The Role of the German Federal Constitutional Court Law and Politics

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I. Introduction

Law and politics are closely intertwined. At Ludwig-Maximilians-University Munich this is demonstrated by the name of our Institute for Politics and Public Law. Furthermore, some professors of our law faculty acted or are acting as Federal Minister[1)], as Minister of a Federal State[2)] , as judge of the Hague International Court of Justice[3)], as judges of the Federal Constitutional Court[4)] or even as President of the Karlsruhe Federal Constitutional Court[5)] . Law is an instrument for politics to organize the society. But politicians are obliged to respect the legal provisions in force. Constitutional law is a mandatory standard for politics since Article 20 (3) Basic Law[6)] states that the legislature shall be bound by the constitutional order. The executive and the judiciary shall be bound by law and justice.

In Germany, the Federal Constitutional Court (FCC) is the guardian that the constitutional order of the Basic Law is respected by all state authority. Therefore it bears the great responsibility of guaranteeing the compliance of legislative, executive and judicial bodies with this order. On one hand it acts as arbiter in interior affairs settling disputes between the supreme federal bodies concerning the extent of their rights and duties. It reviews statutes which were adopted by the Parliament and can declare them to be null and void. The Court has struck down more than 600 laws as unconstitutional. On the other hand, the Federal Constitutional Court's competence also comprises external affairs. It controls German bodies acting in international or European affairs because, in this field the Court bears a special

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1) Prof. Dr. Rupert Scholz, Federal Minister for Defence 1988-1989, Member of the Bundestag 1990-2002.

2) Prof. Dr. Rupert Scholz, Senator for Justice and Federal Affairs of the Land Berlin 1981-1983, Member of the Parliament of the Land Berlin 1985-1988; Prof. Dr. Peter M. Huber, Minister of Home Affairs of Thuringia 2009-2010.

3) Prof. Dr. Dr. h.c. mult. Bruno Simma, judge 2003-2012.

4) Prof. Dr. Dr. Udo di Fabio, Judge 1999-2011: Prof. Dr. Peter M. Huber, Judge 2010-[2022].

5) Prof. Dr. Dres. h.c. Hans-Jürgen Papier, Vice President 1998-2002, President 2002-2010.

6) Grundgesetz für die Bundesrepublik Deutschland vom 23. Mai 1949, zuletzt geändert durch Art. 1 Änderungsgesetz vom 21. Juni 2010. English translation by Christian Tomuschat.

responsibility because of the impact on foreign countries and the international or European order as a whole. The ensuing tension between the Federal Constitutional Court and the bodies underlying its control - especially between the Court and the Parliament as legislator – is apparent in the rather explicit responses of politicians to its decisions in „highly political" cases[7] . But the Court is obliged to decide a case if it is admissibly brought before it.

II. Task and organization of the Court

1. The German Federal Constitutional Court as an independent constitutional organ

"The Federal Constitutional Court shall be a Federal Court of justice independent of all other constitutional organs" [8] . Being a court it is part of the judiciary. Therefore its decisions must be based on law and not on discretion and especially not on reasons of political nature[9] . Yet the Federal Constitutional Court's jurisprudence differs from that of other courts because of its political character[10] , which the nature of its tasks - enumerated in Article 13 of the Federal Constitutional Court Act (FFC Act) - demonstrate. Apart from its nature as court the Federal Constitutional Court is also a constitutional organ having the same status as the "other" constitutional organs based on the Basic Law, i.e. the Bundestag, the Bundesrat, the Federal President and the Federal Government[11] . It must be independent in order to ensure the effective control of these other organs pursuant to the rules of the Basic Law and the Federal Constitutional Court Act, the latter being based on Article 94 (2) sentence 1 Basic Law.

2. Task – Organization – Procedures

a) Task

The main task of the Federal Constitutional Court as "guardian of the constitution"

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7) See e.g. the response of Federal Chancellor Adenauer (CDU) on the television decision (BVerfGE [Entscheidungen des Bundesverfassungsgerichts, amtliche Sammlung] 12, 205) or the commentary of a not exactly identified politician (probably Herbert Wehner, SPD) on the coming decision of the Federal Constitutional Court on the Basic Treaty („Grundlagenvertrag"), BVerfGE 36,1. Cf. *Rudolf Streinz*, Recht und Politik in der Wirtschafts- und Währungsunion der EU, in: Wolfgang Durner/Franz-Joseph Peine/Foroud Shirvani (Eds.), Freiheit und Sicherheit in Europa. Festschrift für Hans-Jürgen Papier zum 70. Geburtstag, 2013, p. 177 (191) with further references. Concerning the television decision („Fernseh case") cf. *Edward McWhinney*, Judicial Restraint and the West German Constitutional Court, Harvard Law Review 75 (1961) 5 (30 et sequ). Cf. e.g. *Richard Häußler*, Der Konflikt zwischen Bundesverfassungsgericht und politischer Führung, 1994.

8) Art. 1 Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz, BVerfGG). English translation provided by Inter Nationes.

9) Cf. *Hans Lechner/Rüdiger Zuck*, Bundesverfassungsgerichtsgesetz, 6th ed. 2011, § 1 para. 1; *Gerd Sturm/Steffen Detterbeck*, in: Michael Sachs (Ed.), Grundgesetz, Kommentar, 6th ed. 2011, Art. 93 para. 11.

10) Cf. *Lechner/Zuck* (note 9), § 1 para 6.

11) Cf. *Sturm/Detterbeck* (note 9), Art. 93 paras 6 et sequ.

("Hüter der Verfassung"[12]) is on one hand the judicial review of legislative acts and on the other hand to be the arbiter in disputes between the Federation and the Länder. Also, it disposes of several additional powers, especially the prohibition of a political party.

b) Organization

The Federal Constitutional Court consists of two panels (Senates)[13], independent of each other[14] (therefore also called "twin court" - "Zwillingsgericht")[15]. Each of them comprises eight members and is headed by the President[16] and the Vice-President[17]. The First Senate shall be competent for legal review proceedings in which a legal provision is claimed to be largely incompatible with basic rights as well as for most constitutional complaints (therefore also called "Grundrechtesenat", Senate for the Basic Rights). The Second Senate shall be competent for matters of governmental structure and for legal review proceedings and constitutional complaints not assigned to the First Panel (therefore also called "Staatsrechtssenat", Senate for State Law)[18]. Therefore the Second Senate is competent for most issues relating to the European Union[19]. The members of each panel are allocated to three chambers ("Kammern") with three judges for hearings in constitutional complaint and single regulation control cases. If a chamber does not decide unanimously or wants to overrule a standing precedent of its panel the case must be submitted to the panel as a whole[20]. If a panel intends to deviate from the legal opinion contained in a decision by the other panel, the plenum of the Federal Constitutional Court (therefore 16 judges) shall decide on the matter[21].

Decisions by a panel require an absolute majority of the quorum of at least six present

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12) The terminus is used by the Court itself in its „Statusdenkschrift, JöR NF 6 (1957) 144 et sequ. See also *Sturm/Detterbeck* (note 9), Art. 93 para 4 with further references.

13) § 2 (1) FFC Act.

14) Each panel is the „Federal Constitutional Court", BVerfGE 1, 14 (29), BVerfGE 2, 79 (95).

15) Cf. *Lechner/Zuck* (note 9), § 2 para 2.

16) At present the Second Senate by Prof. Dr. Andreas Voßkuhle.

17) At present the First Senate by Prof. Dr. Ferdinand Kirchhof.

18) Cf. § 14 (1), (2) FFC Act.

19) BVerfGE 73, 339 – Solange II; BVerfGE 89, 155 – Maastricht; BVerfGE 123, 267 – Lisbon; BVerfGE 126, 268 – „Honeywell" – Ultra vires test; BVerfGE 129, 124 – Greece and EFSF; BVerfGE 132, 195 = EuGRZ (Europäische Grundrechte Zeitschrift) 2012, 569 - ESM-and the Fiscal-Treaty. The First Senate was competent in the Antiterror-data Act case (BVerfGE 133, 277 = EuGRZ 2013, 174/184 et sequ), where the Court in a obiter dictum tried to limit the consequences of the Åkerberg Fransson Decision of the European Court of Justice (Case C-617/10, EuGRZ 2013, 137).

20) For task and practice of the Chambers cf. *Ernst Benda/Eckart Klein*, Verfassungsprozessrecht, 3rd ed. 2012, paras 157 et sequ; *Klaus Schlaich/Stefan Korioth*, Das Bundesverfassungsgericht, 9th ed. 2012, para 40.

