"Patchwork Constitutionalism": Constitutionalism and Constitutional Litigation in Germany and beyond the Nation State - A European Perspective

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“Patchwork Constitutionalism”

Constitutionalism and Constitutional Litigation in Germany and Beyond the Nation State – A European Perspective

Dr. Michael Lysander Fremuth*

I. INTRODUCTION ............................................................ 340

II. CONSTITUTIONALISM IN GERMANY .............................. 341
   A. The German Constitution: The Basic Law .................. 341
   B. The German Federal Constitutional Court ............... 347

III. CONSTITUTIONAL LITIGATION IN GERMANY ............... 357
   A. Introduction and General Principles of Constitutional Litigation .......... 358
   B. Dispute between State Organs .................................. 361
   C. Federal Disputes ................................................. 365
   D. The Judicial Review Proceedings .............................. 366
      1. Introduction .................................................. 366
      2. Concrete Judicial Review .................................... 367
      3. Abstract Judicial Review .................................... 370
      4. The Decision of the FCC in Review Procedures ............ 374
   E. Constitutional Remedies to Defend the Constitution and the Rule of Law .... 377
      1. Forfeiture of Basic Rights .................................... 378
      2. Procedure for Banning Political Parties .................. 380
      3. Further Proceedings ......................................... 383
   F. Constitutional Complaint ........................................ 384
      1. Introduction .................................................. 384
      2. Admissibility .................................................. 387
      3. The Decision and Control Density ........................... 396

IV. PATCHWORK CONSTITUTIONALISM:
   CONSTITUTIONALISM AND CONSTITUTIONAL
   LITIGATION BEYOND THE NATION STATE –

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339
"Then again, virtually every component of globalization's governance will have both domestic and international dimensions, each linked to the other to provide the institutional support for enhanced benefits from globalization."¹

In a globalized world, it is not a surprise that constitutionalism and constitutional litigation, terms that in former times have been exclusively associated with the nation state, transcend national borders and claim existence and recognition on a transnational level, as well. The link between domestic and international dimensions of globalization, stressed by one of its apologists Bhagwati – though with a strong reference to economic assistance – also exists on the legal level and requires an entanglement of the different constitutional orders. The European Union (EU) represents a unique example of not only a supranational organization, but at the same time, a constitutional attempt to make globalization a benefit for all of us.

This article is supposed to give an idea about Germany being integrated in a European system of entangled and interactive constitutions and constitutional courts.

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¹ JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 223 (2004).
Therefore, after a brief introduction to the German constitution (II.A.) and to the Federal Constitutional Court (FCC = Bundesverfassungsgericht) as the constitution’s important defender\(^2\) (II.B.), this article presents a closer look at constitutional litigation in Germany (III.) with a focus on constitutional complaints (III.F.). Afterwards, to examine the questions of constitutionalism and constitutional litigation in Europe (IV.), this article will analyze the EU with regard to its constitutional character and the procedures provided for the individual to enforce, before the Court of Justice of the EU (ECJ), his/her human rights under EU law (IV.B.). Furthermore, the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR) including individual complaints that can be filed before the European Court of Human Rights (ECtHR) will be addressed (IV.C.). Finally, the interplay between those European constitutional orders and the German constitution, as well as the dialogue between the European constitutional courts, will be discussed (IV.D.) before a conclusion is drawn about the future of what I call “patchwork constitutionalism” (IV.E.).

II. CONSTITUTIONALISM IN GERMANY

A. The German Constitution: The Basic Law

Article 1 Basic Law [Human dignity and Human rights]

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.\(^3\)

The Emergence of the Basic Law\(^4\)


\(^3\) GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], Art. 1.
Literally, Germany does not have a constitution (Verfassung) but a “Grundgesetz.” That “Basic Law” does meet all the requirements necessary to be qualified as a constitution. However, after the Second World War, the western allies (the United States, the United Kingdom and France) explicitly asked the prime ministers of the German states (Bundesländer) to set up a Constituent Assembly and to frame a constitution to be adopted by referendum. That constitution should, inter alia, guarantee human rights and provide for a democratic and federal structure of the German state that had to be established bottom-up from the Bundesländer, while also being endowed with a strong Federal Government.5

Yet, as it became apparent that the eastern part of Germany under Soviet occupation was not likely to reunite soon with Western Germany, the prime ministers feared that a final constitution for the western part could perpetuate the division of the country. Rather, a reunified Germany should adopt a common constitution.6 For that reason, no Constituent Assembly was established. Instead, the Constitutional Convention was held at Herrenchiemsee, an island on a Bavarian lake. Composed of Ministry officials and constitutional experts, it prepared a draft for the Parliamentary Council. That body consisted of delegates from the states and approved the Basic Law on May 8, 1949. The constitution was approved by the allies on May 12, 1949, and was then ratified by the parliaments of the states. Only Bavaria rejected the Basic Law, knowing though that an adoption by a two-thirds majority of the other states’ parliaments was sufficient to make the constitution applicable in that state as well. Promulgated on May 23, 1949, the Basic Law entered into force at the end of the same day. It was supposed to be a provisional regulative measure for a provisional West-German state.7 As we know today, it took a little bit longer for Germany to reunify (1989) and, contrary to former Art. 146 of the Basic Law, no common constitution was agreed upon by the German people per referendum. Instead, the Basic Law was extended to Eastern Germany after the former German Democratic Republic acceded to the Federal Republic of

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6. BASIC LAW Art. 146 (referring to the former BASIC LAW ART. 146).
Germany and after a common constitutional commission had proposed a few amendments, some of them finally have been incorporated into the Basic Law. No one disputes that the Basic Law has proven to be a sound and solid constitution for Germany. In the end, the Germans have become proud of their constitution and developed, in a country where patriotism still seems to be suspicious to many, a kind of constitutional patriotism (Verfassungspatriotismus).

The Basic Law – An Overview

Nazi Germany covered the entire continent with an extent of horror and fear unknown to mankind before. After the defeat of Nazi Germany, it was not only the allied powers that asked for a constitution to be a willful and strong renunciation of Nazi Germany. The framers themselves learned their lessons from the experience with the feeble Constitution of Weimar (1919) that had enabled the Nazis to gain power so easily: Art. 48 (2) enabled the Reichspräsident (President of the German Empire) to rule the country by emergency decree (Notverordnungsrecht), including the power to suspend human rights under the constitution. That emergency clause was invoked by the ruling Nazi party to fasten the establishment of their terror-regime. In direct response to the flagrant atrocities committed by that regime, the recognition and protection of human dignity was put at the very beginning of the constitution.

It is not only an individual human right that can be invoked against public authority but also a fundamental principle underpinning the entire constitution and forming the final benchmark for its interpretation. German authority has to respect and protect human dignity under all conditions; it is strictly forbidden to deprive human beings of their humanity and treat

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8. Norbert Lammert, the current president of the Bundestag, in an interview recently called the Basic Law the best constitution that Germany has ever had and presumed that the entire world admires that constitution, cf. Das Parlament, no. 50/2010, 9.
11. BASIC LAW Art. 1(1).
them as mere objects. 

Articles 2 through 19 of the Basic Law contain the most known and recognized basic rights, including personal freedoms, equality before the law, freedom of faith and conscience, as well as freedom of expression, arts and science, freedom of assembly, and association. Some of those rights are human rights granted to anybody, while others are citizen rights for German nationals only. Unlike some states' constitutions, the Basic Law provides for classical human rights but does not contain human rights of the second and third generation (like the right to work, water, peace and a sustainable development as individual and collective rights). However, some of those “modern” human rights might be deduced from the human dignity clause and state principles like the social state principle laid out in Article 20 (1). Unlike the constitution of Weimar, which contained a broad human rights catalogue in Articles 109-165, but neither declared human rights binding upon the legislator nor made them enforceable by procedural means, the basic rights under the Basic Law are enforceable and directly applicable. Their procedural counterpart, constitutional complaint before the FCC, has become a forceful sword that can be used by the individual to make sure that his/her rights are adequately protected.

Article 20 of the Basic Law enshrines the fundamental state principles, such as democracy, rule of law, social state and federalism. The content of those principles, having a binding nature on public authority, is not determined by the constitution itself.

Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 12, 1997, 96 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 375 (399) (Ger.);
Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 9, 1952, 9 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 89 (95) (Ger.).

15. BASIC LAW Art. 2.
16. BASIC LAW Art. 3.
17. BASIC LAW Art. 4.
18. BASIC LAW Art. 5.
19. BASIC LAW Art. 8.
20. BASIC LAW Art. 9.
21. BASIC LAW Art. 1.
22. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 9, 2010, 125 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 175 (222 et seq.) (Ger.).
23. KLAUS STERN, GRUNDRECHTE-KOMMENTAR, Einleitung [Introduction], para. 16, no. 14., (Klaus Stern / Florian Becker eds. 2010).
24. BASIC LAW Art. 1(3).
25. BASIC LAW Art. 93(1), no. 4a.
Accordingly, the FCC is asked to work on developing those principles to give them a real meaning to the people. Those principles, as well as the guarantee of human dignity and the federal division of Germany into the central state and the Bundesländer, cannot be changed or abolished, even by constitutional amendment. The so-called “Eternity Clause”\textsuperscript{27} protects those essentials of the constitution against even the constitutional legislator. Correspondingly, constitutional litigation might be used by an applicant to challenge an “unconstitutional” constitutional law. According to general democratic theories,\textsuperscript{28} the Basic Law could not prevent the German people – as \textit{pouvoir constituant} –\textsuperscript{29} from giving themselves a new constitution by revolutionary act. However, those principles are inviolable within the framework provided for by the German constitution, a system that has opted for a representative democracy\textsuperscript{30} so that constitutional amendments belong to the elected and determined bodies.\textsuperscript{31} Art. 21 of the Basic Law acknowledges that political parties are indispensible for forming the political will of the people and channeling it into the institutional process of decision-making. Article 23 of the Basic Law is an expression of the constitutional conception of “open statehood”\textsuperscript{32} and obliges Germany to be a state friendly towards European integration. This article is also the foundation of Germany’s membership in the supranational EU, to which its member states transferred several sovereign rights and whose authority acts enjoy supremacy over domestic law.\textsuperscript{33} Recently amended Article 23 (1a) of the Basic Law implements the subsidiarity action\textsuperscript{34} into the Basic Law. According to that provision, the Bundestag and the
Bundesrat may file a claim to the ECJ arguing that the principle of subsidiarity has been violated by EU legislation. Though the Federal Government has to submit the claim, the Bundesrat or the Bundestag will remain a party to the proceeding. As a quarter of the members of parliament might force the Bundestag to initiate such a proceeding, the subsidiarity check, intended to strengthen the role of national parliaments and protect national sovereignty, has been formed as a minority right.

Many other provisions of the Basic Law concern the relation between the federal state and the states. Federal Germany is composed of sixteen Bundesländer, each of which has its own constitutions, courts, administrations, and laws. Germany has been built upon the roots of the German states. Accordingly, Article 30 of the Basic Law determines that the exercise of state power and the discharge of state functions belong to the states if the constitution does not set up different rules. The federal level, therefore, depends on an entitlement for action. Lawmaking in particular follows the enumeration principle, meaning that the federal state is competent only if it can invoke a constitutional title. In that case, however, valid federal law shall take precedence over land law. Still, in practice most legal acts are adopted on the federal level, while the states are responsible for the execution.

Other provisions, especially Articles 38 through 69 of the Basic Law, create and regulate the constitutional organs, i.e. entities that are established by the constitution itself and that perform essential state functions. In short, the German parliament is the Deutsche Bundestag. Its members are elected by a combination of personalized and proportional election. The Bundesländer are represented and involved in the legislative process via the Bundesrat, the Federal Council, consisting of delegates chosen by the respective states' governments. This chamber, however, is not an equal lawmaker. Its participation depends on the subject as well as its impact on the states' level and varies between a mere power

35. Basic Law Art. 23(1a).
39. Basic Law Art. 70.
40. Basic Law Art. 31.
to object that can be overridden by the Bundestag and the need of a real consent. A Mediation Committee can be used to enable legislation in cases in which the legislative bodies cannot reach an agreement. The Federal President (Bundespräsident) is the head of state and has to certify the laws. Besides that, and in contrast to the huge amount of powers the former Reichspräsident enjoyed, he/she has a mostly ceremonial function.\textsuperscript{41} The Federal Government consists of the German Chancellor and the Cabinet Ministers. While the Chancellor is elected by the parliament, the Ministers are appointed by the Chancellor himself/herself. The Federal Government is not only at the head of the federal executive branch and the visible face of Germany abroad; most notably it is responsible for the political agenda-setting on the federal level. Finally, the FCC itself has claimed to be a constitutional organ quite early,\textsuperscript{42} an assertion that is indirectly confirmed by § 1 of the FCC-Act.\textsuperscript{43}

\textbf{B. The German Federal Constitutional Court}

"According to its main task, i.e. to safeguard, to apply and to develop the German Constitution, [the FCC has] to decide ultimately on its interpretation and application."\textsuperscript{44}

\textbf{The Status and Task of the FCC}

Talking about constitutional litigation in Germany hardly makes sense without taking a closer look at the FCC, which is the highest and most important judicial body, as well as the supreme guardian and interpreter of the German Basic Law. In Germany, one might conclude that the Basic Law is what the FCC interprets it to be.\textsuperscript{45}

\begin{itemize}
\item \textsuperscript{41} ROMAN HERZOG, GRUNDGESETZ, Art. 54, paras. 88 et seq., (Theodor Maunz / Gunter Dürig eds. 2010).
\item \textsuperscript{43} The Act states, "[t]he Federal Constitutional Court shall be a federal court of justice independent of all other constitutional organs."
\item \textsuperscript{44} Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 24, 2003, 108 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 282 (295) (Ger.).
\item \textsuperscript{45} RUDOLF SMEND, STAATSRECHTLICHE ABHANDLUNGEN UND ANDERE AUFSÄTZE, 582 (1994). According to JOSEF ISENSEE, the character of the constitution is decided by the institution who has the final say about the interpretation in cases of conflict. Josef Isensee, Bundesverfassungsgericht – quo vadis?, 51 Juristenzeitung, 1085 et seq. (1996).
\end{itemize}
Although the FCC is a court in a narrow sense, meaning judges have to decide a case by applying legal standards in an independent and impartial way, it is not a supreme court of appeal and does not even form part of the regular judicial system. Unlike, for instance, the United States Supreme Court, the German FCC is confined to ruling on questions of a constitutional nature. Its task is only to interpret the constitution and to ensure that every act of public authority complies with it. Accordingly, the court's competence is limited to decide if a violation of constitutional law has occurred (Prüfung spezifischen Verfassungsrechts). The interpretation and application of ordinary (non-constitutional) law is not within the competencies of the FCC. In that respect, Germany has several Supreme Courts, i.e. courts that work as courts of final appeal on the federal level: the Federal Court of Justice for criminal and civil actions, the Federal Administrative Court, the Federal Social Court, the Federal Labor Court and the Federal Finance Court. Any court in Germany is bound by the basic rights and has to interpret and give a real meaning to the constitution. However, the FCC can overrule any judgment in the event that the deciding court has not sufficiently considered constitutional law. Thus, a constitutional action directed against the interpretation and application of ordinary law will only be successful if the applicant can argue that the ordinary courts have violated his/her constitutional rights while performing their respective tasks.


47. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 198 (207) (Ger.) explaining that the FCC is not a "Superrevisionsinstanz" [highest appellate court]. See contra CHRISTIAN HILLGRUBER / CHRISTOPH GOOS, VERFASSUNGSPROZESSRECHT, [CONSTITUTIONAL LITIGATION], 1 (2d ed. 2006).


49. BASIC LAW Art.95(1); Germany also has a Federal Patent Court, which is subordinate to the Federal Supreme Court. BASIC LAW Art. 96(1), (3).

50. BASIC LAW Art. 1(3); BASIC LAW Art. 20(3).
Composition and Organization of the FCC

The FCC is not attached to a Federal Ministry, but rather, it is a self-governing judicial entity having its own budget. It is seated in Karlsruhe and consists of two senates (panels), as well as several chambers. Every senate is composed of eight judges and is capable of making decisions when at least six of them are present. The judges, unlike other federal judges, are not in public employment, but their positions are influenced by the constitutional character of their work. Therefore, the Deutsches Richtergesetz (Federal Judges Act), according to its § 69, applies to judges at the FCC only as far as it complies with their special status under the constitution and the FCC-Act, i.e. the constitutional nature of their task. Each senate itself constitutes the FCC in legal terms and, with regard to a decision taken by one of the senates, there is no remedy granted by the other senate of the court. At least three judges in each senate shall originate from the other federal courts to ensure that sufficient practical experience is present in the court. Many of the other members are law professors, which is the only profession that might be held while serving as a judge at the FCC. The members of the FCC are elected, with a two-thirds majority, half by the Bundestag and half by the Bundesrat. Whereas the Federal Council votes directly, the Bundestag has set up an election commission reflecting the political representation of the parliament. Although the constitutionality of such an intermediary body is disputed, no one has ever initiated a proceeding against it.

The Public Reception and Political Relevance of the FCC

The FCC is held in highest esteem by the German public. For many, it has been sought out as a last resort to defend their basic

51. The total budget in 2011 will amount to € 25 millions, see Das Parlament, no. 38/2010, 5.
52. Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BUNDESGESETZBLATT [BGBl I], 243, § 1(2) (Ger.).
53. Id. at § 2(1).
54. Id. at § 2(2).
55. Id. at § 15(2).
57. Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl I at 243, § 2(3) (Ger.).
58. Id. at § 3(4).
59. Id. at § 5-7.
60. Hans-Peter Schneider, 50 Jahre Grundgesetz – Vom westdeutschen Provisorium zur gesamtdeutschen Verfassung, 52 NJW, 1497, 1500 (1999); cf. UWE WESEL, DER GANG NACH
rights and to seek redress for alleged violations. Even though members of the FCC are elected by politicians after political negotiations and bargaining, the court is not a political organ and has proven its independence and impartiality in many judgments and decisions. The court has never flinched from rendering unpopular judgments, further augmenting its popularity. Its jurisprudence, especially regarding the most controversial decisions, is somehow swinging. On the one hand, the FCC demonstrates reluctance and a willingness to defer the solution of conflicts and controversial questions to society and its self-regulative abilities. On the other hand, there is a tendency of rigor towards the use of public authority, especially criminal sanctions, and the FCC has even been very concrete in determining how the lawmaker has to proceed in some cases.

The German constitution is a framework containing vague and broad provisions. Interpreting a constitution often means to breathe life into the constitution, giving it a meaning that meets the current needs and demands of the society and the people. In that sense, a constitution should be regarded as a "living instrument"—a term used to justify an approach of interpretation that intends to fill those gaps resulting from the restricted view the framers had anticipating future developments and to prevent the petrifaction of constitutional law. It seems persuasive that the document that is supposed to be the legal foundation for a society has to adopt and correspond to the development of that society so


61. For a recent example cp. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 9, 2010, 125 ENTSCHEIDUNGEN DES BUNDESVERNASSUNGSGERICHTS [BVERFGE] 175 (Ger.) (deciding that the calculation of social welfare granted to the poor, in particular for children, was inadequate, which finally will lead to a modest increase of public spending).


