Federal Constitutional Court of Germany (Bundesverfassungsgericht) Germany [de]
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Subject(s):

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A. Importance of the Court

1. The Federal Constitutional Court of Germany (‘FCC’) has become one of the leading constitutional courts or supreme courts with the power of constitutional adjudication in the world. Not only was it a model for numerous constitutional courts established in the second half of the 20th century, but also its jurisprudence influenced a number of younger constitutional or human rights courts. Important doctrinal innovations emanated from the jurisprudence of the FCC, the → proportionality test only being the best known example. As David Robertson says: ‘So important is this court that any synoptic discussion [of constitutional jurisprudence, DG] will depend on frequent mentions of the German approach’ (Robertson 79, see also 40). Alec Stone Sweet calls the FCC ‘arguably the most powerful and influential CC in the world’ (Stone Sweet 823; for an excellent overview over the whole jurisprudence see Kommers and Miller).

B. Establishment of the Court

2. The FCC was provided for in Art. 93 of the Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) of 23 May 1949 (Ger) and established two years later after the Act on the Federal Constitutional Court (Bundesverfassungsgerichtsgesetz, Ger), hereinafter FCC Act) had been enacted on 12 March 1951. The FCC rendered its first decision on 9 September 1951. The decisions are published in the official collection Entscheidungen des Bundesverfassungsgerichts (at present 143 vols; English translations of selected cases are available in the series Decisions of the Bundesverfassungsgericht, 7 vols; for a collection of landmark cases see Bröhmer, Hill and Spitzkatz (eds)). They can also be found on the website of the Court; important decisions are available in German and English.

3. In retrospect, the FCC is regarded as the most important innovation of the Basic Law. There was no such court in the German constitutions of the 19th century (Scheuner). Judicial review (→ judicial review) appeared incompatible with monarchical sovereignty. The Constitution of the German Empire (Paulskirchenverfassung) (Ger), drafted during the revolution of 1848/49 and based on the principle of → popular sovereignty, provided for judicial review by a Reichsgericht, but the revolution failed and the constitution did not take legal force. The Reichsgericht of the German Empire (1871–1918) was not a constitutional court, but the highest appeal court in matters of civil and criminal law. The → Weimar Constitution (1919) established a Staatsgerichtshof whose powers were, however, limited to impeachments and federal disputes. The question whether the ordinary courts or at least the supreme court, the Reichsgericht, had the power to review statutes was contested. The Reichsgericht claimed this power, but made little use of it. The Weimar Republic experienced a lively political and juridical debate about the establishment of a full-fledged constitutional court, the protagonists being Hans Kelsen who argued in favour of judicial review and Carl Schmitt who rejected it (Kelsen (1929 and 1931); Schmitt (1929 and 1931); see Wendenburg).

4. The debate remained without practical consequences in the Weimar Republic. The Nazi regime had no constitution, let alone a constitutional court. But the self-destruction of the Weimar democracy and the totalitarian rule of the Nazi regime prepared the ground for a full-fledged constitutional court after World War II. There was a shared belief among the authors of the Basic Law that the new constitution should matter and that, in order to achieve this, an enforcement mechanism was indispensable. The belief found expression in the supremacy clauses of Art. 1 Section 3 and Art. 20 Section 3 Basic Law and in the provisions on the Constitutional Court (Arts 92–94, 99–100 Basic Law; → supremacy / primacy) that were adopted by the Parliamentary Council without any major controversy.
C. Constitutional Status of the Court

5. The Basic Law mentions the FCC in Chapter 9 on ‘The Judicial Power’. This raised the question as to whether it was just another judicial body within the judiciary or whether its specific function of reviewing acts of the various branches of government elevated it to the rank of a highest state organ on equal footing with the Federal President (Bundespräsident), the Federal Parliament (Bundestag), the Federal Council representing the Länder (Bundesrat) and the Federal Government (Bundesregierung). The answer to this question had a number of practical consequences. First and foremost, the judiciary is in all administrative aspects under the control of the Ministry of Justice. In particular, its resources are determined and allocated by the Ministry (→ financing of courts). The FCC faced this dependency in the beginning of its work when the Ministry delayed or diluted the necessary equipment of the FCC in terms of building, personnel, library, etc.

