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Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives

- National Report Germany -

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Abstract:

In accordance with the German constitution that requires Germany to participate as an equal member in a united Europe, the Federal Constitutional Court has put the Basic Law's openness to International law into effect, however without losing sight of the foundations of national constitutional law. The Federal Constitutional Court has, for instance, generally acknowledged the precedence of European Union law, and has incorporated the value judgments of the European Convention on Human Rights into its interpretation of the Basic Law. The Federal Constitutional Court has accorded decisions of European and international courts, within their jurisdiction, a "function of orientation and guidance" for its own interpretation. Apart from this, the Federal Constitutional Court makes extensive reference to decisions of other national and European Courts which are technically not binding on it. This, however, finds its limits in the fundamental rights as laid down in the Basic Law ("*Solange*"), the powers conferred on the European Union ("*ultra vires*"), and Germany's constitutional identity. As yet, the Federal Constitutional Court has never stated a genuine divergence that would have made it impossible to implement decisions of inter- and supranational courts within the German constitutional order.

I. Constitutional courts between constitutional law and European law

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The sole standard for judgments of the Federal Constitutional Court is the Basic Law [*Grundgesetz*, GG]. Since, however, the Court is bound by the principle of open statehood (“*offene Staatlichkeit*”), an indirect legal obligation also exists under the so-called “hinge provisions” (“*Scharniernormen*”) – Art. 1 sec. 2, Art. 23 sec. 1 and Art. 24 sec. 1 GG – to take into account European (and international) law to the extent that this supersedes, re-shapes or influences the provisions of the Basic Law. The Federal Constitutional Court insofar derives from the Basic Law the principles of openness towards European¹ and international law,² which oblige it to give wide-ranging regard to Union law and international law and the decisions of European and international courts in order to avoid conflicts between the obligations of the Federal Republic of Germany under Union and international law, on the one hand, and national law, on the other as far as possible.³

1. Is the constitutional court obliged by law to consider European law in the performance of its tasks?

- a) Even though Union law is not the standard for the decisions of the Federal Constitutional Court, it does, nevertheless, play an indirect role today in many proceedings. For example, the extent to which the Basic Law may be applied to a certain case depends on the provisions of Union law. Open statehood under Art. 23 sec. 1 GG to European law generally allows the legislator to give priority to Union law over the standards and value judgments set out in the Constitution, which is what has implicitly taken place with the ratification of the European treaties – these being at present the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) of 2012⁴. Within the reach of Union law, German laws,

¹ BVerfGE [Decisions of the Federal Constitutional Court] 123, 267 <354> - Lisbon; 126, 286 <303> - Honeywell; 129, 124 <172> - Assistance for Greece and EFSF.

² BVerfGE 128, 326 <368 and 369> - Preventive detention II. The principle has been developed there only in relation to treaties on fundamental rights and human rights. Earlier decisions draw a distinction between openness to international law and an obligation, under constitutional law, of the legislator to comply with international law in BVerfGE 6, 309 <362 and 363.>, 41, 88 <120 and 121>. In another decision, the Federal Constitutional Court derived from openness to international law differentiated obligations to respect international law, BVerfGE 112, 1 <26 and 27> - Soviet expropriations.

³ BVerfGE 109, 13 <23 and 24>; 109, 38 <50>; 111, 307 <318, 328> - Görgülü; 112, 1 <25> - Land reform III; 123, 267 <344 et seq., 347> - Lisbon; 128, 326 <368 and 369> - Preventive detention II.

⁴ In favour of an “expansion of the application” of the Basic Law’s fundamental rights if this is required by European law, see BVerfGE 129, 78 <99 and 100> - Le Corbusier furniture.

administrative measures and court decisions may, therefore, normally be measured against the Basic Law only to the extent that Union law allows a corresponding room of manoeuvre.⁵ Against this background, the Federal Constitutional Court considers Union law if for no other reason than to be able to determine the remaining sphere of application for the standards set in the Basic Law.

In exceptional cases, however, this would not be the case, namely if a measure under Union law were to represent a clear or structurally significant *ultra vires* act,⁶ or if it were detrimental to Germany's constitutional identity as protected under Art. 79 sec. 3 GG, including the minimum standard of protection of fundamental rights⁷ demanded by the Basic Law. Such exceptions, however, have so far not been applied in practice; in the event that they should become relevant, the principle of openness to European law obliges the Federal Constitutional Court to find a solution that is as little detrimental as possible to the integrity of Union law.

- b) The European Convention on Human Rights ranks as a federal law in the German legal system (Art. 59 sec. 2 GG).⁸ It is therefore lower in rank than the Basic Law and does thus generally not set a standard for decisions by the Federal Constitutional Court. Consequently, one cannot take direct action against a violation of the Convention by means of a constitutional complaint.

Nevertheless, the guarantees under the Convention do possess significance in constitutional law, as they influence the interpretation of the fundamental rights and rule of law principles of the Basic Law. The doctrinal basis for this is provided by Art. 1 sec. 2 GG, which contains an acknowledgement of inviolable and inalienable human rights by the German people and makes it clear that the fundamental rights under the Basic Law are to be understood as a manifestation of human rights, which they have

⁵ BVerfGE 118, 79 <95 et seq.> - Emission allowances.

⁶ BVerfGE 89, 155 <187 and 188> - Maastricht; 123, 267 <353, 400> - Lisbon; 126, 286 <304> - Honeywell.

⁷ BVerfGE 37, 271 <278 et seq.> - Solange I; 73, 339 <375 et seq.> - Solange II; 89, 155 <...> - Maastricht; 102, 147 <...> - Banana market.

⁸ BVerfGE 74, 358 <370> - Private suits; 82, 106, <120> - Presumption of innocence; 111, 307 <316 and 317> - Görgülü; 128, 326 <367> - Preventive detention II.

incorporated as a minimum standard.⁹ According to the long established jurisprudence of the Federal Constitutional Court, the Convention and the jurisprudence of the European Court of Human Rights, which gives it a concrete meaning, are to be considered as aids to interpretation for defining the content and range of the fundamental rights and rule of law principles of the Basic Law. On the one hand, this serves to give the guarantees under the Convention the widest possible sphere of application and can, on the other hand, help to avoid that the Federal Republic of Germany is held to violate the Convention. The European Convention on Human Rights is included in the interpretation of the Basic Law not schematically but in a way that is results-oriented.¹⁰

2. Are there any example of references to international sources of law, such as

a) the European Convention on Human Rights,

The jurisprudence of the Federal Constitutional Court was already including references to the European Convention on Human Rights in the 1950s.¹¹ These references have considerably increased since the late 1980s and are found today in most Senate decisions involving the protection of fundamental rights.¹²

b) the Charter of Fundamental Rights of the European Union,

⁹ BVerfGE 74, 358 <370> - Private suits; 111, 307 <329> - Görgülü; 128, 326 <368 and 369> - Preventive detention II.

¹⁰ BVerfGE 111, 307 <316 with further references, 322> - Görgülü; 128, 326 <370, 374 et seq., 391 et seq.> - Preventive detention II.

¹¹ BVerfGE 4, 110 <111>; 6, 389 <440 and 441>.

¹² Most recently BVerfGE 124, 199 <220> - VBL [federal and state pension institution], n. 88; 128, 326 <367 et seq.; 375 et seq. > - Preventive detention II; 131, 268 <296 ff.> - Reservation of the right to order preventive detention, n. 92 et seq.; BVerfG [Federal Constitutional Court], Order of 11 July 2013 – 2 BvR 2302/11, 2 BvR 1279/12 –, juris, Europäische Grundrechte-Zeitschrift – EuGRZ [] 2013, 536 <544 et seq.> – ThUG [Therapeutic Confinement Act], n. 69 et seq., 84 et seq., 88 et seq.