21) § 16 (1) BVerfGG. Examples: BVerfGE 4, 27: Political parties in disputes between organs; BVerfGE 54, 277 – Concerning § 554b ZPO - Civil procedure statute; BVerfGE 101 (1) sentence 2 composition of a court; BVerfGE 107, 395 – legal protection by the Federal Constitutional Court concerning offences against Article 103 (1) Basic Law: BVerfGE 132,1= EuGRZ 2012, 536 – Air Security Act (Luftsicherheitsgesetz 2005).

judges. If the votes are equal, the Basic Law or other Federal Law cannot be declared to have been infringed[22]. In some cases a two-thirds majority is required (e.g. if a party is to be declared unconstitutional)[23] .

Since 1970 a judge holding a dissenting opinion on the decision or a concurring decision on the reasons during deliberation may have it recorded in a separate vote which shall be appended to the decision[24] . There is a controversial discussion if this practice is useful or not[25] . Dissenting votes demonstrate the controversy on legal questions and may be in some cases the starting point for overruling jurisprudence[26] .

c) Procedures

The powers of the Federal Constitutional Court are defined in Article 93 and some special Articles of the Basic Law and set out in Article 13 Federal Constitutional Court Act with references to the concerning Articles of the Basic Law. Special articles of the Federal Constitutional Court Act regulate the concerning procedures in detail. Thus the several procedures in which cases may be brought before the Court – and the Court can decide only on cases which are brought before it – are strictly defined (enumerated).

The most important procedure is the constitutional complaint ("Verfassungsbeschwerde")[27], which may be filed by any person alleging that one of his basic rights or one of his rights enumerated in Article 93 (1) No 4a Basic Law (e.g. the right to vote, Article 38 Basic Law) has been infringed by public authority. This may be the judiciary, the executive or the legislative power. Furthermore, judicial review over the legislature can be attained by the abstract regulation control[28] brought before the Court by several political institutions, including the governments of the Länder[29], and the specific regulation control[30], which must be brought before the Federal Constitutional Court by a regular court which is convinced that

22) § 15 (4) sentence 3 BVerfGG. Examples: BVerfGE 76, 211: Sitzblockaden als Nötigung (coercion by sit-in); BVerfGE 82, 236: Verurteilung wegen Landfriedensbruchs aufgrund eines Demonstrationsaufrufs (sentencing for breach of the peace by call to attend a demonstration); BVerfGE 95, 335: Verfassungsmäßigkeit von Überhangmandaten, die ohne Verrechnung anfallen oder ohne Ausgleichsmandate zugeteilt werden; BVerfGE 99, 19 (37 et sequ): Prüfungsbericht gemäß § 44b des Abgeordnetengesetzes.

23) § 15 (4) sentence 1 BVerfGG.

24) § 31 (2) BVerfGG. Cf. *Benda/Klein* (note 20), paras 366 et sequ.

25) Cf. ibid. para 369 with further references.

26) Cf. *Peter Häberle*, Verfassungsgerichtsbarkeit zwischen Politik und Rechtswissenschaft, 1980, p. 24 et sequ.

27) Art. 93 (1) No 4a Basic Law. Introduced by the Federal Constitutional Court Act in 1951 and embodied in constitutional law by the 19th amendment of the Basic Law of 29 January 1969 (Federal Law Gazette – Bundesgesetzblatt - BGBl I 97); § 13 No 8a, Art. 90, §§ 92-95 BVerfGG .

28) Art. 93 (1) No 2 Basic Law; § 13 No 6, §§ 76-79 BVerfGG.

29) See e.g. the Grundlagenvertrag (Treaty between the Federal Republic of Germany and the German Democratic Republic) case, BVerfGE 36, 1 or the (first) abortion case (BVerfGE 39, 1). Both cases were brought before the Court by the Government of the Free State of Bavaria.

30) Art. 100 (1) Basic Law; Art. 13 No 11, §§ 80-82 BVerfGG.

a law adopted by the parliament (Bundestag or parliament of a Land –"Landtag")[31] is not in conformity with the Basic Law. The Court can even declare unconstitutional an amendment of the Basic Law which has been adopted by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat[32] if Article 79 (3) Basic Law, the so called "eternity clause" ("Ewigkeitskausel") is affected. But in this case a very strict interpretation is needed[33] .

The Court decides disputes between organs, i.e. disputes concerning the extent of the rights and duties of a supreme Federal organ (Bundestag, Bundesrat, Federal Government, Federal President) or of other parties concerned who have been vested with rights of their own by the Basic Law or by rules of procedure of a supreme Federal organ[34] , e.g. a parliamentary group of the Bundestag[35] . The Court decides disputes between the Federation and the Länder if there are disagreements concerning their rights and duties[36] .

Although in practice it has only been carried out twice concerning the Socialist Reich Party (SRP)[37] and the Communist Party of Germany (KPD)[38], the procedure on the unconstitutionality of parties[39] is also important. Only the Constitutional Court has the power to ban a political party. A third procedure concerning the National Democratic Party of Germany (NPD) failed in 2003 because the Federal Constitutional Court discovered that many of the party officials were in fact controlled by the German secret services[40] . The Court decides on complaints against decisions of the Bundestag relating to the validity of an election[41] .

In 2008 the Court decided that the existing Federal Electoral Act was unconstitutional and had to be amended[42]. The Federal Electoral Act was amended in 2001[43]. But on 25 July

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31) Cf. *Hans D. Jarass/Bodo Pieroth*, Grundgesetz. Kommentar, 12th ed. 2012, Art. 100 para 6.

32) Art. 79 (2) Basic Law.

33) Cf. BVerfGE 30, 1 - „Abhörurteil" (telephone tapping); BVerfGE 94, 49 (103) – Right of asylum; BVerfGE 109, 279 – „Akustische Wohnraumüberwachung". Cf. *Brun Otto Bryde*, in: von Ingo von Münch/Philipp Kunig (Eds.), Grundgesetz. Kommentar, 6th ed. 2012, Art. 79 paras 27-30.

34) Art. 93 (1) No 1 Basic Law; § 13 No. 5, §§ 63-67 BVerfGG.

35) BVerfGE 118, 244 (254 et sequ), 124, 161 (187). Concerning other relevant parties cf. *Jarass/Pieroth* (note 31), Art. 93 paras 6 et sequ.

36) Art. 93 (1) No 3, Art. 84 (4) sentence 2 Basic Law; § 13 No 7, §§ 68-70 BVerfGG.

37) BVerfGE 2,1.

38) BVerfGE 5, 85.

39) Art. 21 (2) Basic Law; § 13 No. 2, §§ 43-47 FCC Act (BVerfGG).

40) BVerfGE 107, 339 (356 et sequ). Three of the eight judges of the senate (panel) objected the forthgoing of the procedure which was in this case sufficient because for party ban proceedings a majority of two thirds of the members of a panel shall be required (§ 15 (4) FCC Act [BVerfGG]).

41) Art. 41 (2) Basic Law; § 13 No 3, § 48 BVerfGG.

42) BVerfGE 121, 266. The Federal Electoral Act (Bundeswahlgesetz) had to be amended by a rule in conformity with the Basic Law until 30 June 2011. The Court required that the possibility of a negative effect of voting ("negatives Stimmgewicht") must be abolished.

43) 19th Act amending the Federal Electoral Act (19. Gesetz zur Änderung des Bundeswahlgesetzes) of 25 November 2011 (vom BGBl. I 2313).

2012 the Federal Constitutional Court decided that also this new Act did not comply with its requirements[44] . In 2013 the political parties which are represented in the Parliament agreed on a new Federal Electoral Act[45] which is the basis of the elections of 22 September 2013[46].

Concerning the procedure on the forfeiture of basic rights[47] there were some applications by the Federal Government but none was proved to be founded[48] . The procedure on the impeachment of the Federal President[49] up to now has not been of importance in practice.

The procedure review of specific laws establishes the monopolization of the competence to dismiss a statute at the Federal Constitutional Court to protect the parliamentary legislature

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44) BVerfGE 131, 316 = EuGRZ 2012, 438 = Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2012, 1101. The Court ruled unanimously that the possibility of a negative effect of voting was not fully abolished even by the new Act and that the principle of equality of the vote and the equality of the chances of political parties was infringed if there were more „Überhangmandate" (surplus of seats gained by Members of Parliaments who are directly elected („Erststimme") compared with the result of the proportional elections („Zweitstimme") than half of the Members of a Parliamentary group (i.e above 15 seats).

