3rd Congress of the World Conference on Constitutional Justice
'Constitutional Justice and Social Integration'
28 September – 1 October 2014
Seoul, Republic of Korea

Questionnaire

Reply by the Federal Constitutional Court of Germany

Reporting Justice: Susanne Baer

A. Description of the Court

The Federal Constitutional Court (Bundesverfassungsgericht, FCC) is the first body of its kind in German constitutional history. It was established in 1951 as a reaction to the erosion of the Constitution during the totalitarian rule of National Socialism, which showed the need for a special body to protect human rights, democracy, the rule of law and the federal structure as laid down in the Constitution.
The Court has the power to reverse, upon constitutional complaint, any decision of any other German Court which is held to violate fundamental rights. It is, however, not an instance of revision above the normal stages of appeal. It will interfere with the application of ordinary law by the regular courts only in cases of failure to comply with the rules and principles of the Constitution.

I. Basic texts

The German constitution is the Basic Law (Grundgesetz – GG) of 1949, most recently amended in 2012. The work of the FCC is governed by the Law on the Federal Constitutional Court (Gesetz über das Bundesverfassungsgericht – BVerfGG) of 1951, most recently amended in 2012. In addition, the Court itself issues Rules of Procedure of the Federal Constitutional Court (Geschäftsordnung des Bundesverfassungsgerichts – GOBVerfG) of 1986, most recently amended in 2002.

II. Composition

The Federal Constitutional Court is composed of 16 justices, working in two Senates as well as in Chambers of three (§ 2 sec. 1 and 2, § 15a BVerfGG). The Senates work independently of each other, yet both speak for the ("siblings"-)Court.

Eight of the Justices are elected by the Bundestag (federal parliament, in fact: a sub-committee in non-public proceedings), the other half by the Bundesrat (the second legislative chamber, composed of representatives of the federal states) (§§ 5 - 7a BVerfGG), always with a two-third majority requirement, which to date effectuated consensus on each candidate. The President and the Vice-President of the Court are elected alternately by the Bundestag and the Bundesrat (§ 9 sec. 1 sentence 1 BVerfGG). Following their election, all justices are appointed by the Federal President (§ 10 BVerfGG). The term of office for a

justice is 12 years or ends at the age of retirement which is 68 years (§ 4 sec. 1 and 2 BVerfGG). Justices cannot be re-elected (§ 4 sec. 2 BVerfGG).

Candidates are sought out by political parties, namely their representatives in the respective committees. A candidate must be forty years of age and have full legal training, as specified in the German Judiciary Act (§ 3 sec.1 and 2 BVerfGG). Three Justices of each Senate must have served in one of the highest federal courts of justice (§ 2 sec. 3 BVerfGG), while all others may come from different professions. The mandate of a Justice of the FCC is incompatible with all other professional activities, except being a professor of law at a German university (§ 3 sec. 3 and 4 BVerfGG). Historically, recruiting from universities meant to not recruit people formerly involved with the Nazi-Regime. It also fostered a Court in close interaction with scholarship, and heavily invested in doctrinal systematic work. In fact, there have always been professors on the court, as well as, albeit not many, politicians, and former high administrative officials.

Justices do not enjoy immunity, and is released from service on his or her demand (§ 12 BVerfGG). With the authorisation of the Court, a justice can be taken out of active service in case of permanent incapability to fulfil his or her duties (§ 105 BVerfGG), or dismissed if convicted of committing a dishonourable act or sentenced to over six months' imprisonment, or in case of a breach of duties so offensive that remaining in office is intolerable (§ 105 BVerfGG).
The competences of the Senates (cf. § 14 BVerfGG) as well as the reporting justice for a given case (§ 15a sec. 2 BVerfGG) are predetermined by law, supplemented by a schedule of responsibilities adopted by plenary decision. If there is disagreement as to which Senate is in charge, a subcommittee of six, with three Justices from each Senate, decides, the President having the casting vote. If one Senate wants to – very rarely - deviate from the ratio decidendi of the other Senate, it must call for a plenary decision (§ 16 sec.1 BVerfGG).

III. Procedure

The FCC is a permanent court. Generally, each Senate meets twice a month for two or three days to deliberate the judgments. Most cases are decided based on written procedures. Public hearings before the Senate are rare, lasting one or two days; they are sometimes mandated by law, but discretionary in constitutional complaint proceedings.
To strike down a law, decisions of a Senate require an absolute majority. The Presidents's or Vice-President's vote does not carry greater weight than that of any other Justice. If the Senate is divided four to four, the law or decision challenged will stand, and the arguments of each group of Justices will be published (§ 15 sec. 4 BVerfGG). If a Justice disagrees with the majority, be it regarding the decision or the reasons given for it, he or she may write a dissenting opinion (§ 30 sec. 2 BVerfGG).

Most cases (around 99 %) are decided by the Chambers, to implement doctrine that has already been clarified by a Senate, in individual constitutional complaint proceedings (Verfassungsbeschwerden) and in proceedings on the concrete review of statutes (konkrete Normenkontrollverfahren). Chamber decisions can only be passed unanimously (§ 93d sec. 3 BVerfGG), which is why there may be an intense exchange of memoranda or ad hoc meetings. If there is no consensus, only a Senate decision can break the impasse. Chambers may refuse the admission of an individual constitutional complaint for decision if it has no fundamental constitutional importance or if a decision is not necessary to protect fundamental rights (§§ 93a and 93b BVerfGG). A Chamber may grant the relief sought by such a complaint if certain requirements are met.

Most of the Court´s work is based on circulating draft treatments of the case with a draft judgment, and the full file with all relevant material, including scholarly work and comparative law. This is prepared by the reporting Justice, and to a large degree by the clerks. It relies

heavily on what the parties submitted. In all types of proceedings, applications must be submitted in writing, state reasons and contain the necessary evidence (§ 23 sec.1 BVerfGG). Here, the parties must not be represented by an attorney or a professor of law at a German university (§ 22 sec.1 BVerfGG), while they may ask for financial support to hire one (based on the fundamental right of equal access to justice for the poor, applicable before the FCC as well), and must be represented in oral arguments before the FCC.