References to the Charter of Fundamental Rights (CFREU) can be found in many decisions of the Federal Constitutional Court since 2000 which concern the protection of fundamental rights at the European Union level. The most recent of these is the Counter-Terrorism Database Decision of the First Senate.¹³ The Charter of Fundamental Rights, not unlike the European Convention on Human Rights, is also referred to in order to determine the level of common European protection of fundamental rights.¹⁴

c) other instruments of international law at European level,

Other European instruments of law impact the jurisprudence of the Federal Constitutional Court as well; these include, since 2008, the European Convention for the Protection of Animals Kept for Farming Purposes,¹⁵ the European Convention on Nationality¹⁶ and the European Convention on the Adoption of Children.¹⁷

d) other instruments of international law at international level?

In the last five years alone Senate decisions of the Federal Constitutional Court have made reference – in some cases frequently so – to the Charter of the United Nations¹⁸, the North Atlantic Treaty,¹⁹ the Vienna Convention on the Law of Treaties,²⁰ and the United Nations Convention on the Rights of Persons with Disabilities²¹.

¹³ BVerfGE 126, 286 <290> - Honeywell, n. 78; BVerfG, Judgment of 24 April 2013 – 1 BvR 1215/07 –, juris, EuGRZ 2013, 174 <184> – Counter-terrorism database, n. 88 et seq.

¹⁴ BVerfGE 124, 199 <220> - VBL (Discrimination on grounds of sexual orientation) n. 88.

¹⁵ BVerfGE 127, 293 <334> - Keeping of laying hens.

¹⁶ BVerfGE 116, 24 <48> - Naturalisation obtained by deception.

¹⁷ BVerfGE 79, 51 <67> - Foster parents, care process.

¹⁸ BVerfGE 121, 30 <55> - Hessian Private Broadcasting Act; 123, 267 <423> - Lisbon.

¹⁹ BVerfGE 121, 135 <170> - AWACS deployment (Turkey); 122, 120 <148> - Data retention (preliminary injunction); 123, 263 <423 and 424> - Lisbon.

²⁰ BVerfGE 123, 267 <396> - Lisbon; 132, 195 <286> - ESM (preliminary injunction).

²¹ BVerfGE 128, 138 <156> Pension reduction, invalidity pension; 128, 282 <306 and 307, 311, 315> - Compulsory treatment.

If the jurisprudence of the Chambers is included, the picture becomes even more diverse.²² Since comparative law, which is sometimes designated as the fifth method of interpretation,²³ has gained significantly in importance in the practice of the Federal Constitutional Court (cf. under II.), the grounds for decisions also include many informal references to international sources of law of the kind in question here.²⁴

3. Are there any specific provisions of constitutional law imposing a *legal obligation on the constitutional court to consider decisions by European courts of justice?*

- a) Under Art. 20 sec. 3 GG, the Federal Constitutional Court is bound by law and justice, as are all courts. Furthermore, it has derived the principle of openness to European law from the first sentence of Art. 23 sec. 1, by which it is itself bound. On this basis, the Federal Constitutional Court is not only obliged to consider and respect (even defective) decisions of the Court of Justice of the European Union (ECJ) up to the threshold of *ultra vires* acts or the limit of constitutional identity. It must also give it the opportunity, by means of a preliminary ruling procedure under Art. 267 TFEU, to amend any violation of the enumerated powers of the Union itself, before the Federal Constitutional Court can rule on the limits of European Union powers with regard to Germany.²⁵
- b) From Art. 1 sec. 2 GG, the Federal Constitutional Court has derived not only the obligation to invoke the European Convention on Human Rights as an aid to interpreting the Basic Law, but also, beyond the individual case being decided, to respect the jurisprudence of the European Court of Human Rights.²⁶ This is an expression of the openness of the Basic Law to international law and is based on what

²² See the references in BVerfGK [Chamber Decisions of the Federal Constitutional Court] 18, 539 and 540; 19, 492.

²³ P. Häberle, *Europäische Verfassungslehre* (7th ed. Baden-Baden 2011), p. 250 et seq. with further references.

²⁴ BVerfGE 124, 199 <220> - VBL (Discrimination on grounds of sexual orientation) n. 88.

²⁵ BVerfGE 123, 267 <354> - Lisbon; 126, 286 <303> - Honeywell; 129, 124 >172> - Assistance for Greece and EFSF.

²⁶ BVerfGE 128, 326 <367 and 368> - Preventive detention II.

is, at any rate, the *de facto* function of orientation and guidance accorded to the jurisprudence of the Strasbourg Court of Justice for the interpretation of the European Convention on Human Rights, which goes beyond the specific individual case being decided.²⁷

4. Is the jurisprudence of the constitutional court influenced *in practice* by the jurisprudence of European courts of justice?

- a) Given that the Federal Constitutional Court is indirectly *legally* obliged to consider the jurisprudence of the European courts, there is little room left for any more wide-ranging influence *in practice*. Admittedly, however, the jurisprudence in the *Solange* cases and *obiter dicta* in the *Maastricht* Judgment²⁸ or in the judgment concerning the counter-terrorism database²⁹ may also be regarded as deliberate signals to the European Court of Justice and reactions to the influence of its jurisprudence in practice.
- b) Moreover, the jurisprudence of the Federal Constitutional Court shows that an effort is made to keep divergences from the jurisprudence of the European Court of Human Rights to a minimum and to avoid judgments being rendered against the Federal Republic of Germany. Both with regard to the rights of personality of prominent individuals and in the area of preventive detention, this has resulted in the attempt to build “bridges” to the jurisprudence of the Strasbourg court (cf. I. 6. b).

5. Does the constitutional court in its decisions regularly refer to the jurisprudence of the Court of Justice of the European Union and/or the European Court of Human Rights? Which are the most significant examples?

²⁷ BVerfGE 111, 307 <320> - Görgülü; 128, 326 <368> - Preventive detention II; BVerfGK 10, 66 <77 and 78>; 10, 234 <239>.

²⁸ BVerfGE 89, 155 <210> - Maastricht.

²⁹ BVerfG, Judgment of 24 April 2013 – 1 BvR 1215/07 –, juris, EuGRZ 2013, 174 <184> – Counter-terrorism database, n. 88 et seq.

What has been said above in relation to substantive law (cf. I. 1 and 2) shows that Union law and the Convention are cross-sectional in nature and, apart from a few matters of law merely concerning the organisation of the state, are relevant for nearly all cases upon which the Federal Constitutional Court is called to decide. To this extent, the Federal Constitutional Court has always referred to the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights.

- a) There are many examples.³⁰ The most important decisions from an historical point of view are, however, probably the Solange II³¹, the Maastricht³² and the Banana Market decisions,³³ in which it has been established that the Court of Justice of the European Union guarantees in its jurisprudence a standard of fundamental rights that fulfils the minimum required by the Basic Law.
- b) Again, just to name a few examples, reference has been made to the jurisprudence of the European Court of Human Rights in the definition of the area of protection of Art. 13 GG,³⁴ in the definition of the effective area of protection of the right of personality of prominent individuals,³⁵ in family law, in the definition of inadmissible evidence in criminal trials³⁶ and, most recently, in particular in connection with the law concerning preventive detention,³⁷ the reservation of the right to order preventive detention,³⁸ and therapeutic confinement.³⁹

³⁰ See *pars pro toto* merely BVerfGE 115, 276 <305, 309, 314, 317> - ODDSET-betting with reference to the Gambelli decision of the ECJ.