63. The living instrument approach is disputed in particular among United States lawyers. See DAVID A. STRAUSS, THE LIVING CONSTITUTION, 2010 (discussing the case law of the Supreme Court). See generally ROBERT H. BORK, A COUNTRY I Do NOT RECOGNIZE – THE LEGAL ASSAULT ON AMERICAN VALUES (2005) (Explaining the theory of originalism and arguing that a living constitution is not a constitution at all. The Supreme Court, following a political agenda, is the only remaining sacred institution).


65. HERBERT BETHGE, BUNDESVERNASSUNGSGERICHTSGESETZ, [FEDERAL CONSTITUTIONAL COURT ACT], § 31, para. 7, (Theodor Maunz / Bruno Schmidt-Bleibtreu / Franz Klein / Herbert Bethge eds. 2010).
that it does not become a moot and dead document. One peculiarity of a constitution is its fixed and enduring structure, which puts a high burden on amendments to protect it against short term trends. Interpreting it as a living instrument provides a balance between the difficulties and limits of constitutional amendments on the one hand, and current demands to which the constitution should respond on the other. Accordingly, the FCC deduced, some argue invented, new basic rights like the right to privacy and data protection (Recht auf informationelle Selbstbestimmung) and the protection of IT-systems (Schutz informationstechnischer Systeme). Like presumably any constitutional court, the FCC has never been merely la bouche qui prononce les paroles de la loi or an être inanimé as, indeed, the concretion of a constitution often has a huge political impact and contains a moment of creation. Recent decisions of the FCC, e.g. on the incompatibility of a law allowing the shooting down of an aircraft captured by terrorists with human dignity of the other passengers and the calculation of social welfare being unconstitutional, have provoked no lesser public and scientific debate than the decisions on abortion or on civil partnership for same sex couples did in the past.

Accordingly, and as the line between interpreting the constitution and making a political decision is sometimes hard to draw,

68. CHARLES-LOUIS MONTESQUIEU, OEUVRES COMPLETES, TOME I: ESPRIT DES LOIS, 257 et seq., 1820.
71. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 9, 2010, 125 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFG] 175 (222 et seq.) (Ger.).
74. Leibholz, a former judge and expert in constitutional law, convincingly argued that there is a political question behind any constitutional dispute and stated that constitutional
the FCC is occasionally blamed for being too political. Especially with regard to its competence of declaring an act of parliament to be null and void, this criticism has to be taken seriously. Indeed, the court benefits from constructive criticism, as any open society and pluralistic democracy does. However, when addressing that criticism, one has to bear in mind that there is no "political questions doctrine" in Germany that allows the court to refrain from deciding a case due to its political meaning. Even though, the FCC is not competent to decide merely political disputes, it has to decide legal disputes of a political nature that often occur when it comes to constitutional law. Correspondingly, judicial restraint in a narrow sense would not be allowed under German law. Once the jurisdiction of the FCC is established and a constitutional action is admissible, the court has to render a decision (Entscheidungspflicht). If there is a legal norm serving as a benchmark for the decision of the case, the political nature and law means political law in the sense that politics becomes the object of legal codification, see Gerhard Leibholz, Der Status des Bundesverfassungsgerichts, 6 JbR 111, 120 et seq. (1957).


76. Josef Isensee, Bundesverfassungsgericht – quo vadis?, 51 Juristenzeitung 1085 et seq. (1996), holds that the FCC needs criticism and can bear it. On the limits of criticism see Andreas Volkuhle, Der Grundsatz der Verfassungsorganetreue und die Kritik am Bundesverfassungsgericht, 50 NJW 2216 (1997).

77. GERD MORGENTHALER, GRUNDGESETZ, Art. 93, para. 4, (Volker Epping / Christian Hillgruber eds. 2010).

78. Gerhard Leibholz, Der Status des Bundesverfassungsgerichts, Bericht des Berichterstatters und das Plenum des Bundesverfassungsgerichts zur „Status“frage, 29.03.1952, 6 JbR 121, 125 (1957).

79. JOSEF ISENSEE, HANDBUCH DES STAATSRECHTS VII, § 162, para. 85, (Josef Isensee / Paul Kirchhoff eds. 1992). The call for restraint, e.g. by Rolf Lamprecht, Vom Untertan zum Bürger – Wie das Bonner Grundgesetz an seinem Karlsruher Über-Ich gewachsen ist, 62 NJW 1454 et seq. (2009), is likely to have a different meaning, i.e. an appeal to remain within the competencies granted.

80. HERBERT BETHGE, BUNDESVERFASSUNGSGERICHTSGESETZ [FEDERAL CONSTITUTIONAL COURT ACT], § 31, para. 15, (Theodor Maunz / Bruno Schmidt-Bleibtreu / Franz Klein / Herbert Bethge eds., 2010), which was cited by the FCC in Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 2009, 122 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 304 (207) (Ger.) (stating that the Bundestag does not have a duty to examine the constitutionality of an election because it does not have the competence of annulment. As the FCC enjoys this competence, it has such a duty).
impact of a question does not relieve the FCC from the duty to decide. That duty to offer judicial protection is the corollary of the task of defending the constitution and the right to review. Thus, the FCC is not entitled to restrain itself as to the question of whether to exercise jurisdiction. In line with this argumentation, the FCC explained that judicial restraint, a principle it once claimed to adhere to, does not affect its obligation to enforce the constitutional order, but only contains the duty to refrain from making politics. This confirms that the FCC is not entitled to judicial activism and demonstrates the attempt of the FCC to confine itself to judicial review rather than becoming a substitute legislator. For instance, the court respects the prerogative of the Federal Government concerning foreign affairs and the discretion enjoyed by the legislative branch deciding fundamental questions for the society. However, in Germany that does not appear as a question of jurisdiction, but as a question of control density. So even if the FCC decides that a law is unconstitutional, it often refrains from prescribing a concrete solution. It refers such questions back to the political discretion of the lawmaker while disclosing the constitutional restraints for further action. Yet, as there might be a tendency of politicians to shift more and more decisions, especially the tough ones, to "Karlsruhe," not becoming a substitute lawmaker will be a challenge for the FCC even in the future. Yet and without doubt, as the FCC is not elected by the public and, thus, not dependent on voters and popular favor, its

83. CHRISTIAN HILGEBURT / CHRISTOPH GOOS, VERFASSUNGSPROZESSRECHT 47 (2d ed., 2006).
84. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 7, 2008, 121 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 135 (Ger.).
86. Rolf Lamprecht, Vom Untertan zum Bürger - Wie das Bonner Grundgesetz an seinem Karlsruher "Über-Ich" gewachsen ist, 62 NJW 1454-56 (2009). Lambrecht states that misuse of the FCC is a "policy with a different means"
88. The second decision on abortion, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 81 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 203 (Ger.), may serve as a counter-example, reminding one more of a statute than of a judgment.
voice is indispensable in a chorus of freedom, responsibility, the rule of law and human rights.

In the end, and as former Federal President and Chief Justice Roman Herzog put into words, the full story is less a story of willful intervention of the FCC in the political sphere, but its involvement by citizens who file a constitutional complaint. The relevance of the FCC and subsequent intervention can therefore be regarded as the corollary of this individual remedy's success. The possibility of using the individual and his/her personal interest as a tool to ensure constitutionality is allowed by the constitution and not an arrogation of competencies by the court. The overwhelming acceptance of the FCC is of utmost importance for Germany's success as a democratic society dedicated to the rule of law. The FCC has no means to enforce its judgments and decisions; accordingly, its acceptance by the people as the constitution's ultimate defenders guarantees that no government will ignore them.

The Binding Force and Enforcement of Constitutional Decisions

The lack of enforcement methods, though, does not affect the binding force of the FCC's decisions, which is taken for granted as a non-written principle by the constitution and confirmed by the FCC Act. As a court, the FCC decides and not only recommends. Generally, there is no exemption for FCC decisions that are unlawful, even though scholars discuss a deviation for decisions being an obvious violation of the law. The binding force in a formal

90. This success brought Richard Thoma to argue for an abolishment of constitutional complaint in Richard Thoma, Rechtsgutachten betreffend die Stellung des Bundesverfassungsgerichts, 6 Jör 161, 185 (1957).
91. For the people as the final enforcers of the constitution see Tom Ginsburg / Eric A. Posner, Subconstitutionalism, 62 Stan. L. Rev. 1583, 1589 (2010).
93. Herbert Bethge, Bundesverfassungsgerichtsgesetz, [Federal Constitutional Court Act], § 31, para. 11 (Theodor Maunz / Bruno Schmidt-Bleibtreu / Franz Klein / Herbert Bethge eds. 2010).
sense means that— with an exception for interim measures— those court’s decisions concluding the proceedings cannot be challenged by appeal and therefore become automatically final with their promulgation. Complaints existing on the level of the EU or within the framework of the ECHR do not constitute instruments of appeal against the FCC’s decision. It cannot lead to a repeal and, thus, cannot prevent the FCC’s decision from becoming final (formelle Rechtskraft). In substance (materielle Rechtskraft), the binding force pacifies the dispute by excluding that the same subject-matter of the dispute between the same parties within the relevant period of time might be brought before another court. Therefore, res judicata prohibits any repetition of the proceedings if and as far as the subject-matter has been decided (objective restriction). Furthermore, a temporal restriction does apply as the binding force lasts and is only effective so long as the legal and factual premises remain the same.

The subjective restriction concerns the scope of organs/persons covered by the principle of binding force. First, and in accordance with general theory, the FCC’s decisions are binding among the parties concerned (inter partes). Any extension to persons not parties depends on an explicit legal regulation. This is true not as a result of the binding force, but because of the principle of mutual loyalty among constitutional organs (Prinzip der Verfassungorganantreue): first, other constitutional organs are obliged to follow the rulings of the court. Second, Section 31 (1) of the FCC Act extends the binding force upon federal and state constitutional or-

94. Cf. Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl. I at 243, § 32 (3) (Ger.).
95. MICHAEL SACHS, VERFASSUNGSPROZESSRECHT, 182 (3d ed. 2010) (non-appellability is known as formelle Rechtskraft).
97. For further reading, see MICHAEL SACHS, VERFASSUNGSPROZESSRECHT, 182 et seq. (3d ed. 2010).
98. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 22, 2001, 104 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFG] 151 (196) (Ger.). For more detail concerning the controversial questions see HERBERT BETHGE, BUNDESVERFASSUNGSGERICHTSGESETZ, [FEDERAL CONSTITUTIONAL COURT ACT], § 31, para. 42 et seq. (Theodor Maunz / Bruno Schmidt-Bleibtreu / Franz Klein / Herbert Bethge eds., 2010).
gans as well as on all courts and authorities.\textsuperscript{101} This constitutes a subjective extension of the binding force to all branches of public authority, necessary to cover those who have not been part of the proceedings.\textsuperscript{102} The norm remains somewhat controversial in its details,\textsuperscript{103} which will not be discussed here. However, the FCC itself is not covered by Section 31 of the FCC Act, but only bound by its own decision within a concrete proceeding.\textsuperscript{104} Thus, it may deviate in future proceedings deciding a comparable but different question in the opposite.\textsuperscript{105} In contrast, the lawmaker is bound. Yet, it is disputed whether the legislator is hindered from enacting a law that is the same as the law that has been declared unconstitutional.\textsuperscript{106} A question without practical relevance, as the threat of a defeat in future times, should the case make it to the FCC, will trigger the lawmaker to follow the ruling of the FCC. Third, Section 31 (2) of the FCC Act grants the force of law to decisions on the constitutionality of legal norms – a case \textit{sui generis} only for the FCC that underlines the utmost importance of the court.\textsuperscript{107} Should the FCC declare a legal norm to be null and void, the impact of that decision is extended to the general public \textit{(inter et erga omnes)}, including private persons among themselves and in their relation to the state.\textsuperscript{108} To avoid a petrifaction of the constitution, many scholars restrict the binding force to the operative provision of the decision, whereas the FCC stresses that also the main sup-

\begin{thebibliography}{99}
\bibitem{101} Gesetz übers das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBL I at 243, § 31 (1) (Ger).
\bibitem{102} \textsc{Herbert Bethge}, \textit{Bundesverfassungsgesetz} [Federal Constitutional Court Act], § 31, para. 122 et seq. (Theodor Maunz / Bruno Schmidt-Bleibtreu / Franz Klein / Herbert Bethge eds., 2010).
\bibitem{103} \textsc{Herbert Bethge}, \textit{Bundesverfassungsgesetz} [Federal Constitutional Court Act], § 31, para. 75 et seq. (Theodor Maunz / Bruno Schmidt-Bleibtreu / Franz Klein / Herbert Bethge eds., 2010); Hanno Kube, \textit{Die Bindungswirkung der Normverwerfung – Zur Stellung der Parlamente im Verfassungsstaat}, 55 DÖV 737 (2002).
\bibitem{104} Herbert Bethge, \textit{Die Rechtskraft im Verfassungsprozessrecht}, 77, 81 et seq. (Christian Heinrich ed., Festschrift für Musielak, 2004).
\bibitem{105} Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Aug. 11, 1954, 4 \textit{Entscheidungen des Bundesverfassungsgerichts [BVerfGE]} 31 (38); \textsc{Herbert Bethge}, \textit{Bundesverfassungsgesetz} [Federal Constitutional Court Act], § 31, para. 35. (Theodor Maunz / Bruno Schmidt-Bleibtreu / Franz Klein / Herbert Bethge eds., 2010).
\bibitem{106} \textsc{Herbert Bethge}, \textit{Bundesverfassungsgesetz} [Federal Constitutional Court Act], § 31, para. 71 (Theodor Maunz / Bruno Schmidt-Bleibtreu / Franz Klein / Herbert Bethge eds. 2010).
\bibitem{107} Gesetz übers das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBL I at 243, § 31 (2) (Ger.).
\bibitem{108} Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 21, 1997, 97 \textit{Entscheidungen des Bundesverfassungsgerichts [BVerfGE]} 117 (122) (Ger.).
\end{thebibliography}
porting reasons (ratio decidendi) of the judgment entail binding force enhanced by Section 31 of the FCC Act. Obiter dicta are – de jure – not covered by the binding force but certainly have a huge factual impact.

Finally, Section 35 of the FCC Act entitles the FCC to decide about the enforcement of its decision, including the decision concerning the competent authority and the concrete manner. The broad interpretation of this clause by the FCC has provoked some criticism as the court regards itself as competent to prescribe legal effects similar to statutory law. Again, the warning not to become a substitute lawmaker has to be repeated when it comes to the interpretation and application of that clause.

III. CONSTITUTIONAL LITIGATION IN GERMANY

"Constitutional jurisdiction constitutes a structural principle of the German state under the Basic Law"

What worth is a right that cannot be enforced? On the international level, the tendency towards individual complaint procedures confirms the paramount meaning of procedural measures for an adequate protection of human rights. The same holds true for the protection of competencies granted to state organs. Obviously, constitutional litigation is the counterpart of constitutional guarantees and an essential element of constitutionalism itself. In Germany, constitutional jurisdiction (Verfassungsgerichtbarkeit) constitutes a structural principle of the state under the Basic Law.


110. Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl I at 243, § 35 (Ger.).

111. HERBERT BETHEGE, BUNDESVERFASSUNGSGERICHTSGESETZ, [FEDERAL CONSTITUTIONAL COURT ACT], § 31, para. 2 et seq. (Theodor Mauz / Bruno Schmidt-Bleibtreu / Franz Klein / Herbert Bethge eds. 2010).


114. The most far-reaching procedure is most likely Art. 34 of the ECHR, which is further discussed in Section IV(C) below. Furthermore, there is a recent and strong movement towards the establishment of an individual complaint procedure as Third Optional Protocol to the Convention on the Rights of the Child.
Duquesne Law Review

A. Introduction and General Principles of Constitutional Litigation

"Constitutional jurisdiction forms the crown of the system of legal protection"¹¹⁵

In Germany, constitutional litigation is open to individuals and private associations, as well as to the Bundesländer, the federal state represented by the Federal Government, state organs, branches of government, municipalities, members of parliament and political parties. Germany has made a decision to follow the model of separation (Trennungsmodell), i.e. establishing constitutional jurisdiction distinct from ordinary courts and putting it in the hands of the FCC (on the federal level). This model has emerged as a huge success. The procedure of individual constitutional complaint forms the vast majority of all constitutional remedies with a total number of 6,508 initiated proceedings in 2009. Even though only about 2% of the complaints filed are successful, the mere number shows that the personal interest of individuals is an adequate tool to bring constitutional questions before the FCC. Besides the request for interim measures (not addressed in this article), the procedure of concrete judicial review, initiated by ordinary courts, is of factual importance (forty-seven initiated proceedings in 2009). Other constitutional remedies do not play a major role, based on their total numbers, but occasionally lead to some important decisions. Furthermore, the other constitutional remedies are still important for understanding the theoretical underpinnings of the constitution and will therefore be briefly addressed here as well.

As an introduction to constitutional litigation in Germany, this article must focus on the most important remedies, and as such, confines itself to constitutional litigation under the federal constitution with regard to federal law. At the outset, some general principles regulating constitutional litigation before the FCC and demonstrating that it is a real court in the narrow sense¹¹⁶ shall be addressed.

¹¹⁶ The principles to address are very much similar to the general characteristics of judicial powers already named by Alexis de Tocqueville. Alexis de Tocqueville, Democracy in America 43 (Henry Reeve trans., 1998).
First, jurisdiction of the FCC is ruled by the enumeration principle and the absence of the court’s right of initiative. As no blanket clause exists in German law, the FCC depends on a concrete title to justify it exercising jurisdiction. Those titles can be found in Article 93 of the Basic Law in conjunction with Section 13 and further of the FCC Act. Since the competence to render advisory opinions (formerly under Section 97 of the FCC Act) has been abolished in the 1950’s, the FCC is no longer able to respond to abstract and hypothetical questions, but instead has to decide concrete cases on the basis of constitutional law. Accordingly, applications asking for an opinion on a hypothetical question would be inadmissible. The FCC’s status as “defender of the constitution” is a result of competencies, but not a justification for usurping competencies not conferred upon the court.