The proceedings are free of charge (§ 34 sec. 1 BVerfGG). Only in case of an abuse of the constitutional jurisdiction may a party or its attorney be charged with a fee of up to € 2,600.00 (§ 34 sec. 2 BVerfGG).

There are time limits for applications: An individual constitutional complaint must be brought within one month after the challenged decision or act has been served by a public authority or a court (§ 93 sec. 1 BVerfGG); if it is directed against a statute, the time limit is one year (§ 93 sec. 3 BVerfGG). In case of a conflict between supreme federal bodies or between the Federation and the Länder (federal states), a party has to initiate proceedings within six months (§§ 64 sec. 3, 69 BVerfGG).

Constitutional complaints which are clearly inadmissible or obviously do not have sufficient prospects of success are assigned to the Court's General Register (§ 60 GOBVerfG). If a complainant, after being informed about this by the Court, however insists on a judicial decision, the constitutional complaint is transferred to the register of proceedings (§ 61 sec. 2 GOBVerfG) and enters the admission procedure.

IV. Organisation

The FCC is a constitutional body and therefore not subject to supervision by any Ministry. This status had to be fought for in the early years of the Court, when the government challenged its status, did not want to provide sufficient funding etc. Today, the budget of the FCC is part of the federal budget adopted by Parliament, and needs to be negotiated with parliament in advance.

The President represents the Court and heads its administration. Fundamental organisational decisions are taken by the plenary of all 16 Justices, which also gives a preliminary estimate of the budget (§1 sec. 2 and 3 GOBVerfG). In practice, the President entrusts the chief administrative officer (Direktor beim Bundesverfassungsgericht) with most administrative tasks (§§ 14, 15 GOBVerfG).

To assist the Justices, the FCC has a staff of almost 250. Each Justice may hire up to four clerks as research assistants, up to his or her own choice. The majority of these are judges or public prosecutors from the civil, criminal, administrative, social, financial, or labour courts. They are usually delegated by the states which employ them to the Court for about three years. Other research assistants come from universities, or from federal or state administrative positions.

V. Jurisdiction/Powers

The competences of the FCC are determined by the Basic Law and by statute. The Court may not act of its own motion, but only in response to an application.

The most important competence of the FCC is the decision of constitutional complaints (Article 93 sec.1 no. 4a GG, §§ 13 no. 8a, 90 et seq. BVerfGG), by far the most common type of proceedings. Everyone may lodge a constitutional complaint on the assertion that his or her fundamental rights have been directly infringed by an act of public authority, such as a decision of a court, legislation, or a measure of an administrative body. A constitutional

complaint requires admission for decision, if it is of fundamental constitutional significance or if it is necessary to enforce the complainant's rights, e.g. in cases where the complainant would otherwise suffer severe harm (§ 93a sec. 2 BVerfGG). A constitutional complaint may be brought only after exhaustion of all remedies offered by other courts (§ 90 sec. 2 BVerfGG).

Only the FCC may declare a statute incompatible with the Basic Law. There are two specific proceedings to challenge statutes directly. If a regular court considers a statute to be unconstitutional and wishes not to apply it in a specific case, it must submit it to the FCC in a concrete review of statutes (konkrete Normenkontrolle; Article 100.1 GG, §§ 13 no. 11, 80 et seq. BVerfGG). Also, the Federal Government, a State Government or one fourth of the members of the Bundestag may initiate abstract proceedings for the review of statutes (abstrakte Normenkontrolle; Article 93 sec.1 no. 2 GG, §§ 13 no. 6, 76 et seq. BVerfGG).

In addition, the FCC decides constitutional disputes (Article 93 sec. 1 no. 1 GG, §§ 13 no. 5, 63 et seq. BVerfGG), namely if constitutional bodies disagree on matters of state organisation (organ controversies) or if the Federation and the Länder disagree (State-Federal conflicts) on their respective constitutional rights and duties. In organ controversies, the matters at issue may be law that governs political parties, elections, or parliament, while state-Federal conflicts frequently address questions of the distribution of powers in the federation.

Finally, the Court decides on the validity of elections (Article 41 sec. 2 GG, §§ 13 no. 3, 48 BVerfGG), has the exclusive mandate to decide on a ban of a political party (Article 21 sec. 2 GG, §§ 13 no. 2, 43 et seq. BVerfGG), and decides constitutional complaints that are lodged by municipalities (Article 93 sec. 1 no. 4b GG, §§ 13 no. 8a, 91 BVerfGG).

VI. Nature and effects of judgments

Decisions passed by the FCC pursuant to oral arguments are issued as judgments; decisions handed down in the absence of oral argument are passed as orders (§ 25 sec. 2 BVerfGG). All decisions of the FCC are final and cannot be appealed. In a world of multilevel constitutionalism, some cases are however brought to international courts, namely the European Court of Human Rights in Strasbourg. The decisions of the FCC are binding upon federal and Land (state) constitutional bodies as well as on all German courts and other authorities (§ 31 sec. 1 BVerfGG). Decisions concerning the compatibility or incompatibility of law with the Constitution have the force of law (§31 sec. 2 BVerfGG).

The FCC has several options in deciding a case. In proceedings involving review of a statute, including constitutional complaint proceedings, the FCC may hold laws or regulations null and void (§ 78 BVerfGG). The norms in question then immediately cease to operate. More often, the Court chooses to declare statutes to be incompatible with the constitution (but not void), in which case, and unless the Court sets a time limit, the statute remains in force until its legislative abrogation, for which the FCC may also set a time limit, yet it cannot be applied anymore and courts have to stay proceedings already pending.

If a statute is declared null and void or incompatible with the constitution, non-appealable administrative acts or court rulings passed on the basis of this statute remain in force. Only the act which was the object of the case before the FCC is directly voided as a consequence of the nullity of the legislative act upon which is was based. For all final criminal convictions based on a rule which has been declared null and void or incompatible with the Basic Law, new proceedings may be instituted in accordance with the provisions of the Code of Criminal Procedure (§ 79 BVerfGG).

In constitutional complaint proceedings that challenge a court ruling, the FCC may quash the decision of a court and remit the case (§ 95 sec. 2 BVerfGG). However, the FCC is not a Supreme Court in that it is limited to address constitutional questions only, and it does not replace the prior court's ruling with its own.