³¹ BVerfGE 73, 339 <368> - Solange II.

³² BVerfGE 89, 155 <202> - Maastricht.

³³ BVerfGE 102, 147 <153 and 154> - Banana market.

³⁴ BVerfGE 130, 1 <31>. – Inadmissibility of evidence in criminal trials.

³⁵ BVerfGE 120, 180 <201 et seq.> - Caroline v. Hannover III; without reference to the ECHR BVerfGE 101, 361 et seq. – Caroline I; BVerfG, NJW [Neue Juristische Wochenschrift] 2005, 1857 et seq. – Caroline II (Decision of the 1st Chamber of the 1st Senate).

³⁶ BVerfGE 130, 1 <30 and 31> - Inadmissibility of evidence in criminal trials.

³⁷ BVerfGE 128, 326 <370, 375 and 376> - Preventive detention II.

³⁸ BVerfGE 131, 268 <296 and 297> - Reservation of the right to order preventive detention.

³⁹ BVerfG, Judgment of the Second Senate of 11 July 2013 - 2 BvR 2302/11, 2 BvR 1279/12 -, EuGRZ 2013, p. 536 <543 and 544>, n. 61 et seq. – Therapeutic Confinement Act.

6. Are there any examples of divergences in decisions taken by the constitutional court and the European courts of justice?

- a) In theory, there are two substantial divergences between the Federal Constitutional Court and the Court of Justice of the European Union. Firstly, the Federal Constitutional Court, contrary to the jurisprudence of the court in Luxembourg,⁴⁰ accepts no blanket precedence of Union law over national constitutional law.⁴¹ Since the precedence of Union law, as far as Germany is concerned, is based on the national act ratifying the European treaties and since this act must satisfy the primacy of the Constitution, the precedence of application is necessarily limited, in the opinion of the Federal Constitutional Court, by the core of identity of the Basic Law, which, under the third sentence of Art 23 sec. 1 in conjunction with Art. 79 sec. 3 GG, is not open to integration. The task of guarding the integrity of the Basic Law belongs to the Federal Constitutional Court and is not the same as the obligation of the Court of Justice of the European Union under the first sentence of Art. 4 sec. 2 of the Treaty on European Union to give regard to the national identity, which is understood more broadly.

Secondly, the Federal Constitutional Court is obliged to declare *ultra vires* acts by organs and other institutions of the European Union inapplicable in Germany. Union law derives its democratic legitimacy in Germany within the meaning of Art. 20 sec. 1 and sec. 2 GG primarily by virtue of the German act consenting to the programme of integration laid down in the European treaties. This means that in the final analysis, according to the principle of sovereignty of the people, every action by public authorities in Germany must derive its legitimacy from the German people; therefore, the Federal Constitutional Court sees itself as being obliged to monitor at least those actions that arbitrarily exceed the limits of the programme of integration, that is, the

⁴⁰ ECJ Case 6/64 (Costa v. ENEL), ECR 1964, 1251; Case 11/70 (Internationale Handelsgesellschaft mbH), ECR 1970, 1125; Case 106/77, (Simmenthal) ECR 1978, 629, n. 24; Case C-13/91 and Case C-113/91, (Debus), ECR 1992, I-3617, n. 32; Case C-119/05, (Lucchini), ECR. 2007, I-6199, n. 61; Case C-115/08, (CEZ) ECR 2009, I-0000, n. 138; Case C-314/08, (Filipiak), ECR 2009-I-11049, n. 81 et seq.; Case C-147/08, (Römer), ECR 2011 I-3591, n. 54;

⁴¹ BVerfGE 73, 339 <375> - Solange II; 123, 267 <398> - Lisbon; 126, 286 <302> - Honeywell.

powers accorded to the European Union, and if necessary to find such legal acts to be inapplicable in Germany.⁴²

However up to the end of 2013, the Federal Constitutional Court has not identified any violation of the constitutional identity of the Basic Law or any *ultra vires* act.⁴³ Even with regard to the assumption, which is somewhat questionable from a doctrinal point of view, by the Court of Justice of the European Union that prohibition of age discrimination can be seen as a general principle of law under Union law,⁴⁴ the Second Senate, apart from the dissenting opinion of Justice *Landau*,⁴⁵ did not find any clear and structurally significant transgression of the limits of European powers.⁴⁶

- b) In relation to the European Court of Human Rights, there have so far been three main areas in which divergences in jurisprudence have existed at least temporarily. These are the balancing of the protection of the privacy of prominent individuals with the freedom of the press, the position of the biological father in family law, and the law concerning preventive detention.

In the complex relationship between the protection of the privacy of prominent individuals and the freedom of the press, the Federal Constitutional Court has from the very beginning⁴⁷ tended towards privileging press freedom because, among other reasons, this fundamental right is constitutive of the very basis of a free and democratic society. Thus, in its decision in *Caroline v. Hannover I*, the First Senate approved the idea developed in the jurisprudence of the civil courts of the “absolute person of contemporary history” and suggested that also prominent people who do not hold public office should accept reporting about themselves to a greater degree

⁴² BVerfGE 58, 1 <30 and 31> - Eurocontrol; 75, 223 <235, 242> - 6th VAT Directive; 89, 155 <188> - Maastricht; 123, 267 <354> - Lisbon; 126, 286 <308> - Honeywell.

⁴³ Czech Constitutional Court, Decision of 31 January 2012 – Pl.ÚS 5/12 (Holoubec).

⁴⁴ ECJ Case C 144/04 – Mangold – ECR 2005, I - 9981.

⁴⁵ BVerfGE 126, 286 <318> - Honeywell.

⁴⁶ BVerfGE 126, 286 <307 et seq.> - Honeywell; however see BVerfG, Dec. of 14 January 2014 - 2 BvR 2728/13 e. a. - preliminary procedure concerning the OMT-programme of the ECB.

⁴⁷ To some extent already BVerfGE 7, 198 <221 and 222> - Lüth.

than is otherwise the case.⁴⁸ The Senate found that the public has insofar a “legitimate interest in learning whether such persons, who are often regarded as a role-model or as an example, convincingly bring into agreement the behaviour that they show in their public function and their personal behaviour.”⁴⁹ Conversely, the European Court of Human Rights, in its *von Hannover v. Germany* judgment of 24 June 2004, found that the freedom of the press, protected under Art. 10 of the ECHR, did not have predominant interests, allowing this only when reporting about political matters or other matters of importance, at least to a certain degree.⁵⁰ The regular German courts thereupon to a large extent based their balancing of conflicting fundamental rights in the individual case on the (narrower) criteria set by the European Court of Human Rights. In its *Caroline v. Hannover III* decision, the Federal Constitutional Court gave its blessing to this solution of the conflict between diverging fundamental rights, was in conformity with the Constitution too.⁵¹

In its *Görgülü* decision, the Second Senate of the Federal Constitutional Court overturned decisions by the civil courts concerning the rights of custody and access of the father of an illegitimate child because they had not given sufficient consideration⁵² to a previous successful fundamental rights complaint by the father.⁵³ The Senate ruled that the European Convention on Human Rights participates in the primacy of the law (Art. 20 sec. 3 GG) and must insofar also be accorded due consideration by the ordinary courts. “Taking into account” does not, however, mean strict compliance, but “taking notice of the Convention provision as interpreted by the ECHR and applying it to the case, provided the application does not violate prior-ranking law, in particular constitutional law.”⁵⁴ It is also important “how taking account of the decision takes place in the system of the field of law in question”, so that the

⁴⁸ BVerfGE 101, 361 <390 et seq.> - Caroline I; previously already BVerfGE 34, 269 <283>.

