JURISTRAS

State of the Art Report

Strasbourg Court Jurisprudence and Human Rights in Germany: An Overview of Litigation, Implementation and Domestic Reform

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A. Introduction

In Germany, human rights protection comprises a differentiated political and judicial system. However, the main focus of the protection lies on the national courts.

Notably, the Federal Constitutional Court plays an integral role in protecting, promoting, and developing human rights or human rights aspects. Public opinion and politicians highly acknowledge and respect judgments made by the Federal Constitutional Court, even if the findings are received controversially. Over the last decades, the Federal Constitutional Court has grown into the role of a safeguard for human rights and fundamental rights contained in the German Basic Law or Federal Constitution. This strong position and the highly developed case-law might explain the relatively low number of judgments against Germany by the European Court of Human Rights (ECtHR) in Strasbourg. The case-law in the ambit of the rights in Article 3 and Article 6 ECHR pertaining to minorities within the Juristras project as well as civil and political rights enshrined in Article 8, Article 9, Article 10, Article 11, and in conjunction with Article 14 ECHR comprises 20 decisions by the European Commission of Human Rights and the European Court of Human Rights and 15 judgements by the European Court of Human Rights.

Nonetheless, the role of the ECtHR should not be underestimated despite the relatively low number of judgements against Germany. Firstly, the overall protection of human rights cannot be guaranteed only by one judicial body. The ECtHR rectifies developments that were not regarded problematic from a human rights point of view on a national level. Secondly, the ECtHR's judgments provide an important and valuable legal knowledge and orientation for similar cases and therefore fulfil its objective to guarantee the interpretation of national provisions and even of the Basic Law in accordance with human rights. Finally, the European Convention on Human Rights and the Strasbourg judgments influence the political lawmaking process and, subsequently, protect human rights in a preventive manner even before individual applicants lodge a constitutional complaint with the Federal Constitutional Court or lodge an application with the ECtHR.

With regard to the different political and judicial systems protecting human rights, the assessment of the civil and political rights protection should be extended to the political means. In fact, an informal system of non-governmental organisations, of political foundations, and of national and academic human rights institutions additionally guarantee human rights protection. Therefore, the following report comprises an overview of the lawmaking system in Germany, parts of the civil-society sector as well as other relevant institutions. Due to the scope of the project, the list will not be exhaustive; however, this sector should be mentioned taking its importance into account. These actors lobby mainly human rights aspects during the draft process of a sensitive legislation and, like the press, function as watch dog concerning the implementation of human rights sensitive legislation, the political development in such areas, and the implementation of the judgments of the ECtHR.

The following report will show a large number of judicial, political and administrative institutions protecting the rule of law and the fundamental rights enshrined in the German Basic Law and the ECHR. This well functioning system and the obvious merits of the Federal Constitution Court shall not obstruct the view on existing human rights problems and on examples of flaws in the course of the draft process of federal legislation: The situation of elderly people in foster homes concerns in some cases the integrity of the body.[1] The immigration and asylum law raises questions regarding

[1] See V. Aichele and J. Schneier, Soziale Menschenrechte älterer Personen in Pflege, Berlin 2006.

the non-refoulement principle and the right to respect for family life.[2] Finally, some concerns exist about the situation of sans-papiers regarding the education of their children and the access to health care. In addition, some further examples will be outlined in this report where appropriate. It has to be underlined that the judicial protection despite its important and supportive role for the protection of human rights does fail in those cases in which the potential litigants cannot lodge a complaint with the Federal Constitution Court or lodge an application with the ECtHR because of his or her legal situation in Germany – as it is the case for the immigrants without legal residence status[3] - or because of their degree of education or their situation as elderly persons.

The report provides in its first part a short summary of the legal system in Germany (B) followed by an overview of the judicial and the political system in respect of human rights protection (C). The aspect of protection through the national Federal Constitutional Court concerning the civil and political rights is described in the fourth passage (D) while the part following (E) contents the summary of the assessed decisions and judgments by the European Commission of Human Rights and the ECtHR. Chapter (F) contains two subjects on present human rights topics. The assessment of the empirical material like the ECtHR's decisions follows a critical review of the legal and political science literature (G).

B. Overview of the legal system

I. Introduction

The national legal system has to be thought of as a system of different kinds of federal and states competence and subjects. Due to the fact that the German legal system is directly influenced by EC-regulations and EU-framework decisions, by international binding conventions (like the UN Convention against Torture), or the European Convention on Human Rights, its ground structure has been altered during the last decades. The process of European integration has amended the whole system. The main architecture, as described under (1), comprises the same elements, but it does not mirror the real impact of EU-legislation and other international instruments, as described under (2).

1. The main architecture of the legal system

The German legal system consists of legal norms in its centre and the jurisdiction of the courts, implementing the legal norms, interpreting them due to the facts of a case and, where necessary, developing new rules. Very briefly, it is commonly described as a hierarchical system (or a pyramid), in which the Basic Law stands at the very top of the system. The federal parliamentarian legislation, which will be explained briefly later on, determines the second level. Besides the federal lawmaker, the state lawmaker within the 16 states in Germany are entitled to generate state legislation in accordance with the competence provisions laid down in the Basic Law. This can be regarded as third level. The executive norms like directives or administrative regulations, adopted by the (federal and state) administration, create the fourth level. They serve either as directly binding rule or as guidelines for the interpretation of parliamentarian law. Very simplified, every norm has to be in accordance with its corresponding norm on a higher level. As a result, all legislation has to comply with the Basic Law and the case-law originated from the Federal Constitutional Court. Any incompliance will be considered an infringement of the Basic Law and therefore be quashed by the Court.

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[2] German Institute for Human Rights (ed.), Stellungnahme zum Gesetz zur Umsetzung der EU-Asylrichtlinien, Berlin 2006, http://www.institut-fuer-menschenrechte.de/webcom/show_article.php/_c-419/_nr-101/i.html (visited 16 November 2006).

[3] This situation applies especially for pregnant women and the necessary health care.

2. European and international integration

The aforementioned system has been altered during the last decades. First of all, the European integration in the wake of the EC-Treaties and the EU-Treaty has been (and still is) changing the content of the system and the system itself. The legislative bodies of the EU determine the law within the discretion of the EC-Treaties and the EU-Treaty in areas like the free movement of persons, services and capital, the immigration and asylum law, as well as the police and judicial cooperation in criminal matters. Usually, the national lawmakers implement the EU-legislation into the national system, as was the case with the EC-asylum regulations for the German asylum and immigration law. Furthermore, some national legislation refers directly to an EC-directive as part of the law. The national lawmaker triggered this development in relinquishing legislative competence onto the EU, which can be found in the respective provisions in the Treaties. The system has been changed more visible in establishing a European Court of Justice; its ruling directly binds for example the national courts. Besides this apparent change, some international conventions have altered the system in some other aspects. The UN Convention against Torture (UN-CAT) and its optional protocol ushered in a national monitoring body; however, the national monitoring body shall consist only of four members working as volunteers and one Federal Commissioner for Germany, arguably hardly a functioning system for all possible tasks. Moreover, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights has been transformed into binding national law.

II. The European Convention on Human Rights

1. The ECHR as international law binding Germany

Germany ratified the ECHR on 7 August 1952.[4] Then the Convention became a legally binding international treaty. It created an obligation for Germany as member of the contracting states to guarantee the human rights enshrined in the Convention. This, however, does not prescribe the way of the implementation into the national legal system.

Among the first countries, Germany accepted in 1955 the right of individual petition on the basis of the ECHR. According to the HUDOC database, the first decision from the European Commission of Human Rights dates from 14 December 1961.[5] The first judgment from the ECtHR against Germany was in 1968.[6]

2. The legal status within the German national legal system[7]

The position of the European Convention on Human Rights (ECHR) within this hierarchical system is relatively easy to explain. The ECHR is regarded as national law on a federal level.[8] The repercussions for the ECHR and the national law, however, can be (theoretically) problematic. Considered as federal national law, the ECHR has priority over any state law. On the other hand, the ECHR could be theoretically derogated by any other federal legislation in virtue of the lex posterior principle, if the legislation should be passed after the coming into force of the ECHR.[9] This derogation would not have the same effect of a derogation made under Article 15 ECHR, because the compulsory requirements do not apply. In such a case - which so far has not occurred -

[4] BGBl. II 1952, 686.

[5] Commission, Decision of 14 December 1961, X. vs. Germany, no. 599/59.

[6] ECtHR, Judgment of 27 June 1968, Wemhoff vs. Germany, no. 2122/64.

[7] For further information see, „The legal status of judgments made by the ECtHR within the national legal and political system“ under section C.

[8] Federal Constitutional Court, Desicion of 26 March 1987, no. 2 BvR 589/79, volume 74, p. 370; J. A. Frowein, Einführung, no. 6 in: J. A. Frowein and W. Peukert, Europäische Menschenrechtskonvention. EMRK-Kommentar, 2nd edition, Kehl et al. 1996; E. Pache, Die Europäische Menschenrechtskonvention und die deutsche Rechtsordnung, in: Europarecht 2004, p. 402; R. Uerpmann, Die Europäische Menschenrechtskonvention und die deutsche Rechtsprechung. Ein Beitrag zum Thema Völkerrecht und Landesrecht, Berlin 1993, pp. 72ff.

[9] Uerpmann, pp. 75-77.

the provision in question had to be taken into account by national courts, whilst infringing the ECHR at the same time.

Regarding the Basic Law, the status of the ECHR as national federal law leads to the constellation of a different rank, which results in a prior application of the Basic Law in contentious cases - although it is a binding Convention under international law for Germany.

These findings provoke some critical questions. What meaning could have the ECHR, if national federal law can curtail it? How should the role of the Federal Constitutional Court be understood in relation with the ECHR?

Concerning these questions, the Federal Constitutional Court emphasizes in a recent decision that the provisions of the ECHR bind all responsible bodies of state sovereignty directly.[10] Therefore, the ECHR, in the light of the judgments by the ECtHR, do bind the lawmaker, the courts, and the administration within Germany. The provisions of the ECHR have to be taken into account by the respective courts; moreover, litigants can claim them in any case where applicable.

Concerning the Basic Law, the Federal Constitutional Court holds the view that, where appropriate, the Basic Law (Federal Constitution) has to be interpreted in the light of the ECHR and the findings by the ECtHR.[11] This effect has to be seen in conjunction with the accountability of the ECHR within the complaint system before the Federal Constitutional Court. Even if the ECHR does not have the rank as constitutional law, the Federal Constitutional Court decided that anybody claiming a violation of the ECHR can lodge a constitutional complaint with the Court on the ground of the corresponding Article in the Basic Law in conjunction with the rule of law laid down in Article 20 Basic Law.[12] In addition, the Basic Law encompasses the principle of conformity with international law. Therefore, whenever a specific law can be interpreted in conformity with the ECHR it has to be done in this manner. The Constitutional Court urges to do so explicitly.[13] However, if there is no margin of appreciation the national court has to obey the national law – fully conscious of the violation of the ECHR.

The theoretically remaining questions are solved on a merely practical and political level. State and federal lawmakers usually respect the fundamental rights, which are contained in the Convention and which have evolved during the last decades in the judgments of the European Court of Human Rights. As it will be discussed further on, the provisions of the Basic Law guarantee in general the same degree of protection like the ECHR. As result, the lawmaker takes the ECHR into account when approving a new legislation, which, at the same time, has to be in conformity with the Basic Law. On the other hand, cases have occurred where the ECtHR and the Federal Constitutional Court found a violation of fundamental rights, as happened in the cases on public child benefit.[14] This is an example of the parallel structures of the fundamental rights protection.

C. Brief overview of the judicial and political system in respect of human rights protection

As for those readers who are familiar with the German political system, this chapter might not contain much relevant information. We would like to add, that this part does not in any form claim a thoroughly overview about the political system of Germany. This would simply exceed the

[10] Federal Constitutional Court, Decision of 14 October 2004, no. 2 BvR 1481/04, marginal no. 46.
[11] Federal Constitutional Court, no. 2 BvR 1481/04, marginal no. 32.
[12] Federal Constitutional Court, no. 2 BvR 1481/04, marginal no. 63; H.-J. Papier, Execution and Effects of the Judgments of the European Court of Human Rights from the Perspective of German National Courts, Human Rights Law Journal (2006), p. 2.
[13] Federal Constitutional Court, no. 2 BvR 1481/04, marginal no. 62.
[14] Due to former German legislation, parents without a permanent residence status were not granted puplic child benefit.

question of the project. Nonetheless, we regard it being useful to outline the basic structure of the system, because it creates the background for the findings of this project and the discussion about the function of human rights in the judicial review and the political arena.

I. Competence in national lawmaking and administration. Federal and state powers[15]

The political system in Germany is divided into the federal level consisting of one federal parliament, the Bundestag, and the various federal ministries as well as the state level (or so called "Länder") with state parliaments in the 16 states in Germany (some of them are cities like Hamburg or Berlin) and various state ministries very similar in its working processes to the federal ministries (like Ministry for Justice or Ministry of the Interior). Due to the Basic Law, the lawmakers of each level, so to speak, are entitled to decide on different subjects.

Looking at the different civil and political rights in question, the decision bodies on the federal level or the state level are entitled to amend the existing law or to pass a new legislation. Very briefly, it lies within the competence of the federal parliament to amend the legislation with regard to the freedom of assembly, the regulative legislation on political parties as well as the legislation concerning the right to respect for private life (for instance the question of secret surveillance). On the other hand, the state lawmaker is entitled to pass regulations on preventive measures for the police forces. Moreover, most of the legislation passed by the federal lawmaker has to be implemented by the state administration. Consequently, the states have a crucial role in respecting human rights in daily administrative work.

II. Specific mechanisms in ministries and parliamentary bodies

1. Governmental bodies

The Commissioner for Human Rights of the Federal Ministry of Justice acts as a representative for the German government before the ECtHR.[16] In the same time, the Commissioner's office is responsible for the dissemination of relevant cases from the ECtHR. The Ministry also provides the responsible state administrations (like the state Ministries of the Interior) with the translated judgments versus Germany; in some cases with a legal interpretation of its binding character.

This system is extended through the participation of the Federal Ministry of Justice in any draft legislation. In this role, the responsible department in the Federal Ministry of Justice analyses the drafts on their conformity under constitutional and human rights aspects.[17] The same applies for the Ministry for the Interior.

Pursuant to the new anti-discrimination legislation in Germany, the Federal government is currently establishing a new Federal anti-discrimination post. This post shall be engaged in counselling individuals, in disseminating information, and in supporting the Federal Parliament with recommendations.

2. Parliamentarian committees

The Committee of Interior Affairs and the Committee of Legal Affairs, being part of the committee system in the German Parliament, enforce the rule of law and the importance of respecting the Basic Law in scrutinizing the drafts. As in many parliamentarian systems, their assessment of drafts play a decisive role in the legal proceedings. Unfortunately, human rights, enshrined in the ECHR or in other conventions, are not always taken into account by the committees in a way they should

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[15] The local level, the administration of cities and villages, with their own administrative way of decision-finding processes will be omitted.

[16] Auswärtiges Amt (ed.), Siebter Bericht der Bundesregierung über ihre Menschenrechtspolitik in den auswärtigen Beziehungen und in anderen Politikbereichen, Berlin 2006, p. 30.

[17] The constitutional departments have the obligation to assess the drafts on its constitutionality.

be. In general, the role of the opposition seems to be to uphold human rights concerns. In addition, some laws pass the committees without noteworthy amendments, still violating fundamental rights. The best example is the recently quashed provision in a federal security law that allowed the military to shoot down civilian aircrafts in a case of an abduction by terrorists.[18]

The Committee of Human Rights and Humanitarian Aid, however, does not have this pivotal position within the committee structure as the aforementioned committees. As a result, it cannot fully guarantee the implementation of human rights within the draft legislation in any case.

This passage summarizes the system on the federal level. On the state level, very similar systems are foreseen for the legislative process.

As a result, a highly legally structured system shall and generally does guarantee the necessary protection of fundamental rights or human rights during the legislative drafting.

Despite the obligation of the parliamentarian committees and the State Chamber in upholding the rule of law and the human rights, the Federal Constitutional Court frequently concludes that a legal norm violates the Basic Law or the ECHR. This shows the importance of the judicial system and the litigants or the groups involved in constitutional complaints. Nonetheless, the above-described system guarantees in a first approach the constitutionality or the conformity with human rights of new legal norms.

III. Non-governmental bodies

1. Non-governmental organisations

Non-governmental organisations as Amnesty International, Pro Asyl or Humanistische Union have to be mentioned as important human rights protectors. Even if they are not a part of the political system formally, their importance in promoting human rights protection and in guaranteeing the implementation of human rights in general and of the judgments of the ECtHR in special should be underlined. Most of the organisations work already during the draft process of human rights relevant legislation. In this period, they usually point out possible violations of the ECHR and other national or international obligations. The mentioned organisations complement the ascertainment of the draft legislation through promoting the dissemination of the judgments by the ECtHR and the usage of them as political leverage where appropriate.

2. The German Institute for Human Rights

The German Institute for Human Rights was established in 2001 on the basis of an unanimous resolution of the Federal Parliament. However, in accordance with the Paris Principles for national human rights institutions it enjoys full independence. The main task of the institute consists in promoting human rights on a national level through political counselling, dissemination of information, and conferences. It is also actively involved in promoting human rights issues during the draft process of a new legislation.

IV. The national judicial structure of Germany

1. The national court system

The German court system is subdivided in five different branches. The ordinary courts, competent for civil and crime proceedings, the administrative court, the labour court, the social court, and the tax court.

[18] Legislation: Luftsicherheitsgesetz of 1 January 2005 (BGBl. I S. 78); Federal Constitutional Court, Judgement of 15 February 2006, no. 1 BvR 357/05.

Besides the obligation to rule in accordance with the respective law, every court has to take the Basic Law and the findings by the Federal Constitutional Court into account. The Basic Law directly binds the courts in their judgments, which guarantees a fundamental rights protection to a certain amount.

In general, each branch provides a legal remedy with different requirements according to the respective rules of procedure. The courts are organized in the different states by the state Ministries of Justice. To guarantee a coherent jurisdiction, each branch foresees due to its rule of procedure a remedy to one federal court, like the Federal Court of Justice for civil law litigations.

2. The role of the Federal Constitutional Court

Concerning the civil and political rights at issue, the role of the Federal Constitutional Court could be best described as supervisory body for fundamental rights in the Basic Law. It does not act as another remedy of single judgments; it safeguards fundamental rights. Therefore, it reviews if the impugned court decisions or judgments are in accordance with the Basic Law. It should be underlined that in the course of an individual constitutional complaint the Court not only scrutinizes the question, if the respective court or the administration decided in conformity with the Basic Law; moreover, it judges the constitutionality of the applicable state or federal law. The Court is entitled to quash a decision or judgment delivered by a court. The same applies for a legal act or a single provision in the legislation. Within the national legal system, there is no other means to challenge the findings from the Federal Constitutional Court.

Many issues relevant for human rights like freedom of assembly, freedom of religion, or respect for private life have been brought before the Federal Constitutional Court. As a result, the Court's findings protected human rights through its interpretation of the Basic Law. In some instances, it has created new categories to be protected. Notably, the right for private life in the field of data protection has been developed and specified in its requirements.