If a decision in principal proceedings cannot be made in good time, the FCC may, on application or of its own motion, grant a temporary injunction where this is urgently necessary to avert serious detriment, to prevent imminent violence, or for any other important reason (§ 32 BVerfGG).

Since 1998, the FCC publishes all judgments, usually with a press release, online on its own website <www.bundesverfassungsgericht.de>, with general information and statistics on the proceedings before the Court. If the Justices so wish, decisions are also published in law reviews and entered into the legal database JURIS. All Senate decisions are also published in the digest Entscheidungen des Bundesverfassungs-gerichts (abbreviated BVerfGE), and some chamber decisions can be found in the digest Kammerentscheidungen des Bundesverfassungsgerichts (BVerfGK). The Justices also select decisions and press releases to be translated into English, to be published online and in the series Decisions of the Bundesverfassungsgericht vol. 1-5, each with a thematic focus (vol. 1 International Law and the Law of the European Communities 1952-1989, 1992; vol. 2 Freedom of speech 1958-1995, 1998; vol. 3 German Unification 1973-2004, 2005; vol. 4 Freedom of Faith and the Law of the Churches 1960-2003, 2007; vol. 5 Family 1957-2010, 2013).

B. Social Integration

I. Challenges of Social Integration in a Globalised World

1.1. Challenges the FCC encountered in the past, for example in the field of asylum law, taxation law and social security law?

The challenges the FCC faced in the recent past were multifaceted, ranging from the general challenge of judicial review to case-related challenges. There are more than 500 constitutional complaints per year in the area of social security alone. The following examples may illustrate some of these.

1.1.1. Law of Asylum

The FCC had to decide several cases in the area. One of the challenging questions is whether asylum seekers enjoy a right to freedom of movement within Germany, and how much freedom to move needs to be granted. According to German law, asylum seekers are restrained from moving around the country and face criminal sanctions in case they leave a territory they are assigned to, which may in fact effectuate expulsion. Regular courts were divided in the issue on whether such a law is compatible with fundamental rights. The FCC held that such laws do, in principle, not violate the guarantee of free movement since that is to be understood as physical movement in the boundaries already set by law (Art. 2 sec.2 s. 2 in conjunction with Art.104 Basic Law). It also held that there is an interference with the right to free development of one´s personality (Art. 2 sec 1), which is however justified under the constitution, since the legislature has provided for an exception clause in case people need to leave the territory they are assigned to (FCC, decision of 4 April 1997 – 2 BvL 45/92 -, BVerfGE 96, 10 <22>).

Another challenging question is whether asylum seekers have a fundamental right to basic welfare and whether that may differ from the welfare benefits given to Germans or people residing in Germany with full citizenship right. This is not only a challenge because of its

political ramifications, but also because the Court had to assess whether a specific sum of money suffices to support a meaningful life. According to German law, asylum seekers got much less welfare benefits, in the form of state owned housing and vouchers rather than a budget to get housing and food on one´s own. The FCC held that this violates the human right to dignity (Art. 1 sec 1), which in conjunction with the welfare state principle (Art. 20 sec 1) provides a guarantee for each and everyone living in Germany to get a minimum benefit to provide for a meaningful existence (FCC, decision 1 BvL 10/10, 1BvL 2/11 of 18 July 2012, Bulletin 2012/2 [GER 2012-2-017], BVerfGE 132, 134). In this unanimous decision, the Court emphasized that it would only declare welfare laws unconstitutional in case they are "evidently" unbearable, to address the challenge of a court calculating budget decisions. The Court also stated that such basic welfare rights may not be compromised for reasons of asylum or migration policy. However, it also stated that if the legislature provides rational reasons and data to argue that people who stay in the country for a limited amount of time need less than citizens, it may lower the amount of benefits provided. Notwithstanding this option, benefits need to, based on the human right to dignity, not only address raw physical needs but also cover spiritual and social basic needs, to do justice to the right of every human being to lead a meaningful life.

1.1.2. Taxation Law

Constitutional challenges in the area of tax law often arise with regard to general equal treatment (Art. 3 sec 1), as well as regarding aspects of the rule of law, namely retroactivity (Art. 20 sec 3). However, many more recent cases also intersect with the welfare guarantee in the German constitution (Art. 20 sec 1), and with more specific fundamental rights, i.e. the right of protection of marriage and the family (Art. 6 sec 1) or the right against discrimination (Art. 3 sec 2, 3). Some of the challenges arise in light of the partial or full privatization of social security, and in light of changing patterns and forms of employment and entrepreneurship.

As one example, the Court was asked by the Federal Tax Court whether tax laws that do not recognize private contributions to health- and care-insurance would violate the constitution in that the legislature may disregard the guarantee of a minimum benefit to provide for a meaningful existence (FCC, decision of 13 February 2008 – 2 BvL 1/06, BVerfGE 120, 125). The Court held that the welfare state principle, the right to equality and the right to marriage and family were violated if tax law did not ensure that people with their family retain a minimum level of social security, on the level of those benefits provided for in public social security systems.

As another example, the FCC had to decide whether tax benefits for married couples violated fundamental rights of couples not allowed to marry, but, namely in same-sex-relationships, living in registered partnerships One case concerned tax benefits for spouses in land transactions (FCC, decision 1 BvL 16/11 of 18 July 2012, Bulletin 2012/2 [GER-2012-2-018], BVerfGE 132, 179), while the more recent case concerned a benefit that had indeed been legislated in reaction to an earlier FCC decision, as a simple privilege for marriage (FCC, decision 2 BvR 909/06, 2 BvR 1981/06, 2 BvR 288/07 of 07 May 2013, Bulletin 2013/2). The challenge the FCC faced was also the typical challenge of minority rights cases. Here, the tax decision was one rather late decision in a line of cases in which the FCC continuously held that same-sex registered partners enjoy equal protection with different-sex married partners, including in the case of stepparent adoption (FCC, decision 1 BvL 1/11 of 19. February 2013, Bulletin 2013/1 [GER-2013-1-003]).

1.1.3. Social Security/Welfare Law

In this area, a key challenge for the FCC is always to control budgetary decisions of the legislature. However, and similar to the tax law decisions, the FCC held several times that

the legislature enjoys wide discretion when it comes to welfare benefits, but that it must still, within each regulatory scheme, adhere to the substance of fundamental rights guaranteed for in the Basic Law.