⁴⁹ BVerfGE 101, 361 <393> - Caroline I.

⁵⁰ ECtHR (3rd Section) Judgment of 24 June 2004, *von Hannover v. Germany*, Application no. 59320/00, n. 64; see further ECtHR (4th Section) Judgment of 16 November 2004, *Karhuvaara and Itälehti v. Finland*, Application no. 53678/00, n. 45.

⁵¹ BVerfGE 120, 180 <220 and 221> - Caroline III.

⁵² BVerfGE 111, 307 <330 et seq.> – Görgülü.

⁵³ ECtHR, Judgment of 26 February 2004, *Görgülü v. Germany*, Application no. 74969/01.

⁵⁴ BVerfGE 111, 307 <329.> – Görgülü.

Convention does not automatically take precedence over other (ordinary) federal law. Finally, it should be noted that proceedings before the court in Strasbourg do not adequately depict the legal positions and interests involved in a multi-polar, especially civil law, legal situation.⁵⁵

In its jurisprudence on preventive detention, on the other hand, the Second Senate of the Federal Constitutional Court in 2004 initially approved the retrospective removal of time-limits for preventive detention.⁵⁶ However, when in 2009 the European Court of Human Rights considered this just as much of a violation of Art. 5 and Art. 7 sec. 1 ECHR as the institution of retrospective preventive detention,⁵⁷ the Federal Constitutional Court then ultimately⁵⁸ took this largely into account in its judgment of 4 May 2011 and its later decisions concerning the reservation of a later imposition of preventive detention and therapeutic confinement. It is true that it stressed that the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights should (only) be considered in a results-oriented way⁵⁹ and thus, unlike the Strasbourg Court of Justice, regarded the ordering of retrospective preventive detention or the retrospective extension of its maximum duration not as a problem of retrospective effect under Art. 104 sec. 2 GG, but as a fundamentally disproportionate impairment of the freedom of the person (Art. 2 sec. 2 GG).⁶⁰ Ultimately, however, the Federal Constitutional Court did end up objecting to retrospective preventive detention in the way in which it was implemented, that is, to the retrospective extension of its maximum duration, and in doing so gave particular consideration to the value judgments of the European Convention on Human Rights.⁶¹ It did, however, acknowledge an exception to the general ban on retrospective preventive detention “if a high risk of the detainee’s committing most serious crimes of

⁵⁵ BVerfGE 111, 307 <328 and 329> – Görgülü.

⁵⁶ BVerfGE 109, 133 <159> - Preventive detention I.

⁵⁷ Fundamentally ECtHR, Judgment of 17 December 2009, Mücke v. Germany, Application no. 19359/04.

⁵⁸ Regarding the various constructions *Chr. Grabenwarter*, Die deutsche Sicherungsverwahrung als Treffpunkt grundrechtlicher Parallelwelten, EuGRZ 2012, 507 et seq.

⁵⁹ BVerfGE 128, 326 <370> - Preventive detention II.

⁶⁰ BVerfGE 128, 326 <372 et seq., 392 and 393> - Preventive detention II.

⁶¹ BVerfGE 128, 326 <388 et seq., 391 et seq.> - Preventive detention II.

violence or sexual offences can be inferred from specific circumstances of the detainee's person or conduct and ... the detainee suffers from a mental disorder;" without relying on relevant indications by the Strasbourg Court of Justice. The Federal Constitutional Court based its decision on Art. 5 sec. 1 letter e of the ECHR.⁶² In its most recent decision concerning the Therapeutic Confinement Act, the Senate has further reinforced this approach and dealt in detail with the concept of mental illness ("unsound mind" or "true mental disorder").⁶³ It is still open whether the European Court of Human Rights will step on to this "bridge".⁶⁴ In view of these decisions, it is to be expected that the decisions of the two courts will be compatible even with regard to this difficult question. This is particularly significant not least because it is possible that the duty incumbent upon the state to protect life and physical integrity under Art 2 sec. 2 GG prohibits the German legislator from allowing highly dangerous and

⁶² BVerfGE 128, 326 <332, 396 et seq.> - Preventive detention II.

⁶³ BVerfG, Judgment of the Second Senate of 11 July 2013 - 2 BvR 2302/11, 2 BvR 1279/12 -, EuGRZ 2013, p. 536 <543 and 544>, n. 88 et seq. – Therapeutic Confinement Act.

⁶⁴The Court has partially rejected the criterion of mental disorder (cf. ECtHR, Judgment of 17 December 2009 – Application no. 19359/04 - Mücke v. Germany, n. 103) or at least cast doubt on it (cf. ECtHR, Judgment of 13 January 2011 – Application no. 17792/07 - Kallweit v. Germany, n. 55; Judgment of 24 November 2011 – Application no. 4646/08 - O.H. v. Germany, n. 86; Judgment of 19 January 2012 – Application no. 21906/09 - Kronfeldner v. Germany, n. 79). In this it was guided by the differentiation, at the time to be drawn under national law, between the confinement of dangerous offenders in preventive detention on the one hand and the confinement of persons of unsound mind who have committed crimes in a state of absence of criminal responsibility or significantly diminished criminal responsibility in a psychiatric hospital on the other hand (cf. ECtHR, Judgment of 13 January 2011 – Application no. 17792/07 - Kallweit v. Germany, n. 55) and based its decision on the finding of the domestic courts, which had rejected confinement of the affected person under § 63 of the German Criminal Code (StGB) (cf. ECtHR, Judgment of 17 December 2009 – Application no. 19359/04 - Mücke v. Germany, n. 22, 103; Judgment of 13 January 2011 – Application no. 17792/07 - Kallweit v. Germany, n. 55; Judgment of 13 January 2011 – Application no. 6587/04 - Haidn v. Germany, n. 92, there regarding provisions of federal state law). Further, it found, without rendering a final decision in all cases on the question of mental disorder – that the domestic courts were not, in any case, the competent body to examine whether a mental disorder existed and that the confinement decision was not based on mental disorder (cf. ECtHR, Judgment of 17 December 2009 – Application no. 19359/04 - Mücke v. Germany, n. 103; Judgment of 13 January 2011 – Application no. 17792/07 - Kallweit v. Germany, n. 56; Judgment of 13 January 2011 – Application no. 6587/04 - Haidn v. Germany, n. 93; Judgment of 24 November 2011 - Application no. 4646/08 - O.H. v. Germany, n. 86; Judgment of 19 January 2012 - Application no. 21906/09 - Kronfeldner v. Germany, n. 79). Beyond this, in the Court's opinion, there is no justification, again irrespective of mental disorder, under the second sentence letter e of Art. 5 sec. 1 ECHR, because the confinement was not carried out in an establishment that was appropriate for persons of unsound mind (cf. ECtHR, Judgment of 13 January 2011 - Application no. 17792/07 - Kallweit v. Germany, n. 57 Judgment of 13 January 2011 - Application no. 6587/04 - Haidn v. Germany, n. 94; Judgment of 24 November 2011 - Application no. 4646/08 - O.H. v. Germany, n. 87 et seq.; Judgment of 19 January 2012 - Application no. 21906/09 - Kronfeldner v. Germany, n. 80 et seq.). Most recently ECtHR, Judgment of 28 June 2012 – 3300/10 –, juris n. 92 et seq.; Judgment of 16 May 2013 – Application no. 20084/07 – Radu v. Germany, EuGRZ 40 (2013), 584 <592>, n. 91 et seq.

mentally disturbed criminals, who do not necessarily have diminished criminal responsibility, to go free when there is a specific risk that they will be a danger to the life and limb of others.