Second, every remedy the FCC Act allows depends on an application. Even though constitutional litigation also promotes the general interest that society has in the constitution being respected, the FCC is not enabled to render a decision without an applicant. This general principle in German procedural law (i.e. no judge without an applicant) also applies to constitutional litigation and conveys the assumption that a personal or institutional interest in defending rights and competencies is a solid basis for enforcing the constitution as a whole. However, the withdrawal of an application does not hinder the FCC from continuing the proceeding and taking a decision in case of a prevailing public interest. As a general rule, Section 23 of the FCC Act stipulates

117. MICHAEL SACHS, VERFASSUNGSPROZESSRECHT, 3 (3d ed. 2010).
118. STEFAN MÜCKL, RECHTSSCHUTZ IM ÖFFENTLICHEN RECHT 375, para. 42, (Dirk Ehlers / Friedrich Schoch, 2009).
119. HERBERT BETHGE, Bundesverfassungsgerichtsgesetz, [FEDERAL CONSTITUTIONAL COURT ACT], § 1, para. 53 (Theodor Maunz / Bruno Schmidt-Bleibtreu / Franz Klein / Herbert Bethge eds. 2010).
that the application shall be in written form and signed by the applicant; the assertions have to be substantiated, coherent and justified; and evidence has to be named and specified. The application may be filed by telegram or fax, whereas an e-mail does not meet the requirement of a written application.

Third, to file a constitutional remedy requires legal standing (locus standi). The applicant has to show a legal interest in the outcome of the proceedings which is given if the individual or the organ defends his/her own rights or its respective competencies. Generally, German law does not provide for popular action. That principle applies to constitutional law as well, though some constitutional remedies are open to a minority within a state organ enforcing the right of the entire organ (e.g. the political minority in the Bundestag). However, in case of constitutional litigation, there are some procedures serving an objective and general interest. Thus, even though the number of potential applicants is restricted, an interest of their own is not always required.

Fourth, this legal interest must last until the end of the proceeding. In case of the demise of the applicant, as well as an alteration of facts or the law, the remedy might become moot and thus inadmissible. However, the FCC has minimized the effects of the requirement of a continuing interest (and thereby enlarged its jurisdiction) by regarding itself competent to decide a case irrespective of a continuing interest of the applicant if there is an objective interest in clarifying a constitutional question.
B. Dispute between State Organs

Rationale

In a system of checks and balances where various branches of government have different competencies and are expected to work together in a system of mutual respect and control, the constitution has to provide a mechanism for the peaceful and law-based settlement of disputes. The FCC is a cornerstone of that system in Germany and the Organstreit (dispute between state organs) illustrates a German constitutional tradition that can hardly be found elsewhere. Within that contradictory proceeding, the court is asked to decide disputes between state organs about their respective competencies under the Basic Law. Thereby, conflicts among constitutional organs should be resolved by the means of law. The FCC, as an impartial and independent court, is regarded to be neutral enough to take on tasks such as telling other constitutional organs what their competencies are. Furthermore, that proceeding serves the interest of minorities as they can enforce their rights and even the rights of an organ dominated by the opposing political party (in particular the Bundestag).

Admissibility

Under Article 93 (1), no. 1 of the Basic Law, parties can be supreme federal bodies and other parties vested with rights of their own by the Basic Law or by the rules of procedure of a supreme federal body. Accordingly, the Federal President, Bundestag and Bundesrat, as well as the Federal Government, can be party to the dispute proceeding. Furthermore, minorities might file a representative action before the FCC for the organ they are part of. So, the fraction in parliament (parliamentary group) can file a remedy to defend their minority rights, as well as the right of the

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130. BASIC LAW Art. 93(1), no. 1; Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl I at 243, § 13, no. 5, 63-67 (Ger.). See generally CHRISTIAN HILGEBER / CHRISTOPH GOOS, VERFASSUNGSPROZESSRECHT, [CONSTITUTIONAL LITIGATION], 20-152 (2d ed. 2006).
131. KLAUS SCHLAICH , DAS Bundesverfassungsgericht 52 et seq. (8th ed. 2010).
133. BASIC LAW Art. 93(1), no. 1.
134. Compare Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl I at 243, § 63 (Ger.).
organ itself. This further serves the objective interest in the parliament fulfilling the duty to control the government – a government that might be protected and shielded by the supporting majority in the Bundestag. Under certain and controversial circumstances, even single members of parliament and political parties can be a party to defend their constitutional rights and status, even though single members of the parliament are not entitled to enforce the rights of the Bundestag as a whole. Even though Section 63 of the FCC Act does not enumerate members of parliament and political parties, they were read into the constitution as “other parties” in the sense of Article 93 (1), no. 1 of the Basic Law. This interpretation, not being undisputed, underlines in particular the importance of political parties for the political process and their status as comparable to constitutional organs. Furthermore, it strengthens the role of the members of parliament and, because they are elected by the German people, of democracy. As the constitution trumps the FCC Act, the latter’s narrow interpretation of potential applicants and respondents cannot be exhaustive. However, if the remedy does not concern the political and constitutional status, i.e. if the member in parliament or the party act in a private capacity, not affected as part


140. But see Klaus Schlaich, Das Bundesverfassungsgericht 58 (8th ed. 2010).

141. BASIC LAW Art. 21.

of constitutional life, they have to resort to constitutional complaint.\textsuperscript{143}

Article 93 (1), no. 1 of the Basic Law contains the expression “supreme federal body,” accordingly besides the just mentioned exemptions, any further organs can be a party if they are located on the federal level and if they are not subordinated to any other organ.\textsuperscript{144} For instance, the Federal Assembly (non-permanent constitutional body to elect the Federal President) and the Mediation Committee (a body for reconciliation between Bundestag and Bundesrat in legislative procedures) can be parties. However, the German people (Deutsches Volk) does not belong to the highest federal organs.\textsuperscript{145} Even though the ultimate sovereignty rests with the people, it lacks the necessary degree of organization to be called an organ.

Subject matter of the proceeding is a measure, action or omission of the respondent that impacts on the legal sphere of the applicant. To file an admissible claim the applicant has to prove legal standing, \textit{i.e.} he/she has to assert that this action or omission has harmed or directly endangered him/her or the organ of which he/she is a member in the rights and duties granted to him/her or to the organ by the Basic Law or the rules of procedure of the Bundestag or Bundesrat. As a question of admissibility, the applicant only has to persuade the court of the possibility of a breach of constitutional obligations and a suffered harm.\textsuperscript{146} This requirement is evidence of the contradictory character of the Organstreit meaning that this procedure is less an objective action than a remedy to enforce rights and competencies. The action or omission – presuming it actually occurred – ought to be material and to

\textsuperscript{143} Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Jun. 29, 1983, 64 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 301 (313); Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Jul. 20, 1954, 4 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 27 (31); Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] May 30, 1962, 14 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 121 (129) (if members of parliament or political parties are not affected in their constitutional status, they may file a constitutional complaint).

\textsuperscript{144} BASIc LAW Art. 93(1), no. 1. For a comprehensive review see Klaus Schlaich, Das Bundesverfassungsgericht 55 (8th ed. 2010).


have a real impact on the applicant. The interpretation of a norm as to whether it actually provides for a competence of the applicant can already be addressed at this stage of the proceeding. Should it be obvious that a right or competence of the applicant does not exist, the remedy is already inadmissible. As an example, a member of parliament might invoke the right of a free mandate, but he/she is not entitled, in that respect, to rely on basic rights (e.g. the right to freedom of speech under Article 5 (1) of the Basic Law if his/her speech in parliament is interrupted), as those rights are granted only to individuals not acting in a public function.

The application has to be filed within six months after the act in question occurred or should have been done in case of an omission. Generally, a legal interest in the decision has to persist until the end of the proceeding. However, the FCC has developed some exemptions to this general rule as explained above. The court renders a declaratory judgment whether the act or omission of the opposing party infringes a provision of the Basic Law. Exceeding the wording of Section 67 of the FCC Act and stressing the contradictory character of the Organstreit, the court has occasionally even declared that the applicant has been infringed in its rights. The decision has inter partes-effect but does not have the force of law in the sense of Section 31 (2) of the FCC Act. The parties are obliged to follow the judgment, which is not enforceable eo ipso though. Yet, the Basic Law expects the constitutional organs to voluntarily follow the rulings of the FCC without further enforcement measures. This includes, if necessary, the amendment and alteration of an unconstitutional law as the FCC in the Organstreit-procedure may not annul a law itself.

Relevance

The state organ dispute proceeding has a limited relevance in practical terms, which is confirmed by plain numbers: only two initiated proceeding in 2009. It is of some importance for political parties to enforce their rights as quasi-constitutional bodies or for

147. BASIC LAW Art. 38(1).
148. Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl. I at 243, § 64 (3) (Ger).
149. See infra Part III(A).
the political minority in the parliament to safeguard the rights of the minority or the entire Bundestag against the political majority. When it comes to legislation, this remedy might theoretically be used against statutory law arguing the parliament has violated a constitutional right by adopting the law. With regard to the limited effects of the decision, as mentioned above, the review procedures are much more important, as in those proceedings the FCC not only declares that a violation has occurred, but can also declare a law to be null and void with its decision having the force of law.\footnote{See infra Part III(D)(4).}

**C. Federal Disputes\footnote{BASIC LAW Art. 93(1) no. 3, Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl I at 243, §§: 13 no. 7; 68-70 (Ger.). See KLAUS SCHLAICH, DAS BUNDESVERFASSUNGSGERICHT, 67 – 75 (8th ed., 2010); MICHAEL SACHS, VERFASSUNGSPROZESSRECHT 103 et seq. (3d ed. 2010).}**

**Rationale**

In a federal state, disputes may not only occur between constitutional organs but also on a vertical level between the federal branch and the states. Similar to any federal entity, the federal constitution has the final say about the relation and competencies between the federal and the state level. It contains the decisive rules and, in Germany, is characterized by the enumeration principle, stating that the federal level depends on powers conferred by the constitution before it can take action.\footnote{See supra Part II(A).} Correspondingly, the Basic Law offers the Bund-Länder-Streit (dispute between the federal state and the states procedure) as a remedy to solve conflicts between the different levels within the German state by the means of law and on basis of the constitution itself. Similar to the Organstreit, the FCC is regarded as an independent and impartial watchdog to decide the delicate topics that might be affected by federal dispute.

**Admissibility**

An application can be filed by the Federal or a Land Government only, representing the federal state or the respective Bundesland.\footnote{Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl I at 243, § 68 (Ger.); MICHAEL SACHS, VERFASSUNGSPROZESSRECHT 103 et seq. (3d ed. 2010).} The application has to assert and substantiate the
possibility of a violation of the applicant's rights and competencies deriving from the Basic Law.\textsuperscript{156} If the enforcement of federal law by the states is concerned, there is a preliminary proceeding that must take place in the Federal Council before a proceeding can be brought before the FCC.\textsuperscript{157} The Federal Government or a state can ask the Bundesrat to decide if there have been deficiencies in the execution of federal laws. After that, the decision of the Bundesrat can be appealed to the FCC, who will render a final decision about the adequacy of the enforcement of federal law by the state concerned. The FCC decides the case by declaratory judgment.\textsuperscript{158}

\textit{Relevance}

The practical meaning of the federal dispute procedure is somewhat limited. Most conflicts deal with legislation and the question of competency to legislate. In that case, the procedures of judicial review, discussed below, are more important as the competency of the FCC is much broader.

D. The Judicial Review Proceedings\textsuperscript{159}

"So if a law be in opposition to the constitution ... the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply."\textsuperscript{160}

1. Introduction

The judicial review proceedings, inspired by the United States Constitution and the competencies of the United States Supreme Court, enable the FCC to decide about the compatibility of a legal norm with the German Constitution. Thereby, these constitution-

\textsuperscript{156} Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBL I at 243, §§ 64, 69 (Ger.).
\textsuperscript{157} Basic Law Art. 84(4), Sentence 1.
\textsuperscript{158} Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBL I at 243, §§ 64, 69 (Ger.).
\textsuperscript{159} See Klaus Schlaich, Das Bundesverfassungsgericht 77 – 127 (8th ed. 2010).
\textsuperscript{160} Marbury v. Madison, 5 U.S. 137 at 178 (1803).
al actions guarantee not only a peaceful solution of disputes but also foster legal certainty and obedience to the law.

German law knows two types of remedies for legal review. First is concrete judicial review, which is open to courts only and driven by the need to decide a concrete question in conformity with the constitution. Second is abstract judicial review, which enables the examination of a law irrespective of whether a concrete case has to be decided. Even though the effects of the decision are the same, the prerequisites vary significantly what justifies a separate discussion of concrete judicial review and abstract judicial review.

2. Concrete Judicial Review

Rationale

Every branch of government is bound by the constitution. Accordingly, the courts cannot be expected to apply ordinary law they consider to be unconstitutional. Yet, whereas the courts are entitled to interpret the constitution and to ask whether ordinary law is in conformity with it, they are not competent to take the consequences if the answer is in the negative. Instead, the courts have to refer the question to the FCC for a final answer. Hence, the proceeding of concrete judicial review can be seen as a compromise between all courts being bound by the constitution and the FCC having the final say on constitutional interpretation. This serves the paramount interest in safeguarding the primacy of the constitution and preventing its violation. Furthermore, the monopoly of the FCC to decide averts the risk of a fragmentation in the application of ordinary law and ensures respect for the legislative branch, which finally guarantees legal certainty.

161. See infra Part III(D)(4).
162. See infra Part III(D)(2).
163. See infra Part III(D)(3).
164. BASIC LAW Art. 93(1), no. 5; BASIC LAW Art. 100(1); Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl I at 243, § 13, no. 11m 80-82 (Ger.). See MICHAEL SACHS, VERFASSUNGSPROZESSRECHT 59 – 76 (3d ed. 2010).
165. BASIC LAW Art. 1(3).
166. For a discussion by the FCC itself, see Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Mar. 20, 1952, 1 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFG] 184 (195 et seq.).
Admissibility

Every court that concludes that a law on whose validity its decision depends violates the Basic Law may stay the proceedings and refer that question to the FCC. The term “court” includes every public legal entity that is established by the law to decide a dispute by the means of law in an impartial and independent manner. Private arbitral courts and courts of religious communities exercising their right to self-government are not entitled to ask for a decision of the FCC, neither may administrative bodies.

The object of the proceedings is a statutory norm that has been generated in the legislative procedure provided for by the constitution (formelles Gesetz is known as the law in a formal sense) and after the Basic Law entered into force (nachkonstitutionelles Gesetz). On the federal level this means a law that has been adopted by the Bundestag. Even laws that amend the constitution and have been adopted with a two-thirds majority by the parliament and the Bundesrat, thus having a constitutional character themselves, can be reviewed by the FCC. The court, thereby, accepts the idea of “unconstitutional” constitutional law. The restriction to laws in the formal sense is not indicated by the wording of Article 100 (1) of the Basic Law, but follows from the constitutionally deduced interest in respecting the parliament and its decisions. Law below the status of an act of parliament, such as an administrative (delegated) law, may be dismissed by any court. Whether the FCC has the authority to review law emanating from the EU is controversial and will be discussed later.

The benchmark for the review of federal law is the Basic Law. The referring court must be convinced that the statute in question violates the constitution – doubts do not suffice. If the court considers itself able to interpret a norm in conformity with the consti-
tion (*verfassungskonforme Auslegung*), the conviction requirement is not met.

However, should an ordinary court finally come to the conclusion that a norm is unconstitutional; it is under the duty to refer the question to the FCC if its decision in a concrete case *actually* depends on the decision of the FCC about the constitutionality of the norm to be applied. This requisite has two conditions. First, the decision has to be a decision of a court exercising functions of adjudication and finalizing the proceeding in question. Second, the decision has to depend on the answer of the FCC about the compatibility of the norm with the Basic Law. This is only the case, if the outcome of the proceeding would be different in legal and practical terms, if the norm in question is declared invalid by the FCC. Even though the opinion of the referring court is determinative, the FCC might examine whether it is tenable. Accordingly, within constitutional litigation, the taking of evidence might become necessary. Should a national court consider a law to be incompatible with the Basic Law and EU law, it is within the discretion of the court to determine if it should refer the question to the ECJ in accordance with Article 267 of the Treaty on the Functioning of the EU (TFEU) or to refer such issue to the FCC. This discretion is not only accepted by EU law; in order to ensure the primacy of EU law, the ECJ stresses that a court cannot be deprived from its competence “to refer to the Court of Justice for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory procedure for the review of constitutionality.” Accordingly, and to safeguard the effectiveness of EU law as well as the right of every court under Article 267 of the TFEU, the law of EU member states may not compel national courts to give priority to the decision of national constitutional courts about the compatibility of a norm with their respective constitution.

A pending proceeding concerning the norm in question before the FCC does not make an application inadmissible. Should the FCC have dismissed the norm already, though, the reference is

173. *BASIC LAW* Art. 100; Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl I at 243, § 80(1) (Ger.).

174. Compare Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl I at 243, § 80(2) (Ger.).


176. Joined Cases C-188/10 & C-189/10, Melki and Abdeli, 2010 ECR I-0000.
inadmissible as the decision of the case cannot depend on the norm. If the FCC has confirmed the compatibility of a norm with the constitution – and there is a presumption for the conformity of an act of parliament with the Basic Law – the final effect of the judgment is opposed to a new referral. Among other exemptions, a new reference is admissible if the legal or factual foundations of the judgment have changed. In any case, the requirements established by the FCC to substantiate and justify the reference are high: the court has to analyze the jurisprudence and literature exhaustively and discuss the validity of the norm in question on that basis. Concerns and objections raised have to be discussed from all different angles.

Relevance

The proceeding of concrete legal review is, just after constitutional complaint, the most important constitutional remedy in total numbers and guarantees that all branches of government in Germany are effectively dedicated to the rule of law. However, due to the high requirements of justification and substantiation, most references fail. To address the huge amount of references, the inadmissibility can, in some cases, be declared by an unanimous decision of a chamber, thereby reducing the work amount for the senates and accelerating the duration of the proceeding.

3. Abstract Judicial Review

Rationale

Germany is dedicated to the rule of law. As an emanation of that, the German constitution enjoys supremacy over ordinary federal and all land law. Whereas in the proceeding of concrete judicial review the decision of a court depends on the constitution-

177. See infra Part III(D)(4) (for the effect of § 31(2) of the FCC Act).
179. MICHAEL SACHS, VERFASSUNGSPROZESSRECHT, 71 et seq. (3d ed. 2010).
181. Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl. I at 243, § 81a (Ger.).
182. BASIC LAW Art. 93(1), no. 2; Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl. I at 243, § 13, no. 6, 76-79 (Ger.); See MICHAEL SACHS, VERFASSUNGSPROZESSRECHT 37 – 53 (3d ed. 2010).
ality of a norm, abstract judicial review enables the FCC to rule on
the conformity of ordinary law with the Basic Law, even though
an actual and concrete dispute is lacking and no applicant is di-
rectly affected by the potential violation of the Basic Law. This is
evidence of the objective interest in avoiding any breach of the
constitution and thereby guaranteeing the integrity of the consti-
tutional legal order in Germany. Accordingly, no individual inter-
est or right has to be invoked to challenge the law. The procedure
of abstract judicial review is of interest in particular for the politi-
cal minority in the Bundestag. It can challenge an unwanted act of
parliament adopted by the majority by calling it unconstitutional.

