse, but it states its opinion exclusively for the right to a hearing in court. Whether, in the long run, the decision will thus only cover infringements of Art. 103 para. 1 GG and possibly the few other constitutionally granted procedural rights, such as Art. 14 para 3 sentence 4 and Art. 34 sentence. 3, or whether it will also become the basis for the protection of sub-constitutional procedural rights, will most likely be determined before the Court in the future.

The Court bases its restriction to violations of Art. 103 para. 1 GG on two lines of reasoning. On the one hand, it develops a particular relationship between the general right to judicial recourse and Art. 103 para. 1 GG.[50] These constitute two sides of a coin. Whoever reaches a court formally also needs to reach it substantively.[51] While the general right to judicial recourse, respectively Art. 19 para. 4 GG, takes care of the former, Art. 103 para. 1 GG takes care of the latter. In a trial, these two

[48] Sub C II of the decision, introductory sentence, and C II 1.

[49] Under C II 1 b) of the decision: only minimum standard must be guaranteed.

[50] Sub C I 4 of the decision.

[51] Under C II 1 of the decision.

rights therefore go hand in hand. A court procedure in which it is impossible for a plaintiff or a defendant to be heard would therefore not concur with the general right to judicial recourse. Consequently, the person whose right to be heard in court was impaired needs to be protected by the constitution, regardless of the phase of a court proceeding in which the violation takes place.

On the other hand, the court emphasizes that the right to a hearing in court is one of the very few procedural rights that are directly conferred by the constitution.[52] Other procedural safeguards that are considered to be constitutionally founded, *e.g.* the right to a fair trial, have been extracted from general substantive values of the constitution, but they are not explicitly stated in the Basic Law. They are considered to be a concrete expression of general values within the constitution, such as the principle of the rule of law or the view that the *Grundrechte* (individual basic rights) need a complementing procedural venue in order for their enforcement to be effective.[53] Since these procedural rights are only a partial expression of the substantive values, they are interpreted to be just one of many possible alternatives for fulfilling the requirements of the objective norms of the constitution from which they are derived. Their status within the framework of the constitution is thus less clear and less forceful.[54] The state may substitute one of these procedural safeguards for another without jeopardizing the constitutional value as such. Art. 103 para. 1 GG is also an expression of the principle of the rule of law, but – in contrast to procedural rights like the right to a fair trial – its foundation in the constitution enhances its importance and its irrevocability.

Whether Art. 103 para. 1 GG or the general right to judicial recourse is leading is mainly dependent on how opening of a controlling court's trial is classified, *i.e.* whether it is viewed as constituting an independent trial or whether it is still viewed as part of the first trial. That, in turn, depends on whether one interprets the procedural right that has been violated in a court trial as an independent right or as an annex of the rights already claimed in the first trial. If the monitoring of a last-instance judgment for impairments is considered to be part of an already accepted court procedure to enforce one's rights, the remedy for the violation would have to be dealt with in the realm of Art. 103 para. 1 GG. A new trial would then be allowed only if this was the consequence of the violation of this right. If, upon scruti-

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[52] Under C II 1 of the decision.

[53] *See, e.g.*, only BVerfGE 24, 367, 407; 49, 252, 257; Walter Krebs in Ingo von Münch/Philip Kunig (Eds.), Grundgesetzkommentar, 5th edition, Munich 2000, Art.19 at 47.

[54] *See, e.g.*, Roman Herzog in Maunz-Dürig, Grundgesetz Kommentar, 18th installment, Munich September 1980, Art. 20 at 40.

nizing a judgment in the last instance, a fresh new court proceeding is thought to be initiated, then the general right to judicial recourse provides this as a consequence. The difference, nevertheless, does not matter in this specific case. That follows from the particular consequence of a remedy to a violation in court. Usually, the general right to judicial recourse (or Art. 19 para. 4 GG respectively) would only grant the right to open a court proceeding, while the right to a hearing in court would grant the right to be listened to in an already opened court proceeding.[55] If, however, Art. 103 para. 1 GG is impaired in court, in the end, the remedy can only consist of a repetition of the original court proceeding. In both cases, the scrutinizing court would have to see whether a violation took place. If it is found that there has been a violation, this impairment can only be redressed by re-opening the issue and granting the party the right to a hearing.

3. Compliance of Existing Ordinary and Extraordinary Remedies

The Court then looks into whether the present procedural status of procedural remedies in the general court system suffices to protect Art. 103 para. 1 GG.[56] It argues that the general right to judicial recourse is not complied with in unwritten und unclear remedies against violations of the right to a hearing in court in the last instance.[57] The principle of *Rechtsmittelklarheit* (clarity of legal remedies) that is derived from the principle of the rule of law requires more than that. It demands written appeals within the procedural system that are understandable to the parties. Such remedies might, in their specific design, take into account other principles deduced from the principle of the rule of law, such as *Rechtssicherheit* (legal certainty), *Rechtsfrieden* (law and order) and the interests of all parties involved. With this, the Court reverses the line of reasoning employed in all prior decisions on the impairment of Art. 103 para. 1 GG. Previously, it found the extraordinary and informal remedies sufficient that the courts had developed to help victims whose right to a hearing in court had been violated.[58] It had even encouraged their formation.[59]

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[55] This is generally argued for Art. 19 para. 4 GG, compare e.g. Hinrich Rüping, in Bonner Kommentar zum Grundgesetz, Art. 103 para. 1 at 13; Georg Nolte in Hermann von Mangoldt/Friedrich Klein/Christian Starck , Grundgesetz, Art. 103 para. 1 at 89; Eberhard Schmidt-Aßmann, in Maunz-Dürig, Grundgesetz Kommentar, 42nd installment, Munich February 2003, Art. 19 para. 4 at19.