Regarding the first challenge of assessing the adequacy of budgetary decisions, the FCC held, in 2010, and thus already in times of budget cuts and general limitations of spending, that there is a guarantee of basic benefits to provide for a meaningful existence (FCC. decision 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09 of 09 February 2010, Bulletin 2010/1 [GER 2010-1-003], BVerfGE 125, 175). The Court proceduralized the fundamental right to dignity in that it held the legislature to have the obligation to assess the needs of people in a rational and realistic way, continuously updated, and transparent so that one can see whether and how all relevant needs have been addressed. Later, it framed this as a human right also for asylum seekers in 2012 (supra, BVerfGE 132, 134), and emphasized that the legislatures obligation is not meant to turn parliament into a scientific calculation board, but to force parliament to assess basic needs in a way that may sustain a challenge as to whether it suffices to lead a meaningful life in Germany today. Another case, as a follow up on the legislature´s reaction to BVerfGE 125, 175 is pending.

As an example in which the welfare principle and individual substantive rights intersect, the Court had to decide whether public health care benefits to cover artificial insemination may be limited to married couples (BVerfGE 117, 316). In this case, and different from the tax law cases, the FCC held that the law may in fact differentiate between married and unmarried couples and may also exclude same-sex couples despite the fact that German law to date does not allow them to marry. The Court held, 7 to 1, that this difference is justifiable.

In addition and again, another challenge arises from the privatization of formerly public welfare systems. A crucial constitutional question is whether the legislature may intervene in private insurance contracts to provide for social security. It arose regarding the health care reform 2007, in which the legislature, to strengthen competition in that market, introduced a baseline tariff for private health care insurance and ordered private insurance companies, in certain cases, to enter contracts with conditions they did not want to accept. Insurance companies brought a constitutional complaint, and lost (FCC, decision 1 BvR 706/08, 1 BvR 814/08, 1 BvR 819/08, 1 BvR 832/08, 1 BvR 837/08 of 10 June 2009, Bulletin 2009/2 [GER 2009-2-016] – BVerfGE 123, 186). Starting with an assessment of the wider social context in Germany at the time, in which 71 million people were in public insurance, while 8.4 million were in private insurance, with around half of them as state subsidized civil servants, and an estimated 200.000 people uninsured. The FCC argued that the right to contract freely is, for companies, an aspect of their freedom of profession (Art. 12 sec 1), rather than protected as the individual freedom of self-determination (Art. 2 sec 1). It also held that the interference with Art. 12 is justified under the constitution, since it were a core task of the state, in light of the welfare state principle in 20 sec. 1, to seek to protect citizens of the risk of illness. It also emphasized that the legislature is not forced to organize that task by public insurance only, but that it may also force private companies to adhere to that goal. (BVerfGE 123, 186 <242 et seq>).

Other decisions in the area dealt with age benefits of refugees and people expelled from their home country, who had contributed to such benefit schemes in their home country only (BVerfGE 126, 369). The Court died not only restate that welfare benefts, including age benefits that people contribute towards in insurance systems, do not enjoy fundamental rights protection as property (Eigentum, Art. 14 sec 1), since property is only protected if it is already legally owned, and not an expectation or claim. The Court also rejected the equality claim in that it held that the legislature may, in light of its wide discretion in welfare matters, differentiate between those affected by the law and other pensioners. Here, the Court could rely on early, and challenging, jurisprudence reacting to the welfare claims of people after WW II (BVerfGE 29, 22 [33]) and after German reunification (BVerfGE 116, 96 [129 f.]).

1.2. How were issues of social integration or conflict transformed into legal issues?

In German constitutional law, questions of social integration and social conflict are, predominantly, framed as questions of migration, and/or racism/xenophobia, and not as much as questions of poverty, or class. Migration issues are controversial on the level of culture, published opinion and politics, and create challenges for a constitutional court. In Germany as an EU member state, legal challenges mostly relate to foreigners that are not citizens of any EU member state but so-called third-party nationals, since the EU is built upon a non-discrimination principle regarding nationality. However, challenges around welfare benefits more recently also arise from the question of whether citizens of new EU member states, some of which struck by poverty and thus prone to labor migration, should really enjoy equal welfare benefit entitlements.

As a matter of constitutional law, the FCC addresses such questions mostly as questions of the general right to equal treatment (Art. 3 sec 1), often in conjunction with the welfare state principle (Art. 20 sec 1), sometimes, framed as the right to an existential minimum, as the basic guarantee of dignity (Art. 1 sec 1). Notably, the prohibition of discrimination based on race/ethnicity (Art. 3 sec 3 s 1), which is in Germany also a historical reaction to the atrocities of the Holocaust, rarely figures in this jurisprudence to date.

1.3. Is there a trend towards an increase in cases? what were, and what are at present, the dominant questions before the Court?

Depending on one´s understanding of social integration (see 1.2.), there seems to be a rising number of challenges brought to the FCC. Regarding poverty/welfare, a general real or felt decline of wealth, and, namely, the decisive reforms of a formerly generous and all public welfare system in the 21st century seems to give rise to cases.

More recently, the Court has thus been asked to decide whether basic welfare or social rights extend equally to foreigners, be they asylum seekers (above) or foreign (non-EU) nationals that lawfully reside in Germany. To give an example, the FCC had to decide whether laws may restrict education benefits given to parents of small children were compatible with the Basic Law if the restriction is based on the recipient´s nationality only. The Court held that the exclusion from benefits for parents is an inequality in need of justification, and that such justification is not in sight if benefits are based on conditions and seek results that apply to Germans and EU-citizens and to non-EU foreigners alike (FCC, decision 1 BvL 14/07 of 07 February 2012, Bulletin 2012/1 [GER 2012-1-007], BVerfGE 130, 240).

In the areas of asylum, tax and welfare law, several developments seem noteworthy.
Regarding asylum, there have been but 3 decisions in the first 50 volumes published by the FCC (BVerfGE 9, 174; 15, 249; 38, 398), mostly regarding expulsion of asylum seekers but with no intensive doctrinal work on the right to asylum in Art. 16 sec. 1 (then; sec 2 s 2). However, the Court did build on some remarks from back then. In particular, it emphasized the procedural dimension of the right, in that the state is obliged to design procedures so that the refugee is protected, and that the regular courts have a constitutional obligation to protect these rights in each and every case (BVerfGE 54, 341).