Due to the competence of the Federal Constitutional Court, litigants *cannot* lodge a constitutional complaint only alleging a violation of the ECHR.[19] The Federal Constitutional Court reiterates regularly that it is not entitled to decide complaints *only* on the basis of the ECHR.[20] However, the Federal Constitutional Court holds the view that it scrutinizes, if a legal act, a judgment, or another administrative activity complies with the corresponding Article in the Basic Law in conjunction with the rule of law.[21] Moreover, because of the broad ambit of Article 2 Basic Law[22] protecting all activities of individuals in general, the Federal Constitutional Court can judge on the basis of Article 2 Basic Law covering activities by individuals protected also by the ECHR. As a result, the Court can *de facto* judge with regard to the ECHR on the legal basis of the Basic Law.

V. Execution of judgements made by the ECtHR and their legal status within the national legal and political system

1. Introduction

As laid down in the Convention in Article 46 ECHR, judgments by the ECtHR are binding for the respective state. However, this does not determine the legal status within the national legal system. The ECtHR itself stresses that, "The Contracting States that are parties to a case are in principle free

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[19] Federal Constitutional Court, no. 2 BvR 1481/04, marginal no. 32; no. 2 BvR 1570/03, marginal no. 11
[20] Ibid.
[21] Federal Constitutional Court, no. 2 BvR 1481/04, marginal nos. 61-63.
[22] Article 2 para. 1 Basic Law: "Everybody shall have the right of free development of his personality insofar he does not infringe the right of others or offend against the constitutional order or the moral law."

to choose the means whereby they will comply with a judgment in which the Court has found a breach."[23]

In Germany, judgments delivered by the ECtHR directly bind the courts or the administration in accordance with the rule of law, either on federal level or on state level. The same applies for the national lawmaker, should the judgment suggest an amendment in the national legislation, because the law itself violates the ECHR.[24] The Federal Constitution Court underlines this general understanding of compliance with the ECtHR's judgments in a landmark decision as follows: "All bodies of German public power are generally bound within the state by the judgments of the Court in accordance with the respective provisions of the Convention in conjunction with the approval legislation (Zustimmungsgesetz) as well as the requirements of the rule of law (…)."[25] The Federal Constitutional Court clearly emphasizes the importance of the judgments by the ECtHR and their binding character in its decision in an outstanding manner.[26] On the other hand, it curtails the effect of judgments by the ECtHR in the same decision in saying, "in accordance (…) with the rule of law." Regarding this, it concludes in another passage of the decision that the Basic Law does not foresee the complete and uncontrollable transference of national sovereignty to an international body.[27] The ECHR additionally has the same rank as federal law and therefore has to respect, on a mere national level, the provisions of the Basic Law. This leads to an understanding of the ECHR and the judgments as generally binding, with the (seldom) exception that the blind "execution" of a judgment might violate the Basic Law and consequently should not be complied with.[28] Nonetheless, the Federal Constitutional Court enforces the importance of the ECHR and the judgments of the ECtHR in this decision.

The binding character of all administrative bodies was questioned after the judgment Jalloh vs. Germany. The ECtHR found that the practise of the compulsory administration of emetics in the state of Nordrhrein-Westfalen violates Article 3 ECHR.[29] Despite this clear judgment the Department of Interior in Hamburg, which is another state (Bundesland), declared that it would continue to administer emetics.[30]

Pursuant to Article 46 ECHR judgments against other states do not have a judicially direct binding effect *erga omnes*, and the reasoning of the judgment (against other states and against Germany) have no judicially binding character either.[31] On the other hand, it is commonly accepted that the judgments of the ECtHR have a normative and orientating function that goes beyond the mere single case.[32] In this regard, it is referred to Article 1 ECHR, which obliges the Contracting States within their discretion to guarantee the human rights enshrined in the ECHR in the light of the judgments.[33] The Federal Constitutional Court underlines the general importance of judgments decided not against Germany. In its view, judgments against other states create an obligation to ascertain the own legislation in respect of its conformity with the ECHR.[34]

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[23] ECtHR, Judgment of 23. January 2001, Brumarescu vs. Romania, no. 28342/95, para. 20.
[24] See H.-J. Papier, p. 1.
[25] Federal Constitutional Court, no. 2 BvR 1481/04, marginal no. 45.
[26] See Meyer-Ladewig, Konvention zum Schutz der Menschenrechte und Grundfreiheiten, Handkommentar, 2nd edition, Baden-Baden 2006, Article 46, marginal no. 10.
[27] Federal Constitutional Court, no. 2 BvR 1481/04, marginal nos. 34-36.
[28] Federal Constitutional Court, no. 2 BvR 1481/04, marginal no. 47.
[29] See ECtHR, judgment of 11 July 2006, Jalloh vs. Germany, no. 54810/00.
[30] Meanwhile, all police offices abolished the administration of emetics.
[31] C. Gusy, Die Rezeption der EMRK in Deutschland, in: Grewe and Gusy (eds.), Menschenrechte in der Bewährung, Baden-Baden 2002, p. 154.
[32] Federal Constitutional Court, no. 2 BvR 1481/04, marginal no. 38; J. Meyer-Ladewig, Article 46, marginal no. 15; H.-J. Papier, p. 1.
[33] J. Meyer-Ladewig, ibid.
[34] See Federal Constitutional Court, no. 2 BvR 1481/04, marginal no. 39.

Regarding the dissemination of translated judgments against Germany and other important judgments it can be said that the system could be improved in some parts. Even if the Federal Ministry of Justice disseminates the judgments against Germany and, moreover, academic periodicals publish and translate important judgments, it has to be underlined that no translated and systematically structured publication of the judgments exists, which facilitates the understanding of the ECtHR and the practical work with the ECHR.

2. ECtHR and the legal findings of national courts

The Constitutional Court stresses that the judgments by the ECtHR have to be taken into account in upcoming similar cases of any court in any branch. But at the same time, the Federal Constitutional Court describes the limitation of this rule. Should a court decide in accordance with a national provision and should this provision precisely determine the result without any margin of appreciation for the court, it has to obey to this rule knowing it might breach the Convention or the ruling of the ECtHR.

The Federal Constitutional Court holds the view that national courts can also deviate from the ECtHR's judgments in cases of bipolar fundamental rights position in question and, in addition, if they proove in their reasoning a sufficient and thorough consideration of the ECtHR's argumentation. The Federal Constitutional Court made this statement in view of cases where the freedom of press was curtailed for the respect for private.

Should judgments directly address violating national court decisions, the courts have to reopen the process where possible (as foreseen in the penal procedure in § 359 Nr. 6 Penal Procedure Code[35]) or decide on the basis of newly submitted facts, if this allows a reopening. In any other case, the judgement is final and the applicant has to be reimbursed by the granted just satisfaction. The civil procedure and the administrative procedure do not foresee special reopening provisions, if a judgment by the ECtHR concludes that a court decision violates the ECHR.

It should be mentioned that in case of a father who wanted to have contact with his child born out of wedlock the Nauemburg Court of Appeal repeatedly and deliberately ignored the judgment of the ECtHR.[36] This rare case has already ushered in four decisions by the Federal Constitutional Court guaranteeing the father the access and quashing the decisions by the Court of Appeal.[37]

3 ECtHR and the administration

In general, the administration is obliged to take the ECHR and the judgments by the ECtHR concerning similar cases into consideration. Hence, the ECHR and the ECtHR influence the decision process of the administration. If a judgment clearly states an administrative action as a breach of the convention, the impugned practice has to be reviewed and stopped in general.

Should the ECtHR decide upon an infringing administrative act, the administration has to revoke the order in accordance with the administration procedure, which is in general possible due to the applicable provisions.

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[35] § 359 Nr. 6 Penal Procedure Code: "The reopening (…) is admissible, if the European Court of Human Rights discern a violation of the ECHR and if the judgment grounds on this violation."

[36] See Federal Constitutional Court, no. 2 BvR 1481/04, marginal nos. 25-27; Nauemburg Court of Appeal, Decision of 30 June 2004, no. 14 W 64/04; ECtHR, Judgment of 26 May 2004, Görgüglü vs. Germany, no. 74969/01.

[37] Federal Constitutional Court, Decisions of 14 October 2004, no. 2 BvR 1481/04; of 28 December 2004, no. 1 BvR 2790/04; of 5 April 2005, no. 1 BvR 1664/04 and of 10 June 2005, no. 1 BvR 2790/04.

4. ECtHR and the legislation

The lawmaker has to take the judgments of the ECtHR in the draft process into consideration.[38] Should the draft suggest an infringement of the ECHR or the judgments by the ECtHR, the draft has to be amended. However, the Basic Law determines the final measurement. Hitherto, no case has been reported in which the lawmaker deliberately violated the ECHR even if the complex judicially situation regarding the binding character of judgments by the ECtHR can prolong a necessary amendment as seen in the process of implementing the reopening provision in the penal procedure (§ 359 Nr. 6 Penal Procedure Code), which lasted for over 10 years after the problem had occurred.[39]

If the ECtHR should judge explicitly that applicable federal or state law do not comply with the ECHR, the lawmaker would have to amend the law under consideration of the ECtHR's findings.[40] It has to be mentioned that in some cases the underlying law promotes court decisions infringing the ECHR. Should the ECtHR decide that a national court decision violates the ECHR, although the application of the law foresees this decision, the ECtHR's judgment only binds in its findings concerning the national court decision and not in its reasoning that the underlying law provoke such a case-law.

In general, it can be observed that the ECHR and the judgments of the ECtHR play only a minor part in national legislation with the exception of the immigration law that directly refers to the ECHR as applicable law.[41] It can be assumed that this stems from the significant position of the Basic Law and the few judgments against Germany from the ECtHR. As a result, only a small number of law amendments can be seen in conjunction with the judgments of the ECtHR, namely the aforementioned provision in the Penal Procedure Code for a reopening and the changes in the legislation for the costs of interpreters in criminal procedures. The laws on public child benefit, which were declared incompatible with the ECHR, had been quashed by the Federal Constitutional Court as well and were subsequently amended.

5. ECtHR and the Federal Constitutional Court

On a constitutional level, the judgments of the ECtHR serve as guidelines for the interpretation of the Basic Law, where appropriate. As mentioned earlier, an alleged breach of the ECHR does not entitle for a constitutional complaint before the Federal Constitutional Court. However, the litigant can allege the breach of the correlating provision in the Basic Law as well the violation of equal treatment, if the impugned decision should be arbitrary.

D. Human rights protection guaranteed by the Federal Constitutional Court

I. Introduction

The Basic Law entitles the Federal Constitutional Court to judge, if a court decision, a legal act, or an administrative act complies with the fundamental rights pertaining to the civil and political rights as enshrined in the Basic Law (of course, the competence of the Court and the fundamental rights cover a broader area, but this is not subject of the project under study). Therefore, the fundamental rights in the German Constitution or in the Basic Law and their respective ambit are comparable with the provisions laid down in the ECHR. Very general, the Basic Law contents several provisions that protect similarly the assessed civil and political rights in the ECHR. A more detailed

[38] Federal Constitutional Court, no. 2 BvR 1481/04, marginal no.48.
[39]See O. Kieschke, Die Praxis des Europäischen Gerichtshofs für Menschenrechte und ihre Auswirkungen auf das deutsche Strafverfahrensrecht, Berlin 2003.
[40] Federal Constitutional Court, no. 2 BvR 1481/04 marginal no. 51.
[41] § 60 para. 5 Aufenthaltsgesetz (Residence Law): "A foreigner shall not be expelled, insofar as the application of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms unfolds, that the expulsion is illegal."

analysis of the respective provision and especially the different judgments would disclose some differences or contradictions. It would, however, exceed the objective of this chapter to assess and describe all provisions in question thoroughly; therefore, the similarities and the differences of both legal systems will be briefly outlined and in some legally important cases deepened. This counts especially for cases decided by the Federal Constitutional Court in respect to a similar case-law of the ECtHR.

II. Civil and political rights in the Basic Law

1. Right to respect for private and family life

Article 8 ECHR protects within its ambit very different aspects of private and family life. Because the ECtHR has not yet defined the legal term "private life", the case-law of Article 8 ECHR has to be the ground for the comparison. The Basic Law contains corresponding provisions or, where missing, the Federal Constitutional Court established them. Very briefly, correspondent provisions are as follows:

Right to respect for private life

This right contents two different aspects. Firstly, a more active aspect can be observed which guarantees the individual a protected sphere of autonomy. Secondly, a more passive aspect protects the individual in his or her right of personal privacy. This includes data protection as well as photographs. The Basic Law secures both aspects in a similar manner.[42] It has to be mentioned that the Federal Constitutional Court decided in 1983 in favour of a constitutional complaint lodged by individuals questioning the constitutionality of the public census in 1983.[43] On this occasion, the Court derived from the Basic Law the constitutional right of "informational self determination", which means that state actors are only entitled to collect, process, and analyse private data electronically with regard to certain requirements as formulated by the Court. It also accepts a protection of private life regarding photographs in a way that the publishing of photographs might be regulated or even prohibited due to the circumstances.

Right to respect for home

The Basic Law foresees a similar provision in Article 13.[44] In addition, the Federal Constitutional Court holds the opinion that business premises fall within the ambit of Article 13 Basic Law.[45]

Right to respect for family life

The national Basic Law protects family life and marriage in Article 6 Basic Law, as well.[46] Concerning the term family, the Federal Constitutional Court does not distinguish between a married couple and a non-married couple.

2. Freedom of thought, conscience and religion

The freedom of thought, conscience and religion finds its complementary protection in Article 4 Basic Law.[47] Like the ECtHR, the Federal Constitutional Court guarantees protection for individuals and for organisations. Although differences can be observed for the latter: While the ECtHR considers the organisation Scientology as being religious, the Federal Constitutional Court

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[42] Protected in Article 2 para. 1 in conjunction with Article 1 para. 1 Basic Law; Article 1 para. 1 Basic Law: "Human dignity shall be inviolable." Article 2 para. 1 Basic Law: "Everybody shall have the right of free development of his personality insofar he does not infringe the right of others or offend against the constitutional order or the moral law."; Article 10 Basic Law: "The privacy of correspondence, posts and telecommunications shall be inviolable."

[43] Federal Constitutional Court, Judgment of 15 December 1983, no. 1 BvR 209/83.

[44] Article 13 para. 1 Basic Law: "The home shall be inviolable."

[45] Federal Constitutional Court, Decision of 13 October 1971, no. 1 BvR 280/66.

[46] Article 6 para. 1 Basic Law: "Marriage and family are under a special state protection."

[47] Article 4 para. 1 Basic Law: "The freedom of faith, of conscience, and the freedom of religious or ideological belief shall be inviolable."

does not. On the other hand, the Federal Constitutional Court interprets freedom of religion in regard to a headscarf in a different way. While the ECtHR judged that a prohibition of wearing an Islamic headscarf at a university did not breach Article 9 ECHR,[48] the Federal Constitutional Court formulated much higher requirements for a prohibition in a case of a Muslim schoolteacher in Germany.[49] The latter case ushered in a widespread debate to which extend schoolteachers should be allowed to wear religious symbols (like the Muslim headscarf, the Jewish skullcap or the Christian nun dress) during class.[50]

3. Freedom of expression

On a national level, the Basic Law guarantees freedom of expression in Article 5.[51] It can be said that it is protected in a same way as by the ECtHR. However, the ECtHR upholds different measurements of proportionality concerning the publishing of photographs protected by Article 10 ECHR and the right for respect of private life (see the passage in the next chapter on Article 8 ECHR).

The freedom of press finds its complementary provision in Article 5 Basic Law, as well as freedom of broadcasting (TV and radio). The still existing dual system of public broadcasting and private broadcasting does not violate Article 10 ECHR, because the regulations concerning the private broadcasting fall within the margin of appreciation of the state. The Federal Constitution Court upholds the opinion that even subsidiary functions within the media are covered of the ambit of Article 5 Basic Law, thus protecting the whole infrastructure if the media. It is not clear from the judgments of the ECtHR that Article 10 ECHR covers this as well.

4. Freedom of assembly and association

Article 11 ECHR contains three different aspects: The freedom of assembly, the freedom of association, and the freedom of coalition. The Basic Law protects all of these aspects within the ambit of Article 8 and Article 9[52] while it contains a special provision for political parties in Article 21 Basic Law.[53] In the respect of coalition, the Federal Constitutional Court holds the same opinion on the constitutionality of compulsory membership in public coalitions. Nonetheless, the Basic Law contains certain differences. Article 8 Basic Law only grants German nationals the freedom of assembly, whilst the provision in Article 11 ECHR contains a human right applicable for any person; however, that has to be read in conjunction with Article 16 ECHR entitling the state to curtail the rights for foreigners. The same applies for the freedom of association, which is only granted to German nationals. On the other hand, the requirements to interfere into the right are much more detailed and lead to a higher degree of protection in the Basic Law than in the ECHR.

5. Prohibition of discrimination

With regard to Article 14 ECHR, the German provision foresees a non-accessorial equal treatment. Thus it generally provides a broader protection. However, if Article 14 ECHR is applicable the state has to justify a different treatment based upon the nationality of an individual. A criterion that is not

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[48] ECtHR, Judgment of 10 November 2005, Leyla Sahin vs. Turkey, no. 44774/98.
[49] Federal Constitutional Court, Judgment of 24 September 2003, no. 2 BvR 1436/02.
[50] See for a good overview of the different legal aspects: U. Häußler, Muslim Dress-codes in German State Schools, in: European Journal of Migration and Law 2001, pp. 457-474.
[51] Article 5 para. 1 Basic Law: "Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship."
[52] Article 8 para. 1 Basic Law: "All Germans shall have the right to assemble peacefully and unarmed without prior notification or permission." Article 9 para. 1 Basic Law: "All Germans shall have the right to form corporations and other associations."
[53] Article 21 para. 1 Basic Law: "Parties shall participate in the development of the political will. The establishment of parties shall be guaranteed. (…)."

specifically emphasised in Article 3 Basic Law.[54] Because Germany has not yet ratified the 12th protocol, the differences still remain. In 2006 the Federal Government declared that it still needed to analyse the possible repercussions on its legal system if it ratified the 12th protocol.[55]

E. Review of the decisions and judgments versus Germany

I. Litigants and strategic litigation. Some general remarks

On 1 January 2007, some 3950 cases against Germany were pending in Strasbourg.[56] Germany does not belong to the high case countries like Russia or Turkey. However, the number of cases points to an increasing acceptance to seek recourse not only with a complaint at the Federal Constitutional Court, but also before the ECtHR.[57] This number, however, discloses at the same time the apparent lack of successful litigations taking into account that 2006 only 8 judgments (merits) were delivered by the ECtHR.[58] An analysis of all accessible decisions and judgments in the HUDOC-database pertaining to the scope of this project partly enlightens this discrepancy as well. Concerning Articles 8, 9, 10, 11 and (in conjunction with) 14 ECHR some 200 decisions and judgments were delivered by the Commission or by the Court in the last decades. As mentioned in the introduction of this report, the ECtHR only judged in 15 cases with regard to this project.