6. The Court therefore argued in a memorandum to the government that its position and function as determined by the Basic Law entailed the status of a constitutional organ equal to the other highest organs of the Federal Republic and consequently independent from the Ministry of Justice (for the relevant documents see Leibholz). The Government and especially the Minister of Justice denied this fiercely. The dispute coincided with the first cases of high political impact that reached the Court in 1951-52, when government and opposition alike tried to instrumentalize the FCC for their political purposes (see the documents in von der Heydte). In this situation, the FCC succeeded in establishing itself as an impartial organ above the political parties, determined to decide constitutional issues regardless of the expectations of the party leadership according to the law (Collings 9–28). The Government finally yielded to the pressure by the opposition and the Länder which supported the Court’s position. Section 1 of the FCC Act was amended in correspondence with the demands of the FCC. Plans of Chancellor Adenauer to bring the election of judges under the control of the majority party failed.

D. Powers of the Court

7. Different from the → Supreme Court of the United States the FCC is specialized on constitutional adjudication, insofar following the Austrian model of 1920, whereas ordinary law is administered by the ordinary judiciary with its five branches: civil and criminal law; administrative law; labour law; social security law; taxation. For a long time after its foundation the FCC was the court with the largest number of powers, partly contained in the Basic Law itself, partly in the FCC Act. Some constitutional courts established after the collapse of the socialist systems in 1989 surpassed the FCC by allowing the actio popularis (like Hungary) or enabling the judges to take up issues on their own initiative (like Russia).

8. The FCC has altogether 20 powers (enumerated in Section 13 of the FCC Act; → powers and jurisdiction of constitutional courts / supreme courts). The most important ones are norm control in two forms: abstract norm control upon application by the federal government, any Länder government or one-fourth of the members of the Bundestag, and concrete norm control upon referral by ordinary courts. Ordinary courts are supposed to check the constitutionality of laws that apply to a case at hand, but are not entitled to declare statutes unconstitutional. Rather they have to refer to the FCC questions of constitutionality of statutes on which the decision in the case at hand depends (Art. 100 Basic Law). The FCC decides furthermore on constitutional disputes among the various organs of the Federal Republic and on disputes between the Federal Republic and the Länder or the Länder among themselves. In addition, the FCC decides on individual complaints that everybody may raise if he or she feels violated in his or her fundamental
rights by a state act (→ individual complaints procedures). The individual complaint, although normally directed against an individual act, can lead to an incidental review of a statute, because infringements of a fundamental right presuppose a basis in a law that, in itself, has to be constitutional. The individual complaint is by far the most frequent procedure, roughly 98 per cent of the annual case load of the court (about 6,000 cases) consist of individual complaints. Among the other powers are → impeachment procedures, powers to implement the concept of → militant democracy like a → ban on political parties, forfeiture of fundamental rights etc.

9. In cases of abstract norm control, federal disputes and → separation of powers issues the FCC has original jurisdiction, whereas the concrete norm control arises out of case and controversy, and individual complaints are admissible only after exhaustion of all other available remedies. This is why the immediate objects of individual complaints are mostly decisions of ordinary courts. A direct complaint to the FCC is possible in exceptional cases only, so if the grievance lies in a law itself, not only in an act of application.

E. Composition of the Court and Appointment of Judges

10. The FCC is composed of 16 judges, sitting in two panels. Judges must be at least 40 years of age and must have the qualification for judgeship, ie two law degrees, the first after law school, the second after a mandatory practical training (→ selection of judges at constitutional courts / supreme courts). Six out of the 16 judges must be taken from the supreme courts of the various branches of the judiciary. The judges serve for a term of twelve years without renewal. Different from the ordinary courts that are composed of career judges, the judges of the FCC come from various legal professions. Next to the six career judges one would normally find law professors, high-ranking civil servants, sometimes practicing lawyers, and often a few members with political experience as members of parliament or heads of a ministry.