[56] Under C IV of the decision.

[57] Sub C IV 1 of the decision.

[58] *See, e.g.*, of the many decisions regarding this issue BVerfGE 9, 89; 42, 243; 47, 182; 49, 252; 60, 96; 73, 322; 70, 180.

[59] *See, e.g.*, BVerfGE 60, 96, 98; 70, 180, 187; 73, 322, 327.

However, the legislature is not permitted to rely on the possibility of a constitutional complaint as remedy in order to fulfill its duties to provide rights to judicial recourse.[60] The Constitutional Court shows that by interpreting the allocation between the special courts and itself within the court system, the legislature made use of its interpretative power assigned to it in Art. 94 para. 2 sub. 2 GG to establish the principle of *Subsidiarität* (subsidiarity) of the Constitutional Court vis-à-vis general courts.[61] According to Art. 94 para. 2 sentence 2 GG and sect. 90 para. 2 BVerfGG, the role of a Constitutional Court is restrained; it serves only as a last refuge in constitutional matters. Thus, the legislature decided to divide competences between the general courts and the Constitutional Court.[62] If the Constitutional Court is called upon regularly because of a lack of a remedy to violations of Art. 103 para. 1 GG in the general courts, this violates the constitutionally provided authority of the legislature to regulate the division of labor between general courts and the Constitutional Court.

In applying these standards to the existing remedies to violations of the right to a hearing in court, the Constitutional Court finds those means sufficient that are integrated into the regular system of appeals.[63] However, the use of extraordinary unwritten remedies to fill gaps in this system are not fulfilling the demands of the constitution, since they violate the differentiation between the Constitutional Court and the regular courts and the principle of the clarity of legal remedies.[64] The Court therefore requires that the legislature introduce new remedies to violations of Art. 103 para. 1 GG. These remedies need not necessarily open judicial recourse to a higher court.[65]

Surprisingly, the Court does not examine whether other principles and objective values of the constitution might justify the fact that written remedies are lacking. That such a justification is possible and part of Art. 103 para. 1 GG is undisputed.[66]

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[60] Sub C III 2 of the decision.

[61] Under C III 2 a) bb)

[62] Sub C III 2 a) bb) of the decision.

[63] C IV 1 of the decision.

[64] C IV 2 b) of the decision.

[65] Sub C III 1 a) of the decision.

[66] *See*, only Franz-Ludwig Knemeyer, in Josef Isensee/Paul Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, volume 6, § 155: Rechtliches Gehör im Gerichtsverfahren, at 33 ff.

The right to a hearing in court is not granted indefinitely. Its *Schutzbereich* (protective scope) has to be determined by the legislature weighing a decision between this and other values of the constitution. The principles of legal certainty and law and order are often used to counterbalance the right to a hearing in court. They justify, for example, *Ausschlußfristen* (exclusive time limits) and other restrictions.

C. Consequences

Although the Constitutional Court has evaded some questions, the consequences of the decision are still far-reaching. The most obvious one has been formulated by the Court itself. By the end of 2004, the German parliament is obligated to institute written reliefs to violations of the right to a hearing in court.[67] This will lead to some changes not only in the Civil Procedure Act – where such a remedy originally was lacking in the decided case – but also in all other procedural codes, most prominently the *Verwaltungsgerichtsordnung* (VwGO -- Administrative Court Procedure Act) and the *Strafprozeßordnung* (StPO -- Procedural Criminal Act). Legislation will have to include remedies to judicial decisions other than judgments, as well, even if the case before the Constitutional Court did not explicitly specify so. One reason for that lies in the binding power of the complaint. The Constitutional Court tested both the judgment of the Court of Appeals and the decision of the Supreme Court of Civil Law. More substantially argued, Art. 103 para. 1 GG does not distinguish between different forms of decision-making in court, but requires adherence to this principle in all court procedures. Thus, the protection against its impairments has to be construed similarly.

A more far-reaching consequence regards the fate of the unwritten and possibly even the written remedies, since the change of opinion of the Constitutional Court establishes a new understanding of the law on appeals and procedural remedies as such. This can be derived from the fact that in the Court's elaboration on the principle of the clarity of legal remedies, it virtually never appeals to Art. 103 para. 1 GG, but states its opinion in very general terms.[68] Most likely, the decision will also mean the end to the extraordinary remedies as such, because the Court finds that the lack of clear and written propositions of such remedies makes their application and forseeability uncertain, thus violating the principle of the rule of law.[69]

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[67] C IV 3 of the decision.