Admissibility

An application can be filed by the Federal Government, a Land
Government, and a quarter of the members of the Bundestag.\(^{183}\)
The quorum of the necessary amount of Bundestag members has
been lowered from one-third to a quarter in order to increase par-
liamentary involvement in issues concerning European Integra-
tion.\(^ {184}\) Even though the proceeding serves the interest of consti-
tutional integrity, the number of applicants is restricted to federal
or land constitutional organs in order to prevent the legislature
from being permanently under attack, which would exhaust the
capacities of the FCC.

Justifications for the application can be disagreements or doubts
concerning the formal or substantive compatibility of federal or
land law with the Basic Law. Concretizing those requirements,
Section 76 of the FCC Act demands, first that the applicant re-
gards the norm in question to be null and void or, second, that the
applicant regards it to be valid if a federal or land organ has re-
jected to apply it, presuming it to be unconstitutional. This
amounts to a quite reluctant understanding of Article 93 (1), no. 2
of the Basic Law, as that constitutional provision declares mere
"doubts" to be sufficient for an application. However, in case of
conflict, the constitution trumps ordinary law so that even doubts
would be sufficient as long as the question for review is not hypo-
thetical.

In contrast to the concrete review proceeding, the object of ab-
stract review can be any federal or land law ranging from federal

\(^{183}\) Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Consti-
tutional Court], Mar. 12, 1951, BGBl. I at 243, § 76(1) (Ger.).
\(^{184}\) Bundestags-Drucksache (printed paper of the Bundestag), no. 16/8488, 2.
constitutional law to even administrative (delegated) law at the land or municipal level. There is no restriction to law in a formal sense, i.e. acts of parliament. The intention of abstract judicial review is to comprehensively guarantee a constitutional status in Germany. According to the jurisprudence of the FCC, even the constitutional legislature – which is a two-thirds majority in parliament and the Federal Council – is bound by the constitution and the court itself competent to review constitutional amendments. Bearing in mind that Article 79 (3) of the Basic Law contains some “eternal” constitutional principles, protected even from constitutional amendments, the claim for jurisdiction by the court is at least open to vindication. Admittedly, the strong hurdles of a two-thirds majority might be a safeguard against the constitution being amended too easily, but that procedural protection clause cannot ensure that the fundamental underpinnings might not be affected. As the Basic Law entrusts the FCC with the task of being the constitutional defender, the assumption that the constitutional status quo is protected by that task can be justified. Even though this would lead to a severe restriction of the democratic principle – after all, two-thirds of the democratically legitimized representatives support the amendment – this principle is counterbalanced by the rule of law being an essential element of constitutionalism as well. Germany’s historic experience has proven that, for the worst case, there shall be an emergency break to protect the constitutional cornerstones from interference. Admittedly, in a situation where a two-thirds majority intends to violate the fundamental norms of the Basic Law, the political circumstances would not spark hope that a ruling of the FCC could prevent an overthrow of the German constitutional state. In cases where the constitutional infringement is less obvious, though, and where the intention of a constitutional breach is lacking, the review competence of the FCC might grant a neutral checkpoint and an offer for trustful cooperation among the constitutional organs.

Only existing law can be reviewed;\textsuperscript{185} there is no preventive abstract judicial review with an important exemption concerning acts sanctioning international treaties;\textsuperscript{186} As Germany would be

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bound by the treaty after it has been ratified by the Federal President and irrespective of the validity of the domestic sanctioning act,\textsuperscript{187} the FCC accepts a constitutional action against that act even before it has become binding. The President, in those cases, stays the ratification to enable the FCC rendering a decision on that question. The FCC has recently stated in its \textit{Lissabon} decision that Germany’s instrument of ratification may not be deposited until the necessary amendments and legal alterations have entered into force.\textsuperscript{188}

According to supremacy, EU law cannot be reviewed under domestic law including constitutional law. Still, there is a dispute between the FCC and the ECJ whether in some exceptional cases, the FCC is entitled to pick up a case and decide if the constitutional foundations of European integration under German law have been violated. This will be addressed more comprehensively later in Section IV(D)(3). Additionally, domestic law to implement EU law is covered by the supremacy of EU law as far as EU law does not leave discretion for the member states.\textsuperscript{189}

The entire Basic Law is the benchmark for review as far as federal law is concerned; land law, however, can be reviewed on the basis of \textit{all} federal law. As, according to Article 25, Sentence 2 of the Basic Law, the general rules of public international law enjoy a status above other federal law, there is much persuasive power in accepting the FCC competency to review on the basis of those rules as well.\textsuperscript{190}

There is no time limit for abstract judicial review but as an unwritten requirement the FCC asks for an objective interest in clarifying (\textit{objektives Klarstellungs interesse}) whether the disputed norm is constitutional.\textsuperscript{191} Such an interest is only lacking if the

\begin{itemize}
  \item \textsuperscript{188} Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Jun. 30, 2009, 123 \textit{Entscheidungen des Bundesverfassungsgerichts [BVerfGE]} 267 (339 et seq.).
  \item \textsuperscript{189} MICHAEL LYSANDER FREMUTH, \textit{DIE EUROPÄISCHE UNION AUF DEM WEG IN DIE SUPRANATIONALITÄT}, 140 et seq., (2010) (as an emanation of the principle of supremacy it might be called “indirect primacy” (indirekter Vorrang)). \textit{See also} Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Mar. 2, 2010, 125 \textit{Entscheidungen des Bundesverfassungsgerichts [BVerfGE]} 260 (306 et seq.) (the indirect primacy of EU law has quite recently been explicitly recognized by the FCC).
  \item \textsuperscript{190} MICHAEL SACHS, \textit{VERFASSUNGSPROZESSRECHT} 44 (3d ed. 2010).
\end{itemize}
norm does not have any further impact.\textsuperscript{192} It is, however, still unclear whether the applicant has to show a personal and individual interest in the clarification of the constitutionality. As the Basic Law itself does not lay down such a requirement, a subjective interest (\textit{subjektives Klarstellungsinteresse}) should not be asked for.\textsuperscript{193}

\textit{Relevance}

Abstract judicial review is an important means of the political opposition to protect the rights and competencies of the \textit{Bundestag}. Critics argue that this might be an incentive to challenge a political defeat by the means of law and the courts. Yet, that assumption is not confirmed by practice: only two proceedings in 2009 were initiated.

4. \textit{The Decision of the FCC in Review Procedures}

\textit{The Content of the Decision – A Tiered Approach}

In cases of concrete judicial review, the FCC only decides on the law, meaning it does not decide the case pending before the referring court.\textsuperscript{194} The nature of the concrete judicial review procedure is therefore an interim procedure – it is the referring court that has to make a decision to conclude the stayed proceeding after the FCC’s decision.

The FCC’s decision can have the same content in both types of review proceedings (abstract and concrete). As a rule established by Section 78, Sentence 1 of the FCC Act, the FCC is asked to declare an unconstitutional law to be null and void. This declaration has \textit{ex tunc}-effect\textsuperscript{195} and can be confined to parts of the norm in

\begin{footnotesize}
194. Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBL I at 243, § 81 (Ger.).
195. \textsc{Herbert Bethge}, \textit{BUNDESVERFASSUNGSGERICHTSGESETZ, [FEDERAL CONSTITUTIONAL COURT ACT]}, § 78, para. 7 (Theodor Maunz / Bruno Schmidt-Bleibtreu / Franz Klein / Herbert Bethge eds., 2010)
\end{footnotesize}
question as well as to a specific interpretation of that law. In the latter case, the FCC itself declares which interpretation of a norm would be in violation of the constitution. However, to declare a norm to be null and void, might even deepen an unconstitutional situation. To avoid this consequence, the court began quite early to define its competency differently. Instead of declaring a norm to be null and void, the court regards itself competent to confine itself to merely declare a norm to be compatible or incompatible with the Basic Law. This competency has meanwhile been confirmed, some argue legalized by Section 31 (2), Sentence 2 of the FCC Act. Declaring a norm to be compatible with the Basic Law allows for legal clarity and helps avoid further conflicts. In some cases, the FCC specifies which interpretation of the law is constitutional so that the confirmation of a norm includes the rejection of the same norm for different forms of interpretation.

Declaring a norm to be incompatible without declaring it null and void enables the further application of the norm to prevent the absence of any legal norm. The rationale behind this is that the absence of a norm could lead to a situation to be even in deeper breach of the constitution. This might be in the case where a norm belonging to criminal law is in breach of the constitution – its invalidation could prevent perpetrators of even severe crimes from being punished. Furthermore, a norm that grants benefits to a group of people, but, in breach of the equality principle, not to another group of people, should not be invalidated. Otherwise, no one would be granted any benefits, as the breach of equality could neither be healed nor settled by denying any benefits in consequence of the annulment. However, one has to bear in mind that the norm is unconstitutional and that keeping such a norm in force raises severe problems in a state dedicated to the rule of law.

198. HERBERT BETHGE, BUNDESVERFASSUNGSGERICHTSGESETZ, [FEDERAL CONSTITUTIONAL COURT ACT], § 78, para. 35, 66 et seq. (Theodor Maunz / Bruno Schmidt-Bleibtreu / Franz Klein / Herbert Bethge eds., 2010).
199. MICHAEL SACHS, VERFASSUNGSPROZESSRECHT 49 (3d ed. 2010).
200. HERBERT BETHGE, BUNDESVERFASSUNGSGERICHTSGESETZ, [FEDERAL CONSTITUTIONAL COURT ACT], § 78, para. 95 et seq. (Theodor Maunz / Bruno Schmidt-Bleibtreu / Franz Klein / Herbert Bethge eds., 2010).
To counterbalance the conflicting interests, i.e. to dispose of an unconstitutional norm while avoiding a situation provoking even more severe constitutional doubts, the FCC may decide under which conditions a norm may be applied for a specific period of time. This authoritative interpretation and delineation is combined with an order for the legislative branch to amend the law in conformity with the constitution as concretized by the court. Interpretation in conformity with the constitution (verfassungskonforme Auslegung) seems to be the solution of the conflict described above. Indeed, deciding about the scope and content of the norm by an authoritative interpretation (having the force of law under Section 31 (2) of the FCC Act) permits the court to intervene in the legislative branch. However, as the legislature is free to amend the law, interpretation instead of invalidation shows more respect for the will of the legislature, even though a decision about the ratio legis might amount to an act of creation rather than interpretation. Finally, the FCC can, respecting the margin of appreciation of the legislature, decide that a norm is currently in conformity with the Basic Law but that, due to remaining doubts, the assumption of the legislature has to be rechecked and proven in a timely manner. In a recent decision, the court overruled a norm after which a father's custody of his child depended on the consent of the mother. It stated that the presumption that a mother would always decide in the best interest of the child was not proven to be adequate.\footnote{201}

\textit{The Decision Having the Force of Law}

All decisions of the FCC shall be binding upon federal and land constitutional organs as well as on all courts and authorities.\footnote{202} Decisions about the validity of legal norms, however, are ordered to have the force of law.\footnote{203} According to this provision, that has been discussed in-depth above, the decision is binding \textit{inter et erga omnes}, which means the force of law extends the binding force to everyone, including private persons. It not only covers the concrete decision and the operative provisions of the judgment, but also its supporting reasoning. The court itself, though, is not bound but free to alter its future jurisdiction.

\footnote{201}{BVerfG, 1 BvR 420/09, 21.07.2010, paras. 59 \emph{et seq.} (referring to new empirical findings).}
\footnote{202}{Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBL I at 243, § 31(1) (Ger.).}
\footnote{203}{Id. at § 31(2).}
The Impact of the FCC's Decision on Final Decisions of other Courts

As a general rule, final decisions based on a norm that has been declared incompatible with the Basic Law or null and void remain unaffected. Nullification may not be asked for, as the interest in legal certainty prevails. Yet, there is no conflict with that interest for future times, so that final decisions shall not be executed. An important exemption is made for final decisions in criminal proceedings as they create a unique burden containing a strong social condemnation. According to Section 79 (1) of the FCC Act, new proceedings may be initiated against convictions based on a norm that has been declared null and void or incompatible with the Basic Law.

E. Constitutional Remedies to Defend the Constitution and the Rule of Law

In German history, several attempts have been made to create a state on a democratic basis dedicating it to the rule of law. Whereas the Paulskirchenverfassung (1849) never entered into force, the Constitution of Weimar (1919) after the First World War constituted the first democratic German state. However, democracy and the rule of law had not been implemented in the mind of the people. As the Constitution of Weimar was a weak constitution – it hardly contained provisions to protect itself against antidemocratic forces and the human rights enshrined were not accompanied by procedural enforcement measures – it did not require huge efforts of the Nationalsozialisten to overthrow it. Though the Constitution of Weimar was not officially abolished, in fact, it was totally undermined and lost any of its meaning after the Nationalsozialisten grasped power in 1933. After the atrocities and the reign of terror under the Third Empire (Drittes Reich), the framers of the Basic Law made the decision in favor of a powerful democratic model able to defend itself against its enemies (wehrhafte Demokratie). The procedures to ban political parties and concerning the forfeiture of basic rights are evidence of the idea of a strong democracy and the interest in defending the rule of law.

204. Id. at § 79(2), Sentence 1.
205. Id. at § 79(2), Sentence 2.
1. **Forfeiture of Basic Rights**

"Whatever is my right as a man, is also the right of another; and it becomes my duty to guarantee, as well as to possess."\(^\text{207}\)

**Rationale**

Basic rights are directed against the state and increasingly against public authority on a supranational level in order to protect the individual from unjustified public interference in his/her individual sphere. From a dogmatic point of view, basic rights are not directed against private persons. However, the mutual respect for your counterpart and his/her basic rights is the very basis of every society. Furthermore, the modern state is less a *Leviathan* but has become a defender of human rights. For that reason, and to protect the state from endeavors intending to abolish it, the misuse of human rights to combat the constitution and the free democratic order has to be fought. The procedure for the forfeiture of human rights offers a means to solve the problem while respecting the rule of law.

**Admissibility and the FCC's Decision**

The forfeiture of basic rights procedure is a contradictory proceeding. Accordingly, after an application has been filed by the parliament, the Federal or a Land Government\(^\text{208}\) enjoys political discretion whether to initiate such a proceeding. The opposing party is given the opportunity to make a statement regarding the accusations.\(^\text{209}\) The procedure can be directed against any person entitled to those basic rights that might be forfeited under Article 18 of the Basic Law, *i.e.* against individuals as well as legal persons. After that preliminary proceeding, the FCC has to decide if the main proceeding is admissible, sufficiently founded or whether it has to be held. Therefore, the court might order a preliminary examination as well as take evidence.\(^\text{210}\) To guarantee an impar-
tial and independent decision avoiding political power games, the FCC is entrusted with the monopoly to decide about the forfeiture.

If the application is founded, the court declares which basic rights (and to what amount and extent) are forfeited. In order to be proportionate, though, that declaration requires a concrete and real threat to the constitutional order. The forfeiture might be limited to a specific period of time, being at least one year. The FCC may further deny the opposing party the right to vote and to be elected as well as the capacity to hold public office. In the case of corporate bodies, the court may direct that they are to be dissolved. This decision forms the legal basis for administrative authorities to take actions against the opposing party. The person concerned is deprived of the protection of those rights for the period of time mentioned in the decision. Measures taken against the individual cannot be reviewed on the basis of the forfeited basic rights. The guarantee of human dignity and other fundamental principles, like the rule of law and the need for an act of parliament for severe restrictions of human rights, must never be violated. A review of the decision can only be asked for if the forfeiture is not limited in time or ordered for more than one year. If the court has already made a decision, a further application has to be based on new facts that emerged after the first decision in order to protect its legal force.

Relevance

The forfeiture of basic rights has not obtained relevance so far as the rare attempts that have been made never led to a decision on the merits. The value of this proceeding seems to be its mere existence as a signal to the enemies of the constitution. Furthermore, it demonstrates that Germany has learnt its lessons from the past and is, actually, willing to protect the constitution against its enemies.

211. Id. at § 41 (1).
212. Id. at § 40.
213. Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl I at 243, § 39 (2) (Ger.).
214. Id. at § 39 (1).
215. Id. at § 40.
216. Id. at § 41.
2. Procedure for Banning Political Parties

"Political parties who use the means of democracy to abolish democracy shall be barred from the political life."

Rationale

As mentioned, political parties enjoy a special status under German constitutional law and they are regarded to be of utmost importance for forming the political will of the people. As a constitutional institution they play a major role in the political life in Germany. However, it is easy to imagine that parties and their privileges may be used to undermine or abolish the free democratic constitutional structure or to endanger the existence of the Federal Republic of Germany. While the forfeiture of basic rights procedure provides for a means directed against individuals combating the free and democratic order, the banning of political parties procedure, which is admissible besides the forfeiture procedure, is intended to challenge the institutional and organized attempt to overthrow the state and its fundamental values. As a response to the weakness of the Constitution of Weimar that had no sufficient defense against the NSDAP (the Nazi party), democracy shall no longer accept that its enemies misuse its freedoms and guarantees.

Yet, an open and liberal state depends on a pluralistic debate and the competition of ideas and beliefs. Therefore, a critical comment about the constitution cannot be sufficient for banning a party. Furthermore, it shall not be the responsibility of other parties or the administrative branches, which are often dominated by the leading political majority, to decide about the prohibition. Ac-

217. BASIC LAW Art. 21(2); Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl I at 243, § 13, no.2 43-47 (Ger.); see also MICHAEL SACHS, VERFASSUNGSPROZESSRECHT 121 - 124 (3d ed. 2010).
cordingly, it is again the neutral FCC that is asked to decide about the banning of political parties.

**Admissibility and Decision**

The proceeding might be initiated by the Bundestag, the Bundesrat or the Federal Government. A Land Government can file an application if the party assumed to be unconstitutional is confined to the territory of that respective state. It is up to those applicants to decide if they want to combat an unconstitutional party by political means or if it shall be prohibited by the FCC. Only political parties can be potential respondents, while other associations (Vereine) can be prohibited by administrative decisions. Due to the higher level of protection, the qualification as political party is important and at the same time controversial. Like in the forfeiture procedure, in a preliminary proceeding, the FCC has to decide if the main proceeding is admissible, sufficiently founded or whether it has to be held. The FCC is entitled to order a seizure as well as preliminary examination. However, if a decision has already been taken, another application has to be based on new facts.