11. The judges are elected, one half by the Bundestag, the other half by the Bundesrat, the representation of the Länder. The election requires a two-thirds majority. This requirement has led to an informal agreement between the two major political parties, Christian Democrats (CDU) and Social Democrats (SPD), according to which they divide the nomination rights equally among themselves. As governments in the Federal Republic are usually coalition governments, the larger coalition partner may cede one nomination right to the smaller coalition partner. However, the informal nomination right does not guarantee the election of the candidate. Rather, the nomination is followed by a negotiation among the parties, where a veto is not unusual. The negotiations happen behind closed doors. The agreement found is usually accepted unanimously in the formal election without a prior hearing (the only empirical study by Billing (1969) is outdated). The system is often criticized for its lack of transparency. However, up to now it has prevented strongly partisan persons from becoming members of the Court and has contributed to a rather high professional quality of the judges. Factions of judges who agree on a common position before the formal deliberation or who routinely vote in one way have not formed. Split votes according to party lines are extremely rare.

F. Internal Procedure of the Court

12. The FCC is a twin court. It sits in two panels of eight judges, called senate. Cases are divided among the senates according to subject matters. If one senate wants to diverge from the judgment of the other, a decision of the plenum is required. Cases of this sort are rare. In abstract norm control procedures, federal disputes and separation of powers cases oral argument is mandatory, in all other cases it is optional. The number of oral arguments per year is small. In order to cope with the caseload a simplified procedure is available for individual complaints and concrete norm controls. If they do not raise new constitutional
questions they may be handled by so-called chambers composed of three judges. The chambers decide unanimously. If unanimity cannot be reached the case devolves to the full senate. The annulment of parliamentary laws is reserved to a decision by the senate. Senate decisions are less than 1 per cent of all cases.

13. The Court has adopted a system of judge rapporteurs (for a good account of the internal procedure see Lübbe-Wolff; further Rogowski and Gawron). Cases are divided among the judges according to subject matters, and precaution is taken that each judge has more or less the same case load. The judge rapporteur prepares a memo for his or her colleagues, which discusses the case, reports on precedents, academic writing, if desirable also on foreign jurisprudence and ends with a proposal how to decide the case. In cases to be decided by the chamber, the judge encloses a draft opinion which circulates and is usually signed by the other members of the chamber without deliberation. In cases to be decided by the senate no draft is added to the memo. Rather, the senate deliberates, usually extensively, and the opinion is written by the judge rapporteur on the basis of the deliberation, even if he or she was in the minority. The draft opinion will then be read and discussed in a second deliberation where every member of the senate may suggest changes concerning argumentation and style.

14. Each judge has law clerks, currently four, most of them judges of lower courts who usually serve for a period of two years before returning to their home institutions (→ clerks of constitutional courts / supreme courts).

15. One can observe a general willingness among the judges to find a common solution, but no pressure to do so (Kranenpohl). It is not an exception but a normality that judges change their mind because of the deliberation. If a case remains controversial the judges vote. In order to declare a state act unconstitutional a majority is required. In the (rare) case of a four-to-four decision the act is upheld. Different from the continental tradition that courts speak with one voice and anonymously, dissenting opinions have been permitted in the FCC as of 1971. However, dissenting opinions are rather rare in the FCC. Judges who are in the minority do not feel obliged to disclose their dissent. Some judges never file a dissenting opinion, but even a great dissenter will hardly file more than one dissenting opinion per year. Hence, the lack of dissenting opinions is not an indicator of a unanimous decision in Germany. From time to time, the vote is disclosed, but in the absence of dissenting opinions without names.