[68] Under C IV 2 a) of the decision.

[69] Sub C IV 2 of the decision.

But also for written remedies, the Court establishes that, although the procedural codes may provide for thresholds, conditions and restrictions, these have to be easy enough to understand that a *Rechtsmittelbelehrung* (instruction on the right to appeal) is not necessary.[70] The instructions on the right to appeal have so far only been known in administrative law, where they are required in some administrative decisions. If procedural remedies are constituted differently, the ruling court would have to do exactly that, instruct the parties about the conditions and possibilities of appeals. Although the Court has not even hinted whether any of the existing remedies would possibly fail to fulfill the requirement of the clarity of legal remedies, there can be considerable doubt that some of them would pass a test under these propositions, *e.g.* some of the difficult, quite differentiated remedies in the *Zwangsvollstreckungsrecht* (civil enforcement law).

But the significance of this decision even goes beyond these effects of the holding. Although the Court made every effort to restrict its ruling to the violations of the right to a hearing in court protected under Art. 103 para. 1 GG, because this case reached a last instance decision, its reasoning and significance transcends this particular right.

So far, the general right to judicial recourse has not received much attention from legal scholars. One reason might be that, in the past, the Court has only applied it to give private parties a right to judicial recourse to enforce their private rights.[71] This was broadly accepted. Now, the general right to judicial recourse has assumed a new importance within the framework of the protection of rights. It is at this point that the decision might lead further than the Court wanted. Because the Constitutional Court has established a general right to judicial recourse, if a court has violated the constitutional right of Art. 103 para. 1 GG, it extends the right of citizens in the face of impairments of procedural rights in general. This is the consequence of the reasoning about the foundation and the area of application of the general right to judicial recourse. This results from the following: So far, this right has been used as a public right addressed at the state by private persons to protect *private* rights. Now, it shall also include a public right addressed at the state by private persons to protect *public*, *i.e.* constitutional, rights. Thus, the first major extension quite obviously broadens the range of application of the general right to judicial recourse. It now encompasses individual public rights. The second extension concerns the expansion from private *substantive* law to public *procedural* law.

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[70] C IV 2 a) of the decision.

[71] BVerfGE 88, 118; 93, 99; 97, 169; 101, 397.

Behind these two extensions lurks another possible one. Are only constitutionally granted public rights included in this new interpretation? So far, the right to judicial recourse has been used to motivate the enforcement of rights not based in the constitution, but based on simple law. It would thus only be consistent to view the general right to judicial recourse as applicable in cases of the violation of simple, unconstitutional procedural rights as well. This result is not reached by simply comparing public and private law, procedural and substantial law, constitutional and simple law. It derives from the dogmatic foundation of the general right to judicial recourse as the Constitutional Court establishes it. This general right to judicial recourse aims to grant especially that – namely, the protection of simple rights that can otherwise not be enforced. These rights now include not only substantive rights, but also procedural rights. They have long lost their status as mere complementary rights, and they are now understood as rights with their own capacity and importance. This is the argument the Constitutional Court uses in explaining the importance of Art. 103 para. 1 GG. This is exactly where the recourse to the principle of the rule of law once again becomes important. Since these simple procedural rights are necessary in the realization of the values of the constitutional state, the general right to judicial recourse must also entail a right to prosecute to achieve it. Given that the right to judicial recourse is constructed as it is, not only all substantial rights are protected, so are all procedural rights.

Of course, the Court made clear that it wants to decide only on the matter of Art. 103 para. 1 GG, and it only wants to grant the general right to judicial recourse in combination with this particular right. But if one takes seriously the reasoning of the Court on the general right to judicial recourse, together with its argument on the right to a hearing in court, this might be the foot in the door for a whole new understanding of the position of procedural rights within the right to judicial recourse. Accordingly, the violation of procedural rights might have to be more strictly avenged in the future, even if other, restraining principles in the design are considered, such as legal certainty and law and order.

D. Conclusion

This decision of the Constitutional Court will extend the understanding of the right to judicial recourse, regardless whether it is largely derived from Art. 19 para. 4 GG or from the *allgemeine Justizgewährleistungsanspruch* (general right to judicial recourse): Now, judicial decisions are no longer exempt. It can be expected that other procedural rights, aside from Art. 103 para. 1 GG, will be tested before the Court in the near future. The success of these complaints may be influenced by the importance of the violated procedural rule within the system of the *Rechtsstaat* (rule of law). A systematic interpretation of the Court's reasoning would even allow a case

to be made for the extensive protection of important procedural rights within the procedural codes, possibly beyond the present status.

The Constitutional Court's decision laid a burden on the legislature of establishing clear and understandable remedies. It remains to be seen whether all existing remedies will pass this test. It can be expected that the reluctance of Court of Appeals and Supreme Courts to establish new, unwritten extraordinary remedies to impairments of law will decline even more, since they usually will not fulfill the requirements of the Constitutional Court for *Rechtsmittelklarheit* (clarity of legal remedies).