In tax law, the FCC started with decisions to establish the principle of individual ability (Grundsatz der Besteuerung nach der Leistungsfähigkeit; BVerfGE 43, 108; 66, 214; decision 1 BvL 10/80 of 22.02.1984, Bulletin 1984/M [GER 1984-M-001] -BVerfGE 122, 210), with later cases on the intersection of tax and family, tax and marriage, or tax and migration.

In the area of welfare law, the FCC has always been confronted with questions of social integration (next to those mentioned above: BVerfGE 23, 258: child benefits for migrating labor; BVerfGE 48, 281: welfare benefits provided for out of the country), next to questions as to the consistency of the regulatory and changing scheme (i.e. BVerfGE 11, 221).

2. International Standards of Social Integration

2.1. What are the international influences on the Constitution regarding issues of social integration?

Generally, the FCC does only apply the German constitution to the cases brought before it. As such, a claim cannot be based solely on either EU or international law. In addition, Germany has ratified all major human rights treaties, including the Social Charter of the European Council and the ICESCR, CERD, CEDAW, CRC, CRDP of the United Nations. Namely, Art. 34 sec. 3 of the Charter of Fundamental Rights of the EU that guarantees a right to social support has not been expressly referred to to date, which may also be based on the limited applicability of the Charter to German law (Art. 51 FRCh).

According to German constitutional law, Art. 25 BL states that the general rules of international law are part of German federal law, enjoy priority over general statutory law and may have immediate effect on people living in Germany. However, "general rules" are understood narrowly, so that the rule has little practical effect. Much more significant for constitutional law, the FCC also holds, since BVerfGE 74, 358 <370>, that the ECHR, both as text and in the jurisprudence of the Strasbourg court, needs to be taken into account when interpreting the constitution, as long as this does not lower the level of fundamental rights protection accorded by the Basic Law itself. ("Bei der Auslegung des Grundgesetzes sind auch Inhalt und Entwicklungsstand der Europäischen Menschenrechtskonvention in Betracht zu ziehen, sofern dies nicht zu einer Einschränkung oder Minderung des Grundrechtsschutzes nach dem Grundgesetz führt"; restated in FCC, decision 2 BvR 1481/04 of 14 October 2004, Bulletin 2004/3 [GER-2004-3-009], BVerfGE 111, 307 <315 ff.> - Görgülü; FCC, decision of 4 May 2011, Bulletin 2011/2 [GER-2011-2-013], BverfGE 128, 326 <346 ff.> - preventive detention).

In FCC jurisprudence to date, it is mostly ECHR rights that have been considered. Regarding social issues, it adds the ESC and the ICESCR has been referred to several times. In labor related cases, the FCC also takes ILO-Conventions into account.

When judgments refer to human rights guaranteed in international law that have a social dimension, the FCC has always held, to date, that international law does not reach further than the right already guaranteed in the Basic Law. As one recent example, the FCC held that university student tuition may be compatible with the right to freedom of choosing a profession, which the Court interpreted to guarantee for equal opportunities of merit-based access to a professional education and university studies, and referred to some international guarantees (FCC, decision 1 BvL 1/08 of 8 May 2013, Bulletin 2013/2 [GER 2013-2-012]).

2.2 Does your court apply specific provisions on social integration that have an international source or background?

Yes. In FCC jurisprudence, international law is sometimes mentioned as part of the constitutional standard, and sometimes mentioned as an addition, in the assessment of the constitutionality of a lower court decision or as a reminder of the legislature to eventually adhere to international law when re-regulating the issue after it has been declared unconstitutional. In such cases, the FCC reminds the legislature that ratified international law is binding on legislation, but does not use it as an autonomous legal standard but as integrated into German constitutional law interpretation.

The FCC, in its decision on labor in prison, prominently referred to international law that, for a long time, addresses unpaid labor of prisoners as a human rights issue. The FCC thus mentioned Art. 2 sec. 2 lit. c of the ILO-Convention No. 29, and notably, the Court stated that this norm, dating from 1930, had already been considered by the framers of the German constitution and should thus inspire its interpretation (FCC, decision 2 BvR 441/90 of 1 July 1998, n. 151).

In other cases, the FCC reminded the legislature to adhere to EU law and UN law, namely Art. 9 and 15 sec 1 a ICESCR and Art. 3, 22 and 28 CRC, when legislating minimum benefits for asylum seekers (FCC, decision 1 BvL 10/10, 2/11 of 18 July 2012, Bulletin 2012/2 [GER-2012-2-017], BVerfGE 132, 134 <161 f.>). In the university tuition decision (FCC, decision 1 BvL 1/08 of 8 May 2013), it upheld an administrative court decision that had already applied international law, namely Art. 10 No. 4 a European Social Charter as well as Art. 13 sec. 1 and 2 c ICESCR, with a reference to the UN Committee on Economic, Social and Cultural Rights, The right to education (Art. 13), UN Doc. E/C.12/1999/10, as well as Art. 2 of the Additional Protocol of the ECHR.

2.3 Does your court directly apply international instruments or expressly refer to them in the application of constitutional law?

The FCC will not directly use international law as a standard of review, being a constitutional court with a limited mandate, namely, to adjudicate constitutional law only. Thus, application of international law is either part of the legal situation at hand, or a dimension of applying national constitutional law, as an interpretatory device.

However, some cases imply a genuine assessment of the issue under international law to clarify whether such law is applicable to the case at all. Then, the FCC does not only discuss the scope of a human right, but frames it as the question of whether the German legislature is forced to apply international law in a given case. Regarding a right to citizenship, as the right to residence in Germany, of foreign spouses and family members, the FCC discussed, and denied, the application of Art. 8 sec. 1 ECHR as well as of Art. 12 of the Association Treaty between the EC and Turkey from 1963 or its Additional Protocol from 1970, as well as of Art. 17 sec. 1 and Art. 23 sec. 1 of the ICCCPR, Art. 19 No. 6 ESC and Art. 2 sec. 1, Art. 10 No. 1 of the ICESCR (FCC decision 2 BvR 1226/83 et al. of12 May 1987, BVerfGE 76, 1 <78 ff.>). Also, the FCC did discuss whether European Union law, including the EU Charter of Fundamental Rights, was applicable to a case on data protection, which it held not to apply (FCC, decision 1 BvR 1215/07 of 24 April 2013, Bulletin 2013/1 [GER-2013-1-10]).