G. Jurisprudence of the Court

1. Method of Interpretation

16. Any account of the Court’s method or methods of constitutional interpretation has to cope with the fact that the opinions remain silent with regard to methodological questions (→ interpretation of constitutions). Research on the Court’s methodology is rare (Wrase). However, so much can be said: The FCC understands the Basic Law as a living constitution. This is not to say that the history of the Basic Law is irrelevant. Rather, the Court is aware that the Basic Law can be fully understood only if it is seen as an answer to the failure of the Weimar Constitution and to the Nazi rule. But it means that originalism in the form of original intent and original meaning is absent in Germany. Likewise absent is a positivistic approach in the sense that only textual and logical arguments are permitted, with the consequence that a court has no possibility to adapt the meaning of constitutional provisions to new challenges emanating from social change.
17. The methodological approach of the FCC is best characterized by three elements: First, the provisions of the Basic Law are not interpreted isolated from each other, but with regard to their position and function within the constitution as a whole.

18. Second, the approach is value- and function-oriented. In particular, fundamental rights are understood as legal expressions of values (groundbreaking is the 1958 → Lüth Case (Ger)). For the interpretation of some fundamental rights (like freedom of the media) and most of the structural provisions the function that they are supposed to fulfil plays an important role. The goal of constitutional interpretation can be described as to give the utmost effect to the value or function of a constitutional norm under given conditions.

19. Third, since this goal can be reached only if the segment of social reality in which constitutional norms are to take effect is taken into account, an analysis of social reality becomes inevitable for which the Court often invites expert knowledge. As social reality is in constant change, this methodological choice gives constitutional interpretation a dynamic feature, limited only by the text and the purpose of the constitution. Several times, this led to unwritten fundamental rights that were formally derived from enumerated rights, but materially amounted to new rights, such as the right to informational self-determination (the → data protection right, see the Volkszählung (Census Act) Case (15 December 1983) (Ger)) and the right to integrity and confidentiality of informational systems (the so-called computer right, see the Online-Durchsuchungen (Online Search) Case (27 February 2008) (Ger)). However, the Court recognizes that there may be social change which one cannot cope with by way of constitutional interpretation but only through constitutional amendment (→ amendment or revision of constitutions).

2. Fundamental Rights

20. Based on this approach the FCC has contributed a number important innovations to constitutional law, mainly regarding → fundamental rights (Grimm 2015), but also the organizational parts of the constitution. Many of these innovations were adopted by constitution makers or constitutional courts or supreme courts of other countries. The most influential contribution to global constitutionalism is the principle of proportionality (see the map in Barak 182). The principle applies if fundamental rights are limited by law or pursuant to law. A law that limits a fundamental right must not only respect the limitation clauses of the constitution but also pass the—unwritten—proportionality test. It must have a legitimate purpose, ie a purpose not prohibited by the constitution. The means employed by the law must be suitable to reach the purpose. In addition it must be necessary to reach the end, meaning that no alternative means exist that would reach the end in the same way, yet limit the fundamental right less. If these tests are met, the last prong consists in balancing the gains and losses of the competing fundamental rights.

21. Other innovations are the interpretation of the right to free development of one’s personality (Art. 2 Section 1 Basic Law) as residual right (Elfes Case (16 January 1957) (Ger)), the horizontal effect (Lüth Case (15 January 1958) (Ger)) and the duty to protect (Schwangerschaftsabbruch I (Abortion I) (25 February 1975) (Ger)). According to Elfes, Art. 2 Section 1 Basic Law covers any individual action that is not protected by a specific right (→ dignity and autonomy of individuals). Fundamental rights protection thus became comprehensive. Every state act that restricts individual freedom can be challenged with the individual complaint. The horizontal effect extends the influence of fundamental rights into private law relationships, although not directly by subjecting private individuals to fundamental rights, but indirectly by way of interpreting private law in the light of the fundamental right affected (‘radiating effect’; → Drittwirkung; → horizontal application). The duty to protect has added a positive dimension to the so-called classical negative dimension of fundamental rights. While in their negative dimension they oblige the state to abstain from certain actions that would amount to a violation of a fundamental right, in their
positive dimension they oblige the state to take action in order to protect a fundamental
right against menaces emanating from private actors, mostly dangers produced by scientific
and technological progress and its commercial use. The addressee of this duty is the
legislature, which means that the FCC may compel the parliament to legislate in order to
fulfil the duty.