45) 20th Act Amending the Federal Electoral Act (20. Gesetz zur Änderung des Bundeswahlgesetzes) of 3 May 2013 (BGBl I 1084). The Act went further than the requirements of the FCC's decision (note 44) and abolished the effect of Überhangmandate (surplus seats) totally by compensating seats according to the result of the proportinal voting system („Zweitstimme").

46) Because of the compensation of the „Überhangmandate" only the result of the proportional elections is decisive. However, political parties which gain less than 5 % of the votes are excluded by a barring clause. Thus after the elections of 22 September 2013 the Free Democratic Party (FDP) with 4.8 % is no longer represented in the German Bundestag (Art. 6 para 3 Federal Election Act – Bundeswahlgesetz). Also the new party „Alternative for Germany" (Alternative für Deutschland – AFD) with 4.7 % failed. The result of Christian Democratic Union/Christian Social Union (CDU/CSU) with 41.5 % (311 seats), the Social Democratic Party (SPD) with 25.7 % (192 seats), the Left Party with 8.6 % (64 seats) and the Green Party with 8.4 % (63 seats) demonstrates that according to the 5 per cent clause abaout 15 % of the votes are not represented in the Parliament and a possible coalition of SPD, Green Party and Left Party with 42.7 % of the votes could form a government against a majority of 46.3 % of the votes in favour for the parties of the former government of CDU/CSU and FDP. The 5 % barring clause is held to be constitutional concerning the German Federal Parliament (Deutscher Bundestag) and the Parliaments of the Länder (Federal States, e.g. Free State of Bavaria), cf. BVerfGE 24, 300 (341); BVerfGE 120, 82 (111 et sequ). However, concerning the elections to the European Parliament according to the German European Parliament Election Act (Europawahlgesetz) the Federeal Constitutional Court on 9 November 2011 (BVerfGE 129, 300 = NVwZ 2012, 33 [37 et sequ]) decided with 5 to 3 votes of the judges that the 5 % clause was not justified overruling its own decision of 22 May 1979 (BVerfGE 51, 222). It is doubtful, if the 3 % barring clause which was introduced in the amended German European Parliament Election Act is justified (the oral hearing of the FCC on the constitutional complaint against this law was held on 18 December 2013). Generally it is doubtful if a barring clause of 5 % concerning the Federal elections is necessary, cf. *Rudolf Streinz*, in: Hermann von Mangoldt/Friedrich Klein/Christian Starck (Eds.), Kommentar zum Grundgesetz, Vol. 2, 6th ed. 2012, Art. 21 Abs. 1, para. 136 with further references in footnote 770.

47) Art. 18 Basic Law; § 13 No 1, §§ 36-42 BVerfGG.

48) BVerfGE 11, 282 – Chairman of the SRP; BVerfGE 38, 23 – Editor of a politically extreme newspaper. Cf. *Bryde* (note 33), Art. 18 para 1; *Michael Brenner*, in: von Mangoldt/Klein/Starck (note 46), Vol 1, Art. 18 para 10; *Walter Schmitt Glaeser*, Grundrechtsverwirkung, in: Detlef Merten/Hans-Jürgen Papier (Eds.), Handbuch der Grundrechte in Deutschland und Europa, Vol III, 2009, § 74 paras 48 et sequ.

49) Art. 61 Basic Law; § 13 No 4, §§ 49-57 BVerfGG.

as well as the unity of the legal order[50]. The latter aim is also pursued by the competence to review whether a rule of (public) international law is an integral part of federal law and whether it directly creates rights and duties for the individual in the sense of Article 25 Basic Law[51] and the decision if the constitutional court of a Land (e.g. the Bavarian Constitutional Court), in interpreting this Basic Law, proposes to deviate from a decision of the Federal Constitutional Court or of the constitutional court of another Land[52].

3. No political question doctrine – but decisions of political relevance

The US Supreme Court has historically regarded some controversies as "political questions" and thus "nonjusticiable", meaning inappropriate for judicial resolution. Although the Supreme Court may have jurisdiction over cases involving the relevant questions it can choose not to decide them, preferring instead to allow them to be resolved by the "political" branches of government[53]. By law, the German Federal Constitutional Court is not entitled to refuse a decision on a question of constitutional law because of "political" implications. There is no room for a "political question doctrine"[54]. Nevertheless the decisions of the Court have "political" consequences and the Court is aware of this fact. Therefore the Court is careful about taking the consequences of a possible ruling into consideration and pays regard to the specific field of policy concerned by each case. This certainly applies where European and international affairs are involved. For this field the Court developed the approach of "judicial self-restraint"[55] and the principles of openness ("friendliness") towards international law[56] and openness ("friendliness") towards European law[57].

4. The election of the judges

Half of the judges of each panel shall be elected by the Bundestag and the other half by the Bundesrat[58]. In both bodies the election of a judge requires a quorum of two thirds[59]. According to Article 6 (1, 2) of the Federal Constitutional Court Act the judges to be elected by the Bundestag shall be elected indirectly by a twelve-man electoral committee which shall

50) Cf. *Sturm/Detterbeck* (note 9), Art. 100 paras 2, 3.

51) Art. 100 (2) Basic Law; § 13 No 12, §§ 83-84 BVerfGG. Example: BVerfGE 16, 27: Immunity of states; BVerfGE 46, 342: Immunity of states, account of an embassy; BVerfGE 121, 388: Succession of states.

52) Art. 100 (3) Basic Law; § 13 No 13, § 85 BVerfGG.

53) *Joel B. Grossman*, Political Questions, in: K. L. Hall (Ed.), Companion to the Supreme Court of the United States, 1992, p. 651 et sequ. with further references.

54) *Benda/Klein* (note 20), Para. 28; *Schlaich/Korioth* (note 20), para 505; *Klaus Stern*, Staatsrecht, Vol. II, 1980, p. 961 et sequ.

55) Cf. BVerfGE 36, 1 (14 et sequ.), even if exactly in this case this approach was not respected by the Court, cf. *Benda/Klein* (note 9), para 27.

56) Cf. e.g. BVerfGE 6, 309 (362); BVerfGE 112, 1 (25 et sequ.).

57) BVerfGE 123, 267 (347).

58) Art. 94 (1) sentence 2 Basic Law; Art. 5 (1) sentence 1 BVerfGG.

59) Art. 6 (2) sentence 1, Art. 6 (5) BVerfGG; Art. 7 BVerfGG.

be elected by the Bundestag by proportional representation. This delegation to a judges election board („Richterwahlausschuss“) is considered to be unconstitutional because Article 94 (1) sentence 2 Basic Law requires the election by the Bundestag itself without an empowerment for delegation[60] . When this was challenged the Federal Constitutional Court declared this practice to be compatible with the Basic Law[61] . The reasons given for this decision are not convincing. At last it may have been decisive that the Court wanted to avoid ruling that its composition had been based on a unconstitutional provision for decades.

The judges must have reached the age of 40, must be eligible for election to the Bundestag (this requires German nationality) and must be qualified to exercise the functions of a judge pursuant to the Judges' Act („Richtergesetz“). Three judges of each panel shall be elected from among the judges of the supreme Federal courts of justice[62] . The other five members of each panel mostly served as a lecturer (professor) at a university[63] , which is the only professional occupation a judge of the Federal Constitutional Court is allowed to maintain with precedence of the functions of a judge, as a public servant[64] or as a lawyer[65] . The judges' term of office shall be twelve years, not extending retirement age of 68[66] . To secure the independence of the judges, a reelection is excluded[67] .

The appointment of the judges by political bodies is a political decision. This is inevitable because it is necessary to render the Federal Constitutional Court democratically legitimate. The wide jurisdiction of the Court and the „political“ character of constitutional law and the consequences and the influence of the Court's decisions lead to a special interest of the political parties to nominate candidates who are in line with their general political views. The requirement of two thirds majorities prevents a politically one-sided composition

60) Cf. e.g. *Jarass/Pieroth* (note 31), Art. 94 para. 1; *Andreas Voßkuhle*, in: von Mangoldt/Klein/Starck (note 46), Vol. 3 Art. 94 para. 10 with further references.

61) BVerfGE 131, 230 = NVwZ 2012, 967. No objection yet in BVerfGE 40, 156; 65, 152 (154 et sequ). Consent e.g. by *Sturm/Detterbeck* (note 9), Art. 94 para. 3 with further references.