One can say that the litigants in Strasbourg seeking protection in cases against Germany cover a wide range of individuals with very different social backgrounds and different interests. Immigrants try to avert their impeding expulsion, they contest the national child benefit legislation, and they try to resume a personal contact to their own children born out of wedlock. Besides this group, one litigant alleged a violation because she was dismissed from the civil service as teacher. In other cases the litigants went to Strasbourg, because they were not granted a position in the civil service. The cases concerning the civil service generally had the political activities of the litigants in the centre of their complaints. In another area, the litigants challenged the legislation on secret communication surveillance as members of a sensitive group like lawyers or journalists, or, as happened in one case, the Princess of Monaco, Caroline von Hannover, alleged a violation of her right to privacy. Some cases reflect several political incidences in Germany as the complaint from members of the Red Army Faction or from members of the peace movement after they were convicted for an unlawful demonstration in front of a US military basis.[59] Interestingly, individuals denying the holocaust or publishing hate speeches notoriously lodge an application after their criminal procedures.[60]

Only the relatively high number of (in general inadmissible) cases of immigrants envisaging an expulsion, especially after an asylum procedure, suggests a structural problem within the legal system of the asylum procedure.[61] It can be argued that this is some kind of strategic litigation deriving from the system. In all other cases, however, hardly any kind of strategic litigation can be observed with the aim to amend the national legislation or administrative praxis. Exceptions were the two complaints against the German laws on security communication surveillance in 1978 and

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[54] Article 3 para. 1 Basic Law: “All persons shall be equal before the law.”
[55] See Bundestagsdrucksache 16/523 of 3 February 2006, Schriftliche Fragen, p. 16.
[56] Council of Europe, European Court of Human Rights, Survey of activities 2006, p. 51.
[57] Germany can be seen as a main country concerning pending cases among UK (some 2200 cases), France (some 4300 cases), and Poland (some 5100 cases). Source: Council of Europe, survey 2006, p. 51.
[58] Council of Europe, survey 2006, p. 41.
[59] See for many: Commission, Decision of 6 march 1989, C.S. vs. Germany, no. 13858/88
[60] See for many: ECtHR, Decision of 13 December 2005, Witzsch vs. Germany, no. 7485/03.
[61] Another reason for expulsion procedures lies in the conviction of immigrants because of drug trafficking. Then, a (regularly inadmissible) application is lodged alleging a violation of the ECHR.

2006.[62] Again, this is a direct result of the strong position of the Federal Constitutional Court, which is, furthermore, entitled to quash a state or federal legislation and which can overrule national judgments.

In contrary to the high number of individuals, only a few applications were lodged by associations.[63] This applies with regard to the freedom of religion for the German section of Scientology[64] and with regard to the freedom of election for a small political organization, which had been denied the status as a political party in accordance with the state law.[65]

II. Litigations in Strasbourg

1. Expulsion of immigrants

The main case-law, within the scope of this project, concerning Art. 3 ECHR arises around the question of an infringement of the ECHR with regard to the expulsion of immigrants, either after an application had been dismissed as political refugee or after the applicant had committed a crime.[66]

Many cases constellate around the question whether the German authorities (the Federal Office for Migration and Asylum, the administrative courts and in the end the responsible administrative body for the expulsion) might have not given Article 3 ECHR the due consideration.[67] Concerning the mentioned cases, the applicants faced an expulsion and alleged a violation of Article 3 ECHR, if the expulsion should be enforced. Those cases conduct the view to an interesting controversial political and legal discussion within Germany: The procedures of the Federal Office for Migration and Asylum, conducting the application procedures, are discussed highly controversial among the experts (like lawyers, church organisations as well as the UNHCR).[68] It is said that the interviews during the procedures are not sufficient, because they focus more on the information allowing to deny the status as refugee. In addition, so the critics, no special safeguards are foreseen for vulnerable individuals like women fleeing sexual violence. Despite the criticism, the Commission and subsequently the ECtHR accepted the findings of the national authorities in its decisions as sufficient and do not question them. The ruling of the Strasbourg organs can be deemed as surprisingly uncritical – and as a result had almost no effect on the asylum procedures in Germany.[69] The development in the Kalantari case[70] shows the only exception. After the application had been declared admissible, the Federal Office for Migration and Asylum (the former Federal Office for Refugees) revoked the former decision and granted a residence status in accordance with the former alien act.[71]

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[62] ECtHR, Judgment of 6 September 1978, Klass and others vs. Germany, no. 5029/71; ECtHR, Decision of 29 June 2006, Weber and Saravia vs. Germany, no. 54934/00.
[63] See Commission, decision of 14 July 1983, A. Union vs. Germany, no. 9792/82; Commission, decision of 27 November 1996, Universelles Leben e.V. vs. Germany, no. 29745/96; ECtHR, Decision of 10 July 2001, Johannische Kirche & Peters vs. Germany, no. 41754/98.
[64] Commission, Decision of 7 April 1997, Scientology Kirche Deutschland e.V. vs. Germany, no. 34614/97.
[65] Commission, Decision of 18 May 1976, Association X., Y. and Z. vs. Germany, no. 6850/74.
[66] The remaining cases, like the important case Jalloh vs. Germany on the compulsory administration of emetics concerning drug dealer, do not fall within the scope of the project, but should nevertheless mentioned.
[67] The former discussion of Article 3 ECHR and the applicability for non state actors has been solved due to the EU-asylum directives. See for the former debate: B. Huber, The Application of Human Rights Standards by German Courts to Asylum-Seekers, Refugees and other Migrants, in: European Journal of Migration and Law 2001, pp. 176-179.
[68] See amnesty international et al. (eds.), Memorandum zur derzeitigen Situation des deutschen Asylverfahrens, Frankfurt a.M. 2005; UNHCR, UNHCR-Eckpunkte zum Flüchtlingsschutz, Berlin 2002, pp. 4-5.
[69] This applies only for the procedure and not for the applicability of Article 3 ECHR in its interpretation of the ECtHR.
[70] ECtHR, Judgment of 11 October 2001, Kalantari vs. Germany, no. 51342/99. The case stands out for another reason as well. A Swiss association for the defence of asylum seekers, called ELISA, represented the applicant.
[71] This decision did not granted the status of a political refugee.

With the focus on immigrants, three cases pertain to an alleged violation of Article 8 because of a forthcoming or even enforced expulsion after the applicants were convicted by a criminal court.[72] In one case the Court decided that the imposed expulsion violated Article 8 ECHR in the light of the existing family bounds of the applicant.[73] The applicant, a Turkish national, living in Germany for 27 years on the day of his expulsion, was convicted for several (minor) criminal offences. The Court argued that the special circumstances of the case "in particular the nature of the applicant's offences, the duration of his lawful stay in Germany, the fact that he had been in possession of a permanent residence permit, and the difficulties which the applicants children could be expected to face if they followed him to Turkey (…)" led to a violation of his right in Article 8 ECHR.[74] In summary, none of the aforementioned cases show some kind of strategic litigation.

Another and much broader part of potential immigrants falls out of the judicial system because the immigrants never come into the position of lodging a complaint. Due to the new EU policy to close the borders[75] tightly and to install a procedure or information system outside of the EU, potential political refugees shall be kept outside the territory of the EU. This leads to the situation in which refugees cannot lodge a complaint and therefore are not covered by the judicial system of human rights protection within Europe. Even if Germany alone does not conduct the EU asylum policy it, nevertheless, bolsters this policy within the EU-Council.

2. Discriminatory behaviour in court proceedings

Like in other countries the main case-law is related to Article 6 ECHR. In Germany, two judgments on the basis of Article 6 ECHR are of interest pertaining the scope of the project (discriminatory behaviour). The cases Luedicke and others vs. Germany and Öztürk vs. Germany.[76] As the applicants were not sufficiently familiar with the German language, the courts decided to assist them in accordance with the national law (Mr. Luedicke was a citizen from the UK; Mr. Öztürk was a citizen from Turkey). After the conviction in the Luedicke case, they were ordered to pay the costs for the interpreter in the criminal procedure. The same took place in the Öztürk case in a regulatory offence procedure. The ECtHR, however, considered this as an infringement of Article 6 ECHR. Subsequently, the German lawmaker amended the relevant legislation in accordance with the Court's findings.[77]

3. Respect for private life

a) Secret communication surveillance

The ECtHR judged already in 1978 in a case, in which the violation of the respect for private life was alleged because of the German legislation on surveillance, namely the legislation for secret communication surveillance by official forces, and the subsequent control procedure. The Court, however, could not discern any reasons not justifying the legislation and therefore held that there was no violation of Article 8 ECHR. The applicants in the case on secret communication surveillance[78] were lawyers, a judge and a public prosecutor. Because the public prosecutor assumed that state authorities secretly observed him, he wanted to challenge the law on communication surveillance.

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[72] ECtHR, Decision of 11 May 2006, Kaya vs. Germany, no. 31753/02, admissible complaint; Judgment of 27 October 2005, Keles vs. Germany, no. 32231/02, violation of Article 8 ECHR; Decision of 7 December 2000, Caglar vs. Germany, no. 62444/00, inadmissible.

[73] Keles vs. Germany, no. 32231/02.

[74] Judgment of 27 October 2005, Keles vs. Germany, no. 32231/02, para. 66.

[75] See the EU-Hague Program and the activities of the EU border agency FRONTEX.

[76] Judgment of 28 November 1978, Luedicke, Belkacem and Koç vs. Germany, no. 6210/73 and Judgment of 21 February 1984, Öztürk vs. Germany, no. 8544/79.

[77] O. Kieschke, Praxis, pp. 156-162; D. Rzepka, Zur Fairness im deutschen Strafverfahren, Frankfurt a.M. 2000, pp. 80-82.

[78] ECtHR, Judgment of 6 September 1978, Klass and others vs. Germany, no. 5029/71.

b) Respect for private life and freedom of press

The recent case pertaining to the respect for private life and the freedom of press found an unpredictable strong resonance in the legal literature.[79] In 2000, Caroline von Hannover challenged the findings of the Federal Constitutional Court and the Federal Court of Justice before the ECtHR in a case pertaining her right for private life.[80] She considered the printing of some photographs depicting her in public on a market place or in a restaurant as a violation of her right for private life. In this respect, the German courts have developed (especially the Federal Constitutional Court) measurements for the proportionality of the individual rights and the rights of the press (freedom of opinion). On the basis of this case-law, the German courts had not found any breach of the right for private life in publishing the above mentioned pictures. The ECtHR put forward the contrary point of view: It decided that the publishing and subsequently the court ruling concerning the publishing were a violation of her rights. Notably the representatives of publishers tried to lobby the German government to appeal before the Grand Chamber of the ECtHR. They published open letters (before and after the judgment by the ECtHR) and asserted that the decision would trigger the end of a free press in Germany.[81] In this case, the opponents of the court ruling strategically organized a public opinion. Taking the procedures of the applicant in Germany and subsequently before the ECtHR into account, a strong interest of hers in redefining the proportionality between the public interest in her life (and as a result in the private life of any commonly known person) and in her wish for private life can be observed. Therefore, her efforts can be regarded as being strategic.

4. Freedom of religion

The Commission and subsequently the Court had only to decide about some cases on freedom of religion – and considered them all manifestly ill-founded and therefore inadmissible. Apart from one case, one can hardly observe any strategic litigation with Strasbourg. The one case mentioned was an application from a family belonging to Scientology.[82] The Bavarian school administration published an information brochure to inform parents and pupils about the practices of Scientology and how to avoid the organisation. It is more or less an assumption that Scientology itself had a strong interest in this case. Indeed, the information brochure described the organization in general and it would be very unusual, if the local group or the part of Scientology working in Germany had not taken any notice of this.

One recent case should be mentioned briefly.[83] The ECtHR decided (inadmissible by virtue of manifestly ill-founded) in an application from parents belonging to a Christian community who alleged a violation of Art. 8, Art. 9 and Art. 2 Protocol no. 1 ECHR. The parents sought to teach their children by their own and oppugned the compulsory attendance at schools in Germany.

5. Civil service and freedom of expression

In the ambit of article 10 ECHR, three cases constellate around one subject. In 1972, the Federal Chancellor and the Prime Ministers of the states (Länder) decided upon a common approach on extremists in civil service.[84] Very briefly, this decree and its implementation in the states (Länder) led in some cases to a suspension of the employment or even a dismissal. In other constellations, applicants for positions in the civil service, like teachers, did not obtain it. Usually, the membership of an extreme left or right party was regarded as a breach of the loyalty necessary for a functioning administrative body in a democracy. After the breakdown of the communist regimes and the fall of the Berlin-Wall, in some states (Länder) the decree was repealed. In the assessed cases before the

[79] See H. Prütting and K. Stern, Das Caroline-Urteil des EGMR und die Rechtsprechung des Bundesverfassungsgerichts, München 2005.
[80] ECtHR, Judgment of 24 June 2004, von Hannover vs. Germany, no. 59320/00.
[81] See M. Hanfeld, Zwischen den Zeilen, in: Frankfurter Allgemeine Zeitung, 1 September 2004, p. 36.
[82] European Commission of Human Rights, Decision of 4 March 1998, Keller vs. Germany, no. 36283/97.
[83] ECtHR, Decision of 11 September 2006, Konrad and others vs. Germany, no. 35504/03.
[84] Decree on employment of extremists in the civil service, Bulletin of the Government of the Federal Republic of Germany no. 15, 3 February 1972, p. 142.

court (only three cases could be found in the HUDOC database), the court decided in one case that there was a violation of Article 10 ECHR.[85] In this case, the responsible school administration, knowing of the membership of the applicant in the far left orientated DKP (German Communist Party), granted her a lifelong position in the civil service as teacher. Nonetheless, the administration suspended her after a couple of years and finally dismissed her completely. The other cases disclose a different structure: The applicants both sought to gain a position in the civil service. Because of their political activities (one for the DKP, the other for the far right NPD, Nationalist Party of Germany), the respective administration rejected their application.[86]

6. Civil service and freedom of assembly

No case occurred *only* claiming a violation of Article 11 ECHR. Moreover, the court concluded only in one case that there was a violation of Article 11 ECHR. The court decided in the case of the aforementioned former schoolteacher, who was member of the DKP (German Communist Party) and who was dismissed by the state school administration, that the decisions by the administration and then by the courts were not justifiable with regard to Article 11 ECHR.[87]

7. Short term residence permits for immigrants and public child benefit

The main case-law of Article 14 ECHR occurs in conjunction with Article 8 ECHR. Concerning the scope of the project the only relevant case-law constellates around the question of the different standards in the field of child benefit.[88] Due to German law in the time of the decision, foreigners without a permanent residence status were not granted a public child benefit. The ECtHR concluded, that there was a violation of Article 8 in conjunction with Article 14 ECHR, because it could not discern any reasons justifying the different treatment. The legal requirements for the benefits have already been changed in favour of the group in question and the Federal Constitutional Court decided that the preceding national regulation violated Art. 3 Basic Law (equal treatment).[89]

F. State of protection concerning other relevant human rights issues

I. Right to life

In Germany, one group should be mentioned with regard to Article 2 ECHR. Pregnant women with no form of a residence permit face a difficult legal situation that may lead to an insufficient healthcare. The German alien law considers any help for illegal immigrants as a crime – and this *could* include the sole humanitarian help from physicians.[90] In addition, in public hospitals physicians are obliged to inform the respective authorities if any case of an immigrant without legal status occurs,[91] what leads to a behaviour to avoid any kind of official contact, including healthcare.[92] Taking the obligation into consideration to protect human life under Article 2 ECHR, it could be argued that the German alien law endorses the system to avoid any medical help, which might lead to a life-threatening situation for the mother as well as for the child. As a result, the State would infringe its obligation out of Article 2 ECHR, if this should lead to the death of the mother or the child due to complications. Because no person without a valid residence permit would question

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[85] ECtHR. Judgment of 26 September 1995, Vogt vs. Germany, no. 17851/91.
[86] ECtHR, Judgement of 28 August 1986, Glasenapp vs. Germany, no. 9228/80; ECtHR, Judgment of 28 August 1986, Kosiek vs. Germany, no. 9704/82.
[87] ECtHR, Vogt vs. Germany.
[88] See for many: ECtHR, Judgment of 25 October 2005, Okpisz vs. Germany, no. 59140/00.
[89] Federal Constitutional Court, Decision of 6 July 2004, 1 BvL 4/97, 1 BvL 5/97 and 1 BvL 6/97.
[90] See § 95 Aufenthaltsgesetz (residance law) in conjunction with § 27 Strafgesetzgebuch (penal code); B. Nitsche, Rechtsprobleme bei der Behandlung Illegaler, Berlin 2002, http://www.aerztekammer-berlin.de/10_Aktuelles/bae/18_BERLINER_AERZTE/Berliner_Aerzte_bis_2005/BAEthemen/09ArtikelFeb02/20illegalRechtsprobl.html, visited 30 Jan 07.
[91] See § 87 para. 2 Aufenthaltsgesetz (residance law).
[92] J. Alt and R. Fodor, Rechtlos? Menschen ohne Papiere, Karlsruhe 2001, p. 99.

this legal status in a litigation, it is very unlikely that a pregnant mother will file a motion with the social court to receive health care. Therefore, the existing legal protection system does not provide any tangible help.[93]

II. Right to free elections

The right of free elections as enshrined in the Protocol to the Convention No 1, Art. 3 can be understood as the core right within in the scope of this project. Therefore, it shall be analysed even if there exists no case-law versus Germany pertaining to it. Regarding the German population, no infringement or even a partly curtailment can be observed. However, taking the foreign population into account it seems to be appropriate to scrutinize the situation. Due to the report of 2005 by the Federal Government Commissioner for Migration, Refugees, and Integration approximately 6.7 million foreigners lived in Germany by the 31 December 2004.[94] Furthermore, the report points out that an estimated group of 60 % from all foreigners in 2003 had been living more than 10 years, a third had been living even more than 15 years in Germany. As the Federal Office for Statistics rectified the number of foreigners for 2004, the total sum of people can only be estimated. However, the conclusion of approximately more than the half of all foreigners in Germany, or 3.5 million persons seems to be justified. Many of them belong to the Turkish community in Germany.[95] These statistics direct the view on the right to free elections and the political participation in Germany. While it is overall accepted that foreigners are not entitled to vote, the duration of the residence poses a difficult human rights question. How long can a democratic society exclude other persons from the freedom of free elections, although they participate in all other aspects of the life in the country?

G. Literature Review

I. General remarks

Besides the case-law and the human rights protection system in Germany, the literature on the implementation of the ECHR and the judgments of the ECtHR or specific questions of the protection play an important role in the perception of the European human rights system.

However, it can be observed that the political science and legal literature mainly focus on the ECtHR and the ECHR. Very little is said about the Council of Europe itself, of the existing treaties, and the Commissioner for Human Rights. The reason for this priority can be found in the assumption in Germany that human rights protection is best guaranteed with a judicial system. More preventive means like Ombudsman institutions or other kind of monitoring bodies are regarded as being less sufficient. This understanding should be questioned, as more and more preventive mechanisms are implemented. This applies for instance on national level for the new anti-discrimination office as monitoring body, the recently launched Fundamental Rights Agency for the EU in Vienna, and for the more political means at the Council of Europe. Therefore, the focus of the German literature on the judicial protection of human rights covers only a part of the protection system.

In addition, it should be mentioned that the notion of a German literature can be misleading and is only partially correct. In Germany, the legal scholars or practitioners from Austria and Switzerland publish in journals or with German publishers. The best example for this are the student books

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[93] See G. Pflaumer, Leben in der Schattenwelt, in: vorgänge Heft 4/2006, pp. 95-101.

[94] Bericht der Beauftragten der Bundesregierung für Migration, Flüchtlinge und Integration über die Lage der Ausländerinnen und Ausländer in Deutschland, Berlin 2005, p. 557.