3. Organizational Structure

22. Regarding the structural part of the Basic Law, the jurisprudence of the FCC is mainly
characterized by turning away from the formal understanding of the constitution that
prevailed during the Empire and still in the Weimar Republic. Instead the FCC developed a
substantive understanding of the guiding principles of the Basic Law such as → rule of law,
→ federalism and in particular democracy (Haltern; Kneip). In this understanding
democracy does not exhaust itself in periodical → elections. The election must also be free
in a material sense. This includes equal opportunities for majority and minority, a free
discourse, which, in turn, depends on a free media system, free once again in a material
sense, ie structured in a way that a democratic society receives the information and
viewpoints which are indispensable for self-government. It presupposes furthermore that
the elected organ has sufficient power in order to transform the electoral will into political
decisions. In the FCC’s view it is one of its most important functions to keep the democratic
process open, open for criticism and alternatives as well as against the attempts of the
political parties in power to immunize themselves against competition. Many elections laws
and party finance laws have thus been declared unconstitutional.

H. Legal Effect of Judgments

23. The decisions of the FCC are final. No appeal is available on the domestic level.
However, the annulment of a law does not bar the legislature from enacting a new law with
the same content, although this is not likely to happen unless the legislature can argue that
changed circumstances demand a new assessment. The effects of an annulment of a state
act extend beyond the parties to the litigation. It binds all state authorities, the
constitutional organs of the Federal Republic and the Länder as well as all courts and state
agencies (Section 31 FCC Act). Decisions about the compatibility or incompatibility of a
statute have themselves the force of law. The sentence is published in the Official Gazette.

24. If a law violates the Basic Law the Court has to declare it null and void (Section 78 FCC
Act). It is regarded as null and void from the outset (ex tunc). However, the Court found it
inopportune to impose nullity unconditionally. In cases where a law violates the general
→ equality clause of the Basic Law (Art. 3 Section 1), for example because it distributes
certain benefits unequally, nullification seems to be an over-reaction as the legislature has
two options: it can abolish the benefit completely or extend it to the neglected group. In
cases like these the law is declared unconstitutional but not null and void. The legislature is
obliged to repair it within a reasonable amount of time. The same is true for cases where
the costs of nullification would be higher than those of a temporary toleration of the law.
Finally, it can happen that the constitutionality of a law seems uncertain so that only the
future development will bring clarity. In these cases the Court obliges the legislature to
observe the development and repair the law if necessary. Another means to avoid
nullification is the interpretation in conformity with the constitution. This solution is not
chosen, however, if the legislative history contains clear evidence of the legislature’s will to
avoid this meaning (regarding the implementation of judgments see Gawron and Rogowski
(2007)).
I. The Court in the Political System

25. The FCC has become an important factor in German politics (Kommers; Jestaedt, Lepsius, Möllers and Schönberger; Möllers (2014); van Ooyen and Möllers (2016)). Its mere existence transformed the political system. A new actor entered the scene and altered the conditions under which the traditional actors, parliament, government and political parties, operate. The political process no longer ends with a decision of the political branches of government. Rather, their decision can be put to constitutional scrutiny by the FCC. Consequently, this eventuality has to be anticipated already during the preparatory stage of political decision-making. The decisive questions to be asked are not only whether a political measure is just, expedient, not too costly, helps winning the next election, or whatever may be relevant viewpoints in political decision-making. The question is in addition to all that whether the measure will stand constitutional muster. Never before the existence of a constitutional court was a German constitution as relevant for political practice as the Basic Law.