2.4 Does your court implicitly take account of international instruments or expressly refer to them in the application of constitutional law?

In many cases, and more and more regularly, international law is considered in internal court deliberations, both as context and in light of interpretatory relevance. However, it is not always part of the written judgment. Sometimes, this is based on the fact that it does not change the interpretation of German constitutional law that has already been established in FCC jurisprudence, so that there is no need to also restate additional law on the matter. Often, international law has not been referred to by parties or constitutional organs asked to submit briefs or experts asked in addition. Sometimes, international law is however referred to in order to join an international dialogue of courts on their interpretation.

Mostly, the FCC refers to international law to state that there is no conflict with German constitutional standards. This happened in a decision on labor union rights (FCC, decision 1 BvR 404/78 of 20 October 1981, BVerfGE 58, 233 <253 ff.>), in which the Court addressed

the question raised by the complainant whether international law, namely Art. 11 sec. 1 ECHR nor Art. 5 of the ESC, nor ILO-Convention No 87 nor Art. 8 sec 1 a ICESCR would provide more than Art. 9 sec 3 BL, which they do not. It also happened in the decision on the (un-) constitutionality of the state´s use of civil servants to break a strike of employees in a state-owned company without a parliamentary law to allow for that (FCC, decision 1 BvR 1213/85 of 12 May 1999, BVerfGE 88, 103 <116>).

2.5 Has your Court ever encountered conflicts between the standards applicable on the national and on the international level? How were these solved?

Conflicts between international and national standards to adjudicate conflicts of social integration tend to be argued more and more often by the parties to a constitutional case, yet seem not to be decisive in many cases. However, there have been significant controversies in some instances, between the ECHR and the FCC, involving freedom of the press and a right to a personal or private life, involving prison and incarceration policies of preventive detention (FCC, decision 2 BvR 2365/09 of 4 May 2011, Bulletin 2011/2 [GER-2011-2-013], BVerfGE 128, 326 <346 ff.>), and regarding church employees and privacy rights. These conflicts have evolved over several decisions, and have been solved that way, too, in a conversation among courts about the standard to eventually apply.

Regarding a conflict between constitutional law and EU law, the FCC holds that as long as EU law remains within its limited sphere of reach and application, it may take priority over national law. However, the GFCC retains an ultima ratio competence to refuse an application of EU law if the EU acts “ultra vires”. In a controversy on age discrimination standards of EU law, a novelty and challenge in German labor law, the FCC however did not intervene (FCC, decision 2 BvR 2661/06 of 6 July 2010, Bulletin 2010/2 [GER-2010-2-010], BVerfGE 126, 286, reacting to ECJ c-144/04, 22 Nov 2005, Mangold).

In addition, the FCC held that it may have to protect the “constitutional identity” of the state, protected in the eternity clause of Art. 79 sec 3 that declares some features of German constitutional law unamendable, even against EU law as well (FCC, decision 2 BvE 2/08 et al. of 30 June 2009, n.240, Bulletin 2009/2 [GER 2009-2-019], BVerfGE 123, 267- Lisbon Treaty); yet this has not been applied to any conflict to date.
In most cases, the FCC states that its interpretation of national constitutional law is fully in line with international standards. In the recent decision on a statutory provision that subjected families to administrative intrusion to test fatherhood, used to gain immigration rights to Germany, the FCC held it to be incompatible with German constitutional law, but did also violate international law on citizenship rights and statelessness when children thus faced such risks (FCC, decision 1 BvL 6/10 of 17 December 2013). As another example, the FCC granted standing to companies based in EU member-states, in interpreting Art. 19 sec. 3 BL that expands the reach of suitable fundamental rights to “domestic legal entities” (FCC, decision 1 BvR 1916/09 of 19 July 2011, Bulletin 2011/3 [GER-2011-3-015]).

Finally, the FCC did also decide a case in which it explained why EU law, and namely the EU Charter of Fundamental Rights, was evidently not applicable to the case at hand (FCC, decision 1 BvR 1215/07 of 24 April 2013, Bulletin 2013/1 [GER-2013-1-010]).

3. Constitutional Instruments Enhancing / Dealing with Social integration

3.1 What kind of constitutional law does your Court apply in cases of social integration?

In German constitutional law, there are no explicit social rights in the Basic Law, yet Art. 20 does state that Germany „is a social state“, which is interpreted as the welfare state principle directed at the legislature to ensure social rights. The absence of a right to housing or work is a historical reaction to the first German Weimar constitution, promulgated in 1919, which

included a long list of social rights yet did not understand these to be enforceable as law. After the war, and facing poverty and destruction, the drafters of the constitution were particularly worried that social rights would be meaningless, and sought to prevent fundamental rights to be infected by this.

Generally, fundamental rights play the central role in adjudicating cases of social justice in German constitutional law. The FCC has, right from the beginning, applied the right to equality (Art. 3 sec. 1) to legislative decisions on social integration. More specifically, if legislation disregards the needs of people with specific protection in the Basic Law, as the family (Art. 6 sec.1) or married couples (Art. 6 sec. 1), the FCC has forced the legislature to not treat those worse than others. Also, the right to property (Art. 14) has been applied, albeit hesitantly, in social integration conflicts. The FCC held, in 1980, that at least those benefits that are financed by individual contributions enjoy protection as property, although the Court also emphasized that the design of social rights is a task of the legislature who thus enjoys wide discretion also to change it (FCC, decision of 28 February 1980, BVerfGE 53, 257). Finally, the right to the inviolability of human dignity, a cornerstone of German constitutional law (Art. 1 sec. 1) has become very significant for the jurisprudence on social integration. In several cases, the FCC has emphasized that there is a right to an existential minimum the legislature must protect. More specifically, many decisions in tax law did focus on the particular needs of families, where an amount needed to sustain a minimum meaningful life must, according to the constitution, be free from taxation (i.e. FCC, decision of 29 May 1990, BVerfGE 82, 60 <80>).