62) At present Wilhelm Schluckebier (2006-[2017]), Michael Eichberger (2006-[2018]) and Reinhard Gaier (2004-[2016]) in the First Senate, Monika Hermanns (2010-[2022], Sibylle Kessal-Wulf (2011-[2023] and Michael Gerhardt (2003-[2015]) in the Second Senate.

63) At present Ferdinand Kirchhof (2007-[2018]), Gabriele Britz (2011-[2023]), Johannes Masing (2008-[2020]), Susanne Baer (2011-[2023]) and Andreas L. Paulus (2010-[2022]) in the First Senate, Andreas Voßkule (2008-[2020]), Peter M. Huber (2010-[2022]) and Gertrude Lübbe-Wolff (2002-[2014]) in the Second Senate.

64) At present Herbert Landau (2005-[2016]) in the Second Senate. Peter Müller (2011-[2023]) was Prime Minister of the Saarland before his election, which led to discussions if politicians should be elected at all. But there are (rare) precedents.

65) Cf. § 3 FCC Act (BVerfGG).

66) § 4 (2), (3) FCC Act (BVerfGG).

67) Concerning the comparison with the US Supreme Court where the Jugdes and the Chief Justice are in effect chosen for life and the problem of compromised independence if a judge is nominated for a political office before or after the expiration of the twelve-year term see *Peter E. Quint*, Leading a Constitutional Court: Perspectives from the Federal Republic of Germany, University of Pennsylvania Law Review 154 (2006), 1853 (1856 et sequ.).

of the Court and even of each panel. On one hand this requirement makes the selection procedure to a certain extent to a matter of haggling[68]. But on the other hand each candidate must at least be acceptable for the other side and thus probably be acceptable in general. And regularly after their election the judges retain and demonstrate their independence[69].

III. Judicial activism

1. The Need for the Interpretation of Constitutions

"A constitution must be short and obscure", the French emperor Napoleon is said to have remarked[70]. It is questionable whether the German Basic Law qualifies as "short" compared with constitutions of other European countries or on a global scale[71]. Since the "Bonner Grundgesetz" entered into force on 23 May 1949, the 58 amendments to the constitution have led to its broadening: On one hand, European Union Law required or at least suggested the need for new provisions, such as Article 23 Basic Law concerning Germany's participation in the development of the European Union or the amendments to Article 16 (now Article 16a) Basic Law concerning the right of asylum. Also, the constitution was amended in order to concretize the limitations of basic rights, e.g. the inviolability of the home (Article 13 Basic Law). Finally, new state objectives have been introduced, such as the protection of the natural bases of life (Article 20a Basic Law). Nevertheless, a constitution must to some extent remain "obscure" and thus flexible in order to allow for discretionary political decision-making.

However, it should also be borne in mind that the FCC is to provide the obligatory interpretation of the Basic Law. Its decisions shall be binding upon Federal and Land constitutional organs as well as on all courts and authorities[72]. Striking a balance between the latter need for clear interpretations on one hand and the preservation of the former "obscure" character of a constitution is the important yet difficult task of constitutional courts. As Charles Evans Hughes, the then Chief Justice of the US Supreme Court, accurately

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68) *Gisbert Brinkmann*, The West German Federal Constitutional Court: Political Control through Judges, in: Public Law 1981, 83 (91)

69) Of course the general views of a judge may influence his or her decision in „delicate" cases like e.g. abortion. But in general there is no one-sided orientation on the politics of a political party. The former differentiation of a „Black" and „Red" Senate of the Federal Constitutional Court never was right, cf. *Benda/Klein* (note 9), para 136.

70) „Une constitution doit être courte et obscure". Cf. also Alexander Hamilton, Speech at New York Ratifying Convention, 28 June 1788, cited in *Fred R. Shapiro,* The Oxford Dictionary of American Legal Quotations, 1993, p 58, No 5: „Constitutions should consist only of general provisions. The reason is, that they must necessarily be permanent, and that they cannot calculate for the possible changes of things".

71) The German Basic Law currently comprises 191 articles (in consideration of 2 deleted and 47 added articles). Three articles (Arts. 59a, 74a and 142a) were added and again deleted.

72) § 31 (1) FCC Act (BVerfGG).

put it: "we are under a Constitution, but the Constitution is what the judges say it is"[73] ; or to quote Udo Steiner, former judge of the FCC: the silence of the constitution does not reduce the constitutional lawyer to silence[74] , which can also be said of constitutional judges. Consequently, we find a lot of examples of judicial activism broadening and deepening the content of a rule as well as its application.

2. Examples for judicial activism

a) Development of "new" basic rights by the Federal Constitutional Court

In its so-called census decision of 15 December 1983, the FCC coined the term and developed – some say "invented" – the right to "informational self-determination" on the basis of Article 2 (1) – general personal freedom – in connection with Article 1 (1) Basic Law – human dignity. Thereby it substantiated the protection of data privacy and granted the individual a right to decide on the use of one's personal data[75]. Having in mind the technical revolution which has taken place in the meantime, the concrete case may seem to be strange. Yet the Court went on to develop the legal instruments in order to parallel the technical progress. Accordingly, the FCC developed "the fundamental right to the guarantee of the confidentiality and integrity of information technology systems[76] in its decision on the Constitution Protection Act of North-Rhine Westphalia – a German Land. In view of this right, the secret infiltration of an information technology system by means of which the use of the system can be monitored and its storage media can be read, is constitutionally only permissible if factual indications exist of a concrete danger to a predominantly important legal interest. The Court declared the Act to be partly unconstitutional. Its assessment of data retention on the basis of the Telecommunications Act[77] and the Counter-Terrorism Database Act[78] was similar.

b) Review of German Acts Approving European Union Treaties by constitutional complaint

Under the Basic Law, a constitutional claim is only admissible if an infringement of one of the complainant's subjective constitutional rights, as stated in Article 93 (1) No. 4a Basic Law, seems possible. Therefore it was questionable if the German Act Approving the Treaty of Maastricht could be brought before the FCC by a constitutional complaint at all. In its Maastricht decision, the FCC chose a rather surprising approach by declaring the

73) Speech, Almira, N.Y., 3 May 1907, cited in *Shapiro* (note 70), p. 216, No 18. This remark must, however, be read in its context. Hughes later declared that he didn't want „to picture constitutional interpretation by the courts as matter of judicial caprice. This was farthest from my thought." Hughes, The Autobiographical Notes of Charles Evans Hughes, 1973, 143 et seq, cited in *Shapiro*, ibid.

74) *Udo Steiner*, Verfassungsfragen des Sports, NJW [Neue Juristische Wochenschrift] 1991, 2729 (2730).

75) BVerfGE 65,1.

76) BVerfGE 120, 274 (313) and headnote 1: „Grundrecht auf Gewährleistung der Vertraulichkeit und Integrität informationstechnischer Systeme".

77) BVerfGE 125, 260. See below.

78) BVerfGE 133, 277 = EuGRZ 2013, 174 . See below.

constitutional complaint to be admissible on the basis of an alleged infringement of the Right to Vote, Article 38 Basic Law. The Court held that – within the scope of Article 23 of the Basic Law – Article 38 forbids the weakening, of the legitimation of state power gained through the democratic act of an election, and of the influence on the exercise of such power, by means of a transfer of duties and responsibilities from the Federal Parliament to the European Union. The extent to which such a transfer of power or loss of influence is permissible, follows from the principle of Democracy, which is declared as inviolable in Article 79 (3) in conjunction with Article 20 (1) and (2) of the Basic Law[79] . Ever since, this approach has served as basis for all constitutional claims filed against German Acts Approving Treaties amending the European Union Treaties.

This was the case concerning the Treaty of Lisbon[80] and at lately the constitutional complaints lodged against German Acts concerning aid measures for Greece and the euro rescue package[81] as well as the Acts Approving the Treaty establishing European Stability Mechanism (ESM) and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, the so-called Fiscal Pact. After the applications for the issue of temporary injunctions were dismissed[82] the principal proceedings are still pending. The FCC acknowledged that there was a threat of the act of voting being eroded if the decision on revenue and expenditure of the public sector were no longer to remain in the hand of the German Bundestag as a fundamental part of the ability of a constitutional state to democratically shape itself. As elected representatives of the people, the Members of Parliament must remain in control of fundamental budget policy decisions. The approach of the FCC has been criticized for using the Right to Vote as a way of introducing a type of collective action ("Popularklage") through the back-door – circumventing the requirement of an infringement of a "real" subjective constitutional right. Yet, this jurisprudence of the FCC is well settled and at least to a certain extent convincing.

c) Taxpayers' rights

aa) General approach

There are a lot of decisions of the FCC on taxpayers' rights. This field is a preeminent example of tensions between the legislator and the judiciary, the FCC and Parliament. This stems from the fact that taxes constitute the core element for the budget and therefore for politics. The "Magna Charta" of tax law and the decisive fundamental right is Article 3 (1) Basic Law which requests equal treatment of taxpayers according to their performance[83] . But the FCC went further.