[95] By 31 December 2004 app. 1.76 millions persons with Turkish nationality lived in Germany.

about the ECHR.[96] Besides this, the strong position of the ECHR in those countries influences the debate in Germany as well. Therefore, this report will cover a broader spectrum of literature.

Besides the following issues regarding the ECHR, some authors[97] choose a broader approach and contextualize the ECHR into the national and especially the international human rights system comprising of the different U.N. conventions, namely the ICCPR,[98] the ICERD,[99] and the CEDAW.[100] The advantage of this literature can be seen in providing a more systematic understanding of the ECHR while on the other hand the specialization of some texts tend to overemphasise smaller problems.

It has to be mentioned that the literature pertaining to the topics under study in this report has reached a very large amount of books, articles, and other means of publication.[101] Therefore, the analysis and the selection of publications reviewed have to be exclusive. The main focus was set on the most recent developments and the themes discussed most controversial as guideline for the review.

II. Review of literature on more general issues concerning the ECtHR and the ECHR

1. ECHR: International law and implementation into the national legal system

International law

In Germany, legal scholars debated about the relationship of international law and national law. The antipodes of the respective opinion, the dualistic perception of international law towards the national legal system and the monistic understanding of the legal system, shall only be mentioned.[102] However, the more dualistic approach to international law influenced the discussion of the applicability in Germany and the question, if the ECHR should be interpreted autonomously, like any national legislation, or in regard with the judgments of the ECtHR.[103] An autonomous interpretation could result in a different degree of protection. The best example is the opinion of the ECtHR that Article 3 ECHR can be violated of a member state, if an immigrant should be expelled to a country where he or she could face torture or inhuman and degrading treatment. If a member state interpreted Article 3 ECHR in a different way, the degree of protection could be lesser – a result, which has to be avoided!

The center of this debate was (and is), whether the national approval legislation transforms the ECHR into national law or whether the approval legislation declares it applicable. The mere transformation, so the opinion, would create an unique national law, with the result that the ruling

[96] C. Grabenwarter, Europäische Menschenrechtskonvention, 2nd edition, München 2005; A. Peters, Einführung in die Europäische Menschenrechtskonvention, München 2003.
[97] K. P. Fritsche, Menschenrechte, Paderborn et al. 2004; M. Nowak, Einführung in das internationale Menschenrechtssystem, Wien 2002; T. Schilling, Internationaler Menschenrechtsschutz, Tübingen 2004; A. Weber, Menschenrechte, München 2004. See especially for the ICCPR: M. Nowak, U.N. covenant on civil and political rights. 2nd edition, Kehl et al. 2005.
[98] UN International Covenant on Civil and Political Rights.
[99] UN International Convention on the Elimination of All Forms of Racial Discrimination.
[100] UN Convention on the Elimination of All Forms of Discrimination against Women.
[101] It is estimated that app. 300 publications were written on the rights pertaining to this project.
[102] See P. Kunig, Völkerrecht und staatliches Recht, in: Vitzthum, Völkerrecht, Berlin 2001, marginal nos. 28-36; G. Ress, Die Wirkungen der Urteile des Europäischen Gerichtshofes für Menschenrechte im innerstaatlichen Recht und vor innerstaatlichen Gerichten, in: I. Maier (ed.), Europäischer Menschenrechtsschutz. Schranken und Wirkungen, Heidelberg 1982, p. 247.
[103] H.-J. Cremer, Zur Bindungswirkung von EGMR-Urteilen, in: Europäische Grundrechtezeitschrift (EuGRZ) 2004, pp. 685-689.

of the ECtHR were not relevant for the interpretation.[104] However, this would thwart the effectiveness of the ECHR and the important interpretation and development by the ECtHR and should not be considered.

Implementation into the national legal system

The question concerning the rank of the ECHR appoints the specific issue in view of the effect of the ECHR and the relationship towards the Federal Constitution. As the German legal system can partially be understood as a hierarchical system of different legislation, the rank of the ECHR was discussed extensively with regard to the Federal Constitution. Already in 1955, the question was brought up in a German law journal, which rank the ECHR has with regard to the Federal Constitution.[105] The following discussion comprises every possible legal construction.[106] One current of opinion in the discussion admitted the ECHR the same position as the Federal Constitution[107] or granted it a position prevailing federal law.[108] On the other hand, the opponents of this view argued that the ECHR had to be regarded as binding federal law with all its disadvantages. Nonetheless, the main dispute over this question has been settled. The majority considers the ECHR as part of the federal national legal system and consequently not in the same rank as the Federal Constitution. [109] However, the discussion in the literature should not obscure the binding character of the ECHR within in the German legal system. The ECHR has to be taken into account by court decisions and by the administration. A common understanding exists that the ECHR legally and directly binds the respective authorities. Even if the Convention does not bind the lawmaker in the same way like the Federal Constitution, the overall acceptance of the ECHR within the political arena avoids an open political opinion that would undermine the ECHR.[110]

Political science literature

Regarding the political science literature on the ECHR and the political integration, a surprising lacuna of articles and books about the system can be observed. The literature ranges between a description of the historical development[111] and a more integrative approach of legal studies and political science.[112] Nevertheless, the low number of publications does not reflect the importance of such studies. They provide a more global and political understanding for the circumstances of the ECHR. Two articles should be reviewed more deeply. One author discusses the philosophical ideas that provide the background for the establishing of the ECHR and the political shift in the middle of the last century. He stated that the human rights could be regarded as leading principles in the political order and that, despite the different understandings of state sovereignty, the ECHR and the

[104] See as critical view: H.-J. Cremer, Bindungswirkung, p. 687.
[105] R. Echterhölter, Die Europäische Menschenrechtskonvention im Rahmen der verfassungsmäßigen Ordnung, in: Juristenzeitung (JZ) 1955, p. 691.
[106] See S. Kadelbach, Der Status der Europäischen Menschenrechtskonvention im deutschen Recht, in: Juristische Ausbildung (JURA) 2005, pp. 483-485.
[107] R. Echterhölter, p. 691.
[108] K. Zwingenberger, Die Europäische Konvention zum Schutz der Menschenrechte in ihrer Auswirkung auf die Bundesrepublik Deutschland, Münster 1997, pp. 147-148.
[109] R. Bernhardt, Die Europäische Menschenrechtskonvention und die deutsche Rechtsordnung, in: Europäische Grundrechte Zeitschrift (EuGRZ) 1996, pp. 339-341; W. Hoffmann-Riem, Kohärenz der Anwendung europäischer und nationaler Grundrechte, in: Europäische Grundrechte Zeitschrift (EuGRZ) 2002, p. 475; J. Meyer-Ladewig, Einleitung, marginal no. 29; L. Wildhaber, Europäischer Grundrechtsschutz aus der Sicht des Europäischen Gerichtshofs für Menschenrechte, in: Europäische Grundrechte Zeitschrift (EuGRZ) 2005, p. 689.
[110] The request of the conservative parties in the German Parliament in 2003 to amend the applicability of the ECHR regarding alien extremists can be considered as an exceptional approach. See Bundestagsdrucksache 15/1239, p. 4.
[111] See J. Dohmes, Die Bedeutung des Europarats für Deutschland, in: Holtz (ed.), 50 Jahre Europarat, Baden-Baden 2000, pp. 185-196.
[112] B. Zangl and M. Zürn, Make Law, Not War: Internationale und transnationale Verrechtlichung als Bausteine für Global Governance, in: Zangl and Zürn (eds.), Verrechtlichung - Bausteine für Global Governance?, Bonn 2004, pp. 12-45.

rulings by the ECtHR served the integration process in an outstanding manner.[113] The second article contextualises the development of the ECHR and the ECtHR into the discussion of global governance. The main thesis states that national states are dependent upon international institutions to guarantee the foundations for a living society.[114] Therefore, specific criteria for a functioning global governance have to be postulated and developed. The opinion was expressed that the enforcement of the rule of law could be regarded as such a criterion, and the ECHR and the ECtHR were deemed as existing examples of highly extended judicial system on an international level.[115]

2. Implementation of judgments of the ECtHR

Besides the aforementioned discussion about the rank of the ECHR within the legal system, the legal question of the effect of judgments by the Court within the respondent country and the judicial consequences have found a nonpareil resonance in the literature.[116] It would exceed the scope of this project and of this chapter to analyse the whole literature in all its legal facets. Therefore, only the main developments shall be outlined. It can be observed that the discussion occurred in different periods of time, especially after contentious judgments of the Court – and it was led with regard to the ECHR as well.

After only specialized lawyers and legal scholars had discussed the ECHR and the judgments of the Court, the Klass case in 1978 brought the ECHR and the judgments back into the broader legal discussion. Even if the Court did not consider the German legislation on secret surveillance as a breach of the ECHR, the Convention was perceived as an European human rights instrument with a judiciary on an European level.[117]

The recent judgments in the case in Görgülü vs. Germany in 2004 and the subsequent decision of the Federal Constitutional Court in the same case as well as the case of Caroline v. Hannover vs. Germany triggered a widespread resonance in the legal literature[118], not only in the specialized journals on human rights, and can be regarded as the latest and most important development of European integration of the ECHR and the judgments.

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[113] K. Dicke, Politische und sozialphilosophische Vorbedingungen der Erfolgsgeschichte der EMRK, in: Grewe and Gusy (eds.), Menschenrechte in der Bewährung, Baden-Baden 2005, pp. 21 and 34.

[114] B. Zangl/M. Zürn, p. 13.

[115] B. Zangl/M. Zürn, pp. 25 and 27.

[116] C. Gusy, Rezeption, pp. 137-156; E. Klein, Should the binding effect of judgments of the European Court of Human Rights be extended?, in: Mahoney, Matscher, Petzold and Wildhaber (eds.), Protecting human rights. The European perspective. Studies in memory of Rolv Ryssdal, Köln et al. 2000, pp. 705-713. See as an extract of the literature: H.-J. Cremer, Kapitel 32: Entscheidungen und Entscheidungswirkung, in: Grote and Marauhn (eds.), EMRK/GG. Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz, Tübingen 2006, pp. 1704-1771; H.-J. Cremer, Zur Bindungswirkung von EGMR-Urteilen - Anmerkung zum Görgülü-Beschluss des BVerfG vom 14.10.2004, in: Europäische Grundrechte Zeitschrift (EuGRZ) 2004, pp. 683-700; J. Meyer-Ladewig and H. Petzold, Die Bindung deutscher Gerichte an Urteile des EGMR, in: Neue Juristische Wochenschrift (NJW) 2005, pp. 15-20; H.-J. Papier, Execution and Effects of the Judgments of the European Court of Human Rights from the Perspective of German National Courts, Human Rights Law Journal (2006), vol. 27, pp. 1-4; G. Ress, Wirkungen und Beachtung der Urteile und Entscheidungen der Straßburger Konventionsorgane, in: Europäische Grundrechte Zeitschrift (EuGRZ) 1996, pp. 350-353; R. Uerpmann, Die Europäische Menschenrechtskonvention und die deutsche Rechtsprechung. Ein Beitrag zum Thema Völkerrecht und Landesrecht, Berlin 1993.

[117] C. Gusy, Rezeption, pp. 142-144.

[118] L. Wildhaber, Europäischer Grundrechtsschutz aus der Sicht des Europäischen Gerichtshofs für Menschenrechte, in: Europäische Grundrechte Zeitschrift (EuGRZ) 2005, pp. 689-693; W. Hoffmann-Riem, Kontrolldichte und Kontrollfolgen beim nationalen und europäischen Schutz von Freiheitsrechten in mehrpoligen Rechtsverhältnissen. - Aus der Sicht des Bundesverfassungsgerichts - in: Europäische Grundrechte Zeitschrift (EuGRZ) 2006, pp. 492-499; J. Meyer-Ladewig and H. Petzold, Die Bindung deutscher Gerichte an Urteile des EGMR, in: Neue Juristische Wochenschrift (NJW) 2005, pp. 15-20; H.-J. Papier, Execution, pp. 1-4.

Direct application
The question, whether the judgements of the ECtHR directly bind the authorities or even overrule judgments by national courts in a way that the execution of a judgment had to be abandoned, has been discussed concerning very different aspects of the possible binding character of the judgments. The debate circled mainly around the question how far the influence and the effect of a judgment by the ECtHR could legally reach and should reach into the state.

Regarding the recent publications the following understanding of the implementation of judgments after the Görgülü case can be observed: The ECHR does not foresee any direct binding of the judgements in way that they overrule the national court judgments, administrative acts or a national legislation. In addition, the ECtHR's findings do not prescribe the way to redress the violation of the ECHR by the respondent state. This, as a conclusion of most of the authors, falls completely into the discretion of the state.[119] However, the judgments directly bind the respective authority *within the legal frame of the state*. This means for Germany that the judgments directly bind the respective authority including the courts in a legal way on the basis of Article 46 ECHR in conjunction with the approval legislation (Zustimmungsgesetz) of the ECHR and the rule of law laid down in the German Basic Law, which is considered as a new approach.[120] They oblige the public authorities to revoke an administrative act on the grounds of the procedure legislation as long as the revocation does not violate the Basic Law. The judgments demand of the lawmaker to amend the legislation, if this should be the reason for the violation.[121] Furthermore, they demand the courts to reopen cases, if foreseen in the court procedure, or take the findings into consideration. It was said that this had been the art of the state before the contentious ruling of the ECtHR in the Görgülü case[122], others, however, stressed that the Federal Constitutional Court had developed its interpretation of the binding character of judgments.[123] The new development applies especially to the possibility to lodge a constitutional complaint if a national court should not have taken due consideration of the applicable findings of a ECtHR's judgment.[124]

It can be anticipated that the discussion will continue with the forthcoming judgments to an even more integrative approach.

Implementation of parallel cases and cases against other states
The question of a general binding character of all judgments of the ECtHR and extending the case against the responding state in parallel cases has been discussed intensively in the legal literature as well.[125] In general, most of the articles stressed that neither the ECHR nor the Federal Constitution foresaw a formally and directly binding effect of the judgments in cases against other states.[126] The same applied to parallel cases within the respondent state. However, in the light of the outstanding function for the European human rights protection system and concerning the conscious violation of the convention in cases of clear parallelism, it was argued that the judgments had to influence the national legal system or that the Basic Law had to be interpreted in the light of the results of the Court. Therefore, it was stressed that the ECHR in the interpretation of the judgments of the ECtHR

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[119] J. Mayer-Ladewig, Kommentar, Art. 46, marginal no. 3; H.-J. Cremer, Kapitel 32. marginal no. 67.
[120] J. Mayer-Ladewig/H. Petzold, p. 20.
[121] J. A. Frowein and W. Peukert, Artikel 53 (Bindende Kraft der Urteile), in: Frowein and Peukert (eds.), Europäische Menschenrechtskonvention. EMRK Kommentar, Kehl et al. 1996, marginal no. 7.
[122] J. Mayer-Ladewig/H. Petzold, Bindung, p. 17.
[123] S. Kadelbach, p. 484; Cremer, Bindungswirkung, EuGRZ 2004, p. 692.
[124] Cremer, Bindungswirkung, p. 698.
[125] See J. A. Frowein/W. Peukert, Artikel 53, marginal no. 7; C. Gusy, Rezeption, pp. 154-156; H. Mosler, Schlussbericht, pp. 355-369; J. Polakiewicz, Verpflichtungen, pp. 279ff. and pp. 347-354. See for the question of the interpretation of fundamental rights provisions: C. Grewe, Vergleich zwischen den Interpretationsmethoden europäischer Verfassungsgerichte und des Europäischen Gerichtshofes für Menschenrechte, in: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 2001, pp. 459-474.
[126] C. Grabenwarter, Europäische Menschenrechtskonvention, p. 98; J. Meyer-Ladewig/Petzold, Bindung, p. 18; E. Pache, p. 406.

had to be taken into account. This had to apply especially to the national courts. With regard to the statements by the Federal Constitutional Court, some authors argued that judgments against other states did have a legally binding character.[127] Recently, after the judgement in the Görgüglü, the discussion took another direction. Despite the clear statement of the Court, the Court itself undermined this legal interpretation in the same decision in upholding the view that German Basic Law had to be considered as the final judicial frame. Thus this ambivalent decision ushered in different interpretations within the literature. Due to the reasoning of the Federal Constitutional Court it was argued that the Court might curtail its preceding view concerning the effect of judgments by the ECtHR.[128] This opinion, however, does not prevail the aforementioned broader understanding of the effect of ECtHR's judgments.

More general approach
Not all articles and books on the implementation focus only on the legal aspect of the implementation. Several authors analyse the general scope of the cases against Germany, partly concerning specialized issues like the case-law on Art. 6 ECHR[129] partly they use a broader approach.[130] Both approaches have in common that they provide an overview of the judgments against Germany. It is argued that despite the lack of a direct effect of the judgements against Germany the situation can be regarded as being more satisfying than it seemed to be at a superficial glance.[131]

3. The relationship between the Federal Constitutional Court and the ECHR and its protection system

a) The ECHR and the Federal Constitutional Court

The aforementioned question whether the ECHR has the rank of a constitutional norm or of a federal legislation triggered the discussion how alleged violations of the ECHR can be judicially scrutinized. Does the procedure of the Federal Constitutional Court allow to lodge a constitutional complaint on the sole ground of the ECHR? During the first decades the opinion that gained most support was the one that a constitutional complaint based on the sole allegation that an act of the state might violate the ECHR could not be lodged. However, the ECHR and the findings of the ECtHR should be taken into account while interpreting the Basic Law.[132] This legal view on the ECHR and its importance in the judicial procedure before the Federal Constitutional Court has to be revised after the landmark decision in the Görgülü case of the Federal Constitutional Court. It stresses the importance of the ECHR and opens, in general, a procedural way to lodge a complaint on the basis of the ECHR in conjunction with the respective provisions in the Basic Law and the principle of the rule of law, which has a constitutional rank. This was observed as development to strengthen the importance and legal validity of the ECHR within Germany.[133]

b) Relationship between the judgments of the ECtHR and the Federal Constitutional Court

The importance of the judgments of the ECtHR has incrementally increased. At the same time the question occurred in the literature, which judgment should prevail judicially in the legal system in the respondent state. It was discussed which judgment should be complied with if they differ from

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[127] J. Meyer-Ladewig, Art. 46, marginal no. 15.
[128] H.-J. Cremer, Kapitel 32, marginal no. 93; see also D. Kadelbach, pp. 484-485.
[129] O. Kieschke, Die Praxis des Europäischen Gerichtshofs für Menschenrechte und ihre Auswirkungen auf das deutsche Strafverfahrensrecht, Berlin 2003.
[130] C. Mahler and N. Weiß, Europäische Menschenrechtskonvention und nationales Recht: Deutschland - eine Spurensuche/Österreich - ein Königsweg?, in: Klein and Menke (eds.), Menschenrechtsschutz im Spiegel von Wissenschaft und Praxis, Berlin 2004, pp. 148-213.
[131] C. Mahler, p. 212.
[132] P. Kirchhof, Verfassungsgerichtlicher Schutz und internationaler Schutz der Menschenrechte: Konkurrenz oder Ergänzung?, in: Europäische Grundrechte Zeitschrift (EuGRZ) 1994, p. 33.
[133] H.-J. Cremer, Bindungswirkung, EuGRZ 2004, p. 698; Meyer-Ladewig/Petzold, Bindung, pp. 19-20.

each other in decisive parts. This discussion reflects again the question of how judgments have to be implemented within the administrative and judicial system. If, for instance, the Federal Constitutional Court decided on the one hand that the administration of emetics did not violate the Basic Law, and then on the other hand the ECtHR decided that this did violate the ECHR the respective authority would theoretically have to consider both judgments. This discussion was led concerning the judgment in the case Caroline v. Hannover in which the ECtHR found that the interpretation of the protection of private life as it was formulated by the Constitutional Court with regard to the Basic Law violated the ECHR.[134] It was argued that the possible solution of this conflict could be found in the implementation of the judgment made by the ECtHR (and thus factual overruling the judgment made by the Federal Constitutional Court) within the legal frame outlined in the Görgülü case of the Federal Constitutional Court.[135] This means that within the legal frame of the Basic Law, the respective national authorities have generally to abide the judgements of the ECtHR.