In addition, the FCC holds that the welfare state principle, read in conjunction with the fundamental right to dignity, carries a right to minimum welfare benefits, namely as a human right, and not as a right reserved for nationals only (supra). The welfare state principle is understood to be a goal the state must pursue (Staatszielbestimmung, Art. 20 sec 1, already referred to in very early decisions, as in decision of 19 December 1951; BVerfGE 1, 97 <105>). It adds a political dynamic to fundamental rights in that it asks the legislature to actively address social needs, and allows for a procedural understanding of fundamental rights. As such, the principle does not grant subjective rights but carries an obligation to regulate for the legislature.

There is a similar jurisprudence regarding the principle of the rule of law (Rechtsstaatsprinzip, Art. 20 sec. 3). Here, the FCC holds that this priniciple, in conjunction with the general right to equal treatment (Art. 3 sec 1) is a right of poor people to get access to justice almost equal to affluent people who have sufficient means, which does in fact require the state to provide funding for lawyers (FCC, decision 1 BvR 2576/04 of 12 December 2006, Bulletin 2007/1 [GER-2007-1-006], BVerfGE 117, 163 <187>;; key decision is: FCC, decision 2 BvR 94/88 et al. of 13 March 1990, BVerfGE 81, 347 <356 et seq>).

3.2 In cases where there is access of individuals to the Constitutional Court: to what extent can various types of constitutional law be invoked by individuals?

The German FCC can be addressed by individuals, in constitutional complaint proceedings in which they may claim a violation of fundamental rights, including those rights guaranteed beyond the first 19 articles of the basic law, namely due process rights like Art. 101 sec 1 s 2 or Art. 103 3 sec. 1. In argueing their case, they will however also need to discuss relevant constitutional provisions regarding separation of powers, namely the power to legislate divided between the federation and the states (since FCC, decision 1 BvR 190/58 et al. of 10 May 1960, BVerfGE 11, 105 (110), or the scope of EU law, or formal constitutionality of legislation.

3.3 Does your court have direct competence to deal with social groups in conflict?

The FCC is often called upon to decide conflicts regarding distribution of resources, as in tax law, or much social security law in which the general right to equality is invoked and supported by arguments that claim that one group has been treated worse than another. Such cases reach the court via individuals or via courts, yet there is no standing for groups. However, in data protection cases, there have been mass cases in that very many individuals signed one brief to claim individual rights. They all need to have standing, since there is no standing for groups. Finally, individuals or, more often, economic actors like companies or employers may claim a right in the constitutional court in a model case to clarify a larger problem. Similarly, and as a growing trend, religious individuals tend to bring claims to gain rights for their group or church. A famous example is the claim to get equal rights compared to Christian churches, i.e. regarding the headscarf of muslim women compared to the dress of nuns (FCC, decision of 24 September 2003, BVerfGE 108, 282; another case pending). Less well known are cases of Christian individuals to be free from the obligation of sending their children to public schools. The FCC has held that the right to religious freedom (Art. 4 sec 1) encompasses a right to equal treatment of all regions and religious beliefs, but needs to also assess the cooperative relationship of recognized churches with the state that the constitution mandates, based on Art. 146 BL.

Regarding social integration, to date, cases around social rights for foreigners seem not to have been supported by groups, nor has the FCC been confronted with claims around social inequalities like racism. Different from that, a line of successful claims established fundamental rights for transsexual people, based on claims that had been supported by NGOs. Similarly, sex equality claims as well as claims around equal treatment of different sexual identities, namely to protect homosexuals from discrimination, have also been part of strategic litigation in which lawyers cooperated intensely with civil society. In most cases, such litigation is brought as an individual constitutional complaint (Art. 93 sec. 1 No. 4a), while in some instances, litigants in regular courts motivated these to ask for constitutional review of a law decisive in the case at hand (Art. 100 sec 1, as in FCC, decision 1 BVL 14/07 of 7 December 2012, Bulletin 2012/1 [GER-2012-1-007], BVerfGE 130, 240).

Finally, social conflicts may have entered political debates, and a case may be brought by those who lost in legislative proceedings in parliament, as an abstract call for constitutional review (Art. 93 sec. 1 no. 2, as in FCC, decision 1 BvF 2786 et al. of 4 July 1995, Bulletin 1995/2 [GER-1995-2-024], BVerfGE 92, 365 regarding collective bargaining rights)

3.4. How does your court settle social conflicts, when such cases are brought before it?

According to § 31 sec. 2 BVerfGG, a decision of the FCC on the constitutionality of a law enjoys the force of law. The Court may set a time for the legislature to regulate the issue according to the standards it clarified in the judgment, and may allow the former law, despite it violating the constitution, to remain in force for that limited amount of time. This involves difficult assessments of political and material consequences of a decision, and may even test the limits of the courts power. I.e., the FCC held minimum benefit laws to be unconstitutional, but allowed them to remain in force until a date set to reregulate. The legislature however did not meet that timelime, which almost resulted in a court order the FCC may issue to implement its judgments (FCC, decision 1 BvL 1/09 et al. of 9 February 2010, Bulletin 2010/1 [GER-2010-1-003],- BVerfGE 125, 175 <255 ff>, with another case on the reregulation pending to date). In the decision on minimum benefits for asylum seekers, in which the law evidently did not meet constitutional requirements, the FCC did declare the law in question to be invalid and issued an interim rule to guarantee for benefit payments, which it stated to remain in effect until the legislature passes a new law, with no fixed date

(FCC, decision 1 BvL 10/10 et al. of 18 July 2012, Bulletin 2012/2 [GER-2012-2-017],- BVerfGE 132, 134 <174 ff.>). To counter criticism that the Court may „play legislation“, and thus overstep its mandate, the order was based on the equivalent rules the legislature had already set for German citizens.

3.5 Can your Court act preventively to avoid social conflict?

The FCC may, in its judgments, issue guidance as to the interpretation of statutory law for the future, and it often does. As one example, the FCC held that a law on welfare benefits for families needs to be interpreted so that single parents that do in fact care for a child yet do not do so all the time, must be seen as forming a „family unit“ according to the law (FCC, decision 1 BvL 14/09 of 12 December 2010, Bulletin 2010/3 [GER-2010-3-017], BVerfGE 127, 263 on § 116 sec. 6 s. 1 SGB X).