Talking about the merits, the Basic Law neither asks for general acceptance nor does it intend to prevent controversial discussions about constitutional questions. Therefore, parties might criticize, question or even be opposed to the constitution. Only if they combat the constitutional order in an aggressive and militant manner, they can be banned. If the application is founded in such a case, the FCC, requiring a two-thirds majority according to Section 15 (4), Sentence 1 of the FCC Act, declares the party to be unconstitutional. This shall be accompanied by the dissolution of the party and the prohibition to establish substitute organiza-

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223. Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl I at 243, § 43(1) (Ger.).
224. Id. at § 43(2).
226. Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl I at 243, § 45 (Ger.).
227. Id. at §§ 47, 38.
228. Id. at §§ 41, 47.
230. Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl I at 243, § 46(1) (Ger.).
The court can further direct the confiscation of the party's property for the public benefit. According to Section 46 (1), no. 4 and (4) Bundeswahlgesetz (Federal Election Act), members of a prohibited party lose their membership in the Bundestag. These consequences guarantee that an unconstitutional party can actually be entirely eliminated from the political scene.

Relevance

As mentioned, only the FCC is competent to declare a party unconstitutional with a two-thirds majority vote. Before such a decision can be made, no administrative measures may be based on the assumption according to which the party is unconstitutional. This protection derived from the monopoly of the FCC to decide about the prohibition of a party is called "party privilege" and distinguishes political parties from any other association that can be prohibited by administrative decision. In the past, only two parties have been banned: the "Sozialistische Reichspartei" (Socialist Empire Party) and the "Kommunistische Partei Deutschlands" (German Communist Party). A recent attempt to prohibit the "Nationaldemokratische Partei Deutschlands" (NPD) failed in 2003 when the FCC declared the application to be inadmissible as the management of the party was strongly influenced by state agents or people cooperating with German intelligence. This influence of the German state even during the pending proceeding runs counter to the "Staatsfreiheit" (freedom from the state) of political parties. The state is not allowed to infiltrate parties while at the same calling for their prohibition.

However, when it comes to the removal of civil servants, the threshold is much lower. As those holding a public office represent the state and its legal order, and thus have to identify themselves with the constitution, being a member to a party questioning the constitution is sufficient for removal even though the behavior of the person concerned is not hostile and aggressive towards the constitution.

231. Id. at § 46(2), Sentence 1.
232. Id. at § 46(2), Sentence 3.
3. Further Proceedings

There are further proceedings, though of minor practical importance, reserved for the FCC to defend the constitutional order and the rule of law.

The FCC is competent to rule on a motion for impeachment of the Federal President if he/she has willfully violated the constitution or federal law.\textsuperscript{235} That action has never been used thus far, which is probably a consequence of the mostly ceremonial functions of the President. However, it grants a possibility to hold a President responsible who does not comply, for instance, with a judgment of the FCC that orders him/her to write out a law he/she regards to be unconstitutional.

To protect the independence of the judicial branch while guaranteeing that judges do not misuse their special status for unconstitutional activities, the FCC is further entrusted to decide on the impeachment of federal and land judges that infringe the principles of the Basic Law or a land constitution.\textsuperscript{236}

Eventually, the FCC has the final say on the validity of elections to the Bundestag.\textsuperscript{237} The parliament itself is responsible for first scrutiny of the election and for the decision if one of its members has lost his/her seat. The decision of the Bundestag, however, can be challenged before the FCC by the member concerned, a person entitled to vote whose prior objection to the Bundestag has been rejected, provided that he/she is supported by at least one-hundred persons entitled to vote, a parliamentary group or a minority in the Bundestag comprising at least one-tenth of the statutory number of all members. As the procedure is supposed to ensure the correct and constitutional composition of the parliament,\textsuperscript{238} rather than protecting individual rights, the claim is only

\textsuperscript{235} BASIC LAW Art. 61; Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl I at 243, § 13, no. 4, 49-57 (Ger.). \textit{See also} MICHAEL SACHS, VERFASSUNGSPROZESSRECHT 124 – 126 (3d ed. 2010).

\textsuperscript{236} BASIC LAW Art. 98(2), (5); Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl I at 243, § 13, no. 9, 58 - 62 (Ger.). \textit{See also}, MICHAEL SACHS, VERFASSUNGSPROZESSRECHT 126 – 128 (3d ed., 2010).

\textsuperscript{237} BASIC LAW Art. 41; Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl I at 243, § 13, no. 3, 48. \textit{See also} MICHAEL SACHS, VERFASSUNGSPROZESSRECHT 129 – 133 (3d ed. 2010).

successful if a proven violation of the election principles has an actual impact on the distribution of seats.\textsuperscript{239}

F. Constitutional Complaint\textsuperscript{240}

1. Introduction

Constitutional complaint is the most important constitutional remedy in total numbers and with regard to its meaning in Germany's constitutional history. For the first time,\textsuperscript{241} individuals and (private) legal persons were endowed with the means to enforce their basic rights granted to them by the federal constitution. Constitutional complaint as the procedural counterpart of basic rights constitutes an important improvement compared to the situation under the Constitution of Weimar, which did not provide for procedural means to enforce the rights enshrined. However, that individual remedy was not originally enshrined in the Basic Law.\textsuperscript{242} The framers discussed individual constitutional remedies, but fearing an excess of judicial control and activism, they refrained from inserting constitutional complaint into the constitution. That remedy was first established by the FCC Act in 1951 (being a sufficient legal basis for the jurisdiction of the FCC); the Basic Law was amended some twenty years later in 1969. Nowadays, it is controversially discussed whether that remedy forms part of the constitutional core guarantees of the Basic Law, preventing its abolishment.\textsuperscript{243} Due to the success of constitutional complaint, that discussion seems rather hypothetical. However, it


\footnotesize{\textsuperscript{240} BASIC LAW Art. 93(1), no.4; Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBL I at 243, § 13, no. 8a, 90 - 95 (Ger.). See also Klaus Schlaich, DAS BUNDESVERFASSUNGSGERICHT 128 – 205 (8th ed., 2010).}

\footnotesize{\textsuperscript{241} There are predecessors of constitutional complaint in German history, but they fall short of the level of protection granted by constitutional complaint under the Basic Law. Compare Klaus Schlaich, DAS BUNDESVERFASSUNGSGERICHT 129 (8th ed. 2010).}

\footnotesize{\textsuperscript{242} Sabine Hain, DIE INDIVIDUALVERFASSUNGSBESCHWERDE NACH BUNDESRECHT 46 et seq. (2002).}

\footnotesize{\textsuperscript{243} According to Michael Kloepfer, constitutional complaint is not an indispensable element for an adequate protection of basic rights, but is justified by legal and political reasons. Michael Kloepfer, Ist die Verfassungsbeschwerde unentbehrlich? 118 DVBL 676 (2004).}
is important to mention that constitutional complaint is an *extraordinary* and subsidiary remedy, not entailing suspensory effect.\(^ {244}\) As it intends to protect constitutional guarantees, constitutional complaint does neither belong to the proceedings of the ordinary courts as an additional remedy, nor does it prolong such proceedings.\(^ {246}\)

Constitutional complaint has a double-function.\(^ {247}\) Besides providing individual legal protection, it serves the objective cross-case interests in constitutional review, interpretation and development,\(^ {248}\) as well as an educational function.\(^ {249}\) Also in this respect, constitutional complaint is a procedural counterpart of basic rights as it does not only avouch individual guarantees, but also constitutes an objective scale of values and fundamental decisions (*objektive Wertordnung*).\(^ {250}\) Accordingly, constitutional complaint offers the FCC, triggered by individuals acting in their personal interest, the possibility to review measures of public authority and thereby to foster the objective values behind basic rights. Moreover, this makes basic rights visible and impels every state agent to bear in mind that he/she is bound by it. Therefore, constitutional complaint educates those acting in public capacity and prevents basic rights from being ignored.

However, the success of constitutional complaint has a "disadvantage": the huge amount of work threatens to exceed the capa-
abilities of the court. To address this overload, the FCC Act offers two opportunities. First, and after the acceptance of the complaint, the court can reject the application \textit{a limine}, at the very beginning of the procedure and without further justification, if the complainant has been informed about the possibility before the rejection and if the application is inadmissible or clearly and obviously unfounded.\footnote{251}{Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBL I at 243, § 24 (Ger).} Second, the court can reject the application after a preliminary procedure of acceptance which has been established and modified several times.\footnote{252}{On the history, see Klaus Schlaich, \textit{Das Bundesverfassungsgericht} 165 \textit{et seq.} (8th ed. 2010).} According to Section 93a (1) of the FCC Act, a constitutional complaint requires acceptance. A system of chambers (each composed of three judges and assigned to a senate under Section 15a of the FCC Act) has been set up to decide about the acceptance without mandatory oral proceedings and the necessity to give reasons for a refusal of the acceptance.\footnote{253}{Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBL I at 243, § 93a (2).} The chamber may reject the complaint by a decision that cannot be appealed.\footnote{254}{Id. at § 93b (first alternative).} If the question does not have fundamental constitutional significance and the complaint is clearly justified, the chamber can even allow the complaint.\footnote{255}{Id. at §§ 93c(1), 93a (2).} Such a decision in the affirmative is equal to a decision by the senate, whereas a decision about the validity of a legal norm having the force of law in the sense of Section 31 (2) of the FCC Act is reserved for the senate.\footnote{256}{Id. at § 93d(3).} Both decisions, rejecting or granting a constitutional complaint, depend on an unanimous decision by the chamber.\footnote{257}{Id. at § 93d(3).} If consensus cannot be reached, \textit{i.e.} if the chamber has neither rejected nor allowed the complaint, the senate has to decide. Most of the complaints that are filed, about ninety-seven percent, are finally dealt with by chambers. Unlike the rejection \textit{a limine}, the rejection by a chamber within the acceptance procedure is not a decision on the merits and thus does not entail binding force. Rather, the complaint remains undecided. If, in contrast, a chamber allows a complaint, that decision is on the merits and therefore entails binding force.
2. Admissibility

Application and Actionability

A constitutional complaint can be filed by "any person." As that remedy is the procedural counterpart of the comprehensive binding force of basic rights, the expression "any person" refers to anyone who may invoke and practice the basic rights in question. Generally, individuals and private legal persons are entitled to basic rights. Some basic rights are granted to anyone under German jurisdiction (human rights), whereas others are confined to German nationals (citizen rights). Foreigners, in any case, are protected by the general freedom of action under Article 2 (1) of the Basic Law, though EU foreigners, due to EU citizenship and the protection from discrimination, have to be equated with German nationals. The question if the unborn child enjoys basic rights or if there is only an objective obligation of the state to protect the human being in statu nascendi is as controversially discussed as is the question of a basic rights-protection post mortem. Those topics are connected to the question of actionability, i.e. the question if an individual is able to act by himself/herself before the court, not depending on legal representation. According to the FCC, there is no clear answer or date, but rather the question posed is whether the complainant is able to reasonably exercise and understand the basic right he/she invokes. In that case, he/she has the legal capacity to bring a case before the court. With regard to legal persons, an answer has to be given if they, as

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258. Basic Law Art. 94(1) no. 4a; Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl. I at 243, § 90 (1) (Ger.).
259. Friedhelm Hufen, Staatsrecht II - Grundrechte 87 (2d ed. 2009) (proposing a broad interpretation of Art. 2(1) of the Basic Law, the general personal freedom).
Duquesne Law Review

a legal person merging the interest of its members, can actually enjoy and realize that basic right for the personal development and fulfillment of the people behind. A broadcasting company, for instance, can rely on the freedom of press and information but obviously not on the right to life.

In contrast, the state, comprising all its emanations like subunits, agents and even legal entities dominated by the state, is bound by basic rights but not privileged by them. Thus, persons acting in official capacity cannot invoke basic rights as far as their official conduct is concerned, with an exemption for procedural and judiciary basic rights. There are important exceptions, though. Public broadcasting networks can invoke the freedom of media and universities may invoke the freedom to academic research and teaching. In those fields, the mentioned entities might be exposed to state interference just like private persons. However, they are not entitled to other basic rights. Finally, churches enjoy a special status under German law. The state is neutral when it comes to religions, but religious organizations might be granted a special status as public corporation (öffentlich-rechtliche Körperschaft). For that case, they are bound by basic rights while at the same time enjoying all (applicable) basic rights.


265. BASIC LAW Art. 5(1), Sentence 2.
266. BASIC LAW Art. 5(3), Sentence 1.


269. Compare BASIC LAW Art. 140; WEIMAR CONSTITUTION Art. 137(V).

Object of the Complaint: Public Authority Act

As all branches of government are bound by basic rights, constitutional complaints might be directed against any manifestation of public authority. To quote the FCC, "the rationale behind the constitutional complaint is to make any act of legislative, executive or judicial authority reviewable with regard to its constitutionality."

In contrast, the general guarantee of recourse to the courts against public authority according to Article 19 (4) of the Basic Law is confined to executive measures violating a person's rights. Basic rights, though, do not bind private persons. Accordingly, private conduct cannot directly be challenged with constitutional complaint. However, as basic rights entail an impact on the entire legal order (objektive Drittwirkung), the courts have to consider and respect them when they interpret and apply general clauses like the bona fide clause under Section 242 of the Civil Code or the morality clause Section 138 of the Civil Code. Accordingly, a judgment can be challenged, raising the argument that the court, judging the private conduct, has not complied with that constitutional obligation.

Besides judgments, administrative and legislative conduct – an action or an omission, if a duty to act has allegedly been violated – can be challenged. Yet, the hurdles to combat legislative acts are quite high. First, the exhaustion of remedies and the principle of subsidiarity have to be overcome (see below). Second, domestic law adopted in order to implement EU law might be exempt from judicial review by the FCC as a consequence of the primacy of supranational law stemming from the EU. If a complaint against a law is admissible, however, even acts of the constitutional legislature may be subject to legal review. Basic rights as well as other parts of the constitution might be changed by constitutional amendment, but there are some fundamental elements that can-

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271. Basic Law Art. 1(3).
not be altered even by constitutional amendment. Besides the protection of human dignity under Article 1 of the Basic Law, the state principles like the rule of law, democracy, federalism and the social state under Article 20 of the Basic Law, as well as the division of Germany between the federal state and the Bundesländer are covered by the eternity clause of Article 79 (3) of the Basic Law, which declares any deviation to be unconstitutional. As already explained, in those cases the FCC might examine the question of "unconstitutional" constitutional law, i.e. constitutional amendments that violate the inviolable principles of the basic law.

In general, constitutional complaints are directed against German public authority including acts sanctioning international treaties. This assumption is questioned by the process of European integration. In the early days, the FCC denied the admissibility against public authority stemming from the European Community (EC)\textsuperscript{277} (now the EU as its successor). In its famous decisions Solange I and Maastricht, however, the court declared that constitutional complaint is not only intended to protect against German authority, but also against public authority having impact within Germany. At least in theory, constitutional complaint against European authority acts may be possible, thereby putting them under the regime of the Basic Law and the control of the FCC. This controversial topic shall be addressed in more detail below in the context of European constitutionalism under Section IV(D)(3).

\textit{Locus Standi (Legal Standing) and Continuing Legal Interest in the Decision}

The applicant has to prove a right to complain should his/her remedy be admissible. Benchmarks for the decision are basic rights according to Articles 1 through 19 of the Basic Law as well as those rights equated with them by Article 93 (1), no. 4a. Even though the FCC utilizes the entire constitution for judicial review, the applicant has to invoke one of those rights. He/she may not merely resort to constitutional principles or international human rights. However, if possible, the applicant can invoke them in conjunction with a basic right. The FCC has acknowledged this opportunity even for human rights enshrined in the ECHR, stating that they form part of the rule of law and bind any court in Ger-

\footnote{\textsuperscript{277} Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Oct. 18, 1967, 22 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 293 (295).}
many interpreting and applying the law including basic rights.\textsuperscript{278} However, the FCC is not entitled to apply those rights directly; especially EU human rights cannot be defended by constitutional complaint.

In order to avoid popular action, the applicant has to bring forward and substantiate\textsuperscript{279} the possibility of a violation in those basic rights he/she invokes.\textsuperscript{280} The violation might be an action restricting his/her rights or an omission in cases of a duty to act.\textsuperscript{281} He/she fails if a violation can be \textit{a priori} and patently excluded, \textit{e.g.} if the applicant is not protected by the basic right or transcends the scope of protection, if the right is not enumerated as a federal right (like the violation of election principles of the Bundesländer) or if the authority act does not amount to a restriction, \textit{e.g.} in case of a merely preliminary measure without a current impact on the legal sphere. Considering that the final decision about the violation is a question of the merits, the actual infringement of basic rights does not have to be obviously justified for the admissibility of constitutional complaint.\textsuperscript{282}

The major test to pass is whether the applicant can prove a current, direct and individual violation by the public authority act in question.\textsuperscript{283} Constitutional complaint is not supposed to address abstract questions of law, accordingly, there has to be an actual restriction. A restriction without any further present impact, as

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well as an expected restriction in future times, cannot be challenged. Yet, if a future impact is beyond doubt and if there is a determination of the current behavior of people, this may suffice for a current restriction.\textsuperscript{284} Furthermore, the applicant can only challenge a measure that directly intervenes in his/her legal sphere. In case a measure depends on enforcement, that act is the real restriction imposed on the applicant. Before the enforcement, a measure of restriction is missing. Finally, and as mentioned above, constitutional complaint is an individual remedy. To avoid popular action, it may only be filed by an applicant to defend his/her own rights, unless there is a provision allowing for representative action. However, it is not only the formal addressee who can be individually affected (those cases do not cause major problems) but anyone who is restricted in his/her legal sphere by the impact of a public authority act can challenge that act, \textit{e.g.} the wife of a husband who shall be expelled.\textsuperscript{285}

The possibility of a violation varies depending on the act in question. In case the action is directed against \textit{administrative} acts, the obvious-test, \textit{i.e.} that the complaint shall not be obviously unfounded, should be sufficient because those acts are, in general, directed against individual persons without requiring further enforcement measures. The same holds true in case a \textit{judgment} is challenged, at least for the convict. The applicant has, however, to claim that the court violated his/her \textit{basic} rights. A misjudgment itself is not sufficient for filing a constitutional complaint. As the FCC is not a supreme court of appeal\textsuperscript{286} it does not review a case if ordinary law has been applied correctly or incorrectly. Only a specific violation of constitutional law (\textit{spezifische Verfassungsrechtsverletzung}) can be challenged before the FCC.\textsuperscript{287} Such a violation is given if the court has not recognized the relevance of a basic right at all, if it has misinterpreted a basic right in abstract terms or if it has applied the basic right wrongly to the case at hand.\textsuperscript{288} A concurring, more recent approach regards the intensity

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\footnoteref{287} \textit{Id.} at 92 et seq.
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of the encroachment, stating that the more intense it is, the more in-depth will be the examination by the FCC.\textsuperscript{289} Irrespective of that and as a general rule, the mere interpretation and application of ordinary law can only be addressed by constitutional complaint if the court acted arbitrarily with regards to what constitutes a violation of the principle of equality according to Article 3 (1) of the Basic Law. In contrast, if a law is challenged as being unconstitutional, the FCC will undertake, in any case, a full judicial review. The same holds true for law developed by judges.\textsuperscript{290}