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79) BVerfGE 89, 155 (172) and headnote 1.

80) See the Lisbon decision of the FCC, BVerfGE 123, 267.

81) BVerfGE 129, 124.

82) BVerfGE 132, 195.

83) *Rainer Wernsman*, Die Steuer als Eigentumsbeeinträchtigung, NJW 2006, 1169 (1173).

bb) The so-called half division principle („Halbteilungsgrundsatz“)

A very controversially disputed[84] example of judicial activism was the development (critics say the invention) of the “half-division principle” (“Halbteilungsgrundsatz”). The Second Senate of the Court stated in 1995 based on Article 14 Basic Law (“Property and the right of inheritance shall be guaranteed”) that the overall tax load on assets must be limited to 50 percent of the yield of those assets[85] . This rule was understood as a general principle of taxation. Extended to taxation and contributions in general, this leads to an upper limit of government’s share of 50 percent overall, a “fifty-percent rule”[86]. This rule was developed by Paul Kirchhof, justice of the FCC and the rapporteur in tax cases. After his term of office had expired in 2003, the Second Senate of the Court confirmed that Article 14 Basic Law grants protection against taxes but denied the existence of a “half-division principle”, guaranteed by the Constitution[87].

cc) Taxes and the Protection of marriage and family

Based on Article 3 (1) Basic Law, combined with the fundamental decision for the protection of marriage and family (Article 6 [1] Basic Law), the FCC decided that the taxpayer must be left a tax-free income that is sufficient to provide for himself or herself and for parents to provide for themselves as well as their children regardless of the family’s social status[88] . Therefore the aliments for the children to be paid by the parents must be tax-free[89] .

3. The Constitution as a living instrument

a) Constitutions as subjects to change

The concept of “law as a living instrument” is commonly acknowledged: As an instrument to regulate the social existence in a society it must on one hand prescribe standards and rules (as a normative order) but on the other hand it must react to changes in

84) Cf. *Andreas von Arnauld/Klaus W. Zimmermann*, Regulating Government’s Share: The Fifty-Percent Rule of the Federal Constitutional Court in Germany, Helmut Schmidt Universität Hamburg, Working Paper No. 100, March 2000.

85) BVerfGE 93, 121 (138).

86) *Von Arnauld/Zimmermann* (note 84), p. 3.

87) BVerfGE 115, 97 (114): „ ... kann Art. 14 Abs. 2 Satz 2 GG nicht … als ein striktes, grundsätzlich unabhängig von Zeit und Situation geltendes Gebot hälftiger Teilung zwischen Eigentümer und Staat gedeutet werden”.

88) BVerfGE 82, 60 (87 f.): „Soweit das Einkommen der Familie benötigt wird, um ihr die Mindestvoraussetzungen für ein menschenwürdiges Dasein zu gewährleisten, ist es – unabhängig vom sozialen Status der Familie – nicht disponibel und kann nicht Grundlage der steuerlichen Leistungsfähigkeit sein“.

89) Cf. to this aspect of the Court’s adjudication on the economic subsistence minimum *Claudia Bittner*, Human Dignity as a Matter of Legislative Consistency in an Ideal World: The Fundamental Right to Guarantee a Subsistence Minimum in the German Federal Constitutional Court’s Judgment of 9 February 2010, German Law Journal 12 (2011), 1941 (1942).

the social development and in moral views of a society to remain effective. Being the basic order of a society, constitutions are changing not only after revolutions but also within the same political system. And there is a "constitutional change" even if the text of a constitution is not amended. This constitutional change becomes evident and necessarily effected when the interpretation of the constitution by the competent courts differs from former views.

A good example to demonstrate the need for change in the exegesis of a legal text can be found in the jurisprudence of the Strasbourg European Court on Human Rights. It interpreted the European Convention on Human Rights as a "living instrument", saying that the use of corporal punishment of juveniles as a criminal penalty must not be interpreted in the views of 1950 when the European Convention on Human Rights was signed but in the light of the present-day conditions, then of 1978: consequently, the Court affirmed a violation of the Convention[90] . Taken seriously, the "living instrument" approach led the Court itself to reverse its own previous case law in response to developments in social and legal circumstances[91] . As shown above, constitutions and also the Basic Law use ample and general language, making more than other laws interpretation necessary. And this interpretation must take into account that a constitution as "living instrument" needs to parallel changes in society in order to remain effective. Similar to the European Court on Human Rights, the FCC decided early on that when interpreting laws and the Constitution, it is not limited to the individual intentions of the legislature[92]. This does not mean that the law and the constitution of a state have no normative function and must follow changes in society opinion without deliberation and political decision of the legislator, the Parliament. Without a normative function law would lose its character.

b) Example: Homosexuality – From punishment to equal treatment

An extreme example for the change of the requirements of a constitution without any change of its text is the view of the FCC on homosexuality. In 1957 the Court ruled on constitutional complaints brought by two men who had been found guilty of violating Article 175 of the German Criminal Code which prohibited homosexual relations between men[93] . The complainants argued that Article 2 (1) Basic Law, protecting the free development of one's personality and Article 3 (2) and (3) Basic Law (equal rights for men and women; no person shall be favored or disfavored because of sex) were violated. The FCC rejected both

90) European Court on Human Rights [ECHR] 25 April 1978 (Tyrer v United Kingdom). Cf. Christoph *Grabenwarter/Katharina Pabel*, Europäische Menschenrechtskonvention, 5th ed 2012, § 5 para 14 with further references.

91) Cf. Philippe *Boillat*, The European Convention on Human Rights at 60: Building on the Past, looking to the Future, 2013.

92) BVerfGE 1, 299 (312). Well settled jurisprudence, cf. e.g. BVerfGE 128, 153.

93) § 175 StGB: (1): „Ein Mann, der mit einem anderen Mann Unzucht treibt oder sich von ihm zur Unzucht mißbrauchen läßt, wird mit Gefängnis bestraft". (2) „Bei einem Beteiligten, der zur Zeit der Tat noch nicht einundzwanzig Jahre alt war, kann das Gericht in besonders leichten Fällen von Strafe absehen".

arguments. There was no violation of the special equality clause of Article 3 (2) and (3) since an unequal treatment of similar situations was not given. Instead, the biological difference between the sexes was seen to be so decisive that hetero and homosexual couples could not be compared at all; any other similar elements would recede entirely in comparison. Article 2 (1) Basic law was not violated because homosexuality would violate the moral law and it could not be clearly determined that a public interest in its punishment was absent[94] .

Article 175 Criminal Code was abolished in 1969[95] . On 16 February 2001 the Act of the Termination of the Discrimination of Same-Sex Couples entered into force[96] . The Civil Partnerships Act[97] introduced the legal status of homosexual partners (men or women) as of 1 August 2001. Based on this development, in 2010 the FCC declared the unequal treatment of marriage and registered civil partnership in the Gift and Inheritance Act[98] to be unconstitutional[99] . In 2013 followed the decision that the exclusion of registered civil partnerships from income splitting for spouses was unconstitutional as well[100] . The Court rejected the argument that this was contrary to Article 6 Basic Law which provides that "marriage and the family shall enjoy the special protection of the state". Having in mind the concrete aim pursued by the relevant Acts, the arguments of the Court seem to be logical or at least acceptable. The question is whether anything of a so-called privileged status of the "real" marriage[101] still remains. In both cases the Court ordered that the violation of the

94) BVerfGE 6, 389: „1. Die Strafvorschriften gegen die männliche Homosexualität (§§ 175 f. StGB) verstoßen nicht gegen den speziellen Gleichheitssatz der Abs. 2 und 3 des Art. 3 GG, weil der biologische Geschlechtsunterschied den Sachverhalt hier so entscheidend prägt, daß etwa vergleichbare Elemente daneben völlig zurücktreten. 2. Die §§ 175 f. StGB verstoßen auch nicht gegen das Grundrecht auf freie Entfaltung der Persönlichkeit (Art. 2, Abs. 1 GG), da homosexuelle Betätigung gegen das Sittengesetz verstößt und nicht eindeutig festgestellt werden kann, daß jedes öffentliche Interesse an ihrer Bestrafung fehlt". Interesting is the report of the history of the provision, beginning with the Bible (3rd Book Mose 18, 22 and 20,3) over the Constitutio Criminalis Carolina (1532), the Prussian General Land Law of 1794, the restrictive interpretation by the French Code Pénal of 1810 but also the Penal Law of the Kingdom of Bavaria (1813), the introduction of the Penal Law of the North German Federation (1869) into the Reichsstrafgesetzbuch of 1871, the attempts to abolish the punishment since 1900, especially under the constitution of Weimar, and the development during the "Third Reich" as well as the report of the hearing of experts by the FCC and the arguments of the FCC on the continuing validity (cf. Article 123 Basic Law) of the provision, BVerfGE 6, 389 (390 et sequ.).