In exceptional cases, the FCC may also accept a constitutional complaint against a law even if that law has not yet been implemented, and the complainant has thus not yet been confronted with an act based on that law, if the complaint demonstrates that there is an imminent violation of fundamental rights.

3.6. Has your Court ever encountered difficulties in applying these tools?

Every decision that affects the future calls for a solid assessment of a complex set of facts, both regarding the real life situation of those affected as well as the reality of the politics around it. Therefore, the FCC always needs to look beyond positive law when deciding a case. Senate judgments and all chamber judgments that declare an act of state unconstitutional are thus based on formalized hearings, in writing and sometimes also in an oral hearing, of all relevant actors. The Justices do decide who will be asked for an assessment of the problem at hand, from their perspective and beyond the parties to a case and the actors responsible for the law or decision at hand, including the highest federal courts in the field or researchers and scientist as well as NGOs. In these proceedings, the FCC may simply send the file and ask for a statement, but it may also ask specific questions that eventually reach beyond the controversy itself, to also assess effects.

This all amounts to quite demanding and refined work on each case, particularly when the Court strikes down an act as unconstitutional. Today, the FCC is seen to have reach its limits regarding the amount of cases brought, in that decisions take a long time (in Senate decisions between one and sometimes even five years). As a court of law, the FCC is subject to the right to timely delivery of justice, adjudicated by the ECHR and legislated, in reacting to decisions against Germany, by federal statute.

3.7 Are there limitations in the access to your court which prevent it from settling social conflicts?

The FCC may be addressed in a variety of proceedings listed in the constitution, namely by individuals and legal entities, as well as by political parties, by individual members of parliament and by the other constitutional organs, namely the government. In addition, regular courts may ask for review of statute decisive for their decisions. Generally, it seems that all major political conflicts eventually reach the Court. Regarding social conflicts, there is however no formal acceptance of group litigation, as in class action suits.

In addition, and somewhat related to the mass of cases brought, the FCC does accept complaints brought without the assistance of a lawyer („Bürgergericht“, “citizens´s court), but it does also employ rather high expectations as to the arguments and material provided by a complainant. A complaint must not only be brought in time and after exhaustion of all

remedies, but the claim must also be “sufficiently substantiated”, including a discussion of relevant FCC jurisprudence.

4. The Role of Constitutional Justice in Social Integration.

4.1 Does your constitution enable your Court to act effectively in settling or avoiding social conflict?

Again, the FCC is not a regular court, but its mandate is based on strict rules that make it work and function like a court, and not as a political actor. In the early years of its existence, the FCC had a mandate of prior constitutional expertise review, yet this was eliminated soon, with only two statements given (FCC, decisions PBvV 1/51of 22 November 195, BVerfGE 1, 76 and PBvV 2/52 of 16 June 1954, BVerfGE 3, 407). The general impression was that such a calling would risk the recognition of the Court as a court, and render it weak, in competing with politics. Today, the FCC may only act if it is called upon in proceedings defined in the constitution, and its mandate is limited to the question raised.

Regarding effectiveness, it is difficult to assess the effects of FCC decisions. Generally, the court does enjoy extremely high institutional standing and reputation in Germany, so that its judgments may be sharply criticized but are nevertheless, albeit sometimes grudgingly, accepted. Members of the Court tend to emphasize, in public, that it is an aspect of constitutional review to be controversial and earn critique, but that a court established to protect fundamental rights, particularly against majority encroachment, is bound to dislike.

Senate decisions of the German FCC are usually understood as very forceful interventions into political and legal debates, and mostly enjoy full respect. As such, they may solve social conflict, at least for a time. Some issues do get back to the Court and must be decided again, which also allows the Court to argue and even hold different than before, either based on changes in the law or changes in life. Examples include, in the area of social issues, abortion (several decisions, with dissents), women´s rights and sex equality in marriage and employment (a long list of decisions starting in the 1950s), gay rights (a line of seven decisions to date), minimum welfare benefits (first decision in 2010, new case pending), religious rights and church-state-relations as in headscarf in public employment cases (first case FCC, decision 2 BvR 1436/02 of 24 September 2003, Bulletin 2003/3 [GER 2003-3-018], BVerfGE 108, 282, with dissent, new case pending).

There has been one exceptional case in which the FCC moved the parties involved to reach a compromise, and avoid a court decision (FCC, decision 1 BvF 1/96 et al. of 11 December 2001, BVerfGE 104, 305 – state law on ethics classes to replace religion in school).

4.2 Does your Court de facto act as a social mediator, or/and has such a role been attributed to it?

The FCC is, in public discourse as well as in scholarly analyses, often seen as an “arbiter” or a “referee” of political conflicts. This has been based on a primary focus on the interplay of the Court and the Federal Government or the Federal Parliament´s majority, and has not been seen as much as a conflict between diverging social interests. This may be due to a, at least in the past, rather common understanding of Germany as a, socially, rather homogenous country.

However, decisions taken in the area of equality, namely sex equality and sexual orientation, as well as on family matters and on religion, tend to more recently also invoke discussions that position the Court in the role of a social arbiter. Finally, the Court is mandated with the task to control the legislature to attain to all social needs, in designing the welfare state, equally. In some decisions, the FCC has phrased appeals to remind politics of this.

4.3 Have there been cases when social actors, political parties could not find any agreement and send the issue to the Court to find a „legal" solution which normally rested in the political area?

Moving issues „to Karlsruhe" (the home of the FCC) is a typical constellation in German politics, which some do criticize as an „over-constitutionalization" of democracy. There is no "political question-doctrine" in German constitutional law, so that the FCC may not avoid a decision because of its political nature. Rather, the Court is seen as a hybrid institution between the courts and political organs, yet acting as a responsive court only.

In fact, it is a regular occurrence in German politics that the political majority decides upon an issue, and the minority or opposition challenges the decision in court. Thus, oral hearings in the FCC sometimes look like a rational version of political debate.

However, the FCC presupposes that the legislature has already found a solution to a conflict, and restrains itself to only test the constitutionality of this solution, not develop one´s own. It is often restated that the Court does not oblige the legislature to find the best, most adequate or perfect answer to a problem, yet that it must adhere to the constitution in implementing its political choice.