Most problems concern remedies directed against \textit{legislative acts of parliament}. In principle and as a matter of subsidiarity, the applicant is expected to wait for the law to be enforced and to challenge that enforcement act in front of the ordinary courts before he/she can bring the case for review by the FCC.\textsuperscript{291} The court will then review the act as well as the underlying law on the basis of the constitution and rule on both manifestations of public authority. As acts of parliament create abstract and general rules, individuals are seldom likely to be directly affected. However, that assumption might be rebutted: it does not apply if the applicant has been induced by the challenged norm to make arrangements and investments;\textsuperscript{292} if the executive branch has no discretion\textsuperscript{293} or if waiting for an enforcement act would be unreasonable.\textsuperscript{294} The latter exemption is especially invoked when the norm in question establishes an obligation, instruction or prohibition. A potential addressee can hardly be expected to break the law, face enforcement measures – possibly leading to criminal sanctions – before

\textsuperscript{289} Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Nov. 27, 1990, 83 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 130 (145 et. seq.);


\textsuperscript{291} Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] May 18, 1982, 60 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 360 (369 et seq.).


he/she can concern the courts and finally the FCC with the law, that in the end might be held constitutional and justify the sanctions taken. Furthermore, the applicant does not have to wait for a life-threatening act before he/she can take action, such as being shot down as passenger of an abducted aircraft in the war on terror.295

Finally, the applicant has to show a continuing legal interest in a decision by the FCC. Whereas most of the admissibility requirements have to be given at the beginning of the proceedings, that interest has to last until the end. Besides the demise of the applicant, which usually leads to the dismissal of the proceedings,296 the mootness of the encroachment upon basic rights is worth some discussion. If the restriction of a basic right is finished, the legal interest persists only in exceptional cases as the risk of repetition,297 the interest in rehabilitation,298 a massive infringement of an important right,299 as well as in those situations in which public authority acts usually cause a short-term restriction on basic rights only.300

Exhaustion of Available Remedies and Subsidiarity

Before he/she can file a constitutional complaint to the FCC, the applicant has to use every means possible and available at law to dispel the public authority act301 – a requirement that even transcends legal remedies in a narrow sense and is underpinned by the

298. HERBERT BETHGE, BUNDESVERFASSUNGSGERICHTSGESETZ, [FEDERAL CONSTITUTIONAL COURT ACT], § 90, para. 269a (Theodor Maunz / Bruno Schmidt-Bleibtreu / Franz Klein / Herbert Bethge eds., 2010).
assumption that ordinary courts are primarily in charge of protecting basic rights.\textsuperscript{302} Exhaustion is attained if all admissible remedies have been filed without success.\textsuperscript{303} If the remedy was not successful due to admissibility reasons or because of an applicant's fault (e.g. expiration, insufficient legal representation), the exhaustion requirement is not met unless the court has taken a decision on the merits. Administrative acts have to be brought before the ordinary courts. Judgments have to be challenged through the various stages of appeal lodging any appeal possible. It is controversial if the applicant has to raise his/her concern about the constitutionality and name those basic rights he/she believes to be infringed, though the FCC adhered to this requirement for a long time. There is no remedy against acts of parliament so that an exhaustion in the narrow sense cannot be required. Only administrative law (statutory orders and rules) can be challenged under certain conditions in accordance with Section 47 of the Verwaltungsgerichtsordnung (Administrative Court Procedures Code) and any court is entitled to set aside administrative law it regards to be unconstitutional. However, with reference to the general principle of subsidiarity, the FCC asks the applicant to confront the ordinary courts by any legal remedy and within any proceedings possible with the constitutional concerns against an act of parliament,\textsuperscript{304} so that those courts may elaborate on the question and refer it to the FCC according to Article 100 (1) of the Basic Law for concrete judicial review. The rationale behind the exhaustion and subsidiarity rule is to relieve the FCC and to make the ordinary and specialized courts comprehensively prepare the case\textsuperscript{305} by taking evidence and elaborating on the constitutional questions so that the FCC can confine itself to a final constitutional examination.

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304. Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Jan 30, 1985, 69 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFG] 122 (124 et seq.). If a norm denies access to health insurance, the applicant might be compelled to apply for participation and challenge the denial before the ordinary courts. \textit{Id}. The ordinary courts would have to refer the question under Art. 100(1) of the Basic Law, otherwise the applicant could bring the final judgment before the FCC via a constitutional complaint. \textit{Id}.
\end{flushright}
The exhaustion and subsidiary rule does not apply if the question is of general importance and transcends the meaning of the individual case (e.g. concerning the reform of German orthography (Rechtschreibung), if the dispute is about the validity of a legal norm is valid or if there might be a severe and inevitable harm for the applicant (e.g. a massive violation due to the existing jurisprudence no different judgment can be expected that means mostly bagatelles are excluded).

**Time Limit**

In general, the constitutional complaint shall be lodged and substantiated within one month, beginning with the notification of the decision or the pronouncement of a judgment. In cases where the complaint is directed against a law or a sovereign act against which no legal action is admissible, the complaint may be lodged only within one year after the law entered into force or the sovereign act was announced. After that year, the law cannot be directly challenged anymore; although an implicit review remains possible. Whereas in the first case restitutio in integrum is available if the applicant has not caused the delay, in the second case it is a cut-off period. In case of an omission, there is no time limit. However, if a statute is challenged as being insufficient, the time limit under Section 93 (3) of the FCC Act applies.

**3. The Decision and Control Density**

Constitutional complaint is successful if the measure challenged is not only unconstitutional, but furthermore violates basic rights

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311. Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBl. I at 243, § 93 (1) (Ger.).
312. Id. at § 93(3).
313. Id. at § 93(2).
of the applicant.\textsuperscript{314} When it comes to the decision by the FCC, the control density is interesting and a further proof of the constitutional complaint's double function including an objective interest in clarifying constitutional questions. Although the applicant has to invoke his/her concrete basic rights, the FCC regards itself competent to utilize the entire constitution as a benchmark for deciding the complaint, unless the applicant himself/herself is not personally restricted to invoke specific basic rights only.\textsuperscript{315} This is the consequence of the FCC's broad interpretation, holding that constitutional complaint may be used to argue that a law restricting the general personal freedom according to Article 2 (1) of the Basic Law, a clause interpreted to cover the right to do or omit whatever the applicant wants to, does not belong to the constitutional order in a formal or substantive sense.\textsuperscript{316} Accordingly, an applicant can challenge any law that violates a provision of the constitution or a constitutional principle as far as it restricts his/her right to do or omit whatever he/she wants.\textsuperscript{317} Constitutional complaint, though an individual remedy, has become a tool of the court for full legal review even including objective provisions of the Basic Law.

If the FCC does not reject the complaint, it explicitly declares which constitutional provisions have been violated by the act or omission under review.\textsuperscript{318} According to the second sentence of Section 95 (1) of the FCC Act, the court can declare that any repetition will violate the Basic Law which is a significant extension of its competencies. Furthermore, should the constitutional complaint be directed against a decision, the FCC can annul that decision; if the ordinary courts have been involved before, it refers the case back to them so that the competent court is able to modify


\textsuperscript{318} Gesetz über das Bundesverfassungsgericht [FCC Act] [Law on the Federal Constitutional Court], Mar. 12, 1951, BGBL I at 243, § 95(1), Sentence 1 (Ger.).
and align its judgment with the interpretation of the FCC.\footnote{319} If a complaint is successful because it is directed against an unconstitutional law or against a decision based on an unconstitutional law, the respective law shall be declared null and void.\footnote{320} That decision has, similar to the respective decisions in review procedures, the force of law according to Section 31 (2) of the FCC Act.

This, in a nutshell, should suffice to give an idea about constitutional litigation in Germany and about the FCC with its major tasks of deciding on federal disputes, on the allocation of competence on a horizontal level and on the protection of basic rights. Yet, Germany is a member state of the EU and party to the ECHR. It might therefore serve as an example to demonstrate that constitutionalism and constitutional litigation in Europe cannot be thought merely in terms of the nation state anymore. To round out the picture, the integration of Germany in a European system of entangled constitutions and interactive forms of constitutional litigation will be briefly addressed.

IV. PATCHWORK CONSTITUTIONALISM: CONSTITUTIONALISM AND CONSTITUTIONAL LITIGATION BEYOND THE NATION STATE – A EUROPEAN PERSPECTIVE

A. Introduction

By now, constitutionalism and constitutional litigation in Europe can hardly be thought of merely in terms of the nation state anymore.\footnote{321}

Much has been argued about the "constitutionalization" of public international law\footnote{322} and this article is not supposed to contribute to that general debate. It shall, however, give an example of constitutionalism and constitutional litigation beyond the nation state in Europe and for that purpose have a closer look at the EU and the CoE – the latter being the framework in which the ECHR was drafted. The ECJ, as the principal judicial organ of the EU under Article 19 of the Treaty on the European Union (TEU), as...
well as the European Court of Human Rights (ECHR), established by the ECHR, have claimed for their respective founding treaties, the EU Treaties and the ECHR, to be constitutional documents. This assumption, as well as the interplay between those European constitutional orders and the German constitutional order, *pars pro toto*, shall now be examined more fully below.

Indeed, the following considerations are based on the, admittedly disputed,323 premise that constitutionalism might exist beyond the traditional nation state.324 One might even speak of a post-national concept of constitutionalism,325 though it has to be stressed that this form of constitutionalism does not substitute, but instead complements state constitutionalism.326 Furthermore, it should be beyond doubt that the understanding of constitutionalism cannot be transferred from the state to a supra-state level on a one to one basis, but – if at all – only *mutatis mutandis.*327 However, as the origins of constitutionalism lie in the ancient *polis*328 and the modern state as its successor, the national level shall be the point of origin for further discussion in order to develop those features necessary to talk of a constitution and to serve as a benchmark for the analysis. In brief,329 while talking about constitutionalism one might distinguish between formal and substantial criteria. In a formal sense a constitution enjoys a special status within a society as it is often the result of a specific originating process. Its amendment and abolition are protected and separated from the political day-to-day business by procedural hurdles and constitutional provisions enjoy supremacy over ordinary law. In a substantial sense, the constitution *constitutes* a polity by deciding about the institutions and the fundamental rules governing the

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society. A constitution in a modern, at least in a western understanding, restricts powers, particularly by the acceptance of human rights, and tries to establish a system of separated powers as well as checks and balances. Thereby, a constitution realizes common values and fosters integration. Finally and from a democratic perspective, the constitution traces back to the will of the people as *pouvoir constituant* and its final legitimatization.

It might not be such a big surprise that Europe is the experimental ground for constitutionalism beyond the nation state as that continent has a long tradition of discussions about the adequate conception of the state and other forms of organized societies. Already Aristotle, as a famous representative of the conception of *eudaimonia*, i.e. the question of happiness as the highest human good and interest, spent some time discussing the various types of constitutions and addressing the question of which constitution serves the interest of the people best. A paternalistic understanding of the *raison d'être* of states was dominant during the absolutistic times in Europe, however, a constitutional restraint on the power of the mighty was lacking and therefore the pursuit of happiness became a justification for oppressing the people. Many European thinkers showed great efforts to set the mighty free from most limitations; Machiavelli and Hobbes are only two of them. Eventually, in the late eighteenth century, the French Revolution (1789) initiated the process of constitutionization and the end of absolutistic monarchy in which *le roi etait l'état*. Individuals (in the understanding at that time meaning only men) became recognized as enjoying inherent dignity and human rights and a restraint on public power and the separation of powers was enshrined. Knowing that the revolution degener-

330. Rudolf Smend, *Verfassung und Verfassungsrecht* 40 - 45 et seq. (1928) (addressing the aspect of integration by the constitution).
333. Although Niccolo Machiavelli, condemned tyranny, *e.g.* in Discorsi, he nevertheless argued in Der Fürst, in favor of a strong ruler who might commit cruelties if necessary for the achievement and maintenance of the common good. See Niccolo Machiavelli, *Discorsi*, Book I, Chapter 10, 39 (1997); Niccolo Machiavelli, *Der Fürst* (1978).
335. Although evidence is lacking, "L'Etat, c'est moi" is attributed to French King Louis XIV.
ated to *le règne de la terreur* and thereby violated its very ideals, a tremendous change was nevertheless induced by that historic event. In Germany, it took a bit longer until a constitution containing human rights and constitutional protection of the individual entered into force. An early attempt, the *Paulskirchen-Verfassung* (constitution adopted in the St. Paul Church in Frankfurt) of 1849, contained a catalogue of directly applicable human rights starting in Section 130 and even a constitutional complaint-procedure as enforcement measure under Section 126. As the Germans lacked a "revolutionary character" like the French, the framers accepted the rejection of that constitution by German Emperor Friedrich Wilhelm IV without any vigilance. In consequence, the progressive and liberal *Paulskirchen-Verfassung* was dead. The following Constitution of the German Empire (1871) and the Weimar Constitution (1919) fell short of providing a sufficient and effective protection of human rights as well as an adequate limitation on public authority. As shown under Section II (A) above, the Basic Law was the first constitution for Germany fully meeting the requirements for calling a legal document a modern and comprehensive constitution enumerated above. Recently, after the breakdown of the Soviet Union and the demise of communism, the Eastern European states had the chance to become constitutional states. Most of them, just like many others states, used the Basic Law as a role model. This overview should suffice to sketch the ambivalent history of constitutional life in Europe.

However, it is not only a story of state constitutionalism Europe has written. After the devastating effects of two world wars, people began to realize that cooperation and integration shall be the means to prevent war and foster well-being and prosperity in Europe. The European Coal and Steel Community (ECSC) was the first attempt of a special form of integration, limiting the sovereignty of the participating states and following the supranational

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337. Famous German poet Heinrich Heine once wrote:

Derweil der Michel geduldig und gut
Begann zu schlafen und schnarchen,
Und wieder erwachte unter der Hut
Von vier und dreißig Monarchen

(German "John Doe" goes to bed after the revolution and awakes under the reign of monarchs).


model which has been the template and model for the former EC and the current EU. Furthermore, the CoE was set up, another measure to guarantee peace in Europe. Both served that interest quite well as Europe enjoyed decades of peace for a period unknown to this formerly quarrelsome continent.

B. The Constitutional Architecture of the European Union

"Nous ne coalisons pas des Etats, nous unisons des hommes"

The EU is an international organization that, with the Treaty of Lisbon and according to Article 1 (3), Sentence 3 of the TEU has completely absorbed the EC. The ECJ has stressed quite early the differences between international law and European community law, making the former EC distinct from other international organizations. Without doubt, the EC had several features, at least in that combination, unknown to other international organizations. Those features are described as the supranational model. First, it can be said that the EU pursues supranational aims. The Union, though not being a state, has a broad array of tasks and serves functions formerly known as classical state functions, including a common market, security and social protection under Article 3. This is a corollary of the phenomenon of globalization that challenges the states' ability to solve those problems on their own and asks for a closer cooperation among states. In the EU, the states share their responsibility for the common


341. JEAN MONNET, MEMOIRES (1976) (cover sheet).


343. A short overview of the features making the EU distinct from other international organizations can be found in ALLAN ROSAS / LORNA ARMATI, EU CONSTITUTIONAL LAW: AN INTRODUCTION, 12 et seq. (2010).

344. On that term and the features in more detail, see MICHAEL LYANDER FREMUTH, DIE EUROPÄISCHE UNION AUF DEM WEG IN DIE SUPRANATIONALITÄT, 23 et seq. (2010).

345. See Tom Ginsburg / Eric A. Posner, Subconstitutionalism, 62 STAN. L. REV 1583, 1611 (2010) (explaining that the EU is often regarded as a quasi-state while sometimes the members are described as “quasi-substates”).
good with the EU overall.  However, it is not the nature of those tasks, but their direction that grants them a supranational character. Those aims intend to impact back in the orders of the member states with the intention of integrating them. This integrative function, leading to a demise of exclusive “internal affairs” within most parts of Europe and the emergence of a common European internal law, is distinct from coordinative aims pursued by other international organizations.

Second, the supranational model is built on competencies of the EU that are specific for the ability to address individuals in the member states directly by legislative, executive and judicial means. Unlike in public international law and for traditional international organizations, no further enforcement or implementing act of the member states is required.

Third, with the EU parliament and commission, being independent from the member states, supranational organs take part in the decision-making process. In that respect, supranational decision-making counterbalances the participation of representative organs like the council, dominated by the member states, by inserting a different perspective and interests that transcend those of particular states. This partly institutional independence combined with majority voting departs from intergovernmental decision-making in traditional international organizations. The independence of the organization is further fostered by its own sources of revenue. Finally, the system of comprehensive judicial control, exercised by the ECJ, has been regarded as a supranational feature.

Admittedly, those features are hard to find within any other organization. But against the major opinion in literature and the ECJ (compare the first paragraph of this chapter), that does neither make EU law a different type of law — as distinct from international law — nor does it deprive the EU of its status as an international organization. Public international law knows most of the

346. The ECJ has stated several times that the EC (now EU) pursues a general interest, which could only be an interest of its own. See, e.g., Case 5/88, Wachauf v. Germany 1989 E.C.R. 02609.

347. The first legal document to use the term “supranational” was Art. 9(5), Sentence 2 of the ECSC-Treaty to describe the independent character of the High Authority (the latter Commission). Compare MICHAEL LYSANDER FREMUTH, DIE EUROPÄISCHE UNION AUF DEM WEG IN DIE SUPRANATIONALITÄT, 26 et seq., 207 et seq. (2010).

features described above – at least in a rudimental status – and it is flexible enough to enable an international organization to develop into a supranational organization forming a sub-system under public international law. Public international law has provided the nucleus upon which the process of European integration could unfold the supranational model. Saying the EU is still an organization under public international law should not be misunderstood as ignoring the significant deviations from traditional organizations.

Eventually, those supranational features themselves do not transform the EU to a constitutional order – rather the supranational character has made the constitutionalization of Europe much more pressing! The supranational model makes the EU, at least in part, akin to the traditional state. However, the more the EU acts like a state, the more important it is to impose limitations on its powers, comparable to those established for democratic states dedicated to the rule of law. Such limits for states are mostly established by national constitutions. Accordingly, it seems advisable to compare the well-known national constitutional principles with features to be found on the EU level in order to find out what may justify the assumption that the EU actually is a constitutional organization.

In a formal sense, the EU Treaties, the TEU and the TFEU are not named a constitution. Rather, the Constitution for Europe, a revision and amendment of all the treaties by a Constitutional Convention was rejected by public vote in France and the Netherlands. However, as proven by the Basic Law, the existence of a constitution is not a question of names, but rather of substance. Long before the Constitution for Europe, a strong opin-

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354. See supra Section II(A).
ion, on its top the ECJ itself, argued in favor of the EC-Treaty being a constitutional document. Furthermore, as we are still talking about international treaties, there is no specific protection against amendments, but the states can leave the EU, alter the treaties unanimously and even abolish the entire EU. The high level of protection against amendments including an “eternity clause” of inviolable principles enshrined in national constitutions is not reflected on the EU level in a comparable way. That is a result, though, of the EU still not being a state, but instead an international organization. Nevertheless, special hurdles are established by Article 48 of the TEU for treaty amendments, so that in the absence of unanimity a single state might be compelled to leave the EU if it does not conform to the constitutional principles any longer.