7. Do other national courts also consider the jurisprudence of European courts of justice as a result of the constitutional court taking it into consideration in its decisions?

The answer to this is in the affirmative, but can be given here only by means of a few examples.

- a) The Federal Constitutional Court holds in its well established jurisprudence that an arbitrary violation of the duty incumbent upon the courts of last instance under Art. 267 sec. 3 TFEU to refer matters where no legal remedy is available under national law for a preliminary ruling [*Vorlagepflicht*] can at the same time be a violation of the guarantee of the lawful judge and has found in favour of numerous constitutional complaints on these grounds.⁶⁵ This has lastingly reinforced the willingness of the ordinary courts to refer matters concerning the validity and interpretation of Union law to the European Court of Justice, and not just in the specific cases in question.
- b) As far as the European Court of Human Rights is concerned, it is only the treatment of the areas of reference dealt with above – protection of rights of personality, the role of the fathers of illegitimate children, and preventive detention – by the Federal Constitutional Court that has created the legal certainty that has enabled the regular courts to incorporate the jurisprudence from Strasbourg.

8. Are there any examples of decisions by European courts of justice influenced by the jurisprudence of national constitutional courts?

⁶⁵BVerfGE 75, 223 <234>; 82, 159 <192 and 193>; 128, 157 <187>; 129, 78 <105>; consistent jurisprudence

- a) It can be taken for granted that in Union law, the decisions of the European Court of Justice concerning fundamental rights have been crucially influenced, at least since the *Nold* judgment, by the *Solange* decision of the Federal Constitutional Court (and the *Frontini* decision of the Italian *Corte Costituzionale*). The same can be demonstrated for the adoption of the principle of proportionality, a feature of Prussian police law which entered German constitutional law via the jurisprudence of the Federal Constitutional Court in the 1950s. A similar process may be seen at work in the attention paid by the European Court of Justice to the subject of constitutional identity, which has been a *cantus firmus* in the jurisprudence of the Federal Constitutional Court as a limit of integration since the *Solange* decision and has now been codified in the first sentence of Art. 4 sec. 2 TEU,⁶⁶ even if, as has already been mentioned, the way it is understood slightly differently in Karlsruhe and Luxembourg. To mention another example, in its 1996 opinion concerning the accession of the European Union to the European Convention on Human Rights⁶⁷ the European Court of Justice adopted the restrictive conditions established in the *Maastricht* judgment regarding Art. 308 of the EC Treaty (now Art. 352 TFEU) almost word-for-word.
- b) The autonomous interpretation of the Convention and the (unfortunate) restriction to English and French as authentic languages of the Convention emphasised by the European Court of Human Rights make it difficult to provide evidence of the influence of the jurisprudence of the Federal Constitutional Court on the jurisprudence of the European Court of Human Rights. On the other hand, the similarities between the jurisprudence of the two courts regarding the concept, function and structure of the protection of fundamental rights is so great⁶⁸ that not inconsiderable indirect influence may be assumed.

⁶⁶ See ECJ, Case C-285/98, Tanja Kreil, ECR 2000, I – 69 – Closing statement by the Attorney General *La Pergola*; Case C 36/02, Omega Spielhallen, ECR 2004, I – 9609, n. 39.

⁶⁷ ECJ, Opinion 2/94, *ECHR*, ECR 1996, I-1759 n. 29 et seq.

⁶⁸ Cf. the summary in *Chr. Grabenwarter*, Europäische Menschenrechtskonvention, 5th ed., 2012, § 18.

More specifically, the conflict areas mentioned above, namely protection of the rights of personality of prominent individuals⁶⁹ and preventive detention⁷⁰, demonstrate that the European Court of Human Rights reacts constructively to the adaptability shown in the jurisprudence of the Federal Constitutional Court. Thus the discursive basis of the cooperation between European constitutional courts [*europäischer Verfassungsgerichtsverbund*] does indeed entail a certain degree of influence.

II. Interactions between constitutional courts

Andreas L. Paulus

The Basic Law does not restrict the ways in which the Federal Constitutional Court may take the decisions of other constitutional courts into account. Reference to, indeed even respect for, international judgments is part and parcel of judicial independence. Comparative law is even regarded by some as a method of interpretation of equal standing with the others.⁷¹ Art. 1 sec. 2 GG provides that “[t]he German people ... acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.” While there is some argument as to the meaning of this provision,⁷² the Federal Constitutional Court and commentators on the Basic Law do, however, agree for the most part that international guarantees of human rights may and

⁶⁹ ECtHR, Judgment of 07 February 2012 – 40660/08, 60641/08 –, *von Hannover v. Germany* - juris; Judgment of 19 September 2013 – 8772/10 –, *von Hannover v. Germany* - juris.

⁷⁰ ECtHR, Judgment of 24 November 2011 – Application no. 4646/08 – *O.H. v. Germany*; Judgment of 19 April 2012, Application no. 61272/09, *B v. Germany*; Judgment of 16 May 2013 – Application no. 20084/07 – *Radu v. Germany*, EuGRZ 40 (2013), 584 <592>, n. 91 et seq.

⁷¹ S. P. Häberle, *Europäische Verfassungslehre* (7th ed. Baden-Baden 2011), p. 250 et seq. with further references.

⁷² Cf. e.g. M. Herdegen, in Maunz/Dürig, GG, Art. 1 sec. 2 n. 39 (March 2006) (Incorporation of the “core” standards of human rights under international law); representing the opposing view H. Dreier, GG, Vol. 1, 3rd ed. 2013, Art. 1 II n. 20 with further references.

should be referred to in order to support the interpretation of human rights under the Basic Law.⁷³

1. Does the constitutional court in its decisions refer to the jurisprudence of other European or non-European constitutional courts?

The Federal Constitutional Court references the decisions of other European or non-European constitutional courts and supreme courts in many of its decisions, without any noticeable bias towards German-speaking or European courts.

The Federal Constitutional Court has always paid particular attention to the rulings of the US Supreme Court, though. Recent judgments have concerned such various subjects as respect for rulings of the International Court of Justice⁷⁴ or the right to demonstrate at airports – with the theory of “public space” being supported additionally with reference to the jurisprudence practice of the Supreme Court of Canada.⁷⁵

These citations do not mean, however, that the Federal Constitutional Court would consider itself bound by the decisions of other constitutional courts. Rather, the Court sees it as a matter of professionalism in a highly integrated international world not only to be aware of legal concepts and ideas from other countries but also to consider those concepts and ideas and relate to them. As an example, a Chamber of the Second Senate, in the process of implementing the decisions of the International Court of Justice in the *LaGrand*⁷⁶ and *Avena*⁷⁷ cases, reached the conclusion that the opinion of the minority of

⁷³ See just for the ECHR BVerfGE [Decisions of the Federal Constitutional Court] 111, 307 <329> - Görgülü; BVerfGE 128, 326 <367 et seq.> - Preventive detention; for other guarantees of human rights cf. BVerfGE 128, 282 <306> - Psychiatric confinement; 132, 134 <161 and 162, n. 68> - Asylum Seekers' Benefits Act (*Asylbewerberleistungsgesetz*); BVerfG [Federal Constitutional Court]; from the literature see merely Herdegen, in: Maunz-Dürig (footnote 714), Art. 1 II n. 47; for the opposing view see Höfling, in: Sachs, GG (6th ed., Munich: Beck 2011), n. 76 and 77.