26. Today one can say that no political decision of some importance escapes the FCC. If a contested measure is not challenged by the political institutions it will sooner or later reach the Court via concrete norm control or individual complaint. Cases as important as the ratification of the → Lisbon Treaty or the rescue measures for the euro came by way of individual complaints. The steady flow of cases keeps the Court in the media and makes the public aware of its influence. Through the Court’s activity it became obvious that the constitution matters. Court and constitution strengthen themselves mutually. The authority that the Court has gained over time is high (Vanberg; Vorländer (2006); Lembcke; Wrase and Boulanger). In the opinion polls the FCC usually figures as the public institution which the population trusts most. This does not save the Court from criticism. But up to now it did not affect the legitimacy of the institution. Politicians have internalized this. Open disregard of judgments would not pay off. This is the soil on which something like ‘constitutional patriotism’ (Müller) and ‘integration by constitution’ (Schuppert and Bumke; Vorländer 2002) could emerge.

27. However, the salience of the Basic Law and the prominence of the FCC do not come without a price. They form a constant invitation to couch every grievance, every concern or interest into a constitutional claim. The consequence is an ever increasing case load, mainly by individual complaints, many of which do not raise serious constitutional questions. What seems more important for German politics is the legalization of the political discourse. Political issues are soon narrowed to constitutional questions. Advocates of a political measure do not only allege that it is useful or necessary, but that it is required by the Basic Law, whereas opponents do not only argue that it is unjust, ineffective, too costly, etc., but unconstitutional.

28. Altogether, the Court plays its role in the political process in a quite active way. On a scale between judicial activism and → judicial deference the FCC would certainly range on the more activist side (see also → constitutional courts / supreme courts as positive legislators). The medium of the activism is constitutional interpretation. The Court tends to a wide and dynamic interpretation of the Basic Law. However, with every broadening or deepening of the meaning of constitutional norms the Court at the same time enlarges its own power. It shifts the borderline, not only between constitutional and ordinary law and thus between itself and the ordinary courts, but also between the juridical and the political realm (Landfried). Nevertheless, it would be too easy to attribute this to an institutional self-interest of the judges, as political scientists often would have it. One should rather distinguish between intent and effect. The intent is to secure the efficacy of the constitution in a constantly changing world. The effect is a power gain of the Court. Still, the constant American concern about the compatibility of judicial review and democracy is more or less
absent in Germany. An explanation may be that in the US judicial review followed democracy and is thus often perceived as a potential threat to democracy, while judicial review in Germany (and other European states) was a reaction to the failure of democracy in the first half of the 20th century. Here it is perceived as a guarantee of democracy.

J. The German Court and the European Courts

29. In a legally and politically more and more integrated Europe the national constitutions lose importance and so do the national constitutional courts (Grimm (2017)). This development affects also the FCC. To the same degree that Germany has transferred powers to the European institutions the FCC loses terrain. It can control the transfer of powers, but in principle not the exercise of the transferred powers by the European institutions. To the contrary, it is now competing with two European rivals, the → European Court of Human Rights (ECHR) and the Court of Justice of the European Union (‘CJEU’); → European Union, Court of Justice and General Court, however in different ways. The borderline between these courts and the FCC are by no means clear. Both European courts claim the power to review decisions of national authorities, including the FCC, as to their conformity with the → European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (‘ECHR’) or European Union law respectively. The FCC had to position itself vis-à-vis these claims (see also → relation of constitutional courts / supreme courts to ECHR; → relation of constitutional courts / supreme courts to EU courts).

1. The European Court of Human Rights

30. The ECHR exceeds traditional international law insofar as it entitles individuals to sue a member state of the → Council of Europe (COE) for violation of their conventions rights before the ECHR. The ECHR remains within the boundaries of traditional public international law insofar as the decisions of the ECHR do not enjoy direct effect within the member states. The ECHR is not an appeal court. It can only render declaratory judgments that are binding for Germany under public international law, but do not necessarily supersede domestic law. Germany has adopted the European Convention in the rank of ordinary law.