Moreover, the source of legitimation provokes some discussions. Most people agree that no European dems exists. While some, from the absence of a uniform European people, draw the conclusion that there cannot be a (at least sufficient) democratic legitimation of the EU, others, convincingly, argue, that the entirety of the European peoples could provide sufficient democratic legitimation for the EU as a political body that shall not be confused with a state and therefore not be subordinated to the same rules.

Respecting those peculiarities of the EU as an international organization, one does, however, find important substantive consti-

358. The distinction between the EU and the state features are shortly described by in Allan Rosas and Lorna Armati. ALLAN ROSAS / LORNA ARMATI, EU CONSTITUTIONAL LAW: AN INTRODUCTION, 15 et seq. (2010).
utional principles on the EU level. At first, the principle after which the constitution and its principles are the highest source of law can be found on the EU level as well. The treaties and the general principles, especially human rights, constitute the benchmark for all delegated EU secondary law and agreements concluded by the EU, which cannot be derogated from even by a consistent practice of EU organs. Furthermore, secondary law depends on a concrete entitlement of the EU and must not violate the treaties and the principles established by the ECJ, which actually is comparable to national ideas of constitutionalism in the sense of a hierarchy of norms.

On a horizontal level, the competencies are divided between different organs and differentiated between a legislative, an administrative and a judicial branch. Simplified, one can say that the European Parliament and the Council are primarily responsible for lawmaking, the European Commission is the administrative body and the ECJ constitutes the main judicial body. The ECJ has stated quite early that the relationship between those organs is ruled by the principle of institutional balance. It says that every organ is entrusted with specific tasks and asks all organs to respect the competencies of the respective others. Therefore, a system comparable to fundamental constitutional principles, including a separation of powers as well as checks and balances, stressed already by Montesquieu and Article XVI of the déclaration des droits de l'homme et du citoyen, also exists within the EU structures.

On a vertical level, the relationship between the EU and its member states is governed by constitutional principles as well.

This proposition is especially true for those constitutions governing a federal entity, a term that has been used for the EC and the later EU from its very beginning, which are familiar with the principles to be addressed in the following. The principle of supremacy according to which the acts of the EU take precedence over public authority acts of the nation state (also referred to as “primacy of EU law”), is of utmost importance and is significant for supranational organizations. It is still controversially discussed in its details between the ECJ and the national constitutional courts, but it can be regarded as accepted in general. Some constitutional courts argue that the claim for supremacy might be rejected if the act in question is ultra vires, thereby referring to another constitutional principle of EU law: the limited conferment of powers. As the sovereignty still rests with the member states, the EU depends on a concrete entitlement before it is allowed to take action. This principle is accompanied by the principle of subsidiarity as a further limitation of EU powers. Derived from Catholic social science, subsidiarity poses the question of which competent level is best for performing a task. So even if the EU is entitled to act, in case a competence is not exclusive, subsidiarity can be invoked to hinder the EU if the objectives of the proposed action can be sufficiently achieved by the member states. Indeed, this does contain a presumption in favor of the competence of the member states, but the ECJ, being entrusted to decide that question, ensures that the principles of conferred powers and subsidiarity do not run counter to the interest of European integration. Furthermore, the principle of Union loyalty (Unionstreue) has a constitutional meaning, asking the EU...
and the states as well as organs of both entities to act mutually in good faith and respect for the respective other.\textsuperscript{377} The ECJ has further stressed the duty to cooperate between the member states and the community’s institutions, for instance in the case of shared competencies when it comes to the negotiation and conclusion of international agreements as well as their fulfillment.\textsuperscript{378}

Those elements, especially the rule of law and the system of judicial protection, prompted the ECJ to call the EU a constitutional order.\textsuperscript{379} However, today, this assertion is fostered and further justified by the development of human rights. In the very beginning, the EU was primarily an economic organization. The ECJ even treated fundamental rights as a threat to the aim of economic integration.\textsuperscript{380} It was the FCC that impelled the ECJ to develop an entire regime of human rights at EU level. The German court declared, in an early ruling, that it is willing to exercise its jurisdiction even over authority acts of the former EC insofar as the community legal order did not sufficiently protect basic rights.\textsuperscript{381}

That was the starting signal for an unforeseen development, given that the ECJ stuck to the principle of supremacy of EU law that was openly challenged by the ruling of the FCC. Although it might go too far to say that there was a deal like “human rights against economic integration and supremacy,” after the judgment of the FCC, the ECJ developed a comprehensive fundamental rights regime\textsuperscript{382} — at that time without a clear authorization in the treaties! The approach of the court is to compare the legal orders of the member states in order to deduce from them similar fundamental rights and to examine if those rights may be applied on the European level (\textit{wertende Rechtsvergleichung}); the ECJ further referred to international human rights treaties as sources of human rights,\textsuperscript{383} under which the ECHR enjoys a special status.\textsuperscript{384}

\begin{thebibliography}{99}
\bibitem{377} Case C-2/88, Zwartveld, 1990 E.C.R. I-3365, paras. 21 et seq.
\bibitem{378} Opinion 1/94, WTO, 1994 E.C.R. I-5267, paras. 106 et seq.
\bibitem{380} Joined Cases 36, 37, 38-59 & 40-59, Ruhrkohlen-Verkaufsgesellschaft, 1960 E.C.R. 423 (439); CHRISTIAN WALTER, \textit{EUROPÄISCHE GRUNDRECHTE UND GRUNDFREIHEITEN} 10, para. 27 (2009).
\bibitem{382} CHRISTIAN WALTER, \textit{EUROPÄISCHE GRUNDRECHTE UND GRUNDFREIHEITEN} 10 para. 25 et seq. (Dirk Ehlers ed., 3d ed. 2009); ALLAN ROSAS / LORNA ARMATT, \textit{EU CONSTITUTIONAL LAW: AN INTRODUCTION}, 143 et seq. (2010).
\end{thebibliography}
In the meantime, those rights have been codified in the Charter of Fundamental Rights of the European Union. This legal document has become binding by reference in Article 6 (1) of the TEU and presents itself as a modern and comprehensive Human Rights Document. Nowadays, individuals in Europe face two sources of public authority, but at the same time their basic rights are protected on both levels. However, not only the EU is bound by European fundamental rights, the member states are also bound if they act in the scope of EU law.

Moreover, and according to Article 2, Sentence 1 of the TEU, the EU is dedicated to constitutional principles going beyond individual guarantees, like the dedication to human dignity and the rule of law, liberty, democracy and equality. The ECJ has not confined itself to a mere protection of those principles but developed further principles like ne bis in idem, the protection of legitimate expectations, mutual loyalty and proportionality.

Finally, the ECJ has become a constitutional court that interprets EU law, as the foundation of this unique political entity, and that decides about the legality of EU (secondary) norms, vital questions concerning the allocation of powers, the relation between EU and member states and fundamental legal guarantees and rights. Complementary to his/her position as a legal subject under EU law, the individual has direct access to the ECJ. Further
thermore, member states' courts may, under certain conditions even have to refer a question concerning the interpretation and application of EU law to the ECJ if the decision of a case depends on it. In Germany, this duty under EU law is supported by the interpretation of the constitution by the FCC arguing that the ECJ is a "lawful judge" in the sense of Article 103 (1) of the Basic Law. Hence, a person has the right to claim the ECJ to be involved. If a court does, arbitrarily, not refer a question, this provision, as a quasi-basic right, would be infringed and the FCC, by constitutional complaint, can be asked for relief. This broad possibility of access and entanglement between national courts and the ECJ is unique for an international organization and gives further proof of its supranational and constitutional character. Some criticism has been raised regarding the fact that there is no constitutional complaint on the EU level and suggestions in that direction have not been successful. Yet, as the past has shown, the existing procedures and the entanglement of the courts are sufficient to guarantee that human rights are adequately protected under EU law. The lack of an EU constitutional complaint does hardly affect the ability of the individual to enforce his/her fundamental rights. The types of actions provided for in the treaty enable the individual to invoke his/her fundamental rights against EU public authority. He/she can, for instance, file an action for annulment against EU secondary law arguing it violates his/her rights. This action comes close to constitutional complaint and serves a comparable function. He/she can further ask a national court to refer a question of EU law within national proceedings to the ECJ so that EU fundamental rights may become important even within national proceedings.

The ECJ, just like the FCC, has shown its willingness to consider, protect and enforce human rights. It has not only addressed and decided delicate political issues like the fight against terror-

397. Id. at art. 267.
ism, abortion, homosexuality, right to family life, freedom of expression and religion, but also extended its jurisdiction to acts not covered by the treaties. The court ruled that any act that intends to produce legal effects for an individual may be challenged by the person concerned. Therefore, and just like a constitutional court, the ECJ has referred to constitutional principles to justify the development of the law even against written terms. This scrutiny and willingness of the ECJ to accept, to develop and to enforce fundamental rights prompted the FCC to accept the supremacy of EU law and the exclusive competence of the ECJ deciding on it. On the other side, the case law of the ECJ caused a particular sensitivity to judicial activism in the field of fundamental rights which led to the new Lisbon Treaty inserting Article 6 (1), Sentence 2 and (2) of the TEU, stating that the human rights architecture does not establish or extend competencies of the EU. Furthermore, the United Kingdom and Poland made a reservation concerning the EU Fundamental Rights Charter, stating that this document does not provide for rights not contained in those member states’ legal orders. A recent judgment provoked further concerns among the member states. In its Mangold-judgment the court struck down a German law that made part time contracts for older employers more easily accessible to strengthen their job opportunities. According to the ECJ, this provision violates the general principle of protection against age discrimination. Most member states and literature contested such a principle to exist. In that respect, the FCC was expected to object to a judgment of the ECJ on national constitutional grounds

405. See infra Section IV(D)(3).
406. Art. 1 and 2 of Protocol (no) 30 to the Treaties on the application of the charter to Poland and the United Kingdom, OJ 2010, C 83, 313.
for the first time ever and to "stop the ECJ."408 However, the FCC refrained from doing so (see infra IV.D.3).

C. The European Convention on Human Rights and Its Court

"The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."409

With the ECHR, there is another important source of human rights in Europe besides the EU and the well-known international human right treaties. The Convention entered into force in 1953 and was drafted and adopted in the framework of the CoE, one of the oldest organizations in Europe that was founded in 1949 after the Second World War to pacify and unify Europe. Driven by the allied powers, the CoE was supposed to guarantee human rights and to serve as a bulwark against the threat of communism spreading in Europe at that time. The CoE shall not be confused with the EU as it does not set up a supranational political entity, but offers a forum for intergovernmental cooperation of nearly all European states.

The ECHR was labeled as a constitutional instrument of European public order410 by the ECtHR, the treaty-based court under the ECHR that is seated in Strasbourg. However, as neither the ECHR nor the CoE do set up a political entity like the EU treaties, this claim has to be justified. The ECHR can be regarded as being a constitutional treaty only with regard to the human rights enshrined. As shown above, human and basic rights as a restriction of public authority constitute an important element of constitutionalism. Indeed, one might object that this would justify calling any human rights treaty a constitutional document. However, the ECHR is somehow different from other human right treaties. After the accession of the EU to the ECHR, stipulated in Article 6

408. Roman Herzog & Lüder Gerken, Stop the European Court of Justice, Published in German on September 08, 2008 by F.A.Z (Frankfurter Allgemeine Zeitung) http://www.cep.eu/fileadmin/user_upload/Pressemappe/CEP_in_den_Medien/Herzog-EuGH-Webseite_eng.pdf.
409. Council of Europe, European Convention on Human Rights, Apr. 11, 1950, art. 34.
(2), Sentence 1 of the TEU,\(^{411}\) it will establish a minimum human rights standard not only for nearly all European states, but also for a supranational organization that can act state-like. Most important, though, the ECHR provides for individual complaint on an international level and grants, unlike other major human rights treaties, direct access to a court.

Admittedly, there is a tendency towards individual complaints procedures under many international and regional human rights treaties.\(^{412}\) However, in most cases the individual can only file an appeal towards a commission and this opportunity depends on the consent of the respective state; direct and general access to a court is hardly granted.\(^{413}\) Until 1998, the ECHR provided for a commission-procedure as well. The individual could submit a complaint to a commission. That commission examined if the complaint was admissible and founded. After that, the commission as well as the Committee of Ministers – a political organ – had to decide about a referral of the case to the court.\(^{414}\) With Protocol 11 to the ECHR, the commission was abolished and the individual was granted direct access to the ECtHR by Article 34 of the ECHR. This right to individual complaint has become mandatory for all parties to the ECHR and forms an extraordinary step\(^{415}\) under public international law\(^{416}\) and even international human rights law. The individual has not only been accepted as a partial subject under public international law, but has also been given the means to enforce the rights granted. This can be seen as the beginning of a further\(^{417}\) paradigm shift of public international law departing more and more from the classical, state-centered Westphalian understanding. Now, sure enough on a regional level, the

\(^{411}\) The accession depends and is prepared by Protocol 14 (CETS no. 194) to the ECHR that went into force on 1 June 2010 after the Russian ratification on 18 February 2010. The amended Article 59 (2) states: The European Union may accede to this Convention.

\(^{412}\) Compare Olivier de Schutter, International Human Rights Law, 805 et seq., 866 et seq., 897 et seq. (2010).

\(^{413}\) Walter Kälin & Jörg Küngli, Universeller Menschenrechtsschutz, 250 et seq. (2009).

\(^{414}\) See Volker Schlette, Das neue Rechtsschutzsystem der Europäischen Menschenrechtskonvention, 56 ZEvR 905, 906-914 (1996) (providing a brief overview of this complicated system).

\(^{415}\) Direct access to the courts for individuals is, though, an important element of supranational law.

\(^{416}\) See Christoph Grabenwarter, Europäische Menschenrechtskonvention 41, para. 1 (4th ed. 2009).

\(^{417}\) Already, the acknowledgment and development of human rights form an important paradigm shift of public international law. Compare Norberto Bobbio, Gegenwart und Zukunft der Menschenrechte in das Zeitalter der Menschenrechte 9 (1999).
individual is able to appeal to a court against any state party to
the ECHR that allegedly has violated his/her rights enshrined in
that document not depending on the latter's consent. Considering
that even states, as original legal subjects of public international
law, depend on the consent of other states they want to sue before
the International Court of Justice, this innovation forms a legal
and dogmatic revolution that might be understood as another form
of constitutional litigation beyond the nation state.

According to Article 34 of the ECHR, any person that claims to
be violated in his/her rights granted by the ECHR can appeal to
the court. This has to be in written terms, a standard form pro-
vided for by the court\textsuperscript{418} should be used, and the facts as well as
the violated right shall be duly told. In any case, local remedies
have to be exhausted; in Germany, this includes constitutional
complaint. Correspondingly, the decisions of the German FCC
can be reviewed by the ECtHR. The individual complaint to the
ECtHR has to be filed within six months after the final domestic
decision under Article 35 (1) of the ECHR. As individual com-
plaint has become obligatory for all state parties, no member to
the ECHR can object the jurisdiction of the ECtHR. The declar-
tory judgments of the court are binding on the state parties. The
ECtHR is not confined to rule on a violation of the ECHR, but, in
case of a violation, it can further afford just satisfaction to the in-
jured party.\textsuperscript{419} However, unlike the judgments of the ECJ, the
judgments of the ECtHR do not entail direct effect. The court can
neither overrule a domestic judgment nor can an individual, by
virtue of the ECHR,\textsuperscript{420} directly invoke the judgment. The state
party is bound only by public international, not supranational law,
to give effect to the judgment and it lies within discretion of the
states how they implement the judgment.

The ECtHR has proven to be an independent and sometimes in-
convenient court, ready to protect human rights effectively even if
this will cause major debates in Europe. Yet, referring to its su-
ervisory function and accepting the states' broad margin of ap-
preciation, the court recently seemed to sometimes avoid taking a

clear stance on the human rights question of a pending case. To

\footnote{418}{European Court of Human Rights Standard Form, http://www.echr.coe.int/NR/rdonlyres/29D52AE6A-1538-4868-AC63-
1FEA0640ECE390/FormulaireGER.pdf.}

\footnote{419}{Council of Europe, European Convention on Human Rights, Apr. 11, 1950, art. 41.}

\footnote{420}{Domestic law might enable an individual to rely on the ECHR and the judgments of
the ECtHR in conjunction with national law, as it is the case in Germany. \textit{See infra} Section
IV(4)(b).}
Spring 2011 Patchwork Constitutionalism 415
give only a few examples of the court’s case law: in a chamber judgment of 2009 the court “banned” crucifixes from classrooms to protect negative freedom of religion and the right to neutral teaching of pupils and their parents leading to many protests among clerics, politicians and religious people in Europe. The case was referred to the Grand Chamber, who in 2011 finally granted the appeal and dismissed the complaint. Unlike the former chamber judgment, the Court does not regard the compulsory display of a crucifix as a violation of the duty of state neutrality or an indoctrination of the pupils. Rather and referring to the lack of a European consensus, it holds that the decision about crucifixes in state-school classrooms, in general, belongs to the margin of appreciation every state enjoys. Even if one accepts this holding, the court should have spent more efforts to discuss the underlying questions, be it the content and limitation of freedom from religion (“negative” freedom of religion), be it the criteria governing the acceptance of a margin of appreciation or be it how to counterbalance antagonistic human rights claims.

Another recent judgment has settled a controversial discussion. Once again referring to the lack of European consensus, the ECtHR declared that the ECHR does not contain a right to abortion – a judgment that found broad support among scholars and the European public. Another recent judgment, in which the ECtHR declared in a case against Germany that a retrospective extension or a retrospective order of preventive detention violates the ECHR, had caused some problems as in consequence, several detainees had to be released. They are expected to be a threat to the public what scares many people and asks for their day-and-night observation. If one accepts the ECHR to be a constitutional document, the German state faces the challenge to counterbalance those constitutional

421. Lautsi v. It., App. No. 30814/06 (Eur. Ct. H.R. 2009). The Court could not “ban” the crucifix itself but rendered a declaratory judgment holding that there has been a violation of the rights mentioned. Id.
423. Protocol 1, art. 2.
426. For a critical comment on the judgment compare Michael Lysander Fremuth, Annotation to Lautsi, 30 NVwZ (forthcoming in 2011)
rights with the right to protection under the German constitution and has, thus, to reconcile competing constitutional claims. Just recently and backing the ECtHR ruling on preventive detention, the German FCC stressed that the Basic Law has to be interpreted in the light of the ECHR and the rulings of the ECtHR. Bearing in mind that the Basic Law has the final say in cases of conflict, it has to be analyzed in each specific case if and how the rulings of the ECtHR can be reconciled with the rights and principles under the Basic Law. In application of that, the FCC ruled in the aforementioned judgment that several provisions concerning preventive detention violate rights under the basic law in an interpretation that duly takes into consideration the ECHR and the ECtHR rulings. The ECtHR has explicitly welcomed the judgment of the FCC.