4. Relationship between the ECJ as well as the EU and the ECtHR

The judicial relationship between the ECtHR and the ECJ and the EU occurs in many different aspects. As to remain within the scope of this report, only the most important developments and opinions shall be outlined: The ECtHR as guarantor for the human rights protection with regard to the EU-law and the latest development concerning the EU fundamental rights Charta as well as the respective competence of both courts.

After the EU-Charta had been proclaimed, several books were written on human rights and fundamental rights protection within the EU.[136] This process can be regarded as a new development to understand human and fundamental rights protection within the member states of the EU as a combination of the ECHR and the EU-Charta[137], consequently taking conflicts of different perceptions and scopes of the respective protection into account.[138] This leads to the practical question of the competence in deciding in human rights cases. Due to the fact that a hierarchical system between the courts was not deemed an appropriate solution, a system a mutual cooperation was described in the legal literature.[139] Another aspect was brought into the discussion in view of the accession of the EU to the protection system of the ECHR.[140] The EU treaty should be extended to a provision for preliminary rulings by the ECtHR concerning the interpretation of the ECHR.[141] This would lead to a more judicially orientated solution.

[134] R. Mann, Auswirkungen der Caroline-Entscheidung des EGMR auf die forensische Praxis, Neue Juristische Wochenschrift (NJW) 2004, pp. 3220-3222.
[135] H.-J. Cremer, Bindungswirkung, EuGRZ 2004, pp. 697-698.
[136] C. Calliess and M. Ruffert, Verfassung der Europäischen Union, München 2006; H. D. Jarass, EU-Grundrechte, München 2005; J. Meyer (ed.), Charta der Grundrechte der Europäischen Union, 2nd edition, Baden-Baden 2006; H.-W. Rengeling and P. Szczekalla, Grundrechte in der Europäischen Union. Charta der Grundrechte und Allgemeine Rechtsgrundsätze, München 2004, K. Stern and P. J. Tettinger (eds.), Europäische Grundrechte-Charta, München 2006.
[137] See C. Walter, Geschichte und Entwicklung der Europäischen Grundrechte und Grundfreiheiten, in: Ehlers (ed.), Europäische Grundfreiheiten und Grundrechte, 2nd edition, Berlin 2005, p. 20.
[138] V. Skouris, Introducing a binding Bill of Rights for the European Union. Can three parallel systems of protection of fundamental rights coexist harmoniously?, in: Blankenagel, Pernice and Schulze-Fielitz (eds.), Verfassung im Diskurs der Welt. Liber Amicorum für Peter Häberle zum siebzigsten Geburtstag, Tübigen 2004, p. 272. He has analysed the already occurred differences concerning the protection of business premises and abortion information for women.
[139] R. Jeager, Menschenrechtsschutz im Herzen Europas. Zur Kooperation des Bundesverfassungsgerichts mit dem Europäischen Gerichtshof für Menschenrechte und dem Gerichtshof der Europäischen Gemeinschaften, in: Europäische Grundrechte Zeitschrift (EuGRZ) 2005, p 194; J. Limbach, Die Kooperation der Gerichte in der zukünftigen europäischen Grundrechtsarchitektur. Ein Beitrag zur Neubestimmung des Verhältnisses von Bundesverfassungsgericht, Gerichtshof der Europäischen Gemeinschaften und Europäischem Gerichtshof für Menschenrechte, in: Europäische Grundrechte Zeitschrift (EuGRZ) 2000, p. 420.
[140] C. Dippel, Die Kompetenzabgrenzung in der Rechtsprechung von EGMR und EuGH, Berlin 2004.
[141] C. Dippel, p. 217.

Some authors discussed the question, whether the ECtHR could be regarded as European Constitutional Court.[142] The case of Matthews vs. UK[143] showed, so the reasoning, that the ECtHR had the legal capacity to judge in cases regarding community law. In addition, as the fundamental rights protection system within the EU was still evolving the ECtHR could act as a safeguard.[144] Moreover, the opinion was expressed that the ECtHR should obtain a predominant position regarding national and European courts.[145] How the relationship between the ECtHR and the ECJ could be understood, has already been outlined in the aforementioned paragraph. Taking the case load of the ECtHR into consideration the model of a predominated position of the ECtHR can only be beneficial to the human rights protection, if the national courts and the ECJ fully respect the judgments of the ECtHR. Any other understanding would raise some severe practical questions, which seem to be insuperable in the current state.

The aforementioned aspects of the discussion clarify how complicated a differentiated legal protection system can become. However, regarding the political situation of the ratification process of the Treaty establishing a Constitution for Europe, the suggested model of cooperation seems to be the most practical one.

5. Protection of Fundamental Rights within the EU

The general question of the effectiveness of the fundamental rights protection granted on the level of the EU by the ECJ will not be discussed thoroughly at this point of the report.[146] However, some aspects of sensitive human rights issues shall be outlined.

The restricted judicial control mechanism regarding the EU-legislation on the basis of Chapter VI of the EU-Treaty (so called third pillar) triggered a critical review in the legal literature. It is argued that the curtailed options of preliminary procedures before the ECJ shortened the judicial review of the EU-legislation.[147]

Another aspect of the EU-legislation concerns the immigration and the asylum procedure. The development of the EU-policies on the ground of Art. 62 and Art. 63 EC-Treaty and, subsequently, the legislation of the respective directives ushered in a critical review of the political process on the basis of the ECHR, mainly on Art. 3 ECHR.[148] Among the many aspects and issues relevant for human rights concerning the immigration and asylum policy, the policy on the EU-borders should be underlined. It is questioned, whether the activities by the EU-agency FRONTEX to secure the borders could open the ambit of Art. 3 ECHR, and, subsequently, transfer the responsibility for the protection granted in Art. 3 ECHR onto the EU regardless of the place.[149]

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[142] R. Laier, Der EGMR als europäischer Verfassungsgerichtshof - dargestellt anhand des Urteils Matthews ./. Vereinigtes Königreich -, in: Esser, Harich, Lohse and Sinn (edss.), Die Bedeutung der EMRK für die nationale Rechtsordnung. Strafrecht - Zivilrecht - Öffentliches Recht, Berlin 2003, pp. 125-139; L. Wildhaber, Eine verfassungsrechtliche Zukunft für den Europäischen Gerichtshof für Menschenrechte, in: Europäische Grundrechte Zeitschrift (EuGRZ) 2002, pp. 569-574.

[143] ECtHR, Judgment of 18 February 1999, Matthews vs. United Kingdom, no. 24833/94.

[144] H. Goerlich, Der Europäische Gerichtshof für Menschenrechte in Straßburg als ein europäisches Verfassungsgericht - insbesondere in Fragen der Menschenrechte und darüber hinaus bis in die Rechtspraxis der Europäischen Union, in: Esser, Harich, Lohse and Sinn (eds.), Die Bedeutung der EMRK für die nationale Rechtsordnung. Strafrecht - Zivilrecht - Öffentliches Recht, Berlin 2003, p. 119.

[145] H. Goerlich, p. 121; C. Lutz, Kompetenzkonflikte und Aufgabenverteilung zwischen nationalen und internationalen Gerichten. Erste Bausteine einer Weltgerichtsordnung, Berlin 2003, pp. 194ff.

[146] See for this question: D. Ehlers, Die Grundrechte der Europäischen Union. § 14. Allgemeine Lehren, in: Ehlers (ed.), Europäische Grundrechte und Grundfreiheiten, Berlin 2005, pp. 383-409.

[147] O. Griebenow, Demokratie- und Rechtsstaatsdefizite in Europa, Hamburg 2004, p. 292; M. Kraus-Vonjahr, Der Aufbau eines Raumes der Freiheit, der Sicherheit und des Rechts in Europa, Frankfurt a.M. 2002, p. 242.

[148] The EU-asylum process was accompanied by a large discussion that cannot be summarized. See as examples: B. Gerber, Die Asylrechtsharmonisierung in der Europäischen Union, Frankfurt a.M. 2004; R. Weinzierl, Flüchtlinge: Schutz und Abwehr in der erweiterten EU, Baden-Baden 2005.

[149] R. Weinzierl, pp. 132-133.

III. Thematic review of the literature on the specific case-law

1. Right to respect for private and family life (Article 8 ECHR)

Regarding Article 8 ECHR the literature can be distinguished into three different topics: The protection of private life vs. freedom of opinion and subsequently the freedom of press, the protection of private life regarding protection of private data and the protection of family life.

Protection of private life vs. the freedom of press

The question of how the protection of private life concerning pictures and the free press was and is discussed in a very general way. Those publications focus mainly on the possible standardization of a European protection of private life measures[150] or on comparative studies.[151] One topic has to be highlightened. As was already mentioned before, the judgment in the case of Caroline von Hannover vs. Germany triggered a widespread literature resonance.[152] This case was even discussed in newspapers,[153] and it was part of a campaign of representatives of the press media to lobby the German government.[154] The campaign aimed - without success - to persuade the government that it should request a referral to the Grand Chamber of the ECtHR. The press media hoped that the Grand Chamber might overrule the judgment in the Caroline case. Within the legal literature, some authors criticised the de facto overruling of the findings of the Federal Constitutional Court as a shortage of a fundamental rights protection especially regarding the freedom of press,[155] while, on the other hand, it can be observed that the opinion was expressed that the ECtHR had rectified a development of the protection of private life[156] and that the judgment was received positively.[157] Admittedly, the latter opinion persuades as the ECtHR rectified the notion of who can be considered as a person of public interest with the result of a minor protection degree. In addition, the alleged curtailment of the freedom of press after the judgment of the ECtHR cannot be ascertained with regard to the press.

Protection of private life/protection of data

The literature on data protection as part of the protection of private life has to be read on the background of the discussion in Germany. In 1983, the Federal Constitutional Court judged in a landmark decision that the right of private life comprised the entitlement of every person to decide whether and how to pass data information on authorities.[158] Since the Court has generated this new

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[150] G. Kirchhoff, Möglichkeiten einer europaweiten Vereinheitlichung des Persönlichkeitsschutzes vor der Presse. Eine vergleichende Untersuchung zum englischen und deutschen Recht des Persönlichkeitsschutzes bei Verletzungen durch die Presse, Baden-Baden 2005.

[151] I. Schnitzer, Ehrverletzende Presseäußerungen aus deutscher und französischer Sicht, Frankfurt am Main et al. 2005.

[152] W. Hoffmann-Riem, Kontrolldichte und Kontrollfolgen beim nationalen und europäischen Schutz von Freiheitsrechten in mehrpoligen Rechtsverhältnissen. - Aus der Sicht des Bundesverfassungsgerichts - in: Europäische Grundrechte Zeitschrift (EuGRZ) 2006, pp. 492-499; S.-C. Lenski, Der Persönlichkeitsschutz Prominenter unter EMRK und Grundgesetz, in: Neue Zeitschrift für Verwaltungsrecht (NvWZ) 2005, pp. 50-53; K.-N. Peifer, Das Caroline-Urteil des EGMR und die Rechtsprechung des Bundesverfassungsgerichts - Die Entwicklung aus zivilrechtlicher Sicht bis zur Entscheidung des EGMR, in: Prütting and Stern (eds.), Das Caroline-Urteil des EGMR und die Rechtsprechung des Bundesverfassungsgerichts, München 2005, pp. 5-21; C. Stark, Das Caroline-Urteil des EGMR und seine verfassungsrechtlichen Konsequenzen, in: Prütting and Stern (eds.), Das Caroline-Urteil des EGMR und die Rechtsprechung des Bundesverfassungsgerichts, München 2005, pp. 23-36; R. Stürner, Caroline-Urteil des EGMR - Rückkehr zum richtigen Maß, in: Zeitschrift für Medien- und Kommunikationsrecht (AfP) 2005, pp. 213-227.

[153] M. Hanfeld, Zwischen den Zeilen, Frankfurter Allgemeine Zeitung, 01 September 2004, p. 36

[154] Verband Deutscher Zeitschriftenverleger, Anrufung der Großen Kammer des Europäischen Gerichtshofs für Menschenrechte, 2004, http://www.kanzlei-prof-schweizer.de/bibliothek/content/02647/index.html, visited on 22 January 2007.

[155] H. Gersdorf, Caroline-Urteil des EGMR: Bedrohung der nationalen Medienordnung, in: Zeitschrift für Medien- und Kommunikationsrecht (AfP) 2005, pp. 222-226; D. Grimm, Frankfurter Allgemeine Zeitung, 14 July 2004, p. 34.

[156] R. Stürner, p. 213.

[157] C. Stark, pp. 29ff.

[158] Federal Constitutional Court, Judgment of 15 December 1983, no. 1 BvR 209/83.

fundamental right, the development in Germany concerning data protection ushered in a preventive protection system of public data protection offices as well as a huge legal data protection frame. Nevertheless, the literature that focuses on the interpretation of Article 8 ECHR underlines the importance of the protection of privacy and data protection[159] and urges an incremental development of the Strasburg jurisdiction towards a more encompassing protection.[160]

The protection of family life
Within the scope of this project, the main discussion of the protection of family life analyses the effect of Art. 8 ECHR and the legal status of immigrants in Germany. To be more specific, it is discussed under which circumstances the ECHR grants a (more permanent) legal residence status for foreigners who have been living in Germany for a long time on the basis of short-term residence permits.[161] As the development in most of the European countries tends to more rigid immigration laws, one of the few options to enter and stay legally in the countries within the EU can be seen on the grounds of family bounds. The same applies for Germany. Therefore, the scope of Art. 8 ECHR regarding immigration is of most interest for the question of how to interpret the national alien law in compliance with the ECHR, which is discussed in specialized alien law journals.[162] This discussion mirrors in an interesting way the latest development in Germany regarding the binding effect of the ECHR and the judgements by the ECtHR and crystallizes in the question whether due to German law foreigners can be granted a legal residence status in virtue of humanitarian reasons.[163] While one opinion expressed that the scope of Art. 8 ECHR should be interpreted restrictively[164] with the result that in some cases the foreigner could not refer to Art. 8 ECHR regarding his or her legal position within Germany another author stressed that a restrictive interpretation could not comply with the idea of the ECHR and the scope of Art. 8 ECHR.[165] Moreover it is underlined that the national authorities had to take into account the interpretation of the ECtHR concerning Art. 8 ECHR while implementing the national alien law and the Basic Law.[166] It can be observed that Art. 8 ECHR was interpreted restrictively during the process of legislation of the new immigration, which will have an effect of the daily implementation. Therefore, the latter opinion of a less rigid interpretation has to be endorsed.

2. Freedom of thought, conscience and religion (Article 9 ECHR).
Although the ECtHR decided in a relatively small number of cases against Germany pertaining the freedom of religion, this did not influence the discussion within the legal literature.[167] The

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[159] C. Gusy, Der Schutz der Privatsphäre in Art. 8 EMRK in: Datenverarbeitung im Recht (DVR) 1984, pp. 289-310; C. Gusy, Polizeiliche Datenerhebung und -verwendung nach der EMRK, in: Wolter (ed.), Datenübermittlungen und Vorermittlungen. Festgabe für Hans Hilger, Heidelberg 2003, pp. 122-129.; D. Kugelmann, Der Schutz privater Individualkommunikation nach der EMRK, in: Europäische Grundrechte Zeitschrift (EuGRZ) 2003, pp. 16-25; B. Siemen, Datenschutz als europäisches Grundrecht, Berlin 2006, p. 211.
[160] L. Wildhaber, Art. 8 EMRK, in: Karl (ed.), Internationaler Kommentar zur Europäischen Menschenrechtskonvention, Köln et al. 2004, marginal no. 336.
[161] This means between five and ten years.
[162] C. Barth, Aufenthaltsrechtliche Schutzwirkungen aus Art. 8 EMRK in der Rechtsprechung des BVerwG, in: Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1998, pp. 1031-1036; G. Benassi, Die Bedeutung der humanitären Aufenthaltsrechte des § 25 Abs. 4 und 5 AufenthG im Lichte des Art. 8 EMRK, in: Informationsbrief Ausländerrecht (InfAuslR) 2006, pp. 397-404; M. Hoppe, Verwurzelung von Ausländern ohne Aufenthaltstitel - Wann kann Art. 8 EMRK zu einem Anspruch auf eine Aufenthaltserlaubnis nach § 25 V AufenthG verhelfen?, in: Zeitschrift für Ausländerrecht (ZAR) 2006, pp. 125-130.
[163] § 25 para. 5 AufenthG in conjunction with Art. 8 ECHR.
[164] M. Hoppe, pp 128-129.
[165] G. Benassi, p. 403.
[166] G. Benassi, p. 401.
[167] A. Bleckmann, Von der individuellen Religionsfreiheit des Art. 9 EMRK zum Selbstbestimmungsrecht der Kirchen, Köln et al. 1995; C. Grabenwarter, Religion und Europäische Menschenrechtskonvention, in: Zimmermann (ed.), Religion und Internationales Recht, Berlin 2006, pp. 97-125; K. Pabel, Der Grundrechtsschutz für das Schächten - Die Entscheidungen, in: Europäische Grundrechte Zeitschrift (EuGRZ) 2002, pp. 220-234; C. Walter, Der Schutz religiöser Minderheiten im Recht der Europäischen Gemeinschaft und nach der Europäischen Konvention zum Schutze der

development of the Commission and later on of the ECtHR on this issue was taken as momentum to analyse the findings in view of the corporative freedoms.[168] Some other more general approaches discuss the relationship of the Art. 9 ECHR and the Community Law. This topic is addressed in conjunction with minority rights[169] and with regard to the incrementally growing of the case-law pertaining to Article 9 ECHR.[170] A more specific approach was undertaken pertaining the question of ritual slaughter of animals in accordance with religious rules[171] and the wearing of headscarves in public institutions like schools.[172]

In general, the discussions focus mainly on legal issues instead on minority or political questions with regard to the freedom of religion. This can be seen as corollary of the strong position of Art. 4 Basic Law (Freedom of religion), the contentious rulings of the Federal Constitutional Court, and the broad debate in the press and the legal literature.[173]

3. Freedom of expression (Article 10 ECHR) and national security

Besides this specific case-law, the debate in the literature raises the question under which circumstances the freedom of opinion could be curtailed referring to the national security.[174] One author argues that the limitation of the freedom of opinion has to be scrutinized carefully as it is the foundation of a democratic society.[175] This common statement leads to the more differentiated question what kind of curtailments can be justified with regard to the national security. The development in Germany tends to incorporate more rigid measurements in the respective legislation. Despite that, the German literature discloses with regard to Article 10 ECHR an apparent lacuna.