95) After 1994 all special criminal rules concerning homosexuals were completely abandoned.

96) Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften.

97) Lebenspartnerschaftsgesetz.

98) Erbschafts- und Schenkungssteuergesetz.

99) BVerfGE 126, 400.

100) BVerfG with 6 to 2 votes and separate opinion of Justice Landau and Justice Kessal-Wulf.

101) The question arises as to whether the term "marriage" in Art. 6 Basic Law should be read to mean a "Partnership of Mutual Responsibility", as proposed by *Anne Sanders*, Marriage, Same-Sex Partnership, and the German Constitution, German Law Journal 13 (2012), 929 (938 et sequ.). If this should be the case, political will would be more honest to change the wording of the Basic Law to „Marriage including partnership and the family enjoy the special protection of the state" with the consequence that there will remain no difference between bi-sexual and homo-sexual couples, in this respect.

Basic Law must be eliminated by the legislator retroactively for the time period when the unequal treatment had not been abolished, respectively to the time the institute of "civil partnership" was introduced. This is relevant for the recent budget and therefore also affects the Parliament's scope for political decision-making.

IV. Judicial restraint

1. Balance of powers: Judicial review of legislation

A motive for judicial restraint is to preserve the balance of powers in favour of the Parliament as the legislative body. The Court emphasizes that it does not replace the political view of the Parliament by its own view. Its control is restricted if the Constitution is saved and does not include aspects if the regulation of the Parliament is the best option[102] . Where a prediction is necessary there must be a margin of assessment of the Parliament[103] . In this case the FCC's density of control is reduced.

A special problem of "judicial restraint" arises when the Court declares a statute unconstitutional but not void and grants the legislator time to adopt a new statute, yet giving concrete instructions how this can be done in a constitutional way or even with "transitional arrangements". At least in sensitive and politically highly disputed cases the FCC has been criticized for acting as a "substitute legislature"[104] .

Judicial restraint is not a benefit the FCC can voluntarily "grant"[105] . If there is a constitutional question the Court has to decide on it. But the Court must not go beyond. This is the essence of judicial restraint, to refrain from deciding matters where the constitution itself leaves room for the other constitutional bodies to act.

2. Judicial restraint in cases on external relations

Since the so-called Saar decision of 4 May 1955[106] the FCC is aware of the specific constitutional challenges connected with international relations and has developed some adequate forms of judicial restraint. The review of German acts in international relations – including the constitutionality of Treaties – is possible, since no political question doctrine applies. However, when several interpretations of a Treaty are possible, the Basic Law

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102) BVerfGE 92, 365 (396).

103) BVerfGE 50, 290 (333) – Codetermination Law 1976. Cf. *Schlaich/Korioth* (note 20), para 532 et sequ.; BVerfGE 106, 62 (151). Cf. *Christoph Degenhardt*, in: Sachs (note 9), Art. 72 para 20.

104) Cf. *Elke Luise Barnstedt*, Judicial Activism in the Practice of the German Federal Constitutional Court: Is the GFCC an Activist Court?, Juridica International XIII 2007, No 2, p. 38.

105) *Schlaich/Korioth* (note 20), para 505 ; *Streinz*, in: Sachs (note 9), Art. 59 para 72 with further references.

106) BVerfGE 4, 157 – Saar Statute. English translation in Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany, Vol. I/Part II: International Law and Law of the European Communities 1952-1989, 1992, p. 70.

requires that the reading compatible with the constitution be chosen[107] . Also, the German bodies must be left sufficient leeway for policy-making[108] . For the solving of problems, a wide margin of assessment is granted[109] . The FCC has transferred this approach to cases concerning international relations to European Union cases.

3. Judicial restraint in economic matters

Decisions on economic matters require special expertise and regularly rely on predictions. Therefore the general motives for judicial restraints are especially and intensively applicable to cases related to economic matters so that the FCC leaves a "wide" margin of assessment to the Parliament as legislative organ[110].

V. The Federal Constitutional Court and European integration

The connection between law and politics and examples of judicial activity on one side and judicial restraint on the other side can be demonstrated by the jurisprudence of the FCC in "European" matters, concerning the relationship between German constitutional law and European Union law.

1. General approach: European integration on the basis of constitutional law

a) The duty to participate in European integration

In its Lisbon decision the FCC emphasized that the "constitutional mandate to realize a united Europe", which follows from Article 23 (1) Basic Law, "means in particular for the German constitutional bodies that it is not left to their political discretion whether or not they participate in European integration. The Basic Law wants European integration and an international peaceful order"[111] . Therefore the German constitutional bodies, especially the government and the parliament, must be engaged in European integration. Only the concrete way is a question of political discretion. This is in line with established jurisprudence of the Court[112] . Therefore it was consistent of the Court to coin the term "principle of the Basic Law's openness toward European law" ("Europarechtsfreundlichkeit") as a parallel to the well-

107) BVerfGE 36, 1 (14 et sequ): Grundlagenvertrag. Cf. *Schlaich/Korioth* (note 20), para. 537. However, in this case the interpretation of the Treaty by the FCC was problematic, cf. *Benda/Klein* (note 20), para. 27.

108) BVerfGE 55, 349 (365); BVerfGE 77, 170 (215); BVerfGE 94, 12 (35). Cf. *Christian Calliess*, Auswärtige Gewalt, in: Josef Isensee/Paul Kirchhof (Eds), Handbuch des Staatsrechts, 3rd ed, Vol IV (Aufgaben des Staates), 2006, § 83 para 33.

109) BVerfGE 55, 349 (364 et sequ) - Rudolf Heß.

110) BVerfGE 37, 1 (20) – Stabilisierungsfonds.

111) BVerfGE 123, 267 (346 et sequ).

112) Cf. *Rudolf Streinz*, The Lisbon decision of the Federal Constitutional Court of Germany on the Treaty of Lisbon, in: Peter M. Huber (Ed.), The EU and National Constitutional Law, 2012, p. 11 (15 et sequ.) with further references.

established principle of "openness towards international law" ("Völkerrechtsfreundlichkeit")[113] in its Lisbon decision.

b) Constitutional restraints: The three tests (fundamental rights, ultra vires, identity review)

However, the competence to transfer sovereign powers to the European Union is limited. The substantive limits have been elaborated by the FCC and have, in their essence, been laid down in Article 23 (1) Basic Law. The FCC developed three tests to determine whether the application of European Union law is in accordance with the requirements of German constitutional law: The fundamental rights review, the ultra vires review and the identity review.

(a) Fundamental rights review: From Solange I to Solange II and Bananamarket

In its Solange I decision[114] of 1974 the FCC reserved itself the right to measure European Community law against the precepts of the Basic Law *as long as* the Community did not have a written catalogue of fundamental rights comparable to the one contained in the Basic law[115] . Such a written catalogue became part of EU primary law not until on 1 December 2009, when the Treaty of Lisbon entered into force. According to Article 6 (1) Treaty of European Union the European Charter of Fundamental Rights shall have the same legal value as the Treaties. But impressed by the jurisprudence of the European Court of Justice which, to save the unity of Community law, had developed and has consistently extended the protection of fundamental rights on the basis of the European Convention for the Protection of Human Rights[116] and the constitutional traditions common to the Member States[117] the FCC reversed its Solange II decision of 1986. This led to the principle: "As long as the European Communities, and in particular the case law of the European Court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and insofar as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation … and it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution"[118] . The consequences were exemplified in the Banana

113) BVerfGE 123, 267 (347).

114) Called thus because of the initial word „Solange", i.e. „As long as".

115) BVerfGE 37, 271. English translation in Decisions (note 106), p. 270.

116) All Member States of the European Union were then and are now parties of the European Convention for the Protection of Human Rights. The Union shall accede to it according to Art. 6 (2) Treaty on European Union. (TEU).