⁷⁴ See in this regard BVerfGK [Chamber decisions of the Federal Constitutional Court] 9, 174 <186 et seq., 191> (duty to take into consideration); BVerfGK 17, 390 <399 et seq.>; recently BVerfG, Decision of 5 November 2013 - 2 BvR 1579/11, juris; BGH [Federal Court of Justice], *Der Strafverteidiger – StV* 2011, 603; cf. opposing U.S. Supreme Court, *Sanchez-Llamas v. Oregon*, 548 U.S. 338 (2006); *Medellín v. Texas*, 552 U.S. 491 (2008).

⁷⁵ BVerfGE 128, 226 <253> - Fraport.

⁷⁶ *LaGrand (Germany v. United States)*, ICJ Rep. 2001, 466.

⁷⁷ *Avena (Mexico v. United States)*, ICJ Rep. 2004, 12.

their American colleagues should be followed in the German legal system, and not that of the majority.⁷⁸

Moreover, the published decisions alone do not provide the full picture of the range covered by consideration of international decisions. Many, if not most, of the reports for the consideration of a case involve a careful analysis of the legal situation in other countries, even if the findings from such analyses are not included into the reasons given for the decisions.

2. If so, does the constitutional court tend to refer primarily to jurisprudence from the same language area?

Notwithstanding the above, the Federal Constitutional Court does have a particular affinity with its sister courts in the German-speaking countries, especially in Austria and Switzerland. However, this is the case not merely for linguistic and cultural reasons, but is also based in part on the similarity of federal structures and common legal traditions.

Wherever there are parallel problems in Austria and Switzerland, there is a good chance that they are reflected upon in German constitutional jurisprudence – which does not mean that the solutions found there are considered binding. Unlike in common law, there is no theory of *stare decisis* in Germany which could put into question the citation of foreign court decisions. It is a matter of exchanging arguments and gaining practical experience with the range of regulatory and interpretative approaches, but also of the compatibility of German decisions with those in other German and European countries.

3. In which fields of law does the constitutional court refer to the jurisprudence of other European or non-European constitutional courts?

It is not possible to clearly determine the fields of law in which the Constitutional Court refers to the jurisprudence of other constitutional courts, as there are no rules exempting any particular field. A reference is most likely to occur in matters of international and European law and in the area of the European Convention on Human Rights, as foreign legal practice has an impact on their interpretation and application in other countries. In contrast, matters of “simple”, ordinary law – civil, criminal and public law – are (still) of a

⁷⁸ BVerfG, BVerfGK 9, 174 <189 et seq.>; BVerfGK 17, 390 <398>; cf. BVerfGE 111, 307 <319> - Görgülü; BVerfGE 128, 326 <367 et seq.> - Preventive detention (both concerning the duty to take into account decisions by the European Court of Human Rights).

mostly national character and are also not subject to full examination by the Federal Constitutional Court. Thus, less reference is made to foreign decisions there.

4. Have decisions of the constitutional court noticeably influenced the jurisprudence of foreign constitutional courts?

This mostly applies to the area of European law (see above), in which the influence on other national courts is also relatively high, not necessarily in the sense of word-for-word adoption, but rather as inspiration⁷⁹ (or even incentive). As an example, the decision by the Czech Constitutional Court to apply the *ultra vires* doctrine⁸⁰ to a decision by the Court of Justice of the European Union can be traced back *inter alia* to the Honeywell Decision of the Second Senate,⁸¹ without following it in every detail.

As far as we can see, no comprehensive study exists of the influence of the Federal Constitutional Court on other constitutional courts.⁸² However, for example, German jurisprudence and practice regarding the principle of proportionality has had a remarkable influence on international jurisprudence on human rights and fundamental rights.⁸³

⁷⁹ Cf. J. Isensee, Positivität und Überpositivität der Grundrechte, in: Merten/Papier (eds.), Handbuch der Grundrechte II (2006) § 26 n. 104 (for the ECHR and the development of international human rights).

⁸⁰ Czech Constitutional Court, Decision of 31 January 2012 – Pl.ÚS 5/12 (Holoubec); also M. Faix, EuGRZ 2012, 597 et seq.; A. Vincze, Europarecht – EuR 2013, 194; J. Komárek, European Constitutional Law Review (2012) 323.

⁸¹ BVerfGE 126, 286 <302 et seq.> - Honeywell.

⁸² See generally C. Tomuschat, Das Bundesverfassungsgericht im Kreise anderer nationaler Verfassungsgerichte, in: P. Badura and H. Dreier (eds.), Festschrift 50 Jahre Bundesverfassungsgericht (Tübingen: Mohr Siebeck 2001) 245 et seq. (with critical notes on the lack of citation practice *ibid.*, p. 285 et seq. and note on citing other constitutional courts in deviating opinions, e.g. BVerfGE 39, 68 (71, 74) – Termination of pregnancy I, Dissenting opinions Rupp-v. Brünneck, Simon – and in BVerfGE 73, 339 (376) - Solange II). For individual impressions see László Sólyom, Worte des Hörers, in: M. Stolleis (ed.), Herzkammern der Republik (Munich: Beck 2011), p. 224 et seq.; A. Zoll, Verfassungsrichter in Polen und in der BRD. Rechtliche Regelungen im Vergleich, *ibid.*, p. 247 et seq. Differences from the French Conseil constitutionnel are emphasised by E. François, Das Bundesverfassungsgericht und die deutsche Rechtskultur: Ein Blick aus Frankreich, *ibid.*, p. 52 et seq.; O. Jouanjan, Conseil constitutionnel und Bundesverfassungsgericht: zwei verschiedene Modelle der europäischen Verfassungsgerichtsbarkeit.

⁸³ On the development of the principle of proportionality and the influence of the Federal Constitutional Court see A. Barak, Proportionality (Cambridge: Cambridge UP 2012), p. 178 et seq. (with a detailed description of the history of that influence in Europe and beyond); D. Merten, Verhältnismäßigkeitsgrundsatz, in Merten/Papier (eds.), Handbuch der Grundrechte III (2009) Sec. 68 n. 6 et seq. Above all, however, see the Kreuzberg Decision by the Prussian Higher Administrative Court, E (Decisions) 9, 353 (370 et seq.). See now the second sentence of Art. 52

5. Are there any forms of cooperation going beyond the mutual acknowledgement of court decisions?

European constitutional courts and supreme courts meet each other on a regular basis; this includes the Court of Justice of the European Union in Luxembourg and the European Court of Human Rights in Strasbourg. There are also many encounters on a personal level. For example, an informal discussion group comprises members of the Federal Constitutional Court, the British Supreme Court, and the French Conseil d'État. It deals with the fundamental principles of European constitutional and administrative law in the jurisprudence of the respective national courts and analyses their interrelation, but also the differences between their respective jurisprudence. Supra-national handbook projects by legal scholars, some of whom are also justices, complement this co-operation, which is close, but for the most part, as we have said, informal.

(1) of the Charter of Fundamental Rights of the European Union and Art. 18 of the European Convention on Human Rights (hereinafter ECHR). On the influence of the Federal Constitutional Court generally see also recent collections and handbooks such as Merten/Papier (eds.), *Handbuch der Grundrechte*; v. Bogdandy/Huber (eds.), *Ius Publicum Europaeum*; on the ECHR see O. Dörr/R. Grote/T. Marauhn, *EMRK/GG Konkordanzkommentar ECHR and Basic Law (GG)* (2nd ed., Tübingen: Mohr Siebeck, 2013).