4. Prohibition of political parties

The procedure before the Federal Constitutional Court in 2001 against the extreme right NPD (Nationalist Party of Germany), which ended with a failure for the government because of potential secret service effects on the evidences, brought the attention of the legal literature to the question, under which factual circumstances and within which legal frame political parties can be prohibited.[176]

Menschenrechte und Grundfreiheiten (EMRK), in: Fauth and Satter (eds.), Staat und Kirche im werdenden Europa. Nationale Unterschiede und Gemeinsamkeiten, Würzburg 2003, pp. 93-125.

[168] See A. Bleckmann, pp. 47-69.

[169] See C. Walter, Minderheiten, pp. 98-104; only in regard with EC-Law: W. Bausback, Religions- und Weltanschauungsfreiheit als Gemeinschaftsgrundrecht, in: Europarecht (EuR) 2000, pp. 261-273.

[170] E. Dujmovits, Der Schutz religiöser Minderheiten nach der EMRK, in: Grabenwarter and Thienel (eds.), Kontinuität und Wandel der EMRK. Kehl et al. 1998, pp. 138-169.

[171] K. Pabel, Schächten, pp. 223-225.

[172] T. Anger, Islam in der Schule. Rechtliche Wirkungen der Religionsfreiheit und der Gewissensfreiheit sowie des Staatskirchenrechts im öffentlichen Schulwesen, Berlin 2003, pp. 99-100.

[173] The case of a Muslima applying for a position in a public school ushered into such a debate. See Federal Constitutional Court, judgment of 24 September 2003, 2 BvR 1436/02.

[174] A. H. Skóra, National Security as the Limitation of the Right to Freedom of Expression in the Jurisprudence of ECHR, in: Gries and Alleweldt (eds.), Human Rights within the European Union, Berlin 2004, pp. 127-137; U. Wölker, Zur Freiheit und Grenzen der politischen Betätigung von Ausländern. Der politische Gebrauch der Meinungs-, Versammlungs- und Vereinigungsfreiheit der Ausländer nach innerstaatlichem Recht, Völkerrecht und Europarecht, Berlin et al. 1987, pp. 198-203. The latter article also covers Art. 16 ECHR.

[175] A. H. Skóra, p. 137.

[176] O. Klein, Parteiverbotsverfahren vor dem Europäischen Gerichtshof für Menschenrechte, in: Zeitschrift für Rechtspolitik (ZRP) 2001, pp. 497-402; D. Kugelmann, Parteiverbote und EMRK, in: Grewe and Gusy (eds.), Menschenrechte in der Bewährung. Die Rezeption der Europäischen Menschenrechtskonvention in Frankreich und Deutschland im Vergleich, Badan-Baden 2005, pp. 244-272, K. Pabel, Parteiverbote auf dem europäischen Prüfstand, in: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 2003, pp. 921-944; B. Sarx, Das Parteiverbotsverfahren der NPD vor dem BVerfG im Lichte der Rechtsprechung des EGMR, in: Esser, Harich, Lohse and Sinn (eds.), Die Bedeutung der EMRK für die nationale Rechtsordnung. Strafrecht - Zivilrecht - Öffentliches Recht, Berlin 2003, pp. 177-191. The article of L. Wildhaber, Politische Parteien, Demokratie und Art. 11 EMRK, in: Bovenschulte, Grub, Löhr, von Schwanenflügel and Wietschel (eds.), Demokratie und Selbstverwaltung. Festschrift für

Concerning the right guaranteed in Art. 11 ECHR the literature consists more of aspects of a judicially review of the judgments by the ECtHR and the implementation within the legal system than a contentious discourse. It was argued that the judgments of the ECtHR concerning the prohibition influenced the contracting states in their foundations.[177] Regarding the function of a political party within the democracy, this thesis can only be endorsed. As the prohibition of a party by the respective state authority is highly sensitive and dangerous for the functioning of a democracy, it is concluded that the ECtHR interpreted the margin of appreciation restrictively.[178]

5. Literature on discrimination and equal treatment

Concerning the debate in Germany, the main part deals with the implementation of the ICERD[179] and the CEDAW,[180] the EU-legislation, and the interpretation of Art. 3 Basic Law. As a result, only a small number of articles in the German literature cover Art. 14 ECHR. In this regard, the discussion comprises of the question of the scope of Art. 14 and the 12th protocol,[181] of the analysis of the case-law pertaining to gender issues,[182] and an analysis of the differences in the degree of protection granted within the legal system of the EU and the ECHR.[183]

As for national minorities (like the small group of people of Denmark or German Sinti and Roma), only some publications cover this question with regard to Germany.[184]

IV. Case study

The University of Zurich currently organises and conducts a research project on the ECHR called: “The Reception of the ECHR in Europe”.[185]

The description of the university says: “The research project deals with an examination of the reception process in the various Member States of the Council of Europe. The central question is how the Strasbourg case law was taken on by the countries and which alterations it caused on the national level. It will be the main topic to examine both the reasons conducive and those prejudicial to the reception process.”[186]

The project covers most of the Council of Europe member states, including Germany. However, because the project is still running, no documents of the case studies are available.

H. Conclusion

The report clearly describes the important role of the Basic Law in Germany and the judgments of the Federal Constitution Court. Nonetheless, the rulings of the ECtHR regarding the scope of this report underlines the necessary role of the court in rectifying developments in the national

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Dian Schefold zum 65. Geburtstag, Baden-Baden 2001, pp. 257-263 summarizes the development of the judgments by the ECtHR.

[177] D. Kugelmann, Parteiverbote, p. 258.

[178] D. Kugelmann, Parteiverbote, p. 259.

[179] UN International Convention on the Elimination of All Forms of Racial Discrimination.

[180] UN Convention on the Elimination of All Forms of Discrimination against Women.

[181] S. Trechsel, Überlegungen zum Verhältnis zwischen Art. 14 EMRK und dem 12. Zusatzprotokoll, in: Wolfrum (ed.), Gleichheit und Nichtdiskriminierung im nationalen und internationalen Menschenrechtsschutz, Berlin et al. 2003, pp. 119-134.

[182] M. Wittinger, Die Gleichheit der Geschlechter und das Verbot geschlechtsspezifischer Diskriminierung in der Europäischen Menschenrechtskonvention, in: Europäische Grundrechte Zeitschrift (EuGRZ) 2001, pp. 272-279.

[183] C. Wahle, Der allgemeine Gleichheitssatz in der Europäischen Union, Osnabrück 2002, pp. 120-145.

[184] See the empirical study: C. Pan and B. Pfeil, Minderheitenrechte in Europa, Band 2, Wien 2002, pp. 84-98.

[185] See hompage: http://www.rwi.unizh.ch/keller/Reception/home.htm, visited on 30 Jan 07.

[186] Ibid.

legislation, as happened with regard to the costs for interpreters, and with regard to the case law of the Federal Constitutional Court, even if this triggered a controversial discussion.

Moreover, the influence and the effect of the ECHR in the interpretation of the ECtHR on the lawmaker and the legislation, the administration and the lower court judgments, seem to be much more crucial than the single judgment against Germany. This can be observed for several areas, especially for the immigration law. This being so, the main issue on the implementation and the rank of the ECHR has to be deemed as decisive, and the fact, that the ECHR stands on the same level as federal law is still unsatisfying. The judicial problems, which might arise from this systematic implementation, are still not solved.

With regard to the question of this report, if there exist strategic patterns of litigation, the assessment of the decisions and the judgments show the following picture: In general, no strategic pattern could be observed in any of the cases. These may be the result of the complaint system before the Federal Constitutional Court, or the lack of knowledge of the system of the ECtHR. However, in the Caroline v. Hannover case the opposite happened. The press and the media organisations in Germany organised strategically an intervention of the coming into effect of the Strasbourg decision. Interesting, although not strategic, are the (in general inadmissible) decisions against Germany in rejected asylum cases, because they constellate around the controversial issue of a sufficient asylum procedure. In addition, the analysis shows that a large group of immigrants, excluded from the right to vote, might give the basis for a strategic litigation before the ECtHR, although it has to be said that the violation of Art. 3, 1. Protocol of the Convention is arguable.

The legal literature, as described and analysed, presents a very broad reflection of each aspect of the ECHR and the judgments made by the ECtHR. It can be observed that with the landmark judgments of the ECtHR in the cases of Caroline v. Hanover and Görgüglü and the subsequent decision of the Federal Constitutional Court the subject has become a new quality, as a more integrative approach towards the ECHR is undertaken. In contrary to the almost over specialized legal literature, an apparent lack of social science and political science literature has to be observed. Nevertheless, the existing political science literature, as mentioned, plays an important role for a broader understanding of the ECHR and the European integration.

In conclusion, the assessment shows that although the role of the ECtHR cannot be deemed decisive as in other member countries, the incremental integration of the ECHR within the national legal system and the effect on the fundamental rights protection alters the legal system in Germany profoundly.

The next step will be the analysis of the reception of the ECHR and the judgments of the ECtHR against Germany and against other states. To provide a broad picture of the subject, available empirical material will be scrutinized and interviews conducted. This will include:

- Declarations and recommendations of the Steering Committee for Human Rights (CDDH) on the implementation of the ECHR
- Resolutions of the Committee of Ministers regarding the execution of judgments
- Parliamentary Assembly's documents
- Federal Governmental reports on human rights policies and integration and refugees
- Federal Parliamentary documents concerning the draft legislation or political discussions with a connection to the ECHR
- Press material and statements on specific cases against Germany or on controversial legislation with a connection to the ECHR (this includes publications from the press, statements by NGOs, or other human rights institutions)

- Interviews with European actors involved in the implementation of the ECHR and the judgments including experts of the Parliamentary Assembly of the German delegation, the Federal Foreign Office, and representatives of the Federal Government at the Committee of Ministers
- Interviews with national actors involved in the implementation and the judgments including experts of the Federal Ministry of Justice, legal experts, NGOs, and other organisations promoting human rights

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Annex I: Short version of the art of the state report intended for policy users

A. Introduction

In Germany, human rights protection comprises a differentiated political and judicial system. However, the main focus of the protection lies on the national courts.

Notably, the Federal Constitutional Court plays an integral role in protecting, promoting, and developing human rights or human rights aspects. The public opinion and politicians highly acknowledge and respect judgments made by the Federal Constitutional Court, even if the findings are received controversially. Over the last decades, the Federal Constitutional Court has grown into the role of a safeguard for human rights and fundamental rights contained in the German Basic Law or Federal Constitution. This strong position and the highly developed case-law might explain the relatively low number of judgments against Germany by the European Court of Human Rights (ECtHR) in Strasbourg. The case-law in the ambit of the rights in Article 3 and Article 6 of the European Convention on Human Rights (ECHR) pertaining to minorities within the Juristras project as well as civil and political rights enshrined in Article 8, Article 9, Article 10, Article 11, and in conjunction with Article 14 ECHR comprises 20 decisions by the European Commission of Human Rights and the European Court of Human Rights and 15 judgements by the European Court of Human Rights.

Nonetheless, the role of the European Court of Human Rights should not be underestimated despite the relatively low number of judgements against Germany. Firstly, only one judicial body cannot guarantee the overall protection of human rights. The European Court of Human Rights therefore rectifies developments that were not regarded problematic from a human rights point of view on a national level. Secondly, the European Court of Human Right's judgments provide an important and valuable legal knowledge and orientation for similar cases and therefore fulfil its objective to guarantee the interpretation of national provisions and even of the Basic Law in accordance with human rights. Finally, the European Convention on Human Rights and the Strasbourg judgments influence the political lawmaking process and, subsequently, protect human rights in a preventive manner even before individual applicants lodge a constitutional complaint with the Federal Constitutional Court or lodge an application with the European Court of Human Rights.

B. Litigation, Implementation and Domestic Reform in Germany

I. The European Convention on Human Rights and its legal status within the German national legal system

Germany ratified the ECHR on 7 August 1952.[187] Then the Convention became a legally binding international treaty. It created an obligation for Germany as member of the contracting states to guarantee the human rights enshrined in the Convention. Among the first countries, Germany accepted in 1955 the right of individual petition on the basis of the ECHR.

The position of the ECHR within the German legal system is regarded as national law on a federal level.[188] It therefore has priority over any state law. Regarding the Basic Law, the status of the ECHR as national federal law leads to the constellation of a different rank, which results in a prior application of the Basic Law in contentious cases - although it is a binding Convention under

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[187] BGBl. II 1952, 686.

[188] Federal Constitutional Court, Desicion of 26 March 1987, no. 2 BvR 589/79, volume 74, p. 370; J. A. Frowein, Einführung, marginal no. 6 in: J. A. Frowein and W. Peukert, Europäische Menschenrechtskonvention. EMRK-Kommentar, 2nd ed., Kehl et al. 1996; R. Uerpmann, Die Europäische Menschenrechtskonvention und die deutsche Rechtsprechung, Berlin 1993, pp. 72ff.

international law for Germany. However, the Federal Constitutional Court emphasizes in a recent decision that the provisions of the ECHR bind all responsible bodies of any state sovereignty directly.[189] Therefore, the ECHR, in the light of the judgments by the European Court of Human Rights, binds the lawmaker, the courts and the administration within Germany. The provisions of the ECHR have to be taken into account by the respective courts; moreover, litigants can claim them in any case where applicable.

Concerning the Basic Law, the Federal Constitutional Court holds the view that, where appropriate, the Basic Law (Federal Constitution) has to be interpreted in the light of the ECHR and the findings by the European Court of Human Rights.[190] This effect has to be seen in conjunction with the accountability of the ECHR within the complaint system before the Federal Constitutional Court, as a constitutional complaint can be lodged with the Federal Constitutional Court on the ground of the corresponding Article in the Basic Law in conjunction with the rule of law laid down in Article 20 Basic Law.[191]

II. Execution of judgements made by the European Court of Human Rights and their legal status within the national legal and political system

As laid down in the Convention in Article 46 ECHR, judgments by the European Court of Human Rights are binding for the respective state. However, this does not determine the legal status within the national legal system. The European Court of Human Rights itself stresses that, "The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach."[192]

In Germany, judgments delivered by the European Court of Human Rights against Germany do, in general, directly bind the courts or the administration in accordance with the rule of law, either on federal level or on state level. The same applies for the national lawmaker, should the judgment suggest an amendment in the national legislation, because the law itself violates the ECHR.[193] The Federal Constitution Court underlines this general understanding of compliance with the European Court of Human Rights judgments in a landmark decision as follows: "All bodies of German public power are generally bound within the state by the judgments of the Court in accordance with the respective provisions of the Convention in conjunction with the approval legislation (Zustimmungsgesetz) as well as the requirements of the rule of law (…)."[194] Pursuant to Article 46 ECHR judgments against other states do not have a judicially direct binding effect *erga omnes*, and the reasoning of the judgment (against other states and against Germany) have no judicially binding character either.[195] On the other hand, it is commonly accepted that the judgments of the ECtHR have a normative and orientating function that goes beyond the mere single case.[196]

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[189] Federal Constitutional Court, decision of 14 October 2004, no. 2 BvR 1481/04, marginal no. 46.
[190] Federal Constitutional Court, no. 2 BvR 1481/04, marginal no. 32.
[191] Federal Constitutional Court no. 2 BvR 1481/04, marginal no. 63; H.-J. Papier, Execution and Effects of the Judgments of the European Court of Human Rights from the Perspective of German National Courts, Human Rights Law Journal (2006), p. 2.
[192] European Court of Human Rights, Judgment of 23 January 2001, Brumarescu vs. Romania, no. 28342/95, marginal no. 20.
[193] See H.-J. Papier, p. 1.
[194] Federal Constitutional Court, no. 2 BvR 1481/04, marginal no 45.
[195] C. Gusy, Die Rezeption der EMRK in Deutschland, in: Grewe and Gusy (eds.), Menschenrechte in der Bewährung, Baden-Baden 2002, p. 154.
[196] Federal Constitutional Court, no. 2 BvR 1481/04, marginal no. 38; J. Meyer-Ladewig, Europäische Menschenrechtskonvention, 2nd ed., Baden-Baden 2006, Article 46, marginal no. 15; H.-J. Papier, p. 1.

III. Review of the decisions and judgments versus Germany

1. Litigants and strategic litigation. Some general remarks

On 1 January 2007, some 3950 cases against Germany were pending in Strasbourg.[197] Germany does not belong to the high case countries like Russia or Turkey. However, the number of cases points to an increasing acceptance to seek recourse not only with a complaint at the Federal Constitutional Court, but also before the ECtHR.[198] This number discloses at the same time the apparent lack of successful litigations taking into account that 2006 only 8 judgments (merits) were delivered by the ECtHR.[199] An analysis of all accessible decisions and judgments in the HUDOC-database pertaining to the scope of this project partly enlightens this discrepancy as well. Concerning Articles 8, 9, 10, 11 and (in conjunction with) 14 ECHR some 200 decisions and judgments were delivered by the Commission or by the Court in the last decades. As mentioned in the introduction of this report, the ECtHR only judged in 15 cases with regard to this project.

One can say that the litigants in Strasbourg seeking protection in cases against Germany cover a wide range of individuals with very different social backgrounds and different interests. Immigrants try to avert their impeding expulsion, they contest the national child benefit legislation, and they try to resume a personal contact to their own children born out of wedlock. Besides this group, one litigant alleged a violation because she was dismissed from the civil service as teacher. In other cases the litigants went to Strasbourg, because they were not granted a position in the civil service. The cases concerning the civil service generally had the political activities of the litigants in the centre of their complaints. In another area, the litigants challenged the legislation on secret communication surveillance as members of a sensitive group like lawyers or journalists, or, as happened in one case, the Princess of Monaco, Caroline von Hannover, alleged a violation of her right to privacy. Some cases reflect several political incidences in Germany as the complaint from members of the Red Army Faction or from members of the peace movement after they were convicted for an unlawful demonstration in front of a US military basis.[200] Interestingly, individuals denying the holocaust or publishing hate speeches notoriously lodge an application after their criminal procedures.[201]

Only the relatively high number of (in general inadmissible) cases of immigrants envisaging an expulsion, especially after an asylum procedure, suggests a structural problem within the legal system of the asylum procedure.[202] It can be argued that this is some kind of strategic litigation deriving from the system. In all other cases, however, hardly any kind of strategic litigation can be observed with the aim to amend the national legislation or administrative praxis. Exceptions were the two complaints against the German laws on security communication surveillance in 1978 and 2006.[203] Again, this is a direct result of the strong position of the Federal Constitutional Court, which is, furthermore, entitled to quash a state or federal legislation and which can overrule national judgments.

[197] Council of Europe, Registry of the European Court of Human Rights, Survey of activities 2006, p. 51.
[198] Germany can be seen as a main country concerning pending cases among UK (some 2200 cases), France (some 4300 cases), and Poland (some 5100 cases). Source: Council of Europe, survey 2006, p. 51.
[199] Council of Europe, survey 2006, p. 41.
[200] See for many: Commission, Decision of 6 March 1989, C.S. vs. Germany, no. 13858/88.
[201] See for many: ECtHR, Decision of 13 December 2005, Witzsch vs. Germany, no. 7485/03.
[202] Another reason for expulsion procedures lies in the conviction of immigrants because of drug trafficking. Then, a regularly inadmissible application is lodged alleging a violation of the ECHR.
[203] ECtHR, Judgment of 6 September 1978, Klass and others vs. Germany, no. 5029/71; ECtHR, Decision of 29 June 2006, Weber and Saravia vs. Germany, no. 54934/00.