D. The Interplay of Constitutional Legal Orders and the System of Tiered Judicial Protection in Europe

1. Introduction

As already indicated, if one accepts the existence of various constitutional orders within Europe, concurring constitutional claims may have to be counterbalanced and conflicts of jurisdiction must be solved. Accordingly, some final remarks sketching the interplay of the constitutional orders and the respective constitutional courts will be made.

In short, one can say the ECHR provides for the minimum standard of human rights protection. After the accession of the EU to the ECHR, that treaty will constitute the ultimate benchmark for human rights protection in Europe. Domestic law as well as EU law will have to be in conformity with the rights contained and with their interpretation by the ECtHR but they may also exceed the guarantees and provide for a higher level of protection. The member states will not be allowed to go below the level of protection of human rights under the ECHR and EU law

(if applicable). As the ECJ accepts restrictions on European integration, especially the economic freedoms, justified by the protection and promotion of human rights, even if they are handled differently in the member states, the states may grant the highest level of protection. In the end, though, the ECtHR will have the final say and be able to review measures of public authority by the states and the EU.

2. Legal Effects of the ECHR on Domestic and EU Law

First, the domestic law of the state parties has to comply with the ECHR and their public authority acts are reviewable by the ECtHR, whose decisions are binding on the respective states. The state parties might be forced to alter their laws and, as an innovative feature, the court may even sentence a state party to pay a penalty to the individual violated in his/her rights. As said, those decisions do not entail direct effect and individuals cannot rely on them directly. Rather, the states have to decide about the status and the implementation of the Convention and the court's rulings. In Germany, the ECHR as an international treaty only has the status of ordinary law under Article 59 (2) of the Basic Law, so that a constitutional complaint cannot be based on rights under the ECHR only. However, according to the rulings of the FCC, national courts have to read and interpret basic rights under the German constitution with regard to the jurisprudence of the ECtHR. Otherwise courts might violate the rule of law principle. By this "dodge" of the FCC, the ECHR is granted a vital role in interpreting the German constitution likely to avoid conflicts with the ECtHR. Accordingly, the individual can file a constitutional complaint based on basic rights, but in the interpretation influenced by the ECHR and the rulings of the ECtHR. Nevertheless, the Basic Law remains the basis for the work of the courts and the

435. CHRISTOPH GRABENWARTER, EUROPAISCHE MENSCHENRECHTSGENOSSENSCHAFT 18, para. 6 (2009).
final authority in Germany, as the ECHR does not occupy a higher rank. In conclusion, it is national law that decides about the actual impact of the ECHR and rulings of the ECtHR.

Second, human rights under the Convention already have an influence within the EU legal order, even before the accession of the EU to the ECHR. The ECJ, from the very beginning of its human rights jurisprudence, has referred to the ECHR and the rulings of the ECtHR, acknowledging their "special status" as a legal source. Article 6 (3) of the TEU confirms the court's case law declaring that "fundamental rights, as guaranteed by the ECHR . . . shall constitute general principles of the Union's law." The Lisbon Treaty further inserts Article 6 (2) to the TEU, which earmarks the accession of the EU to the ECHR. How to implement the accession is still under debate, but after it has been accomplished, acts of public authority of the EU will formally be subordinated to the Strasbourg-regime as well. Then, every act of EU authority will have to comply with EU fundamental rights and the ECHR itself. The ECtHR will be able to review acts of the EU and to declare them incompatible with the Convention. Currently, the court can only review acts of the state parties implementing EU law. To protect the ECHR from any evasion, the court has stressed that, although the parties can transfer competencies to international organizations, this does not divest them from their obligation under the ECHR. Rather, the transfer of competencies presupposes that the ECHR rights continue to be secured.

Third, mediated by EU law, the human rights under the ECHR have a further strong and indirect impact on the domestic legal

438. See supra Section IV(B).
440. Id.
442. The German Foreign Minister Guido Westerwelle recently held his first speech before the Parliamentary Assembly of the Council of Europe in favor of the ratification of the ECHR and declared that it is all about creating a uniform human rights standard for all citizens on European soil. Id.
443. See Tobias Lock, EU accession to the ECHR: implications for the judicial review in Strasbourg, 35 Euro. L. Rev. 777 (2010) (providing for a broader discussion of the consequences of an accession, especially with regard to the competence of the ECtHR and the responsibilities of the EU and its member states).
444. It will not be competent to declare them null and void. Such a competence is missing even today towards the state parties. It will be up to the EU to decide how to implement the judgment.
orders. For the member states are entirely bound by EU law if and in as far as they act in the scope the latter’s application, ECHR-human rights channeled into EU law by the ECJ have part in supremacy and direct effect of supranational law.

3. The Entanglement between the European Constitutional Courts

With regard to the constitutional courts – the FCC, the ECJ and the ECtHR – one can already detect a policy of shared responsibility, mutual trust and reconciliation. Though the further development after the accession of the EU to the ECHR has to be waited for, both the FCC and the ECJ already take into account the rulings of the ECtHR. The ECtHR itself respects in its jurisprudence a margin of appreciation of the national level and will, most likely, do the same with regard to EU law. The question of who has the final say in a case of conflict may be most interesting. It is linked to the question of sovereignty, even though the Schmittanian doctrine, after which sovereignty means the decision of the exceptional case, most probably will never play a role due to the efforts paid by the courts to avoid the “final conflict.”

The Relation between the ECJ and the ECtHR

After the accession, the ECJ, which already resorts to the case law of the ECtHR quite often, will be formally subordinated to the ECtHR. Its ruling can be reviewed by the ECtHR, so that in questions of human rights the ECJ will no longer have the final say in Europe. However, the ECtHR has already shown its willingness to trustful cooperation among the two courts. The court not only considers EU law and the case law of the ECJ. In the Bosphorus-case, the ECtHR was asked to rule on a decision of Ireland to impound aircrafts leased by a company based in Turkey but owned by a company in former Yugoslavia. The UN Security Council had adopted a resolution asking for the freezing of all assets and the EU had enacted secondary legislation to implement that resolution. Ireland felt bound by EU law not to release the aircrafts and the ECJ confirmed that interpretation. The applicant argued before the ECtHR that his right to property as pro-
vided for by Art. 1 of Protocol 1 to the ECHR was violated. The ECtHR responded that it does not review an implementation measure of a state to comply with EU law as long as that organization is considered to protect fundamental rights in a manner at least equivalent to the level of protection of the ECHR. According to the court, there is a presumption that the state has not departed from the requirements of the Convention when it does no more than implement legal obligations following from its membership. This presumption can be rebutted if, in a particular case, the protection of rights also protected by the ECHR is “manifestly deficient.” However, according to the ECtHR the protection of fundamental rights by the EC (now the EU) can be considered to be, and to have been at the relevant time, “equivalent” to that of the Convention system.448 Thus, Ireland had not violated the property right of the applicant.

Currently, the ECtHR is not competent to review acts of the EU but limited to implementing acts of the state parties. However, with Bosphorus, the ECtHR has shown a notable judicial restraint towards acts impelled by the EU law and seems to have engaged in a form of judicial cooperation trusting the EU human rights protection and confining itself to a surveillance authority. However, most recently, in an asylum-case, the court has stressed that the presumption only applies to strict international obligations and it rejected the presumption of equivalent protection in case the state party enjoys discretion whether to take a measure (transferring the asylum-seeker to another country) or not.449 Good arguments exist that after the accession of the EU this confidence towards and special status of the EU and the ECJ might be repealed450 and a recent common statement from the Presidents of both courts supports this assumption.451 Yet, the ECtHR might recognize the value and mutual benefit of a tiered responsibility and competence approach, not only to reduce its own workload but also as a contribution to a collaborative human rights protection within Europe, and therefore adhere to the Bosphorus-presumption. It might be more likely, though, that the ECtHR will not retract its jurisdiction but grant the EU the same margin

of appreciation as it does to the state parties. In that case, mutual cooperation and trust between the courts will not be a question of jurisdiction, as it is in FCC’s approach in *Solange II* (see below), but of control density.

**The ECtHR, Domestic Law and the German FCC**

The ECtHR has a huge amount of power. It remains, though, an international court without the ability to enforce the judgments by itself. The ECtHR cannot annul judgments of the FCC but it can rule differently on the topic and grant the individual financial redress. The FCC will bear in mind the interpretation of the ECtHR as otherwise Germany would continuously be in violation of its international human rights obligations which is not only a breach of public international law but runs furthermore counter to the Basic Law’s commitment to international law (Völkerrechtsfreundlichkeit). However, how to reconcile and align national law with the rulings of the ECtHR, is up to the nation state to decide. Thus, the court and the applicant depend on the willingness of the state parties to comply with the judgments. In that respect, it should be acknowledged that the ECtHR accepts the limits of its competence and leaves the state parties with a broad margin of appreciation. It does not provide abstract judicial review in cases of individual complaints but confines itself to examine the issues raised by the case before it.

Furthermore, it explicitly recognizes the variety of legal systems in Europe and stresses that it is not the court’s task to standardize them. In a recent case on abortion, the court confirmed this approach, stating that no right to abortion exists and that states can establish tough restrictions even if the majority of European states showed a more liberal approach. Regarding and considering the constitutional legal orders of the state parties, the court opens a dialogue and pays tribute to the mutual impact of the legal orders that may avoid provoking conflicts and resentments as well as incomprehension in society.

On the other side and exemplified by the judgment on preventive detention, the ECtHR is willing to decide contrary to a constitutional court (the FCC) and the major opinion within a state. In

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conclusion, one might say that the court tries to develop a common denominator generally deduced from the states' legal orders. However, there is an autonomous interpretation of the Convention and the court does not shrink from protecting that approach even against the state parties and the public opinion. On the other side, as shown above, the German FCC, referring to the rule of law, Article 20 (3) of the Basic Law, gives the ECHR and the ECtHR’s rulings a strong meaning within the German legal order thereby trying its best to avoid a conflict. Yet, the court does not leave doubts that it is up to the national courts, and finally the FCC, to decide on the basis of the domestic constitution even if this would amount to a breach of international law. This is due to the conviction that the sovereignty of Germany still rests in the Basic Law – a conviction that plays an important role for the stand taken by the FCC towards EU law as well.

The Cooperation between the ECJ and the FCC

Though one might agree with the FCC calling the relation between both courts a relation of cooperation, the legal foundations in their final consequence remain controversial even though the practical relevance is limited. The controversy is provoked by the different views on the relation between EU law and the law of the member states.

The ECJ stresses that the EU and its laws are different from traditional international organizations and from public international law respectively. As a different source of law having a supranational and autonomous character, EU law is characterized, inter alia, by the principle of supremacy. Accordingly, domestic provisions cannot be invoked against EU law. From this point of view, EU law prevails even over domestic constitutional law. Bearing in mind its self-conception as the constitution’s defender, the FCC felt uneasy hearing those words from Luxembourg. Although the FCC accepts the claim for supremacy by the ECJ, its justification differs. The court emphasizes that only the national

457. Id.
461. See MICHAEL LYSAUNDER FREMUTH, DIE EUROPÄISCHE UNION AUF DEM WEG IN DIE SUPRANATIONALITÄT 135 et seq.
constitution can open the understanding of statehood for supremacy of acts not deriving from the state; thus, supremacy is only granted under the conditions and to the extent the Basic Law allows for it.\textsuperscript{462} In its early Solange \textit{I}-ruling,\textsuperscript{463} the FCC has stated that it will exercise its jurisdiction to protect basic rights even against supranational acts of public authority from the former EC. This triggered the human rights jurisprudence of the ECJ. In \textit{Solange II},\textsuperscript{464} the FCC undertook an in-depth scrutiny to show that the standard of fundamental rights on EU level is sufficiently comparable to the indispensable national standard under the Basic Law. Therefore, the court is able to refrain from exercising its jurisdiction but only as long as ("solange") the ECJ provides for an effective and generally sufficient protection standard that ensures the essence of fundamental rights and is substantially comparable to the standard granted by the Basic Law. Unlike the ECtHR, and more EU friendly, the FCC refers to the general level of protection whereas the ECtHR in \textit{Bosphorus} reserves exercising its competence in every individual case. In \textit{Maastricht}, a decision on the ratification of the Treaty of Maastricht establishing the EU, the FCC confirmed \textit{Solange II} but stressed the claim for national sovereignty and asserted that its relation to the ECJ is governed by an understanding of judicial cooperation as both courts protect human rights on the respective level in mutual respect and understanding.\textsuperscript{465} The following \textit{Bananenmarktordnung}-decision\textsuperscript{466} had a great impact on constitutional litigation, as the FCC stated that constitutional complaints as well as applications for concrete judicial review by the courts against supranational acts are only admissible if the applicant/referring judge, after a comprehensive examination of the case law of the FCC and the ECJ, can prove that the level of human rights protection on EU level had fallen below the generally sufficient standard compared with the Basic Law. This requirement can hardly be met so that constitutional


complaints against supranational acts may be presumed to be generally inadmissible. In its recent Lissabon-ruling, dealing with the establishment of the new EU merging the former EC and EU into one single personality, the court confirmed its previous decisions. Going further, it explicitly stressed its willingness to exercise its jurisdiction against ultra vires acts of the EU (ultra vires review) and acts violating the constitutional identity of the Basic Law (identity review) in order to defend the effectiveness of the right to vote and democratic self-determination.

A showdown was awaited for the FCC's Honeywell decision as a reaction to the ECJ's decision in Mangold. In the latter judgment, the ECJ asserted the existence of a general principle of non-discrimination in respect of age in addition to the basis of that principle under EU secondary law. Many scholars accused the ECJ of transgressing its competencies and expected the FCC to object, for the first time and in accordance with its ruling in Lissabon, to the case law of the ECJ by exercising its reserved competence to ultra vires review against supranational acts. Yet, the FCC concretized Lissabon, some even argue deviated from it, and stated that it is only able to review in a manner open towards European law, requiring a breach of competence by EU bodies to be sufficiently qualified and the ECJ having been asked to reassess its disputed jurisprudence before allowing for review. For that, the act in question has to be manifestly in breach of competencies, leading to a structurally significant shift to the detriment of the member states in the structure of competencies between them and the EU. The court consequently left open whether such a general principle against age discrimination exists and rejected the complaint as, in any case, such a significant shift had not occurred. In consequence of this jurisprudence, an action against EU law will hardly ever be even admissible. So, in prac-

468. BASIC LAW Art. 38(1); BASIC LAW Art. 23(1); BASIC LAW Art. 79(3).
471. See supra Section IV(B).
472. See Roman Herzog / Lüder Gerken, Stop the European Court of Justice, Published in German on September 8, 2008 by F.A.Z (Frankfurter Allgemeine Zeitung).
473. 2 BvR 2661/06, 96 (Landau, J., dissenting); see opinion Judge Landau, paras. 96 et seq.; also Daniel Gehlhaar, Honeywell in der Praxis, Ein Aus- und Überblick, 27 NZA 1053 (2010) (arguing that this decision goes beyond the Lissabon-ruling).
474. 2 BvR 2661/06, para. 53 et seq.
nce a conflict is not likely to emerge as both courts show the ten-
dency to trustful cooperation in order to avoid a case of serious
conflict.

E. Conclusion

In Europe, we observe a more and more entangled system of
constitutional legal orders with their respective constitutional
courts. Europe, thereby, may offer an important model of how to
address challenges of globalization on the state, supranational and
international level while at the same time protecting those (consti-
tutional) guarantees generations have fought for.

There is much weight in arguing that sovereignty still rests in
the nation states,\textsuperscript{475} \textit{i.e.} those entities that have proven to be the
best ones in size, structure and tradition to integrate a polity and
protect the individual’s rights. But other defenders of the common
good and the individual have been created, not only to control the
states. As globalization increasingly transcends the abilities of
the traditional nation state, international organizations have been
entrusted with former state functions and granted means analo-
gous to the states. Accordingly, they have to observe and they are
bound by comparable restrictions. Their respective courts are re-
quested to ensure that those organizations comply with these ex-
pectations.

Surely, there will be conflicts in future times about sovereignty,
competencies and supremacy. But in a more a more complex
world, only a system of multi-tiered responsibilities and compe-
tencies, of trustful cooperation and mutual enrichment can grant
security, peace, prosperity and happiness for the people.

As it has been demonstrated, the European constitutional courts
are working on the alignment and balancing of their jurisdiction
and jurisprudence to reconcile and foster different elements of
constitutionalism and human rights protection in Europe. What
seems to emerge, though on a minimal and initial level, is an over-
lapping common and comprehensive European constitution.
Though inspired and nourished by the other written constitutional
documents (ECHR, EU law and domestic constitutions), that
overall European patchwork constitution is different from them.
It forms the idea \textit{behind} mutual comparison of constitutional or-
ders and the attempt to deduce common principles and under-

standings that react back on the interpretation of the document to apply in a specific case. In that sense, European constitutionalism is a patchwork comprising of different constitutions, connecting and forcing them to interact. Yet, that overall European patchwork constitution is like a rag rug: the common picture is broader than the single patches.

Especially the individual is the winner of that process as can be seen by the triplication of human rights protection. Unlike elsewhere in the international sphere, the individual, under certain conditions, has or – after the accession of the EU to the ECHR – will have three courts to appeal to if he/she regards himself/herself violated in fundamental rights. The individual does not exist for the state but the state for the individual.476 Accordingly, international organizations, including their respective courts, that fulfill state functions and – in part – act like states have to constantly demonstrate their dedication to the individual as the final reason for all law and efforts in the world.477

A well-tuned and connected system of constitutional litigation on all relevant levels might grant them that chance and, accordingly, persuade the individual to vote in favor of his/her state and its international and supranational integration by a daily plebiscite (plebiscite de tous les jours).478

476. BASIC LAW Art. 1(1) (Herrenchiemsee-proposal for the Basic Law); NORBERTO BOBBIO, DAS ZEITALTER DER MENSCHENRECHTE 52 (1999).
477. WOLFGANG GRAF VITZTHUM, VÖLKERRECHT, 27, para. 60 (Wolfgang Graf Vitzthum ed., 5th ed. 2010). From the perspective of a sociological interpretation of public international law, see GEORGE SCHELLE, DROIT INTERNATIONAL PUBLIC 410 et seq. (1944).
478. Ernest Renan, in his famous speech at Sorbonne addressing the nation, stated that "l'existence d'une nation est [...] un plébiscite de tous les jours, comme l'existence de l'individu est une affirmation perpétuelle de vie." ERNEST RENAN, QU'EST-CE QU'UNE NATION? (1882). He is, furthermore, said to have anticipated the European integration as he assumed that the nation state might be replaced by a European confederation.