III. Interactions between European courts in the jurisprudence of constitutional courts

Andreas L. Paulus

Interactions between European Courts and the Federal Constitutional Court are much more formal than those between domestic courts. This is mainly because the decisions of European Courts, namely the Court of Justice of the European Union and the European Court of Human Rights, formally have a function of orientation and guidance for the interpretation and application of the relevant Treaties. The European courts can in particular exert considerable pressure for the implementation of their decisions, including sanctions, which the Court of Justice of the European Union is able to impose for non-implementation of its decisions (Art. 260 sec. 2 subsection 2 TFEU). The Committee of Ministers of the Council of Europe monitors the enforcement of decisions of the European Court of Human Rights, and, as is well known, the Court now uses the binding nature of its decisions under Art. 46 of the ECHR to issue so-called “pilot judgments”,⁸⁴ which can, if necessary, demand that State parties take rather drastic measures to prevent future violations of the Convention.⁸⁵

But a distinction must be drawn here: while the decisions of the Court of Justice of the European Union are part of the precedence of application of Union law, as is acknowledged in the consistent constitutional case law⁸⁶, the Federal Constitutional Court has accorded the decisions of the European Court of Human Rights (only) a “function of orientation and guidance” in the application of the European Convention on Human Rights

⁸⁴ *Broniowski v. Poland* (Grand Chamber), 31443/96, 2004-V, EuGRZ 2004, 472; in this regard see merely S. Schmahl, EuGRZ 2008, 369 et seq.; *Rumpf v. Germany*, 46344/06, EuGRZ 2010, 700, p. 59 et seq.

⁸⁵ See as a reaction to the *Rumpf* Decision the Law concerning legal protection in over-long court proceedings and criminal investigation proceedings of 24 November 2011, Bundesgesetzblatt – BGBl. [Federal Law Gazette] I 2302, with many changes to the entire German trial and court constitution law with the introduction of the remedy of a formal objection to delay (*Verzögerungsrüge*).

⁸⁶ See BVerfGE 126, 286 <301> - Honeywell; BVerfGE 129, 78 <97> - Le Corbusier furniture.

within German jurisdiction,⁸⁷ but does not accord it final and binding effect within the domestic legal system. Any deviation from such decisions, however, requires a great deal of time and effort for presenting reasons, which means that it occurs extremely rarely, if at all.

Thus, the Federal Constitutional Court has not so far denied the implementation within German jurisdiction of any decisions of either of the two European courts with binding effect on Germany. In the Lisbon judgment,⁸⁸ the Honeywell decision,⁸⁹ and in the judgment concerning the counter-terrorism database,⁹⁰ the Constitutional Court has, however, imposed limits regarding the acknowledgement of judgments of the Court of Justice of the European Union – which have so far remained theoretical. Similarly, in its second judgment concerning preventive detention, the Federal Constitutional Court has imposed limits in relation to decisions by the European Court of Human Rights.⁹¹

1. Do references to European Union law or to decisions by the Court of Justice of the European Union in the jurisprudence of the European Court of Human Rights have an impact on the jurisprudence of the constitutional court?

The Federal Constitutional Court incorporates the case law of the Court of Justice of the European Union into its own; there is thus no need in Germany for a separate incorporation by the European Court of Human Rights. As has been described above, the Federal Constitutional Court has consistently established that it fundamentally acknowledges the precedence of European law in its jurisprudence.⁹² This includes the binding nature of decisions by the Court of Justice of the European Union in matters of Union law. For instance, the First Senate has used the precedence of application of European law and the jurisprudence of the Court of Justice concerning the prohibition of

⁸⁷ See merely BVerfGE 111, 307 <320> - Görgülü; BVerfGE 128, 326 <368> - Preventive detention.

⁸⁸ BVerfGE 123, 267 <398> - Lisbon Treaty; see already BVerfGE 73, 339 <375> - Solange II.

⁸⁹ BVerfGE 126, 286 <302 et seq.> - Honeywell.

⁹⁰ BVerfG, Judgment of 24 April 2013, *Neue Juristische Wochenschrift* – NJW [2013, 1499; BVerfG, Judgment of 24 April 2013 – 1 BvR 1215/07 – Counter-terrorism database, juris, n. 91.

⁹¹ BVerfGE 128, 326 <371 and 372> - Preventive detention II; 111, 307 <327> - Görgülü.

⁹² BVerfGE 126, 286 <301>; BVerfGE 129, 78 <97>, footnote ~~86~~16 *supra*.

discrimination on the grounds of nationality (Art. 18 TFEU) to substantiate its finding – over and above the wording of Art. 19 sec. 3 GG⁹³ – that the fundamental rights under the Basic Law are also applicable to legal entities domiciled in other Member States of the European Union.⁹⁴

This does not, however, apply in the same way for areas that Union law reserves either expressly or, for lack of conferred powers, tacitly, for national law. The Court of Justice of the European Union has extended the application of European fundamental rights to cover the entire sphere of application of Union law, including exceptions from the fundamental freedoms provided for in the Treaties⁹⁵ and the sphere left to the discretion of the Member States, and has upheld this despite the restriction under Art. 51 sec. 1 CFREU, which requires the application of the Charter by member States “only when ... implementing Union law”.⁹⁶ However, in its decision concerning emission rights, the Federal Constitutional Court has clarified that the fundamental rights under the Basic Law apply to the full extent in this area and will be subject to its oversight.⁹⁷ Only in cases where Union law imposes mandatory requirements leaving no scope for discretion in implementation are solely applicable the fundamental rights of the Union; in this instance, the Federal Constitutional Court has merely a residual competence for ascertaining that fundamental rights are as effectively protected in the Union as under the Basic Law, as long as the European Court of Justice preserves the essential content of the applicable fundamental rights.⁹⁸ In reaction to the expansive jurisprudence of the Court of Justice of the European Union, the Federal Constitutional Court has once again, in its judgment on

⁹³ Art. 19 (3) GG reads: “The basic rights shall also apply to *domestic* artificial persons to the extent that the nature of such rights permits.” (our emphasis).

⁹⁴ BVerfGE 129, 78 <94 et seq.> - Le Corbusier furniture.

⁹⁵ Regarding the area of application of Union law see now ECJ, Åklagaren v. Åkerberg Fransson, Judgment of 26 February 2013, Case C-617/10, n. 19 with further references; cf. D.-E. Khan, in: Geiger/Khan/Kotzur, EUV/AEUV (3rd. ed. 2010), Art. 18 AEUV n. 12 with further references; cf. in this regard BVerfGE 123, 267 <349 et seq.>; 126, 286 <302>; 129, 78 <98>.

⁹⁶ Åkerberg Fransson, Judgment of 26 February 2013, C-617/10, n. 19 et seq. Critical of this e.g. P.M. Huber, NJW 2011, 2385.

⁹⁷ BVerfGE 118, 79 <95 et seq.> - Emission trading; confirmed in BVerfG, Judgment of 24 April 2013 – 1 BvR 1215/07 – Counter-terrorism database, juris, n. 88.

⁹⁸ BVerfGE 73, 339 <387> - Solange II; 102, 147 <162 et seq.> - Banana market Regulation; 118, 79 <95> - Emission trading.

the German Counter-Terrorism Database Act,⁹⁹ confirmed its jurisprudence to the effect that German fundamental rights are fully applicable within the discretion left to the Member States by Union law even within the latter's scope of application.