In contrary to the high number of individuals, only a few applications were lodged by associations.[204] This applies with regard to the freedom of religion for the German section of Scientology[205] and with regard to the freedom of election for a small political organization, which had been denied the status as a political party in accordance with the state law.[206]

2. Litigations in Strasbourg

a) Expulsion of immigrants

The main case-law, within the scope of this project, concerning Art. 3 ECHR arises around the question of an infringement of the ECHR with regard to the expulsion of immigrants, either after an application had been dismissed as political refugee or after the applicant had committed a crime.[207]

Many cases constellate around the question whether the German authorities (the Federal Office for Migration and Asylum, the administrative courts and in the end the responsible administrative body for the expulsion) might have not given Article 3 ECHR the due consideration.[208] Concerning the mentioned cases, the applicants faced an expulsion and alleged a violation of Article 3 ECHR, if the expulsion should be enforced. Those cases conduct the view to an interesting controversial political and legal discussion within Germany: The procedures of the Federal Office for Migration and Asylum, conducting the application procedures, are discussed highly controversial among the experts (like lawyers, church organisations as well as the UNHCR).[209] It is said that the interviews during the procedures are not sufficient, because they focus more on the information allowing to deny the status as refugee. In addition, so the critics, no special safeguards are foreseen for vulnerable individuals like women fleeing sexual violence. Despite the criticism, the Commission and subsequently the ECtHR accepted the findings of the national authorities in its decisions as sufficient and do not question them. The ruling of the Strasbourg organs can be deemed as surprisingly uncritical – and as a result had almost no effect on the asylum procedures in Germany.[210] The development in the Kalantari case[211] shows the only exception. After the application had been declared admissible, the Federal Office for Migration and Asylum (the former Federal Office for Refugees) revoked the former decision and granted a residence status in accordance with the former alien act.[212]

With the focus on immigrants, three cases pertain to an alleged violation of Article 8 ECHR because of a forthcoming or even enforced expulsion after the applicants were convicted by a criminal court.[213] In one case the Court decided that the imposed expulsion violated Article 8 ECHR

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[204] See Commission, Decision of 14 July 1983, A. Union vs. Germany, no. 9792/82; Commission, Decision of 27 November 1996, Universelles Leben e.V. vs. Germany, no. 29745/96; ECtHR, Decision of 10 July 2001, Johannische Kirche & Peters vs. Germany, no. 41754/98.

[205] Commission, Decision of 7 April 1997, Scientology Kirche Deutschland e.V. vs. Germany, no. 34614/97.

[206] Commission, Decision of 18 May 1976, Association X., Y. and Z. vs. Germany, no. 6850/74.

[207] The remaining cases, like the important case Jalloh vs. Germany on the compulsory administration of emetics concerning drug dealer, do not fall within the scope of the project, but should nevertheless mentioned.

[208] The former discussion of Article 3 ECHR and the applicability for non state actors has been solved due to the EU-asylum directives. See for the former debate: B. Huber, The Application of Human Rights Standards by German Courts to Asylum-Seekers, Refugees and other Migrants, in: European Journal of Migration and Law 2001, pp. 176-179.

[209] See amnesty international et al. (eds.), Memorandum zur derzeitigen Situation des deutschen Asylverfahrens, Frankfurt a.M. 2005; UNHCR, UNHCR-Eckpunkte zum Flüchtlingsschutz, Berlin 2002, pp. 4-5.

[210] This applies only for the procedure and not for the applicability of Article 3 ECHR in its interpretation of the ECtHR.

[211] ECtHR, Judgment of 11 October 2001, Kalantari vs. Germany, no. 51342/99. The case stands out for another reason as well. A Swiss association for the defence of asylum seekers, called ELISA, represented the applicant.

[212] This decision did not granted the status of a political refugee.

[213] ECtHR, Decision of 11 May 2006, Kaya vs. Germany, no. 31753/02, admissible complaint; Judgment of 27 October 2005, Keles vs. Germany, no. 32231/02, violation of Article 8 ECHR; Decision of 7 December 2000, Caglar vs. Germany, no. 62444/00, inadmissible.

in the light of the existing family bounds of the applicant.[214] The applicant, a Turkish national, living in Germany for 27 years on the day of his expulsion, was convicted for several (minor) criminal offences. The Court argued that the special circumstances of the case "in particular the nature of the applicant's offences, the duration of his lawful stay in Germany, the fact that he had been in possession of a permanent residence permit, and the difficulties which the applicants children could be expected to face if they followed him to Turkey (…)" led to a violation of his right in Article 8 ECHR.[215] In summary, none of the aforementioned cases show some kind of strategic litigation.

b) Discriminatory behaviour in court proceedings

Like in other countries the main case-law is related to Article 6 ECHR. In Germany, two judgments on the basis of Article 6 ECHR are of interest pertaining the scope of the project (discriminatory behaviour). The cases Luedicke and others vs. Germany and Öztürk vs. Germany.[216] As the applicants were not sufficiently familiar with the German language, the courts decided to assist them in accordance with the national law (Mr. Luedicke was a citizen from the UK; Mr. Öztürk was a citizen from Turkey). After the conviction in the Luedicke case, they were ordered to pay the costs for the interpreter in the criminal procedure. The same took place in the Öztürk case in a regulatory offence procedure. The ECtHR, however, considered this as an infringement of Article 6 ECHR. Subsequently, the German lawmaker amended the relevant legislation in accordance with the Court's findings.[217]

c) Respect for private life

Secret communication surveillance

The ECtHR judged already in 1978 in a case, in which the violation of the respect for private life was alleged because of the German legislation on surveillance, namely the legislation for secret communication surveillance by official forces and the subsequent control procedure. The Court, however, could not discern any reasons not justifying the legislation and therefore held that there was no violation of Article 8 ECHR. The applicants in the case on secret communication surveillance[218] were lawyers, a judge and a public prosecutor.

Respect for private life and freedom of press

The recent case pertaining to the respect for private life and the freedom of press found an unpredictable strong resonance in the legal literature.[219] In 2000, Caroline von Hannover challenged the findings of the Federal Constitutional Court and the Federal Court of Justice before the ECtHR in a case pertaining her right for private life.[220] She considered the printing of some photographs depicting her in public on a market place or in a restaurant as a violation of her right for private life. In this respect, the German courts have developed (especially the Federal Constitutional Court) measurements for the proportionality of the individual rights and the rights of the press (freedom of opinion). On the basis of this case-law, the German courts had not found any breach of the right for private life in publishing the above mentioned pictures. The ECtHR put forward the contrary point of view: It decided that the publishing and subsequently the court ruling concerning the publishing

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[214] Keles vs. Germany, no. 32231/02.

[215] Judgment of 27 October 2005, Keles vs. Germany, no. 32231/02, para. 66.

[216] Judgment of 28 November 1978, Luedicke, Belkacem and Koç vs. Germany, no. 6210/73 and Judgment of 21 February 1984, Öztürk vs. Germany, no. 8544/79.

[217] O. Kieschke, Die Praxis des Europäischen Gerichtshofs für Menschenrechte und ihre Auswirkungen auf das deutsche Strafverfahrensrecht, Berlin 2003, pp. 156-162; D. Rzepka, Zur Fairness im deutschen Strafverfahren, Frankfurt a.M. 2000, pp. 80-82.

[218] ECtHR, Judgment of 6 September 1978, Klass and others vs. Germany, no. 5029/71.

[219] See H. Prütting and K. Stern, Das Caroline-Urteil des EGMR und die Rechtsprechung des Bundesverfassungsgerichts, München 2005.

[220] ECtHR, Judgment of 24 June 2004, von Hannover vs. Germany, no. 59320/00.

were a violation of her rights. Notably the representatives of publishers tried to lobby the German government to appeal before the Grand Chamber of the ECtHR. They published open letters (before and after the judgment by the ECtHR) and asserted that the decision would trigger the end of a free press in Germany.[221] In this case, the opponents of the court ruling strategically organized a public opinion.

d) Freedom of religion

The Commission and subsequently the Court had only to decide about some cases on freedom of religion – and considered them all manifestly ill-founded and therefore inadmissible. Apart from one case, hardly any strategic litigation can be observed. The case mentioned was an application from a family belonging to Scientology.[222] The Bavarian school administration published an information brochure to inform parents and pupils about the practices of Scientology and how to avoid the organisation. It is more or less an assumption that Scientology itself had a strong interest in this case. Indeed, the information brochure described the organisation in general and it would be very unusual, if the local group or the part of Scientology working in Germany had not taken any notice of this.

e) Civil service and freedom of expression

In the ambit of article 10 ECHR, three cases constellate around one subject. In 1972, the Federal Chancellor and the Prime Ministers of the states (Länder) decided upon a common approach on extremists in civil service.[223] Very briefly, this decree and its implementation in the states (Länder) led in some cases to a suspension of the employment or even a dismissal. In other constellations, applicants for positions in the civil service, like teachers, did not obtain it. Usually, the membership of an extreme left or right party was regarded as a breach of the loyalty necessary for a functioning administrative body in a democracy. After the breakdown of the communist regimes and the fall of the Berlin-Wall, in some states (Länder) the decree was repealed. In the assessed cases before the court (only three cases could be found in the HUDOC database), the court decided in one case that there was a violation of Article 10 ECHR.[224] In this case, the responsible school administration, knowing of the membership of the applicant in the far left orientated DKP (German Communist Party), granted her a lifelong position in the civil service as teacher. Nonetheless, the administration suspended her after a couple of years and finally dismissed her completely. The other cases disclose a different structure: The applicants both sought to gain a position in the civil service. Because of their political activities (one for the DKP, the other for the far right NPD, Nationalist Party of Germany), the respective administration rejected their application.[225]

f) Civil service and freedom of assembly

No case occurred *only* claiming a violation of Article 11 ECHR. Moreover, the court concluded only in one case that there was a violation of Article 11 ECHR. The court decided in the case of the aforementioned former schoolteacher, who was member of the DKP (German Communist Party) and who was dismissed by the state school administration, that the decisions by the administration and then by the courts were not justifiable with regard to Article 11 ECHR.[226]

g) Short term residence permits for immigrants and public child benefit

The main case-law of Article 14 ECHR occurs in conjunction with Article 8 ECHR.

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[221] See M. Hanfeld, Zwischen den Zeilen, in: Frankfurter Allgemeine Zeitung, 1 September 2004, p. 36.
[222] European Commission of Human Rights, Decision of 4 March 1998, Keller vs. Germany, no. 36283/97.
[223] Decree on employment of extremists in the civil service, Bulletin of the Government of the Federal Republic of Germany no. 15, 3 February 1972, p. 142.
[224] ECtHR, Judgment of 26 September 1995, Vogt vs. Germany, no. 17851/91.
[225] ECtHR, Judgement of 28 August 1986, Glasenapp vs. Germany, no. 9228/80; ECtHR, Judgment of 28 August 1986, Kosiek vs. Germany, no. 9704/82.
[226] ECtHR, Vogt vs. Germany, no. 17851/91.

Concerning the scope of the project the only relevant case-law constellates around the question of the different standards in the field of child benefit.[227] Due to German law in the time of the decision, foreigners without a permanent residence status were not granted a public child benefit. The ECtHR concluded, that there was a violation of Article 8 in conjunction with Article 14 ECHR, because it could not discern any reasons justifying the different treatment. The legal requirements for the benefits have already been changed in favour of the group in question and the Federal Constitutional Court decided that the preceding national regulation violated Art. 3 Basic Law (equal treatment).[228]

C. Overview of legal and political science literature

Besides the case-law and the human rights protection system in Germany, the literature on the implementation of the ECHR and the judgments of the ECtHR or specific questions of the protection play an important role in the perception of the European human rights system.

However, it can be observed that the political science and legal literature mainly focus on the ECtHR and the ECHR. Very little is said about the Council of Europe itself, of the existing treaties, and the Commissioner for Human Rights. The reason for this priority can be found in the assumption in Germany that human rights protection is best guaranteed with a judicial system. More preventive means like Ombudsman institutions or other kind of monitoring bodies are regarded as being less sufficient. This understanding should be questioned, as more and more preventive mechanisms are implemented. This applies for instance on national level for the new anti-discrimination office as monitoring body, the recently launched Fundamental Rights Agency for the EU in Vienna, and for the more political means at the Council of Europe. Therefore, the focus of the German literature on the judicial protection of human rights covers only a part of the protection system.

In addition, it should be mentioned that the notion of a German literature can be misunderstood. In Germany the legal scholars or practitioners from Austria and Switzerland publish in German journals or with German publishers. The best example for this are the student books about the ECHR.[229] Besides this, the strong position of the ECHR in those countries influences the debate in Germany as well.

I. Implementation and rank of the ECHR in the national legal system

Implementation into the national legal system

The question concerning the rank of the ECHR appoints the specific issue in view of the effect of the ECHR and the relationship towards the Federal Constitution. As the German legal system can partially be understood as a hierarchical system of different legislation, the rank of the ECHR was discussed extensively with regard to the Federal Constitution. Already in 1955, the question was raised in a German law journal, which rank the ECHR has with regard to the Federal Constitution.[230] The following discussion comprises every possible legal construction.[231] One current of opinion in the discussion admitted the ECHR the same position as the Federal Constitution[232] or

[227] See ECtHR, Judgment of 25 October 2005, Okpisz vs. Germany, no. 59140/00.

[228] Federal Constitutional Court, Decision of 6 July 2004, 1 BvL 4/97, 1 BvL 5/97 and 1 BvL 6/97.

[229] C. Grabenwarter, Europäische Menschenrechtskonvention, 2nd ed., München 2005; A. Peters, Einführung in die Europäische Menschenrechtskonvention, München 2003.

[230] R. Echterhölter, Die Europäische Menschenrechtskonvention im Rahmen der verfassungsmäßigen Ordnung, in: Juristenzeitung (JZ) 1955, p. 691.

[231] See S. Kadelbach, Der Status der Europäischen Menschenrechtskonvention im deutschen Recht, in: Juristische Ausbildung (JURA) 2005, pp. 483-485.

[232] R. Echterhölter, p. 691.

granted it a position prevailing federal law.[233] On the other hand, the opponents of this view argued that the ECHR had to be regarded as binding federal law with all its disadvantages. Nonetheless, the main dispute over this question has been settled. The majority considers the ECHR as part of the federal national legal system and consequently not in the same rank as the Federal Constitution.[234]

However, the discussion in the literature should not obscure the binding character of the ECHR within in the German legal system. The ECHR has to be taken into account by court decisions and by the administration. A common understanding exists that the ECHR legally and directly binds the respective authorities. Even if the Convention does not bind the lawmaker in the same way like the Federal Constitution, the overall acceptance of the ECHR within the political arena avoids an open political opinion that would undermine the ECHR.[235]

Political science literature
The political science literature provides a more global and political understanding for the circumstances of the ECHR. Two articles should be reviewed more deeply. One author discusses the philosophical ideas that provide the background for the establishing of the ECHR and the political shift in the middle of the last century. He states that the human rights could be regarded as leading principles in the political order and that, despite the different understandings of state sovereignty, the ECHR and the rulings by the ECtHR served the integration process in an outstanding manner.[236] The second article contextualises the development of the ECHR and the ECtHR to the discussion of global governance. The main thesis states that national states were dependent upon international institutions to guarantee the foundations for a living society.[237]

II. Implementation of judgments of the European Court of Human Rights
The recent judgments in the case Görgülü vs. Germany in 2004 and the subsequent decision of the Federal Constitutional Court in the same case as well as the case of Caroline v. Hannover vs. Germany triggered a widespread resonance in the legal literature[238], not only in the specialized journals on human rights, and can be regarded as the latest and most important development of European integration of the ECHR and the judgments. Regarding the recent publications the following understanding of the implementation of judgments after the Görgülü case can be observed: The ECHR does not foresee any direct binding of the judgements in way that they overrule the national court judgments, administrative acts or a national legislation. In addition, the ECtHR's findings did not prescribe the way to redress the violation of the ECHR by the respondent

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[233] K. Zwingenberger, Die Europäische Konvention zum Schutz der Menschenrechte in ihrer Auswirkung auf die Bundesrepublik Deutschland, Münster 1997, pp. 147-148.

[234] R. Bernhardt, Die Europäische Menschenrechtskonvention und die deutsche Rechtsordnung, in: Europäische Grundrechte Zeitschrift (EuGRZ) 1996, pp. 339-341; W. Hoffmann-Riem, Kohärenz der Anwendung europäischer und nationaler Grundrechte, in: Europäische Grundrechte Zeitschrift (EuGRZ) 2002, p. 475; J. Meyer-Ladewig, Einleitung, marginal no. 29; L. Wildhaber, Europäischer Grundrechtsschutz aus der Sicht des Europäischen Gerichtshofs für Menschenrechte, in: Europäische Grundrechte Zeitschrift (EuGRZ) 2005, p. 689.

[235] The request of the conservative parties in the German Parliament in 2003 to amend the applicability of the ECHR regarding alien extremists can be considered as an exceptional approach. See Bundestagsdrucksache 15/1239, p. 4.

[236] K. Dicke, Politische und sozialphilosophische Vorbedingungen der Erfolgsgeschichte der EMRK, in: Grewe and Gusy (eds.), Menschenrechte in der Bewährung, Baden-Baden 2005, pp. 21 and 34.

[237] B. Zangl and M. Zürn, Make Law, Not War: Internationale und transnationale Verrechtlichung als Bausteine für Global Governance, in: Zangl and Zürn (eds.), Verrechtlichung - Bausteine für Global Governance?, Bonn 2004, p. 13.