117) Nowadays, compare Art. 6 (3) TEU. For the development of European basic rights by the ECJ cf. *Paul Craig/Grainne de Búrca*, Text, Cases and Materials, 5th ed. 2011, p. 364 et sequ.

118) BVerfGE 73, 339. English translation in Decisions (note 106), p. 613 and CMLR 3 (1987), p. 225. Cf. the wording of this decision with the requirements of Art. 23 (1) sentence 1 Basic Law which was introduced in 1992.

market decision of 2000. The Court continued to claim jurisdiction on fundamental rights in "European Community cases". But it set up such high hurdles that it has become very improbable that it will ever exercise its reverse competence in this area[119] . The comment of Udo Steiner, Professor at Regensburg University and then Member of the FCC, illustrates the situation: We are in the position of a substitute player with a very low chance of being brought on[120] . But let me add: At least not only spectators on the stand.

(b) Ultra vires review: From Maastricht to Honeywell

In its Maastricht decision, the FCC stated that an interpretation of the EU Treaty provisions which would result in the extension of the Treaty's scope (i.e. so-called ultra vires acts) would not have binding effect within the sphere of German sovereignty and reserved its jurisdiction to assess whether an act keeps within the boundaries of the competences transferred by the German Act Approving the Treaty on European Union[121] . There must remain responsibilities of sufficient importance as competences of the Parliament (Bundestag)[122] . This approach as well as the qualification of the European Union as "a confederation of allied states", as an "association of states" ("Staatenverbund")[123] was repeated in the Lisbon decision[124] . Additionally, the FCC stated that Article 79 (3) Basic Law not only presupposes sovereign statehood but also guarantees it. Therefore the competence to decide on its own competence (Kompetenz-Kompetenz) must be reserved. It could not be transferred to the European Union which would then become federal state, not even on the basis of an amendment of the Basic Law but instead only after a new German constitution had been freely adopted by the German people according to Article 146 Basic Law[125]. Furthermore, Germany as Member State acting "on the basis of a union of sovereign states under the Treaties" must retain sufficient leeway for the political formation of the economic, cultural and social circumstances of life. To this end, the FCC enumerated specific areas of policy[126]. The FCC was blamed for this judicial activism[127]. But in its first decision after Lisbon when the ultra vires control was probable to become realized, the FCC demonstrated a strong judicial restraint. The ultra vires control must be exercised in a manner which is open towards European law. Therefore the FCC laid down that a sufficiently

119) BVerfGE 102, 147.

120) *Steiner*, Richterliche Grundrechtsverantwortung in Europa, in: Lorenz/Geis (Eds.), Staat, Kirche, Verfassung. Festschrift für Hartmut Maurer, 2001, p. 1005 (1013), footnote 43: „Wir befinden uns in der Lage eines Ersatzspielers mit geringer Einsatzchance".

121) BVerfGE 89, 155 (182). English translation in Decisions (note 106), Vol II, 1998.

122) BVerfGE 89, 155 (186) and headnote 4.

123) BVerfGE 89, 155 (183) and headnote 2.

124) BVerfGE 123, 267, headnote 1.

125) BVerfGE 123, 267 (332, 349).

126) BVerfGE 123, 267 (363) and headnote 3.

127) Cf. eg. *Claus-Dieter Classen*, in: von Mangoldt/Klein/Starck (note 46), Art. 23 para 29 with further references.

qualified breach of competences on the part of the European bodies is necessary for an ultra vires review to be considered. This was contingent on the act of the authority of the European Union being manifestly in breach of competences and the impugned act leading to a structurally significant shift to the detriment of the Member States in the structure of competences[128] . Prior to admitting an (alleged) ultra vires act for decision, the FCC would also afford the Court of Justice of the European Union the opportunity to interpret the Treaties in the context of preliminary ruling proceedings according to Article 267 (3) Treaty on the Functioning of the European Union (TFEU)[129] .

(c) Identity review: Lisbon and beyond

In its Lisbon decision the FCC decided that the constitutional limits of integration were exceeded if the inviolable core content of the constitutional identity of the Basic Law was not respected. To a certain extent the identity review may be a special case of the human rights review or, as long as Article 79 (3) Basic Law is affected, also the ultra vires review. After the Lisbon decision there is one concrete case concerning EU law during which the FCC mentioned under which conditions the identity of the German constitutional order would be breached. In its decision on the implementation of the EU Data Retention Directive[130] the Court said with a reference to its Lisbon decision that it is an element of the "constitutional identity of the Federal Republic" of Germany" that the citizens' use of freedom must not be totally recorded and registered[131] . The FCC decided that some provisions of the German Telecomunications Act[132] were void but denied a conflict with the EU-Regulation which left the Federal Republic of Germany a broad discretion and could be implemented in conformity with the fundamental rights of German Basic law. Thereby the FCC avoided a referral to the European Court of Justice by a preliminary request according to Article 267 (3) TFEU[133] . The problem is that the binding interpretation of European Union law including directives is the competence of the European Court of Justice and it is questionable if there was an exemption of the obligatory duty for preliminary requests according to the so called Acte

128) BVerfGE 126, 268 (304 et sequ) and headnote 1a. Cf. *Rudolf Streinz*, Mangold nicht hinreichend qualifiziert ultra vires. Zur Reduktion der Ultra-vires-Kontrolle im Honeywell-Urteil des Bundesverfassungsgerichts, in: Holger Altmeppen/Hanns Fitz/Heinrich Honsell (Eds), Festschrift für Günter H. Roth, 2011, 823 (826 et sequ).

129) BVerfGE 126, 268 (304) and headnote 1b.

130) Directive 2006/24/EC of the European Parliament and the Council on the retention of data generated or provided in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ 2006 L 105/54.

131) BVerfGE 125, 260 (324): "Dass die Freiheitswahrnehmung der Bürger nicht total erfasst und registriert werden darf, gehört zur verfassungsrechtlichen Identität der Bundesrepublik Deutschland (vgl. zum grundgesetzlichen Identitätsvorbehalt BVerfGE 123, 267 [353 f.])."

132) Telekommunikationsgesetz – TKG.

133) BVerfGE 125, 260 (307).

Clair theory[134] . So we must wait for the first preliminary request of the FCC brought before the European Court of Justice.

(d) The responsibility for integration of the Parliament

The most important consequence of the Lisbon decision was the FCC's order to the Parliament, Bundestag and – if required by the provisions of legislation – the Bundesrat, to exercise their "responsibility for integration" when sovereign rights are transferred to the European Union. This must be safeguarded in every case, although sometimes in differing ways. Therefore the FCC decided that the German Act Approving the Treaty of Lisbon (Zustimmungsgesetz zum Vertrag von Lissabon) is compatible with the Basic Law, but in contrast, the German accompanying law[135] was unconstitutional as far as that the rights of participation of German legislative bodies, especially the Bundestag, were insufficient[136] . Therefore the Treaty of Lisbon could not be ratified before the constitutionally required new accompanying laws to the Lisbon Treaty, with extended parliamentary rights of participation had entered into force. These new accompanying laws[137] were swiftly elaborated so that the Treaty of Lisbon could be ratified by Germany[138] .

c) The principle of cooperation between the Federal Constitutional Court and the European Court of Justice

In its Maastricht decision the FCC reserved its competence for fundamental rights review if German persons are affected by acts of the European Union. However, the FCC declared that it exercises "its jurisdiction regarding the applicability of derivative Community law in Germany in a 'co-operative relationship' with the European Court of Justice"[139] . This approach was followed by judicial restraint in fundamental rights review cases (Banana market decision) and finally in ultra vires review cases (Honeywell decision). Although invented unilaterally by the FCC, this idea also impressed the European Court of Justice so

134) See ECJ Case 283/81 (CILFIT/Ministero della sanità) ECR 1982 p. 3415 paras 10 et sequ.

135) Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters (Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union).

136) BVerfGE 123, 267 (339, 432 et sequ).

137) Act on the Exercise by the Bundestag and the Bundesrat of their Responsibility for Integration in Matters concerning the European Union (Integrationsverantwortungsgesetz, IntVG) of 22 September 2009. Furthermore amendments of the Act on Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union (Gesetz über die Zusammenarbeit zwischen Bundesregierung und Bundestag in Angelegenheiten der Europäischen Union – EUZBBG; now replaced by the Act of 4 July 2013, BGBl. I 2013 p. 2170) and the Act on the Cooperation between the Federation and the Länder in European Union Affairs (Gesetz über die Zusammenarbeit zwischen Bund und Ländern in Angelegenheiten der Europäischen Union - EUZBLG).