In terms of content, the Federal Constitutional Court addresses decisions by the Court of Justice of the European Union above all where the German law implements Union law. In these cases, it ensures that the national courts' duty under Art. 267 sec. 3 TFEU to refer matters for a preliminary ruling (*Vorlagepflicht*) is complied with in principle, while it does not fully control its implementation. It assesses the duty to refer matters for a preliminary ruling according to the provisos of the relevant – expansive – jurisprudence of the Court of Justice of the European Union.¹⁰⁰

Just as with regard to respecting the competences of national courts, it does, however, not exercise full control here, but leaves the regular courts room for discretion. The Federal Constitutional Court overturns judgments by the regular courts as violations of the right to one's lawful judge (second sentence of Art. 101 sec. 1 GG), which is equivalent to a fundamental right, only in cases in which the manner is untenable in which the regular courts deal with the duty of referral for a preliminary ruling, particularly in those cases in which the duty of referral is fundamentally disregarded, there is a deliberate deviation from existing jurisprudence without any willingness for referral, or if in an arbitrary manner, no referral is made in spite of the incompleteness of European jurisprudence in the matter.¹⁰¹ This has happened in a few cases in practice.¹⁰²

The Federal Constitutional Court frequently takes into account the content of Union jurisprudence, even outside the area of application of Union law, where Union law has no binding effect in the case in question. Nonetheless, German law also goes over and above the standard set by Union law (cf. Art. 53 CFREU); for example, workplaces and places of business fall under the protection of the inviolability of the home under Art. 13

⁹⁹ Judgment of 24 April 2013 (footnote [9727](#)) – Counter-terrorism database, n. 88-91.

¹⁰⁰ Cf. BVerfGE 129, 78 <105 and 106>; BVerfG, Judgment of the Second Senate of 28 January 2014 - 2 BvR 1561/12 - n. 177 et seq.

¹⁰¹ See BVerfGE 128, 157 <187 et seq.>; 129, 78 <106 and 107>; BVerfG, Judgment of the Second Senate of 28 January 2014 - 2 BvR 1561/12 - n. 179 et seq.; regarding restriction to examination of untenability BVerfGE 126, 286 <317 and 318> - Honeywell.

¹⁰² See merely BVerfGK 17, 533 <543 et seq.> - Printers and plotters.

sec. 1 GG,¹⁰³ whereas this was - at least for some time - not entirely clear in the case law of the Court of Justice.¹⁰⁴

2. How does the jurisprudence of constitutional courts influence the relationship between the European Court of Human Rights and the Court of Justice of the European Union?

Until the relationship between the European courts is re-structured after the accession of the European Union to the European Convention on Human Rights (cf. Art. 6 sec. 1 TEU) – not only in the accession treaties but also in practice – it is difficult to predict the influence of the jurisprudence of the constitutional courts on the relationship between the European courts. Now that an accession agreement has been drafted,¹⁰⁵ we will have to wait for the opinion of the Court of Justice of the European Union pursuant to Art. 218 sec. 7 TFEU to see whether this draft is compatible with the treatiesU.

However, the so-called “co-respondent mechanism”, that is, the mechanism providing for a statement of the Court of Justice of the European Union on such matters before the European Court of Human Rights,¹⁰⁶ raises many questions as to its domestic implementation. In particular, the statement’s authority is not yet clear when the statement deviates from the previous jurisprudence of the Court of Justice of the European Union, for example in order to avert a possible conviction of the Union by the European Court of Human Rights. The prior assessment of compatibility with the Convention rights under Art. 3 sec. 6 of the draft accession treaty, on the other hand, is intended to lead to a judgment by the Court of Justice of the European Union which, under Art. 19 sec. 1 TEU, is part of the precedence of application of Union law. However, the means by which such a prior assessment can be brought about under Union law do not yet seem quite clear.

¹⁰³ See BVerfGE 76, 83 <88>; 97, 228 <265> - short reporting; 120, 274 <309> - Acoustic surveillance of residential space.

¹⁰⁴ Opposing this ECJ, Case 46/87 - Hoechst, ECR 1989, 2859 n. 18 and 19; but affirming subject to restrictions ECtHR, *Deés v. Hungary*, No. 2345/06 of 9 November 2010, n. 21; while open ECJ, Case 94/00 - *Roquette Frère SA*, Judgment of 22 October 2002, ECR 2002, I-9032, n. 29.

¹⁰⁵ See now the ‘Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms’, in: Final report to the CDDH (Steering Committee for Human Rights) of 10 June 2013, Doc. 47+1(2013)008rev2, Appendix 1; see in this regard J. Polakiewicz, *EuGRZ* 2013, 472.

¹⁰⁶ Draft revised agreement, *ibid.*, Art. 3, in this regard Polakiewicz, *EuGRZ* 2013, 472 <476 et seq.>.

National constitutional courts will have a say in this, just as they have already influenced the interpretation and application of the European Convention on Human Rights in their jurisprudence. Moreover, the constitutional traditions common to the Member States of the European Union that are determined by national courts will under Art. 6 sec. 3 TEU continue to be part of Union law as general principles. On the other hand, the Charter of Fundamental Rights contains so many and such expansive fundamental rights that these constitutional traditions are likely to decline in significance.¹⁰⁷ Nevertheless, their influence with regard to the interpretation and application of fundamental European rights and especially for the Charter should not be underestimated.

3. Do differences between the jurisprudence of the European Court of Human Rights, on the one hand, and the Court of Justice of the European Union, on the other hand, have an impact on the jurisprudence of the constitutional court?

As has been pointed out above, the jurisprudence of the European Court of Human Rights has a function of orientation and guidance for the interpretation of the Convention and for its application in the domestic jurisdiction. It may on occasion have to be “integrated” and reconceived to fit the overall structure of the national legal system.¹⁰⁸ The national context may even require the use of other – national – constitutional institutions or rights than the Convention. Not everything with the same wording carries an identical meaning. But the Convention is an expression of a common European standard, a common foundation of human rights for the whole of Europe. The possibility of asserting the primacy of the Constitution and disregarding the Convention in extreme cases has so far remained theoretical. Ultimately, according to the Convention, the parties are obliged to respect the Convention and the decisions of the European Court of Human Rights (see Art. 46 ECHR).¹⁰⁹

The above is also true of the Court of Justice of the European Union that serves as the guardian of the Union treaties (Art. 19 sec. 1 second sentence TEU). However it adjudicates only within the area of application of Union law, and in the area of

¹⁰⁷ T. Kingreen, in: C. Calliess/M. Ruffert (eds.), EUV/AEUV (4th ed., Munich: Beck 2011), Art. 6 n. 17 and 18. questions entirely the justification for regarding constitutional tradition as a source of law alongside the Charta; R. Streinz, in: same (eds.), EUV/AEUV (2nd ed., Munich: Beck 2012), Art. 6 n. 35 is more positive.

¹⁰⁸ See BVerfGE 111, 307 <327>; 128, 326 <370 and 371> - Preventive detention II.

¹⁰⁹ See in this regard BVerfGE 128, 326 <370 and 371> - Preventive detention II.

fundamental rights when implementing the law of the Union (Art. 51 sec. 1 CFREU). To the contrary, the Federal Constitutional Court generally does not exercise its jurisdiction to protect fundamental rights in Germany¹¹⁰ within the area of mandatory Union law.¹¹¹ From a formal point of view, the ECJ's decisions are not binding in national law in so far as the Court does not implement mandatory European law.

Of course, this is to understate the informal influence exercised by European law. In the event of a divergence from the European Court of Human Rights, the following applies: When domestic courts implement Union law, Union law, including European fundamental rights, prevails. In all other respects, the jurisprudence of the European Court of Human Rights has a function of orientation and guidance for the jurisprudence of the Federal Constitutional Court in the application of European human rights within the domestic constitutional sphere.

¹¹⁰ Cf. BVerfGE 89, 155 (156, 175) – Treaty of Maastricht.

¹¹¹ BVerfGE 118, 79 <95 et seq.> - Emission trading; confirmed in BVerfG, Judgment of 24 April 2013 – 1 BvR 1215/07 – Counter-terrorism database, juris, n. 88.