[238] W. Hoffmann-Riem, Kontrolldichte und Kontrollfolgen beim nationalen und europäischen Schutz von Freiheitsrechten in mehrpoligen Rechtsverhältnissen. - Aus der Sicht des Bundesverfassungsgerichts - in: Europäische Grundrechte Zeitschrift (EuGRZ) 2006, pp. 492-499; J. Meyer-Ladewig and H. Petzold, Die Bindung deutscher Gerichte an Urteile des EGMR, in: Neue Juristische Wochenschrift (NJW) 2005, pp. 15-20; H.-J. Papier, Execution, pp. 1-4; L. Wildhaber, Europäischer Grundrechtsschutz aus der Sicht des Europäischen Gerichtshofs für Menschenrechte, in: Europäische Grundrechte Zeitschrift (EuGRZ) 2005, pp. 689-693.

state. This, as a conclusion of most of the authors, falls completely into the discretion of the state.[239] However, the judgments directly bind the respective authority *within the legal frame of the state*. This means for Germany that the judgments directly bind the respective authority including the courts in a legal way on the basis of Article 46 ECHR in conjunction with the approval legislation (Zustimmungsgesetz) of the ECHR and the rule of law laid down in the German Basic Law, which is considered as a new approach.[240] The ECtHR's findings oblige the public authorities to revoke an administrative act on the grounds of the procedure legislation as long as the revocation does not violate the Basic Law. The judgments demand of the lawmaker to amend the legislation, if this should be the reason for the violation.[241] Furthermore, they demand the courts to reopen cases, if foreseen in the court procedure, or take the findings into consideration. It was said that this had been the art of the state before the contentious ruling of the ECtHR in the Görgülü case[242], others, however, stressed that the Federal Constitutional Court had developed its interpretation of the binding character of judgments.[243] The new development applies especially to the possibility to lodge a constitutional complaint if a national court should not have taken due consideration of the applicable findings of a ECtHR's judgment.[244]

III. The relationship between the Federal Constitutional Court and the ECHR and its protection system

The aforementioned question if the ECHR has the rank of a constitutional norm or of a federal legislation triggered the discussion how alleged violations of the ECHR can be judicially scrutinized. Does the procedure of the Federal Constitutional Court allow to lodge a constitutional complaint on the sole ground of the ECHR? During the first decades the most favoured opinion underlined that a constitutional complaint based on the sole allegation that an act of the state might violate the ECHR could not be lodged with the Federal Constitutional Court. However, the ECHR and the findings of the ECtHR should be taken into account while interpreting the Basic Law.[245] This legal view on the ECHR and its importance in the judicial procedure before the Federal Constitutional Court has to be revised after the landmark decision in the Görgülü case of the Constitutional Court. It stresses the importance of the ECHR and opens, in general, a procedural way to lodge a complaint on the basis of the ECHR in conjunction with the respective provisions in the Basic Law and the principle of the rule of law, which has a constitutional rank. This was observed as development to strengthen the importance and legal validity of the ECHR within Germany.[246]

D. Conclusion

The report outlines the important role of the Basic Law in Germany and the judgments of the Federal Constitution Court. Nonetheless, the rulings of the European Court of Human Rights regarding the scope of this report underlines the necessity role of the court in rectifying developments in the national legislation, as happened with regard to the costs for interpreters, and with regard to the case law of the Federal Constitutional Court, even if this triggered a controversial discussion. Moreover, the influence and the effect of the ECHR in the interpretation of the European Court of Human Rights on the lawmaker and the legislation, the administration and the lower court judgments, seem to be much more crucial than the single judgment against Germany.

[239] J. Mayer-Ladewig, Art. 46, marginal no. 3; H.-J. Cremer, Entscheidungen und Entscheidungswirkung, in: Grote and Marauhn (eds.), EMRK/GG. Konkordanzkommentar, Tübingen 2006, marginal no. 67.
[240] J. Mayer-Ladewig/H. Petzold, p. 20.
[241] J. A. Frowein/W. Peukert, Artikel 53 (Bindende Kraft der Urteile), marginal no. 7.
[242] J. Mayer-Ladewig/H. Petzold, p. 17.
[243] S. Kadelbach, p. 484; Cremer, Bindungswirkung, EuGRZ 2004, p. 692.
[244] H.-J. Cremer, Zur Bindungswirkung von EGMR-Urteilen - Anmerkungen zum Görgülü-Beschluss des BVerfG vom 14.10.2004, in: Europäische Grundrechtezeitschrift (EuGRZ) 2004, p. 698.
[245] P. Kirchhof, Verfassungsgerichtlicher Schutz und internationaler Schutz der Menschenrechte: Konkurrenz oder Ergänzung?, in: Europäische Grundrechte Zeitschrift (EuGRZ) 1994, p. 33.
[246] H.-J. Cremer, Bindungswirkung, p. 698; J. Meyer-Ladewig/H. Petzold, pp. 19-20.

This can be observed for several areas, especially for the immigration law. This being so, the main issue on the implementation and the rank of the ECHR has to be deemed as decisive, and the fact, that the ECHR stands on the same level as federal law is still unsatisfying. The judicial problems, which might arise from this systematic implementation, are still not solved.

With regard to the question of this report, if there exist strategic patterns of litigation, the assessment of the decisions and the judgments show the following picture: In general, no strategic pattern could be observed in any of the cases. These may be the result of the complaint system before the Federal Constitutional Court, or the lack of knowledge of the system of the European Court of Human Rights. However, in the Caroline v. Hannover case the opposite happened. The press and the media organisations in Germany organised strategically an intervention of the coming into effect of the Strasbourg decision. Interesting, although not strategic, are the (in general inadmissible) decisions against Germany in rejected asylum cases, because they constellate around the controversial issue of a sufficient asylum procedure.

The legal literature, as described and analysed, presents a very broad reflection of each aspect of the ECHR and the judgments made by the European Court of Human Rights. It can be observed that with the landmark judgments of the European Court of Human Rights in the cases of Caroline v. Hanover and Görgüglü and the subsequent decision of the Federal Constitutional Court the subject has become a new quality, as a more integrative approach towards the ECHR is undertaken. In contrary to the almost over specialized legal literature, an apparent lack of social science and political science literature has to be observed. Nevertheless, the existing literature, as mentioned, plays in important role for a broader understanding of the ECHR and the European integration.

To conclude it can be said that although the role of the European Court of Human Rights cannot be deemed decisive as in other member countries, the incremental integration of the ECHR within the national legal system and the effect on the fundamental rights protection alters the legal system in Germany profoundly.

Annex II: Mapping of Research Competence

The research landscape comprises only some institutions explicitly focusing on the development and the implementation of international and regional human rights legislation. Despite the fact that many universities in Germany have law faculties, only a small number of academic and more political research institutes can be named with regard to human rights. This applies for the international human rights sector as well as for the regional sector like the ECHR. It can only be assumed why amidst the, in general, highly developed research landscape only some institutions in Germany concentrate on human rights. Presumably, the strong position of the Federal Constitutional Court, the possibility of an individual complaint to this Court, and the Basic Law obscure the importance of the regional and the international human rights protection system. It seems to be that neither the majority of scholars nor the majority of practitioners are fully aware of the existing human rights system - or it is deemed less important. This, of course, influences the decisions of a university or other institutions to establish special research departments. The European integration with regard to the EU and the corresponding legislation supports this assumption as well. Besides the national law, legal scholars focused and focus on the EU legislation. Furthermore, the declaration of the Charta of Fundamental Right added to the EU legislation a significant human rights document, which might lead some awareness to the EU level instead to other regional and international obligations.

The research landscape can be distinguished, very briefly, in a more academic and a more political orientated branch. The academic institutions at universities for instance mainly hold lectures on human rights protection, publish on specific human rights issues, and organise conferences on legal questions while the more political institutions provide the lawmaker and other leading persons more directly with the necessary information concerning recent developments. Of course, the more political orientated work is based on academic research. The German Institute for Human Rights, for instance, structures its work around specific research themes, which the respective researcher deepens holding in view possible political developments. The Institute accompanies its work with a comprehensive equipped public library on human rights protection. On the other hand, the leading researchers of the more academic institutions are invited to public hearings at the German Federal Parliament or they deliver requested opinions on human rights topics. Therefore, the differentiation should only serve as first guideline.

The institutions named below were chosen, because they focus lay on the academic understanding of the implementation of the ECHR in Germany, like the Human Rights Centre of the University of Potsdam, or they support the political implementation, like the German Institute for Human Rights. The “Europa-Institut” of the University Saarland provides specialized lectures on the ECHR on a Masters program in European integration, and the Max Planck Institute for Comparative Public Law and International Law serves the development of the human rights protection in general.

List of leading institutions and scholars

I. The Human Rights Centre of the University of Potsdam

Contact information:
August-Bebel-Str. 89
D-14482 Potsdam
Germany
Phone: +49-(0)331-977-3450
Fax: +49-(0)331-997-3451
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Web: http://www.uni-potsdam.de/u/mrz/

Directors:
Prof. Dr. Eckart Klein
Prof. Dr. phil. Cristoph Menke

Short Description:
The Human Rights Centre of the University of Potsdam (MRZ) was established in 1994, being one of the interdisciplinary centres of the University.

Research activities concentrate among others on the international obligations and their significance to the German State powers, human rights clauses in the EC's foreign relations, the question of remedies for violation of international human rights obligations or minority issues. The Centre is working closely together with the Council of Europe, with its fellow institutions in the other member States of the Council of Europe, and also with the respective departments of the Federal Ministries of Foreign Affairs and of Justice.

II. "Europa-Institut", University Saarland

Contact information:
Europa-Institut
Department of Law
Saarland University
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Germany
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website: www.europainstitut.de

Directors:
Prof. Dr. Werner Meng
Prof. em. Dr. Georg Ress
Prof. Dr. Torsten Stein

Leading experts:
Prof. em. Dr. Gerog Ress
Prof. Dr. Herbert Petzold

The "Europa-Institut", founded in 1951, offers an international LL.M. program "European Integration". The education concentrates on institutional and substantial European law with five different units of specialization (European Economic Law, Foreign Trade Law, European Management, European Media Law, and European Protection of Human Rights). The specialization in Human Rights consists of a one-year course on the work of the European Court of Human Rights and a half -year course on recent cases.

III. German Institute for Human Rights

Contact information:
Deutsches Institut für Menschenrechte
Zimmerstr. 26/27

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Phone: +49 (0)30-259359-0
Fax: +49-(0)30-259359-17
Email: info@institut-fuer-menschenrechte.de
Web: www.institut-fuer-menschenrechte.de

Directors:
PD Dr. Heiner Bielefeldt
Frauke Seidensticker

The German Institute for Human Rights informs about human rights issues in Germany and in other countries. Its intention is to contribute to the prevention of human rights violations and to the promotion and protection of human rights. The Institute was founded in March 2001 following an unanimous decision by the German Bundestag of December 7, 2000.

The various functions of the institute include information and documentation, research, policy advice und human rights education within Germany. The Institute organises seminars on human rights education on the basis of the Compass handbook, edited by the Council of Europe and translated into German by the Federal Centre for Political Education and the German Institute for Human Rights. In addition, the Institute offers a course on national and international human rights protection and publications on human rights education.

IV. Max Planck Institute for Comparative Public Law and International Law

Contact information:
Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht
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Website: www.mpil.de/ww/en/pub/news.cfm

Directors:
Prof. Dr. Armin von Bogdandy
Prof. Dr. Rüdiger Wolfrum

Leading Expert:
Prof. em. Dr. Jochen Abr. Frowein

Institute was founded in Berlin in 1924 as the Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht (Kaiser Wilhelm Institute for Comparative Public Law and International Law) within the framework of the Kaiser-Wilhelm Gesellschaft (Kaiser Wilhelm Society). It was re-established in 1949 by the Max-Planck-Gesellschaft (Max Planck Society) as the Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht (Max Planck Institute for Comparative Public Law and International Law) in Heidelberg. Presently, 45 scholars employed under a joint directorship are engaged in researching basic issues and current developments in the areas of public international law, European law, comparative public law and German public law. Their work serves to promote the formulation and development of positive law as well as its conceptual and theoretical permeation.

Annex III: Judgments and Decisions

Article 3 ECHR

- Judgment of 26 July 2006, **Jalloh** vs. Germany, no. 54810/00. Violation of Art. 3 ECHR. Forceful administration of emetics to gain evidences in a criminal procedure.

- Decision of 22 September 2005, **Kaldik** vs. Germany, no. 28526/05. Inadmissible because the complaint was manifestly ill-founded. Expulsion of Turkish national with Kurdish background after dismissal of political asylum application.

- Decision of 18 April 2002, **Aronica** vs. Germany, no. 72032/01. Inadmissible because the complaint was manifestly ill-founded. An Italian nation faced extradition to Italy after he had been convicted by an Italian criminal court.

- Judgment of 11 October 2001, **Kalantari** vs. Germany, no. 51342/99. Struck out of the list after the Federal Office for Refugees had granted a residential status; Iranian applying for political refugee status in Germany

- Decision of 26 October 2000, **Damla** and other vs. Germany, no. 61479/00. Inadmissible because the complaint was manifestly ill-founded. A Turkish national belonging to the Yezidis community applied for political asylum because of the situation for her in Turkey

- Decision of 29 June 1999, **Ebrahimzadeh** vs. Germany, no. 47547/99. Inadmissible because the complaint was manifestly ill-founded. An Iranian national applied for political asylum

- Decision of 19 January 1999, **Allaoui** and others vs. Germany, no. 44911/98. Inadmissible by virtue of failing to exhaust the domestic remedies. A Lebanese Family faced expulsion to Lebanon after staying in Germany for 8 years

- Decision of 8 December 1998, **Loganathan** vs. Germany, no. 44667/98. Inadmissible because the complaint was manifestly ill-founded. A Tamil from Sri Lanka applied for political asylum because of the civil war in Sri Lanka

- Decision of 30 October 1998, **Ariz** and others vs. Germany, no. 37669/97. Inadmissible because the complaint was manifestly ill-founded. A Kurdish family from Turkey applied for political asylum because of links to the PKK

- Decision of 29 October 1998 by the Commission, **Bezabi** vs. Germany, no. 43891/98. Inadmissible by virtue of manifestly ill-foundedness. The applicant, an Ethiopian citizen, alleged a violation of Art. 3 ECHR in virtue of his forthcoming expulsion after his application for political asylum on the grounds of belonging to the Oromo minority had been dismissed

- Decision of 31 August 1999, **Basika-Nkinsa** vs. Germany, no. 47638/99. Inadmissible because the complaint was manifestly ill-founded. The applicant, an Angolan national, applied for political asylum on the grounds of political activities in Angola.

- Decision by the Commission of 18 September 1998, **Amirthalingam** vs. Germany, no. 41088/98. Inadmissible by virtue of failure to exhaust the domestic remedies. A Tamil from Sri Lanka applied for political asylum because of the civil war in Sri Lanka

- Decision by the Commission of 18 September 1998, **Atak** and others vs. Germany, no. 40866/98. Inadmissible because the complaint was manifestly ill-founded. The applicants are Turkish citizens of Kurdish origin and applied for political asylum on the grounds of state persecution in Turkey

- Decision by the Commission of 10 September 1998, **Asadi** vs. Germany, no. 39683/98. Inadmissible because the complaint was manifestly ill-founded. Iranian national applied for political asylum on the grounds of state prosecution in Iran

- Decision by the Commission of 29 May 1998, **Sewa and Poovi** Wilson vs. Germany, no. 41356/98. Inadmissible because the complaint was manifestly ill-founded. Citizens from Togo applied for political asylum.

Article 6 ECHR

- Judgment of 28 November 1978, **Luedicke, Belkacem and Koç** vs. Germany, no. 6210/73; 6877/75; 7132/75. Violation of Article 6 ECHR. Costs for the interpreter for Turkish nationals in a German criminal procedure.

- Judgment (violation) of 21 February 1984, **Öztürk** vs. Germany, no. 8544/79. Violation of Article 6 ECHR. Costs for the interpreter in a "regulatory offence" (Ordnungswidrigkeit) procedure.

I. Article 8 ECHR

1. Respect for family life

- Decision of 11 September 2006, **Konrad** and others vs. Germany, no. 35504/03. Inadmissible with regard to Article 8, Article 9 ECHR and Protocol No. 1 Article 2. Parents, belonging to a Christian community, alleged a violation of the Convention regarding their children's education

- Decision of 11 May 2006, **Kaya** vs. Germany, no. 31753/02. Admissible complaint under Article 8 ECHR. A Turkish national, born in Germany, was expelled to Turkey after he had been convicted for several crimes in Germany

- Judgment of 27 October 2005, **Keles** vs. Germany, no. 32231/02. Violation of Article 8 ECHR. Expulsion of Turkish national despite family bounds in Germany

- Judgment (violation) of 26 February 2004, **Görgülü** vs. Germany, no. 74969/01. Violation of Article 8 ECHR**.** A father claimed right of access to his child born out of wedlock

*- Decision of 18 April 2002, **Aronica** vs. Germany, no. 72032/01. Inadmissible, the complaint was manifestly ill-founded in regard with respect for family life. An Italian nation faced extradition to Italy after he had been convicted by an Italian criminal court*

- Decision of 7 December 2000, **Caglar** vs. Germany, no. 62444/00. Inadmissible because the complaint was manifestly ill-founded. A Turkish national with family ties in Germany faced expulsion after living in Germany for some 30 years because of a seven year prison detention

2. Respect for private life

- Judgment of 24 June 2004, **v. Hannover** vs. Germany, no. 59320/00. Violation of Article 8 ECHR. Publication of photographs of the princess showing private activities such as shopping

- Judgment of 12 June 2003, **van Kück** vs. Germany, no. 35968/97. Violation of Article 8 ECHR. Denial of reimbursement by the public health system of gender reassignment measures

- Judgment of 6 September 1978, **Klass** vs. Germany, no. 5029/71. No violation of Article 8 ECHR. Public prosecutor and others claimed violation of their right regarding the secret communication surveillances and their parliamentarian control

3. Respect for his home

- Judgment of 16 December 1992, **Niemietz** vs. Germany, no. 13710/88. Violation of Article 8 ECHR. Search warrant for business premises of a lawyer who was member of a local political party

II. Article 9 ECHR[247]

- Decision by the Court of 5 December 2002, **Islamische Religionsgemeinschaft** vs. Germany, no. 53871/00. Inadmissible because the complaint was manifestly ill-founded. Religious group in the former GDR; donation from the Party of Democratic Socialism

- Decision by the Court of 10 July 2001, **Johannische Kirche** vs Germany, no. 41754/98. Inadmissible because the complaint was manifestly ill-founded. Apllicant claimed a violation of Article 9 ECHR concerning a refusal of a permission to build a chapel and a cementary in a protected wildlife area

- Decision by the European Commission of Human Rights of 30 October 1998, **Beshara** vs. Germany, no. 43696/98. Inadmissible because the complaint was manifestly ill-founded. Alleged violation of Article 9 ECHR because of a forthcoming expulsion to Egypt

- Decision by the European Commission of Human Rights of 4 March 1998, **Keller** vs. Germany, no. 36283/97. Inadmissible because the complaint was manifestly ill-founded. Applicants claimed a violation of Article 9 ECHR concerning an information brochure about Scientology issued by the Bavarian Ministry of Education

III. Article 10 ECHR

- Judgment of 26 September 1995, **Vogt** vs. Germany, no. 17851/91. Violation of Article 10 ECHR. Dismissal as schoolteacher because of political activities for the DKP, the German Communist Party, after obtaining a life-long position in the civil service

- Judgment of 28 August 1986, **Kosiek** vs. Germany, no. 9704/82. No violation of Article 10 ECHR. Denial of employment in the civil service, because of national socialist political activities

- Judgment of 28 August 1986, **Glasenapp** vs. Germany, no. 9228/80. No violation of Article 10 ECHR. Denial of employment in the civil service, because of political activities in the field of communists

IV. Article 11 ECHR

- Decision of the Commission of 20 July 1957, **KPD** vs. Germany. No violation of Art. 11 ECHR (The commission referred to Article 17 ECHR as applicable in the case) in: Yearbook of the European Convention on Human Rights (YB) 1, 222

[247] No judgments against Germany can be found in the HUDOC database concerning Article 9 ECHR. The quoted decisions shall give an overview of the cases coming to the ECtHR. The list is not exhaustive.

*- Judgment of 26 September 1995, **Vogt** vs. Germany, no. 17851/91. Violation of Article 11 ECHR. Dismissal as schoolteacher because of political activities for the DKP, the German Communist Party, after obtaining a life-long position in the civil service*

V. Article 8 in conjunction with Article 14 ECHR

- Judgment of 25 October 2005, **Okpisz** vs. Germany, no. 59140/00. Violation of Article 8 and 14 ECHR. Denial of public child benefits because of legal resident status

- Judgment of 25 October 2005, **Niedzwiecki** vs. Germany, no. 58453/00. Violation of Article 8 and 14 ECHR. Denial of public child benefits because of legal resident status