138) Cf. concerning the process of ratification of the Lisbon Treaty *Rudolf Streinz/Christoph Ohler/ Christoph Herrmann*, Der Vertrag von Lissabon, 3rd ed. 2010, p. 27 et sequ.

139) BVerfGE 89, 155 (175) and headnote 7.

that the latter granted Member States a certain margin of appreciation in human rights cases[140] . Mutual respect is indeed necessary to avoid conflicts between European Union law and national constitutional law as well as between the Courts.

2. Fundamental rights: Is there a serious conflict between the German Federal Constitutional Court and the Court of Justice of the European Union?

Ever since the improvement of the European Court of Justice's jurisdiction in fundamental rights cases – especially since the European Charter of Fundamental Rights entry into force on 1 December 2009[141] and the further development of concrete consequences of the "co-operative relationship" – the fundamental rights problem could essentially be thought to have been solved. But currently a new conflict concerning the competence to decide fundamental rights cases between the FCC and the European Court of Justice is threatening to arise. In its Åkerberg Fransson decision, the European Court of Justice widened its competence by broadly interpreting the scope of application of the EU Charter on Fundamental Rights[142] and provoked a harsh reaction of the FCC in its decision on the German Counter-Terrorism Database Act. In an *obiter dictum* – because there was no real conflict with European Union law – the FCC interpreted the Åkerberg Fransson decision in a restrictive way and threatened that otherwise, it would view it as an "apparent ultra vires act"[143]. Indeed, a level-headed assessment requests a more precise definition of the European Charter of Fundamental Rights' scope of application but denies real grounds for a serious conflict between the FCC and the European Court of Justice. Such a conflict, especially in the area of fundamental rights, would be very detrimental to European integration and must be avoided.

3. The decisions on the Lisbon Treaty and the ESM-Treaty: Judicial activism as well as judicial restraint

Constitutional complaints, based on the FFC's interpretation of Article 38, urged the Court to decide on a matter which intertwines law and politics in the economic field and was of decisive importance for the European Union's future: the cases concerning the EU's "save the Euro measures". The Lisbon decision, in addition to the Maastricht decision clearly served as theoretical basis. Correspondingly, the Court came forth with a "yes …but" diction[144] , similar to those in the former decisions. The FCC stated reservations and

140) Cf. ECJ Case 36/02 (Omega) 2004 ECR I-9609.

141) Cf. concerning the development of the ECJ's jurisprudence in fundamental rights cases after the EU Charter on Fundamental Rights *Adam Bodnar*, The EU Charter of Fundamental Rights in the jurisprudence of the CJEU, 2012.

142) ECJ, Case 617/10 (Åkerberg Fransson), EuGRZ 2013, 137.

143) BVerfG, Press release of 24 April 2013.

144) Cf. *Karsten Schneider*, Yes, But … One more Thing: Karlsruhe's Ruling on the European Stability Mechanism. German Law Journal 14 (2013) 53 (54).

conditions but did not hinder the ratification of the European Treaties. These "save the Euro" cases confronted the Court with the problem of how to deal with economic matters which are highly disputed amongst economic experts. In its decisions on constitutional complaints lodged against aid measures for Greece of 7 September 2011[145] and on applications for the issue of temporary injunctions[146] to prevent the ratification of the ESM Treaty and the Fiscal Compact, the Court proved "a remarkably strong manifestation of judicial restraint"[147] . It emphasized the competence and responsibility of the political bodies and that it may not replace the decision of the Parliament which is the institution "first and foremost democratically appointed for this task"[148] . In the field of decisions with economic aspects, the political bodies have a "wide" margin of assessment[149] . Therefore the density of constitutional review is reduced. On the other hand, the Court displayed some judicial activism as well, emphasizing its intention – well-settled since the Maastricht decision – to safeguard the rights of the German Parliament. The rights of the German Parliament must be guaranteed in two directions: Firstly, the budget autonomy must remain with the Bundestag and not be transferred to the European institutions. As the FCC put it: The "German Bundestag may not transfer its budgetary responsibility to other actors by means of imprecise budgetary authorizations. In particular it may not, even by statute, deliver itself up to any mechanisms with financial effect which –whether by reason of their overall conception or by reason of an overall evaluation of the individual measures – may result in incalculable burdens with budget relevance without prior mandatory consent, whether these are expenses or losses of revenue"[150] . Secondly, the parliamentary right to participation must be safeguarded by the Federal Government, especially by means of adequate information of the Parliament by the Government[151] . Concerning the inter-parliamentary allocation of responsibilities,[152] the rights of all Members of Parliament must be respected. Therefore the Court declared the broad empowerment of a special parliamentary committee (Sondergremium), composed of nine members of the Budget Committee (Finanzausschuss) of the Bundestag, to be unconstitutional and reduced the special committee's competence to some rare emergency cases where absolute confidentially is requested, so that the measures' effects would otherwise be thwarted[153] .

145) BVerfGE 129, 124.
146) Cf. Article 32 FCC Act (BVerfGG).
147) *Mattias Wendel*, Judicial Restraint and the Return to openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012, German Law Journal 14 (2013) 21 (44).
148) BVerfGE 129, 124 (177, 183).
149) BVerfGE 129, 124 (182 et sequ).
150) BVerfG 129, 124 (179) and headnote 3a.
151) BVerfGE 131, 152 (202 et sequ) and headnotes 1-4 - ESM and Euro Plus Pact case.
152) Cf. *Wendel* (note 147), p. 40 et sequ.
153) BVerfGE 130, 318 (342 et sequ) and headnotes 1-3.

VI. Summary

Law and politics are closely intertwined. This applies to all branches of law but in particular to public law and, within this branch, above all to constitutional law. Therefore, the decisions of the German Federal Constitutional Court (FCC) – although based on law because the FCC is part of the judiciary – have political relevance. In Germany, by law there is no room for a political question doctrine which would exclude a matter because of "political" implications. Therefore, if there is an admissible case brought before the Court, the FCC must decide on all Constitutional questions, even if they have serious political consequences. This is the case in interior affairs when the FCC is arbiter, settling disputes between the supreme federal bodies because the Court decides on the distribution of political power. The Court can even decide whether the Bundestag may dissolve itself or not. Or when the Court declares the unconstitutionality of a political party or refuses to accept the application of the Bundestag, the Bundesrat or the Government. Or when the Court decides on the rights of political parties or decides on the rights of the members of the Parliament, saving minority rights. Or when the Court declares statutes adopted by the Parliament unconstitutional and void because it prevents the democratically legitimized legislative organ to pursue political aims. Therefore, in "highly political cases", e.g. the legislation on abortion or on equal treatment of homosexual partnership, conflicts arise between the Court and the Parliament. Apart from cases on interior politics, the FCC's decisions also lead to serious political consequences in cases concerning the European Union, international relations or foreign states. The Court is aware of these problems and correspondingly, it takes these consequences in the varying fields into consideration, differentiating its approach according to the respective field's nature. Especially for these cases the Court developed the approach of "judicial self-restraint".

There is no clear-cut answer to the question whether the FCC is an "activist" Court: On one hand, judicial activism is, to a certain extent, necessary because the constitution must remain a living instrument and must be adaptable to both social developments and technical progress. Therefore the Court construed ("invented") "new" fundamental rights on the basis of existing rights, e.g. the "right to informational self-determination" with further development of the "right to the guarantee of the confidentiality and integrity of information technology systems". The decisions of the FCC on homosexuality demonstrate the change of social and consequently legal views very clearly. On the other hand, the Court tried to practice judicial restraint in order to respect the balance of powers in view of the competence of the Parliament as legislator and above all in cases on external relations and in European affairs; always bearing in mind the risk of unpredictable political consequences. This is also true for cases related to economic matters. In all these decisions the FCC leaves a certain margin of assessment and appreciation to the political bodies, the Parliament and the Government. This can be demonstrated very clearly by the recent decisions of the FCC concerning European

integration: By means of judicial activism the Court strengthens the Parliament's (Bundestag) position in relation to the Government (Bundesregierung) and requests the Parliament to exercise its responsibility for integration when sovereign rights are transferred to the European Union. Taking judicial restraint seriously, the FCC leaves the actual decision of how to save the European monetary union to the "wide" margin of assessment of the responsible political bodies. This demonstrates the limitations of legal instruments and of law to regulate political and economic matters.