31. This means that Germany is internally barred from implementing a judgment of the ECHR if the implementation would violate the Basic Law. A conflict can especially arise in cases that evolve from private law litigation where the national courts have to strike a balance between fundamental rights on both sides. The ECHR reviews decisions of this type in spite of Art. 53 ECHR that prohibits interpretation of the Convention that would lead to a restriction or impairment of a national fundamental right. If the ECHR finds that the balance struck by the national court violates the Convention it inevitably weakens the right that prevailed on the national level and, by the same token, strengthens the right that had to give way on the national level.

32. The FCC confirmed its power to review judgments of the ECHR as to their compatibility with the Basic Law. It made clear however, that it will exercise the power in a Europe-friendly way. If an interpretation of the Basic Law can be found that avoids a conflict with the jurisprudence of the ECHR this interpretation will be accepted. Regarding the position of ordinary courts, the FCC declared that they are obliged to take the decisions of the Strasbourg Court into account, but have to follow them only if they are compatible with the Basic Law and do not disturb the balance of interests in German law (Görgülü Case (14 October 2004) (Ger)).
2. The Court of Justice of the European Union

33. Things are different as to the relationship between the FCC and the CJEU. The European Court claims unconditional primacy for EU law, even over national constitutional law. In its view, national law that has been declared incompatible with EU law automatically loses applicability. The FCC accepts this in general, but with two reservations (Lissabonner Vertrag (Lisbon Treaty) Case (30 June 2009) (Ger)). One of them is that the primacy of EU law does not apply if the EU acted ultra vires. The CJEU agrees that only European acts that are compatible with the treaties can have derogatory force. But it claims the exclusive power to determine whether a European act exceeds the powers transferred by the member states, whereas the FCC is of the opinion that, with regard to Germany, it has the last word in ultra vires conflicts. The difference is rooted in opposite understandings of the source of European law. While the CJEU is of the opinion that EU law flows from an independent European source, the FCC insists on the principle that EU law owes its applicability in Germany to the order of the German Parliament to apply it internally. This order covers only powers that the German Parliament has actually transferred. The FCC has, however, conceded that it will exercise its power only in cases of clear violation of the treaties which, in addition, causes a power shift from the member states to the EU, and only after referring the ultra vires question to the CJEU (Honeywell Case (6 July 2010) (Ger)). But the FCC does not feel bound by the answer from Luxemburg.

34. The second reservation concerns the identity of the Basic Law. Even EU acts based on a transferred power may not take effect in Germany if they are incompatible with the very identity of the Basic Law. The FCC finds support for its opinion in Art. 4 Section 2 Treaty on European Union (TEU) according to which the EU respects the national identity of the member states as expressed in their constitutional structure. The identity of the Basic Law is more or less defined by those principles that are protected by the so-called eternity clause (Art. 79 Section 3 Basic Law; → entrenched clauses) and are thus exempt from amendment. In particular, it is the existence and efficacy of fundamental rights that is part of the identity. This assumption gave rise to the famous Solange jurisprudence of the FCC (Solange I Case (29 May 1974), and Solange II Case (22 October 1986) (Ger)). Here the FCC declared that, as long as there is no fundamental rights protection in the European community equivalent to that of the national level the FCC will review European acts as to their compatibility with the German → bill of rights.

35. Up to now, the FCC has not made use of these reservations. Should it happen that two contradicting judgments in the same case exist no legal solution would be available, as the primacy claims of each court appear well-founded if one accepts the premises on which they rest. No arbiter has been established. Under these circumstances it is ultimately the national government that decides which court to follow. This may seem unsatisfactory but it is the consequence of the legal nature of the EU that has not become a state but is a supranational organization, albeit a unique one.

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